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# Let's Focus on Victim Justice, Not Criminal Justice

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The number of inmates in federal and state prisons in the United States fell slightly from its 2009 peak of 1,615,487 to 1,571,013 in 2012 (Carson and Golinelli 2013). This reduction allegedly provides “persuasive evidence of what some experts say is a ‘sea change’ in America’s approach to criminal punishment” (Goode 2013), but a 2.75 percent reduction after a 500 percent increase over the previous three decades (Sentencing Project 2013) is far from a sea change. A true sea change would occur with decriminalization and a change in the focus of the entire “criminal justice” system—away from punishing criminals toward “victim justice” through compensation for victims. This essay proposes this very sea change, explores its feasibility, considers the institutional changes that would accompany it, and outlines its substantial benefits.

*Decriminalization* does not mean *legalization* when there is an identifiable victim. Violent and property offenses were not always *crimes*, but they have always been *illegal*. Before criminal law, they were treated as offenses against individuals (intentional torts) rather than as offenses against “society,” the king, or the state (*crimes*) (Benson 1994a; 1998, 195–226; 2011, 11–30). Successful prosecution resulted in compensation to victims (*restitution*) rather than in fines or confiscations going to the state, physical punishment, and/or imprisonment. In other

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words, decriminalization means that individuals who intentionally harm others are liable for damage payments—victim justice.

Decriminalization also implies that public institutions currently involved in criminal justice would not have responsibility for pursuit, prosecution, or punishment. Instead, victims would seek compensation for harms they suffer, as in modern tort law. To do so, they would call upon mutual support arrangements and/or employ specialized individuals or firms, assuming true “privatization” of justice is allowed.

The term *privatization* has multiple meanings. Here it implies that private producers meet private demand for goods or services typically assumed to be functions of government. It does not mean transferring public agencies to the private sector, although such transfers may be part of the privatization process. It also does not mean government “contracting out” with private entities for production of goods or services. In fact, although various examples of private supply to meet government demand (e.g., prisons) are discussed later, this does not imply support for such government contracting out. These examples simply illustrate that the private sector can effectively provide such services. There are several concerns when private firms provide services demanded by government (e.g., prisons to punish criminals [Benson 1994b]) that would not arise with decriminalization and privatization. Nonetheless, the relevant privately produced actions to protect potential victims of and obtain justice for those who are victimized are analogous to the current mix of privately and publically produced actions to control crime. Both processes involve (1) watching to prevent intentional harms, but (2) if an offense occurs, the offense or its consequences must be observed, and if the observer (e.g., victim, witness) is unable to apprehend the offender, (3) then the offense must be reported to an investigator (e.g., public police, private security service, private investigator), who pursues the offender; (4) if apprehended, the offender must either admit guilt or be charged and prosecuted (by a public prosecutor, a victim, or a victim’s private representative); (5) if the accused offender denies guilt, adjudication is required (through public courts or privately produced alternative dispute resolution), and if the accused is determined to be guilty, a sentence (punishment or compensation payment) must be determined; and (6) the sentence must be carried out (e.g., mandated punishment served or compensation paid). The consequences of decriminalization and privatization are illustrated in this article by examining actual private provision of actions (1) through (6) to illustrate that the private sector can effectively produce the relevant services and by predicting changes in their provision.

## **Stage 1: Prevention through Private Watching**

Public police patrol on foot, in cars, and in aircraft, but these public activities are actually secondary sources of watching to prevent crime. Police tend to wait for crimes to be reported, and then they respond and pursue arrests. Therefore, most

watching to prevent is privately produced, including significant levels of watching by voluntary organizations such as neighborhood-watch associations (Benson 1998, 80–86; 2011, 205–11), but the focus here is on *market* provision of such services in a narrower sense (i.e., private production to meet the demands of private individuals and organizations).

The major intended benefit of private security today is localized or “specific” deterrence for an individual target (e.g., person, home, or business), geographical area (e.g., neighborhood, private gated community, shopping mall, college campus, or business district), or specific activity (e.g., railroads in the United States are protected by private railroad police). Such focused specialization raises the expected costs for offenders against the protected entity, activity, or area by reducing the probability that criminals will succeed. Thus, for instance, residential communities protected by private security enjoy much lower crime rates than surrounding areas (Walsh, Donovan, and McNicholas 1992). The fact that market provision of crime prevention is substantial and growing rapidly suggests that private security effectively produces the specific deterrence that buyers demand.

### *The Private-Security Market*

Table 1 indicates that over a little less than five decades U.S. employment by private firms specializing in protective and detective services increased by 1,177 percent, and the number of firms offering such services grew by 1,180 percent. The growth in the private-security market was more rapid through the last four decades of the twentieth century than it has been since then, presumably in part because of the rising crime rates that characterized much of the period before the early 1990s. Other determinants of demand are also important. Private security appears to be a normal good, for instance, so the rate of growth also correlates positively with changes in income (Benson and Meehan 2013). Other factors probably include changes in land-use patterns for housing and retailing that make the use of private security increasingly effective (e.g., the growth of gated communities and enclosed malls relative to urban neighborhoods and downtown retail areas). In addition, the perceived threat of terrorism and mass killings have led to increased demand for security by potential terrorist targets, colleges, and other institutions (discussed later). These data do not include direct employment of security personnel by nonsecurity firms, residential developments, or other institutions. Of four thousand firms surveyed in 2005, for instance, 56.5 percent reported using “proprietary security” (in-house security staff) rather than contracting with security firms (American Society of Industrial Security [ASIS] Foundation 2005). After examining a number of sources, Kevin Strom and his colleagues reported that about 60 percent of total security employment is by specialized security firms, and 40 percent is proprietary (2010, 4-4). In contrast, a 1991 National Institute of Justice study estimated that there were approximately 1.3 million

**Table 1**  
**Investigative and Security Firms in the United States and Employment  
by These Firms**

Year	Number of Firms	Increase in Firms from 1964 (%)	Average Annual Change in		Increase in Employment from 1964 (%)	Average Annual Change in Employment (%)
			Number of Firms <sup>a</sup>	Number of Employees		
1964	1,988	—	—	62,170	—	—
1973	4,182	111	244	202,561	225	25.1
1979	6,502	227	387	310,333	399	8.7
1988	11,675	483	575	473,308	661	5.8
1993	14,824	646	630	543,734	775	3.0
1997	17,906	801	771	636,884	924	4.3
2001	22,041	1,009	1,034	720,465	1,059	3.3
2004	23,193	1,067	384	754,514	1,114	1.6
2007	25,249	1,170	685	788,766	1,169	1.5
2011	25,455	1,180	52	793,734	1,177	0.2

<sup>a</sup> Change from year X to year Y divided by number of years between X and Y.

*Source:* Data compiled from various issues of *County Business Patterns*, published by the Bureau of the Census, U.S. Department of Commerce.

private-security personnel at the time (Cunningham, Strauchs, and Van Meter 1990), when private-security firms employed 526,435, according to *County Business Patterns* (U.S. Bureau of the Census 1992)—that is, about 1.5 proprietary security personnel for each security firm employee. Proprietary security and specialized-firm-provided security are substitutes, so this apparent increasing portion of security provided by specialists suggests that the rapid growth in the security market implied by table 1 may reflect a substitution of firm-provided security for in-house security, in part because the quality of services provided by specialists has been increasing, as suggested later.

The private-security market also has grown rapidly relative to public police. A 1970 estimate reported that the number of privately employed proprietary and contractual security personnel was roughly equal to the number of public police, but by 1983 there reportedly were more than twice as many private-security personnel as public police (Reichman 1987, 247). A 1991 study reported a private-security/public-police ratio of about 2.5 (Cunningham, Strauchs, and Van Meter 1990). In 2004, Elizabeth Joh contended that there were three private-security employees to every public-police officer.

Technological advances are lowering the cost of security equipment while simultaneously increasing its effectiveness. The percentage of companies purchasing

various kinds of security technology reported in the ASIS Foundation (2005) survey of four thousand firms illustrates the range of options available. The most frequently purchased technologies were computer and network security-system technology (39.7 percent of respondents), monitoring and alarm technology (26.3 percent), closed-circuit television (23.8 percent), and video cameras (23.6 percent). More than 15 percent of the firms also purchased background investigation technology, security lighting, access-control technology, sensors and detectors, and badging/ID card printers. Between 10 and 15 percent reported purchasing electric/electromagnetic locks, two-way radios, safes and vaults, information-security technology, web-based security monitoring, digital video storage and retrieval technology, electronic access control, asset-tracking technology, perimeter-protection technology, intercoms, and gate operator technology. More than 5 percent also obtained emergency/security telephones, vehicle- or fleet-monitoring/tracking technology, photo ID/imaging ID systems, and integrated security systems. Some firms also purchased security glass, incident analysis software, security-equipment enclosures, telephone entry systems, electronic article surveillance, integrated building systems, biometric access control, turnstiles, transmission systems, and night-vision equipment.

About 75 percent of security industry employees in the United States are guards or patrol officers, but with the rising use of technology private security is increasingly engaged in a broad range of risk management, information-technology integration, and overall corporate security. Therefore, security personnel include both stereotypical minimum-wage night watchmen and fully qualified police officers (including but not exclusively public police who moonlight as private security and many who have resigned the public-police force to enter the private-security market) as well as highly trained and skilled risk managers, security consultants, and electronic-security experts. The increased types of services offered expand the scope of and therefore the demand for private security, while the technology tends to be complementary to private security, further increasing demand. ASIS Foundation's (2005) survey found that the percentage of firms' contracts involving provision of personnel to perform specific security activities varied from 69.9 percent for alarm installation, maintenance, and repair to 9.7 percent for security engineering. Other contracted services (with the percentage of respondents doing so provided in parentheses) included alarm monitoring (68.9), substance-abuse testing (61.6), background investigations (43.8), computer security (31.6), guarding (30.3), shredding (25), investigations (18.7), systems integration (18.0), badging (19.1), and armored courier delivery (14.4).

Further evidence that private security is relatively effective is provided by the wide array of targets that it protects. In addition to the large corporations referred to earlier, private security obviously protects many retail businesses (including malls, business districts), banks, casinos and other entertainment locations, and private homes (e.g., alarms, gated communities). Perhaps less obviously, private security protects many government buildings and installations. In addition, the 104 U.S.

nuclear reactors and around fifteen thousand major chemical plants increased their demand for protection after September 11, 2001, and the private sector responded. Chemical plants increased monitoring well beyond government requirements, using private guards (Blackstone and Hakim 2010, 366). Nuclear facilities are protected by large, reputable security firms' highly trained guards equipped with powerful weaponry.

A substantial portion of the increase in private security over the past decade or more also has been for colleges, universities, and hospitals. There are more than three thousand colleges and universities and more than five thousand hospitals in the United States. A Virginia Tech University student killed thirty-two students and faculty in 2007, leading many universities to increase security substantially (Blackstone and Hakim 2010, 364–66). By 2009, 25 percent had their own sworn-officer police departments. Sworn university private-security officers make arrests and perform complicated investigations requiring specialized knowledge of university issues. Most other colleges and universities contract with private-security firms. Violence by gangs in emergency rooms and trauma centers is a major concern for hospitals, along with kidnappings of babies and drug thefts. Hospitals employ substantial numbers of security personnel as a consequence, either in house or through contracts with security firms.

### *Private Security and General Deterrence*

Criminals deterred from victimizing one entity, activity, or location because of private protection may simply find another unprotected victim, activity, or location, of course, so even though private security substantially reduces offenses against specific targets, it may not have large impacts on total offenses. In this context, increases in public policing efforts in one area also lead to increased criminal activity in nearby areas (Rasmussen, Benson, and Sollars 1993). For instance, increased interdiction efforts against smugglers in one area lead to increased smuggling elsewhere (Ying and Benson 2014). Furthermore, a reallocation of public police in order to increase control of one type of crime reduces efforts against other crimes, and those crimes increase (Benson 2009, 2010).

Private security also can generate *positive* spillovers in the form of general deterrence. Ian Ayres and Steve Levitt (1998) illustrate this effect in their empirical analysis of the impacts of Lojack, a hidden radio transmitter installed in cars and remotely activated if the car is stolen. Lojack greatly reduced the expected loss for car owners who installed it, with 95 percent of the cars equipped with these devices being recovered, compared to 60 percent of cars not equipped with Lojack. However, this direct benefit to buyers is only part of Lojack's total benefits. There is no visible indication that a vehicle is equipped with Lojack. If potential car thieves know that Lojack is available in an area, then uncertainty about whether a vehicle is equipped with the device raises the probability of arrest and punishment for car theft. Ayres and Levitt (1998) found that a one percent increase in Lojack

installations was associated with a 20 percent decline in auto thefts within large cities and a 5 percent reduction in the rest of the state. Other aspects of private security should have similar impacts. Does a store have hidden video cameras or plain-clothes security officers? Does the residence have an alarm? If more individuals, businesses, and homes employ difficult-to-observe security and criminals are aware of the trend, a general reduction in crime might result.

The results regarding Lojack deterrence presumably should not hold for highly visible investments in private security, and there are strong incentives to use highly visible options in order to maximize specific deterrence effects. Security guards in banks and shopping malls wear uniforms; many homes with alarm systems have signs posted in prominent places warning the criminal away; video cameras often are clearly visible; and so on. In these cases, criminals may simply choose other less-well-protected targets, as suggested earlier, and no reduction in overall crime occurs. John MacDonald, Jonathan Klick, and Ben Grunwald's (2012) findings regarding the impact of the University of Pennsylvania's private police force on crime in the surrounding area appear to contradict this assumption, however: they found a 45–60 percent reduction in all crime incidents in the area due to the extra private policing. This positive spillover effect could be relatively localized, of course, with criminals just moving farther away from the university (the same holds for public policing, as noted earlier). There are reasons to expect general deterrence for some crimes as a consequence of visible private security, however.

One characteristic that malls and retail districts can offer is a relatively secure environment for shopping, eating out, socializing, and so on. Retailers, restaurants, bars, and other businesses willingly contribute to cover the costs of such security because the safe environment attracts more potential customers, raising expected demand for their goods and services. Those customers actually pay for security, of course, because it is bundled with the goods and services they purchase. If a mall or business district gains a competitive advantage with a relatively safe environment, competitive malls and business districts are likely to respond by making such investments too. Competitive pressures lead to the spread of private security; potential criminals who target retail firms, shoppers, and restaurant/bar patrons (e.g., shoplifters, pickpockets, car thieves, robbers, rapists) face increasing costs of search for vulnerable targets, and these rising costs reduce overall crime—that is, produce general deterrence. This process of generating general deterrence is quite different from the public criminal justice system's process. The public sector tends to focus on responding *after* a crime is committed (Sherman 1983; Benson 2010 and 2011, 131–37), and evidence does suggest that employing resources for arresting and punishing generates general deterrence (Tauchen 2010). Private security focuses on preventing offenses against specific targets, but as such protection spreads, an unintended benefit arises: offenders find fewer attractive targets and perceive a rising cost of illegal activity due to increased chances of being observed, so they are less likely to commit offenses in the first place. The rapid expansion in

the use of private security suggests that this is occurring, and there is empirical support for this hypothesis.

One study (Benson and Mast 2001) examined the potential for missing-variable bias in John Lott and David Mustard's (1977) results regarding laws affording the right to carry a concealed handgun, but in doing so it considered the potential deterrence impact of private security. The study's focus was on the possibility that right-to-carry laws and resulting firearm ownership could correlate with other private investments in security, showing that the Lott–Mustard estimates were biased upward. Therefore, the study added data on private-security employment and private-security firms, along with numerous instrumental variables, to Lott and Mustard's original data. Private-security data were obtained from the U.S. Census Bureau's annual *County Business Patterns*, which reports the number of private-security firms in each county along with employment by these security firms. Many businesses and probably some residential communities choose to hire security personnel in house, so given the lack of jurisdiction-level data on in-house security, the Benson–Mast results are likely to be biased against finding any relationship. County-level-weighted least-square panel regressions were estimated with county- and time-fixed effects, as in Lott and Mustard, to alleviate other potential sources of missing variable bias. The Benson–Mast study did not find any evidence of bias in Lott and Mustard's coefficients, but it did discover evidence of general deterrence from private security. The strongest results were for burglary and rape. Because the study's primary purpose was to reconsider Lott and Mustard's results with additional controls for private security, however, not explicitly to model and test the private-security deterrence hypothesis, some important aspects of the study may have masked more significant deterrence relationships (as noted in Benson and Meehan 2013). Therefore, another study (Benson and Meehan 2013) also developed an empirical model with the explicit purpose of isolating private-security effects on crime, using state-level licensing requirements to instrument county-level private-security services for a sample of urban counties over the 1998–2010 period. The private-security data were from *County Business Patterns*, so, as with the Benson and Mast study (2001), results were likely to be biased against finding a relationship. Nonetheless, the Benson and Meehan (2013) study provided relatively strong evidence of general deterrence by private security. Negative and significant (at customary levels) effects of private security were found for total violent crime and total property crime as well as for rape, burglary, arson, and auto theft. Results for robbery and assault also suggested negative relationships, but they were only significant at the 10 percent level. Calculations based on sample means for both security firms and crimes indicate that a 10 percent increase in the number of private security firms is associated with around a 10.2 percent decrease in total violent crimes and a 3.2 percent decrease in total property crime within a county, on average.

The Benson–Meehan study's (2013) first-stage regression suggests that some regulatory requirements (e.g., high bond or insurance requirements, testing)

impose significant limits on entry. By limiting entry, these regulations resulted in significant increases in most crimes. Deregulation may be necessary to achieve the full benefits of private security under current policy and clearly would be required with decriminalization.

## Stage 2: Private Reporting of Offenses

A large majority of crimes against persons and property are not reported to public police. Victimization surveys in the United States show that reporting varies across crime types—for example, from 27 percent of rapes/sexual assaults in 2011 to 83 percent of auto thefts (Truman and Planty 2012, 8). Interestingly, crimes most likely to be reported involve insured property loss, such as motor vehicle thefts. When individuals purchase private insurance to protect their wealth, they report crimes in order to obtain evidence of the loss for their insurance companies. Insurance essentially serves as a private substitute for the unlikely recovery of losses by public police.

The reasons for nonreporting reflect the high costs associated with reporting and then cooperating with the criminal justice system and the low expected benefits from doing so (as explained in Benson 1998). The institutional process of criminal justice means that costs of reporting (e.g., forgone income, psychological and time costs of repeatedly describing the events at different stages in the process, possible retaliation by the offender) are not likely to be lowered enough to make much difference. Expected benefits to victim reporting might rise if the probabilities of apprehension, prosecution, conviction, and punishment can be increased, assuming victims obtain satisfaction from such punishment (e.g., retribution), but significant changes in these probabilities are also difficult to produce, given the institutionalized incentives in the criminal justice system (Benson 2009, 2010). Victims endowed with a right to restitution through decriminalization would have much stronger incentives to report, however, as illustrated by high levels of reporting when recovery through insurance is available. Furthermore, if restitution covers costs associated with collecting restitution, victims' expected costs of reporting fall. False reports might arise if restitution payments are too high, of course, but the restitution-determination process should mitigate this problem, as discussed later. With increased reporting, the probability of apprehension rises, generating greater deterrence.

Market-provided “watching” to prevent offenses also results in observing some crimes. Again, however, many of these offenses are not reported to police. If a private-security officer reports a crime, for instance, he may have to go to a police station, fill out forms, spend time being interviewed, perhaps repeatedly, and testify in court, all of which would divert attention from primary duties, including quickly discovering the gap in security that allowed the offense and implementing appropriate changes (Blackstone and Hakim 2010, 360). Thus, for instance, 46 percent of the shoplifters caught by security in Macy's department store were not reported

to police in 2002 (Joh 2005, 589–91), and security personnel for Greyhound Bus Lines in Tennessee who discovered travelers carrying small amounts of drugs regularly seized and destroyed the drugs but released the travelers involved (Joh 2004, 73). In fact, Joh's (2004) case study of a major private-security firm found that the firm preferred to deal with many security issues without police involvement because of the costs police imposed on the firm's clients. For example, a firm director explained that he preferred to deal with an abandoned attaché case in house rather than calling the police because the police "will want to shut everything down. But was there a [threatening] phone call? Was there a letter? What are the chances it really is a bomb? The cops don't care. They figure 'you never know.' We don't want to just shut down for that. We want to protect ourselves from the police, to tell you the truth" (qtd. in Joh 2004, 86). This does not mean that offenses against victims who employ private security are not dealt with. Private punishment and compensation are common. In addition, with restitution for victims, the demand for pursuit and prosecution would increase, and private security would respond by facilitating these activities.

### **Stage 3: Private Investigation and Pursuit**

Given the private-security focus on prevention and protection, investigations of offenses already committed and the pursuit of criminals are dominated by public police. Private police, including many university police departments, do perform these functions, however, and there is a substantial "private investigator" market. Much of the work done by private investigators today focuses on noncriminal investigations (e.g., search for evidence to be used in divorces and other civil litigation) because that is what demanders of investigative services currently pay for, not because that is all private investigators can do. Nonetheless, private investigation of crime is an important and expanding activity. Insurance company employees investigate many crimes, for instance, and both the American Banking Association and the American Hotel-Motel Association contracted with an international detective agency.

Railroad police trace back to the mid-1800s, but they were officially established at the end of World War I as complete and autonomous private police forces. By the end of World War II, there were about nine thousand railroad police officers in North America, but reductions in passenger services and the shift of freight to trucks resulted in the shrinking of this police force to about twenty-three hundred (Miller and West 2008). Although railroad police are often involved in routine patrol of rail yards, depots, and railroad property, they also are responsible for "conducting complex investigations involving cargo theft, vandalism, theft of equipment, arson, train/vehicle collisions, and even investigate assault and murders that may spill over onto railroad property" (Miller and West 2008). In 1992, U.S. railroad police cleared about 30.9 percent of the offenses reported to them (Reynolds 1994, 11–12); in contrast, public police cleared about 21.4 percent of

reported crimes that year. Because of the railroad police's relative effectiveness, however, an estimated 75 percent of all offenses against railroads were reported, compared to 39 percent of all crimes reported to public police. Therefore, adjusted for reporting, the clearance rate for railroad police (23.2 percent) was 186 percent higher than that for public police (8.1 percent).

Another example of private pursuit is in the bail-bonding market. Many alleged criminals must be released prior to trial due to court delay, limited jail space, and constitutional guarantees of bail. Those released are expected to make a commitment to appear for trial. To back this commitment, defendants often post property or monetary bonds. Some are able to post full cash bonds themselves, but many cannot do so. The latter can go to commercial bail bondsmen, however, who post surety bonds in exchange for fees. There are about fourteen thousand bondsmen in the United States, and about 2 million defendants obtain surety bonds each year (Cohen and Reaves 2007, 4). Bondsmen lose the full bond if a defendant fails to appear in court, in which case a national network of private "bounty hunters" is notified.

A "public-bail" alternative was developed in the mid-1960s with a stated goal of helping people accused of nonviolent crimes but unable to post bond. Pretrial release (PTR) bureaucracies administer these public arrangements. PTR staff interview prisoners and make recommendations to judges about who should be released through "public bail." Among those released under public bond, however, the largest portion is simply freed under a personal recognizance bond or release on recognizance (ROR). The alleged offender simply promises the judge to appear in court when called. Another alternative is an unsecured bond, where a bail amount is set, but no payment is needed to secure it. Some prisoners also post a deposit bond, a portion of the bond set by the court.

There are now eight distinct types of PTR. Surety bonds are posted by commercial bondsmen, but these private agents are not involved in other releases. Defendants with financial capacity to do so can post full cash bonds or property bonds. Some defendants may also post deposit bonds. Three other arrangements involve no financial conditions: ROR, unsecured bonds, and conditional releases where defendants agree to comply with specific conditions, such as regular reporting or drug-use monitoring. A final category, emergency release, results from court orders to relieve jail crowding. A study of PTR from state courts in the seventy-five largest counties in the United States considered data from 1990 to 2004 and reported that about 33 percent of prisoner releases had surety bonds (Cohen and Reaves 2007, 7). Roughly 5 percent paid full cash bonds, about one percent had property bonds, 9 percent were released under deposit bonds, and 51 percent paid nothing. Emergency releases accounted for approximately one percent of the total (Cohen and Reaves 2007, 2). About 30 percent of defendants released with unsecured bonds failed to appear when their trial date arrived, as did 26 percent of those who were ROR (Cohen and Reaves 2007, 9). By comparison, only 18 percent of those with surety bonds did not appear, a better appearance rate than the

20 percent for full cash bonds and the 22 percent with deposit bonds. Only about 14 percent of those with property bonds failed to appear, but use of this option by the courts is relatively rare. Finally, 22 percent of those under conditional release did not appear. Clearly, financial considerations are more effective means of ensuring appearance than the nonfinancial alternatives, but those under surety bonds were even more likely to appear than all of the other financial alternatives except infrequently used property bonds. This likelihood reflects the bounty-hunter market used by bondsmen.

Fugitive rates after a year are even more revealing in that just 3 percent of those under surety bonds remained at large, compared to 4 percent of those under property bonds; 7 percent under both cash and deposit bonds; and 6, 8, and 10 percent under conditional releases, ROR, and unsecured bonds, respectively (Cohen and Reaves 2007, 9). Clearly, the incentives of bondsmen to make sure their clients appear in court and the system of private bounty hunters they call upon provide a more effective means of getting defendants to court than public alternatives. Courts apparently recognize the effectiveness of these means. During the first four years of the data period, 41 percent of those released were ROR, but only 24 percent were under surety bonds (Cohen and Reaves 2007, 2). By the last four years in the study period, however, 42 percent of those released had surety bonds, and only 23 percent were ROR. This shift from ROR to surety bonds should save taxpayers' money because administering PTR programs is relatively costly. For instance, the Harris County, Texas, PTR program had one staff employee in 1992 for every sixteen defendants supervised, compared to one staff person for eighty-seven defendants supervised by a private bail-bonding company in the county (Reynolds 1994, 19).

Bounty hunting or thief taking has a long history, of course, in response to rewards offered for capture of people accused of crimes and of escaped convicts as well as for the return of stolen property, kidnap victims, runaways, or anything else that someone is willing to pay to have found. If victims have a right to restitution, including the cost of collections, then rewards can be offered for successful collection of restitution, and bounty hunters will respond. Alternatively, if the right to restitution is transferable, a victim might simply sell it to a specialist, who then pursues the offender and recovers the debt.

Numerous other arrangements are possible, of course, as suggested by the discussions of railroad and campus police. Indeed, if victims have transferable rights to restitution, the market would probably expand its offering of "victim insurance," wherein victims are compensated (e.g., as with many auto and homeowners insurance policies today; see additional discussion later) and insurance companies would then have rights to collect the payments. Organizations, including residential and retailing communities, also might contract with private providers of all policing services. After all, there are contracts between local governments and private-security firms for provision of all policing services, and there would be more such contracts

if not for costly lawsuits filed by public-police organizations challenging them (Benson 2011, 182; 2012).

### **Stage 4: Private Prosecution**

Public prosecutors supposedly represent victims, but their mandate is to pursue criminal justice, not victim justice, and, furthermore, there are far too many victims for prosecutors to represent effectively. The demands on courts also are so great that there is not sufficient time to try the vast majority of criminal cases given the institutions of modern criminal justice. Therefore, prosecutors plea-bargain away punishment related to some crimes or simply drop some charges altogether in exchange for criminals' guilty pleas for lesser crimes or fewer crimes than they actually commit. More than 90 percent of all convictions are achieved through such bargaining.

Why not allow private prosecution—and courts? After all, as John Langbein explains, for much of English history a criminal trial was a “lawyer-free contest” (2003, 11). The victims themselves served as prosecutors, and those accused were not represented either. Private prosecution organizations also began forming in England in the mid-eighteenth century (Koyama 2012). Recognizing the high prosecution costs for individual victims, neighbors agreed to support prosecution of any crime committed against any of them. These agreements became more formal over time as groups established constitutions, membership lists, entry fees, and annual dues to pay expenses for apprehending (e.g., payments for informers, rewards) and prosecuting suspects. Private solicitors were hired to represent members of most associations in court. Between victim prosecution and prosecution associations, private prosecution was widespread in England well into the nineteenth century (Koyama 2012). Although relatively rare in England today, the right to pursue private prosecution is guaranteed both by common-law tradition and, since 1979, by legislation (*Prosecution of Offences Act 1979*, c. 31, s. 4 [U.K.]). Privately funded prosecutors also played a significant role at the state level in the United States throughout the nineteenth century (Ireland 1995; Fairfax 2009, 421–23), but not today.

With decriminalization, incentives to privately prosecute would increase dramatically. After all, decriminalization turns crimes with victims into torts, and tort law is privately prosecuted.

### **Stage 5: Private Adjudication**

In Japan, mediation between the accused and the victim occurs before the formal criminal trial. If the accused admits guilt and pays restitution, the victim writes to the judge, who then reduces or eliminates punishment (Benson 1998, 251–54). Mediation also is employed in a growing number of programs in the United States, but generally in lieu of a trial.

### *Community Mediation Programs*

Community mediation centers (CMC) or community dispute-resolution (CDR) programs first appeared in large cities in the 1960s and 1970s to deal with domestic and neighborhood disputes, but they have since spread all over the country. The American Arbitration Association established one of the first CDR projects and began mediating minor criminal cases in Philadelphia in 1969. Their success provided impetus in other cities to use CDR/CMC programs for victim–offender mediation in minor criminal cases. By 2011, approximately 400 programs employed 1,300 full-time equivalent staff and worked with more than 20,000 volunteer mediators. Private nonprofit organizations operated about 86 percent of the programs, while city or county government agencies ran about 11 percent, and the rest involved public–private hybrids (Corbett and Corbett 2012, sec. 3). Fifty-eight percent of the programs mediated cases involving a victim versus a juvenile offender, and 35 percent mediated cases with adult offenders. Most programs dealt with misdemeanors, but 13 percent also mediated felony cases. Approximately 19 percent of these programs were used by criminal courts as diversion mechanisms.

A related program was imported from New Zealand: family group conferencing (FGC) (Barnsdale and Walker 2007, 1.2.12). This program was proposed by Maori tribal representatives to deal with New Zealand child-welfare agency interventions in the lives of their children. Its spread has been “[p]rincipally promoted in a ‘bottom-up’ manner by enthusiasts and practitioners” (Barnsdale and Walker 2007, 1.2.44). In the United States, the American Humane Association has been a major supporter of FGC. Although child-welfare issues continue to be a primary focus for FGC programs, many also deal with juvenile justice (58 percent in 2002 [Barnsdale and Walker 2007, 1.2.13]). The process often involves several people, including a mediator, victim, and offender as well as others affected by the offense (the victim’s and/or offender’s family, neighbors who feel threatened, arresting officer, etc.). Everyone speaks their peace, offering reactions to the offense, suggestions for restitution, ideas about implementing the agreement, and perhaps a willingness to assist the victim or the offender or both (Umbreit and Stacey 1996, 33). Research on outcomes is limited (Barnsdale and Walker 1007, 1.4.1), but in comparison with interventions that do not involve mediation, these programs apparently reduce victims’ fears of retaliation, both offenders and victims are more satisfied with the process than with alternatives, and restitution negotiations and agreements are generally completed (Williams-Hayes 2002).

### *Victim–Offender Mediation*

The programs discussed in the previous section do not deal exclusively with crimes, but victim–offender mediation (VOM) does. VOM first appeared in the early 1970s (Wellikoff 2003). For instance, a Victim–Offender Reconciliation Program, modeled

after a program previously established in Canada, was introduced in Elkhart, Indiana, in 1978 through a joint effort of the Mennonite Central Committee and the organization Prisoner and Community Together (Umbreit 1995, 264). By 2000, there were 289 VOM programs in the United States and hundreds more in other countries (Umbreit and Greenwood 2000, 30). About 65 percent of these programs were privately provided, 22 percent by churches and 43 percent by community-based organizations.

When first initiated, VOM was typically limited to juvenile crimes and non-violent property crimes. By 2000, 56 percent of the VOM programs worked with adult offenders, however, and 9 percent worked exclusively with adults (Umbreit and Greenwood 2000, 6). The vast majority of the mediated cases involved vandalism, theft, burglary, and minor assaults. Ilyssa Wellikoff contends, however, that “[t]he benefits attributed to mediating less violent and less serious crimes only further validate the importance of handling violent and serious crimes in victim–offender mediation” (2003). When VOM programs were asked if they ever mediated cases involving more severe violence, “a surprising number reported that they occasionally handle such cases as assault with bodily injury, assault with a deadly weapon, negligent homicide, domestic violence, sexual assault, murder, and attempted murder” (Umbreit and Greenwood 2000, 7).

VOM programs, generally seeking restitution for victims as well as reconciliation, allow victims to express the full impact of the offense on their lives, find out why offenders targeted the victims, and directly participate in determining how to hold offenders accountable. Offenders can also explain their situation and how the offenses affected them. After examining the evidence about VOM programs, Marty Price reported that,

[o]f the cases mediated, over 90% result in a restitution agreement and contract. Restitution may take the form of a payment of money, in a lump sum or installments, repair or replacement of damaged or stolen property, personal service for the victim or other solutions limited only by the creativity of the parties and the mediator. . . . Of the cases in which a restitution contract is signed, over 95% of the contracts are satisfactorily completed within one year of the mediation; 60% are completed within 6 months. Mediation program staff monitor completion of the contracts and arrange additional mediation meetings, when necessary, to secure compliance. (1995)

More recently, the Umbreit–Greenwood survey found that roughly 92 percent of the VOM efforts examined resulted in written agreements, and 99 percent of these agreements were fulfilled (2000, 8). Furthermore, a growing body of evidence indicates that recidivism rates for offenders who participate in VOM are lower than

for offenders dealt with through standard criminal justice institutions (Umbreit et al. 2005, 284–89).

### *Private Courts*

Civil dispute resolution has been shifting into formal private forums for some time. Commercial arbitration has a long history and is growing in importance (Benson 1995, 2000). A significant entrepreneurial innovation also has developed and spread over the past few decades, creating a new industry. In 1976, California had a public-court backlog of seventy thousand cases, with a median pretrial delay of 50.5 months (Poole 1980, 2). Two lawyers who wanted a complex case settled quickly found a retired judge with expertise in the area, paid him attorney's fee rates to resolve it, and saved their clients a tremendous amount of time and expense. This idea was quickly imitated and improved upon. By 2000, it was clear that “[p]rivate judging is a big business nationally, but nowhere more so than in California, where more than 500 former public judges, including six former justices of the state Supreme Court, are listed in directories as seeking private judging assignments” (Rohrlich 2000). The first private for-profit firm offering trials, Judicial Arbitration and Mediation Services Company (JAMS), was started in 1979 by a retired California state trial judge. It has become the largest firm in a rapidly expanding market, with offices in twenty-six U.S. cities, five European cities, and one Canadian city. JAMS has more than 300 full-time “neutrals” (retired judges) plus 195 employee associates and on average twelve thousand cases annually, dealing with issues involving antitrust, bankruptcy, employment, engineering and construction, entertainment and sports, the environment, family, financial markets, government, health care, insurance, intellectual property, partnerships, personal injury, probate, product liability, real estate, trusts and estates, and more.<sup>1</sup> A sampling of other firms that have entered the industry include Judicate, Civicourt, EnDispute (now merged with JAMS), ADR Services Inc., Alternative Resolution Services, Cyber Settle, Inland Valley Arbitration Mediation Service, First Mediation Corporation, Agreement.com, National Arbitration Forum, Resolution Remedies, and National Arbitration and Mediation. Many law firms and individuals also offer dispute resolution, independently or through the American Arbitration Association, and many organizations such as trade associations have internal arbitration arrangements for members.

If decriminalization and a focus on restitution occur, making the issue one of determining damages rather than punishment, private judging will quickly be offered. Under a restitution system, the number of available courts could expand dramatically. Whereas plaintiffs often can choose a court jurisdiction in public

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1. For these statistics and more on JAMS, see its website at [webhttp://www.jamsadr.com/aboutus\\_overview/](http://www.jamsadr.com/aboutus_overview/).

courts, both parties to a dispute must agree to use a particular private court. Damage awards will be determined by these competitive courts, so the likelihood of either excessive or insufficient restitution should be relatively low. Courts with a reputation for favoring one party or the other will not attract business because both parties must agree to use the court.

## **Stage 6: Private Imposition of Sentences**

Formally recognized private alternatives to public criminal courts and criminal prosecutors are available only in limited numbers today, and even when they are available (e.g., VOM), victims and offenders cannot formally choose them without consent and referral from criminal justice officials. Less formal institutions have developed, however, to pursue private criminal justice. Employee theft imposes substantial costs on businesses, for instance, as does shoplifting for retail firms. The most recently released *National Retail Security Survey* indicated that 43.9 percent of retail losses (approximately \$15.1 billion) were due to employee theft in 2011, and shoplifting accounted for 35.7 percent (\$12.3 billion) of losses (Hollinger 2012). These thefts are presumably prosecutable, but the public criminal justice system is not likely to deal with such crimes (Mohl 2005, citing the president of the Retailers Association of Massachusetts). Therefore, many are dealt with by private-security personnel or by victimized firms. The process may be formalized, involving internal disciplinary bodies, boards, or panels, or they may be informal, with confrontations and negotiation between security personnel or managers and accused offenders. In many situations, the offender is apprehended but then released after a warning. In other cases, sanctions are imposed. As David Sklansky has noted, “[T]he sanctions in this private system range from dismissal or ejection, to a return of purloined merchandise, to fines or restitution extorted by the threat of a criminal complaint” (1999, 1277). One sanction is to ban the offender from the property. For instance, Macy’s banned shoplifters from the store for seven years (Joh 2005, 589–91). Another common practice among major retailers such as Home Depot, CVS, and Filene’s Basement is to routinely send a “civil demand letter” to anyone caught shoplifting (Mohl 2005), offering to settle a potential tort lawsuit in exchange for a specified compensation payment. The implication is that if the offender does not pay, the store will sue for damages. Although stores are unlikely to file such suits, the threat may be sufficient to obtain restitution from some offenders or at least to deter them from victimizing the store again.

### *Restitution Contracts*

Decriminalization would mean that victims have a right to pursue restitution, and privatization of prosecution through private courts would reduce the demands for

informal justice. Restitution payment processes can be specified contractually, as they are through VOM, so payments would presumably occur in the same way that any contractual debt is paid. Most people voluntarily pay their contractual debts, with the contract specifying the size of the debt, the interest rate that will apply if the debt is paid over time, the timing and size of payments, the means of payment (e.g., cash, labor services, assets owned by or goods produced by the debtor), and numerous other potential contingencies that could affect the ability to meet certain terms of the contract. Indeed, as noted earlier, at least 95 percent of the VOM restitution agreements are fulfilled within a year.

Agreements to pay restitution may be breached, of course, just like any contract. If this is seen as a serious risk, the agreement can include a clause under which the offender agrees to be supervised in some way until the debt is paid. Varying degrees of supervision are likely to be provided, with the actual process chosen depending on perceived risks of breach. A private “collection” agency might be employed to supervise the contract, providing appropriate monitoring to ensure payment (staff monitor performance of the contracts achieved through VOM). Offenders might engage in unsupervised work, for instance, but report to a contracted supervisor at regular intervals. More than 60 percent of all convicted criminals in the United States are sentenced to supervised probation, after all, not to prison, and many convicts are placed on supervised parole after serving time in prison. All such supervision involves regular reporting or visitation or both. Alternatively, employers might act as supervisors during work hours, and the offenders placed in a secure location each night, as with halfway houses (many of which are contracted out to private providers). If the risk of renegeing is large enough, the contract might specify more significant levels of supervision, including work within a secure environment like a prison (as discussed later). These secure facilities could be run by the producing firms themselves or by contracting with specialists in security services. Whatever the level of supervision, a choice of contracts could be offered to the offender by competitive firms providing work in secure facilities. Income generated through offender production could be divided, with part of it paying “room and board,” including supervision costs, and part of it paying restitution (some portion also might go to the offender’s family, to the offender for purchases of some amenities, or to other purposes).

Contracts might vary considerably depending on the situation. The offender might agree to job training, for instance, or drug/alcohol treatment and other productivity-enhancing programs so he can earn more. Offenders’ incentives to take advantage of these options would be strong if they can work off their restitution debts more quickly. The more secure the facility has to be, the higher the room-and-board costs will be, so offenders also would have incentives to behave well in order to transfer to less secure facilities where they can work off their debts more quickly. All of this means that the private sector would operate a variety of secure work environments, including some that are like current prisons that have prison

industries programs. This is clearly possible because private provision and management of entire correctional facilities is common, as are a wide variety of prison industry programs.

### *Private Provision of Supervision*

The first privately operated U.S. high-security institution in modern history, an intensive-treatment juvenile facility at Weaverville, Pennsylvania, was taken over by RCA in 1975. Privatization of major adult-detention facilities began in the early 1980s when Behavioral Systems Southwest provided a minimum-security prison for illegal immigrants (Fixler 1984, 2). Since then, this market has expanded rapidly. Corrections Corporation of America, Inc. (CCA), formed in 1983, contracted with New Mexico to design, finance, construct, and operate a prison for all of the state's female felons, becoming the first private minimum- through maximum-security state prison in recent history. By 2007, private companies in the United States operated 264 correctional facilities (Schmallegger and Smykla 2007). Among these companies, the GEO Group managed and/or owned 116 correctional, detention, and residential treatment facilities with a capacity of approximately eighty thousand beds and a workforce of more than twenty thousand.<sup>2</sup> CCA managed more than 60 facilities, 44 of which were company owned, with a capacity in excess of eighty thousand.<sup>3</sup> They had contracts with the three federal agencies that have prisons as well as with about half the states and several local governments.

The still limited use of contract prisons in some places reflects political barriers, not a lack of qualified suppliers. For instance, Tennessee lawmakers turned down CCA's offer to take over the state's entire prison system, despite substantial cost savings. States generally put tighter budgetary or operating restrictions on private prisons than on public prisons, sheltering state-run facilities and their employees from competition. Indeed, a major source of political resistance to contracting out for prisons is organized correctional officers (Benson 2011, 334).

Imprisonment is only one form of supervision in criminal justice, but the alternatives are also privately produced. Drug-treatment programs are frequently contracted out, and the Federal Bureau of Prisons contracts out all of its halfway houses. As noted earlier, the most frequent sentence for criminals is probation, and states facing growing budgetary pressures in the 1970s began considering ways to more effectively deal with growing probation (and parole) caseloads. Florida was the first to turn to private provision of probation services in 1975, contracting with Salvation Army Misdemeanor Probation. By 2007, at least ten states used private organizations to supervise misdemeanor and low-risk offenders on court-ordered

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2. See the GEO Group, Inc., website at <http://www.thegeogroupinc.com/about.asp>.

3. See the CCA website at <http://www.cca.com/about/>.

probation (Schloss and Alarid 2007, 233). For instance, about forty private probation companies are currently registered in Georgia, employing 850 probation officers and serving 640 court jurisdictions (Private Probation Association of Georgia 2013).

Some states also contract for parole supervision (American Prohibition and Parole Association 2006). Connecticut contracts with private providers for juvenile outreach, tracking, and reunification services, for instance, a component of parole supervision; private organizations contract for juvenile parole aftercare supervision in New York; and Nebraska contracts with various private organizations to provide supervision and treatment for juvenile offenders and status offenders. These three states are among those that have separate agencies dealing with parole and probation, but more than thirty states have consolidated these agencies. Some consolidated agencies are contracting for both probation and parole supervision. Private companies in Florida supervise juveniles under conditional release; for instance, North Carolina contracts with private agencies for transition placement of juveniles leaving Youth Development Centers, and private companies supervise juveniles in both Maryland and Michigan. Private companies also provide adult probation and parole supervision through the Community Corrections Program in New Mexico; North Dakota contracts with private companies for supervision of low-risk adult offenders; and although there are no private providers of adult probation or parole supervision in Washington, the state does contract out for electronic monitoring. Clearly, the private sector can provide supervision of offenders who are not held in secure facilities. Furthermore, if criminals eligible for probation or parole were required to post financial bonds, obtained for the most part from private bondsmen for a fee, such private supervision would not have to be paid for by taxpayers (Reynolds 2000). Beyond that, decriminalization would lead to similar private supervision of offenders working to pay off restitution debts, and part of offender income would cover supervision costs.

### *Private Supervision of Privately Employed Offenders*

During the nineteenth century, many state prisons financed their operations by selling prison labor or its products (Reynolds 1994, 33). Today, much of the prison population represents a huge pool of almost completely unused labor that simply drains government treasuries. One reason for the change may be revulsion against inhumane treatment of prisoners in the historical government-run, prison work programs, but offenders could be protected against such abuses given decriminalization. Competing firms could offer contracts specifying work conditions, wages, and the portions of the wages allocated for different purposes. If a firm does not live up to contractual promises, the inmate could sue for breach of contract and collect damages. Competitive forces also would work to preclude mistreatment because a firm with a reputation for allowing abuse by firm employees and/or other

prisoners (e.g., prison rape) would not attract contracts from offenders. Beyond that, firms that fail to protect a particular prisoner from abuse would be in breach of contract and liable for payment of damages, while the abuser would be liable for restitution because the abused prisoner is a victim.

There also is another explanation for the demise of prison work. In 1935, under pressure from business and labor unions, Congress prohibited interstate commerce in prison-made products when the receiving state had laws against marketing such goods. In 1936, private contractors were prohibited from using prison labor to meet government contracts exceeding \$10,000. Then in 1940 transportation of prison-made goods across state borders became a federal offense, regardless of state laws. "The effect of all these statutes was virtually to wipe out the market for prisoner labor and for prisoner-made goods" (Shedd 1982, 27–28). However, soaring prison costs and increasing prison populations forced state and federal governments to reconsider. In 1979, Congress removed federal restrictions on the interstate sale of prison-made goods, provided that (1) inmates' wages are equal to or greater than local wages for similar work; (2) local unions are consulted before the project is initiated; and (3) no employed workers outside the prison are displaced, no local surplus of labor exists in the industry employing prisoners, and existing contracts for services are not impaired (Auerbach et al. 1988, 10–11). This legislation also authorized up to an 80 percent deduction from workers' gross wages for taxes, room and board, family support, and government-run victim-compensation programs. Between 1979 and 1988, more than half of the states also authorized private-sector involvement in prison work (Auerbach et al. 1988, 11–13) as evidence mounted that prison work programs were beneficial for both prisoners and the public (Auerbach et al. 1988, 25–29). By 2000, forty-nine of the fifty-two U.S. state and federal corrections jurisdictions (forty-seven states, the District of Columbia, and the Federal Bureau of Prisons) had prison industries programs ("2000 Prison Industries" 2000). State programs ranged in size from Vermont with 100 prisoners employed to California with 6,600; the Federal Bureau of Prisons program had 20,288 prisoner employees. Furthermore, the survey on prison industries that appeared in the June 1997 issue of *Corrections Compendium* stated that most types of industries appeared to fall into the category of "traditional" prison enterprises (Wees 1997). This is not the case with current industries. Production efforts include printing; data entry and telephone answering; furniture (design, production, refurbishing); clothing; cleaning equipment and supplies; packaging; slaughter; vehicle repair; mattresses; food-service equipment; fruit and vegetable produce; flags; picture framing; silk-screening; brooms and brushes; optical ware microfilming; recycling; translation; lumbering; ranching; and much more.

In 2009, the Federal Bureau of Prisons had ninety-eight factories spread over seventy-one prison facilities, producing numerous products classified into seven broad business segments: clothing and textiles, electronics, fleet management and

vehicular components, industrial products, office furniture, recycling, and services (Federal Prison Industries 2009, 22).

Markets for prison labor are advocated here so offenders can pay compensation for the costs of the harms they inflict, but such programs have other benefits. Chief Justice Warren Burger (1992) correctly saw prison work programs as mechanisms for rehabilitation. Arizona produced a detailed examination of characteristics of recidivists and nonrecidivists, for instance, and reported that although rehabilitation programs in general reduced recidivism, among these programs “prison industry programs proved to be the most effective, reducing recidivism by approximately 34%” (Arizona Department of Corrections 2005, 8). Similarly, the one-year recidivism rate for prisoners employed in the California Prison Industries Authority (CALPIA) programs prior to being paroled was 23.6 percent, compared to 45.7 percent for non-CALPIA prisoners; the two-year rate was 38.6 percent for CALPIA parolees and 56.9 percent for other prisoners; and the three-year rate was 46.8 percent for CALPIA parolees and 63.7 percent for non-CALPIA prisoners (“California Prison Industries Authority” 2013). Although some of these differences may reflect selection bias, several other states report similar results. This is not surprising. Productive use of inmate time provides incentives to develop marketable skills. It also helps instill the discipline needed to hold a job after release.

Even more benefits for both offenders and victims might be generated through establishment of true property rights to restitution and the right to turn to private organizations for collection of the restitution. After all, when an offender is working off a predetermined restitution fine, even in a secure prisonlike environment, the sentence takes on a self-determinative nature: more productive prisoners obtain release more quickly. This should encourage productive activity and instill a conception of reward for good behavior and hard work.

## **Nonpayment Problems: Unsuccessful Pursuit, Madmen, Martyrs, and Malingeringers**

The preceding discussion focuses on private watching, reporting, pursuit, prosecution, and collections, pointing to past and present examples to show that the private sector is capable of providing the kinds of services that are necessary for a decriminalized system. There is little doubt that unanticipated dramatic changes in organizations, products and services, and technology would also occur to enhance the performance of these services. Consider the advancing technology in security equipment, such as alarms, monitoring devices, identification procedures, and so on. What might occur as the private sector moves into pursuit, prosecution, adjudication, and restitution collection?

One area of product innovation that others have predicted would result from a shift from publicly provided criminal justice to privately provided victim justice is

a dramatic expansion in the role and functions of insurance. In fact, what appears to be the first analysis of the potential for completely privatized system of protection and law enforcement stressed this prediction in 1849 (Molinari [1849] 1977). Insurance providers are likely to offer expanded insurance options against losses due to property and violent offenses. They already insure vehicles and a great deal of other personal property now, of course, and they provide both disability and life insurance. They are likely to expand their coverage, however, as well as the services they offer.

Even with the incentives from decriminalization and privatization that should result in greater deterrence and more successful pursuit and prosecution, some offenders will not be successfully apprehended or prosecuted. Some who are caught also may have severe physical or mental impairments that prevent work in order to pay restitution. The threats that some very dangerous offenders pose may mean that the costs of supervision alone will exceed any income generated from their labor. In addition, malingeringers will no doubt exist, and, depending on their alternatives, some may refuse to work and pay restitution. Some "madmen" are extremely dangerous predators who victimize many people before capture (and are likely to victimize more people if released): serial killers, sexual predators, and so on. Many predators of this type (as well as some portion of other offenders), will probably resist capture with violence and be killed as a result. Suicide is also a frequent choice by such offenders when capture becomes eminent. Similarly, some people have strong beliefs that lead them to commit large-scale violence intended to kill many victims with little concern for their own survival. In fact, martyrdom may be their goal. Martyrs and madmen who survive their own violent acts and fail to commit suicide may not respond to any incentives to work at all, in part because their debts to multiple victims are so large that they can never pay them off to obtain release (martyrs may prefer continued martyrdom under harsh conditions to demonstrate the strength of their beliefs). Even if madmen and martyrs work, most of their victims will never be fully compensated. So how might this system deal with madmen, martyrs, and malingeringers?

If insurance organizations were able to collect restitution payments from offenders after they pay victims' claims (i.e., payment means the right to restitution has been transferred to the insurer, who then invests in pursuit and prosecution, as explained in the next paragraph), this added source of revenue should allow them to offer more types of insurance against intentionally inflicted harms and property losses at lower rates. As a result, insured victims would be compensated to a degree (determined by the policies chosen) whether offenders are caught or not.

There is likely to be a wide array of policies and insurance/protection/investigative arrangements if the market is allowed to work. Group insurance may be purchased by employers, homeowner or business associations, landlords, and many others organizations. Insurance, protection, and investigative services

may be purchased separately, or all may be bundled. Organizations may create their own mutual insurance pools. Some people may choose to self-insure, making personal investments in security, or they may enter into voluntary arrangements with other individuals facing similar threats (e.g., the prosecution associations discussed earlier), or both.

Insurance pools and providers have incentives to reduce offenses, so they might offer protection services either through contracting with specialists or through proprietary security employment, or they might charge lower prices to customers who invest in protection, or both. Pursuit and prosecution of offenders also can serve as a deterrent. Therefore, insurers would have incentives to pursue offenders beyond the desire to collect restitution. A reputation for doing so should deter attacks on their customers. Providers might employ their own investigators, contract with specialized investigators, and/or offer rewards. This means that the fact that a particular offender will not be able or willing to pay restitution does not eliminate incentives for pursuit. Indeed, investigators employed by or under contract with insurance organizations are likely to pursue all serious offenders who attack their customers. In many cases, they will not know whether the offender is a madman, martyr, malingeringer, or someone who can actually pay restitution. Even if they do know, they would have incentives to pursue all offenders who pose significant threats against their customers, including serial killers and sexual predators, because they recognize the likelihood of repeated offenses and therefore repeated insurance claims. Even if madmen or martyrs are not deterred, they are likely to attack softer targets (those not well protected and not likely to support effective investigators) rather than hard targets (those protected by providers with reputations for effective protection and pursuit).

If investigators catch a madman, martyr, or malingeringer who has successfully been prosecuted but has refused (or is unable) to work off debts, what will they do with the captive? Someone who is a danger to customers (a madman or martyr) clearly cannot be released, but the same consideration applies even if potential victims are not customers because the firm releasing a dangerous offender is likely to be sued and held liable for subsequent offenses committed by the prematurely released offender. Note that this is a major difference between public-sector criminal justice personnel and private providers of protection, pursuit, prosecution, and collections. Private individuals and firms will be held liable for harms arising from their mistakes or intentional actions (e.g., mistreatment of customers or alleged offenders, false arrest, withholding of evidence, etc.). Public criminal justice officials might be held accountable for intentional harms if reported, but it is virtually impossible to sue a public official for harms from negligence. There are numerous examples of criminals who are released long before their sentences are complete due to prison crowding and then commit heinous crimes. The public prisons or parole boards that released the individuals early are not liable for the consequences, nor are the judges and prosecutors who have precipitated this early

release of serious offenders because they have sent high numbers of relatively minor offenders to prison, nor are the legislatures that underfund prisons relative to what would be required for all of the criminalization they have mandated (e.g., victimless crimes).

One can only speculate about how the private sector would deal with madmen, martyrs, and malingerers too dangerous to release. These individuals have violated the rights of others in society, so they would have a legal obligation to pay restitution. Refusal should put them outside the protection of the law. In historical restitution-based legal systems, this refusal generally meant ostracism, expulsion, or even death. In a modern society, expulsion may be possible under limited circumstances, but death for failure to pay a debt is not likely to be politically acceptable. Perhaps such offenders will be offered a choice between a specified prison term in a conventional “nonproductive” prison facility with few amenities or a prison work program accompanied by more amenities. If they decide to work, some portion of the resulting income can be directed to cover room and board, some to restitution, and some to purchase amenities.

Even if some offenders can never work off their full restitution debt, they may be willing to work in order to obtain some amenities and in the process generate some restitution payments for the insurance provider or uninsured victim. If not, then they are likely to be held in the nonproductive prison with few amenities for a very long time. The insurance organization maintaining a facility (or perhaps the consortium of organizations who join together to maintain such a facility, if there are scale economies) has incentives to facilitate rehabilitation, if possible, in order to move offenders into facilities where they can work, but if this is not possible, they have incentives to maintain the offender in a secure facility that can be run at relatively low costs—no doubt a fairly undesirable environment. Offenders could avoid these conditions by accepting contracts to work, however, so those in such an environment would choose to be there.

## Conclusions

“Criminal” justice, with its focus on punishment, should be changed to emphasize “victim” justice by decriminalizing and by recognizing victims’ rights to restitution. The result would be relatively efficient compared to punishment by imprisonment, which imposes huge costs on taxpayers and wastes large amounts of resources in the form of idle prisoners’ time. Even if close supervision in prison work programs is required to ensure restitution payments, prisoners are working to produce goods for sale rather than being idle. Additional efficiency gains also would arise if constraints on entry into markets for private policing, prosecution, adjudication, and collection of restitution were eliminated. Offenses against persons and property would decline *relative* to the current system as victims become more involved by reporting offenses and pursuing prosecution of offenders, either directly or

indirectly by buying insurance or engaging the services of specialized private firms. Entrepreneurial opportunities to serve the various markets will lead to new innovative processes for protection, prevention, detection, pursuit, prosecution and collections. The result would also be more equitable, in part because the system reduces the costs borne by victims. Opportunities for offenders to work off their debt will also enhance the likelihood of rehabilitation as they learn new skills, and a competitive market for offender labor will do far more to ensure humane treatment than any oversight and monitoring efforts that presumably constrain public officials who run prisons today.

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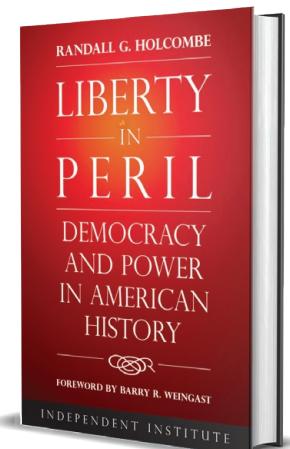
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