PRIVATE CRIMINAL JUSTICE

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The past few decades have seen the rise of two distinct, alternative approaches to criminal justice: private law enforcement initiatives and restorative justice programs. These two approaches arise from different causes—the first is an effort by private citizens to obtain greater and more responsive crime control; the second is a movement attempting to address the psychological needs of victims and perpetrators of crime—but they are strikingly similar in many ways. Both represent a return, roughly speaking, to the way in which criminal justice has been administered throughout most of our recorded history. Both have grown out of a failure of the public criminal justice system to satisfy the needs of potential and actual crime victims. Both advocate for a change in the focus of criminal law, away from retribution and incarceration, and toward a victim-centered approach grounded in restitution (with an attendant downplaying of so-called victimless crimes). Both employ streamlined procedures in apprehending and adjudicating criminals. And, although the private policing phenomenon and the restorative justice movement arise from different ends of the political spectrum, they share similar underlying philosophies.[1]

Together these two approaches are forging an alternative private criminal justice system, in the same way that an alternative dispute resolution industry has arisen in the civil law context. But this alternative criminal justice system is still in its infancy, and, although its contours are slowly taking shape, the system still contains gaps which must be filled in. Private criminal law, for example, has grown into an immense industry operating completely outside of the public criminal justice system, but it is currently limited to the law enforcement stage of the process. By contrast,

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1. *See infra* notes 58–64, 134–44 and accompanying text.

restorative justice programs impact the adjudicative process and the resolution stage, but their operation is almost wholly dependent upon state action. A viable private alternative to the public criminal justice system can be achieved only by combining these two approaches.

This alternative will not replace the public criminal justice system, just as the vast alternative dispute resolution industry has not replaced the public civil justice system. Rather, the private criminal justice system will provide a different option—or, more accurately, a set of different options—for the individuals who commit or are victims of crime. The public criminal justice system will always be present, adjudicating cases in which either the defendant or the victim does not wish to participate in the private alternative, and also serving as a default for the cases in which the parties fail to reach a resolution in the private system.[2]

Part I of this Article describes the failures of the public criminal justice system and shows how many of these failures are due to the public monopoly on the provision of criminal justice services. Part II chronicles the privatization of law enforcement, examining its dramatic growth and the limited response from scholars and lawmakers. Part III provides a brief summary of the theory and practice of the restorative justice movement. Part IV combines these two movements to demonstrate what a private criminal justice system would look like. Part V examines potential criticisms of a new private criminal justice alternative, and Part VI concludes the Article by briefly setting out suggestions for how an emerging private system of criminal justice should develop in light of these potential criticisms.

I. PUBLIC FAILURES, PRIVATE OPPORTUNITIES

On December 1, 1997, Thomas Cannon pled guilty to two counts of felony drug possession to cover two separate instances when he had been caught carrying less than fifteen grams of crack cocaine.[3] More than six years later, Cannon was arrested again after police recovered sixty grams of crack cocaine from an automobile he had

2. The public criminal justice system, like its civil analogue, will also serve two other, related functions. First, its failings (perceived or actual) will serve as an incentive for victims and criminal defendants to participate in the private system, since in many cases both parties will be better off in the private system than they would be after a public adjudication. Second, the public criminal justice system will continue to provide benchmark resolutions to similar cases so that victims and defendants participating in the private system will have some guidance as to what resolutions are reasonable.

3. United States v. Cannon, 429 F.3d 1158, 1161 (7th Cir. 2005).

occupied.[4] After Cannon was convicted, the trial judge sentenced him to twenty years in prison.[5] The prosecutor appealed the sentence, and the Seventh Circuit held that under the Federal Sentencing Guidelines, Cannon had to be sentenced to life in prison.[6] Although the Seventh Circuit questioned "whether life imprisonment is the best way to deal with repeat offenders who peddle retail rather than wholesale quantities," it conceded that its hands were tied by the sentencing laws.[7]

The public criminal justice system is failing. This is not to say that the public administration of criminal justice is on the verge of collapse, nor that it does not satisfactorily carry out certain necessary functions. But it is becoming increasingly clear that the public criminal justice system is inadequate on two counts: first, it makes almost no attempt to rehabilitate and reintegrate the perpetrators of crime; and second, it does not satisfy the needs of crime victims. And as we have seen in other industries, from education to postal services to resolving civil law disputes, a failure of the public system will inevitably lead to the development of a private alternative.

A. The Failure of the Public Criminal Justice System

It is an open secret that the public criminal justice system has essentially given up on rehabilitating convicted criminals. Rehabilitation, which was the hallmark of the corrections system for most of the 20th century, was abandoned in the 1970s,[8] to be replaced by an ever more punitive system which incarcerates defendants at an astonishing rate: the United States leads the world by imprisoning 750 people out of every 100,000 citizens, while almost every European country ranges between 100 and 200.[9]

Recent decades have seen a dramatic increase in the sheer

4. *Id.* at 1160.

5. *Id.*

6. *Id.* at 1160, 1161. Under the Federal Sentencing Guidelines, an individual with two prior felony convictions possessing over fifty grams of cocaine with the intent to distribute must be sentenced to life in prison. 21 U.S.C. § 841(b)(1)(A) (2000).

7. *Cannon*, 429 F.3d at 1161.

8. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 4–7 (1981).

9. The second most punitive country in the world is French Guiana, with 630 people imprisoned per 100,000 citizens. *See* International Centre for Prison Studies, Prison Population Rates, http://www.prisonstudies.org (follow "World Prison Brief" hyperlink; then follow "Highest to Lowest Rates" hyperlink) (last visited Oct. 20, 2007).

number of crimes,[10] as well as an increase in the severity of sentences handed out for each crime.[11] For example, a defendant sentenced in federal court in 1998 for a given crime would spend twice as long in prison as he would in 1984 for the same offense.[12] Furthermore, the sentencing process has become much more mechanical, with both the federal sentencing guidelines and the mandatory minimums imposed by many states replacing individualized, case-by-case judicial decision making.[13] The result is an extremely punitive public criminal justice system which responds to populist political movements and arguably serves neither the utilitarian nor the retributive goals of criminal justice theory.[14]

10. *See infra* notes 250–56 and accompanying text.

11. *See, e.g.*, Brent Staples, *Why Some Politicians Need Their Prisons to Stay Full*, N.Y. TIMES, Dec. 27, 2004, at A16 (criticizing the Rockefeller drug laws in New York, which mandate fifteen years to life for nonviolent, first-time drug offenders).

12. Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentencing Severity: 1980-1998*, 12 FED. SENT'G REP. 12, 17 (1999).

13. *See* Joshua Dressler, *The Wisdom and Morality of Present-Day Criminal Sentencing*, 38 AKRON L. REV. 853, 856–59 (2005).

14. *Id.* at 858 (arguing that federal and state sentencing laws result in "defendants [being] punished more than they deserve under any decent retributive system, and [punished] far more . . . than is necessary for utilitarian purposes"). Examples of overly punitive sentences imposed under both state and federal mandatory sentencing laws abound. For instance, under California's Three Strikes law, a defendant received a sentence of twenty-five years to life for stealing a magazine. People v. Romero, 122 Cal. Rptr. 2d 399, 404 (Ct. App. 2002). His prior convictions were for burglary, hit-and-run, battery on a peace officer, obstructing a peace officer, and lewd conduct with a child. *Id.* at 403–04. In an example of an overly punitive sentence under federal sentencing law, one defendant, with no prior record, was sentenced to fifty-five years in prison for three counts of carrying—not brandishing or using—a firearm in connection with a drug offense. United States v. Angelos, 345 F. Supp. 2d 1227, 1230, 1263 (D. Utah 2004). According to the district court, federal law mandated a five-year sentence for the first offense and twenty-five years for each subsequent offense of possession of a firearm in connection with a drug offense, on top of the sentence for dealing marijuana. *Id.* at 1232. The court imposed the sentence even though it found that the penalty was irrational and unjust because the court believed its hands were tied. *Id.* at 1261, 1265. In an effort to show the unjust nature of the sentence, the district court pointed out that those who hijacked an aircraft or committed second-degree murder or rape would receive lighter sentences under the sentencing regime. *Id.* at 1230. For information on the average sentences for different crimes, see MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2002, at 3–4 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf; GERARD RAINVILLE & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000, at 32–34 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc00.pdf.

Perhaps the greatest sign that the criminal justice system has failed on this count is that these long sentences and extraordinary incarceration rates have become normalized. It is no longer shocking that we lock up nonviolent offenders for decades at a time, or that millions of our citizens will spend part of their lives in prison; it is simply the way things are.

An outside observer considering these developments might be tempted to conclude that the skyrocketing incarceration rate has at least ensured that victims of crimes are satisfied with the system. Alas, this is not the case. Although crime rates have dropped dramatically in recent years,[15] they are still higher than in most other countries,[16] and a large proportion of the population still feels unsafe because of crime.[17] Furthermore, once someone becomes a victim of a crime, he is treated extremely poorly by the criminal law system.[18] The adjudication process is time consuming and draining

15. In 1994, the number of victims of violent crime was 51.2 out of 1000 people aged twelve and over in the United States. By 2005, that ratio dropped dramatically to 21.0 per 1000 people. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY VIOLENT CRIME TRENDS, 1973–2005 (2006), *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/viortrdtab.htm.

16. Violent crime rates in the United States tend to outpace violent crime rates in many other countries. For instance, from 1999 to 2001, the number of homicides per 100,000 people in the United States was 5.56, compared to less than 2 per 100,000 in Australia, Canada, Japan, Italy, Germany, France, and England, among others. GORDON BARCLAY & CYNTHIA TAVARES, HOME OFFICE, RESEARCH DEV. & STATISTICS DIRECTORATE, INTERNATIONAL COMPARISONS OF CRIMINAL JUSTICE STATISTICS 2001, at 10 tbl.1.1 (2003), *available at* http://www.csdp.org/research/hosb1203.pdf.

17. In 2005, 38% of the population reported that there was an area within a mile of their home where they would not feel safe walking alone at night (this number is down from a high value of 48% in 1982, but still higher than 1965, when it was 34%). SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.2.37.2005 (Ann L. Pastore & Kathleen Maguire eds., 2005), http://www.albany.edu/sourcebook/pdf/t2372005.pdf. Over 40% of respondents in a 2005 poll reported that they "frequently" or "occasionally" worried about having their home burglarized or their car broken into or stolen. *Id.* at tbl.2.39.2005, http://www.albany.edu/sourcebook/pdf/t2392005.pdf. The same poll found that 47% of the population avoids going to certain places they would otherwise want to go to because of a fear of crime, and that 23% purchased a gun to protect themselves or their home from criminals. *Id.* at tbl.2.40.2005, http://www.albany.edu/sourcebook/pdf/t2402005.pdf.

18. Because victims are not parties to the action, they are generally treated no differently from any other witness to the offense—and most witnesses are treated merely as tools in the overworked, underfunded criminal justice system. One observer described the process over thirty years ago: waiting "tedious, unconscionably long intervals of time in dingy courthouse corridors," being "ignored by busy officials," and returning time and again for criminal cases

for the victims and witnesses.[19] The multiple delays inherent in our criminal justice system are costly—financially costly for victims who must miss work and emotionally costly for victims who suffered trauma as a result of the crime and are seeking closure.[20] Most importantly, victims ultimately have no control over the adjudicative process or the outcome of the trial[21] because all real decisions are made by the judge or the prosecutor. Notwithstanding the long sentences meted out by the courts, underreporting of crime and low arrest and conviction rates lead to the perverse result that much of the criminal activity which occurs is not punished at all. Thus, taking into account the chances of being caught and successfully prosecuted, the average expected sentence for an individual who commits a serious felony may only be a few months.[22]

Given these failures of the public criminal justice system, it is not surprising that one survey found that seventy-five percent of

which keep getting adjourned without explanation—though each trip to the courthouse still could instill "tension and terror" at the thought of having to testify in open court against the defendant. Michael Ash, *On Witnesses: A Radical Critique of Criminal Court Procedures*, 48 NOTRE DAME LAW. 386, 390 (1972). "In sum, the experience is dreary, time-wasting, depressing, exhausting, confusing, frustrating, numbing and seemingly endless." *Id.*

19. *See* BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE 54 (1998). Benson notes that after having already suffered at the hands of the criminal, the victim must pay for transportation and related costs for the multiple trips to meet with the prosecutor and lost wages for the days spent preparing the case or at trial, in addition to the emotional and psychological costs of the process. *Id.*

20. *See, e.g.*, Paul G. Cassell, *Balancing the Scales of Justice: The Case For and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1402–05 (describing a sexual molestation case involving numerous children that lasted nearly nine months from arrest to plea, including over ten different court appearances). The Victim-Witness Coordinator on the case stated: "The delays were a nightmare [for the children involved]. Every time the counselors for the children would call and say we are back to step one. The frustration level was unbelievable." *Id.* at 1405 (quoting Interview with Betty Mueller, Victim-Witness-Coordinator, in Weber County, Utah (Oct. 6, 1993)).

21. The limited role of victims in criminal prosecutions has been one of the primary complaints of the victims' rights movement. *See, e.g.*, Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 123 (1984) ("Increasingly, demands are being made not only for better treatment of victims as witnesses, but also for expansion of the role of the victim beyond that of a witness."). As a result of the victims' rights movement, most victims have the right to be notified of the proceedings and to speak at sentencing. *See infra* note 109 and accompanying text.

22. One commentator has calculated that the expected sentence for an individual who commits a robbery is sixty-six days, while the expected sentence for an individual who commits a burglary is thirteen days. BENSON, *supra* note 19, at 69.

Americans were in favor of "totally revamping the way the criminal justice system works."[23] When a publicly run industry is failing to satisfy consumers to this degree, the rise of a private alternative is inevitable.

B. The Culture of Privatization

As it turns out, when we examine the criminal justice system in the context of the entire economy, the real question is not whether a private alternative should exist, but rather why it has taken so long for a robust private alternative to arise. It is hard to think of any other industry or area of the economy in which there is no private alternative to the public provisioning of services. From primary education to health care, from the delivery of the mail to the maintenance of roadways, nearly every segment of the economy gives individuals both a private and a public alternative. If receiving the service is deemed to be a fundamental right or, as in the case of crime control, if the service is believed to provide a positive externality to society, the state offers to deliver the service for free—either to everyone, or perhaps only to those who have demonstrated that they lack the ability to pay for the service themselves. Primary, secondary, and even college education fall into this category, as does health care, criminal legal defense services, provision of libraries, and a vast array of other social services. But even though these services are deemed to be so important that the state will guarantee them to everybody, there is a general consensus that those who wish to spend more money to obtain higher quality services should be able to do so. Although the state will always provide (and should always provide) a free public school education, it would seem quite radical to prohibit individuals from opting out of the public school system to purchase a private school education that was of a higher quality—or perhaps of the same quality, but better tailored to their perceived educational needs (for example, a smaller school, or one that focuses on teaching fine arts or science).[24] Even in the justice system, our society has chosen to create and maintain a robust public civil law court system, but also to allow parties the option of private alternative dispute

23. Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 19 (citing JOHN M. BOYLE, CRIME ISSUES IN THE NORTHEAST 1 (1999)).

24. In many of these cases—education, health care, criminal defense lawyers—the state plays an active role in regulating the private alternatives to ensure that they are of adequate quality and do not deceive or otherwise unfairly treat their clientele. Whether and to what extent this regulation would be necessary in a private criminal justice system will be discussed *infra* at notes 225–319 and accompanying text.

resolution systems which may be cheaper, faster, more flexible, or simply more responsive to the parties' needs.

And yet in the field of criminal justice, the conventional wisdom is that a public monopoly is necessary and appropriate. As a result, the provisioning of criminal justice services, at least beyond the field of law enforcement, remains the exclusive province of the state. This state of affairs is not only anomalous when compared to other types of services provided by the state, but it is also anomalous when compared to the provision of criminal justice services over the past one thousand years.[25] There are various historical reasons why the state has attained a public monopoly on the provision of these services, and, more to the point, there are strong arguments in favor of maintaining this monopoly.[26] But in the face of the growing failures of the public criminal justice system, the potential benefits of a private alternative, and the growing role of both private law enforcement and alternative dispute resolution programs for criminal cases, it is at least time to begin questioning these arguments.

It should be noted that when this Article discusses "privatizing" the criminal justice system, it is not referring to a total abandonment of the state's provisioning of criminal justice services. Such abandonment would be extraordinary as well as unprecedented: there is almost no segment of the economy which is completely privatized without any state involvement whatsoever. Thus, in creating a "private criminal justice system," this Article is not speaking of tearing down the current system of criminal justice and replacing it with a private alternative. Instead, this Article merely seeks to build an alternative private method of resolving criminal disputes that—if both the victim and the defendant choose to do so—could be used instead of the existing public system. Given the numerous problems inherent in the public criminal justice system, it is inevitable that both victims and defendants will demand to have such a choice. And because the emergence of such a system is inevitable, it is important to guide and shape the private criminal justice system at this critical stage in its evolution.

II. THE CURRENT STATE OF PRIVATE CRIMINAL JUSTICE

In a very real sense, the emergence of a private criminal justice system is not only inevitable, it has already begun. The law enforcement phase of criminal justice is already dominated by private security, which leads to countless arrests each year. But the privatization movement has not yet affected the rest of the criminal

25. *See infra* notes 39–57 and accompanying text.
26. *See infra* notes 105–11 and accompanying text.

justice system in any meaningful way, which leads to the crucial questions: what is happening—and what should happen—to these thousands of alleged criminals after they are apprehended by private police?

A. The Ubiquitous Private Police

The degree to which private entities have taken over law enforcement functions in this country is extraordinary. Today, the so-called "private police" are everywhere: conducting residential security patrols; monitoring shoppers in department stores; safeguarding warehouses; patrolling college campuses and shopping malls; and guarding factories, casinos, office parks, schools, and parking lots.[27] Companies hire internal security to monitor their own workers and investigate employee theft and to detect fraud on the part of their customers.[28] The rise of the Internet has created an entirely new branch of the private security industry, as companies, governments, and nonprofit organizations hire specialists to ensure

27. *See, e.g.*, Michael Barbaro, *Hot Off the Shelves: Shoplifting Gangs Are Retailing's Top Enemy*, N.Y. TIMES, Nov. 8, 2005, at C1 (discussing retail security efforts); Michael Leahy, *Crimes and Misdemeanors: High School Security Chief Wally Baranyk Says Most of the Wrongdoing in Suburban High Schools Goes on in the Shadows. So How Dark Does it Get?*, WASH. POST, June 4, 2006, at W08; Suzanne Smalley, *A Force of Their Own: Neighborhood's Private Guards Help Keep the Peace*, BOSTON GLOBE, May 26, 2006, at B1 (discussing residential security patrols); William Yardley, *Does it Work? Campus Security: Finding Safety in Numbers*, N.Y. TIMES, Jan. 8, 2006, at A18 (discussing security on college campuses). Among the many clients of the private police industry are government agencies: federal, state, and local governments relied on private security firms for forty percent of their security needs in 1995. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1177 (1999). However, the mere "contracting out" of criminal justice services to private individuals is not nearly as significant a phenomenon as true privatization—that is, when the criminal justice administration is under the complete control of a private individual or entity. *See infra* notes 95–99 and accompanying text.

28. For businesses of all sizes, "inventory shrinkage"—an industry term encompassing retail losses from customer and employee theft, administrative error, and fraud—represents a significant cost of doing business, a cost that rose to $33.6 billion in 2003. *See* Richard C. Hollinger, 2003 National Retail Security Survey Final Report, *available at* http://www.econo-security.com/produit.php?prod_id=117&detail=info&cat=101. Because employee theft and shoplifting constitute 47% ($15.8 billion) and 32% ($10.7 billion) of all retail losses, respectively, large retailers allocate a significant amount of time and money to store security in an effort to maximize loss prevention. *See id*. Likewise, the casino security establishment dedicates substantial resources to gaming enforcement, which also includes a sustained focus on employee monitoring. *See generally* GARY L. POWELL ET AL., CASINO SURVEILLANCE AND SECURITY: 150 THINGS YOU SHOULD KNOW (2003) (examining various aspects of casino security).

that their presence on the web is secure.[29]

The "clients" of the private police are not limited to the large corporations that own the casinos, office parks, and retail stores: frequently, a neighborhood will band together to step in where public policing has failed. In the Olympic neighborhood on the East Side of Los Angeles, for example, ordinary citizens and business owners were growing increasingly frustrated with the high number of burglaries and graffiti in their midst.[30] One business owner commented that the criminal activity "goes in spurts depending on the visibility of the officers in the Los Angeles Police Department," adding that the police were generally "shorthanded"—"even our police substation had been defaced with graffiti."[31] In response, the business owners formed the Business Watch, in which each of the forty members contributes $1,800 per month to pay for a private security company to patrol the neighborhood at night.[32] The result was a marked decrease in crime in the neighborhood.[33]

Although the immense breadth of the industry makes definite numbers hard to come by, it is undisputed that private security officers vastly outnumber public law enforcement officers,[34] and

29. In 2004, the multibillion dollar cyber-security industry's top worldwide firms—including, among others, Citadel, Citrix, McAfee, PGP, Qualys, RSA Security, and Symantec—formed an industry association, the Cyber Security Industry Alliance ("CSIA"), dedicated to "ensur[ing] the privacy, reliability, and integrity of information systems that power our global economy." Cyber Security Industry Alliance, Mission Statement, https://www.csialliance.org/about_csia/mission_statement/ (last visited Sept. 27, 2007).

30. Mary Anne Perez, *Community News: Boyle Heights; Groups Join Forces to Combat Crime*, L.A. TIMES, Oct. 2, 1994, at 11.

31. *Id.*

32. *Id.*

33. *Id.* The Chicago Alternative Policing Strategy ("CAPS") is another example of neighborhood-based private law enforcement. In the 1990s, the Chicago Police Department encouraged the creation of civilian "advisory councils" to help police high-crime neighborhoods. *See* Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1535–36 (2002). These councils organized marches and "positive loitering" in high-crime areas in order to reduce criminal activity; they also worked to gather evidence to shut down a noisy tavern and helped to convict a landlord whose tenements were being used for drug dealing. *Id.* at 1536.

34. Almost ten years ago, *The Economist* magazine reported that private law enforcement outnumbered public law enforcement by a three-to-one ratio. *Policing for Profit: Welcome to the New World of Private Security*, ECONOMIST, Apr. 19, 1997, at 21. The United States Department of Labor reported that in 2000, there were "more than 1.1 million" security guards and gaming surveillance officers and about 39,000 private detectives and investigators in the United States, compared to 834,000 public police and detectives. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 346, 349, 351 (2002). Another source states that there are two million private

spending on private security is approximately double the spending for public law enforcement.[35] For the most part, this growth has all occurred within the past three or four decades—only thirty-five years ago, there were more public police officers than private security guards.[36]

This stunning increase could be called revolutionary if it were not for the fact that it is actually just a return to the standard structure of law enforcement throughout most of our recorded history. In fact, the dominance of publicly provided security that occurred in the first half of the twentieth century is a relatively short-lived historical aberration.[37] The period of the early 1970s was both the first and the last time in which public security officials outnumbered private security forces.[38] To understand the evolution of the private and public police, it will be useful to review the history of the two entities.

1. Private Policing in Historical Context

The very idea of defining certain conduct as "criminal" first arose approximately one-thousand years ago. Before that, the tort/crime distinction that today serves as the foundation of criminal law did not exist. The eleventh century nation-state had virtually nothing to do with maintaining law and order—or anything else, for that matter. Kings did little except tax their citizens and wage war

guards and detectives. Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 191 (2005). Yet another states that as of 1990, there were three times as many private police as public police (two million private police officers and 650,000 public police officers). *Id.*; DAVID H. BAYLEY, POLICE FOR THE FUTURE 164 (1994). More recent statistics from the United States Department of Labor reveal that in 2006, there were over a million security guards and private investigators, as compared to only 624,000 public police officers. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, MAY 2006 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES 28, *available at* http://www.bls.gov/oes/current/oes330000.htm.

35. By the end of the 1990s, about $52 billion was spent on private security, while $30 billion was spent on public security. Boghosian, *supra* note 34, at 191.

36. *See* JAMES S. KAKALIK & SORREL WILDHORN, THE PRIVATE POLICE INDUSTRY: ITS NATURE AND EXTENT 34 (1971).

37. Although public police forces have been around since the late eighteenth century, *see* Sklansky, *supra* note 27, at 1200–01, they did not come to dominate the criminal justice system until the twentieth century. As one scholar has noted: "Throughout the nineteenth century, public policing remained an urban phenomenon. Statewide police departments were mostly nonexistent, and the federal government used private guards and detectives for its occasional police work; outside city limits there thus was virtually no public police protection." *Id.* at 1211 (citations omitted).

38. *See* KAKALIK & WILDHORN, *supra* note 36, at 34.

against each other, and only became interested in law enforcement when it became apparent that the criminal law could be another source of state funding.[39] In England, for example, King Henry I declared in 1116 that certain intentional torts—such as arson, robbery, and murder—would henceforth be considered crimes.[40] Thus, instead of the perpetrator being subject to a civil suit in which he would be liable to the victim for damages, the perpetrator's property would be forfeited to the state.[41] In addition to providing more revenue for the King, the criminalization of intentional torts was meant to cut down on instances of private retribution by the victim, a process which was seen as less legitimate than state action.[42]

However, even after the Crown decided to reclassify certain torts as "offenses against the King's peace"—thereby creating a criminal code—the responsibility for apprehending and even prosecuting the criminals remained a private responsibility for many centuries.[43] Before the nineteenth century, public criminal justice was essentially a form of "mandatory community service":[44] although most towns relied upon night watchmen to guard or patrol the community, these watchmen were unpaid and were simply ordinary citizens who served in the positions on a rotating basis; if any trouble occurred, they were meant to raise an alarm, at which point all citizens were required to assist in the arrest.[45] The watchmen did little besides "keeping an eye out for trouble, raising an alarm when it was spotted, and perhaps deterring some of it by mere presence."[46] They were also incompetent and poorly trained,[47]

39. JAMES F. PASTOR, THE PRIVATIZATION OF POLICE IN AMERICA: AN ANALYSIS AND CASE STUDY 34 (2003).

40. *Id.* Pastor goes on to note that "King Henry II went even further. He replaced the private, decentralized civil law with a public, centralized and politicized criminal law." *Id.*

41. *Id.*

42. *Id.* at 34–35.

43. *Id.* For a brief history of the private roots of prosecuting crimes, see *infra* notes 58–64 and accompanying text.

44. Sklansky, *supra* note 27, at 1195.

45. *See* PASTOR, *supra* note 39, at 35 ("Upon such a call to order, able-bodied men would respond to lend assistance when criminal actions arose, or when a criminal was to be pursued."). Pastor notes an interesting analogy between the traditional system of law enforcement and the current phenomenon of private police, whose duty is to "observe and report." "The theory behind observe and report is that the security officer . . . is to gather information about the criminal (or the crime) and then immediately report such to the public police." *Id.*

46. Sklansky, *supra* note 27, at 1198.

47. *See* PASTOR, *supra* note 39, at 36.

which led wealthier individuals to hire their own private guards, while the government offered large rewards for apprehending criminals (leading to professional informers or "thief-takers" who earned their money primarily by tracking down criminals and claiming the reward).[48]

The birth of widespread public policing did not occur in Great Britain until 1829,[49] and not in the United States until 1845.[50] Even then, private law enforcement remained dominant throughout the nineteenth century, particularly outside urban areas.[51] Corporations hired their own "company police" to protect their interests, while large private police forces (such as the Pinkerton National Detective Agency) provided patrol and investigative services to the growing nation.[52] But as the twentieth century progressed and public police supplanted private security across the country, police forces spread beyond the major urban areas as smaller communities, states, and even the federal government began to develop their own police departments.[53] Concurrent with this growth in numbers was a change in public attitudes towards the concept of public police forces. When these public forces were first introduced, they were met with great resistance from the general population, especially in the United States.[54] But eventually the increasing use of "private armies" to protect the interests of the railroads and other industrial age giants led to a backlash against private police forces.[55] This political fallout and the increasing professionalization of police departments led to a widespread belief that policing was an essential *public* function.[56]

As we have seen, however, the era of public-policing dominance was short-lived, as private policing enjoyed a spectacular rebirth towards the end of the twentieth century.[57] The widespread support for public policing remains in force, but it has been tempered somewhat as the inadequacies of purely public policing have become more apparent. Today, nearly everyone will agree that a strong,

48. *See* Sklansky, *supra* note 27, at 1197, 1199.

49. The Metropolitan Police Act was passed in 1829, which for the first time created police officers who were independent of the courts, uniformed, and full-time employees. T.A. CRITCHLEY, A HISTORY OF POLICE IN ENGLAND AND WALES 900–1966, at 47–57 (1967).

50. New York City established the first American police force in 1845. Sklansky, *supra* note 27, at 1207.

51. *See id.* at 1210–11.

52. *Id.* at 1211–17.

53. *Id.* at 1216–17.

54. *Id.* at 1202, 1206–07.

55. *Id.* at 1214–16.

56. *Id.* at 1219.

57. *Id.* at 1220–21.

competent public police force is a necessary element of our society—but nearly everyone will also agree that it should be permissible and is probably desirable to allow individuals to supplement public police protection with private security. The result is a law enforcement system which is predominantly private in nature, but which is supported by a robust public police force at its core.

2. The Roots of the Privatization Movement

Both the shift in attitude regarding public and private police and the dramatic growth in the private security industry can be traced to the failure of the public criminal justice system to satisfy the needs of the citizens. Primary among these needs is the need to feel safe and secure: if the public police are scarce or nonresponsive to crimes being committed in a certain company or neighborhood, the company or neighborhood will likely respond with its own measures to improve security by hiring private guards, contracting with a private security firm, forming a neighborhood watch association, etc. Frequently, the reason for turning to private law enforcement may be dissatisfaction not only with the *level* of response but also with the *outcome* or the *method* of the response.[58] The public police have their own agenda and goals, which may differ quite dramatically from the agenda or goals of the private entity. For example, the public police generally want to arrest the perpetrator and begin formal criminal proceedings against him, which usually culminates in a suitable punishment. This policy is derived from the standard goals of the public criminal justice system: retribution against those who commit crimes, incapacitation of offenders so that they cannot commit more crimes in the near future, and general deterrence by showing other potential criminals that committing a crime has negative consequences.[59] These goals

58. *Id.* at 1222. Sklansky notes that the failure of public law enforcement to provide "the amounts and the kinds of policing that many people want" explains two hundred years of private law enforcement "filling gaps in the police protection offered by public law enforcement." *Id.*

59. The fourth traditional goal of a public criminal justice system—rehabilitation—has become increasingly absent from modern day criminal justice policy relative to its position as the dominant theory in the nineteenth and early twentieth centuries. *See* Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343, 343–44 (2001) ("Very quickly, rehabilitation became a dirty word in American corrections."). *See generally* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981). *But see* NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 6 (2004) ("Commentators and others have tended to overstate the prior dominance of rehabilitation, as well as the modern failings of rehabilitative efforts and the general decline of the role of rehabilitation in sentencing."). However, the decline of rehabilitation's role in

can only be met if formal criminal proceedings are brought against the alleged perpetrator; indeed, the goal of deterrence is only achievable if the police regularly apprehend and initiate formal criminal procedures against a substantial number of criminals. In this sense, the criminal justice system is providing a public good: by expending large amounts of resources to apprehend and punish a significant percentage of wrongdoers, the system creates an expectation that committing a criminal action will (at least possibly) result in punishment.

A private entity, however, may not share any of these goals, at least not to the same degree. The "clients" of the private security industry—that is, the company who employs the private security force or the residents of the neighborhood who hire the security guards—may not care about retribution or incapacitation against any specific perpetrator; they only want to ensure that the perpetrator does not commit crimes which affect their company or homes. One method of advancing this goal would be to apprehend the perpetrator and hand him over to the police for formal criminal adjudication—but this is almost certainly not the most efficient method. By involving the public criminal justice system, the private entity loses control over the process, and the costs—both in time and money—to cooperate with the public police and courts can be significant. The private entity might be able to achieve its goals more efficiently by simply removing the perpetrator from the situation, either temporarily or permanently; ejecting or banning the perpetrator from the entity's jurisdiction; suspending or firing the perpetrator; and so on. The same calculus applies even more dramatically to the public good of general deterrence: the private entity will not be willing to invest the resources necessary to ensure that other potential criminals are deterred from committing similar crimes. The private entity has an interest in *specific* deterrence—"specific" in this context meaning deterring anyone from committing a crime against that particular private entity—but it is indifferent between shifting the criminal activity to another store or block and preventing the criminal activity altogether.[60]

modern sentencing has not resulted in a complete abandonment of the rehabilitative ideal in the formulation of current sentencing policy. *See* JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 37 (5th ed. 2004) ("Today, we tend to think of rehabilitation as an ancillary goal of penal incarceration, involving educational or therapeutic 'programs' in prison."); *see also* 18 U.S.C. § 3553(a)(2)(D) (2000) ("The court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.").

60. *See* Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. &

Beyond having different ultimate goals, a private entity might prefer that the *method* of law enforcement be different than the method used by the public police. For example, the private entity may want to use more subtle methods of law enforcement so as not to disturb other customers of the corporation or lower property values in the area. Noisy arrests inside a department store—indeed, even the presence of uniformed police personnel—may project an image that drives away potential customers.[61] Frequent drug busts in a neighborhood—with the inevitable negative publicity and high crime statistics that derive from arrests which are public records—may lower property values, thus damaging the interests of homeowners in the neighborhood.[62] Conversely, some private entities may want more blatant and ostentatious demonstrations of law enforcement: for example, local media coverage of multiple apprehensions inside a certain store might serve to deter would-be shoplifters, and frequent patrols of brightly marked cars inside a gated community might scare away potential burglars.[63]

In short, although the varying types of private police may share some characteristics (they generally tend to prioritize prevention over apprehension, for example), each private security force has a "client-defined mandate,"[64] and thus the goals of private law

CRIMINOLOGY 49, 86 (2004).

61. Professor Joh, who conducted a case study of a major private security firm, learned that there were many security issues in which a private firm would prefer the police not get involved. For example, if a suspicious abandoned attaché case is seen on the street, one of the directors of the private firm explained in an interview that he would want to take care of the situation before the police got involved:

> [The police will] want to shut everything down. But was there a phone call? Was there a letter? What are the chances that 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.

Id.

62. *See* Bernard E. Harcourt, *Policing L.A.'s Skid Row: Crime and Real Estate Redevelopment in Downtown Los Angeles [An Experiment in Real Time]*, 2005 U. CHI. LEGAL F. 325, 329.

63. *See* Sklansky, *supra* note 27, at 1222 ("Private police today . . . tend at least in broad outline to do the kinds of things that public police departments are faulted for *not* doing: patrol visibly and intensively, consult frequently with the people they are charged with protecting, and—most basically—view themselves as service providers."); *see also* Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 587 (noting that "what counts as deviant or disorderly behavior for private police is defined not in moral terms but instrumentally, by a client's particular aims: a pleasant shopping experience, a safe parking area, or an orderly corporate campus").

64. *See* Clifford D. Shearing & Philip C. Stenning, *Private Security: Implications for Social Control*, *in* UNDERSTANDING POLICING 521, 531–32

enforcement will vary depending on the needs of the client. This is another reason that private law enforcement is appealing to its clients—no matter how responsive and efficient the public police might be, by nature they cannot satisfy all of the various and perhaps conflicting preferences of private citizens.

B. Neglect by Legal Scholars, Lawmakers, and Judges

In spite of this explosive growth, the privatization movement in criminal law enforcement has not been accompanied by a complementary development of theory and law explaining and regulating the private security industry. Until approximately ten years ago, there was almost no legal scholarship on the issue;[65] in 1999, one author noted that legal scholars have tended to "ignore private security," and that, as a result, the field of private law enforcement was "terra incognita—wild, unmapped, and largely unexplored."[66] This deficiency is rapidly being rectified, and the last decade has seen a steady increase in law review articles attempting to explain, classify, justify, and criticize the dramatic increase in private law enforcement.[67]

Legislatures have been even slower to respond to this trend, and, as a result, there are virtually no statutes specifically designed to empower or regulate private security forces.[68] In a sense, this is

(K.R.E. McCormick & L.A. Visano eds., 1992).

65. Although economists and criminologists have been writing on this subject for decades, *see, e.g.*, PRIVATE POLICING (Clifford D. Shearing & Philip C. Stenning eds., 1987); PRIVATIZING THE UNITED STATES JUSTICE SYSTEM: POLICE, ADJUDICATION, AND CORRECTIONS SERVICES FROM THE PRIVATE SECTOR (Gary W. Bowman et al. eds., 1992), prior to that, most of the legal scholarship in the field had been done by law students, and most was quite limited in scope, generally arguing for greater regulation or stricter oversight of private law enforcement officers. *See, e.g.*, Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039 (1971); Gloria G. Dralla et al., Comment, *Who's Watching the Watchman? The Regulation, or Non-Regulation, of America's Largest Law Enforcement Institution, the Private Police*, 5 GOLDEN GATE U. L. REV. 433 (1975). It was not until 1999, when David Sklansky wrote the seminal article *The Private Police*, that the subject began to receive serious attention from the legal academic world. Sklansky, *supra* note 27.

66. Sklansky, *supra* note 27, at 1166, 1167; *see also* PASTOR, *supra* note 39, at ix ("[In 2001], private policing was not a mainstream issue . . . . In fact, the nuances of private policing, such as its functions and constitutional implications, were issues even most intellectuals had not given much thought to.").

67. *See, e.g.*, Boghosian, *supra* note 34; Joh, *supra* note 63; Joh, *supra* note 60; Clifford J. Rosky, *Force Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004); Sklansky, *supra* note 27.

68. One exception to this pattern is the widespread regulation of uniforms

not too surprising because there are surprisingly few statutes which empower or regulate *public* police.[69] Public police receive most of their explicit powers through grants of immunity: as long as police do not act in bad faith, they are immune from tort or criminal liability for assault, false imprisonment, and trespass.[70] Private security guards enjoy some of these immunities through what are known as "merchant's privilege" statutes,[71] but for the most part, statutory law treats private security guards no differently than any other private citizens.[72] Thus, if a private officer searches private

worn by private security forces. *See* Sklansky, *supra* note 27, at 1261. Many states have passed statutes to ensure that private security guards cannot be confused with public police. *See, e.g.*, MICH. COMP. LAWS § 338.1069 (2001) (stating that private security guard uniforms may not "deceive or confuse the public or be identical with that of a law enforcement officer"); TENN. CODE ANN. §§ 62-35-127 to -128 (1997) (prohibiting the use of the word "police" anywhere on a private security officer's badge). This emphasis is perhaps not too surprising given the history of controversy surrounding the uniforms of public police when they first came into existence. *See* Sklansky, *supra* note 27, at 1207–08.

69. One side effect of the increased academic interest in private police has been a reexamination of the source of public police power. As it turns out, most police powers are derived from cultural norms and common law. *See* Sklansky, *supra* note 27, at 1194–95. There are, of course, some explicit statutory grants of power: many states have statutes which direct when and how a police officer can make an arrest, *see, e.g.*, 725 ILL. COMP. STAT. ANN. § 5/107-2 (2006); N.Y. CRIM. PROC. LAW § 2.20 (2003); OHIO REV. CODE ANN. § 2935 (2006), and when and how they can apply for search warrants, *see, e.g.*, 725 ILL. COMP. STAT. ANN. § 5/108-3 (2006); KAN. STAT. ANN., § 22-25 (Supp. 2006); OHIO REV. CODE ANN. § 2933 (2006). Public police also derive some powers from statutes which lay out certain duties that private citizens have towards the police; for example, to obey and assist police officers under certain circumstances, *see, e.g.*, KAN. STAT. ANN. § 22-2407 (Supp. 2006); N.C. GEN. STAT. § 15A-405 (2006), and to acquiesce with a lawful or even unlawful arrest, *see, e.g.*, ALA. CODE § 13A-3-28 (2005); OR. REV. STAT. § 161.260 (2005). But these positive grants of power only represent a portion of the true scope of traditional police power.

70. The manifestation of police immunity most often comes in the form of traditional sovereign immunity statutes attributed to public officers of the relevant state. *See, e.g.*, GA. CODE ANN. § 50-21-25 (2006); OHIO REV. CODE ANN. § 9.86 (Supp. 2006). However, some statutes do address specific immunities of police in the exercise of their statutory duties, such as immunity from false arrest claims for recovery of a suspect detained by a private individual through citizen's arrest, *see, e.g.*, CAL. PENAL CODE § 847(b) (2006), or even broad immunity for exercising arrest authority in certain contexts, *see, e.g.*, MISS. CODE ANN. § 93-21-27 (2004); OR. REV. STAT. § 133.315 (2005). Likewise, private citizens acting upon command for assistance by a public police officer are most often afforded explicit civil as well as criminal immunity. *See, e.g.*, COLO. REV. STAT. § 16-3-202 (2006); GA. CODE ANN. § 16-3-22 (2007).

71. *See* Sklansky, *supra* note 27, at 1183–84.

72. This is not to say that private police are limited in their powers.

property without the consent of the owner, his action generally constitutes a trespass, and if a security guard wrongfully arrests or detains another individual, he may be exposed to civil and criminal liability for false imprisonment.[73] Of course, these restrictions are not the result of an intentional decision on the part of state legislatures to regulate and monitor the conduct of private police; rather, they apply by default as the primary form of regulation because legislatures have neglected to address the question.

Courts have also refused to apply the standard constitutional restrictions on law enforcement (such as the exclusionary rule and *Miranda* warnings) to private security forces.[74] This refusal is perhaps the most significant area of neglect, as the Constitution is the source of all significant limitation on public police powers, regulating how the public police conduct investigations, searches, arrests, and interrogations.[75] For this reason, it is useful to examine in some detail the reasoning behind the courts' abdication on this issue.

The Supreme Court has applied a version of the state action doctrine to the regulation of private police, using three factors to

Ordinary citizens, which of course include traditional private police, enjoy what is generically referred to as the right of citizen's arrest. In most states, this authority extends to arrests for felonies, and sometimes misdemeanors, that are either committed in the individual's presence or where the citizen possesses some other requisite knowledge of the criminal act. *See, e.g.*, 725 ILL. COMP. STAT. ANN. § 5/107-3 (2006); KY. REV. STAT. ANN. § 431.005(5) (1999); OHIO REV. CODE ANN. §§ 2935.04, .06 (2006). Private citizens—and private police—are also allowed to search a suspect if given consent and interrogate a suspect in order to obtain a confession. Private police are more aware of these powers than average civilians and therefore use them more often and more aggressively. *See* Lynn M. Gagel, Comment, *Stealthy Encroachments Upon the Fourth Amendment: Constitutional Constraints and Their Applicability to the Long Arm of Ohio's Private Security Forces*, 63 U. CIN. L. REV. 1807, 1837 (1995). Some private police, such as bail bondsman, have the same powers of search and arrest as police do. Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System,* 33 HOUS. L. REV. 731, 763 (1996). And, of course, all private police are free from the constitutional restrictions which limit the powers of the public police. *See infra* notes 74–85 and accompanying text.

73. Sklansky, *supra* note 27, at 1183. In one case, a woman brought a civil action against J.C. Penney for false imprisonment after two security guards accused her of shoplifting, brought her back inside the store, and held her in a room for twenty-one minutes. Barrows v. J.C. Penney Co., 753 A.2d 404, 405–06 (Conn. App. Ct. 2000). A jury awarded her $2000. *Id.* at 405.

74. *See, e.g.*, Sklansky, *supra* note 27, at 1232.

75. Indeed, much of the existing scholarship on the issue of private police addresses the question of whether private police should be immune from these constitutional mandates. *See, e.g.*, Joh, *supra* note 60, at 90–105; Sklansky, *supra* note 27, at 1230–69.

determine if state action is present: (1) the extent to which the actor relies on governmental assistance and benefits; (2) whether the actor is performing a traditional governmental function; and (3) whether the injury caused is aggravated in a unique way by the incidents of governmental authority.[76] At first, it seems as though most private security guards would qualify as "state actors" under these factors: they work closely with public police to perform their duties;[77] criminal law enforcement is arguably a "traditional governmental function";[78] and the injury caused by improper searches or coercive interrogations is certainly aggravated by the state when the tainted evidence is used to convict a defendant in court.[79] But as pointed out by Professor Sklansky, this argument ends up proving too much: if applied literally, it becomes nearly impossible to distinguish between private police and ordinary private citizens who happen to carry out a law enforcement function.[80] Public law enforcement provides assistance not just to private security companies but to many individuals and groups: commercial establishments, neighborhood associations, schools, individual citizens, and so on.[81] Even if we concede that policing is a "traditional governmental function" (and given the long history and current dominance of private policing, this may itself be a tough sell), why would the state action doctrine apply to private security guards who make arrests, but not to an ordinary citizen who makes an arrest? After all, by making the arrest, both are engaging in the same traditional governmental function.[82] The same argument applies to the "unique aggravation" prong—although the state may ultimately use its unique authority to punish defendants as a result of the actions of private security guards, it uses the same authority to punish defendants when any private citizen provides evidence to the courts.[83] Thus, given the current status of the state action doctrine for criminal procedure cases, there is no way to legally distinguish between private police and private citizens.[84]

76. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621–22 (1991).

77. *See* Joh, *supra* note 60, at 83–86.

78. Sklansky, *supra* note 27, at 1258–59 ("[I]f policing is not a public function, it is hard to imagine that much else is.").

79. *See* John M. Burkoff, *Not So Private Searches and the Constitution*, 66 CORNELL L. REV. 627, 666 (1981).

80. *See* Sklansky, *supra* note 27, at 1247–50.

81. *Id.* at 1252.

82. *Id.* at 1259–60 & n.530.

83. *Id.* at 1263–64.

84. Indeed, the state action doctrine in this area is so muddled that some commentators have argued that it should be abolished entirely, so that every actor, public and private, must abide by the same rules. *See, e.g.*, Erwin

Courts and scholars may yet find a way out of this doctrinal dilemma,[85] but for now and the foreseeable future, the private police remain safely outside the constitutional limitations on state power. It appears many citizens like it that way,[86] and there is little doubt that the clients of the private police are happier that their security forces are unfettered by constitutional limits. Indeed, this is one of the appealing aspects of hiring private security instead of relying on public police. Most scholars, on the other hand, appear to watch the spreading army of private police operating outside the Constitution's mandate with growing dismay.[87] But, as it turns out, the question may turn out to be far less important than it seems to be. Whether or not the evidence gathered by private security forces is admissible in the public courts might not matter much to the private police, nor to the individuals, organizations, and companies that hire them, nor even to the suspects that the private police apprehend.[88] This is because as often as not, those who employ private police decide to opt out of the public criminal justice system altogether and merely take their own private action against the alleged perpetrator.[89] Thus, the entire incentive system upon which the jurisprudence of the Fourth, Fifth, and Sixth Amendment relies—excluding evidence from court if it was improperly obtained—is ineffective with regard to the private police.

For this reason, the only effective way of monitoring and regulating the conduct of the private police is to turn to legislative

Chemerinsky, *Rethinking State Action,* 80 NW. U. L. REV. 503, 504–05 (1985). *But see* Sklansky, *supra* note 27, at 1270–73 (arguing that to "jettison the state action doctrine altogether in criminal procedure" would be "the wrong response"). This addition would, of course, mean that private police would be subject to the same constitutional limitations as their public counterparts.

85. It may be that scholars must do more work to help the courts in understanding this new phenomenon before courts are able to address the problem more rationally. The current lack of theory surrounding private law enforcement has certainly hobbled the courts, so that "when courts talk about private policing, they make unstated and sometimes erroneous assumptions." Joh, *supra* note 63, at 574–75.

86. As noted above, state regulation of private security guards is minimal, and there seems to be very little political pressure to change the status quo. And on one of the rare occasions when a state court did hold that the exclusionary rule applied to private police, the decision was overturned by a state proposition. People v. Zelinski, 594 P.2d 1000, 1006–07 (Cal. 1979), *superseded by* California Proposition 8 (1982), *available at* http://www.peoplesadvocate.org/prop8.html.

87. *See* Sklansky, *supra* note 27, at 1166–68.

88. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.8(a), at 219–20 (3d ed. 1996); *see also* Joh, *supra* note 60, at 118–20.

89. *See infra* notes 112–28 and accompanying text.

bodies. As noted above, some of this statutory regulation already exists: the tort and criminal doctrines of assault, trespass, and false imprisonment do apply to the private police—in fact, they form the primary, if not the exclusive, legal limitations on the power of the private police.[90] But, because the aggrieved citizen so rarely exercises these civil law rights—indeed, because this method of regulating conduct is completely dependent upon the unreliable initiative of aggrieved citizens in order to function—many commentators have called out for greater regulation.[91] But before we can even conceptualize what this regulation should look like, we should consider the broader perspective of private criminal justice.[92] More specifically, what happens to the suspect *after* he or she is apprehended by a private security guard? As we shall see, it is here that the evolution of the private criminal justice system has been stunted, with troubling results.

C. The Bottleneck and "Unofficial" Private Dispositions

At this point in the analysis, it is useful to divide the criminal justice system into three stages. The first stage is law enforcement, which is meant here in its broadest sense: patrolling and guarding a building or an area, investigation of criminal activity, and apprehension of suspected criminals. The second stage is the adjudication process: the procedure by which the system determines whether a crime has been committed, what the crime was, who committed it, and what the consequences should be. The final stage is the application of those consequences, which this Article will refer to as the disposition stage.

1. The Limited Scope of True Privatization

In the public criminal justice system, these stages are divided into specific spheres of influence: the police and other various local and federal agents conduct law enforcement activities; the courts (including the judge, prosecutor, and defense attorney) carry out the adjudication; and the disposition phase is either controlled by the courts (in the case of a probationary sentence or some other sentence short of imprisonment, such as a fine or a treatment program) or by a department of corrections, which runs the jails and prisons.

90. *See supra* notes 71–75 and accompanying text.

91. *See infra* notes 277–94 and accompanying text.

92. Without understanding the ultimate goal of those who employ the private police, efforts to regulate their conduct may be ineffective—as evidenced by those who call for application of the exclusionary rule to evidence obtained by private security guards, even though many of the clients of the private security guards have no intention of referring the case to the public courts.

Thus far, our discussion of a "private criminal justice system" has focused exclusively on the law enforcement stage of the process for the obvious reason that the privatization movement in criminal law has been confined almost exclusively to that stage. There is virtually no evidence of privately sponsored criminal adjudications, and for the most part, post-conviction matters remain under the control of state actors.

It is true that many aspects of the postconviction phase, particularly incarceration, are contracted out to private parties: approximately seven percent of prisoners in this country are serving time in a privately run correctional facility.[93] Private organizations also manage some of the treatment, counseling, and rehabilitation programs to which many convicted criminals are sentenced or referred.[94] But this type of "contracting out" does not in itself represent any significant change in the theory of criminal jurisprudence or in the provision of criminal justice services. As economists have noted, every single service that a government provides is to some extent "contracted out," because the government must hire a private individual on the open market to provide the service.[95] Thus, the only difference between a government agency that hires a corporation to provide security services or correction services and a government agency that hires and manages its own police force or prison system is that in the former situation, the agency is contracting for a bundle of services at once, to be managed and coordinated by a profit-seeking entrepreneur instead of a civil

93. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2004, at 5 (2005). As of 2004, over 98,000 prisoners in the United States were under private management. *Id.* The largest commercial provider of corrections services, Corrections Corporation of America ("CCA"), made approximately $1.2 billion dollars in revenue and controlled about 71,000 prison beds at the end of 2005. CCA claims to run the nation's fifth largest prison system, after Texas, California, the Federal Bureau of Prisons, and New York. *See* Corr. Corp. of Am., Annual Report (Form 10-K), at 32, 34 (Mar. 7, 2006), *available at* http://www.sec.gov/Archives/edgar/data/1070985/000095014406001892/g99938e10vk.htm.

94. For example, a defendant convicted of drug possession might be given probation on the condition that he or she attend substance abuse programs at Phoenix House, a national nonprofit organization, which treats approximately 5000 individuals a day in nine different states. *See* Phoenix House Facts, http://www.phoenixhouse.org/National/About/PhoenixFacts.html (last visited Oct. 20, 2007). A defendant convicted of domestic violence assault might be required by the court to complete an anger management program run by a private organization such as AngerHelp. *See* Court (Ordered) Anger Management Program, http://angerhelp.com/CourtProg.htm (last visited Oct. 20, 2007). In either case, however, the sentence is determined, monitored, and enforced by a public court.

95. *See, e.g.*, BENSON, *supra* note 19, at 16.

service bureaucrat. Both organizational structures have costs and benefits,[96] but in either case, a state agency ultimately controls the provision of services, which means a prison guard or a law enforcement officer is subject to the same rules and restrictions under the law whether he is hired directly by the state agency or by a company that is in turn hired by a state agency.[97] More importantly, the goals and policies of the police force or prison institution will be identical to the goals and policies of the state agency that is in charge, regardless of whether the services are managed and coordinated by a private corporation.[98]

In contrast, true privatization means that a private citizen or entity sets the rules, the goals, and the policies for the provision of the criminal justice services. The rules may be similar to those which regulate the public criminal justice system, but they probably are not. Likewise, as noted above, the goals of the private entities may happen to coincide with the goals of the public criminal justice system, but they likely will not.[99]

For example, when Wackenhut Services runs a juvenile detention facility for the federal government, it decides how to design the prison, how many employees to hire, how much to pay them, and what kind of training to give them. But Wackenhut's treatment of the prisoners must still abide by the statutory and

96. For example, the entrepreneur may be able to provide the same level of services more efficiently and therefore more cheaply, but might have an incentive to provide a lower-quality service if the consumer (the state agency) does not set sufficient standards in its contractual agreement. *Id.* at 27, 30. The bureaucrat, on the other hand, is immune from the temptation to cut costs in order to increase profits, but is no less immune to corruption and far less likely to innovate in order to increase efficiency. *Id.* at 27–28, 44–45.

97. For a discussion of the state action doctrine, see *supra* notes 76–84 and accompanying text.

98. Contracting out does present its own set of opportunities and challenges. A private company's drive to innovate can increase efficiency and thereby reduce costs in an industry which is, for better or for worse, growing dramatically and taking up larger portions of state and federal budgets. On the other hand, if contracts with private corrections companies are not structured properly, the private incentive to cut costs could lead to unacceptable conditions for the prisoners. *See, e.g.*, Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 460–62 (2005) (detailing "cost-cutting" measures by CCA such as rationing bread and toilet paper, or reclassifying maximum security prisoners as medium security, possibly leading to greater violence). Professor Dolovich also levels a more profound critique of the contracting out of state prisons, arguing that they fail to meet the two basic principles of liberal legitimacy, which are that the state must avoid punishments which are gratuitously inhumane or gratuitously long. *Id.* at 444–46.

99. *See supra* note 98 and accompanying text.

constitutional regulations set down for prison management,[100] and its purpose in providing the prison services is identical to the goal of the state agency that hired it, or more accurately, the incentives that the state agency put into the contract—that is, to rehabilitate the prisoners in order to facilitate their reentry into society, to punish them in accordance with the sentence that the state courts have found to be appropriate, and so on.[101] In contrast, when Macy's hires a guard to watch for shoplifters inside its store, or a neighborhood watch association hires a security company to patrol its streets, the private entities' undertakings are not bound by any of the constitutional restrictions which impede public entities (or private contractors working for public entities); they can search a suspect without probable cause or consent, for example, and they can elicit confessions without concern for *Miranda* rights.[102] If they flout these rules too radically, they may be unable to use the evidence which they recover in a subsequent criminal prosecution—but private law enforcement entities are frequently indifferent to the mandates of the public criminal justice system.[103] This indifference stems from the most important distinction between the truly privatized actors in the criminal justice system and those who are simply contracted out by the government: the goals of the truly privatized law enforcers are the goals of the private entity which hired them—which, as we have seen, may or may not be consistent with the goals of the public criminal justice system.

Once the "contracting out" services are excluded from the

100. There may be abuses, but these abuses are still the responsibility of the state entity that hired the private company, either in failing to set out the appropriate standards in the contractual arrangement, or the failure to monitor the actions of the private company for the duration of the contract. In other words, the failure of a state-contracted private corrections company to provide appropriate care for prisoners is doctrinally no different from the failure of a public civil servant (such as a warden of a public prison) to provide appropriate care.

101. As two leading economists on the issue of so-called "private" prisons have noted: "It is important to remind ourselves here that we are not discussing the legislative and judicial allocation of punishment, but only its delivery." MICK RYAN & TONY WARD, PRIVATIZATION AND THE PENAL SYSTEM: THE AMERICAN EXPERIENCE AND THE DEBATE IN BRITAIN 69 (1989).

102. Of course, these private law enforcement entities are still bound by the same laws that apply to any other private citizen, so they may not commit a crime or a tort (e.g., assault or kidnapping) against the suspect. But many states give private citizens significant powers when apprehending suspected criminals, and the professional private law enforcers are well aware of their rights and entitlements under the law. *See supra* notes 71–76 and accompanying text.

103. *See infra* note 111 and accompanying text.

privatization analysis, it becomes clear that private entities perform and control the overwhelming majority of the law enforcement duties in this country, but none of the adjudication and almost none of the dispositions in the criminal justice system.[104] The unstoppable privatization trend that we see in law enforcement has not reached the other two branches of the criminal justice system. There are two primary reasons for this discrepancy. First, violations of criminal law frequently result in incarceration, or in the threat of incarceration if an alternative sentence is not carried out. However, within the last one-hundred years, this country (as well as most western industrialized states) has achieved what one commentator refers to as a "monopol[y] of punishment, policing, and military force."[105] Thus, any attempt to privatize the disposition phase will potentially conflict with the state's monopoly of coercive power. Second, criminal law violations are fundamentally different than civil law violations, in that they involve a moral as well as a private transgression;[106] the perpetrator has not only harmed another individual, he has also broken the social contract. Indeed, for many crimes, there is no victim to be harmed (or the "victim" is a diffuse entity, such as all the citizens of a community or everyone who buys shares of a stock); thus, there is *only* a moral transgression to be

104. Some private entities have come up with ways to punish the accused without resorting to the public criminal justice system, with troubling results. *See infra* notes 112–133 and accompanying text.

105. Rosky, *supra* note 67, at 895–96. Rosky adapts Weber's concept of a "monopoly of force" and applies it to the private law enforcement context, noting that in the twentieth century, "[t]he West fought two world wars and developed a massive network of military, policing, and punishment institutions, which were characterized by unprecedented levels of specialization, professionalism, bureaucratization, and strength." *Id.* at 896 (citations omitted). As Rosky points out, however, this "monopoly," like the public criminal justice system itself, is a relatively new phenomenon historically: "[T]hroughout the [last] millennium, states periodically resisted the monopoly logic by making punishment, policing, and military force more private in many respects." *Id.* at 894–95. Rosky cites examples such as European privateers, mercenaries, mercantile companies, English thief-takers, American Pinkertonism, and convict leasing systems. *Id.* Although some of these examples were more accurately "contracting out" and not true private use of force, it is true that historically private entities traditionally enjoyed greater latitude in using force than they did in the early- to mid-20th century.

106. *See, e.g.*, Stephen P. Garvey, *Restorative Justice*, *Punishment, and Atonement*, 2003 UTAH L. REV. 303, 306–07 (distinguishing between "harms," which are torts in which an individual suffers material loss or bodily injury, and "wrongs," which contain an element of moral injury because of the intentional or reckless infliction of the harm by the perpetrator onto the victim, such that "all crimes do wrong, and some crimes also cause harm").

dealt with.[107] Although private parties can take action to remedy the private transgression (if one exists) by, say, seeking restitution or evicting the perpetrator, they cannot (and perhaps should not) take any action to remedy the moral transgression involved.[108]

2. The Backlog of Privately Apprehended Defendants

Whatever the reason, the result of this stunted privatization movement is that we are faced with a predominantly private law enforcement system, and a purely public adjudication and disposition system. Which leads us back to the crucial questions from the beginning of this Part: what is happening—and what should happen—to the thousands of alleged criminals who are being arrested by the private police? At first, the answers seem simple—so simple that many do not realize the significance of the questions themselves—the private police should contact the public authorities and give them custody of the accused, so that proper charges may be brought against them in the public courts. But there are at least two reasons why these answers fall short.

The first is that many of the same factors that drove private individuals, organizations, and companies to take law enforcement matters into their own hands—dissatisfaction with the public provision of these services, a desire for greater control of the process and the outcome, a frustration with the many legal and procedural obstacles which exist in state-sponsored law enforcement—apply with equal or greater force to the adjudicative and disposition

107. *Id.* Garvey cites, as an example, conduct which causes a risk of harm to another, but no actual harm, such as reckless endangerment. Other so-called "victimless" crimes might fit into this category—narcotics offenses, prostitution, gambling, etc.—in which the perpetrator is not harming any specific victim (at least not directly) but is committing a "wrong" because he is showing "contempt, not so much for anyone in particular, but for the law itself, which forbids such conduct. While the rest of us play by the rules, the offender behaves as if he is above them, free to do as he wishes." *Id.* at 307.

108. From a law and economics perspective, the moral transgression on the part of the defendant would require a significant sanction against the defendant in order to deter the behavior, particularly because many perpetrators are not caught. This sanction (if monetized) would almost certainly be more than the victim would deserve for the harm that he or she suffered; it would also frequently be more than the defendant could pay. Thus, it makes sense for the state to intervene in order to impose heavier sanctions, either by imposing a fine or community service (which is returned to the "community" that was offended by the moral transgression) or with incarceration, which does not unduly enrich the victim but (theoretically) provides the optimal amount of deterrence to would-be perpetrators. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 215–19 (6th ed. 2003). For further discussion of the harms/wrongs distinction, see *supra* note 107 and accompanying text.

phases of the criminal justice system. A victim—that is, the client who controls the private police—will receive little or no benefit from reporting the crime to the police, and may in fact incur a significant cost in being forced to assist in the prosecution of the case. Because the public system is focused on the defendant—and specifically, on punishing the defendant—the victim will invest hours of time and perhaps experience emotional trauma reliving the event—and in exchange, gets no control over the ultimate outcome and will likely receive no restitution from the defendant or the state.

The state, to be sure, has attempted to respond to these frustrations. In response to victims' advocacy groups, states have passed various victims' rights legislation, which generally give crime victims the right to be notified at certain stages of the proceeding and the right to be heard at a defendant's sentencing.[109] And, of course, every citizen has some "control" over the outcome of a criminal case, though it is very tangential: the prosecutors and judges who make the decisions are usually elected officials, and sentencing regimes themselves are constantly being fine-tuned by legislators to better reflect society's views on what each crime is "worth" and what factors should be taken into account in determining punishment.[110] But even so, given the incentive structure faced by any given victim, there will frequently be little reason to begin public criminal proceedings against the accused.

This limitation leads to the second reason why we cannot assume that the clients of the private police will simply turn the accused over to the public system: not only is it against their interest to do so, they are *in fact* not doing so. It is becoming increasingly clear that private entities are beginning to opt out of

109. *See* Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights*, 91 A.L.R.5th 343, 364 (2001) ("[A]lmost all states have enacted a wide variety of constitutional and statutory provisions under the rubric of victims' rights, which clauses have often been enacted by wide majorities." (citations omitted)). Many of these constitutional and statutory provisions give the victim a right to be heard at sentencing. *Id.* For example, in Alabama, crime victims are "entitled to the right to be informed, to be present, and to be heard when authorized, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the person accused of committing the crime." ALA. CONST. art. I, § 6.01.

110. *See, e.g.*, Clyde Haberman, *When It Comes to Drug Laws, the Jokes End*, N.Y. TIMES, Mar. 14, 2006, at B1; *A First Cut at Sentencing Reform*, N.Y. TIMES, Dec. 11, 2004, at A18 (detailing the changes being made to the Rockefeller drug laws in New York in response to public dissatisfaction with the laws). Just as is the case with private policing, frequently, different citizens may want harsher or more lenient sentences for the same crime, so that the state faces an impossible task when it tries to satisfy everyone.

the public criminal law enforcement system entirely and impose their own sanctions on the alleged perpetrators.[111] We are thus left with a steady flow of accused criminals emerging from the privatized law enforcement pipeline, a state which has reserved for itself the power to formally adjudicate and punish the alleged perpetrators, and a strongly held dissatisfaction with the method in which the state exercises its monopoly authority—all of which result in a backlog of privately apprehended criminals, many of whom are never handed over to the public system.

3. Private Responses to Criminal Activity

Given the state's well-established monopoly on coercive punishment, private entities that are dissatisfied with the public criminal justice system and seek to bypass public adjudication and disposition face limited options. Many times the private police merely stop the offending conduct and let the offender off with a warning.[112] If the private entities who employ the police believe that a greater sanction is warranted, they may direct the private police to execute a "sentence" that is within their private property rights to enforce: for example, ejecting the alleged perpetrator from the property (along with revocation of the suspect's right to reenter the property); fining, suspending, or firing an employee; or forcibly retrieving the stolen property.[113] Other private responses are more insidious. Consider two examples: civil demand letters and sexual predator websites.

Many major retail stores routinely send out a "civil demand letter" to any customer whom they catch shoplifting, seeking a payment from the alleged perpetrator for hundreds of dollars.[114] Technically these letters are simply offers to settle a potential civil lawsuit; if the alleged perpetrator does not pay, the store will simply

111. *See, e.g.*, Joh, *supra* note 63, at 589–91 (noting that Macy's department store only reported fifty-six percent of its shoplifters to the police in 2002); Joh, *supra* note 60, at 63 n.73 (detailing how, for a time, Greyhound Bus Lines' security guards in Tennessee routinely released persons possessing small amounts of drugs after seizing the drugs and destroying them).

112. *See* Joh, *supra* note 60, at 63.

113. *See, e.g.*, Joh, *supra* note 63, at 589–91 (noting that Macy's private response to shoplifters is to ban them from the store for seven years); Sklansky, *supra* note 27, at 1277 ("The sanctions in this private system range from dismissal or ejection, to a return of purloined merchandise, to fines or restititution extorted by the threat of a criminal complaint.").

114. *See* Bruce Mohl, *Retailers' Message to Shoplifters: Pay Up or Risk Prosecution*, BOSTON GLOBE, Dec. 11, 2005, at C1. According to the article, Filene's Basement, Home Depot, and CVS all send out these civil demand letters.

sue him for damages under tort law.[115] But the civil nature of the letters appears to be lost on everyone involved: a representative of one retail store says that the "fine" that the store is demanding is "the penalty for committing a crime."[116] Supporters of the program note that the shoplifter benefits from the procedure because by participating, he "avoids criminal prosecution."[117] A recent newspaper article on the topic is illustrative, *Retailers' Message to Shoplifters: Pay Up or Risk Prosecution*.[118]

Stores that send out these letters no doubt have no intention of bringing criminal charges against the recipients. Instead, these stores are indirectly using the public criminal law as a threat to coerce the recipients into paying a civil settlement. If the accused pays up, the store gets some amount of restitution—but even if not, there is some deterrent effect on the alleged shoplifter, thus helping to prevent further crime against the store.

Privately constructed dispositions are not limited to large companies, however; grassroots criminal justice initiatives are also getting in on the act. Consider the numerous private organizations that have sprung up to combat Internet crime.[119] Many of them act essentially as private law enforcement or victim support services, gathering tips and passing them on to the police, providing training and raising awareness on issues of identity theft and online child solicitation, and lobbying for changes in the law governing computer crimes.[120] However, some organizations have gone past the law

115. Many states have passed special laws that allow retailers to recover up to $500 in addition to actual damages—which might be negligible or nonexistent, especially if the perpetrator is apprehended and the property recovered. *Id.* The letters themselves are very clear in stating that they will not absolve the defendant of any criminal liability:

> In order to save you additional time and expense, a demand is hereby made upon you for $295.00. If we do not receive this payment within 20 days from the date of the letter, we may hire a local attorney to take all necessary legal steps, which includes a civil court action to collect the full amount allowed by the statute.
>
> IMPORTANT NOTICE: The payment of amount demanded of you releases you from further civil liability with respect to the above referenced incident, but does not preclude the possibility of criminal prosecution. However, the payment would not be admissible in any criminal proceeding as an admission or evidence of guilt.

(civil demand letter on file with author).

116. Mohl, *supra* note 114, at C1.

117. *Id.*

118. *Id.* The article accurately portrays the letters as "civil demand" letters, but notes that if alleged perpetrators do not pay the civil demand, they are "pursued in court"—and the article immediately segues into a discussion of the case load at the local district attorney's office. *Id.*

119. *See infra* notes 120–28 and accompanying text.

120. *See, e.g.*, Counter Pedophelia Investigative Unit, http://cpiu.us/ (last

enforcement stage and set up their own system of punishment. For example, volunteers at the website perverted-justice.com go online posing as children in order to lure potential "cyberpredators" into a conversation.[121] The volunteers then attempt (in role) to gather a photograph and contact information about the individual who is soliciting them, and representatives of the organization will then call to confirm the intentions of the potential child solicitor.[122] Once the organization is convinced of the individual's guilt, it will post the alleged perpetrator's name, contact information, and picture on their website, alongside a transcript of the sexually explicit chat the individual had with the volunteer.[123] The organization suggests the possibility of contacting the alleged perpetrators and their friends and families;[124] it also works with local and national media outlets to put some of the perpetrators on television.[125] Although Perverted Justice works with law enforcement, this is not its primary purpose.[126] Its goals are independent of the public legal system:

visited Oct. 20, 2007) (training parents about "safe" use of the Internet for their children, educating Internet users about the restrictions on child pornography, and lobbying for changes in state and federal laws on child pornography); WiredSafety, http://www.wiredsafety.org/information/what.html (last visited Oct. 20, 2007) (training internet users, parents, and law enforcement about maintaining proper internet security; "patrolling" the internet for "child pornography, stalkers, child predators, groups advocating child abuse and pedophilia, hate and bigotry sites and scam artists;" and soliciting tips online about various different cybercrimes).

121. Perverted Justice, http://www.perverted-justice.com/guide (last visited Oct. 20, 2007).

122. *See* Perverted Justice, http://www.perverted-justice.com/index.php?pg=faq (follow "Do you contact the men or do they contact you? A.+" hyperlink) (last visited Oct. 20, 2007).

123. Perverted Justice, http://www.perverted-justice.com/guide (last visited Oct. 20, 2007).

124. *See* Perverted Justice, http://www.perverted-justice.com/guide/?article=3 (last visited Oct. 20, 2007) ("[S]ending emails and letters and phone calls at appropriate hours (following rules of proper conduct) to alert interested parties is not illegal—as such we will not encourage or discourage it. How to respond—if at all—is something entirely left up to the reader.").

125. *See* Perverted Justice, http://www.perverted-justice.com/?pg=faq (follow "In regards to Media" hyperlinks) (last visited Oct. 20, 2007). Recently, the organization has teamed up with a national cable television show to film alleged perpetrators as they arrive at what they believe to be the house of the child they were soliciting, only to find police and television cameras. *See Dateline: To Catch A Predator* (NBC television series 2004–2007), *available at* http://www.msnbc.com/id/10912603. The group terms this kind of publicity "the court of public opinion." Perverted Justice, http://www.perverted-justice.com/guide/?article=3 (last visited Oct. 20, 2007).

126. *See* Perverted Justice, http://www.perverted-justice.com/index.php?pg=faq (follow "What is the goal of PJ? A.+" hyperlink) (last visited Oct. 20, 2007).

first, to privately punish those who attempt to solicit children by publicizing their actions; and second, to use this publicity to deter potential perpetrators from engaging in internet solicitation by "poisoning the well," so that individuals who may wish to engage in the conduct will abstain because of the fear that they will in fact be exposed by an adult volunteer posing as a child.[127]

Perverted Justice is only one example of the "public shaming" punishments imposed by private groups who wish to punish criminals. Residents of Chicago, for example, organized to picket the home of a slum landlord for two years in order to draw attention to the fact that his apartments had become the basis for gang activity.[128]

These examples of private criminal dispositions arise out of a dissatisfaction with the way the traditional public criminal justice system handles these cases. The statutes which allow retailers to recover extra damages against shoplifters were passed out "of frustration that it was difficult to get the courts to spend the time and effort to prosecute shoplifters."[129] The organizations that publicize the actions of those who solicit children online are acting out of a belief that the criminal justice system's response to the issue has been inadequate.[130] This same dissatisfaction also motivates other private entities who choose to punish suspects without the help of the public criminal justice, even if that "punishment" is simply evicting or banning the suspect from the entity's private property. In other words, the same forces which pushed private entities into hiring their own private police officers—frustration with the time-consuming and expensive process of a criminal prosecution and disappointment with the responses of the public

127. *Id.*

128. *See* Kahan, *supra* note 33, at 1536.

129. Mohl, *supra* note 114, at C1 (quoting Jon Hurst, president of the Retailers Association of Massachusetts).

130. Perverted-justice.com provides this description of the criminal justice system's response to one of the individuals they turned over to the police:

> Unfortunately, the law in California and the nation does not treat sexual solicitation of a minor as an offense that requires an abnormally high bail, nor do [sic] any state require such a criminal to remain in law enforcement hands until trial. Equally unfortunate is the system itself, damaged to allow multiple delays . . . meaning a predator like Chan [the defendant] can be out in the community nearly immediately after his arrest and depending on his attorney's tactics, possibly awaiting trial for years, not months. Potentially years without registered sex offender status, without any oversight. That's our criminal justice system, and there are no resources to keep up on these people as they await trial. Chan was able to make bail.

Perverted Justice, http://www.perverted-justice.com/opinions/?article=13 (last visited Oct. 20, 2007).

criminal justice system—are also pushing them to create alternative methods of resolving criminal cases once the private police make the arrest.

And what is the adjudication process which precedes these private resolutions? One of the most troubling aspects of the current private criminal justice system is that we know almost nothing about how private entities determine the guilt of those that are apprehended by their own police.[131] It is possible—perhaps even likely—that most such private entities use no adjudicative processes whatsoever; once someone has been apprehended by private law enforcement, he is presumed guilty and the private entity moves directly to sentencing. To be sure, there are a few private institutions, such as universities, which have an incentive to provide a formal or quasi-formal adjudicative process for individuals who are apprehended by private police[132]—but these are the exception rather than the rule.

In other words, while the private options for disposition are limited and haphazard, the private options for the "adjudicative" phase are almost nonexistent.[133] With no institutions in place to help the private entities determine the individual's guilt or level of culpability, private entities set their own standards, relying on their private police to conduct investigations and interrogations as they see fit in order to ensure that the accused is guilty. Once the private entity is convinced of the party's guilt, the process moves to the disposition phase without any procedure involving input from the

131. *See* Sklansky, *supra* note 27, at 1277 ("If we know little about the private police, we know even less about private adjudication.").

132. For example, the private police at Ohio Wesleyan University are charged with "uphold[ing] University policies and State and federal laws" and regularly make arrests for illegal activity, such as underage drinking, marijuana possession, and disorderly conduct. *See* OHIO WESLEYAN UNIVERSITY STUDENT HANDBOOK 2007–08, at 29, 35–39, *available at* http://campus.owu.edu/pdfs/20072008StudentHandbook.pdf. Once a suspect has been apprehended for one of these crimes (or for a violation of a University policy), he or she appears in front of a "Judicial Board" of five students, which adjudicates the case and decides on the appropriate punishment. *See* OHIO WESLEYAN UNIVERSITY CODE OF STUDENT CONDUCT 2007–08, at 29–33, *available at* http://campus.owu.edu/0607Conduct.pdf.

133. There have been some examples of states contracting out the adjudicative procedures. For example, the city of St. Louis formed a partnership with local businesses in which the businesses would pay for a special court for "quality of life crimes" that occurred in the area. Any community service ordered by the judge would be designed to benefit the businesses who paid for the court. Although this was not a true "private adjudication" (since the client was the state), the arrangement was struck down by a state court. *See* Missouri v. Bonner, Order Granting Summary Judgment, Missouri Circuit Court 044-250 (Sept. 24, 2004) (on file with author).

defendant or from the community.

In short, restricting the privatization movement to the law enforcement phase has resulted in a suboptimal situation for everyone. Private entities that opt out of the public system face limited options as to what to do with the suspects they apprehend. The accused are punished without any chance to prove their innocence or provide input into the sentencing process. And the entire operation takes place out of the public eye, with no community input. All parties could benefit from institutionalizing a private system of adjudication and disposition. In order to determine what this system might look like, we must examine another alternative criminal justice movement which has arisen over the past few decades: restorative justice.

III. RESTORATIVE JUSTICE

Like the rise of private police, restorative justice has gained adherents because victims and defendants have been frustrated with the failure of the traditional criminal justice system to meet their needs. But while the privatization movement has been limited to the law enforcement phase, restorative justice addresses the next two phases of the criminal justice system: adjudication and resolution. Also unlike the privatization of law enforcement, restorative justice has inspired a large body of legal scholarship.[134] What follows is a very brief summary of the basic tenets and philosophy of restorative justice, as well as an examination of how these principles have been applied in practice.

A. Restorative Justice Theory

Restorative justice represents a serious paradigm shift in how society responds to criminal behavior.[135] The traditional criminal

134. A LexisNexis search shows seventy-nine different law review articles with the term "restorative justice" in their title and over three thousand with the term "restorative justice" somewhere in the text. One commentator notes that in 2005, there were "more than 750 articles in law journals and hundreds more in other related journals" dealing with restorative justice topics. Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 254 (2005).

135. As restorative justice theorists are quick to point out, however, the theory of restorative justice is anything but new:

> Signs of restorative justice have, for example, been detected in the practices of 'ancient Arab, Greek, and Roman civilizations,' of the 'Germanic peoples who swept across Europe,' not to mention 'Indian Hindus as ancient as the Vedic civilization . . . and ancient Buddhist, Taoist, and Confucian traditions.' Likewise, restorative justice has been discovered in the practices of the 'Aboriginals, the Inuit, and the native Indians of North and South America.

justice system focuses on the defendant, imposing a penalty upon him in order to punish him for past wrongdoing and to deter him from future criminal actions. Restorative justice focuses on both the defendant and the victim, seeking (as the name implies) to restore the affected individuals to their precrime condition.[136] The theory is not to punish the defendant, but rather to lead him to atone for his crime, work to repair the damage he has done, and reintegrate him into the community. Restorative justice has been defined as "a process to involve . . . those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible."[137] According to John Braithwaite, the leading restorative justice theorist, "restorative justice is about restoring victims, restoring offenders, and restoring communities."[138] The ideology is quite distinct from the traditional criminal justice mentality; as proponents of restorative justice put it, the goal is to "find[] hope, meaning, and healing in the process of creating justice and promoting accountability."[139] Howard Zehr, a leading proponent of the restorative justice movement, has set out the primary ways in which restorative justice differs from traditional criminal justice:

Criminal Justice	Restorative Justice
Crime is a violation of the law and state	Crime is a violation of people and relationships
Violations create guilt	Violations create obligations
Justice requires the state to determine blame (guilt) and impose pain (punishment)	Justice involves victims, offenders, and community members in an effort to put things right
Central focus is offenders getting what they deserve	Central focuses are the victim's needs and the offender's responsibility for repairing harm.[140]

Some of the outcomes of restorative justice—forcing the

Garvey, *supra* note 106, at 304.

136. Some restorative justice programs also attempt to restore the community to its precrime condition. *See* Lawrence W. Sherman, *Domestic Violence and Restorative Justice: Answering Key Questions*, 8 VA. J. SOC. POL'Y & L. 263, 268–69 (2000) (describing broad participation by victims' family members and other community members in restorative justice processes).

137. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 37 (2002).

138. JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 11 (2002).

139. *See* Umbreit et al., *supra* note 134, at 254.

140. ZEHR, *supra* note 137, at 21.

defendant to pay financial restitution to the victim, to attend a drug treatment program, or to perform community service—are also part of the traditional criminal justice system, but that is where the similarities end. The process of restorative justice is generally informal, without lawyers or judges present, and involves the victim and the defendant sitting together with a mediator and telling each other his or her respective story.[141] After the victim explains how the crime has affected her life, the defendant explains his own actions and (hopefully) takes responsibility for the crime he has committed.[142] The two of them together then attempt to create a plan which will make the victim whole again.[143] As restorative justice proponents concede, this is an aspirational goal because many times a crime victim cannot be truly restored to the emotional, psychological, or even material condition which she enjoyed before the crime occurred.[144]

A diverse collection of interest groups support the restorative justice movement. Many proponents are drawn to the theory because it focuses on rehabilitating and thus reintegrating the perpetrator—goals which have been all but discarded by the traditional criminal justice system.[145] On the other hand, victims' advocates have been supportive of restorative justice programs because—again in contrast to the traditional criminal justice system—it allows the victim to play a central role in the process and in the outcome.[146]

Perhaps the most surprising lesson from the small but growing restorative justice movement is in the substantive sentencing

141. *See* Gordon Bazemore & Mark Umbreit, U.S. Dep't of Justice, *A Comparison of Four Restorative Justice Models*, JUV. JUST. BULL., Feb. 2001, at 2, *available at* http://www.ncjrs.org/pdffiles1/ojjdp/184738.pdf.

142. *Id.*

143. *See* MARK S. UMBREIT, MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE 140–45 (1995).

144. *See* Sherman, *supra* note 136, at 268 ("Certain kinds of harm are clearly irreparable, and beyond any meaningful exchange of value. This may even be more true of emotional harm than of physical harm."). Professor Sherman gives the example of a husband who hits his wife; the defendant can pay for medical treatment to heal the physical injuries, but "there can never be the same level of trust and security that there was prior to that first assault." *Id.*

145. *See* Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 755 (2000).

146. *See, e.g.*, Umbreit et al., *supra* note 134, at 254 ("Most contemporary criminal justice systems focus on law violation, the need to hold offenders accountable and punish them, and other state interests. Actual crime victims are quite subsidiary to the process and generally have no legal standing in the proceedings.").

results that it produces. During the last few decades, the traditional criminal justice system has grown more and more punitive—ratcheting up minimum sentences, annually setting new records for prison population, criminalizing more and more types of behavior—while the restorative justice movement has grown in popularity by giving victims exactly the opposite.[147] There are a number of ways to explain this dissonance: perhaps the recent politicization of crime has had the effect of overemphasizing "tough on crime" policies beyond what many citizens actually believe is appropriate; or perhaps the dissonance simply reflects a true split in the country as to how best to deal with crime. Either way it is clear that, as in the law enforcement context, the punitive sentencing policies of the traditional criminal justice system are not providing the results that many victims want.[148]

However, the restorative justice revolution is more fundamental than a change in sentencing policies. The theory of restorative justice focuses on the process as much as—and perhaps more than—the outcome. Restorative justice programs allow both the victim and the defendant an opportunity to do what the traditional criminal justice system denies them: the ability to tell their stories to each other directly and to work together to try to repair the damage—whether physical, material, or psychological—which the crime has caused.[149] Thus, restorative justice programs fundamentally change *the way* criminal cases are resolved, in addition to changing the substantive resolutions themselves.

There is evidence that this change in process is the true secret to the success of restorative justice programs. In recent decades, psychologists have devoted a significant amount of study to determining what aspects of dispute resolution lead the participants to believe that they are treated fairly. The first and most surprising result of these studies is that whether or not an individual believes he or she was treated fairly depends primarily on whether or not the individual believed the *procedure* was fair, not on the actual substantive outcome of the case.[150] Thus, psychologists have worked to determine what aspects of procedure led the participants to

147. *See* Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 400 (2006); Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, 1998 W. CRIMINOLOGY REV. 1, *available at* http://wcr.sonoma.edu/v1n1/umbreit.html.

148. Many victim advocates acknowledge that victims could have both an interest in restitution and an interest in retribution. *See* Gittler, *supra* note 21, at 136–41.

149. *See* Strang & Sherman, *supra* note 23, at 27.

150. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 74 (1990).

believe the dispute resolution system was fair and legitimate.[151]

Studies in this field of "procedural justice"[152] have demonstrated that there are three factors that determine whether or not an individual believes that a given procedure is fair.[153] The first is known as "process control," which is the individual's opportunity to participate in the procedure, whether or not their participation affects the actual outcome.[154] The second factor is whether the participant views the decision maker as neutral and unbiased—that is, whether the rules are impartially followed and the decision maker appears motivated to be fair to both sides in a given case.[155]

151. Citing six separate psychological studies, Professor Tyler notes that:

> Recent research confirms that people evaluate their experience in procedural terms. Such procedural effects have been found in trials as well as in other procedures used to resolve disputes, including plea bargaining, mediation, and decision making by police officers . . . . Wherever procedural issues have been studied they have emerged as an important concern to those affected by the decisions.

Id. (citations omitted). As Professor Tyler explains, there are two potential reasons for this focus on process rather than on substance. First, in a complex society, individuals receive a diverse variety of benefits (from monetary benefits to clean and safe streets) and pay a similarly diverse variety of costs (from paying taxes to having liberty restricted to a certain degree). Because it is impossible for any individual to keep track of all of the benefits received and all of the costs paid, the individual finds it easier to focus on the procedure itself and evaluate its fairness. If procedures are generally fair, the individual will conclude that in the long run he or she will pay and receive a just distribution of costs and benefits. The second possible explanation is that in a diverse society, individuals may disagree on what constitutes a just distribution of substantive benefits and costs, but can generally agree on what constitutes fair procedure. *Id.* at 109. As will be shown *infra,* the preference for a fair and meaningful process over any specific substantive result has been confirmed in the restorative justice context. As one restorative justice proponent has noted: "Several studies have consistently found that the restitution agreement is less important to crime victims than the opportunity to talk directly with the offender about their feelings regarding the crime." Umbreit, *supra* note 147.

152. The name of the discipline is misleading, since the studies are only focused on the *perception* of fairness and not the *actual* fairness of the process. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 119 (2000).

153. *Id.* at 121.

154. *See, e.g.*, E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990). One study found that allowing victims to testify at sentencing hearings increased the victim's perception of the fairness of the process even if their arguments had no effect on the ultimate sentence given to the defendant. *See* Anne M. Heinz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC'Y REV. 349 (1979).

155. *See* TYLER, *supra* note 150, at 122; Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, *in* 25 ADVANCES IN EXPERIMENTAL

The final consideration is whether the individual is treated with dignity and respect during the process.[156]

Restorative justice programs satisfy the first and third criteria, especially when compared to the traditional criminal justice system. Defendants and victims get a chance to participate fully in the restorative justice process, and a major tenet of restorative justice is recognizing the humanity and dignity of all the participants—treating both victim and the defendant as individuals with significant needs and limitations.[157] By contrast, in the traditional criminal justice system, nearly all of the cases are resolved through plea bargaining between a prosecutor and a defense attorney, a process in which victims and defendants almost never participate. Even if the case goes to trial, the victim and the defendant only participate in a very limited way, by testifying as witnesses under strict and formal rules. Both the victim and the defendant frequently find the criminal justice process rather dehumanizing; the victim may feel like simply a tool the prosecution uses to obtain a conviction (which essentially is the case), while the accused is merely another faceless defendant to be processed in the vast criminal justice machinery.[158] Whether or not the decision maker—or in the case of restorative justice programs, the mediator—is seen as neutral and unbiased may vary widely depending on the specific program. As we will see, the success of restorative justice programs—and probably the success of any alternative to the traditional criminal justice system—depends in large part on the identity, training, and behavior of the mediator.[159]

Overall, however, restorative justice programs score quite high on the procedural justice metric, and surveys of restorative justice programs back up this observation. Restorative justice participants—both defendants and victims—tend to be extremely satisfied with the process, with a satisfaction rate of between ninety and ninety-five percent.[160] Nor is this high level of satisfaction due

SOCIAL PSYCHOLOGY 115 (Mark P. Zanna ed., 1992) (explaining the preconditions for the effective functioning of authorities).

156. *See* TYLER, *supra* note 150, at 122.

157. *See* Umbreit et al., *supra* note 134, at 256.

158. Strang & Sherman, *supra* note 23, at 18.

159. *See infra* notes 178–80 and accompanying text.

160. *See* John Braithwaite*, Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, *in* 25 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1 (Michael Tonry ed., 1999). A 1997 survey of victims who participated in the Polk County, Iowa Victim Offender Reconciliation Program found that ninety-six percent of victims stated they would choose the program again and would recommend it to other victims. Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 FORDHAM URB. L.J. 1651, 1654 (2000).

to self-selection—even when cases are randomly assigned to courts or to restorative justice programs, satisfaction levels and perceptions of fairness are higher for participants in the restorative justice programs.[161]

Of course, just because most victims and defendants *believe* that restorative justice programs are more fair does not make them so. Obviously, the question of whether victims or defendants are *in fact* better off in an alternative criminal justice system—whether purely privatized or a restorative program sponsored by the state—is a critical one, and will be discussed *infra*.[162] But the issue of perceived fairness should not be overlooked, since it is critical to the legitimacy—and therefore to the long-term survival—of any criminal justice system. In other words, even if the traditional criminal justice system were to utilize procedures and produce outcomes which all of the experts agreed were fair and just, the system would have no long-term viability if the individuals within the system—victims and defendants—perceived it to be unfair. The procedures inherent in the traditional criminal justice system—procedures which marginalize the victim, prevent both the victim and the defendant from participating directly in the process, and dehumanize victims and defendants alike—create a dissatisfaction with the system that will inevitably result in change. Surveys of victims over the past twenty years have shown that victims' dissatisfaction with the criminal justice system stems overwhelmingly from these procedural justice concerns:

> [Victims] say they are unhappy about their lack of a legitimate role in the processing of their cases beyond that of witness for the prosecution, the lack of opportunity to be consulted about the progress of their cases, the lack of recognition of the emotional, as well as material, harm they have experienced, and the lack of fairness and respect they receive at the hands of the justice system as a whole.[163]

Thus, like the privatization of law enforcement, the restorative justice movement has gained in popularity because of perceived failures of the traditional criminal justice system. For those victims and defendants who choose the restorative justice route, the traditional criminal justice system is too punitive, ignores the root causes and human effects of crime, and makes little attempt to

161. Braithwaite, *supra* note 160, at 20–28.

162. *See infra* notes 267–77 and accompanying text; *see also infra* notes 296–315 and accompanying text.

163. Strang & Sherman, *supra* note 23, at 18 (citations omitted).

either assist the victim or rehabilitate the defendant.[164] And like private law enforcement, restorative justice is a return to older concepts of criminal justice.

Before King Henry I decreed that certain actions were "offenses . . . against the King's peace," criminal behavior was "viewed as conflict between individuals, and an emphasis upon repairing the damage by making amends to the victim was well established."[165] Even after certain harms became criminalized, private prosecution was still common; as late as the seventeenth century, both the English and the colonial criminal justice systems depended upon "a system of private prosecution, where the victim or interested individual had the right to bring and prosecute the case against a criminal offender."[166] John Langbein describes pre-eighteenth century criminal trials as "lawyer-free contest[s] of amateurs" in which the victim of the crime served as the prosecutor.[167] Although the state had some involvement in criminal cases throughout the medieval and colonial period, it was not until the eighteenth century

164. It is important not to overstate this argument, however. The traditional criminal justice system does occasionally result in restitution for a victim or community service in the neighborhood where the defendant committed the crime. As noted above, defendants in the traditional criminal justice system—especially first-time offenders—are frequently given a chance at rehabilitation through drug treatment programs, anger treatment programs, or other mandatory counseling sessions. More fundamentally, there are no doubt plenty of victims who feel "restored" by seeing the defendant severely punished. Indeed, whether punishment is able to restore victims is the question that lies at the core of the debate over restorative justice.

> Retributive theory holds that the imposition of some form of pain will vindicate, most frequently deprivation of liberty and even loss of life in some cases. Restorative theory argues that "what truly vindicates is acknowledgement of victims' harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behavior."

Umbreit et al., *supra* note 134, at 257 (quoting ZEHR, *supra* note 137, at 59).

But this debate merely reinforces the argument that the traditional criminal justice system cannot do all things for all victims. By expanding restorative justice programs—or by privatizing the adjudication process using restorative justice programs as a guide—we can increase the options available to victims and defendants. Those victims who prefer the punitive and retributive model will always have the option of using the traditional criminal courts.

165. Umbreit et al., *supra* note 134, at 255; *see also* John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1730–31 (1999); Strang & Sherman, *supra* note 23, at 16–17.

166. *See* Gittler, *supra* note 21, at 125–26.

167. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 11 (2003).

that public prosecutors first began to appear.[168]

There is another common thread between restorative justice programs and the privatization of law enforcement: the de-emphasis of the role of the state in criminal justice matters. As noted in the table *supra*, restorative justice proponents argue that justice does not consist of the state adjudicating blame and determining and imposing punishment; instead, justice consists of the victim, the defendant, and the community working together to craft a solution that makes all three parties whole again.[169]

In reality, restorative justice programs usually operate under the aegis of state supervision. For example, in most cases a criminal action is initiated by the prosecutor's office before it is diverted into a restorative justice program, and the ultimate resolution usually requires the approval by the court.[170] However, one possible next step in the evolution of restorative justice is to bypass the state altogether and allow the victim and defendant to mediate the case without ever involving a state actor. Before we consider what such a system may look like, let us examine how restorative justice programs currently operate.

B. Restorative Justice in Practice

In practice, restorative justice programs are generally limited to relatively minor crimes such as vandalism, theft, and minor assaults,[171] although they have also been applied to serious violent felonies.[172] Restorative justice programs can take many different

168. Gittler, *supra* note 21, at 125–32 (describing the historical development of the public prosecutor in the American colonies). Prior to the development of a public prosecutor, certain public officials were sometimes involved in criminal prosecution in England. For example, the attorney general would prosecute cases of treason, though such cases "occurred quite rarely." LANGBEIN, *supra* note 167, at 12–13. Under the Marian statutes of 1555, justices of the peace were given certain prosecutor-like duties to "reinforc[e] citizen prosecution." *Id.* at 40. The justices of the peace could issue search warrants and arrest warrants, and examine those suspected of committing crimes, frequently resulting in confessions. *Id.* at 40–43.

169. *See supra* note 141 and accompanying text.

170. *See* MARK S. UMBREIT & JEAN GREENWOOD, OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES 8–9 (2000) [hereinafter NATIONAL VOM SURVEY]; *see also infra* notes 171–88 (describing restorative justice programs in practice).

171. The 2000 survey of VOM programs found that vandalism, theft, minor assaults, and burglary made up the "vast majority" of offenses referred to the programs. NATIONAL VOM SURVEY, *supra* note 170, at 7.

172. Some VOM programs reported having used the process for assault with a deadly weapon, sexual assault, and murder. *Id.* at 7–8.

forms.[173] In its most radical incarnation, known as "sentencing circles" or "peacemaking circles," the defendant and the victim each invite numerous members of their support group (family members, peers, etc.) to the dialogue, and other interested members of the community also participate.[174] A "talking piece" is handed from person to person as each interested member has his or her say about how the crime has affected his or her life or the community.[175]

Somewhat less unwieldy is the process of "group conferencing" or "community group conferencing," which tends to be more structured and includes fewer members of the victim's and defendant's support groups.[176] But by far the most popular form of restorative justice in this country is victim-offender mediation ("VOM"),[177] which is somewhat similar to a civil law mediation. There are, however, important differences. A civil law mediator tends to be a neutral facilitator who does not pass judgment on either side, whereas the VOM process is undertaken with all participants—including the mediator—fully aware that the defendant bears the responsibility of repairing the damage he has done.[178] The mediator also is aware that there is a third interest unrepresented in the mediation—that of society—and will endeavor to ensure that the resolution not only addresses the damage to the victim but also the breach of the social contract caused by the crime.[179]

Addressing the societal harm is a critical aspect of these programs for two reasons. First, under restorative justice ideology it is important for the defendant to realize that he has committed an

173. Aside from restorative justice programs, there is another form of criminal mediation which has attracted some recent scholarly attention: so-called "case-management mediation." *See generally* Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571 (2004). Unlike restorative justice, case management mediation does not seek to repair the harms done or lead the perpetrator toward atonement. Instead, case-management mediation is essentially assisted plea bargaining, in which the trial judge calls the attorneys and the defendant into chambers and tries to broker a settlement. *Id.* at 586–87. This type of mediation is not really a step toward privatization (since formal charges are already filed and both the judge and the prosecutor are involved in the procedure); it is really only another method of plea bargaining,

174. Umbreit et al., *supra* note 134, at 269–70.

175. *Id.* at 270.

176. *Id.* at 269.

177. Some programs are known by the even stranger acronym of VORP ("Victim-offender reconciliation program").

178. *See* Patrick Glen Drake, Comment, *Victim-Offender Mediation in Texas: When "Eye for Eye" Becomes "Eye to Eye*," 47 S. TEX. L. REV. 647, 665 (2006).

179. *Id.*

injury against the community as well as the individual victim, and for him to accept responsibility for that injury.[180] But there is a more practical reason as well: although restorative justice programs are certainly a revolutionary method of resolving criminal disputes, they are almost always undertaken as part of the public criminal justice system, under the watchful eye of a prosecutor or a judge, who will seek to ensure that the final resolution is acceptable to the state.[181] The vast majority of VOM programs (and restorative justice programs generally) are begun only after formal criminal charges are filed, so the state is already involved in the adjudication process,[182] and the representative of the state will be unwilling to dismiss the charges or agree to the resolution unless he or she believes the harm to society has been suitably accounted for.

It is fair to say that restorative justice programs have been quite successful. In addition to the extremely high satisfaction levels reported by victims and defendants,[183] restorative justice programs have produced more tangible benefits to the participants. Over 90% of criminal mediation programs result in a restitution agreement, and 95% of these agreements are successfully completed within a year of the mediation—this rate is compared to a 20–30% compliance rate for court-ordered restitution.[184] Recidivism rates are demonstrably lower for defendants who participate in a restorative justice program rather than the traditional criminal justice system.[185]

180. Teresa W. Carns et al., *Therapeutic Justice in Alaska's Courts*, 19 ALASKA L. REV. 1, 5 (2002) ("Restorative justice emphasizes repair of the relationships between the victim, community and offender."); Kent Roach, *Criminology: Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 710 (1999) ("Restorative justice works best if offenders voluntarily participate and accept responsibility for the offense.").

181. *See* NATIONAL VOM SURVEY, *supra* note 170, at 7.

182. A 2000 national survey of VOM programs found that only 3% of mediations occur prior to any court involvement; it is unclear how many of those three percent might later be referred to the public criminal justice system. *Id.* at 8. Most VOM programs (approximately 65%) require the defendant to admit guilt before being eligible to participate; 34% take place before any adjudication takes place (having been diverted out of the traditional system either by the prosecuting attorney or judge during the plea-bargaining stage); another 28% occur after the adjudication of guilt but before disposition in order to assist the judge with the sentencing process; and another 28% occur after sentencing. *Id.* at 8–9.

183. *See supra* notes 161–62 and accompanying text.

184. Marty Price, *Mediated Civil Compromise—A Tool for Restorative Justice*, OR. DEF. ATT'Y J. (2002), *available at* http://www.vorp.com/articles/civil.html.

185. Umbreit et al., *supra* note 134, at 284–89 (citing numerous meta-analyses which show reduced recidivism rates for restorative justice

Emboldened by these successes, restorative justice proponents are understandably seeking to multiply and expand the scope of these programs, by establishing them in more jurisdictions[186] and by enlarging the categories of crimes which could be referred into victim-offender mediation, including—most controversially—crimes of violence.[187] In spite of these efforts, the restorative justice movement has been quite limited in extent—as one commentator notes, "restorative justice principles have been adopted mainly in scattered small-scale programs dealing with minor offenses."[188]

But one tantalizing possibility for a dramatic expansion of restorative justice programs would be to create an industry of private mediators to resolve criminal disputes even before they entered the public criminal justice system, thus bypassing prosecutors, judges, and courts altogether. This industry could adjudicate and enforce dispositions for the substantial (and increasing) number of individuals being apprehended by private law enforcement officers who are not being turned over to the public system. The private individuals, companies, and communities who employ private police would no doubt be willing to utilize—and even pay for—a third option, one in which they were given a chance to process the dispute without resorting to state action and reach a resolution which was able to restore them to their original condition. Similarly, defendants who face the possibility of the long delays, lack of participation, and retributive punishments of the state-sponsored criminal system might be more willing to enter into a private adjudication process.

IV. THE EMERGING PRIVATE CRIMINAL JUSTICE SYSTEM

Private individuals and organizations dissatisfied with the traditional public provisioning of criminal justice have already

procedures); *see also* JENNIFER E. SHACK, CENTER FOR ANALYSIS OF ALTERNATIVE DISPUTE RESOLUTION SYSTEMS, BIBLIOGRAPHIC SUMMARY OF COST, PACE, AND SATISFACTION STUDIES OF COURT-RELATED MEDIATION PROGRAMS (2d. ed. 2007), *available at* http://www.caadrs.org/studies/MedStudyBiblio.htm.

186. Currently there are over 300 restorative justice programs in almost every state, but that is still a small fraction of the thousands of criminal jurisdictions in the country. *See* Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 421.

187. *See, e.g.*, Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 676 (2005).

188. Beale, *supra* note 186, at 421. Beale goes on to note that the average juvenile victim-offender program receives only 136 referrals per year, while the average program for adults receives only 74 referrals per year. *Id.*

begun to develop and utilize alternatives. For the law enforcement phase, the alternative is a robust, privately funded, and privately controlled network of security guards, detectives, investigators, and the like who may or may not turn over the results of their work to the public court system.[189] For the adjudication and disposition phases, restorative justice offers an alternative to the traditional model, but it is not nearly as predominant as private law enforcement, and for the most part it has remained under the ultimate control of the public criminal justice system.[190] Yet both alternative systems share many attributes: returning to the historical roots of criminal law; focusing on the victim's needs; empowering the parties involved, primarily the victim, but in the restorative justice context, the defendant as well; streamlining procedures, including diminished legal protections for the accused; and abandoning the incarceration mentality that permeates the traditional public system.[191]

The ideologies underlying these approaches are similar as well. In his seminal article on private police, Professor David Sklansky discusses the three major benefits of private security agencies. First, they are more flexible than public law enforcement agencies, allowing private police to "act in ways in which government either cannot or will not."[192] Second, they are more directly accountable to the consumers of their product, unlike public police who are "answerable to every business and citizen in the city but are not accountable to them."[193] Third, they empower those who hire them, by making individuals take responsibility for their own security, and by building "social capital" among groups and agencies that arrange joint private security measures.[194]

These same underlying motivations lie behind the restorative justice movement. Restorative justice supporters, like supporters of other alternative dispute resolution programs, frequently trumpet the fact that the process is "flexible, transparent, and creative in its approach,"[195] which allows participants to experiment with

189. *See supra* Part II.

190. *Id.*

191. In the case of private law enforcement, this abandonment may not be by choice; lacking the public criminal justice system's coercive power to incarcerate, private clients have been forced by necessity to come up with alternatives to incarceration for the alleged perpetrator. In the case of restorative justice, of course, the repudiation of incarceration is a principal tenet of the movement.

192. *See* Sklansky, *supra* note 27, at 1189.

193. *Id.* at 1190.

194. *Id.* at 1190–91.

195. Kenworthey Bilz & John M. Darley, *Law and Psychology: What's Wrong*

procedures and resolutions outside of the traditional criminal process. Accountability is also a major goal for restorative justice advocates—in fact, it not only insists on making the defendant accountable for his actions (in a far more real sense than the traditional criminal justice system); it also looks to the community and even the victim to be accountable for the causes and the solutions to the criminal activity.[196] And just as private policing empowers those who take responsibility for their own security, restorative justice empowers both victims and defendants to resolve their dispute—in fact, empowerment is perhaps the primary tenet behind the restorative justice movement.[197]

Given these similarities in attributes and ideologies, the next logical (and perhaps inevitable) step in this evolution is for the private individuals and organizations to turn to the restorative justice movement to develop purely private alternative systems of adjudication and disposition that can absorb the hundreds of thousands of individuals being apprehended by the existing private law enforcement organizations. After the accused is arrested by a private police officer or security guard, the private entity controlling the law enforcement official can decide (as it does now) whether to turn the accused over to the public criminal justice system or handle the case privately. If the private entity prefers to handle the case privately, the accused must also make a choice. He can agree to the private adjudication, and the case would be heard by a private criminal mediator, or he can refuse, thus forcing the private entity to either call the public police after all or dismiss the case altogether.

The ability of either side to opt out of the private criminal justice system (or more accurately, the ability of either side to refuse to opt out of the public criminal justice system) is critical to ensuring that both the accused and the victim are better off under the private system than the public one. In essence, both parties would always know that the default system—the public criminal law system—was available, and thus could always choose to take their chances there if they lost faith in the private resolution process. This is one of the reasons why the private alternative should not *replace* the public criminal justice system—any more than alternative dispute

with Harmless Theories of Punishment, 79 CHI. KENT L. REV. 1215, 1251 (2004).

196. Strang & Sherman, *supra* note 23, at 25 (arguing that victims must be "stakeholders equal to offenders and the community").

197. Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349, 362. ("[R]estorative justice provides crime victims with a process that answers their most important needs: for participation, involvement and acknowledgement.").

resolution systems have replaced public courts in the civil law context.

But unlike civil law conflicts, which consist of a dispute between two parties, the criminal law system involves a victim, a defendant, and the state. Thus, the public criminal law system exists to serve another function: ensuring that the state's interest in the criminal case is met, at least indirectly. Because the public criminal justice system would officially retain jurisdiction over every case that passed through the private system, the procedures and outcomes would be loosely monitored by public officials in ways that would both constrain the private system from straying too far from public norms and provide valuable feedback to the actors in the public system.

At first, the private criminal system would seem to operate completely independently of public norms and community input. The private criminal justice system would be made up of individuals—specifically private police officers (who as we have seen already dominate the law enforcement phase of criminal law) and mediators, who would be in charge of resolving the criminal dispute between the victim and the defendant and crafting a solution satisfactory to both of them. Like the actors in the public criminal justice system, these individuals will be professionals and specialists, applying their own expertise to make critical decisions about when to arrest, what crimes were committed, what kind of disposition is appropriate, and so on. However, the private actors will be different from public actors in very important ways. When individual actors in the public criminal justice system make decisions, they are in theory acting as the voice of the community—acting in conformance with their own belief as to how the community would like them to respond. Sometimes this is a centralized decision—as when a police chief institutes a policy of mandatory arrest for all domestic violence cases. Other times it is an individual decision, based on the professional's expertise and experience—as when a prosecutor decides not to bring charges in a rape case because the evidence is too weak. In the end, there is a check on their individual exercise of power: the public individuals and institutions must ultimately answer to those who elected or appointed them,[198] and thus cannot stray too far from societal expectations.

In contrast, the actors in the private system will have more

198. This check on power is, of course, less relevant for judges who have lifetime appointments, but even some of those judges (at least those who aspire to a higher bench) must keep public opinion in mind when they make their decisions.

constraints on their decision making. First, they are accountable directly to their client, and so must make decisions that meet the needs of that client (indeed, this is precisely the allure of the private security industry)—while in the public system, the "client" is an amorphous concept of the community or the government, leaving much more room for discretion and interpretation on the part of the individual decision makers. Second, unlike prosecutors and judges, the private mediators in the system must ensure that both sides are satisfied with the process and the outcome, as either the defendant or the victim can choose to opt out at any time if he or she does not like what is happening. In the public system, of course, neither the victim nor the defendant have any say over the process, and each have very little say over the outcome.[199]

But it is the third control over individual exercise of power by actors in the private criminal justice system which is the most significant. The fact that the public criminal justice system would maintain jurisdiction over all of the crimes processed through the private system would force the private actors to conform to societal norms in crafting their resolutions. We have already discussed how resorting to the private criminal justice system would be optional, such that if either of the parties is not satisfied with the result, the case will be turned over to the public criminal justice system. In the case of the victim's or the defendant's dissatisfaction, the process is obvious: either side can call off the mediation at any time, and the police will be called in to arrest and process the defendant under the public system. In the case of a resolution which is outside the acceptable norms of the community, the process will be a little more indirect: the public police or prosecutor will learn of the crime, investigate to determine how the dispute was resolved, and if the resolution is contrary to the interests of the community, the prosecutor will be obliged by public duty (and ultimately political considerations) to step in and bring formal public charges.[200]

Of course, many times the public police or prosecutor will not even be aware that a crime has occurred and been resolved; other times, the prosecutor will find that the victim is much less

199. The prosecutor or judge may consult with the victim before seeking or imposing a specific sentence, and the defendant has the right to accept a given plea deal or go to trial, but neither has anything like the power they would have in a mediation context.

200. This intervention will rarely be necessary if a resolution treats the defendant too harshly; such a resolution would probably not be accepted by the defendant in the first place, and even if it were, the prosecutor would lack the power to *lessen* the burden on the defendant. Furthermore, as we have seen, restorative justice programs tend to be much more lenient toward defendants than the traditional criminal justice system has been.

cooperative once the victim has been through a private mediation and is already satisfied with the outcome—thereby making the case much harder, though not impossible, to prosecute. Thus, the public criminal justice system will likely not get involved unless one or more factors is present: the crime is so severe or affects enough individual citizens that it attracts public attention, the private resolution is severely out of line with societal norms, or the private mediator who ran the dispute has a long record of repeatedly ignoring the community interest in crafting resolutions. The private criminal justice system will thereby be somewhat insulated from the public criminal justice system, since many of its decisions—particularly for smaller crimes or crimes isolated between a defendant and a victim—will escape the attention of the public authorities altogether. However, any private criminal mediator (or private criminal mediation company) that wants to avoid its resolutions being made moot by a subsequent public prosecution will work to ensure that the community interests are taken into account when crafting solutions to criminal disputes. The more often and more dramatically a private mediator ignores the community interests, the more he or she will attract the attention of public prosecutors, until ultimately the public prosecutor in the jurisdiction will routinely review every one of that mediator's outcomes, thus lessening the incentive for either the defendant or victim to participate in the private alternative, and eventually running the private mediator out of business.

In this sense, a private criminal justice system will only exist—and can only be effective—at the suffrage of the public criminal justice system. If the public authorities in any given jurisdiction believe that a private criminal justice system is inappropriate, all they need to do is monitor the activities of every case processed through the private criminal justice system (if necessary, by subpoenaing the records of every private criminal mediator) and bring formal criminal charges against all the defendants regardless of the outcome of the private mediation. No defendant would agree to private adjudication in such a jurisdiction, and the private criminal alternative (at least past the law enforcement stage) would simply wither away. A more libertarian jurisdiction might take the opposite view: as long as neither the victim nor the defendant complain, there is no need to intervene, thus allowing private criminal adjudication and resolution systems to flourish (and thereby saving the public authorities a significant part of their budget). Most jurisdictions, of course, will end up somewhere in the middle, allowing private criminal mediators free reign for misdemeanors or for certain specific crimes like theft or vandalism. As the authorities and the public get more comfortable with private

criminal justice, and as certain private criminal mediators build reputations for incorporating the community interest into their resolutions, the types of crimes for which the public criminal justice system will allow private resolutions will probably increase.

As always, this result will in large part be a question of resources. In a universe of finite government spending, is it worth the money to track down every single privately brokered resolution, or should the public authorities only overrule the private criminal justice industry in egregious cases? It is this budgetary concern, more so than any ideological shift, which will eventually allow the private criminal justice system to establish itself. Once again, there is evidence that this interaction between the private and public criminal justice system is already occurring: consider a recent policy change by the Wal-Mart retail chain regarding shoplifters caught in their store (almost all of whom, of course, are apprehended by private security guards working for Wal-Mart).[201] Up until recently, Wal-Mart pursued an aggressive strategy towards thieves: the store managers would call a police officer and engage the public criminal justice system for every instance of shoplifting, whatever the amount of the loss or potential loss.[202] Then in the summer of 2006, Wal-Mart changed its policy so that first-time thieves who steal merchandise worth less than $25 will be let off with a warning instead.[203] Wal-Mart's reasoning was simple: formal prosecution of an individual who steals a $4 magazine costs tens or hundreds of times that amount in salary for private guards who process the arrest and lost work time for employees who must go to court.[204] The reaction from the public criminal justice authorities was frequently supportive—under the old policy, many small police departments had been forced to hire an additional officer just to process arrests from the local Wal-Mart,[205] and prosecutors' offices and courts were no doubt equally burdened. In changing its rules, Wal-Mart is simply falling into line with the policy of almost every major retail chain in the country for first-time petty thefts—handling the case privately instead of publicly.[206] In a very real sense, the public criminal justice authorities are more than happy to delegate this aspect of criminal justice response to the private sector.

It does not take too much imagination to envision the next step

201. Micheal Barbaro, *Some Leeway for the Small Shoplifter*, N.Y. TIMES, July 13, 2006, at C1.
202. *Id.*
203. *Id.*
204. *Id.* at C10.
205. *Id.* at C1.
206. *Id.* at C1, C10.

in this process. What should Wal-Mart (or other retailers) do with individuals who are caught a second time stealing a $10 product? The warning was ineffective the first time, but it still seems like a waste of public and private resources to begin a public prosecution. What if the offender were told that if he worked for an hour stacking boxes or retrieving shopping carts from the lot, the police would not be alerted? Most defendants would (rightfully) conclude this deal was in their best interest; the retailer would be compensated for the loss caused by the offense, and the government would save resources. Would police or prosecutors object that the "community interest" was not served by such an arrangement?

In order to bypass the state on even more serious crimes, it would probably be necessary—or at least helpful—to call in a private criminal mediator to help settle the dispute. What if an employee were caught by in-store detectives stealing hundreds of dollars from the company? The resolution might not be so simple as before—the offender may be willing to pay the money back, but the employer would likely want something more. The offender, for her part, may be unwilling to simply agree to whatever terms the employer sets out—perhaps she would be happier taking her chances in the public criminal justice system if the employer asked for too much. In such a situation, both sides could turn to a private criminal mediator, who could work to find a solution acceptable to both sides—restitution plus a fine, counseling, demotion but not a firing, and so on. The offender's ability to participate in the mediation directly would make her much more likely to accept the ultimate outcome, the retailer would get more than it could by laying out a one-sided demand (and certainly more than it could by simply calling the police), and once again the police and prosecutor—if they learned of the crime at all—would likely find that the community interest was sufficiently served by the outcome.

The next step would be to broaden the application of the procedure to crimes of violence: what if one worker assaulted another in the company's warehouse? The offender would likely be apprehended by store security, and again a private solution would likely be impossible without the assistance of a professional criminal mediator. If both the victim and offender consented, they could both agree to work with the mediator to craft a private resolution. Such a forum would be superior to a public criminal adjudication in many ways: it would be faster and more efficient, saving time and resources for both the offender and the victim; it would likely result in some restorative justice-type repair of the physical and emotional harm done to the victim; it would mean the defendant could avoid incarceration; and (perhaps most importantly), it might address some of the deeper emotional or behavioral issues underlying the

assault.

And what of the "community interest" in the resolution of such a crime? First of all, for a crime of violence it would be much more likely that the public authorities would be aware of the crime—perhaps the victim would have required medical attention, or perhaps third parties would have seen the crime and reported it. Secondly, the public police or the prosecutor would examine the private outcome more critically—was the offender sufficiently punished to satisfy the community interest in the crime? The fact that all of the private parties agreed to the outcome would probably create some inertia on the part of the public officials, thus giving the private criminal systems a bit more leeway to depart from what the prosecutor believes to be in the public interest, but any extreme deviation from societal norms—for example, the offender merely having to apologize after an assault that put the victim in the hospital—would result in the prosecutor taking action in order to ensure the community's interest in deterrence and retribution was met. The very fact that the prosecutor might be monitoring the situation would force all sides to consider the community interest in forging a resolution, since they would be aware that the prosecutor holds an effective veto over the process.

Once private criminal mediators (or private criminal mediation companies) are established, their relationships with the public prosecuting agents in the jurisdiction will become more predictable, and perhaps even be formalized. A prosecutor's office might assign a lawyer full-time to review the hundreds of private dispositions reached by the private criminal justice system, with the authority to bring formal charges for any case in which the result did not adequately reflect the community interest. Private criminal mediators, who as repeat players would know the limits set out implicitly or expressly by the prosecutor's office, could counsel the victim and offender during the mediation process, explaining that certain proposed resolutions would not be acceptable to the public authorities and suggesting ideas which make the resolution more palatable. The influence of the community would still be present, though it would be somewhat muted.

Thus, a private criminal adjudication industry would operate outside of the public criminal justice system, but would still inevitably be monitored by the public authorities—namely, the prosecutor's office. This monitoring would not only serve to keep the private resolutions roughly in line with community norms, but would also likely have a feedback effect on the public system itself. As prosecutors monitored the private resolutions, they would begin to notice trends, perhaps repeated deviations from the dispositions handed down in the public system. Prosecutors could use these

deviations as evidence of how local community norms might be shifting—if victims were consistently agreeing to dispositions for a certain crime that were far less severe than what prosecutors had been recommending in the public system, it might be worthwhile for the prosecutor to reconsider their policies for that particular crime.

Although the primary model for a private criminal law system would involve a large company as the victim (such as a large retail store, an amusement park, or the owner of a corporate park or warehouse), there would be many other opportunities for smaller entities to utilize the private system. Already we have seen the grassroots emergence of a private criminal adjudication system in growing numbers of "neighborhood justice centers" which have been established across the country.[207] These privately run organizations mediate criminal disputes between members of their community, with the goal of keeping the dispute out of court altogether.[208] For example, a crime victim in San Francisco could contact the neighborhood Community Board instead of calling the police.[209] A case developer will interview the victim and, if appropriate, call for both sides to attend a "hearing," at which both the victim and the perpetrator will tell their story to a panel of mediators known as "neutrals."[210] The neutrals will help to guide the discussion, but will leave it up to the parties to resolve the dispute—a result which occurs ninety percent of the time.[211] The Community Boards in San Francisco hear a wide range of cases, from purely civil disputes such as excessive noise and landlord/tenant disputes, to decidedly criminal behavior such as threats, harassment, vandalism, property damage, and assaults.[212] These neighborhood justice centers tend to specialize in a category of crime which the public criminal justice system is ill-equipped to handle: relatively minor criminal cases in which the victim and defendant know each other, including disputes between neighbors and friends.[213]

Likewise, intrafamily violence is another area where the public

207. The number of neighborhood justice centers increased from fifteen in 1976 to approximately four hundred in 1993. Jill Richey Rayburn, Note, *Neighborhood Justice Centers: Community Use of ADR—Does It Really Work?*, 26 U. MEM. L. REV. 1197, 1200 (1996).

208. *See generally* Timothy Hedeen, *Institutionalizing Community Mediation: Can Dispute Resolution "of, by, and for the People" Long Endure?*, 108 PENN. ST. L. REV. 265, 269 (2003).

209. Rayburn, *supra* note 207, at 1206. Although the victim can initiate the process, the Community Boards also take referrals from courts. *Id.*

210. *Id.* at 1206–07.

211. *Id.* at 1207.

212. *Id.* at 1208.

213. *Id.* at 1206, 1208, 1211.

system has failed to provide adequate resolutions for criminal activity. Any practitioner in the field of domestic violence is familiar with the scenario that occurs when a husband or boyfriend commits an act of violence against a victim.[214] Frequently, the victim does not call the police at all, since she does not want the authorities to be involved. If the police are called in, they will usually make an arrest[215]—but then the victim is asked to participate in a criminal case against her abuser. Many of these victims refuse to cooperate because they do not want to see their loved one go to jail. Others are scared that they will put themselves in even more danger if they testify against their abuser—after all, even if the defendant is convicted, he is likely only going to jail for a few months, and he may seek retribution when he is released.[216] Long delays inherent in the criminal justice system give the defendant ample time to reconcile with the victim, thus making ultimate prosecution even less likely.[217] The sad result is a large number of domestic violence cases in which charges are dropped after a significant amount of police and prosecutorial effort and resources are devoted to the case[218]—or the case is pled down to a minor violation, with the defendant forced to enter into "anger management" as a condition of probation.[219]

214. Both men and women commit domestic violence crimes, but the majority of cases involve violence of men against women. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993–2001, at 1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/abstract/ipv01.pdf (stating that "85% of victimizations by intimate partners in 2001 were against women").

215. Many jurisdictions now have mandatory arrest policies for domestic violence cases. *See* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 558 & n.32 (1999) (listing jurisdictions with mandatory or limited-discretion arrest policies for domestic violence).

216. *See* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1866, 1868, 1882 (2002); Mills, *supra* note 215, at 589–91; Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533, 459–50 (1996).

217. *See* Robert C. Davis et al., *Increasing Convictions in Domestic Violence Cases: A Field Test in Milwaukee*, 22 JUST. SYS. J. 61, 61, 69 (2001), *available at* http://www.ncsconline.org/WC/Publications/KIS_FamVioJSJV22No.1.pdf; *see also* Richard R. Peterson & Jo Dixon, *Court Oversight and Conviction Under Mandatory and Nonmandatory Domestic Violence Case Filing Policies*, 4 CRIMINOLOGY & PUB. POL'Y 535, 539–40 (2005).

218. *See* Angela R. Gover et al., *Combating Domestic Violence: Findings From an Evaluation of a Local Domestic Violence Court*, 3 CRIMINOLOGY & PUB. POL'Y 109, 113 (2003); *see also* Epstein, *supra* note 216, at 1857.

219. *See* Molly Butler Bailey, *Improving the Sentencing of Domestic Violence Offenders in Maine: A Proposal to Prohibit Anger Management Therapy*, 21 ME. BAR J. 140, 144 (2006), *available at* http://www.mainebar.org/images/temppdf/MBJsummer06.pdf.

No doubt many domestic violence cases belong in the public criminal justice system, and perhaps some of the defendants deserve to be incarcerated, particularly if the injury is severe and the victim is cooperative. But the public criminal justice system is simply not serving the needs of a good number of the victims and defendants involved in these disputes.[220] If a credible private criminal mediation system were to handle these cases, victims would be much more willing to cooperate—and probably more likely to report the abuse in the first place. The mediator could help the parties reach a resolution which actually helps the defendant rehabilitate himself and provides some amount of restitution to the victim—neither of which occur in the current public model.[221]

All of these above examples involve crimes for which the public criminal system is not providing the level or type of response that is desired by the victim. Shoplifting in retail stores, trespassing on private corporate property, vandalism or disorderly conduct in amusement parks, minor disputes between acquaintances, and domestic violence are all examples of such crimes. In this way, victim dissatisfaction with the public criminal law system will drive the privatization movement in the adjudication and disposition phase, just as the same phenomenon has already created a large private industry in the law enforcement phase.

Once a private system of criminal adjudication is established, however, there are other categories of crimes which might be appropriate for private adjudication. One such category is criminal activity in crowded urban areas, where prosecutors and judges respond to overwhelming case loads by offering generous plea bargains.[222] In many states, misdemeanors such as petty larceny, criminal damaging, or even assault may only be punished with a night in jail if committed in a large city, but result in a week in jail if committed in a suburban or rural area.[223] As community members in urban areas become aware of the discrepancy, they may be less

220. *See* Mills, *supra* note 215, at 604, 606–09; Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL'Y & L. 921, 935 (2003). *Cf.* Epstein, *supra* note 216, at 1899–900 (discussing how negotiation and ADR can improve results in civil cases as well).

221. *See* C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289 (2004); Smith, *supra* note 220, at 937–38 (discussing the use of restorative justice for domestic violence cases).

222. *See* Owen S. Walker, *Below-Guideline Plea Bargains*, 2 FED. SENT'G REP. 68, 68, 70 (1989); *see also* Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 310 (1987).

223. *See, e.g.*, John M. Klofas, *The Jail and the Community*, 7 JUST. Q. 69, 80–81 (1990).

enthusiastic about turning to the overworked public criminal justice system to deal with these problems.

Another category of crimes which could be better dealt with by private, victim-centered adjudication and disposition are cases in which there is a legitimate social problem but the criminal court system is ill-equipped to deal with the problem (such as "quality of life" crimes committed by the homeless, or narcotics possession by drug-addicted defendants). The criminal justice system has proven to be a poor tool for adjudicating these disputes and crafting appropriate and constructive resolutions to them[224]—yet in most situations, the criminal justice system is the only viable mechanism for processing such disputes. These disputes could probably be better handled by a private system, in which the local community can receive some benefit from the disposition, and in which the defendant can have a role in designing a disposition which will punish him appropriately, but also help to reintegrate him into the community.

V. POTENTIAL CRITIQUES OF A PRIVATE CRIMINAL JUSTICE SYSTEM

Even if a private criminal justice system were to solve these problems, there are many who would consider any kind of privatization to be undesirable. The growing private law enforcement industry has attracted plenty of criticism,[225] as has the limited privatization of contracting out prisons to private companies.[226] And for all its success, the nontraditional approach to adjudication and postconviction resolution offered by restorative justice has been rejected by many practitioners and commentators.[227] Given these current debates, there is no doubt that a private industry of criminal dispute adjudication and resolution would be extremely controversial, and that many academics, prosecutors, defense attorneys, judges, and lawmakers would be opposed to the very existence of such an industry. Thus, it would be useful to examine the potential criticisms of such an industry, both to evaluate whether the criticisms are valid and to help guide us in

224. *See, e.g.*, Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1060 (2003).

225. Boghosian, *supra* note 34, at 177 (pointing out numerous criticisms of the current state of private police, including inadequate screening and training, and noting that Oklahoma City bomber Timothy McVeigh was a private security guard).

226. *See, e.g.*, Dolovich, *supra* note 98, at 545.

227. *See, e.g.*, Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 112–13 (2001) (arguing that private prisons actually constitute an extravagant and insidious aggregation of state power).

constructing a private criminal justice system which could address and alleviate those criticisms.

A. Can There Be a Criminal Justice System Without the State?

The most fundamental critique of a private criminal justice system is that a criminal justice system simply cannot function without state action. This critique can be made in three different ways. The first argument is definitional: many people would argue that it is literally impossible to have a criminal case if the state is not a party, because crimes by definition are transgressions against the state,[228] so if the state is not represented in the system, we are really talking not about a criminal justice system, but merely about another aspect of the private tort system. The second argument is practical: because criminal justice penalties frequently involve incarceration, it would be impossible to implement any resolution of a private criminal justice system without infringing on the state's monopoly on legitimate use of coercion and force. The final argument is normative: even if it were possible to adjudicate and resolve a criminal case without the state, it would be a bad idea, because a criminal action is a violation of the social contract, a crime against the community as well as the victim, and the state therefore must have input on how the case is resolved.

On one level, the definitional argument is impossible to refute. If one defines criminal justice as (in part) a process in which the state is a party, then there is by definition no way to have a private criminal justice adjudication.[229] But this is a rather limited (and as we have seen, historically inaccurate) definition of criminal justice.[230] A more appropriate definition might be that a criminal justice system is one that responds to, processes, and resolves

228. Black's Law Dictionary defines "crime" as "[a] positive or negative act in violation of penal law; an offense against the State or United States," further noting that "[a] crime may be defined to be any act done in violation of those duties *which an individual owes to the community,* and for the breach of which the law has provided that the offender *shall make satisfaction to the public*." BLACK'S LAW DICTIONARY 334 (5th ed. 1979) (emphasis added). Many legal scholars consider crime to be by definition a transgression against the state. *See, e.g.*, Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 371 (1986). However, Webster's New World Dictionary defines "crime" merely as "an act committed or omitted in violation of a law." WEBSTER'S NEW WORLD DICTIONARY AND THESAURUS 142 (1996).

229. *See, e.g.*, Jennifer Gerarda Brown, *Blackmail as Private Justice*, U. PA. L. REV. 1935, 1967 (1993) ("To say that a public authority enforces the criminal law is to state a near tautology. Many define criminal prohibitions not just by the severity of their associated penalty, but also by the state's exclusive entitlement to enforce them.").

230. *See supra* notes 37–38 and accompanying text.

criminal activity—and such a system may or may not involve the state. If we assumed that criminal justice must by definition involve the state, we would have to redefine the actions of hundreds of thousands of private law enforcement officers and detectives who apprehend criminals every day—not to mention redefine the actions of the criminals themselves. If an individual appropriates a shirt from a department store and is apprehended, the activity is criminal regardless of whether he was apprehended by a public employee or a private employee. Similarly, if a person hits another person in the face while waiting in line at Disneyland and is arrested by a park security guard, the act of violence was still a criminal action. Any of the individuals involved—the victim, the guard, or (theoretically) the defendant—could report the incident to the public police or the local prosecutor and the state would become involved. But if all three parties agree to adjudicate and resolve the dispute in some alternative way, the private adjudication and resolution could end the matter altogether. Whether we call that process a private criminal adjudication or a civil adjudication that avoids public criminal charges from being filed is really only a matter of terminology. Either way, a crime was committed and the matter was resolved to every party's satisfaction.

As for circumventing the state's monopoly on the legitimate use of force, there is no reason to believe that a criminal case needs to be resolved with force or coercion—indeed, many minor crimes are resolved in the public criminal justice system without resorting to incarceration.[231] In practice, the small but growing movement toward private resolution of criminal law cases has shown that resolving criminal cases need not involve the use of force or incarceration against the accused—indeed, many true believers of restorative justice theory believe that traditional coercive punishments are almost never appropriate for criminal defendants.[232]

However, these responses only lead to the final and more substantial argument: even if the criminal case *can* be adjudicated and resolved without state intervention, many would argue that it should *not* be. Crimes are different from ordinary harms because they involve a transgression not only against an individual victim, but against all of society. Indeed, many crimes—prostitution, use or sale of contraband such as drugs or firearms, attempted crimes—

231. *See, e.g.*, Jeff Bleich, *The Politics of Prison Crowding*, 77 CAL L. REV. 1125, 1168–69 (1989).

232. Braithwaite, *supra* note 165, at 1735–42 (arguing that restorative justice is an alternative that can and should marginalize the use of punishment).

have no individual victim and are *only* a transgression against society, while others—illegal dumping of pollution, securities fraud, and so on—have only a large and ill-defined group of individual victims.[233] In other words, all crimes cause a "moral injury" against society, but only some crimes cause physical, emotional, or financial injury to a victim or victims.[234] While a private criminal justice system could repair the victims' physical, emotional, or financial injury, it would be unable to address the moral injury—the very element of the action which defines it as "criminal." Many current restorative justice programs recognize this fact and include a community representative at the mediation[235]—and even if not, the ultimate resolution must almost always be approved by a judge before the criminal case is dismissed.[236]

There are a number of responses to this argument. The first and most radical response is to question the need for a tort/crime distinction at all. As far back as the 1970s, commentators were proposing a "restitutive theory" of criminal justice, in which the victim and the defendant would be the two parties and the primary (if not only) goal of the criminal justice system would be to repair the harm done to the victim.[237] Proponents of this new theory of criminal law pointed out that the tort system is ineffective in compensating victims; in reality, the vast majority of crime victims do not bring civil suit against the perpetrators and are left only with what the criminal justice system gives them (if anything).[238] There is also a legitimate question about why the system should force victims to bring an entirely separate action—why, after being interviewed by detectives, prepared and then placed on the stand by

233. *See supra* notes 106–08 and accompanying text.

234. *See supra* note 106–07 and accompanying text.

235. *See* Umbreit et al., *supra* note 134, at 269–70 (noting that in at least two types of restorative justice programs—group conferencing and circles—community representatives participate).

236. *See, e.g.*, Gretchen Ulrich, *Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 HAMLINE J. PUB. L. & POL'Y 419, 439–40 (1999) (explaining that in one type of restorative justice program in Minnesota—sentencing circles—a judge must approve the sentence recommended by the circle).

237. *See* Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279, 287 (1977); Randy E. Barnett, *The Justice of Restitution*, 25 AM. J. JURIS. 117, 117 (1980).

238. Many criminal defendants have little or no money, so a tort case against them would not be worth the time or expense. Gittler, *supra* note 21, at 139. In contrast, a private criminal system using a mediation process similar to what is currently used in restorative justice programs could help the victim and defendant craft a flexible resolution even if the defendant were judgment proof.

prosecutors, and cross-examined by defense attorneys, should the victim then need to find a lawyer and start all over again in order to repair the harm that was done?[239]

Although there seems to be little popular support for such a major paradigm shift in criminal law, there is certainly evidence that the distinction between crimes and torts is blurring somewhat: the growing popularity and effectiveness of the victims' rights movement has led the public criminal justice system to be more focused on private harms rather than public harms.[240] Over twenty years ago it was observed that "the wide acceptance and use of restitution within the criminal justice system has already resulted in the partial merger of criminal and tort law."[241] Now, with restitution even more common and victims' rights legislation allowing victims to participate in various stages of the criminal process, the merger is even more apparent. Furthermore, as the criminal codes expand ever further into regulating more and more aspects of our life—economic activity, environmental activity, and so on—unlawful acts which have traditionally been thought of as private torts or civil regulatory violations are being reclassified as crimes.[242] Once again, when we look at the historical evolution of the criminal justice system, there is nothing inevitable or preordained about the dominant state role in criminal prosecutions. It has been nearly nine hundred years since King Henry declared that certain harms were crimes against the state as well as the victim; for most of that time, both in England and later in the United States, the primary responsibility for prosecuting crimes fell to the private party who had been wronged.[243]

Admittedly, this response only goes so far. However many private interests have infiltrated the public criminal justice system, there is a general consensus among lay people and criminal law experts alike that the state or community interests should be

239. *Id.* ("[V]ictims, who have already been through a criminal proceeding, may not have the energy and stamina required to become involved in yet another proceeding.").

240. *See id.* at 118.

241. *Id.* at 139.

242. *See generally* John C. Coffee, Jr., *Does 'Unlawful' Mean 'Criminal'?: Reflections on the Disappearing Tort/Crime Distinction in American Law,* 71 B.U. L. REV. 193 (1991).

243. *See, e.g.*, John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 282–83 (1978) (noting that there was usually no prosecuting attorney for most felony trials in England until the late 1700s); Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 571–73 (1984) (describing private prosecutions in America before the revolution).

represented in a criminal adjudication and ultimately reflected in the resolution.[244] However, this premise does not necessarily lead to the conclusion that a public criminal justice system is better able to accomplish this task than a private criminal justice system. The real question is how the community interests are currently represented in the public criminal justice system, and how might they be represented in an alternative private system?

This question leads to the second response to the normative argument against removing the state from some criminal proceedings. We have already seen that the public criminal justice system has its own problems: the marginalization of victims' needs, the overly punitive sentencing of defendants, and the lack of real participation by victims and defendants alike.[245] Perhaps the most damning critique of the public criminal justice system—and the one which is most relevant to the question of privatization—is a criticism which is inextricably tied to its public nature: the pervasive politicization of the public criminal justice system.[246] This politicization affects every aspect of the public criminal justice system—the writing of criminal legislation, the policies of public police, the charging decisions by prosecutors, and the sentencing by judges—and calls into question whether or not the public criminal justice system can in fact represent the interests of the "community."

In this context, "politicization" means two separate but related phenomena. The first is that over the past four decades criminal policy has been transformed into a populist political topic, with dramatic results.[247] Before the 1960s, criminal policy was left more or less to the expertise of the professionals—career police officers, prosecutors, judges, and even academics.[248] Crime control was, for the most part, not mentioned in political campaigns and legislators

244. *See, e.g.*, Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1316–17 (2002) ("Relatively few commentators want to return to the . . . early nineteenth century, when crime victims in New York and Philadelphia often settled their cases out of court."). Most commentators have condemned the traditional system of private prosecution. *See, e.g.*, John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 569 (1994); Ahmed A. White, *Victims' Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 87 KY. L.J. 357, 413–14 (1999).

245. *See infra* notes 10–22, 148–149, and accompanying text.

246. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 145 (2001).

247. *See id.* at 13.

248. *See id.* at 145 ("For most of the twentieth century, punishment and crime control have hardly featured in electoral competition, particularly at the national level.").

on the federal or even state level did relatively little to change the substantive or procedural aspects of criminal law. Indeed, the greatest change to substantive criminal codes during the first seventy years of the twentieth century was probably the Model Penal Code, which was designed by academics and other professionals to simplify and streamline substantive criminal law.[249]

All that changed with the skyrocketing crime rates of the late 1960s.[250] Criminal policy became a significant campaign issue on the local and national level; new initiatives were sold to voters with catchy slogans like "[t]hree-strikes and you're out,"[251] while candidates and parties began to compete to demonstrate who could be the toughest on crime.[252] Once in office, legislators "reclaimed the power to punish that they had previously delegated to [the] experts,"[253] thereby beginning a spectacular increase in both the number of crimes and the severity of punishments for those crimes. On the federal level, forty percent of all crimes in existence today were passed since 1970;[254] a similar increase during this period occurred on the state level.[255] Strict sentencing regimes, including mandatory minimum sentences, were also enacted.[256]

Perhaps in a democratic society, the eventual capture of crime policy by the voting public was inevitable. What is not inevitable—indeed, what seems curious—is why the politicization of crime led so quickly and directly to an abandonment of rehabilitation and an increase in the severity of sentences. Various scholars have attempted to explain this phenomenon. For example, David Garland has hypothesized that various factors created a "cultural

249. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 513–14 (2001) (describing the reform of the state's penal code in 1961 due to the Model Penal Code project).

250. *Id.* at 524.

251. GARLAND, *supra* note 246, at 13.

252. *See id.* at 145.

253. *Id.* at 151.

254. *See* JAMES A. STRAZZELLA, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998) [hereinafter ABA REPORT].

255. For example, statistics from the United States Department of Justice show that state courts reported 583,000 convictions in 1986 and over 829,000 convictions in 1990. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: FELONY SENTENCES IN STATE COURTS, 1990, at 1–2 (1993). From 1973 to 1990, the national incarceration rate skyrocketed by 186%. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF GENERAL GOVERNMENT ELECTED OFFICIALS IN CRIMINAL JUSTICE 9–10 (1993).

256. *See* GARLAND, *supra* note 246, at 151. The New York Rockefeller drug laws of the 1970s and the Federal Sentencing Guidelines of 1984 are two of the more well-known examples of this phenomenon.

shift" in how people viewed crime, resulting in an internalized crime consciousness and overly emotional reactions toward crime.[257] But there is no question that police, prosecutors, legislators, and judges—most of whom are elected to their office—feel populist pressure to adopt and retain a very punitive level of criminal justice.

The other meaning of the term "politicization" in this context refers to the institutional incentives that are created by the public criminal justice system. Legislators can appear tough on crime by criminalizing more and more behavior and then counting on prosecutors to wisely choose which crimes will be prosecuted and which will not. Prosecutors find it easier to seek convictions with more crimes to choose from (many of which have overlapping elements or are simply traditional crimes with a difficult-to-prove element removed) and encourage legislators to criminalize more behavior.[258] The same incentive structure exists for sentencing policies: by increasing sentences at both the minimum and maximum level, legislators can look good while relying on prosecutors to charge crimes appropriately, so as not to be overly punitive.[259] Prosecutors can then use these higher sentences during the plea-bargaining process to get exactly the sentence they want with less work, thus increasing the efficiency of the office. As William Stuntz explains, "[p]rosecutors are better off when criminal law is broad than when it is narrow. Legislators are better off when prosecutors are better off."[260]

The result of these two political realities is well-known: a public criminal justice system with an overly broad penal code and an incarceration rate higher than any other country in the world.[261] It is fair to ask whether this system truly represents what the "community" actually wants. Indeed, it is fair to ask what kind of "community" we seek to represent in the criminal justice system, or whether a country as heterogeneous as ours could even have a "community."[262] Certainly one of the most significant effects of the politicization of crime over the last four decades has been the centralization of crime policy: the federal government has become more and more involved in criminal law,[263] and both Congress and

257. *Id.* at 152–65.

258. *See* Stuntz, *supra* note 249, at 528–29.

259. *Id.* at 530.

260. *Id.* at 510.

261. *See supra* note 9.

262. *See, e.g.*, Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1293–95 (1994).

263. *See* ABA REPORT, *supra* note 254, at 7 ("[T]he trend to federalize crime has continued dramatically, covering more conduct formerly left to state prosecution."). Even though most criminal law is still enforced and adjudicated

state legislatures are creating mandatory sentencing guidelines which apply across the country or state, thus reducing the influence each local jurisdiction wields over its own crime policy.[264] The public criminal justice system has taken on a life of its own, fueled by populist politics and sustained by institutional incentives which continue to criminalize more behavior and punish more severely those who transgress.

A private criminal justice system could blunt the effect of this politicization in two ways. We have already seen that although prosecutors will likely review the decisions by private mediators (thus providing some incentive for the private system to take the community interest into account), the prosecutors would likely only overrule the private resolution and bring public charges against the defendant in cases which deviated egregiously from the public interest.[265] Thus, the prosecutors' effect on the process would be indirect, providing private dispositions with a layer of insulation from the political process.

Second, private criminal justice systems would be able to craft more flexible and creative solutions to problems, thus dampening the public desire for punitive measures against the defendant. Under the public criminal law regime, sentencing tends to be a rigid process, with only a few options—incarceration for a certain amount of time, a fine of a certain amount, and so on. In such an institution, "justice" tends to be conflated with a certain number—one defendant "deserves" five years in prison, while another deserves ten years. Under a private criminal justice system based on restorative justice principles, mediators would be empowered to take a much broader view of justice, crafting resolutions which not only help to restore victims to their precrime status, but also are more likely to rehabilitate the defendants.

B. Lack of Procedural Protections for Defendants

Critics of both private police enforcement[266] and restorative justice programs[267] already worry about diverting so much criminal

by the states, "[c]rime's politics have become increasingly nationalized." Stuntz, *supra* note 249, at 533.

264. *See* Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 427–30 (2000); Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L. J. 395, 395–97 (2005).

265. *See supra* note 200 and accompanying text.

266. *See supra* note 67 and accompanying text.

267. *See, e.g.*, Brown, *supra* note 262, at 1288–89; Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?*, 14 OHIO ST. J. ON DISP. RESOL. 855, 858–60 (1999).

justice activity out of the public courts, where defendants are protected by a myriad of constitutional and statutory protections. Expanding privatization into the adjudication and resolution phases of criminal justice would no doubt exacerbate these concerns. For example, although the private police are immune to the constitutional restrictions on search and seizure and interrogation,[268] the debate over the immunity is currently of little more than academic interest, as most of such evidence is never intended for public courts, and so applying the exclusionary rule would have little effect. However, if improperly gathered evidence were to be used in a private criminal proceeding, the harm from such behavior would be much more real. Similarly, there would be no guarantee that a defendant in a private mediation would receive even the most basic rights during the process—the right against self-incrimination, the right to an attorney, the right to confront witnesses against him—since the Constitution only provides for those rights when the state is prosecuting a defendant.

The first response to this criticism is to point out the reality of the public criminal adjudication system, which rarely ever involves an actual criminal trial. Over ninety percent of all criminal cases are plea-bargained,[269] a process which provides very few procedural safeguards to the defendant. A full-fledged criminal trial, with all of its robust constitutional protections, has proven to be too costly and time consuming for the state to provide in most instances;[270] thus, it is somewhat unfair to compare a private criminal adjudication to a criminal trial. Rather, it makes more sense to think of a private criminal adjudication as merely another method of dispute resolution that would be available to the defendant. A defendant could choose to go to trial, or authorize his attorney to accept a plea deal in exchange for a guilty plea (and a simultaneous waiver of many trial rights), or opt out of the public criminal law system altogether. Although the plea-bargaining system has attracted its share of criticism,[271] it is by now a well-established aspect of our

268. *See supra* notes 74–84 and accompanying text.

269. The Department of Justice reports that in 1988, ninety-one percent of all felony convictions were guilty pleas. JODI M. BROWN & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 1994, at 3 (1998).

270. *See* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 971–72 (1983).

271. *See, e.g.*, Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining,* 36 U. CHI. L. REV. 50, 52 (1968); Raymond I. Parnas & Riley J. Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101, 101 (1978); Stephen J. Shulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979

criminal justice system, based on the legal principle that the defendant is always allowed to waive his rights in exchange for something that he wants (generally, a lesser sentence).

This perspective highlights a broader point in defense of private criminal mediations: defendants can always opt out of the private proceeding (or rather, choose *not* to opt out of the public system) and thereby receive the added constitutional protections (and harsher retributive penalties) of the public system. Because the state maintains its monopoly on coercion, neither the victim nor the mediator can force the defendant to agree to even participate in the private mediation, much less force him to agree to specific terms.

Some commentators, however, reject the "voluntariness" of alternatives to public adjudication, arguing that the uncertainty of the resolution in the public courts creates a coercive atmosphere which pressures defendants to agree to proposals that are not in fact in their interest.[272] This uncertainty is exacerbated by the lack of informed consent requirements in most existing restorative justice programs, so that defendants may not have a clear understanding about the rights and potential plea bargains they might receive if they choose the public route.[273] It is true that a defendant who accepts a plea bargain is waiving many of his constitutional rights, but he is usually still given the opportunity to consult with an attorney,[274] and the attorney can ensure that his ultimate decision to forgo a trial is the result of informed consent. If an attorney is not present in a restorative justice mediation—or in a privately sponsored criminal mediation—there could be a legitimate concern that the defendant's participation is not truly voluntary.

One important, but insufficient response to this concern would

(1992).

272. *See, e.g.*, Brown, *supra* note 262, at 1266. Some commentators also find "coercion" in some existing restorative justice programs in which an offender's refusal to mediate or rejection of an offer during mediation can be used against him in the subsequent public adjudication. *Id.* at 1269–70. A court is only likely to take this into account if the case has been referred to mediation from the public court system, with a public entity represented in the process; in a true private system, a defendant's refusal to participate would not be counted against him in any subsequent public adjudication because the refusal would take place before the state was ever involved in the case.

273. *Id.* at 1270–71. Professor Brown also points out that in many existing restorative justice programs, the defendant is a first-time offender or a juvenile, while the victim may be a repeat player or a large savvy institution. *Id.* at 1271–72.

274. This is not always the case, however. Many smaller jurisdictions do not assign defendants attorneys for minor cases and allow the defendant to waive his right to counsel and plead guilty at arraignments without ever consulting an attorney.

be to point out the difference between substantive outcomes under the traditional criminal justice system and likely outcomes under a private system. The extraordinarily punitive nature of the traditional justice system and its heavy reliance on incarceration are both well documented,[275] while a resolution under a private criminal justice system will almost certainly preclude incarceration (unless the state releases its monopoly hold on coercive power). If current restorative justice programs are any guide, giving victims a greater say in the resolution will usually result in a more lenient sentence, while surveys of victims show that many would be happy to find a resolution that does not involve incarceration as long as the victim has a greater say in the crafting of the resolution.[276]

But in the end, it is not sufficient for an outside observer to conclude that the substantive benefits which the defendant will likely receive under a private criminal mediation make up for the loss of procedural safeguards built into the public criminal system. Rather, for those rights to have any meaning, each defendant must understand the rights he could have in the public system and knowingly waive those rights, just as he does when he agrees to a plea bargain. Private criminal mediators should be required to provide the defendant with an explanation of the rights he is forgoing by choosing to opt out of the public criminal justice system. Imposing such a requirement on private mediators would not be a very onerous burden, and it would go a long way toward legitimizing the private criminal justice system by ensuring that defendants were making an informed choice to bypass the public courts.

C. Lack of Accountability for Private Police

The army of private security forces which now dominate the law enforcement stage of our criminal system have already come under heavy criticism for their conduct. Commentators argue that private security routinely violate the constitutional rights of suspects,[277] receive little or no training for their job,[278] and are paid so little that the quality of personnel is low and turnover rates are high.[279] Regulation of private security guards is haphazard, with no federal guidelines[280] and states enforcing widely varying (but mostly

275. *See supra* notes 8–14 and accompanying text.

276. *See* Strang & Sherman, *supra* note 23, at 18.

277. *See, e.g.*, Boghosian, *supra* note 34, at 177–78.

278. *Id.* at 182–83 (noting that the average uniformed security guard receives only four to six hours of training before beginning his assignment).

279. *Id.* at 179–81, 184–85.

280. *Id.* at 180–81.

minimal) standards as to licensing, screening, and training.[281] Since private police are not controlled by any public agency—indeed, are answerable only to their client—they are far less accountable for their actions and more likely to mistreat civilians with whom they come into contact. The perceived lack of accountability for private police would be further exacerbated by the secrecy—or at least lack of publicity—in which a private criminal justice system would operate.[282] Allowing the private police to transfer their arrests into a private criminal system would only further insulate their actions from public scrutiny.

As it turns out, the truth about private police accountability is somewhat more complex. Some commentators have argued that the private nature of security guards makes them more accountable than the public police.[283] Unlike the public police, who are insulated from the communities which they patrol by the large government bureaucracy that employs them, many private guards must treat the public as customers of the client who hired them.[284] In other words, it is too simplistic to simply state that public police are accountable for their actions and private police are not—both are accountable to the individuals they interact with in different ways and to varying degrees.

But this is again only a partial response to the concern about the private police. In reality, the only way to regulate the private police agents effectively is through the private tort system. A few scholars have already claimed that tort actions are the only effective and reasonable method of regulating the public police,[285] arguing that the exclusionary rule is insufficient or ineffective in deterring police conduct.[286] Recently the Supreme Court itself noted that "[a]s far as we know, civil liability is an effective deterrent [against public police misconduct], as we have assumed it is in other contexts."[287] Although there are few published cases of successful lawsuits against the public police,[288] many such lawsuits are settled before

281. *Id.* at 181–82.

282. *See, e.g.*, 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1978) ("Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.").

283. *See, e.g.*, Sklansky, *supra* note 27, at 1189–90.

284. *Id.*

285. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 811–16 (1994).

286. *Id.* at 785–800.

287. Hudson v. Michigan, 126 S.Ct. 2159, 2167–68 (2006).

288. *See* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 762–66 (2004).

they go to trial, as reflected in the budget expenditures by large cities to pay settlements for police misconduct.[289]

Still, it is fair to question whether these lawsuits are an effective deterrent against public police misconduct. Plaintiffs in such cases face significant legal hurdles in bringing such lawsuits, including the qualified immunity enjoyed by public police officers and the sovereign immunity doctrine which protects state agents.[290] Juries may be more willing to believe a police officer's version of the events than an individual plaintiff, thus making success in such cases difficult.[291] Even when the plaintiff wins an award or receives money in settlement, the money may be paid out by the city or county which employs the police, thus only indirectly impacting the police department itself and thereby lessening the deterrent effect of such lawsuits.[292]

Whatever the efficacy of relying on private causes of action to regulate the conduct of public police, there is no reason to believe the tort system would not prove effective in regulating private police. The significant legal and strategic hurdles that plaintiffs face in suing public police are nonexistent for suits against private security guards—private guards do not enjoy qualified immunity, are not protected by sovereign immunity, and juries are unlikely to show any special sympathy for private security guards. More significantly, the damages awarded as a result of these lawsuits will be levied directly against the party most responsible for the private police's actions: the client. Unlike a city or county which can absorb large damage awards into its budget, the private client will be affected much more severely by negative verdicts or large settlement payments—not to mention the attorney's fees in defending against such lawsuits. In addition, private clients will be eager to avoid the

289. *Id.* at 766–70. Miller and Wright cite budgetary numbers from various large cities: for example, San Francisco paid out $1.54 million to settle 25 cases between 1990 and 1994; New York City paid approximately $70 million for settlements or claims between 1994 and 1996, and Miami paid $17.8 million between 1990 and 2001 to settle 110 claims. *Id.* at 768–69 & n.34.

290. *Id.* at 762.

291. *Id.*

292. *Id.* at 781–82. Miller and Wright point out that very little is known about what entity actually does pay these damages and settlements. However, they do conclude that:

> [T]he monetary cost of judgments against police are not always fully or directly born [sic] by police departments or by individual officers. Civil judgments come out of city or county funds, or perhaps from insurance policies that the local government purchases—i.e., from taxpayers . . . It is city council members, county boards, and city and county administrators who bear the financial and political cost [of these lawsuits].

Id.

negative publicity associated with such lawsuits, thus providing an even greater incentive to ensure that their private security forces are properly screened and trained.

Critics of private law enforcement point to the significant number of tort cases against private security guards as proof that the private police do in fact violate the rights of suspects.[293] Although these cases surely provide evidence that some private security guards do abuse their power, the fact itself is not too surprising—with somewhere between one and two million security guards interacting daily with the general population,[294] frequently in confrontational situations, it is inevitable that some of them will mistreat civilians. The large number of successful tort cases could equally be seen as evidence that the tort system is working—that suspects whose rights are violated by public police are able to bring suit and win damages. Whether or not the tort system provides an adequate level of deterrence is an open question, requiring more empirical study—how often do private police abuse their authority? How often does the aggrieved party sue as a result? What are the average damages for these lawsuits? If abuses are indeed widespread (though there is, as of now, no reason to believe they are), if lawsuits are relatively uncommon compared to the amount of abuse, or if damages are too low to affect the behavior of those employing the private guards, the tort rules can be modified to provide the necessary amount of deterrence: lower the barriers to bringing suit, or increase the punitive damages available once mistreatment has been proven.

D. Exacerbating the Inequality of the Criminal Justice System

Another argument against further privatization of the criminal justice system is that the significant income and wealth disparities in our society will result in an unacceptable disparity in the provision of criminal justice services. Critics could contend that the rich will be able to pay for a much higher level of protection from private law enforcement and will be far safer from crime—and while we are perhaps willing to concede that the rich deserve bigger

293. *See, e.g.*, Boghosian, *supra* note 34, at 177 ("It is not surprising that security personnel frequently find themselves in court accused of using excessive force and violating the constitutional rights of others."). A review of case law shows that "the discretion afforded private security guards has resulted in a spate of legal cases, ranging from excessive force claims to claims of 'consumer racism' against minority shoppers by private security guards in retail stores." *Id.* at 189.

294. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, SECURITY GUARDS AND GAMING SURVEILLANCE OFFICERS 2 (2006), *available at* http://www.bls.gov/oco/pdf/ocos159.pdf.

houses and better cars, the right to be free from crime is a fundamental entitlement which should not depend upon the size of one's bank account. At the same time, a rich person and a poor person who are apprehended and accused of the same crime could be treated quite differently in a privatized criminal justice system. Wealthier defendants could opt out of the public system, and then conceivably pay their way out of their crime by offering a monetary settlement to the victim, while those with less means would be stuck in the public courts.[295] The public institutions that the poor would remain dependent upon—police, prosecutors, judges, prisons, etc.—will become even more resource-starved as privatization saps money from the public system. In other words, as the rich and middle class decide to pay more for their own private criminal justice institutions, they will be less willing to support government expenditures for public criminal justice institutions.

This is a familiar argument against any movement towards privatization—most prominently with regards to schooling,[296] but also in the debate about how far to go in providing free medical care,[297] and in the discussion about civil law alternative dispute resolution programs.[298] One possible response by more conservative

295. *See* Brown, *supra* note 229, at 1970.

296. *See, e.g.*, Brian P. Marron, *Promoting Racial Equality Through Equal Educational Opportunity: The Case for Progressive School-Choice*, 2002 BYU EDUC. & L.J. 53, 106 n.234 (documenting numerous instances in which members of Congress argued against privatization of the school system by use of vouchers because such a system would drain public schools of scarce and necessary funding); Kimberly McLarin, *Ohio Paying Some Tuition for Religious School Students*, N.Y. TIMES, Aug. 28, 1996, at B9 (reporting on the beliefs of those opposed to privatizing schools through the use of vouchers: "Voucher opponents say the program, which will cost $5.2 million over two years, will drain badly needed money.").

297. *See, e.g.*, Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 128 (2003) ("In the United States, poor women of color experience barriers in accessing health care due to increased privatization of the health care industry."); Dorothy E. Roberts, *Privatization and Punishment in the New Age of Reprogenetics*, 54 EMORY L.J. 1343, 1349 (2005) ("The ownership society and the privatization philosophy it reflects demand that individuals rely on their own wealth to meet their needs and discourage government aid for poor mothers who face systemic hardships in caring for their children.").

298. One commentator explained the argument as applied to alternative dispute resolution in the following way:

> There is the risk . . . that as the rich move out of the courts to private dispute resolution forums, only criminals and the poor will be left in the courts, thus, reducing the effective power of these institutions over all society.

supporters of privatization movements is that even if something is a fundamental right—or especially if it is a fundamental right—individuals should be allowed to spend more money to get more of it if that is how they choose to spend their resources. But this response is not as persuasive to those who do not subscribe to a libertarian economic philosophy—the idea that the rich will get "better" justice (or perhaps not have to answer for their crimes to the same degree as those with less resources) seems fundamentally unfair.

A better response would be to more closely examine the reality of the current criminal justice system, which reveals two unpleasant facts. The first is that the rich already get far more protection from crime then the poor. Partly this is due to geography, because for a variety of reasons, the poor tend to live in high-crime neighborhoods.[299] And as noted above, the law enforcement stage of the criminal justice system has already been privatized to a large extent,[300] so the wealthier are already able to pay for safer streets and lower crime. In fact, one of the strongest indicators of whether an individual will be the victim of a violent crime is the individual's level of income.[301]

> A recent news report confirms the immediacy of the threat that increased resort to ADR will result in creation of "a two tier system of justice." According to the report, California's "three strikes law" is forcing diversion of civil judges to criminal trials to handle the increased caseload. With the public resources to handle civil cases shrinking, some are predicting that one day only the rich will have recourse to civil litigation—by hiring private judges as provided for under California law. We can imagine without much difficulty a future "in which wealthy litigants will use private ADR while the poor and powerless will be consigned to public courts which government will have little incentive to fund because their constituents lack political clout." This would create a situation analogous to what has happened to public education in some of our central cities because of the middle class exodus to private schools and the suburbs.

Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 261–62 (1996) (citations omitted).

299. *See* Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 75 (1998) ("Low-crime and high-crime areas within any metropolitan region can be located on a map, and, usually, the most privileged suburbs are low-crime areas while poor suburban and central city neighborhoods are high-crime areas.").

300. *See supra* notes 27–38 and accompanying text.

301. For instance, those with an annual family income of $7500 or less suffer a robbery victimization rate of 5.6 per 1000 individuals in that category, while those with an annual family income of $75,000 or more suffer a robbery victimization rate less than half that, at 2.1 per 1000 individuals in that category. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL

The second unpleasant fact is that under our public system of criminal justice, the poor who are arrested get nothing like the treatment of the middle or upper classes. They are dependent on court-appointed defense attorneys, who are famously overworked[302] and underpaid,[303] and after they are arraigned, they will be held in jail (even though they are presumed innocent) unless they can pay the government a certain amount of money to be released on bail.[304] Those with more resources will be able to hire a private attorney and will be much more likely to make bail after the arrest. The question of bail is not just a matter of being able to remain at liberty for the few months until one's trial is concluded, it also has a fundamental effect on the ultimate outcome of one's criminal case. One study found that defendants who are incarcerated prior to trial

VICTIMIZATION IN THE UNITED STATES, 2005 STATISTICAL TABLES 27 tbl.14 (2006). Likewise, those with an annual family income of $7500 or less suffer an assault victimization rate of 29.9 per 1000 individuals in that category, compared to a rate of 13.7 per 1000 individuals in the category of those making more than $75,000 a year. *Id.* The rate of victimization tends to decrease as income increases. *See id.*

302. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended the following maximum caseload: 150 felonies per attorney per year or four hundred misdemeanors per attorney per year. AM. BAR ASS'N, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 17 (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf. However, examples abound of caseloads far exceeding this recommendation. For example, in Rhode Island, public defender felony caseloads exceed the recommended number by 35 to 40%, and misdemeanor caseloads exceed it by 150%. *Id*. In Baltimore, public defenders were handling eighty to one hundred serious felonies *at any given time*, typically exceeding the recommended 150 *per year*. *Id*. at 18.

303. *See* JOSHUA DRESSLER & ALAN C. MICHAELS, 2 UNDERSTANDING CRIMINAL PROCEDURE 56, n.68 (4th ed. 2006) (noting that most states pay court-appointed defense counsel between $40 and $70 per hour for non-capital cases and that many states have an overall cap for any given case, which is usually around $3000 but could be as low as $445). As Dressler and Michaels point out, "[i]n New York, a defendant facing a life sentence may get a lawyer who spends as few as 20 hours on the case; the lawyer may get as little as $693 for the work, a figure less than the average cost for a real estate closing." *Id.*

304. In 2002, sixty-six percent of felony defendants in the seventy-five largest counties had a bail amount set by the court, and were required to post all or part of that amount to secure release. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at 18 (2006), *available at* http://www.ojp.usdoj.gov/bjs/abstract/fdluc02.htm. More than half of those with a bail amount had it set at $10,000 or more. *Id.* The average bail set for drug offenses was $34,900, for property offenses was $30,000, and for violent offenses was $90,800. *Id.* at 18 tbl.16. Only about half of defendants required to post bail to secure release did so. *Id.* at 19. Overall, then, thirty-two percent of defendants in the seventy-five largest counties in America were held on bail pending disposition of their case. *Id.* at 17 tbl.14.

are 35% more likely to be convicted than those who are not—if the defendant is facing a felony charge, he is 70% more likely to be convicted if he is in jail before trial and is much more likely to plead guilty[305] (for misdemeanor cases, the amount of time defendants will wait until trial could easily equal or exceed the likely sentence for their crime)[306]—and are less able to assist in their own defense.[307]

However, simply highlighting the deep inequities of the current system and claiming that an alternate system could not possibly be much worse is not much of an argument in favor of privatizing the criminal justice system. As it turns out, however, a private criminal justice system will likely be much better for lower-income individuals than the current system. The reason is straightforward: the current public system relies primarily on incarceration as

305. *See* Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 50 (2005) ("If pretrial detention is ordered, or if bail is set at a level that the defendant cannot afford, and the defendant is detained as a result, then the likelihood that the defendant will accept a plea bargain increases."). Whether by guilty plea or conviction at trial, defendants detained until disposition have a conviction rate of 81%, compared to a conviction rate of 60% for defendants released until disposition. BUREAU OF JUSTICE STATISTICS, *supra* note 304, at 24 tbl.24. Defendants detained pending disposition not only have higher overall conviction rates, but are more likely to be convicted of a felony rather than a misdemeanor. *See id.* (showing that defendants detained pending disposition are convicted of felonies in 72% of cases, compared to a felony conviction rate of only 48% for defendants released pending disposition).

306. One commentator summarized this reality as follows:

> Most criminal cases . . . involve misdemeanors or minor felonies, such as petty theft, that usually carry short sentences. Though many defendants make bail for these offenses, some do not have enough money or are detained without bail. One empirical study found that roughly four times as many defendants charged with misdemeanors or lesser felonies are imprisoned before trial as are after conviction. The pretrial detention can approach or even exceed the punishment that a court would impose after trial. So even an acquittal at trial can be a hollow victory, as there is no way to restore the days already spent in jail. The defendant's best-case scenario becomes not zero days in jail, but the length of time already served.

Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2491–93 (2003) (citations omitted).

307. Joseph Lester argues that a free defendant can assist in finding witnesses, has fuller access to his or her attorney, and does not suffer from the pressure to accept or initiate a guilty plea. Lester, *supra* note 305, at 51. Furthermore, a free defendant's case often proceeds at a slower pace. *Id.* The longer a case goes without being tried, the more difficult the government's case becomes due to witnesses' memory losses and destruction of evidence. *See id.* at 51 & n.434. A detained defendant does not have these advantages.

punishment, and incarceration is extremely (and probably disproportionately) punitive to lower-income individuals. Even a short jail sentence can mean that a marginally employed individual will lose his or her job, while longer sentences make criminals unemployable when they are released.[308] The effect on family members of those who are convicted of crimes is even more dramatic (and of course, completely unjust): families may lose their primary breadwinner for months or years at a time, while single parents are forced to raise children on their own, helping to maintain a cycle of poverty.[309]

An alternative criminal justice system, using the restorative justice ideology of rejecting incarceration and emphasizing rehabilitation and reintegration,[310] could dramatically improve the lives of lower-income defendants and their family members. Instead of being locked up for months or years at a time, which includes being in jail for months before conviction, and then released into society with poor employment prospects, those who commit crimes can work out more flexible arrangements with their victims which will allow them to continue working and stay with their families while their punishment or penance is being carried out.

The possibility that the rich will be able to pay their way out of criminal liability is indeed troubling. However, there is far more to restorative justice "penalties" than monetary fines, and many of the resolutions involved in restorative justice—apologies, shaming, providing a service to the victim, etc.—would have the same effect on any individual, regardless of his or her economic class.

Also, we have already seen the haphazard way in which a

308. Robert G. Lawson, *Difficult Times in Kentucky Corrections—Aftershocks of a "Tough on Crime" Philosophy*, 93 KY. L.J. 305, 368–69 (2004) ("'Research has yet to reveal the precise effects of incarceration on future employment, although several studies show that former inmates have more difficulty than other people finding and keeping a job.' . . . Most inmates [are] handicapped . . . by the fact that they search for work as persons who served time in prison ('ex-convicts')." (quoting MARTA NELSON & JENNIFER TRONE, STATE SENTENCING AND CORRECTIONS PROGRAM: WHY PLANNING FOR RELEASE MATTERS 2 (2000)).

309. *See generally* John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST.: REV. RES. 121, 131–48 (1999).

310. Studies demonstrate a reduction in recidivism rates for participants of restorative justice programs. Gabbay, *supra* note 197, at 385. Some restorative justice supporters explain this effectiveness with the Reintegrative Shaming Theory. *Id.* at 384. This theory uses family and community conferencing to emphasize the disapproval of the act while refraining from negatively stigmatizing and humiliating the offender. *Id.* This allows the offender to acknowledge his crime without being cast out of the community, thereby effectively rehabilitating or reintegrating the offender into society. *See id.*

private criminal adjudication system is developing, from civil demand letters[311] to neighborhood community boards.[312] Many of these unofficial adjudications fly under the radar of the public criminal justice system, which may easily lead to situations in which those with means are able to buy their way out of trouble, while those without means are punished in other ways. As private criminal adjudication systems become more widespread, however, prosecutor's offices will begin to monitor their actions, which will help to cure any abuses that might otherwise exist.[313]

E. Reluctant Victims

Critics of current Victim-Offender Mediation programs point out that many victims will not want to participate in restorative justice opportunities.[314] Some victims may object to the process of restorative justice; they understandably might not want to meet the offender face-to-face and would prefer that the police and prosecutors handle as much of the work as possible. Others may not agree with the goals of restorative justice; they may have no interest in reconciling with or forgiving the defendant and may not be concerned with restitution.[315]

The same complaint could be made about a private criminal mediation system. Not only would participation in the system require the victim to meet with the offender (a prospect some victims would find uncomfortable, if not terrifying), but it would also require quite a bit more time and effort on the part of the victim. As we have seen, if the private criminal justice system follows the restorative justice model, such victims will be the exception, not the

311. *See supra* notes 113–19 and accompanying text.

312. *See supra* notes 207–13 and accompanying text.

313. *See supra* Part IV.

314. *See* Brown, *supra* note 262, at 1274–81.

315. *Id.* at 1274. ("In some respects . . . VOM may betray the interests of the victims it seeks to protect. VOM's emphasis on 'reconciliation' may inhibit victims' expression of anger and pressure them to forgive their offenders."). It is true that many victims feel anger toward the perpetrators of the crime and that mediation is an imperfect medium through which to express that anger; however, it is doubtful that the formal adjudicative process is better able to allow the victims to express that anger. One critic of mediation in the context of divorce proceedings argues that the public court system could better allow for the expression of anger "in a formal, contained way through the ritualized behavior of the lawyers." Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1573 (1991). This may be true in the civil context, in which each party essentially hires a mercenary (the attorney) to go out and do battle with the opposition in the public arena, but it is much less true in criminal cases, in which the victim's role in a prosecution is little more than to watch from the sidelines and testify when called upon.

rule, since the overwhelming majority of victims who participate in restorative justice programs are satisfied with the result.[316] Furthermore, the current public criminal justice system has been roundly criticized for treating victims poorly—not giving them a real say in the process or outcome, summoning them to court multiple times before the case is actually litigated, and exposing them to harsh and sometimes brutal cross-examination.[317] In fact, one of the biggest advantages to a private criminal justice system is that it empowers the victims, allowing them to choose the quality and type of law enforcement[318] and giving them more control over the process and the outcome of the adjudication.[319] Unlike the public criminal justice system, a private system is centered around the victim.

However, there will inevitably be those victims who do not want to participate in the private criminal justice system. For them, as for the defendants, the solution will be simple—simply call the police, or call off the mediation once it has started, and divert the entire proceeding into the public criminal justice system. As long as the public criminal justice system exists as a default, victims will not be forced into participating in a process which makes them feel uncomfortable or intimidated.

VI. GUIDING AND SHAPING THE INEVITABLE PRIVATIZATION TO COME

As this Article has shown, private criminal adjudications and resolutions are already occurring, although they are not always recognized as such. They are a natural, inevitable outgrowth of the enormous private law enforcement system, and like their law enforcement counterpart, their prevalence and significance are likely to grow dramatically in the coming decades. The reasons for the rise of the private criminal justice system—both in the context of law enforcement and in the adjudicative and resolution stages—can be traced directly to the perceived and actual failures of the public criminal justice system. Private individuals and companies are seeking criminal justice services that better meet their needs. Perhaps a neighborhood or a retail store wants more extensive law enforcement, a family member or community wants a result that is less punitive and more rehabilitative than the public system will provide, or the victim seeks more control over the process itself. Most significantly (since the accused himself must agree to opt out of the public criminal justice system), the draconian punishments of the public criminal justice system lead defendants, knowingly or

316. *See supra* notes 151–62 and accompanying text.
317. *See supra* notes 18–21 and accompanying text.
318. *See supra* notes 58–64 and accompanying text.
319. *See supra* note 147 and accompanying text.

otherwise, to forfeit their rights under the public system and enter into a private adjudication process in which they have more control over the outcome and can possibly repair the damage they have done.

The very existence of an alternative private criminal justice system is admittedly a controversial proposition, even if it is meant only to supplement and not replace the traditional criminal justice system. For better or for worse, it appears that a private criminal justice system is developing as the extensive network of private police continues to apprehend individuals, while those who employ the private police are less and less interested in simply handing the alleged perpetrators over to the public criminal justice system. But just because a private criminal justice system is inevitable does not mean that we cannot try to affect the direction in which it develops. Although some of the criticisms of a private criminal justice system may be exaggerated, we have seen that there are legitimate concerns about the emergence of a private criminal justice industry.

In response to these concerns, there are a few reforms which would serve to make the institutions of this new criminal justice system more fair. For example, there does seem to be a need to protect defendants' rights in a private criminal justice system—or more accurately, a need to ensure that defendants are knowingly and voluntarily relinquishing the rights they would receive under the public criminal justice system. Second, the proceedings of a private criminal justice system need to be privileged, so that any statements made by the defendant or the victim cannot be used against them if the private adjudication is unsuccessful. Third, it would make sense to certify or license the private mediators—the way that most states now license private security guards—for example, institute minimum levels of training and set up guidelines to ensure that they avoid conflicts of interest in any given case. Finally, since the private tort system will be the primary method of regulating the conduct of private security guards, it would be useful to conduct some further examination of the liability of private police, and perhaps liberalize the rules so that it is easier to hold them accountable for abuses.

These suggestions are meant to guide the inevitable development of a private criminal justice system, because, given the shortcomings of the public criminal justice system and the strong appeal of a private alternative, the evolution of a private criminal justice system is indeed all but inevitable. The private police currently apprehend hundreds of thousands of criminals each year, and restorative justice theory provides an ideal blueprint for adjudicating and resolving their cases. Mediation has already revolutionized the way that civil law disputes are resolved, and

private restorative justice programs would offer the same efficiency and flexibility to the parties of a criminal dispute. As long as the state is able to regulate the results (and intervene if they differ too radically from the public interest), a private criminal justice system could provide a more satisfactory process and better results for victims and defendants alike.