

**TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY
IN CRIMINAL JUSTICE. BY BRUCE L. BENSON. INDEPENDENT
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To Serve and Protect is a breath of fresh air in the fog of mainstream recommendations concerning security, crime, and punishment. In the mainstream literature, liberals typically regard the offender as the victim of an egoistic society and conservatives typically say that the only way to reduce crime is to increase the severity of punishment (Ehrlich 1972, 1973, 1977, 1981, 1996; Stigler 1970; Becker 1968). Benson brilliantly shows that the solution to the problem of criminal justice does not rest with increasing law-enforcement budgets (pp. 2–3) or imposing harsher punishments, but with privatization.

The crisis in the administration of justice is part of a more general crisis: that of the welfare state. Government monopolization of security and justice exhibits the failures symptomatic of other government programs (poor service and inefficient rationing). The feeble results of the struggle against crime and for justice derive from a system-wide failure, where the interdependent links between public institutions make partial governmental solutions impossible. The police and judiciary systems are part of a politicized mechanism, and, consequently, are unable to evade inner contradictions inherent in all government provision of services (chaps. 11–12).

Benson argues that private crime control is possible and that thorough privatization would be more attentive to the demands of justice (chap. 5). For this reason, the market for specialized security services and equipment has been flourishing. Even under the constraints of the present system, private spending for protection of person and property is double that of public spending. In 1991, the ratio between private and public employment in security services was approximately 2 to 5. Between 1964 and 1991, the number of firms increased 543 percent, and it increased 745 percent in terms of employees. In some cities, voluntary group actions prevent crimes where the public police long ago decided not to go (p. 88). The same privatization path is being taken in the administration of justice. Today, private firms handle every manner of dispute: business, personal injury, divorces, construction warranty disputes, loan defaults, and many other areas. Benson argues that this experience both highlights the failure of government and illustrates the effectiveness of private enterprise (p. 116).

However, privatization of justice must cover the entire production of justice, as Benson shows by discussing the shortcomings of partial privatization. The first

case of partial privatization refers to “contracting out” methods. In 1994, for example, 49,154 prisoners in more than 60 private prisons were controlled by roughly 21 private firms (p. 22). Better management by the private sector has permitted a cut in costs of 10 to 50 percent. Competition among firms has created the incentives to increase productivity and to discover new techniques of production (p. 33). In spite of being an important improvement, the “contracting out” option cannot first be assimilated to a true private justice. It can be only a first step towards a completely open market. Otherwise it is likely to produce certain perverse effects, which are often wrongly attributed to the private sector, such as bribing and corruption. Bureaucrats can take advantage of their position and negotiate special privileges, and they can destroy the mechanisms of competition by erecting legal barriers (p. 43–46).

Another instance of the failure of partial privatization is that it does not address the rights of the victims. In most cases, the judicial process simply ignores crimes that are not considered serious. The careers of judges and prosecutors become more important than restitution for victims (p. 62–64). The plea-bargain is an example of these symptomatic disorders of the justice system. The victim is missing from the process altogether, so that the pseudo-efficiency of the system can be enhanced. This type of bargaining is in fact the result of the inability of government to properly produce justice:

A plea or charge bargain is an exchange agreed upon by negotiating parties, and it might be expected to improve the efficiency of the criminal justice system. . . . Indeed, the typical justification for the widespread use of plea bargaining is that it relieves some of the pressure on the prosecutorial and judicial systems arising from court crowding and delay. (p. 62; emphasis added)¹

We could share Benson’s analysis and follow him in his conclusions; however the theoretical framework is insufficient, and the book fails to clearly establish the limits of law.

For example, Benson identifies a form of informal justice—that which circumvents the public sector but which is not subject to market discipline. This is also known as “taking the law into you own hands,” and can often involve the destruction of assets and physical punishment. Is it correct to identify this sort of behavior as self-justice, as Benson does, or does it simply constitute revenge? To note the reaction of a distraught population towards criminality and injustice is one thing, but to identify these behaviors to a type of private justice is another (p. 120).

Moreover, can we really talk about privatization, when the given examples deal only with particular forms of substitution of public justice or private ones, and when the core of justice remains public and the monopoly of the government? The private sector can only make so many strides when government retains a monopoly in deciding what the law is and how it is to be enforced. At most, Benson’s

¹Does justice imply the presence of a third person: arbitrator, judge, and mediator to ensure fairness in the process and proportionality in the sentence (Rothbard 1998)?

examples of privatization illustrate the social advantages of private markets for security and justice, but they do not illustrate the workings of true privatization.

A more narrow class of problems is connected with Benson's neoclassical economic outlook. In this view, criminality and punishment are analogized to market exchange, where there is a demand for crime, a supply of criminal possibilities, and punishments are treated as prices for services (p. 51). There are grave problems associated with this approach. For example, a government system ends up determining the expected price for crime. But can we really call an arbitrary value determined unilaterally by a governmental institution a price? A price has a real meaning only in a free market. More fundamentally, it is not possible to speak of a demand for crime, any more than it is possible to find suppliers who offer, at a price, three rapes, two thefts, and three murders. Unlike crime that is an aggressive procedure for appropriation, the market is based upon voluntary agreements. Consequently, crime and exchange are two different, incompatible, irreconcilable phenomena, which is why a "market for crimes" cannot exist (Ehrlich, 1996). Benson commits the same error by asserting that Mafia organizations are one example of a form that the private sector could take (p. 112). Private institutions respect property rights and apply the rule of law, whereas the state does not. In that sense, a Mafia that uses violence and extortion is better seen as a primitive state in competition with other primitive states.

Another problematic area is the way Benson explains the expected benefits of privatization (chap. 7). He argues his case primarily by providing examples of the improvements in resource allocation that can be expected. The lack of knowledge and the disincentive for research obviously skews the judgment of those who produce security and justice. In a similar way, the arbitrariness of the political system (pp. 128–34) can bring about a situation in which offenders do not serve their sentences² and where there is too much focus on enforcement of some types of crimes (say, for example, ingesting illegal drugs) even as such enforcement causes the rate of other crime rates to rise (say, for example, crimes against property to pay the artificially high prices of these drugs; p. 139).

But reducing the benefits of the privatization of justice to a cost–benefits analysis has its limits. It does not address more fundamental issues concerning what should and should not be considered a crime in a free society. Are drug dealers always to be considered as criminals in a libertarian society? Will prostitutes still be considered outlaws even though they supply voluntary services (Block 1976)? There are many other such "victimless crimes" or crimes against the state which the libertarian society may permit or which would not exist, among which we might include insider trading, money laundering, and tax evasion. About these issues, Benson says nothing. And yet this is a crucial concern. Is the role of justice

²The inability of government to manage the judiciary system explains also why the punishments are extremely low. Indeed, the average expected punishment for a murder is 2.99 years, 338 days for a sexual offense, 4.5 days for theft, and 10 days for an automobile theft (p. 68).

to intervene in private relationships when no harm (no violation of property rights) is done? The idea that the privatization of justice amounts to little more than the application by private firms of the law produced by governmental institutions is a restrictive view of the problem. It begs the crucial question of what type of law must be enforced, an issue that would be addressed in a private system in a radically different manner.

Moreover an argument about justice cast solely in terms of benefits and costs suggests that efficiency is the only issue; a theory of justice must also deal with the legitimacy of law enforcement. Many issues of criminal law today deal with a conflict between the efficiency of law enforcing institutions and private-property rights. For instance, he writes, "if someone is carelessly hired or trained to be a police officer uses excessive force and violates a person's rights, a local government is not likely to be liable for damages" (p. 180). In other words, governmental agents can still violate the rights of citizens to enforce the law. This opens a Pandora's box.

Benson also seeks to support the case for the privatization of criminal justice by an analysis of the history of law and enforcement in private-property societies (pp. 94–13, 198–212). In the first Anglo–Saxon societies, for example, justice was dispensed according to custom on an entirely private basis, and in this system, only crimes against person and property called forth restitution. Only as the government became centralized did the definition of crimes begin to broaden, while fines and property confiscation became a source of revenue instead of a means of restitution (p. 205).

As important as history and examples are, however, they do not substitute for a strong theoretical perspective. One can well imagine a treatment from the opposite perspective, written by a scholar as brilliant as Benson, who could provide other examples, other interpretations, and additional factual analysis justifying more government intervention in the criminal justice system. This same author could explain that the failures of the judicial system are the consequence of capitalism. As it stands, Benson's argument is vulnerable to being overturned by this approach, whereas a more developed theoretical framework (Rothbard, 1998) would have given his overall argument more analytical power.

Nonetheless, and despite its analytical flaws, Benson's book is a worthy contribution to identifying both the source of the problem, the state and its victim-creating policies, and the means of its solution, the privatization of police and justice.

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