

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

2022

For Grand Juries

Roger Fairfax

American University Washington College of Law, rogerfairfax@wcl.american.edu

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Roger Fairfax, *For Grand Juries*, 13 California Law Review Online 20 (2022).

Available at: https://digitalcommons.wcl.american.edu/facsch_lawrev/2207

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

For Grand Juries

Roger A. Fairfax, Jr.*

Introduction	20
I. The Aims of Capers’s Private Prosecution Proposal	21
II. Problems a Shift to Private Prosecution Might Create	22
A. Discretion and Abuse	23
B. Vulnerable Victims	24
C. Law and Policy Development.....	24
D. Non-Repeat Players	25
III. Why the Grand Jury Might Help Solve Old Problems Without Creating New Ones	25
A. Restoring Power to the People.....	25
B. Identifying Victimless Crimes.....	26
C. Enhancing Prosecutorial Oversight.....	26
D. Recognizing Expanding Criminalization	26
E. Promoting Mercy and Compassion.....	27
F. Enhancing Participatory Citizenship.....	27
G. Expanding the Role of Juries.....	27
IV. Overcoming The Grand Jury’s Shortcomings	28
Conclusion.....	29

INTRODUCTION

In his provocative essay, *Against Prosecutors*,¹ Professor Bennett Capers contributed to a now-robust conversation that was on the fringes just a decade ago. Although it remains to be seen whether the pendulum will swing away from the engagement with abolitionist theory that intensified in the wake of the May

DOI: <https://doi.org/10.15779/Z38HQ3S059>

Copyright © 2022 Roger A. Fairfax, Jr.

* Dean and Professor of Law, American University Washington College of Law. Special thanks to the editors of the *California Law Review*, my fellow symposium contributors, research assistant Shahnoor Khan, and Professor Bennett Capers, with whom I co-author a Criminal Law textbook.

1. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561 (2020) [hereinafter *Against Prosecutors*].

2020 murder of George Floyd, a number of serious thinkers have staked out ground questioning the dogma that organs of the criminal legal system are inevitable.²

Refusing to be burdened by conventions of the past, Capers trains his sights on another criminal justice institution—public prosecution. Although prosecutors long have been criticized for a variety of ills, most responsive proposals have focused on reform, rather than replacement or abolition.³ To be sure, Capers does not argue for the abolition of public prosecution. Rather, what Capers would abolish is the state’s virtual *monopoly* on prosecution.⁴ And this is Capers’s innovation—arguing for a system of accusation, investigation, and advocacy, anchored in private action and decision making rather than the state.⁵

However, the benefits of Capers’s proposal, which he outlines in compelling fashion,⁶ would not come without serious costs, including those borne by alleged victims and defendants. This brief response to *Against Prosecutors* queries whether we might enjoy many of those benefits without this collateral damage by using the grand jury not as a prophylactic in a private prosecution regime, but as an enlightened, empowered institution in a system of public prosecution. After taking inventory of the aims of the Capers proposal, this response highlights the challenges it might create and why the grand jury could achieve those same objectives while avoiding the collateral consequences. Furthermore, this essay argues that the grand jury is susceptible to certain reforms that would better equip it to do the work with which Capers tasks his proposed private prosecution regime.

I.

THE AIMS OF CAPERS’S PRIVATE PROSECUTION PROPOSAL

In his thought-provoking essay, Capers suggests that alleged victims should have a range of options, including (1) self-prosecution; (2) ceding the case to a public prosecutor; (3) self-prosecution with the help of a state-provided “prosecutor-advocate”; (4) self-prosecution with a privately-funded prosecutor-advocate; and (5) deciding not to prosecute at all.⁷ All of these options, Capers

2. See, e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (The New Press, 2017); Josie Duffy Rice, *The Abolition Movement*, VANITY FAIR (August 25, 2020), <https://www.vanityfair.com/culture/2020/08/the-abolition-movement>.

3. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (Oxford University Press, 2007); Jeffrey Bellin, *The Power of Prosecutors*, 94 NYU L. REV. 171 (2019).

4. *Against Prosecutors*, at 1586-87.

5. For a thorough history of private prosecution in the United States, see generally JOHN BESSLER, *PRIVATE PROSECUTION IN AMERICA: ITS ORIGINS, HISTORY, AND UNCONSTITUTIONALITY IN THE TWENTY FIRST CENTURY* (Carolina Academic Press, 2022).

6. *Against Prosecutors*, at 1586-07.

7. *Id.* at 1588-89.

argues, center decision-making authority with the alleged victim, rather than with the state.⁸

Capers asserts that this shift to private prosecution would produce a panoply of benefits. He notes that a return to a private prosecution regime would restore power to “we the people,” particularly the powerless.⁹ Another claim is that the private prosecution regime also would help highlight victimless crimes “not deserving of prosecution at all.”¹⁰ Capers argues further that a collateral benefit of his proposal is that courts will enhance oversight because private prosecutors will not enjoy the trust courts (and legislatures) have for public prosecutors.¹¹

He also believes his proposed system of private prosecution would alter the way we think more generally about the adversarial system and focus greater attention on both complainants and defendants, thus helping to “level the playing field” between prosecution and defense.¹² In a similar vein, Capers asserts that the private prosecution system would help us to recognize the proliferation of criminalization.¹³ In addition, having victims drive the process would, in Capers’s view, promote mercy and compassion, with particular implications for racial justice.¹⁴

Some other benefits of private prosecution Capers cites include the enhancement of “participatory citizenship”¹⁵ due to the greater victim engagement in the process, and increased deterrence, since alleged victims would be able to initiate criminal proceedings without the interference or intervention of a public prosecutor.¹⁶ Capers also anticipates that his proposal would enhance policing by causing law enforcement to focus on offenses “actual victims care about, rather than merely following the agenda of an elected prosecutor who need only appeal to a fraction of her constituents.”¹⁷ Finally, and importantly, Capers sees his proposal as contributing to an “expansion of the role of juries.”¹⁸

II.

PROBLEMS A SHIFT TO PRIVATE PROSECUTION MIGHT CREATE

Capers does acknowledge that there are concerns with his vision, and he offers potential solutions. For instance, he allows that “we might want the state

8. *Id.* at 1589.

9. *Id.* at 1590.

10. *Id.* at 1592.

11. *Id.* at 1593-95.

12. *Id.* at 1595-96.

13. *Id.* at 1596.

14. *Id.* at 1596-1604.

15. *Id.* at 1604.

16. *Id.*

17. *Id.* n.235.

18. *Id.* at 1607.

to have primary decision-making authority” in certain circumstances,¹⁹ including cases involving child abuse or domestic violence, “cases involving victim/witness coercion and intimidation,”²⁰ and cases involving homicide or in which a deceased victim has no family member who can be responsible for deciding which option is appropriate. However, the potential problems with a privately-centered vision of prosecution are much broader.

A. Discretion and Abuse

One problem with private prosecution is the flip side to one of the key benefits Capers imagines. Placing the decision-making authority to trigger criminal proceedings in the hands of private parties invites abuse and weaponization of the criminal process by aggrieved persons not satisfied by non-criminal channels for resolution. To be sure, not all public prosecutors wield their discretion in a noble, public-minded manner, and public prosecutors certainly are not typically required to explain their decisions.²¹ Undoubtedly, some prosecutors allow external influences or ignoble considerations to distort decision making. However, public prosecution, when it works the right way, mitigates concerns about abuse or misuse of the criminal process. This is not because of external oversight by juries and courts, but because of the public-oriented mission of the prosecutor, who is duty-bound to have an eye to the greater societal good rather than the narrower interests of an alleged victim.²²

On the other hand, any number of personal and illegitimate reasons for initiating criminal proceedings against an accused could motivate an alleged victim, who has no public duty. Capers makes the fair point that judicial—and jury—oversight of criminal allegations can protect defendants against meritless charges, but the process itself is, in many ways, part of the punishment.²³ Furthermore, such judicial review often comes after one has been arrested or publicly accused. Allowing an alleged victim to trigger the criminal process without the intervention of a more neutral arbiter could exacerbate the already significant challenges that accused individuals face in our criminal legal system.

19. *Id.* at 1589.

20. *Id.*

21. See generally, Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001).

22. Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 432-36 (2009). However, there are important nuances to consider in the characterization of what animated the duties and attitudes of public prosecutors. See generally, Carolyn Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309 (2002).

23. See, e.g., *Kaley v. United States*, 571 U.S. 320, 329 (2014) (noting the “economic, reputational, and personal harm [commencement of criminal proceedings] entails”). Capers also suggests an income-sensitive bond system to discourage the initiation of meritless cases. See *Against Prosecutors*, at 1587.

B. Vulnerable Victims

Another problem with private prosecution is that putting the authority and responsibility for initiating prosecution with alleged victims has tremendous potential to open up the most vulnerable alleged victims to further victimization. Capers rightfully acknowledges the issues that might arise, particularly in the context of child abuse and domestic violence cases.²⁴ However, the broader category of cases he cites—those involving coercion or intimidation—is virtually limitless, and not contained to intimate violence. One can easily imagine the physical, emotional, economic, or other type of intimidation that might discourage an alleged victim from exercising the option to move forward with proceedings. Furthermore, in many communities, the well-established norms against cooperation with law enforcement certainly could affect the willingness of alleged victims to pursue prosecution, whether alone or with a state-funded or privately funded prosecution-advocate.²⁵

C. Law and Policy Development

Another challenge of an expansion of private prosecution is that it could frustrate the development of law and policy around good prosecutorial practices. Public prosecutors see a wide swath of cases and, over the broad run of those matters, develop common approaches that facilitate the development of the law. As public prosecution is diminished by the advent (or return) of private prosecution, there will be less opportunity—and, perhaps, zero incentive—to develop and adhere to sound, generally-applicable policies, such as the offer of pre-trial diversion in certain categories of cases and other tools that further decarceration. Of course, not everyone will see this as a negative consequence. One who believes the prevailing policies to be ill-advised, would welcome the disruption of public prosecution. However, there is a danger that ad hoc, case-by-case approaches could lead to even greater disparity in treatment and outcomes within the criminal legal system.²⁶

24. *Against Prosecutors*, at 1589.

25. See, e.g., Andrea L. Dennis, *A Snitch in Time: An Historical Sketch of Black Informing During Slavery*, 97 MARQ. L. REV. 279, 281-84 (2014) (citing Michael L. Rich, *Lessons of Disloyalty in the World of Criminal Informants*, 49 AM. CRIM. L. REV. 1493, 1513-18 (2012); Bret D. Asbury, *Anti-Snitching Norms and Community Loyalty*, 89 OR. L. REV. 1257 (2011)).

26. For example, in a system with private prosecution, manuals such as the American Bar Association Criminal Justice Standards (Prosecution Function) would be essential to modelling and maintaining best prosecutorial practices. See Amer. Bar Ass'n, *Criminal Justice Standards, Prosecution Function* (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/; see also Roger A. Fairfax, Jr., *Prosecutors, Ethics, and the Pursuit of Racial Justice*, 19 OHIO ST. J. CRIM. L. 25 (2021). However, private prosecutors might have little incentive to follow such guidelines, even though they presumably would be subject to strictures of the ethical rules adopted in the relevant jurisdiction. See, e.g., Am. Bar Ass'n, *Model Rules of Prof. Conduct 3.8* (1983).

D. *Non-Repeat Players*

Closely related to private prosecution's impact on law and policy development is the concern about inefficiency associated with replacing public prosecutors—who typically are repeat players in the courtroom and process—with victims and those who are less familiar with how courts and the system operate. To be sure, as with the concern about law and policy development, critics of the way the courts and system work may applaud the introduction of new players who may choose to usher in change rather than adapt and assimilate. That said, having novices engage the system on a regular basis could undermine efficiency.²⁷

III.

WHY THE GRAND JURY MIGHT HELP SOLVE OLD PROBLEMS WITHOUT CREATING NEW ONES

Professor Capers addresses many of the aforementioned concerns in his essay and, as he argues, they are not insurmountable.²⁸ Furthermore, given the worthiness of many of Capers's goals, there is the temptation to think outside the box in order to achieve them. However, there may be an easier way to achieve what Capers is seeking, without the concomitant costs. Rather than reviving private prosecution—a largely defunct institution—we could reinvigorate and deploy one that has been here with us all along.

The grand jury, properly equipped, can help to deliver many of the benefits Capers's private prosecution model seeks. This essay notes several distinct benefits that adoption of private prosecution would generate. Nearly all of them could be enjoyed in an enlightened grand jury regime.

A. *Restoring Power to the People*

The grand jury is the quintessential democratic body—a cross section of the community brought together to deliberate and vote on matters of public importance.²⁹ Ensuring that the grand jury plays a real and meaningful role in determining when to initiate criminal proceedings could help resituate power with the people.

27. Of course, the “prosecutor-advocate” Capers proposes, *see Against Prosecutors*, at 1588-89, could easily accumulate the sort of experience and expertise that might address some of these concerns. *But see* Benjamin Levin, *Criminal Justice Expertise*, 90 *FORDHAM L. REV.* 2777 (2022) (posing important foundational questions about the framing of expertise in the criminal justice context).

28. *Against Prosecutors*, at 1608.

29. *See, e.g.*, Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Grand Jury*, 94 *Geo. L.J.* 1265, 1318 (2006); Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 *MINN. L. REV.* 398, 409-11 (2006).

B. Identifying Victimless Crimes

What better body to serve as the arbiter of which victimless offenses are not worthy of prosecution?³⁰ The grand jury, by its very nature, is designed to represent the wisdom and conscience of the community. As representatives of the community, the grand jury can provide perspective on laws and enforcement policies that are in tension with evolving community norms and the administration of mercy and forbearance in the criminal law.³¹ Also, the grand jury can help guide our consideration of which crimes are truly “victimless.” For example, although narcotics offenses are often described as “victimless,” for those whose economic circumstances force them to raise children in a home situated near an open-air drug market, such criminal activity may not seem victimless. The grand jury can help provide valuable community perspective on these types of questions.³²

C. Enhancing Prosecutorial Oversight

Capers envisions the private prosecution proposal as leading to greater court oversight of *public* prosecutors. The grand jury can also be an organ of oversight of public prosecutors, weighing in not only on the merits of prosecution in individual cases, but also broader issues of prosecutorial and enforcement priorities.³³ Properly equipped, the grand jury could also oversee and regulate prosecutorial misconduct, just as it historically has effectively investigated other forms of governmental misconduct.³⁴

D. Recognizing Expanding Criminalization

The grand jury could also play a key role in recognizing the expansion of criminalization. As grand juries sit for a relatively lengthy period of time and handle a wide swath of matters,³⁵ they are well-positioned to gauge the reach—and overreach—of the criminal law. Additionally, using its historic reporting function,³⁶ the grand jury could be a mechanism for sharing with the larger public their observations and findings on criminalization.

30. See generally, Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703 (2008) [hereinafter *Grand Jury Discretion*].

31. See *id.*

32. See, e.g., *id.* at 705.

33. Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL OF RTS. J. 339, 364-367 (2010) [hereinafter *Grand Jury Innovation*]; *Grand Jury Discretion*, at 755-56.

34. *Grand Jury Innovation*, at 367-68.

35. *Grand Jury Discretion*, at 744-47.

36. See, e.g., Barry Jeffrey Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73 (1987).

E. Promoting Mercy and Compassion

As I have written elsewhere, the grand jury is particularly well-equipped to be a locus of mercy in the criminal law.³⁷ The grand jury's intended role as conscience of the community, its cross-sectional identity, and its potential for meaningful group deliberation all contribute to its ability to promote mercy in the criminal legal system. Indeed, in the examples Capers cites to illustrate his criticism of prosecutorial overcharging,³⁸ an enlightened grand jury could have resisted the charges.³⁹

F. Enhancing Participatory Citizenship

Capers brings up in the essay Alexis de Tocqueville's robust view of the American trial jury.⁴⁰ The jury is, in the words of Alexis de Tocqueville, a "free school."⁴¹ If this is so, I maintain the belief that the *grand* jury, because of its work beyond the confines of one case, is a graduate school.⁴² Grand jurors not only have the opportunity to participate in the workings of the criminal legal system in the context of a case, but they also could have direct influence on other matters of governance, just as grand juries did in earlier eras of American history.⁴³

G. Expanding the Role of Juries

The final benefit discussed in Capers's essay is one of the most compelling for choosing to deploy grand juries in lieu of private prosecution.⁴⁴ Expanding the role of juries,⁴⁵ especially the grand jury,⁴⁶ can open a world of possibilities for improvement in the criminal legal system. Rather than hoping such an expansion is a consequence of a shift to private prosecution, we might simply invest directly in the expanded use of grand juries and, in doing so, reap many of the benefits Capers outlines. Importantly, use of the grand jury would also avoid concerns about abuse of the criminal process by aggrieved victims and the concomitant harm to vulnerable victims. Also, if properly equipped, the grand

37. See, e.g., *Grand Jury Discretion*.

38. *Against Prosecutors*, at 1568.

39. See, e.g., *Grand Jury Discretion*, at 705.

40. *Against Prosecutors*, at 1587-88.

41. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 316 (1835).

42. *Grand Jury Innovation*, at 353 (arguing that, if the jury is a free school, the grand jury "can provide a veritable Ph.D. in civic engagement"); see also Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 *HOW. L.J.* 825, 830 (2015).

43. See *Grand Jury Innovation*.

44. See *Against Prosecutors*, at 1607.

45. See, e.g., Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 *VA. L. REV.* 311 (2003).

46. See, e.g., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 *WM. & MARY BILL OF RTS. J.* 339 (2010); Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 *CORNELL L. REV.* 703 (2008).

jury can provide feedback to the public prosecutor on matters of enforcement policy.

IV.

OVERCOMING THE GRAND JURY'S SHORTCOMINGS

To be sure, in order for the grand jury to do this work, it would need to undergo an overhaul. The grand jury institution has been the subject of a great deal of criticism—much of it deserved—over its history.⁴⁷ However, there are two primary critiques that provide a blueprint for how we can equip the grand jury to help achieve the benefits Capers's private prosecution model seeks out.

First, critics often characterize the grand jury as the captive of the prosecutor. The primary evidence for this claim is the high rate of indictment by grand juries.⁴⁸ Thus, the argument goes, the grand jury is too pliant, and essentially serves as a rubber stamp for the government when reviewing cases for probable cause.⁴⁹ I have frequently pushed back against this conventional wisdom about the grand jury by pointing out that subsequent judicial or jury findings of proof beyond a reasonable doubt during the plea process or after a trial overwhelmingly corroborate grand jury decisions.⁵⁰ I also have noted that the statistics showing an extremely high rate of indictment do not reflect cases in which the prosecutor withdraws the case from the grand jury and decides not to persist in the charges based on the grand jury's tepid or negative reaction to the evidence presented.⁵¹

Nevertheless, there are ways to enhance the grand jury's independence. The empaneling judge, while charging the grand jurors, could convey that they are co-equals with the prosecutor and have a duty to act as an independent check on prosecutorial discretion and as the empowered voice of the community. Also, the grand jury instructions could further highlight this independence and define for the grand jurors their engaged role in the process. More generally, there could be a public education campaign about the role of the grand jury and its importance in our system.

A second typical critique of the grand jury is that it is an afterthought in our criminal legal system—essentially a speed bump that does not practically improve justice.⁵² However, the grand jury can be deployed for many potential

47. *Grand Jury Innovation*, at 341-45.

48. *See, e.g.*, Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825, 828 & n.21 (2015).

49. *Grand Jury Innovation*, at 342-44.

50. *See, e.g., id.* at 343-44.

51. *Id.*

52. *See, e.g.*, William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973); *see also* Kevin K. Washburn, *Restoring the Grand Jury*, in Roger A. Fairfax, Jr., ed., *Grand Jury 2.0: Modern Perspectives on the Grand Jury* 261 (2011).

tasks, including diversion,⁵³ criminal alternative dispute resolution,⁵⁴ prosecutorial regulation and guidance,⁵⁵ and, as Capers points out, plea bargaining and sentencing.⁵⁶ Facilitating the pursuit of Capers's aims—without the costs of diminishing public prosecution—would be an example of the type of dormant usefulness the grand jury possesses.

CONCLUSION

Capers's essay is a thought-provoking work from one of the most innovative criminal law scholars of his generation. It forces even those who would not subscribe to Capers's proposal to explain why the current system of public prosecution is superior to his vision and what would make it better. Understood this way, Capers has already moved the needle. However, rather than being *against* prosecutors, we may achieve many of the aims set out in the Essay if, instead, we were *for* grand juries. Both public prosecution and the grand jury undoubtedly need reform,⁵⁷ but together, they can enhance the quality of justice for defendants and alleged victims alike.

53. See, *Grand Jury Innovation*, at 359-62.

54. See *id.*

55. See *id.* at 364-68.

56. *Against Prosecutors*, at 1607. See also *Grand Jury Innovation*, at 354-58.

57. See, e.g., Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 *How. L.J.* 825 (2015).