Returning Justice to its Private Roots

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To Serve and Protect: Privatization and Community in Criminal Justice.

INTRODUCTION

Artists generally portray the figure of Justice as a blindfolded woman bearing a sword and scales. In To Serve and Protect: Privatization and Community in Criminal Justice, Bruce L. Benson, a prolific and distinguished economist at Florida State University, uses economic analysis to reveal Justice to be an entrepreneur. Restoring Justice to her historical role as businesswoman is the key to Benson’s prescription for what ails the criminal justice system.

Justice as entrepreneur? Isn’t “Justice” (with a capital “J” at least) a deep philosophical concept? What about all those ideas first year law students debate: retribution, deterrence, and restitution? What could economics possibly say about justice that would be useful?

Quite a bit, as it turns out. As an economist, Benson studies the incentives for all the participants in the criminal justice system (including criminals, victims, police, defense lawyers, prosecutors, prison guards, judges, jurors, and parole officers). His focus on incentives—developed through examination of historical and comparative law examples as well as through a comprehensive survey of empirical work on crime and criminal justice—provides the overall framework for the book. Understanding incentives is a valuable substitute for philosophy.

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1 Benson has written or cowritten numerous articles and two other books on legal topics. The books are The Enterprise of Law: Justice without the State (Pacific Research Institute 1990) and The Economic Anatomy of a Drug War (Rowman & Littlefield 1994) (with David W. Rasmussen).
The relative lack of competition among law and economics scholarship enhances the value of this book. The economic analysis of law has something to offer in most fields of legal scholarship, but law and economics scholars have neglected criminal law. The most recent edition of Richard A. Posner's definitive treatise, for example, offers only one and a half chapters on criminal law and procedure, and much of that draws primarily on scholarship from the 1970s and 1980s.\(^2\) (Benson authored or coauthored a significant portion of the scholarship that does exist on the subject.\(^3\))

Part I discharges the basic responsibility of a book reviewer to discuss the non-substantive characteristics of the reviewed book that will matter to potential readers. Parts II and III examine the content of Benson's analysis of criminal justice with respect to the role of private actors in public crime control and the theory and practice of private crime control. Part IV uses the example of the late nineteenth-century open range cattle industry in Texas and Wyoming to test Benson's analysis against an historical example. Part V looks at Benson's prescriptions for policy change and concludes by assessing the benefits of Benson's analysis for the public policy debate over criminal justice reform.

I. THE REVIEW BASICS

The rest of the Review will try to convince you that the benefits of reading *To Serve and Protect* are large; this Part will tell you why the costs of reading it are low.\(^4\) Well written books are less costly to read than poorly written books. Academics in general and economists in particular are not known for lowering readers' costs. This, however, is a well written book. Benson has a lively and engaging style of writing. If the book has a flaw in the writing, it is that there are too many quotes from writers whose styles (at least in the quoted selections) are neither. The book is well produced, with a thorough index and only a few typographical or other production errors. The extensive references


\(^3\) I found forty-nine references to papers written by or coauthored by Benson in the bibliography of *To Serve and Protect*. Since there are papers not referenced there, this bibliographic listing represents only a subset of Benson's output.

\(^4\) This is also the appropriate place to make disclaimers. I know Bruce Benson, have participated in a number of conferences with him, and have been familiar with his work for over ten years. Along with quite a few others, I read and commented on a portion of this book when it was in manuscript form. Benson also used a manuscript of mine, analyzing private provision of law in the nineteenth-century American West, as a minor source for the book. (The manuscript was subsequently published as Andrew P. Morriss, *Miners, Vigilantes & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 Land & Water L Rev 581 (1998).)
provide a valuable resource for others interested in the economics of almost any aspect of criminal justice.

Benson also thoroughly researched and documented the book. He provides an exhaustive survey of factual information on everything from the operation of the modern bail bond system to the development of the criminal justice system in medieval England. I would be surprised if there is a significant empirical study of any relevant aspect of the criminal justice system that he failed to cite or discuss.

Although this book is an economic analysis of criminal justice, it is remarkably free of economic jargon and mathematical obfuscation. Benson clearly and concisely explains each important economic concept he uses. There are no graphs and few equations or tables. A reader without a background in economics will find the book valuable as an introduction to economics as well as accessible as a policy analysis of criminal justice.

While most of the book is an objective application of economic principles to issues of criminal justice, the final third is a series of policy prescriptions aimed at the primary audience for the book: people working to improve the criminal justice system. The book would also be useful in a law and economics course or in a criminal law seminar. Outside the academy, anyone interested in criminal justice issues will find the book both provocative and an invaluable guide to the empirical criminal justice literature.

One final note for readers: this book is part of a series entitled "The Political Economy of the Austrian School." Austrian economics is a subfield of economics, which, despite the name, is not about or practiced primarily in the country of Austria. As a distinct subfield, Austrian economics first developed as a response to socialist economic theory. Well known Austrian economist and Nobel laureate Friedrich Hayek wrote extensively on legal issues. Austrian econom-

5 The name derives from the significance of several key figures of Austrian nationality: Carl Menger, Ludwig von Mises, and Friedrich Hayek. The main academic centers of Austrian economics today are New York University and Auburn University. The Foundation on Economic Education, in Irvington-on-Hudson, New York, and the Ludwig von Mises Institute, in Auburn, Alabama, are also centers of Austrian inquiry.

6 The Austrians, for example, "won" the "socialist calculation debate" against market socialist theorists like Oscar Lange. See Trygve J.B. Hoff, Economic Calculation in the Socialist Society (Liberty 1981). The Austrians successfully demonstrated that without decentralized markets, the information problems in calculating how to allocate production and consumption could not be solved in an efficient manner. See G.R. Steele, The Economics of Friedrich Hayek 96 (St. Martin's 1996).

ics today often examines the role of entrepreneurs and generally eschews the mathematical formalism associated with modern economic theory. Benson’s book fits within this tradition since it emphasizes the importance of entrepreneurial activity and property rights. A reader previously unfamiliar with the nuances of the Austrian school will not, however, notice anything particularly unusual about the economics in the book other than its extraordinary readability.

II. THE PRIVATE ROLE IN PUBLIC CRIME CONTROL

Discussions of the private role in public crime control often center on the need for privatization of particular services. Most people associate the term “privatization” with the practice of contracting with a private sector firm to provide a service previously provided by a public entity. Indeed, the term “privatization” suggests both that the status quo is not private and that the end result of the process will be private. In the first part of the book, Benson explains how this understanding of “privatization” creates a misleading picture.

There is certainly a great deal of “privatization” going on in criminal justice, from private prisons to contracting out certain police services to private firms. But Benson distinguishes true privatization from simply hiring a private entity to provide public services, which he terms “contracting out.”

[C]ontracting out is, at most, only partial or incomplete privatization. The determination of what is going to be demanded from and produced by the firm under contract remains in the political arena, under the influence of interest groups and public officials rather than under the direct control of private citizens acting as individual buyers. Complete privatization in criminal justice involves private-sector control over all of the decisions regarding the use of resources devoted to the protection of persons and property (p 15).

The distinction matters because Benson argues that all government services involve a degree of contracting out. First, “[e]verything that the government allegedly produces is actually produced by contracting with private entities” (p 16). Government employees, like police officers, are simply individuals with whom the government has an

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8 See, for example, Israel M. Kirzner, *Discovery and the Capitalist Process* ix–xi (Chicago 1985).

individual employment contract. Contracting with Richard Roe to be a police officer or Sally Smith to be a prison guard is thus no different in concept from contracting with Roe Protective Services, Inc or Smith Private Prisons Co. This is an important part of Benson's overall argument for increasing the role for private actors in criminal justice. If all government action involves contracting with private entities, then "the normative view that government must be the only organization with police and punishment powers, for fear that private entities might abuse such powers, really does not make much sense" (p 16). Second, governments are increasingly contracting out for criminal justice services, including police and security services, corrections services, and even court services, as Benson documents in Chapter 2 (pp 15–25). We need to realize that this is not true privatization because Benson wants us to have a discussion about whether contracting out goes far enough.

Understanding government actions as merely different forms of contracts helps as well. What matters in any government contract is the incentives the contract creates. If a contract between the government and a private entity rewards the private entity for increasing a particular outcome or cutting costs, then we can expect that the private entity, regardless of whether it is an individual or a corporation, is going to increase the outcome or cut the costs.

Public and private contracts differ in the incentives they create. Private actors bear the risk of loss and gain the potential for profit; public employees are (in general) immune from losses and forbidden to reap the rewards of their actions (p 17). Private firms are restricted by competition; on the other hand, public entities compete largely with other public entities for a share of the budget. "Private firms must persuade customers to buy their product rather than the product of the competition by offering a price/quality mix that consumers find to be equal to or better than the price/quality mix offered by someone else" (p 27). Governments, on the other hand, "can coerce taxpayers into buying something they do not want" (p 27). Combined with "the rigidities of most civil servant employment systems, which are dominated by people most concerned with job security, increasing wages and other benefits, avoiding risks and responsibility, and lowering their personal costs of doing the job, the inefficiencies of government production are not too surprising" (pp 27–28).

Contracting out can solve some, but not all, of these problems. By shifting production of various criminal justice functions to a private

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10 This point is consistent with the growing neoclassical economic literature on the various forms of government contracting. See Jean-Jacques Laffont and Jean Tirole, *A Theory of Incentives in Procurement and Regulation* (MIT 1993).
entity, the distortionary effects of public employment contracts can be removed. Private entities also have the ability to profit by innovating ways to reduce costs, and so contracting out can also increase innovation. Benson examines several cases where private contractors were able to innovate in prison construction and operation and police security services (pp 28-34). In one of the best examples, Benson examines how the Corrections Corporation of America has innovated in prison design to reduce operating costs. By eliminating a single post requiring continuous staffing (which would require five employees to staff 24 hours a day, 365 days a year), five employee positions could be eliminated, saving over $100,000 per year (p 31).

The great fear with contracting out is that firms will express their entrepreneurial instincts through relentless cost-cutting that will lead to reduced quality. Critics of private prisons, for example, argue that privately run prisons will skimp on prisoners' medical care and food to increase profits (p 35). As Benson notes, however, whether quality-enhancing or quality-decreasing competition results depends in part on the structure of the contract with the private firm. For example, paying court-appointed defense attorneys a flat fee per case will not encourage them to provide a vigorous defense but rather to maximize volume (p 39). Paying them per hour of work, however, will encourage public defenders to defend their clients vigorously (and perhaps overzealously).

Unfortunately, the same bureaucratic incentives that affect government production of criminal justice services affect government production of contracts for criminal justice services (pp 42-44). If bureaucrats cannot deliver the criminal justice services efficiently, there is little hope that they will deliver efficient contracts with private parties.

One example of the problems caused by relying on bureaucrats to write contracts with private parties is the potential for corruption in awarding the contracts. "When entrepreneurs recognize that contracts are going to be awarded on the basis of bribes paid to public officials, they tend to respond to these incentives" (p 45). Corruption can take many forms, including political contributions in return for contracts. However, if corruption exists in contracting out, it is also likely to exist elsewhere in the system, and so eliminating contracting out is unlikely to eliminate the problem (pp 44-46).

A final reason to be concerned about contracting out is the ends to which the contracts harness the efficiency of the market. Contracting out lowers the cost of purchasing criminal justice services through the government. In other words, for a given quantity of tax dollars, the government will be able to imprison more people (or the same people for longer) if it contracts out the actual running of the prisons. As
Benson notes, when a government pursues an immoral end, making the process more efficient is undesirable (p 47). We can thus be thankful that murderous modern despots like Hitler, Stalin, Pol Pot, and Mao have been devotees of central planning. Concern over this point extends closer to home as well. The drug war is an excellent example of an area where increased efficiency may produce only more efficient rights violations. The major insight offered is that the public debate over contracting out misses a crucial point about the existing criminal justice system: private inputs are, and have always been, a necessary component of the production of criminal justice services.

These private inputs are subject to distorted incentives by the public sector’s role. For example, many victims and witnesses do not report crimes. Benson argues that people do not report crimes because the criminal justice system fails to provide them with the incentive to do so (pp 54–56). The incentives for victims come, in large part, from the punishment imposed on the perpetrator. Because of the flaws in the public portion of the system, these incentives for victim cooperation are attenuated.

Not only do victims not receive restitution, they experience significant costs if they pursue justice. “The cost to victims of reporting a crime and then cooperating with prosecution can be staggering” (p 54). Victims risk retribution, bear the emotional costs of confronting the defense attorney, are often poorly treated by prosecutors, incur considerable out-of-pocket costs to attend court sessions, and have little certainty about the benefits of cooperating (p 54).

While victims experience high costs from participating in the system, criminals experience shockingly low costs. Discounting for the various uncertainties in crime reporting, arrest, prosecution, conviction, and imprisonment, Benson shows that (relying on his earlier work) the expected prison term for burglary in Florida in 1992 was 12.8 days (p 69). Criminals are unlikely to be engaged in calculations of such precision, but their experience can hardly fail to miss such dramatic disparities between nominal and expected sentences. The combination of high costs for victims and low costs for offenders is telling evidence that the criminal justice system is failing and, more-

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11 Benson has coauthored an article on the incentive effects for police of civil forfeiture laws, which he does not discuss at any length in this book. Brent D. Mast, Bruce L. Benson, and David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 Pub Choice 285, 303–04 (2000) (discussing the shift in police resources from non-drug related crimes to drug related crimes).

12 U.S. government statistics suggest that only 39 percent of the most serious crimes are reported (p 50). These “Index I” crimes include murder, manslaughter, sexual offenses, aggravated assaults, robbery, burglary, larceny, and auto theft.
over, that it is failing because of its inadequate provision of incentives for private inputs.

By the end of the first part of the book, the reader will see that “public” provision of criminal justice services is actually dependent on significant private inputs, that the public portion of the production of criminal justice services is subject to significant incentive problems, and that the public portion of the production raises the cost of private participation. In the second part of his book, Benson turns to truly private systems for providing criminal justice services as substitutes for public systems that utilize some private inputs.

III. The Theory and Practice of Private Crime Control

Private crime control is a reality today in many ways. Businesses design buildings to be resistant to attacks by criminals (p 79); individuals adopt safer driving habits (varying routes, locking doors) (pp 76–77) and buy guns (p 77); both hire private providers of security services (pp 79–80); and private groups engage in volunteer efforts against crime (pp 80–83). When crime control efforts are properly seen as including this broad range of activities, private crime control efforts dwarf public efforts under any measure.

There are also examples of more comprehensive privatization. The St. Louis metropolitan area, for example, has more than four hundred private street-providing organizations, covering a mix of wealthy and less wealthy neighborhoods (p 85). These streets stand out among the many private streets in the United States because they were public streets that were privatized in response to neighborhood demand (p 84). San Francisco has sixty-five “private police beats,” which are “owned” by private groups (p 86). The private groups bid for the right to provide security services in the designated area. Despite multiple attempts by the city police to do away with these organizations, they have survived since 1851 (p 86).

Given the demand for secure environments, it should come as no surprise that entrepreneurs are selling products that satisfy this demand. Gated communities are an obvious example, but Benson also

13 Private crime control is not new. Specific forms, such as gated communities, may be new, but private criminal justice traces its history to colonial times. “Government law enforcement was not the norm in the original thirteen colonies” (p 94). In colonial times, public courts were often far from where people lived, and so private, restitution-based alternatives developed. Neighbors assisted victims in pursuit, in part because they knew that they might require similar assistance themselves in other instances (p 95).

14 Benson documents how extensive private providers of civil justice have become today (pp 113–16). Just as private providers, such as arbitrators, have moved in to supply civil justice in response to the failures of the state legal system, Benson argues that entrepreneurs also offer alternatives in the criminal justice sector. He finds extensive evidence that volunteer groups are engaged in just such activities in inner city neighborhoods. Community groups in Philadelphia
Returning Justice to its Private Roots describes enclosed shopping malls and office complexes as security innovations. "The incentive to design facilities with security in mind and to provide adequate levels of security for both businesses and their customers is very strong when a mall or office complex owner must compete with other malls and office buildings to attract businesses" (p 92). While these developments offer other advantages as well, one crucial difference between a mall and a city street is that the mall is private property owned by a single entity that can exclude others (p 92). The importance of the ability to exclude highlights the crucial point that the legal environment affects the viability of private solutions. Evaluations of the success or failure of private solutions must therefore consider the broad legal environment within which those solutions are attempted. Given the many problems with our current legal environment identified by Benson, we must consider whether problems with private solutions are due to their private nature or to aspects of the legal environment. Benson's analysis thus provides a powerful reason to be skeptical of criticisms of privatization proposals in the criminal justice area.

Benson also examines historical evidence of private criminal law provision. For example, there is powerful evidence that the western frontier was not a violent, lawless place. Economic historians Terry Anderson and P.J. Hill, for example, have documented numerous cases of cooperative behavior built on property rights including land clubs and wagon trains. John Umbeck has exhaustively surveyed California gold rush mining camp records and found that the forty-niners regularly chose contractually created property rights over violence. Benson thoroughly surveys the evidence and prior work in this area (pp 97-106).

The most troubling bits for advocates of private provision of criminal justice services are the various episodes of western vigilantism. The consensus view of western vigilantism today is that it was a bad thing. For example, Richard Maxwell Brown, the most prominent

and Washington, D.C. have successfully reduced drug-related crime in several neighborhoods, despite the disadvantage of not being in the position of the owners of public spaces (pp 120-24). For a variety of reasons, private justice services are not as widespread as private security services, but the evidence seems clear that such services are possible.


17 I discuss one example he does not discuss at greater length in Part IV.
of the "new western history" writers on this topic, argues that vigilantism was part of the violent "Western Civil War of Incorporation" fought by capital against labor, minorities, and other disadvantaged and oppressed groups.\(^\text{18}\) Vigilantism had "[a]t its core . . . the conservative, consolidating authority of capital."\(^\text{19}\) Against this backdrop, when modern opponents of private efforts at providing criminal justice services label such efforts "vigilantism," they are scoring a public relations blow. Benson cuts against the popular consensus on vigilantism and reinterprets several western incidents as private provision of law.\(^\text{20}\)

Critics of vigilantes are correct that some (and perhaps many) of the individuals who called themselves "vigilantes" were simply thugs violating the rights of their victims.\(^\text{21}\) The history of vigilantism in the American South is primarily a history of campaigns of terror aimed at violating the rights of African-Americans in an effort to return them to a status of de facto slavery.\(^\text{22}\) Simply labeling terrorists as vigilantes, however, does not change their essential nature as terrorists. Applying the same label to legitimate private efforts at crime control likewise does not make those efforts illegitimate.

In many respects, the vigilance committees are the most problematic examples of privately produced law. To the extent they are disorganized, they run the risk of degenerating into mere mobs, with all the attendant losses of accuracy and deliberation that entails. As they become more organized, however, they begin to look uncomfortably like a state, often without any checks and balances. Evaluating decentralized institutions and movements based on whether some who claim adherence to the movement violate the rights of others is slippery ground, however. Just as all police are not the Los Angeles Police Department, not all vigilantes were thugs with a fancy name. Benson takes a fresh look at this issue.

The possibility of private crime control is not enough, however. To complete the case for private provision of criminal justice services,


\(^{19}\) Id at 396.

\(^{20}\) Benson focuses on the two San Francisco vigilance committees of 1851 and 1856 and the Montana vigilance committee of 1863-64. In these three instances, he argues, vigilantes were privately providing services that the public authorities could not or would not provide (pp 106-11). Benson is right on the theory and right about the Montana vigilantes, but only partly right about the San Francisco vigilantes. The 1851 committee was an organization devoted to privately providing criminal justice services due to the failure of the public authorities to do so. The 1856 committee was a coup d'etat. See Morriss, 33 Land & Water L Rev at 627-35 (cited in note 4).

\(^{21}\) The same is true of some modern heirs of the western vigilantes. The "common law courts" movement, for example, was criminals engaged in fraud who found it convenient to conceal their fraud with pseudo-legal window dressing. See id at 691-94.

\(^{22}\) See Ray Abrahams, Vigilant Citizens: Vigilantism and the State 95-100 (Polity 1998) (describing how the Ku Klux Klan used vigilantism to maintain white supremacy).
supporters of private provision must also show that private provision is desirable. Benson catalogues an impressive collection of privatization's benefits. He informs his discussion with theory, empirical evidence, and a comparative institutional analysis of private and public provision of such services.

Benson begins with the fundamental economic fact of scarcity, which implies that some means of rationing services is necessary. "[J]ustice' provided through the public sector is always rationed—it must be because it requires the use of scarce resources" (p 131). Benson then compares public and private means of rationing criminal justice services. Public rationing requires three steps. First, the public provider must gather and process information on the relative desires of constituents for criminal justice and other services. Second, the public provider must decide how to allocate the services produced. Third, the public provider's actions must be monitored (pp 128–31).

Economic analysis and public choice analysis suggest that all of these areas are problematic for public providers of criminal justice (and other) services. For example, how are public officials to determine whether citizens prefer more police patrols or more prison spaces (or more environmental protection or other services)? Voting gives an imperfect measure—one must vote for a "bundle" of positions when selecting a candidate (p 129). In short, in the political "marketplace" one cannot select one candidate's (or party's) position on one issue (drug criminalization) and reject her position on another (the death penalty). Similarly, since public rationing is not by willingness to pay, it must rely on alternative measures of demand. Do services go to those willing to wait for them (for example, courts ration access by requiring litigants to wait for a trial) or to interest groups according to political influence (for example, there are more police patrols in affluent neighborhoods)?

Benson develops an excellent example to show how alternative rationing systems affect the criminal justice system (p 135). Judges have a set of punishments available to them ranging from prison sentences to parole. Judges (and prosecutors) face no costs for using prisons but accrue political benefits from signaling that they are "tough on crime" by handing out stiff prison terms (p 135). Sentencing a convicted defendant to prison thus confers only benefits on the judge while bestowing both costs and benefits on society. Even more importantly, judges concerned with the response of their community have an incentive to sentence harshly because a defendant sent to prison is

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23 Monitoring raises an interesting set of issues. If a public employee, such as a prosecutor, must prove to the electorate that she is doing a good job, she has an incentive to focus on compiling a record that "proves" she is doing a good job. Prosecutors thus have an incentive to "pursue the easiest cases and ration through plea bargaining" (p 133).
unlikely to harm the local community (even if his imprisonment costs the state significant resources). Judges will thus overutilize prison sentences because prison sentences are unpriced.

Benson's key insight, however, is not that too many criminals will go to jail. It instead is that because "there is no price to signal the relative merits of imprisoning the two offenders," judges will fail to gauge the impact of their decisions to sentence a new offender to prison (p 136). Thus, in a world with scarce prison space, the constant influx of new prisoners causes the early release of existing inmates (p 136).

The alternative to public rationing is market rationing, and markets ration by prices. Consumers can buy products to fit different needs, rather than facing an "either/or" bundle requirement as in the political marketplace. The result is a different set of incentives for consumers, with regard to gathering information and making decisions, compared to the incentives for voters:

Consumers buying in markets have very strong incentives to gather information, compared to the motivation of taxpayer/voters in the political arena, because the individual consumer receives the benefits from a good decision (the purchase of a product that truly provides more satisfaction than any alternative purchase, given the consumer's money income, or number of votes, and the money prices of alternatives). The consumer also bears the cost of a bad decision (the purchase of a product that gives less satisfaction than some alternative would have provided, given money income and prices). Therefore, consumers benefit directly from any time, effort, and expenses invested in information gathering and evaluation that increase the likelihood of a good decision. Furthermore, they have access to much better information than voters do (p 143).

The crucial difference between markets and politics is thus not that participants in one institution are better behaved or more altruistic than participants in the other. Rather the distinction is that competitive markets have a feedback mechanism that allows decentralized decisionmaking; governments do not.

This feedback produces differences in incentives and thus in the way services are produced. For example, customer price sensitivity means private providers of criminal justice services need to achieve...
cost efficiencies. One way to do so is through the division of labor. Amarillo, Texas, for example, allowed a private firm to respond to security system alarms, rather than requiring the public police to do so (p 150). The private firm substituted specialists in alarm response for full police response. This saved the police department an estimated 3,420 person-hours or eight alarm calls per day. Since the private firm was able to utilize less expensive personnel to respond to the alarms, the overall cost was lowered (p 150). By providing different levels of services for different prices, entrepreneurs can expand consumers' options.

The final piece of the argument is Benson's response to the market failure argument. Suppose you are right, one can imagine a critic responding to Benson, suppose the government is as bad as you say it is. But isn't the market just as bad or worse? Benson responds to four main market failure arguments: (1) the profit motive will produce "too much" cost cutting and thus poor quality services; (2) private entities will abuse their power; (3) markets favor the rich; and (4) criminal justice services are a public good and will therefore be underprovided in the marketplace (pp 169–70).

A. Profit Motive and Cost Cutting

Benson's response to the cost cutting argument echoes his earlier discussion of privatization. How an entrepreneur will respond to market demands for criminal justice services depends on the incentives the entrepreneur faces. So long as the customers want quality services (such as police protection), entrepreneurs lack incentives to compete by lowering quality (pp 171–74).

B. Abuse of Power

The abuse of power argument against a market system is a serious issue, as discussed above in connection with the vigilance committees. Benson identifies the underlying problem as one of coerced monopoly. Only when an entity can prevent exit can it safely abuse its victims (p 177). The problem of abuse of power is thus largely an institutional failure of monopolies, not competitive markets.

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26 Quality arguments often mask a different agenda. For many, such as public sector unions, quality is equal to fully trained police even though fully trained police are not necessary for many criminal justice services (for example, being night watchmen or responding to burglar alarms) (p 172).

27 For example, why do victims not "exit" protection rackets by reporting the crimes involved to the public police (pp 177–78)? Because corrupt rackets have access to economies of scale in corrupting public criminal justice authorities (p 178).

This appears to create an opportunity that private security entrepreneurs would seize, and in fact individuals and firms who employ reputable private security firms are not likely to
The fact is that many individuals, whether publicly or privately employed, might abuse their positions by cutting costs, doing poor quality work, and bullying—if they can. The institutional arrangements within which people perform their tasks determine whether or not such abuses can be carried out, and competitive markets supply one of the best (if not the best) institutional arrangements for discouraging abusive, inefficient behavior (p 179).

C. Favoring the Rich

Markets do favor the rich. Markets provide more goods and services and greater choices to those with more resources to purchase them. The same is true, however, of political “markets.” The real question, then, is whether the poor will be able to procure better or more criminal justice services in a market context than they can in a political context.

Benson offers two reasons why the poor would fare better in a market-based system than in the current political one. First, if a private system provided for transferable property rights to restitution, the poor would be able to sell their claims to more powerful interests (p 184). Those interests would then ensure that justice was done (in other words, that the perpetrator paid). Second, the poor represent an untapped market at present (p 185). There is already evidence that some entrepreneurs are providing poor communities with criminal justice services at low cost and making a profit doing so (pp 185–86). The poor may not get as many criminal justice services as the rich in a market-based system, but they will get more than they do now.

D. Underprovision of Public Goods

Benson makes an important distinction that undercuts the public good argument against a market system. Publicly provided criminal justice services are not a public good but a common access resource (p 190). The difference is subtle but important. In a public good provision problem, the issue is persuading individuals to contribute towards the provision of the good. Individuals rationally refrain from doing so because they can secure the benefits of the good even if they do not pay much in the way of extortion (except to the organization that has so much power that individual private security firms cannot stand up to it—the state) (p 178).

28 Benson provides a short list of examples of state abuse of criminal justice powers as a further argument that this is not a market failure so much as a problem of monopoly (pp 179–84).

29 This is what happened in medieval Iceland. See David Friedman, The Machinery of Freedom: Guide to a Radical Capitalism 204 (Open Court 2d ed 1989).
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In a common-pool problem, the issue is rationing access to the common-pool resource. Since publicly provided criminal justice services are already being provided, victims face the common-pool problem of capturing the existing resources, not the public good problem of funding the services. The distinction is important because of the consequences for the solution.

The public-goods terminology seems to imply... that nonexcludability is an intrinsic problem that cannot be resolved without coercing free-riders into paying for the service. The common-pool terminology emphasizes that incentives arise because of the existing definition of property rights and therefore that another property rights assignment can alter such incentives (p 191).

By clarifying the terminology, Benson effectively undercuts one of the major arguments against market provision of criminal justice services.

In the first two-thirds of the book, Benson proposes a theory about criminal justice services that suggests the following: where markets can provide such services, criminal justice services will be provided at lower cost and with greater innovation and more justice than where those services are publicly provided. I now turn to a brief case study from the nineteenth-century American West to test this hypothesis.

IV. A TEST CASE: THE OPEN RANGE CATTLE INDUSTRY

Between 1865 and the end of the nineteenth century, an immense range cattle industry appeared across central North America, ultimately stretching from Texas north into Canada. Some regions, like Texas, developed stable institutions and orderly societies. Others, like Wyoming, degenerated into open warfare between "cattle kings" and small settlers. Although Texas's and Wyoming's cattle industries shared many characteristics, they also differed in significant respects. These differences illuminate the conditions under which the private production of criminal justice services can succeed.

The open range cattlemen's need for law stemmed from fungible cattle roaming across large expanses of land. Free-roaming cows were easy to steal and hard to police. Moreover, policing them required specialized services that did not benefit the general public. Simply providing more cops on the general beat was thus not enough—the beneficiaries of the services provided to the cattlemen were largely only the cattlemen themselves. The primary cost of public provision

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30 That is why most listeners do not contribute to public radio stations, for example.
31 Overstocking a common pasture (the "tragedy of the commons") is the classic example.
32 In contrast, an urban homeowner lobbying for increased public provision of crime detec-
of criminal justice services for the cattlemen was the cost of procuring the services. The relevant government had to be persuaded to adopt the necessary rules and then to appropriate the resources required to enforce the rules. We should expect the cattlemen to have chosen public provision whenever the cost of lobbying for the services was less than the cost of private provision. The question is thus when are the costs of lobbying for public provision going to be less than the costs of private service provision?

Livestock associations\(^3\) offered the cattlemen both a private alternative to public provision of criminal justice services and a means of collective action for lobbying. “These livestock associations exercised real government functions. The rules and regulations adopted by them were respected as law and were obeyed as faithfully as the statutes of any legislative body.”\(^4\) They confronted problems, such as raids by Indians, through cooperative efforts.\(^5\)

In Texas, private property rights in land were available, lowering the cost of private efforts. The state government was relatively costly to capture because of competing political interests, making the cost of procuring public provision of those services relatively high. Wyoming, on the other hand, lacked private property rights, raising the costs of private provision. In Wyoming “the stock-growing industry was in full command of the law-making department,”\(^6\) thus lowering the cost of public provision. In 1890, for example, eight of twelve members of the upper house of the legislature were members of the cattlemen’s association.\(^7\) As a result, the association often appeared to treat the territorial and state governments as instruments of power to gain advantages over farmers and small cattlemen.


\(^5\) Losses to Indians during 1880–81, for example, led a meeting of western Montana stockmen to offer rewards for the capture and conviction of traders selling alcohol to Indians. Paul C. Phillips, ed, 2 *Forty Years on the Frontier: As Seen in the Journals and Reminiscences of Granville Stuart* 156 (Arthur H. Clark 1925). The associations also hired their own guards to “look after Indians.” Id at 157.

\(^6\) A.S. Mercer, *The Banditti of the Plains or The Cattlemen’s Invasion of Wyoming in 1892 [The Crowning Infamy of The Ages]* 11 (Oklahoma 1954). See Ernest Staples Osgood, *The Day of the Cattleman* 42 (Minnesota 1929) (Wyoming’s story was so intertwined with the growth of the cattle industry “that the story of one is to a very large degree the story of the other.”).

\(^7\) Smith, *The War on Powder River* at 85 (cited in note 33).
A. Property Rights and Private Provision

Control of land was central to the cattlemen's ability privately to provide criminal justice services. Raising range cattle took a great deal of land—Texas longhorns, the primary type of cattle in the early days of the cattle kingdom, commonly ranged far enough to require "three or four hundred square miles of grazing territory, extending in all directions" from water sources.  

When the first cattlemen arrived in the various parts of the cattle kingdom, the land was empty. With the land technically owned by the federal government, the state government (in Texas), Indian tribes, or with unclear ownership, newcomers often simply helped themselves to whatever portion they desired. Thus, a man who wished to become a rancher rode until he found open country and chose a headquarters, usually along a stream. Within a few years, men with herds often numbering in the thousands turned their unsupervised cattle loose onto public lands in the fall to fend for themselves in the winter and gathered them in a spring roundup, collecting their increase.  

Federal land policy in the West created three important problems for the cattlemen. The first was that under federal policy they could not legally obtain sufficient land for cattle raising. Cattle raising required a minimum of four sections of land for an economically viable herd in the plains, for example, and only a quarter of that could be legally obtained. The difference with Texas is illustrated by the units

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38 Wellman, The Trampling Herd at 31 (cited in note 33).
40 T.A. Larson, History of Wyoming 164-65 (Nebraska 1965).
41 One solution to the problem of the unavailability of legal title was simply to take possession without regard to title. Cattle kings who bought railroad land, which alternated with public land along railroad rights of way, often simply fenced the public land with their adjacent property to reduce fencing costs. Id at 179. By 1887, for example, almost 250,000 acres of public land had been fenced illegally in Montana alone. Joseph Kinsey Howard, Montana High, Wide, and Handsome 108 (Yale 1959). Illegal fencing reached its peak in the mid-1880s and declined after a vigorous federal law enforcement campaign against the practice. Larson, History of Wyoming at 179-80 (cited in note 40). Federal officials went to work removing illegal fencing and cleared 135,000 acres in Montana during 1887. Howard, Montana High, Wide, and Handsome at 109.
42 Webb, The Great Plains at 393 (cited in note 39); Black's Law Dictionary 1356 (West 7th ed 1999) (A section is a parcel of land containing 640 acres). Indeed, Webb suggests that "little attention" was devoted to the size of the unit of land to be provided. Webb, The Great Plains at 407. Even as early as 1875, the federal General Land Office reported to Congress that "title to the public lands cannot be honestly acquired under the homestead laws" in the West. Report of Commissioner of General Land Office, H Exec Doc 1, pt 4, 44th Cong, 1st Sess 7 (1875). When the Congress finally did adjust the size of parcels available upward in the Desert Land Act of 1877, 19 Stat 377 (1877), codified as amended at 43 USC §§ 321-39 (1994), there was still insuffi-
used by the surveys: Texas’s arid lands were initially surveyed into 4,428 acre tracts in 1881, rather than 640 acre sections used by federal surveys.  

Second, federal land policy was based on a survey grid that took no account of the topography of the land or the availability of water. Dividing the arid lands of the West with a grid into square sections left many without access to water.

Third, federal policy encouraged homesteading, an activity incompatible with range cattle and one that introduced a group with no incentive to follow customary norms. The same homestead law that denied cattlemen adequate range “served as an effective bait which lured the farmers” west. Worse, homesteaders seeking protection for their crops against the cattle fenced off access to water, severely handicapping cattle’s ability to survive. Use of water for irrigation reduced the available water in streams and rivers for cattle as well.

An important consequence of the absence of private property in land was the lack of incentives for privately providing services like law enforcement. The vast distances and sparse population of the plains made it costly to provide law enforcement services. The government resources that were available, such as military posts, were often busy with other tasks such as enforcing federal Indian policy. As a result, public provision of criminal justice services on the northern plains was limited. Private provision was also limited. Without the ability to exclude people from the range, the only protective services possible were guarding the cattle or ex post investigations to support prosecutions.

Texas followed quite different land policies from the federal government. Texas used its lands, particularly the vast tracts of arid Panhandle and west Texas range, to fund projects, granting individuals and syndicates land as payment. Because “[m]ost of the grantees of these lands needed money more than they needed land,” they put their holdings on the market, allowing investors to purchase large consoli-

44 Howard, Montana High, Wide, and Handsome at 34–35 (cited in note 41).
45 It is important to be clear about what was not the problem of the open range—its appropriation by private individuals. From the Homestead Act of 1862, 12 Stat 392, codified at 43 USC §§ 161 et seq (1891), land policy in the United States was based on the idea that the public interest was best served by providing free land to settlers and gaining “the increased national prosperity and increased property values” that would result. Webb, The Great Plains at 404 (cited in note 39). Government revenues would come from taxes on prosperity, not from sale of lands (as they had before 1862). Id. That quite a bit of the public domain ended up in private hands was a shared national goal, not an objection to the cattlemen’s appropriations.
dated tracts. The state also leased public lands for grazing. Charles Goodnight, for example, was able to purchase enough land to create the 1,335,000 acre JA Properties. The XIT ranch (so named because it covered part or all of ten counties—“Ten in Texas”) was created when its owners “traded” a three million dollar state capitol building for three million acres. The development of barbed wire allowed these tracts to be fenced and so by 1882 Panhandle ranchers could not only buy land, they could effectively exclude others.

Where ranchers were able to get title to or lease land, they used their control to impose law and order. As J. Evetts Haley concludes in his history of the XIT, in a region so remote that the “law was so distant as to be impotent, ‘the [capitol] Syndicate’ was bringing development, law, and a measure of promise out of the desert.” The XIT imposed a code of behavior in 1888 that forbade gambling, carrying six-shooters, keeping private horses, running game with XIT horses, or drinking. It also warned cowboys “Don’t steal a beef for us! If you do we’ll fire you.” When the Texans had problems with law and order, it was often due to poor management and agency problems. Since the Texas ranches were owned outright, their owners were able to internalize the benefits of law production and, not surprisingly, produced more of it than the northern plains ranchers.

50 McNeill, *The McNeills’ SR Ranch* at 10–11 (cited in note 47). When the XIT obtained its land and began fencing it, it spurred the Panhandle’s other outfits to take similar measures. The XIT’s fence cut the LS outfit off from range it had used in Deaf Smith County, for example, and the LS took steps to acquire title to land as well. Dulcie Sullivan, *The LS Brand: The Story of a Texas Panhandle Ranch* 95–96 (Texas 1968). Because both the XIT and the LS held legal title to land, they were also able to solve boundary conflicts by trading land. Id at 96. Even where Texas had previously promoted settlement, cattle companies were frequently able to buy out settlers. Pearce, *The Matador Land and Cattle Company* at 23 (cited in note 48).
51 Lewis Atherton, *The Cattle Kings* 43–44 (Indiana 1961) (discussing the prohibition on alcohol, gambling, and fighting at certain ranches).
52 Haley, *The XIT Ranch* at 104 (cited in note 43). Ownership also brought investment in other improvements—the XIT ranch, for example, began fencing almost immediately and ultimately spent more than $180,000 on its outer fence alone. Id at 87–88; Wellman, *The Trampling Herd* at 289 (cited in note 33). The LS maintained a pack of seventy-five greyhounds to hunt wolves, investing in both a “mush-pot wrangler” to care for the dogs and improved kennels. Sullivan, *The LS Brand* at 151–52 (cited in note 50).
54 For example, the XIT’s early problems with rustling “largely grew out of the gross carelessness if not the sympathy of the first general manager.” When he was replaced by a more competent manager, the situation rapidly improved. Haley, *The XIT Ranch* at 109–11 (cited in note 43).
The availability of legal title in Texas also produced a different attitude toward settlement and farming. The Texas Panhandle ranches encouraged settlement because their owners realized they could profit from selling land to small holders. The XIT, for example, was owned by the Capitol Syndicate that envisioned its ultimate profit coming from land sales and viewed ranching as a stop-gap. Similarly the Espuela Land and Cattle Company promoted colonization. Even companies initially opposed to colonization, like the Matador, eventually came to see the potential economic gains. Having title also made resort to the civil legal system a realistic alternative to violence—the Matador company, for example, relied heavily on eviction proceedings to protect its range.

The cattle kingdom's experience with land is a textbook example of the impact of incentives on individual behavior. Where the cattlemen were able to obtain legal title to the land necessary to develop their interests, they used private property rights to amass land holdings. These holdings allowed them to internalize the benefits of providing services such as law enforcement. They were also able to internalize the benefits of development, leading to quite different attitudes toward settlement.

The second important lesson from the experience is the importance of externally imposed incentives on the ability of people to generate privately produced legal regimes. Again, the Texans largely succeeded because they were able to exclude other interests from the Texas range. The Wyoming ranchers not only could not exclude others, but were also subjected to a federal policy that actively encouraged immigration by people with incompatible interests. Had the Wyoming ranchers not faced the early competition by federally subsidized settlers, they might have had time to develop lasting customary institutions.

B. Rustling

Rustling was a serious problem with range cattle. Cattle turned loose on the range could be identified by branding and ear cropping.
but a cow converted to beef was almost impossible to identify. Cattle theft was thus hard to prove ex post. Although before improved stocks were introduced individual cattle were not particularly valuable, and some degree of appropriation of another's cattle was tolerated, rustling was much more than simply taking a steer here and there for dinner. Rustlers were highly organized in many instances. Wellman, for example, recounts how rustlers would earmark range cattle with the true owner's mark and turn them loose, in hopes the earmark would ensure the marked cattle would be skipped in the next roundup. The rustlers could then brand them and remark the ears at their leisure. Similarly rustlers would "brand" cattle with the correct brand, but apply it so lightly that it would not alter the hide. After the calf's hair shed, it could be rebranded. Stopping rustling thus required relatively sophisticated measures.

To enforce their property rights in cattle, cattlemen sometimes hired men to provide additional police services to supplement the inadequate activities of the state and local authorities. For a time, the Wyoming Stock Growers Association fielded a force of up to twenty-one private detectives on the range and private inspectors at shipping terminals to combat thefts, but financial pressures forced them to restrict severely these activities by the late 1880s. Rustling was hard to control through the formal legal system in part because the habits of the earlier times, when it was no crime to eat another's beef, persisted among juries and in part because the law was often physically too distant.

Like the northern plains cattlemen, Texas Panhandle ranchers were also plagued by well-organized rustlers. The Texans took several
steps to control rustling: they obtained the governor’s permission to hire “Home Rangers,” men with official status but paid by the local ranch (the men hired included Pat Garrett, who went on to be sheriff of Lincoln County, New Mexico and kill Billy the Kid); purchased advanced weapons that improved their men’s ability to shoot rustlers (the LS bought twelve 8mm Mannlicher Austrian Calvary guns, for example, capable of shooting accurately a quarter mile); and announced policies of shooting on sight at strangers spotted on ranch land without authorization. These measures proved effective. Because they owned their ranges, Texas ranchers were able to deploy such strategies successfully.

Although rustling was a serious problem across the northern plains, Wyoming stockmen were convinced they faced a particularly serious problem. In particular they thought that local juries’ sympathies for local defendants made obtaining a conviction almost impossible in the counties in north central Wyoming. A lack of credibility on the part of Association stock detectives among the general public also made convictions hard to secure—one juror reportedly told a prosecutor after a trial that he would not convict a dog on the basis of the testimony of such liars. Failure to secure convictions led the Association’s leaders to “the dangerous conviction that everybody was out of step but themselves—the press, the public, the juries, the judges.”

Several members of the Wyoming Stock Growers Association determined that “a lynching bee” was the way to resolve the conflict. An invasion of Johnson County in north central Wyoming by a combination of hired gunmen and trusted employees was chosen as the best method and planned for at least a year. Heavily armed and

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66 Id at 87-88, 151; Haley, The XIT Ranch at 112 (cited in note 43).
67 Larson, History of Wyoming at 189-90 (cited in note 40). The cattle kings were right that jury sympathy sometimes made it difficult to convict rustlers, although they exaggerated the extent of the conviction problem. The Association’s problems in obtaining convictions were not caused by juries being made up of rustlers, but because most settlers believed “that the Association operated on the principle of one rule for me and another rule for thee. The average citizen believed that stock-law violations were winked at when committed by favored members, while the same ‘mistake’ if made by an ordinary fellow would lead to his arrest.” Smith, The War on Powder River at 71 (cited in note 33). Smith and Mercer recount a number of incidents in which prominent Association members violated the law with impunity. Id at 71-75; Mercer, The Banditti of the Plains at 14 (cited in note 36). As a result, “[t]he cowboys were thoroughly disaffected by this time, even in sympathy with the rustlers and they had no intention of interfering.” Smith, The War on Powder River at 151.
68 Smith, The War on Powder River at 81 (cited in note 33).
69 Id.
70 Larson, History of Wyoming at 271-72 (cited in note 40).
71 William H. Kittrell, Foreward, in Mercer, The Banditti of the Plains at xxix (cited in note...
using a special twelve car train, the "Regulators" headed north from Cheyenne to Casper. The organization of the train "required great skill in organization and implied support in high places in the State, from the railroads, and in the army and War Department as well." Amazingly, the invasion force included two newspaper reporters.

After an unplanned day-long siege of the KC ranch that netted them only two "dead rustlers" and allowed their approach to be spotted, the Regulators found themselves pinned down. They managed to get word to their supporters of their predicament. Wyoming's two Senators, Joseph M. Carey and F.E. Warren, both allied with the cattle kings, personally joined acting Governor Barber's appeals, reportedly getting President Benjamin Harrison out of bed to order out the federal troops. Although the federal troops rescued the Regulators from the angry citizens and took them into custody, the Regulators escaped unpunished through a variety of legal maneuvers.

C. Evaluating the Cattlemen's Experiences

The experiences of the cattlemen in these two jurisdictions differ with respect to the level of violence. The level of violence was lower in Texas and higher in Wyoming. Innocent peoples' rights were rarely violated in Texas and frequently violated in Wyoming.

Part of the explanation for this difference lies in the differing incentive structures provided by the legal system. Land laws in particular were important. The northern plains suffered under laws that

36). 72 Sam Travers Clover, *On Special Assignment: Being the Further Adventures of Paul Travers: Showing How He Succeeded as a Newspaper Reporter* 234–35 (Argonaut 1965). The intentions of the men behind the invasion were made clear by interviews they gave in Denver while the invasion was in progress. Convinced their forces would triumph, one member of the "prominent cattlemen" told the *Cheyenne Daily Tribune*; "I am willing to give all the assistance possible to any body of men which will attempt to exterminate the rustlers." Mercer, *The Banditti of the Plains* at 35 (cited in note 36). H.B. Ijams, secretary of the Wyoming Board of Livestock Commissioners told another reporter that the invaders included some of "the best citizens of the whole state" who were going to Johnson County for "retribution." Id at 36–37.

73 Kittrell, *Foreward* at xxx (cited in note 71). Helena Huntington Smith concludes that the evidence confirms participation by many of the leading men of the state. Smith, *The War on Powder River* at 193 (cited in note 33). John Clay, a prominent cattlemen, later wrote that the planners "were backed by every large cattlemen in the state and behind them they had the moral influence of the two senators, Warren and Carey." Id. Certainly the invaders did not believe that the official legal system would offer a serious threat of punishment.

74 Smith, *The War on Powder River* at 197 (cited in note 33). Planning for the invasion included manipulation of the press. "A spate of articles began reaching the press of the nation, denouncing what was referred to as the 'reign of terror' in Johnson County." Id at 180.


were persistently broken in the West because they were not made for the West and were wholly unsuited to any arid region. The homestead law gave a man 160 acres of land and presumed that he should not acquire more. Since a man could not live on 160 acres of land in many parts of the region, he had to acquire more or starve.”

The incentive structures influenced the private institutions that the cattlemen used to solve many of their problems. They could not overcome the handicap that the homestead laws imposed, and so could not control access to the commons. “Not only were absurd laws imposed upon them, but their customs, which might well have received the sanction of law, were too seldom recognized. The blame for a great deal of western lawlessness rests more with the lawmaker than with the lawbreaker.” Further, as Webb notes, “All legislation was made in favor of the farmer; none was ever made for the cattleman, so far as the disposal of the public domain was concerned, except in Texas.”

The impact of the incentives provided by the government legal systems undermined the private legal regime in Wyoming and supported it in Texas. The Texans were able to internalize the benefits of private action; the people in Wyoming could not. This demonstrates that government-provided law can be determinative of the success of private legal regimes.

The story of the open range cattlemen strongly supports Benson’s analysis of criminal justice issues. As the brief sketch above illustrates, the key to successful private provision of criminal justice services rested in the various incentive structures. Where individuals had the ability to capture the benefits of their efforts at controlling crime, they were able effectively to provide criminal justice services. Where the institutional framework created incentives to undermine private action, they failed. Failure was not simply enduring a high crime rate, however. It led to higher levels of violence and rights violations. When such institutional failure coincided with relatively “cheap” opportunities to seize state power, it produced a disaster.

The story of the cattlemen also suggests some valuable lessons for crime control today. The success of the Texas ranches in solving their crime problem rested on their ability to exclude trespassers from their property. Not only did this give Texans the means to address the problem, but it also gave them the incentive to invest in technology that made exclusion a practical reality as well as a legal possibility. Barbed wire revolutionized the cattle industry not just by keeping cattle in but

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78 Id at 500.
79 Id at 428.
by helping keep trespassers out. The Wyoming cattlemen, on the other hand, could only invest in violence when their attempts to acquire legal title to land peacefully failed.

The current plight of high crime areas such as public housing projects is, in part, due to a similar failure to allow residents to exclude criminals and potential criminals from their neighborhoods. Gated communities provide the well-to-do with the ability to exclude; poor people need similar mechanisms to allow them to protect their homes and neighborhoods.

V. POLICIES FOR REAL PRIVATIZATION

The final section of Benson's book addresses two questions: (1) How did we ever get into such an enormous mess? and (2) What can we do about it?

The answer to the first question requires an understanding of criminal law's history. Benson traces the transformation of English criminal law from a restitution-based, essentially private system before the Norman conquest to the modern public system (pp 198-211). The central theme of the story is the Crown's desire to gain new sources of revenue by transmuting torts into offenses against the King's peace.

The increasing role of royal officers in prosecuting offenses had consequences for other parts of the criminal justice system as well (pp 211–22). The rules of evidence, the development of the criminal defense bar, plea bargaining, imprisonment, and many other features of the modern criminal justice system can all be traced to the kings' gradual displacement of the private system. Thus

[t]he evolution of England's criminal law system was altered by a long history of direct commands intended to serve the self-interested goals of kings, their bureaucrats, and politically powerful individuals and groups. These changes substantially weakened private citizens' incentives to participate in voluntary law enforcement arrangements and ultimately forced the government to provide bureaucratic alternatives. The fact that the state has taken such a prominent role in criminal law is not a reflection of the superior efficiency of state institutions, but a result of the state's undermining the incentives for private participation in criminal law (p 223).

What to do about this state of affairs is more difficult. Benson argues that the appropriate goal for criminal justice reform is "to ensure liberty and justice" (p 227). ⁸⁰ Reorienting the criminal justice system

⁸⁰ Efficiency is not the primary goal, something that may surprise some readers. A commu-
around restitution for victims is the means to this end because it also gets the incentives right for all the participants (p 227)."  

From the normative perspective of liberty, all individuals should be treated as free and responsible beings as long as they live up to their responsibilities to others (i.e. respect other people's property rights). Someone who, in the exercise of free will, intentionally violates another person's property rights through theft or violence essentially forfeits his own property rights (economic and civil) until justice is done. . . . Criminals should lose many of their own property rights unless and until they have restored the property they have taken, diminished in value, or destroyed. . . . [M]aking criminals responsible for their actions should mean making them responsible to their victims, and refusal to accept that responsibility should result in loss of all civil and economic rights (pp 228-29).

This is a far reaching prescription, essentially calling for outlawry for those who commit crimes and refuse to compensate their victims.

To provide proper incentives and promote justice, the focus must be on restitution. Prison sentences do not meet this criterion as they force both the criminal who does the time and taxpayers who foot the bill to "pay" for the crime, while leaving the victim uncompensated. "Justice for victims requires more than punishment as negative consequences are reflected onto the criminal. Justice requires that the negative consequences should also be deflected away from others. The criminal alone should pay" (p 232).

Many criminals cannot simply write a check to their victims. Or at least they cannot write a check that would not bounce. Others lack the skills necessary to earn enough income to make meaningful restitution payments. Those in prison lack the opportunity to find work at all. Understanding how criminals can make restitution requires examining alternatives to the current prison-based system (pp 232-33). Benson has a number of suggestions about how this might be accomplished; the main point is that restitution must become the focus of the system.

A restitution-based system raises a host of problems of its own. Victims, if given the power to determine how much restitution they are owed, may behave opportunistically and demand unreasonable

81 While incarceration or retribution could also be provided privately, neither provides appropriate incentive structures. Privately provided incarceration, for example, must depend on public funding (unless we want to impose yet another cost on victims). As a result it is under-priced from a victim's point of view, and victims will demand excessive incarceration.

nitarian reviewer, for example, was "surprised by the frequency of [his] own sympathetic reactions." David R. Karp, A Libertarian-Communitarian Bridge?, 10 The Responsive Community 78, 79 (Winter 1999-2000). Benson notes that efficiency is generally a complement to liberty and justice, but he is clear that when a choice must be made the latter should dominate.
amounts of restitution (p 236). Many societies have developed institutions that restrain such opportunism. Benson surveys practices from modern Japan, medieval Iceland, medieval England, Jewish law, and other sources to gather clues on how this can be accomplished. "The point is that the rules regarding restitution can be as complex and fine-tuned as the society wants them to be, and the precise rules that might evolve in a modern restitution-based system would naturally depend on the norms of the citizens of that society" (p 240).

Short of a revolution in criminal justice, what can be done to improve on the margins? Benson offers a number of suggestions for ways in which incremental improvements could be obtained. As elsewhere, the focus is on the incentives for the participants in the criminal justice system. Correcting the disincentives for preventative watching, for example, could significantly reduce crime at a modest cost (pp 263–71). Simple things, like assigning police to behave the way that private security firms do, focused on watching rather than detecting, are a start. Reducing barriers to entry for private security firms, to lower the cost of watching services, is another straightforward improvement. Promoting reporting of crimes by implementing steps that lower the costs of doing so to victims and witnesses can also help. Many of these policies are simple and cheap measures—assigning a single prosecutor to work with a victim throughout the investigation and prosecution, for example, prevents the cost in time and emotional energy of requiring the victim repeatedly to educate new personnel about the crime. Similarly, allowing private prosecutions would increase the number of prosecutions and therefore heighten the probability of punishment.

Benson's most controversial recommendations have to do with changes in punishment. Consistent with his focus on restitution, Benson suggests shifting the costs of punishment to criminals by requiring them to pay for their own supervision (pp 298–99). He also suggests marketing prison labor to increase criminals' ability to pay restitution awards (p 299). As Benson recognizes, these proposals are likely to draw opposition from powerful interest groups.

What will happen if society ignores Benson's recommendations? Benson offers a surprisingly upbeat assessment: "Privatization will occur to a large degree anyway" (p 317). The advantages of privatization and the costs of the failures of the current system have become too large to ignore. "The choice policymakers face is not between privatization and no privatization. It is between encouraging and supporting the privatization trend and attempting to thwart it, thereby perhaps slowing its evolution and diverting its path, but not stopping it" (pp 317–18).
As a society we spend a great deal of time and resources on criminal justice services. Public provision requires a consensus, which does not exist, on issues from what conduct is criminal to the goals of incarceration. Bruce Benson’s analysis suggests an alternative approach to these issues. A restitution-based, private criminal justice system offers a chance for the victims of crimes to secure justice. It offers neutral principles that guide the choice of conduct to criminalize. It promises efficiency in the delivery of the services.

Come the revolution, many interest groups and individuals will not like the world to which Benson’s analysis points. Moralists who insist on criminalizing consensual conduct that does not harm third parties will be disappointed that the law cannot serve as a club against those with different beliefs. Political pressure groups will be frustrated that they cannot secure special treatment for their favorite cause. Those enamored with symbolic politics will be left unfulfilled by the focus on actual harms. Others will find much to cheer. Victims, and potential victims, of crimes will gain new opportunities for restitution. Individuals will find new opportunities to create wealth, either as entrepreneurs or as investors in, or employees of, entrepreneurs who fulfill private roles in the criminal justice system.

Benson’s analysis also has much to offer short of a complete revolution in criminal justice. Understanding the importance of private inputs into the public provision of criminal justice services, and understanding the role of incentives in determining the level of those inputs, will enable policymakers to improve existing criminal justice systems. Understanding how privatization efforts affect incentives for participants, from victims to police to criminals, will enable those efforts to succeed more often. Paying attention to criminal justice’s private roots is thus critical to reform, whether piecemeal or wholesale.

The book has a larger message as well. This is a case where economics has a clear contribution to make to the study of law. The contribution is made without jargon, without mathematical hand waving, and without the sacrifice of the English language. In short, this is what economists ought to be doing about law (and other topics). Fortunately, more economists are attempting to write clearly and intelligently about law. Unless economists can reach noneconomists, they are doomed to speak only to one another. This book makes an excellent start at bringing the insights of economics on criminal justice issues to a wider audience.

82 See, for example, David D. Friedman, Law’s Order: What Economics Has to Do with Law and Why it Matters (Princeton 2000).