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Weekend Reading →

## Would America Be Better with Private Prosecutions?

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I've been debating this idea for a while. I first learned about private prosecutions in *The Justice Cascade* by Kathryn Sikkink, in which she examines human rights prosecutions in Argentina, Portugal, and Greece and argues that they contributed to the creation of the International Criminal Court by diffusion of the concept of human rights prosecutions. In her chapter on Argentina, Sikkink mentions a characteristic of the Argentinian judicial system that allowed human rights prosecutions to occur, and it's a practice common in Latin American civil law systems (and maybe civil law systems in Europe and Asia – I don't know). Basically, in common law systems like America's, the state is always the prosecutor in criminal cases. This stems from the notion that a crime against the state's laws is a crime against the state/society as well as a crime against the actual victim. While this functions in many ways, it fails in instances where the state doesn't want to proceed with prosecutions either because the case is deemed too weak to be successful or because the state is actually culpable or even the perpetrator of crimes.

In Argentina, after years of disappearances and human rights abuses by the military regime, some people began to circumvent state prosecutions by leveling accusations at members of the state police independently through private prosecutions. Others were able to use private prosecution to force wary state prosecutors in the judiciary to continue moving forwards against the executive. Sikkink believes that this is just one of many things that allowed human rights prosecutions to arise in Argentina, but it is surely an important one.

While private prosecutions aren't part of the American justice system, I wonder if they should be. I'm no lawyer, and this isn't realistic, but it could be a tool with which victims typically unable to see perpetrators prosecuted (because the crime was ignored by the state or they were victimized by societal problems as much as by actual perpetrators) could still seek justice. Right now you can sue others in civil court and win monetary judgements, but the prosecution in criminal court is run by the state. If you end up in jail, it's because the state thought you should be in there and a jury agreed. What if, instead of just suing for damages, victims of foreclosure fraud could get fraudulent bankers facing jail time? What if, to circumvent police that refuse to call date-rape "rape," victims of sexual assault could send rapists to jail?

Obviously this is no guarantee of justice: rich bankers and corporate executives would have the best lawyers, and even rogue police could be protected by their own, and judges and juries are just as affected by rape culture as the rest of society. But it could be a start. Especially if lawyers were willing to take up these cases pro bono (or non-profits/social movements could start funds to pay fees) victims that usually can't afford to seek out justice would be that much closer to some peace of mind. If only a few trigger-happy stand-your-ground neighbors, poisoned-your-water-supply polluters, or you-were-drunk-but-you-still-said-yes rapists who usually stay free instead found themselves in jail, it would send a message that just because you are powerful or your crimes don't get everyone's attention doesn't mean you won't at least be brought before a court and maybe found guilty.

Of course, even if it were possible to implement this, there would be problems. The power of some groups could still be strong enough to dissuade some from filing prosecutions, and the shaming of some victims would be too much for many to even think about coming forward. And it isn't unrealistic to think that corporations-as-people would use private prosecutions to enact even more overreach against each other, whistle-blowers, and the usual victims.

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