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## Victims as a Check on Prosecutors: A Comparative Assessment

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# Victims as a Check on Prosecutors: A Comparative Assessment

Jenia I. Turner\*

Introduction .....	72
I. Victim Participation as a Check on Prosecutorial Decisions: A Comparative View .....	73
II. The Limits of Victim Participation as an Accountability Mechanism for Prosecutors.....	81
Conclusion.....	84

## INTRODUCTION

In *Against Prosecutors*, Bennett Capers presents thought-provoking arguments for empowering victims in criminal cases.<sup>1</sup> He proposes that victims should be given greater authority to initiate and direct prosecutions of criminal cases, and should have the options to veto prosecutions or to serve as private prosecutors themselves.<sup>2</sup> Such a shift of authority from public prosecutors to victims, Capers argues, could help check prosecutorial abuses and steer enforcement of criminal law to those areas where it is most needed.<sup>3</sup> Capers urges us to ponder this possibility as a way of transforming the criminal justice system into one that is fairer and more just.

The boldness of the proposal is appealing but also raises some questions, both theoretical and practical. Could victims truly represent not just their own private interests, but also the public interest in prosecuting crime? Might greater reliance on victim enforcement potentially undermine principles of consistency

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1. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1587–90 (2020).
2. *Id.* at 1588–89.
3. *Id.* at 1591–92.

and equality? Might it also conflict with defense rights and fairness in the process? And could the proposal be implemented effectively in practice?

Capers analyzes U.S. history to make the case that prosecutorial monopoly over criminal law enforcement is not inevitable and that greater victim involvement is feasible.<sup>4</sup> He also notes that the experience of other countries could help provide relevant insights.<sup>5</sup>

This response Essay takes up Capers's suggestion to seek out comparative lessons on victim participation. I focus on just a few jurisdictions and only one aspect of victim involvement that is central to Capers's argument—whether and how victims could provide a check on prosecutors' broad powers. After reviewing the way several European states have approached this question, the Essay concludes that giving victims a central role in criminal case decision-making is not likely to be the most promising way to ensure fair and just prosecutions in the U.S. context. At the same time, the European experience suggests one way in which the U.S. criminal justice system can expand victims' rights in a way that benefits society without undermining defendants' constitutional rights—by giving victims the right to challenge prosecutorial declination decisions. Victims' interest in challenging declination decisions coincides broadly with the public interest in ensuring equal treatment in prosecutions. At the same time, unlike some of the other participatory rights that might be accorded to victims, the right to review declination decisions does not generally conflict with defendants' rights to due process. Declination review by victims can thus be implemented as one element of broader reforms of our criminal justice institutions to bolster prosecutorial accountability and promote fairness and consistency in the criminal process.<sup>6</sup>

## I.

### VICTIM PARTICIPATION AS A CHECK ON PROSECUTORIAL DECISIONS: A COMPARATIVE VIEW

Both in the United States and elsewhere, arguments in favor of broad victim participation in the criminal process fall into two general categories. First, some advocates argue that victim participation should be strengthened in order to respect and protect the dignity of victims.<sup>7</sup> In this view, participation in the criminal process can help victims feel heard and recognized and can serve as a stepping stone toward healing from crime-induced trauma. Second, some commentators propose that victims can serve as “agents of accountability” in the

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4. *Id.* at 1573.

5. *Id.* at 1608.

6. See Jeffrey Bellin, *A World Without Prosecutors*, 13 CALIF. L. REV. ONLINE 1; Angela Davis, *The Perils of Private Prosecution*, 13 CALIF. L. REV. ONLINE 7.

7. See, e.g., Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 193–94; Anat Horovitz & Thomas Weigend, *Human Dignity and Victims' Rights in the German and Israeli Criminal Process*, 44 ISR. L. REV. 263, 263–66 (2011).

criminal process, pushing against prosecutorial decisions that disserve the interests of both victims and the public.<sup>8</sup>

Capers focuses primarily on the second issue—whether the involvement of victims can reduce undue prosecutorial dominance in criminal case decision-making. Capers traces the rise of public prosecutors in American colonies in the eighteenth century and explains that, by the mid- to late-nineteenth century, they had supplanted crime victims as the main actors in deciding whether and how to pursue a criminal case.<sup>9</sup> Over time, U.S. prosecutors came to “wield enormous power” in the criminal process, Capers argues, and “their power [today] is almost completely unchecked.”<sup>10</sup> He believes that courts have restrained their oversight of prosecutors in part because judges trust professionally trained players to act in the public interest.<sup>11</sup> Capers proposes that if victims were to become directly involved in criminal case decisions, courts would be more likely to review charging and plea bargaining decisions.<sup>12</sup> More broadly, involving victims directly in the process “may prompt us to rethink why we provide so much funding to public prosecutors and comparatively so little to public defenders[, and] . . . level the playing field between prosecution and defense. . . .”<sup>13</sup> Capers therefore suggests that greater involvement by victims would restore an equilibrium among different participants in the process and make the process fairer.

Many traditionally inquisitorial systems today engage victims more extensively than the U.S. system does. As in the United States, many of these systems had transferred power to public prosecutors in the past.<sup>14</sup> But in the 1980s, a global movement toward victims’ rights gained ground and led to the adoption of the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration called on states to take steps to alleviate the suffering of victims and otherwise assist them in the journey through the criminal process.<sup>15</sup> In Europe, the Council of Europe and later the European

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8. Marie Manikis, *Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process*, 2017 PUB. L. 63, 63–64.

9. Capers, *supra* note 2, at 1578–79, 1584; *see also* Jed Handelsman Shugerman, *Professionals, Politicos, and Crony Attorneys General: A Historical Sketch of the U.S. Attorney General as A Case for Structural Independence*, 87 FORDHAM L. REV. 1965, 1986–87 (2019).

10. Capers, *supra* note 2, at 1593–94.

11. *Id.* at 1594.

12. *Id.* at 1595.

13. *Id.* at 1595.

14. *See, e.g.*, Johanna Göhler, *Victim Rights in Civil Law Jurisdictions*, in THE OXFORD HANDBOOK OF CRIMINAL PROCESS 267, 268 (Darryl K. Brown, Jenia I. Turner & Bettina Weisser eds. 2019).

15. UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res. A/RES/40/34, New York, 29 Nov. 1985, [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/40/34](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/40/34); Horovitz & Weigend, *supra* note 8, at 276.

Union enacted measures to strengthen victims' access to justice.<sup>16</sup> As a result, today, victims in many European countries participate alongside prosecutors, defendants, and judges to bring criminal cases to resolution.<sup>17</sup>

First, in some civil-law European countries, victims can exercise a veto over prosecutorial decisions to bring charges in certain minor cases. In Germany, a victim request is a prerequisite to prosecution in trespass and slander cases.<sup>18</sup> The theory is that these types of crimes affect only the victim's private interests, so the person whose interests have been harmed should choose whether to have the state pursue the case.<sup>19</sup> Capers proposes a similar victim veto over certain charging decisions, noting that this might encourage mercy in the criminal justice system and reduce the societal burdens of overcriminalization.<sup>20</sup>

Yet even for minor crimes, society may have an independent interest in punishing the misconduct—for retributive, expressive, or deterrent purposes. The victim's wishes to refrain from prosecution may not be the only relevant consideration.<sup>21</sup> For this reason, even in European countries that give victims some veto power over prosecution, the power is heavily circumscribed to offenses that are believed to offend particularly private interests.<sup>22</sup>

Across Europe, victims also generally have the right to challenge a prosecutor's decision to decline prosecution. This right is guaranteed by the 2012 EU Directive establishing minimum standards on the rights, support, and protection of victims of crime; it is also endorsed in recommendations by the

16. See, e.g., Ante Novokmet, *The Right of a Victim to a Review of a Decision Not to Prosecute as Set Out in Article 11 of Directive 2012/29/EU and an Assessment of Its Transposition in Germany, Italy, France and Croatia*, 12 *UTRECHT L. REV.* 86, 87–88 (2016).

17. See Elisabetta Grande, *Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe*, 64 *AM. J. COMP. L.* 583, 592–93 (2016).

18. E.g., GER. CRIM. CODE [StGB] § 123 (trespass prosecuted only upon request); § 194 (insult generally prosecuted only upon request except where public interest is deemed violated); § 205 (violations of private and trade secrets). Horovitz & Weigend, *supra* note 8, at 277. Some offenses, such as assault, “exhibitionism,” and sexual harassment are generally prosecuted upon the victim's request unless the prosecutor determines there is a special public interest in prosecution. E.g., GER. CRIM. CODE [StGB] §§ 183, 184i, 230.

19. Horovitz & Weigend, *supra* note 8, at 296 & n.195.

20. Capers, *supra* note 2, at 1587.

21. See, e.g., Stephanos Bibas, *Victims Versus the State's Monopoly on Punishment?*, 130 *YALE L.J. FORUM* 857, 858 (2021).

22. In civil-law countries, the power to veto charges is limited to a small subset of misdemeanors that concern minor violations of individual dignitary and property interests. See *supra* note 19 (noting trespass, insult, and violations of trade and private secrets as misdemeanors for which victims can veto prosecution in Germany); Göhler, *supra* note 15, at 284 (noting that the requirement of a victim request, which exists in a few civil-law countries, “forms a rare exception” and is limited to certain minor crimes). In common-law countries, victims have no veto power over the decision to file charges. Marie Manikis, *Conceptualizing the Victim Within Criminal Justice Processes in Common Law Tradition*, in *THE OXFORD HANDBOOK OF CRIMINAL PROCESS* 247, 257 (Darryl K. Brown, Jenia I. Turner & Bettina Weisser eds. 2019). While this is true as a formal matter, in practice, given limited resources, both U.S. and foreign prosecutors are unlikely to pursue charges if victims are opposed. See, e.g., Horovitz & Weigend, *supra* note 8, at 296 n.195.

Council of Europe.<sup>23</sup> In France, Germany, and England and Wales,<sup>24</sup> victims can challenge prosecutorial declination decisions first internally, by filing a complaint with the prosecutor's office, and then externally, by filing a petition with the court.<sup>25</sup> In Italy, judges automatically review any decision to decline charges, and victims have the right to submit their views to the court.<sup>26</sup>

The purpose of these mechanisms is in part to respect victims' interests in the resolution of the case and in part to promote equal treatment of similar cases.<sup>27</sup> When challenging a declination decision, victims are seen as representatives of the public, but also as uniquely "motivated to contribute to the control of the public prosecutor."<sup>28</sup>

In practice, victims rarely exercise their right to challenge prosecutorial decisions to decline charges. In England, for example, about 2.5% of declinations were challenged via internal administrative review in 2020-21, while in Germany, a 2008 study found that less than 1% of declination decisions were challenged in court.<sup>29</sup> The success rate of administrative challenges in England was about 13%.<sup>30</sup> This was significantly greater than the success rate of German judicial challenges—less than 1%.<sup>31</sup>

23. Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, O.J. (L315)57, Nov. 14, 2012. The duty does not apply to prosecutorial decisions resulting from an out-of-court settlement where "the settlement imposes a warning or an obligation." *Id.* at 62, ¶45.

24. Although the United Kingdom is no longer an EU member state, its criminal procedures have been shaped by its earlier EU membership. Moreover, the UK is still a member of the Council of Europe, which has also promulgated a range of recommendations on victims' rights, including a recommendation to give victims the right to ask for a review of decisions not to prosecute.

25. Göhler, *supra* note 15, at 283; Manikis, *supra* note 23, at 260; Manikis, *supra* note 9, at 71–75; Novokmet, *supra* note 17, at 92–93, 98–101. In Germany, this right to challenge declinations is limited to cases in which the prosecution declined to file charges because of a perceived insufficiency of the evidence. Victims may not challenge declinations based on a lack of a sufficient public interest in prosecution (a type of declination possible only in misdemeanor cases, where the principle of mandatory prosecution does not apply).

26. Novokmet, *supra* note 17, at 95–96.

27. Göhler, *supra* note 15, at 284; Manikis, *supra* note 23, at 260–61; Thomas Weigend, *Echte Verfahrensrechte für angebliche Opfer?*, in KRIMINOLOGIE—JUGENDKRIMINALRECHT—STRAFVOLLZUG: GEDÄCHTNISSCHRIFT FÜR MICHAEL WALTER \*7 (Frank Neubacher & Michael Kubink eds. 2014).

28. Göhler, *supra* note 15, at 284; *see also* Weigend, *supra* note 28, at \*7.

29. Victims' Right to Review Data 2020-21, Crown Prosecution Service, [http://www.cps.gov.uk/victims\\_witnesses/victims\\_right\\_to\\_review/vr\\_data/index.html](http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/vr_data/index.html) (England); Edda Meyer-Krapp, *Das Klageerzwingungsverfahren*, PhD Dissertation, Faculty of Law, Georg-August-Universität zu Göttingen 101–03 (2008), <https://ediss.uni-goettingen.de/handle/11858/00-1735-0000-0006-B345-3>. The study did not examine the percent of cases in which victims filed petitions with the prosecutor's office and the success rate of such petitions. In Germany, a petition with the prosecutor's office is a precondition to filing a complaint with the court.

30. Victims' Right to Review Data 2020-21, Crown Prosecution Service, [http://www.cps.gov.uk/victims\\_witnesses/victims\\_right\\_to\\_review/vr\\_data/index.html](http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/vr_data/index.html); Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 876 (2018) (finding similar rates in earlier periods).

31. Meyer-Krapp, *supra* note 30, at 101–03.

The rarity of challenges is partially attributable to lack of resources and expertise by victims.<sup>32</sup> The low rate of success of victim petitions likely reflects the complexity of the process<sup>33</sup> and the deferential standard that courts tend to apply in reviewing declination decisions.<sup>34</sup> Still, the very possibility of a challenge by the victim may incentivize prosecutors to be careful in deciding whether to file charges.<sup>35</sup>

Notably, these accountability mechanisms only permit victims to request review prosecutorial decisions *not* to file charges. As Capers and others have noted, some victims may also be interested in a restorative approach to criminal justice and may appreciate the opportunity to contest a prosecutor's decision *to* file charges.<sup>36</sup> With limited exceptions, formal challenges of this nature are not available in European systems.<sup>37</sup>

In many European countries, including Germany, Poland, and Portugal, victims can also influence the process as accessory prosecutors.<sup>38</sup> As accessory prosecutors, victims can be represented by counsel (and receive legal aid if they cannot afford one), attend the trial proceedings, inspect the evidence in the case file, participate actively in the presentation and examination of evidence, make arguments to the court, and appeal certain decisions even against the wish of the

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32. German law has put in place requirements to discourage frivolous complaints that may deter some legitimate challenges as well. Courts may require victims to furnish security in advance for court costs, and costs are imposed in the event of an unsuccessful challenge. A lawyer must also sign the petition. GER. CRIM. PROC. CODE [StPO] §§ 176, 177; Meyer-Knapp, *supra* note 30, at 47–49; Novokmet, *supra* note 17, at 94. Regarding England, see Marie Manikis, *A New Model of the Criminal Justice Process: Victims' Rights as Advancing Penal Parsimony and Moderation*, 30 CRIM. L.F. 201, 211 (2019) (noting that victims do not have the resources or time to undertake judicial review of prosecutorial charging decisions) (citing *R. v. Killick* [2011] EWCA Crim 1608; [2012] 1 Cr. App. R. 10).

33. In Germany, legal aid to challenge the declination decision is available to the same degree as in civil litigation. GER. CRIM. PROC. CODE [StPO] § 172(3); GER. CIV. PROC. CODE §§114–122.

34. Horovitz & Weigend, *supra* note 8, at 291 (discussing Germany); *see also* Brown, *supra* note 31, at 876–77; Manikis, *supra* note 9 (noting that in England, judicial review of prosecutorial declination charges is deferential, but administrative review is less so).

35. *See, e.g.,* KAROLINA KREMENS, POWERS OF THE PROSECUTOR IN CRIMINAL INVESTIGATION: A COMPARATIVE PERSPECTIVE 304 (2021).

36. Capers, *supra* note 2, at 1591; Manikis, *supra* note 9, at 79; Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 707–13 (1999).

37. *Cf.* Manikis, *supra* note 32, at 210–11 (noting that victims in England and Wales can “seek judicial review of decisions to prosecute as well as decisions not to prosecute,” but administrative review is limited to declination decisions).

38. Göhler, *supra* note 15, at 277–78 (noting further that the Spanish and Czech criminal justice systems have similar provisions for citizens/victims to act as accessory prosecutors); EU Agency for Fundamental Rights, *Victims' Rights as Standards of Criminal Justice—Justice for Victims of Violent Crime, Part I*, at 37–41 (2019) (discussing victims' right to participate as accessory prosecutors in Austria, Germany, Poland, and Portugal). In Germany, the accessory prosecution (*Nebenklage*) procedure is reserved for certain more serious violent offenses, but the list of eligible offenses has increased over time. Kerstin Braun, *Giving Victims a Voice: On the Problems of Introducing Victim Impact Statements in German Criminal Procedure*, 14 GERMAN L.J. 1889, 1896 (2013).

public prosecutor.<sup>39</sup> France and Belgium have a similar mechanism under which victims can serve as civil parties alongside prosecutors and seek to influence the process and recover damages.<sup>40</sup>

These arrangements aspire to protect individual victim interests and, in the case of the civil party system, facilitate victim compensation without forcing victims to spend time and money in a separate civil trial.<sup>41</sup> They also promote oversight of prosecutors' decisions and help advance public interests in uncovering the truth about the case and enforcing the criminal law.<sup>42</sup>

Critics of the procedure have noted that serving as a civil party or accessory prosecutor is often too burdensome and costly.<sup>43</sup> Legal aid is, however, typically available to help with costs for indigent victims.<sup>44</sup> Moreover, in some systems with accessory prosecution, if the defendant is convicted, the defendant must reimburse the victim for costs incurred during the accessory prosecution, including attorney's fees.<sup>45</sup> Still, victims are often reluctant to devote the time and resources necessary for active participation as accessory prosecutors. Statistics from Germany show that victims participate as accessory prosecutors in a minority of cases—mostly in cases concerning sexual offenses.<sup>46</sup> Another

39. GER. CRIM. PROC. CODE [StPO] §§ 395, 397, 397a, 406h; Göhler, *supra* note 15, at 276, 278.

40. FR. CRIM. PROC. CODE §§ 10-2, 85-91-1; 371-375-2, 418-426; Göhler, *supra* note 15, at 276; EU Agency for Fundamental Rights, *supra* note, at 1616 (listing Austria, Belgium, France, Germany, Greece, the Netherlands, Portugal, and Spain as EU countries that permit victims to participate in criminal proceedings as civil parties). In France, a small minority of victims participate as civil parties in less serious criminal cases—in 2019, only about 9% of decisions in Tribunaux correctionnels involved civil parties. Référence Statistiques Justice, L'Activité pénale des juridictions 117 (2020), [http://www.justice.gouv.fr/art\\_pix/PARTIE-11\\_Annuaire\\_ministere-justice\\_2019\\_16x24\\_converted.pdf](http://www.justice.gouv.fr/art_pix/PARTIE-11_Annuaire_ministere-justice_2019_16x24_converted.pdf). But victims are much more likely to take part in the more serious cases handled by investigative judges. Ministère de la Justice, Les chiffres clés de la Justice 2021, at 11 (2021), [http://www.justice.gouv.fr/art\\_pix/Chiffres\\_Cles\\_2021\\_WEB.pdf](http://www.justice.gouv.fr/art_pix/Chiffres_Cles_2021_WEB.pdf) (reporting that victims filed a complaint to initiate the proceeding and to be treated as civil parties in 23% of cases handled by investigative judges (i.e., serious felonies)).

41. See, e.g., Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J.L. & SOC'Y 294, 309 (2005) (citing studies that found victims who had served as accessory prosecutors reported greater satisfaction with the process than those who had not); Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises*, 2001 U. ILL. L. REV. 791, 820 (2001) (noting that the civil party system helps victims obtain compensation more easily).

42. Göhler, *supra* note 15, at 278; Lettow Lerner, *supra* note 42, at 820 (“[T]he civil party serves to push the investigating judge (or prosecution if there is no investigating judge) into vigorous investigation and presentation of the case. . . . French legal writers often use the phrase “conquering the inertia of the prosecutor” to describe the civil party’s role.”).

43. *Id.* at 277. GER. CRIM. PROC. CODE [StPO] § 472.

44. See *supra* note 40; FR. CRIM. PROC. CODE §§88; GER. CRIM. PROC. CODE [StPO] § 472.

45. See *supra* note 40; GER. CRIM. PROC. CODE [StPO] § 472.

46. Horovitz & Weigend, *supra* note 8, at 291 (citing STEPHAN BARTON & CHRISTIAN FLOTHO, OPFERANWÄLTE IM STRAFVERFAHREN 60-67 (2010)) (noting that in district court, where more serious felonies are tried, victims participated in 21% of cases, and a high percentage of cases concerning sexual offenses); William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 55 (1996) (citing studies that in cases where



issue is that as more criminal cases are resolved through negotiations, the influence of accessory prosecutors over the process has diminished as they may not veto a negotiated disposition.<sup>47</sup>

Other commentators have also expressed concerns that active victim participation can undermine procedural fairness as it forces the defense to have to respond to two adversaries—one public and one private.<sup>48</sup> This issue is somewhat less pronounced in inquisitorial systems where tighter judicial control of the proceedings makes it less likely that adding victims as a party would endanger defense rights.<sup>49</sup> Still, even in inquisitorial systems, some commentators have criticized the arrangement on the ground that it conflicts with defendants' right to a fair trial.<sup>50</sup> For example, some have argued that victims' ability to review the investigative file can undermine the defendant's ability to confront victim-witnesses effectively because it allows victim-witnesses to review the evidence in the case and prepare their testimony accordingly.<sup>51</sup> Additionally, the defendant and defense witnesses can be worn down by successive examinations—from the court, the defense, the prosecution, and victim's counsel.<sup>52</sup> Finally, in countries such as France, where victims can initiate prosecutions and then stay involved as civil parties, commentators worry that victims may abuse the system for improper private ends—to harass people or to pressure them in parallel civil disputes.<sup>53</sup> In sum, the effectiveness and fairness of accessory prosecutions and the civil party system remain topics of active debate.

Victims can also serve as private prosecutors in some European countries. The right to private prosecution is typically limited in various ways—to certain less serious offenses, to cases where the public prosecutor has declined to press charges, or to “exceptional circumstances.”<sup>54</sup> Victims may have to bear the costs

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accessory prosecution is an option, about 20% of victims participate, but that a much higher percent of victims participate in sexual assault cases).

47. See, e.g., Jenia I. Turner & Thomas Weigend, *Negotiated Case Dispositions in Germany, England and the United States*, in I CORE CONCEPTS IN CRIMINAL LAW AND CRIMINAL JUSTICE 389, 407 (Kai Ambos et al. eds. 2020).

48. Göhler, *supra* note 15, at 279; Horowitz & Weigend, *supra* note 8, at 291; Kristina-Maria Kanz, *Alles im Interesse der Opfer?!—Eine kritische Bestandsaufnahme rechtlicher Veränderungen, politischer Motivationen und empirischer Erkenntnisse der letzten 30 Jahre*, 100 MONATSSCHRIFT FÜR KRIMINOLOGIE & STRAFRECHTSREFORM 227, 234 (2017).

49. Braun, *supra* note 39, at 1895 (2013); Pizzi & Perron, *supra* note 47, at 41.

50. Horowitz & Weigend, *supra* note 8, at 293–94; Pizzi & Perron, *supra* note 47, at 57.

51. Kanz, *supra* note 49, at 233.

52. See *id.* at 234.

53. Lettow Lerner, *supra* note 42, at 820 n.122; Jean-Claude Magendie, *Président du tribunal de grande instance de Paris, Célérité et Qualité de la Justice: Rapport au Garde de Sceaux 115–136* (2004) (discussing abuses and proposing reforms); Pieter Verrest, *The French Public Prosecution Service*, 8 EUR. J. CRIME CRIM. L. & CRIM JUST. 210, 241 (2000) (noting the abuse of the *partie civile* system in financial cases).

54. Göhler, *supra* note 15, at 279; Jamil Ddamulira Mujuzi, *Victim Participation in the Criminal Justice System in the European Union through Private Prosecutions: Issues Emerging from the*

of the proceedings if the defendant is acquitted or the charges dismissed, a risk many are reluctant to assume.<sup>55</sup>

The rarity of private prosecutions casts doubt on their effectiveness as a check on prosecutors.<sup>56</sup> When they do occur, they have been criticized for resulting in disparate treatment in the criminal process, as defendants who have less resourceful or less determined victims are less likely to face the prospect of private prosecutions.<sup>57</sup> Most countries thus retain private prosecution in a limited fashion, primarily as a backstop to public prosecution.<sup>58</sup>

In contrast to European systems, the U.S. victims' rights movement has focused on less direct mechanisms of victim participation. The focus is more on keeping victims informed about the case and allowing them the opportunity to convey their views to decisionmakers.<sup>59</sup> In many states and the federal system, victims have the right to be notified of critical stages and decisions in the case.<sup>60</sup> Many jurisdictions further require prosecutors to consult with victims before making major decisions.<sup>61</sup> Others also give victims the opportunity to present their views about bail, plea agreements, and sentencing directly to the court.<sup>62</sup> But unlike the European countries examined in this Essay, U.S. jurisdictions do not give victims the right to veto prosecutorial charging decisions, to challenge prosecutorial declination decisions, or to act as accessory or private prosecutors or civil parties.<sup>63</sup>

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*Jurisprudence of the European Court of Human Rights*, 24 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 107, 115–16, 118–19 (2016).

55. Mujuzi, *supra* note 55, at 119; Amanda Konradi & Tirza Jo Ochrach-Konradi, *Victims and Prosecutors*, in OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 373, 390 (Ronald F. Right, Kay L. Levine & Russell M. Gold eds. 2021). In Germany, upon conviction, the defendant must reimburse the private prosecutor for costs incurred. GER. CRIM. PROC. CODE [StPO] § 471. On the other hand, “if the charges against the accused are dismissed or if the accused is acquitted or the proceedings terminated, the costs of the proceedings and the accused’s necessary expenses shall be charged to the private prosecutor.” *Id.*

56. *Cf.* Göhler, *supra* note 15, at 279 (noting that some commentators nonetheless view the possibility of private prosecution as a check on prosecutorial abuse).

57. *Id.*

58. *See supra* note 53. In some countries, the public prosecutor may take over the private prosecution if it is in the public interest. GER. CODE CRIM. PROC. [StPO] §§ 376, 377.

59. *E.g.*, Brown, *supra* note 31, at 863.

60. *See, e.g.*, 18 U.S.C. § 3771(a); Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy’s Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 104–05, 109–10 (2020).

61. 18 U.S.C. § 3771(a); Cassell & Garvin, *supra* note 61, at 117.

62. 18 U.S.C. § 3771(a); Cassell & Garvin, *supra* note 61, at 114–18.

63. Brown, *supra* note 31, at 862–83. *But cf.* Roger A. Fairfax, Jr., *Delegation of Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 423 (2009) (noting that just a few U.S. states allow private prosecutions).

## II.

## THE LIMITS OF VICTIM PARTICIPATION AS AN ACCOUNTABILITY MECHANISM FOR PROSECUTORS

The comparative overview suggests that certain aspects of victim involvement could feasibly be strengthened in U.S. criminal proceedings. In Europe, both adversarial and inquisitorial systems have given victims greater participatory roles without significant disruption. Yet the European experience does not resolve the larger policy concerns raised by such participation. Indeed, it highlights questions that U.S. jurisdictions should consider before determining whether (and if so, how) to expand victim participation.

One concern is that victims' decisions may too often reflect narrow private interests. Some have worried that private prosecutions, accessory prosecutions, and civil party participation could produce more punitive results or could be misused for malicious private ends. Although empirical evidence on this question is contested, some studies from Germany suggest that when victims act as accessory prosecutors, outcomes are harsher for defendants.<sup>64</sup> In France, commentators point to the high percentage of victim-initiated prosecutions that are dismissed (as many as 80%) as one sign that the system is subject to abuse.<sup>65</sup>

Another concern, again, is the burden that active participation might impose on victims. A study of German sexual violence victims, for example, found that 67% of them primarily wanted to forget the crime, while only 13% prioritized punishment of the offender.<sup>66</sup> As noted above, monetary and non-monetary costs of active participation in criminal proceedings discourage many victims from such participation.<sup>67</sup> Victims' preferences may therefore at times conflict with the public interest in defining and enforcing criminal laws.

Other potential issues arise with giving victims veto over prosecutorial choices. Such an arrangement effectively elevates individual interests over societal ones. Although victims' interests in prosecution—or non-prosecution—should certainly be considered in criminal justice policy, the question is how to do so while also taking into account potentially competing public interests. When it comes to defining the scope of criminal laws, victims' wishes are more appropriately considered at legislative hearings, in a democratic forum where all views—the victims' as well as those of the broader public—are heard. And when it comes to exercising discretion in the enforcement of criminal laws, at the charging stage, the public interest is better assessed by democratically elected,

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64. Göhler, *supra* note 15, at 274 (noting mixed and contested findings); Kanz, *supra* note 49, at 243 (same).

65. Lettow Lerner, *supra* note 42, at 820 n.122; Magendie, *supra* note 54, at 115; Verrest, *supra* note 54, at 241 (noting the abuse of the *partie civile* system in financial cases).

66. Kanz, *supra* note 49, at 240.

67. See *supra* notes 44–47, 56 and accompanying text; see also Davis, *supra* note 6 (discussing similar problems with private prosecutions in colonial America).

or administratively accountable, prosecutors, as well as grand juries who represent the community.

Giving victims a dispositive or significant influence over charging may also undermine consistency in prosecutions. Some defendants may receive milder treatment simply because they happened to harm a more vulnerable victim, who is too overwhelmed or lacks the resources to mount a vigorous prosecution alongside, or in place of, a public prosecutor.<sup>68</sup> As Capers notes, legal aid to victims may help ameliorate some of these issues. But as the comparative experience suggests, it does not entirely relieve victims of the burdens of active participation and does not entirely solve the arbitrariness stemming from differences in victims' disposition and resources.

Finally, active victim participation in the proceedings can conflict with defense rights. Even the very designation of a victim at the pre-adjudication stage is potentially problematic.<sup>69</sup> After all, some percentage of victims are not truly victims or are not victims of the named defendant, leading to questions about whether broad participatory rights for all victims at the pre-adjudicatory stage are appropriate.<sup>70</sup> Furthermore, burdening defendants with responding to multiple accusers for the same incident can overwhelm an already stretched indigent defense system. While Capers believes that victim participation can encourage local and state authorities to improve indigent defense spending, it is possible that the opposite would occur: as local authorities have to spend money on victim legal aid, indigent defense (a less politically popular budget item) might be cut.

One type of victim involvement, however, appears less problematic than the others, yet still offers promise in improving prosecutorial accountability. Giving victims the right to challenge—administratively and then judicially—prosecutorial declination decisions may be a feasible and worthwhile addition to U.S. criminal procedure. This type of victim involvement serves not merely victims' private interests in the resolution of cases, but also the broader public interest in truth-seeking and consistent enforcement of the law. It also does not raise significant due process concerns because of the preliminary nature of the charging decision—and because the prosecution and the defense will generally be allied in supporting the declination decision.

The relative rarity of victim challenges in Europe suggests that the mechanism is not likely to be abused or to be particularly costly for the criminal justice system. Like courts in Europe, U.S. courts could also apply a deferential

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68. See, e.g., Bibas, *supra* note 22, at 866–67; Braun, *supra* note 39, at 1902; Brown, *supra* note 31, at 864–65; Davis, *supra* note 6.

69. Horowitz & Weigend, *supra* note 8, at 267–70; Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449 (2021); Weigend, *supra* note 28, at \*\*1–5.

70. See Weigend, *supra* note 28, at \*\*9–10 (arguing that while some participation rights make sense even if we accept that victims are merely alleged victims, others currently permitted by the German system, such as the direct questioning of witnesses, should be reconsidered).

standard of review to prosecutorial declination decisions to ease concerns about abuse by victims, as well as concerns about breaching the separation of powers between the judicial and executive branches.<sup>71</sup> And while the separation of powers problem may be insurmountable in some jurisdictions,<sup>72</sup> at least some states already permit victims to petition courts to review prosecutorial declination decisions.<sup>73</sup>

Consistent with Capers's and others' proposals, some U.S. jurisdictions may also consider allowing victims to challenge prosecutors' decisions to file charges. If victims believe that the evidence does not support the charges or otherwise believe prosecution to be against the public interest, they could be given the right to object to a prosecutor's decision to proceed with charges (as victims can do in England)<sup>74</sup>, either administratively, or in court, or before the grand jury. Such mechanisms are less likely to be needed, however, as prosecutors are already constrained in various ways formally (by grand jury or judicial review) and practically (by victim non-cooperation and limited resources) in deciding whether to charge. Existing mechanisms requiring prosecutors to consult with victims would therefore likely be sufficient in most cases to discourage charges where victims are opposed to them.

Finally, we should also consider reforming existing methods to provide stronger accountability for prosecutorial abuses. Many of the concerns raised by Capers can be addressed, at least partially, by reforms to standing institutions intended to check prosecutorial discretion.

One such institution is the grand jury, which was designed to provide a popular check on prosecutorial overzealousness. Unlike individual victims, grand juries are deliberative bodies that are supposed to represent the community and to consider the public interest in reviewing prosecutors' charging choices. While in practice, grand juries rarely challenge prosecutorial charging decisions, reforms intended to strengthen grand jurors' independence and access to relevant information have been implemented in some states and are a feasible method of strengthening accountability.<sup>75</sup>

Another way in which prosecutors are held accountable is through the political process—via elections or appointments of chief prosecutors.<sup>76</sup>

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71. See Manikis, *supra* note 9, at 77-78.

72. *In re Wild*, 994 F.3d 1244 (11<sup>th</sup> Cir. 2021); *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 737 (D.C. Cir. 2016).

73. Brown, *supra* note 31, at 882 (discussing statutes in Colorado, Michigan, Nebraska, and Pennsylvania); *State v. Unnamed Defendant*, 150 Wis.2d 352 (1989); Wis. Stat. Ann. § 968.26 (West).

74. See Manikis, *supra* note 23, at 265.

75. E.g., Roger A. Fairfax, Jr., *Testing Charges*, in OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 59, 64–68 (Ronald F. Right, Kay L. Levine & Russell M. Gold eds. 2021); see also Sara Sun Beale et al., *Grand Jury Law and Practice, Prosecutor's Duty to Present Exculpatory Evidence* § 4:17 (2d ed. 2021).

76. See Carissa Hessick, *Prosecutors and Voters*, in OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 399, 400–02 (Ronald F. Right, Kay L. Levine & Russell M. Gold eds. 2021); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593 (2014).

Accountability at the ballot box, which does not exist for European prosecutors, arguably reduces the need to rely on victims to monitor prosecutors.<sup>77</sup> And although democratic accountability is far from perfect and can be reformed, it is another important means of public oversight.<sup>78</sup>

Administrative accountability also has its place in the overall scheme. The Department of Justice has a stronger framework of internal review and discipline than most local and state prosecutors' offices.<sup>79</sup> But this is likewise an area where reform has begun and can continue, particularly as technological developments allow offices to review more clearly individual prosecutors' choices and the effects of those choices.<sup>80</sup> As Darryl Brown has argued, in many ways, state and local prosecutors are also held in check by their federal counterparts, who can step in when a local prosecutor unjustifiably fails to bring charges.<sup>81</sup> Finally, as Jeff Bellin argues in his response Essay for this symposium, the concerns that Capers raises should also be directed to legislatures, which pass the strict criminal laws that prosecutors then have to enforce, and to judges, who are most often responsible for sentencing decisions made in individual cases (within parameters set by the legislature).<sup>82</sup> In brief, victim involvement is simply one of many steps that we can take to enhance fairness in prosecution and better represent community interests in decisions about criminal cases.

#### CONCLUSION

Recent years have seen two parallel trends in our criminal justice system: more critical thinking about prosecutorial discretion and a renewed push to strengthen victims' rights in the criminal process. Bennett Capers urges us to link the two and consider whether increased victim participation can be harnessed to strengthen accountability for prosecutors.

Comparative analysis suggests that victims can indeed participate more fully in the process to enforce both their own private interests and the public interest in fair and just prosecutions. But the European experience also suggests that victim participation has its own drawbacks. As U.S. jurisdictions consider different ways to engage victims and oversee prosecutorial choices, it would be useful to consider this experience. It can help us understand which, if any, types of victim involvement in the criminal process are likely to be most beneficial and least costly to implement. Giving victims the right to challenge prosecutorial

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77. Brown, *supra* note 31, at 884–89.

78. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 463–64 (2001); Davis, *supra* note 6 (discussing the promise of electing progressive prosecutors); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 91–99 (2011).

79. Brown, *supra* note 31, at 878–83.

80. See, e.g., Urb. Inst., *Collecting and Using Data for Prosecutorial Decision making: Findings from 2018 National Survey of State Prosecutors' Offices* (2018).

81. Brown, *supra* note 31, at 881, 884.

82. Bellin, *supra* note 6.

declination decisions, as most European countries have done, appears to be the most promising potential reform. As one tool in a larger set, it can help bring us closer to the ideal of fair and just prosecutions to which Capers's Essay is addressed.