

Using the Private Sector To Deter Crime

by

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Executive Summary

Since 1965, the share of gross domestic product (GDP) devoted to the U.S. criminal justice system has more than doubled. Yet the amount of crime reported to the police is near an all-time high and the amount of violent crime reported is *at* an all-time high. Perhaps it is time to consider turning more of the criminal justice burden over to the more efficient, innovative private sector, which already plays an important part in the system. For example:

- There are nearly three times as many private security guards as public law enforcement officers — 1.5 million in 1990, and the private sector spends almost twice as much on private security as we pay in taxes to support the public police.
- Private bounty hunters, or bail enforcement agents, make the private bail bonding system work for persons accused of crimes by tracking down and apprehending those who try to flee.
- And the private sector on occasion has been used innovatively in other ways — to prepare cases for district attorneys, to prosecute criminal cases and to employ prisoners behind bars.

This study analyzes ways to expand the role of the private sector to reduce crime and lessen the burden of criminal justice for taxpayers. The proposed reforms include:

1. Contract out noncrime, nonemergency police functions to private security firms, allowing public law enforcement officers to concentrate more of their own efforts on crime. Pay bonuses or special incentives to departments that achieve independently verified reductions in crime.
2. Make greater use of reserve law enforcement officers and explore ways to expand their ranks.
3. Shut down pretrial release bureaus and so-called free bonds in favor of competitive, commercial bail bonds.
4. Increase the use of private rewards for criminal convictions, including bounties offered by commercial insurance policies.
5. Pay bounty hunters for recovering criminals who are wanted on bench warrants (orders by judges or courts to arrest persons charged with criminal offenses).
6. Make greater use of private attorneys to prepare and/or litigate criminal cases at private expense in order to expand prosecutor resources at no taxpayer expense.
7. Reduce legal obstacles to integration of criminal prosecution and civil remedies in order to raise the price of crime to criminals and compensate victims more adequately.
8. Require convicts eligible for probation and parole to post a private bond to guarantee good behavior, thus ensuring supervision by a bondsman, raising the cost of committing another crime or violating the terms of their release and encouraging self-control.
9. Accelerate private construction and operation of prisons to control costs and raise quality.
10. Accelerate the private employment of prison labor and explore private employment of convict labor alongside nonconvict labor.

The debate over crime has been in a rut for decades, with conservatives emphasizing tough policies and liberals emphasizing soft remedies and improved economic opportunities. Privatizing the criminal justice system on an incremental basis is a win-win solution: the innovation and productivity of private enterprise can reduce crime, reduce taxes and improve the protection of civil liberties.

Introduction: The Failure of the Criminal Justice System

The U.S. criminal justice system costs billions of dollars to operate each year, and the cost is growing rapidly as police, courts and prisons are added. As Table I shows:

- In 1965, the justice system cost taxpayers \$4.6 billion, about six-tenths of 1 percent of gross domestic product (GDP).
- By 1993 the cost had grown to about \$100 billion, 1.57 percent of GDP.
- The number of justice system employees grew from 600,000 in 1965 to nearly 2 million in 1993.¹

Despite these increases in spending and personnel, the number of serious crimes reported to the police is near an all-time high [see Figure I] and the number of violent crimes reported to the police is *at* an all-time high [see Figure II].² The more resources government applies to the war on crime, the less effective they seem to be.

In light of this government failure, is it possible that the private sector could be more successful? Let's take a look.

"The more resources government applies to the war on crime, the less effective they seem to be."

TABLE I

Spending on the Criminal Justice System¹

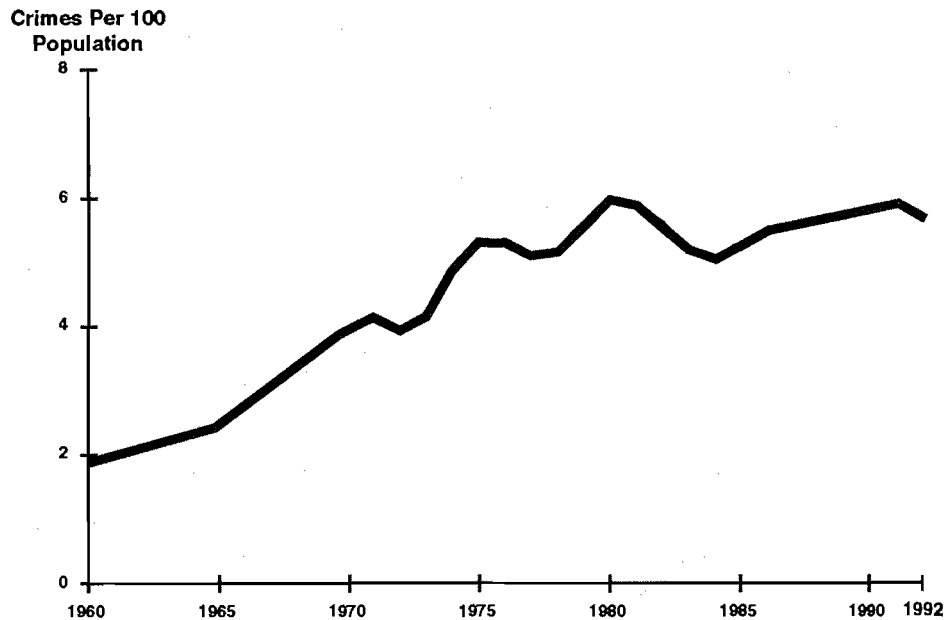
<u>Year</u>	<u>Total Expenditures</u> <u>(millions \$)</u>	<u>Spending as a</u> <u>Percent of</u> <u>GDP</u>	<u>Number of People</u> <u>Employed</u> <u>(thousands)</u>
1965	\$ 4,573	.65	600
1970	8,571	.84	775
1975	14,954	.94	1,011
1979	26,028	1.05	1,178
1985	45,607	1.13	1,369
1988	60,980	1.24	1,601
1990	74,000	1.34	1,722
1993 ²	100,000	1.57	2,000

¹ Public sector expenditures, all levels of government. Includes some civil court expenditures which are not separated from the total.

² Preliminary estimates.

FIGURE I

Number of Serious Crimes Reported to the Police¹

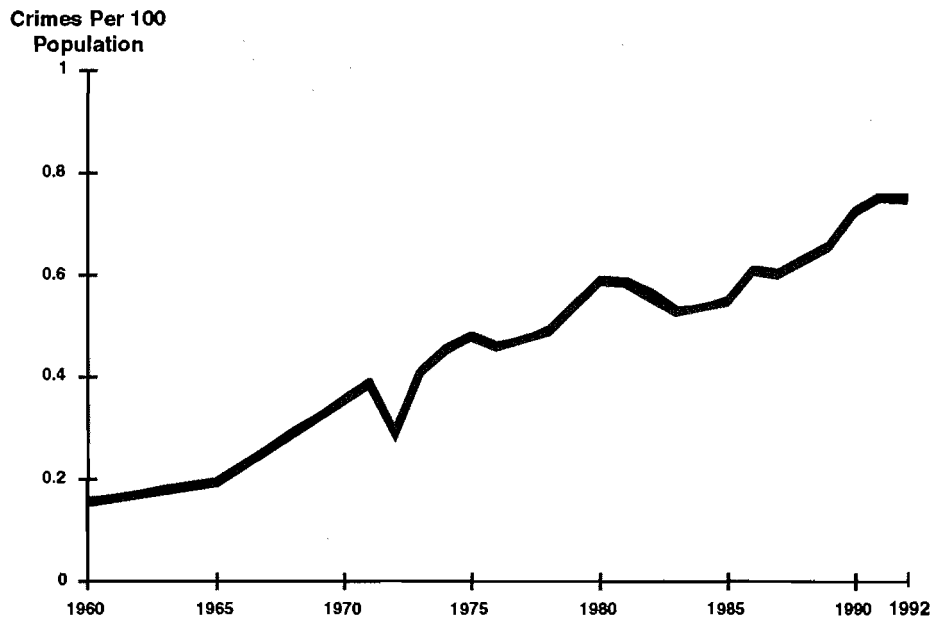


¹ Crimes classified as serious crimes are murder, rape, robbery, aggravated assault, burglary, arson, motor vehicle theft and larceny/theft.

Source: Federal Bureau of Investigation, *Crime in the United States*, annual.

FIGURE II

Number of Violent Crimes Reported to the Police¹



¹ Crimes classified as violent crimes are murder, rape, robbery and aggravated assault.

Source: Federal Bureau of Investigation, *Crime in the United States*, annual.

Historical Origins of Government's Monopoly on Criminal Justice

Today's heavy reliance on government to control crime is a relatively recent phenomenon. Not too long ago, most protection of life and property in the United States and Europe was personal and private. There were no public prosecutors, and the police were public in name only, deriving most of their income from bounties and shares of revenues from fines.

Anglo-Saxon Law.³ The American legal system derives from English law, which in turn derives from Anglo-Saxon law and the laws of Norman monarchs. In Anglo-Saxon society, individuals lived in small kindred or tribal groups and relied on the group for protection against crime and for pursuit of an offender after an offense was committed.⁴ Kindred also were jointly responsible for bringing a member to answer a charge and for payment of fines. The Anglo-Saxons gradually moved from blood feuds to a system of "wergilds" or prices to be paid to the relatives of people who were killed. This peaceful remedy appeased the victim or victim's survivors, deterred offenses and avoided the terrible costs of blood feuds or warfare.⁵

The wergilds, based on social rank, appear to have been fairly uniform throughout England, suggesting a degree of efficiency in the market for justice. Society was made up of nobles, churls (free men below the rank of noble) and slaves. In the event of homicide, for example, nobles' lives were valued at 300 gold pieces (the equivalent of about 150 head of cattle). Churls' lives were valued at 200 gold pieces in most areas. Slaves were not considered to have a wergild, but a price had to be paid to the slave's master if the slave was killed. Until the late 9th century, there was another class of free man, ranking below the churl, with a wergild about half that of a noble.

Violence was rarely necessary to force compliance with monetary sanctions. If the accused person was unable to pay, he was placed in slavery. If he failed to appear to answer a charge or refused to pay, he was an outlaw and the accuser had the right under the Anglo-Saxon common law to take his life. This worked because a social consensus prevailed on the law and the fines.⁶ The criminal's kindred also had a "duty imposed by custom to make amends for the offenses of its members," another avenue of compensation for victims of crime.⁷

Moving from the Law of Tort to the Law of Crime. Before the 10th century, intervention by the powerful in ordinary legal disputes was rare.⁸ However, if a powerful offender successfully resisted tribal justice, a victim could call upon an elder and ultimately an earl or king for enforcement. When this happened, and the accused was found guilty or liable, it cost him considerably more money because he had to pay the victim restitution and to pay the powerful individual who enforced the settlement.

"Under Anglo-Saxon law, criminals were forced to compensate their victims."

Kings, whose primary function was conducting warfare, began to see the justice process as a cash cow and gradually expanded their role. Violations of certain customary laws began to be referred to as violations of the “king’s peace.” Initially, the king’s peace meant the peace of the king’s house. But as royal power grew through warfare, the king declared that his peace extended to places where he traveled, then to churches, highways and bridges. Eventually, royal officers such as sheriffs could and did proclaim almost any incident anywhere to be a disturbance of the king’s peace.

By the 10th century, as the power of the king evolved, many offenses that were previously regarded as intentional torts (suable, noncontractual wrongs) became instead crimes against the king’s peace or against the people of England. Whereas the spoils of tort law belonged to the victims, the spoils of criminal law went to the king. For the most part, a new system of justice began to replace the payment of wergilds. Criminals were declared to be outlaws, their property could be confiscated, and corporal and capital punishment were instituted.

Defendants appeared before a court made up of local residents and presided over by an appointee of the king. This court depended on two procedures: the oath and the ordeal. Usually the court of residents, who made the decision of guilt or innocence rather than the presiding official, would allow a defendant to produce an oath of his innocence with the help of witnesses, or “oath helpers,” who would also testify to his innocence. In the rare case in which the defendant failed to produce enough friendly witnesses, the court turned him over to the church to conduct a trial by ordeal — the outcome of the ordeal being considered the judgment of God. The defendant might be required to hold a piece of red-hot iron in his hand for nine steps or plunge his hand into boiling water; how well the burns healed were considered an indication of innocence or guilt. Or he might be bound and thrown into cold water; if he sank, it was an indication of guilt.⁹

The Norman Influence. The Norman kings who conquered England in 1066 carried the evolution from private to public criminal justice still further. Their system of fines, confiscations and corporal and capital punishments was administered by royal law enforcement and judicial apparatus. In 1116, during the reign of King Henry I, known as “the law giver,” the *leges Henrici* (or laws of Henry) were issued. They decreed that “there shall be certain offenses against the King’s peace: arson, robbery, murder, false coinage, and crimes of violence. These we deem to be felonious.”¹⁰ A power-hungry Henry II (1154-1189) was especially innovative in replacing private, decentralized civil law with public, centralized, politicized criminal law.

As the list of actions violating the king’s peace grew, so did the contrast between criminal and civil causes, with criminal law referring to offenses that generated revenue for the king and the sheriff rather than restitution for

“As the powers of kings grew, many offenses became ‘crimes’, with the spoils going to the king instead of the victim.”

the victims. Wherever possible, victims attempted to have an offense considered civil, since that was the only way they could achieve compensation. In response, the king issued more decrees in order to secure his monopoly over the prosecution of criminal law and to generate more revenue. The king used the following methods to replace the private law of crime with state rule and to induce or compel cooperation:¹¹

- A victim was declared a criminal if he obtained restitution from the criminal privately before he brought the case before a king's justice.
- Victims could not pursue civil remedies until criminal prosecution was completed.
- The rightful owner of stolen property could not get his goods back until after he had given evidence in a criminal prosecution.
- Advertisers or printers who posted rewards for the return of stolen property, no questions asked, were fined.

The State's Monopoly. As influential interest groups sought to relieve themselves of the heavy expense of personal security by having state-subsidized protection from crime, and as the ambitions of kings rose, the state gradually gained a monopoly on pursuit, prosecution and punishment of criminals. Yet this displacement of private criminal law by the state depends on certain legal fictions to this day. For example, reflecting the Anglo-Saxons' ancient reliance on private prosecution of crimes, "English common law maintains that police officers are not distinct from the general body of citizens ... therefore, [even today] when a police officer initiates a criminal proceeding he is legally acting not by virtue of his office but as a private citizen interested in the maintenance of law and order."¹²

Criminal Justice Comes to America. By the time the American colonies were formed, England had begun using a system of constables, appointed by noblemen, to police rural parishes. The sheriff, who was also the king's tax collector, had charge of policing the English counties. The colonies adopted the same system, supplemented in some cities by night watches conducted either by soldiers or by citizens appointed by the town government. However, crime was not considered a major problem during the colonial period nor in the early days of the United States. In areas where it became a problem, it generally was handled informally. For example, during the 18th century the executions by private law enforcers led by Colonel Charles Lynch of Virginia gave the practice of "lynching" its name.

It was not until the 1830s, when criminal gangs first appeared in cities, that cities began to form police departments. The police were intended to keep order against mob rule, not to deal with ordinary crime such as theft or murder. From these beginnings, local police forces under government control developed. Initially, cities themselves formed police departments, but corrup-

"The state gradually gained a monopoly on the pursuit, prosecution and punishment of criminals."

tion in city governments led states to take control of the police in most cities. It was only after the Civil War that local police forces reappeared and the practice of having government-controlled police spread to smaller jurisdictions. During the 19th and 20th centuries, the state increasingly took control of criminal justice.

“Contrary to popular belief, there was not a great deal of ‘ordinary’ crime in the Old West.”

Justice in the Old West. For the most part, private crime control prevailed in the western United States through most of the 19th century, probably because the West was still the frontier and the population was scattered. Contrary to popular belief and despite the impression left by novels and movies, there was not a great deal of “ordinary” crime in the Old West.¹³ Most of the violence was related to clashes with Indians, bandits or foreign nations. There were law enforcement officers in the Old West, mostly town marshals, but with a few legendary exceptions they were rather ineffective. “The citizens themselves, armed with various types of firearms and willing to kill to protect their persons or property, were evidently the most important deterrent to larcenous crime.”¹⁴

When there was crime, much of the law enforcement in that era was carried out on an as-needed basis by interested citizens. For example, cattlemen’s associations often took action to stop rustling. Poses were formed to chase down perpetrators of crimes. And some communities had vigilance committees — the vigilantes — who acted both to prevent crime and to apprehend criminals. Again contrary to popular belief, most vigilance committees were not mobs acting in the heat of passion but were made up of prominent citizens whose primary concern was preserving community law and order.

The Old West did have such public law officers as U.S. marshals and Texas Rangers, but they were few in number and even these officers were usually paid only small salaries, with bounties and rewards making up an important part of their compensation.

As the population grew in the West, more and more of the responsibility for criminal justice was taken over by government-controlled police and other law officers. By the early years of the 20th century, public law enforcement officers predominated, although private law enforcement did not entirely disappear.

A Legacy of Government’s Monopoly: The Lack of a Right to Protection

Although government has taken control of the public criminal justice system, courts have ruled that it nevertheless does not have a specific duty to protect individuals.¹⁵ For example, New York State’s highest court ruled in

1968 that a victim who was attacked after seeking police protection to no avail had no right to protection. The court refused to create such a right, saying it would impose a crushing economic burden on the government.

For the most part, federal courts have agreed. The Supreme Court held in an 1856 case that local law enforcement officers had a general duty to enforce laws, not to protect a particular person.¹⁶ In 1982, a federal court of appeals said:

. . . [T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators, but it does not violate the due process clause of the Fourteen Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties: it tells the state to let people alone, it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.¹⁷

“Courts have ruled that government does not have a specific duty to protect individuals.”

These rulings are probably consistent with the original intent of the founding fathers. Some legal scholars argue that the framers of the U.S. Constitution assumed that law-abiding people would largely be responsible for their own safety.¹⁸ They note that under English common law the sheriff’s main jobs were collecting taxes and enforcing government decisions. Keeping public order was a secondary duty.

Private-Sector Law Enforcement

Private security guards offer daily evidence of private-sector involvement in law enforcement, but they are only one element of a larger picture. Efforts to establish exclusive reliance on private policing in municipalities has faced obstacles, but many police functions that do not involve crimes or emergencies are being contracted out. Railroads have long employed private police forces. Industries more concerned with recovery of property than with arrests — which tend to be the focus of attention of the public police — use private investigators. And private crime prevention devices such as central alarm systems are big sellers.

Growth of the Private Sector. Despite the prominence of government in law enforcement, private law enforcement plays an important role — one that appears to be growing.

“Private security guards outnumber public law enforcement officers by nearly three to one.”

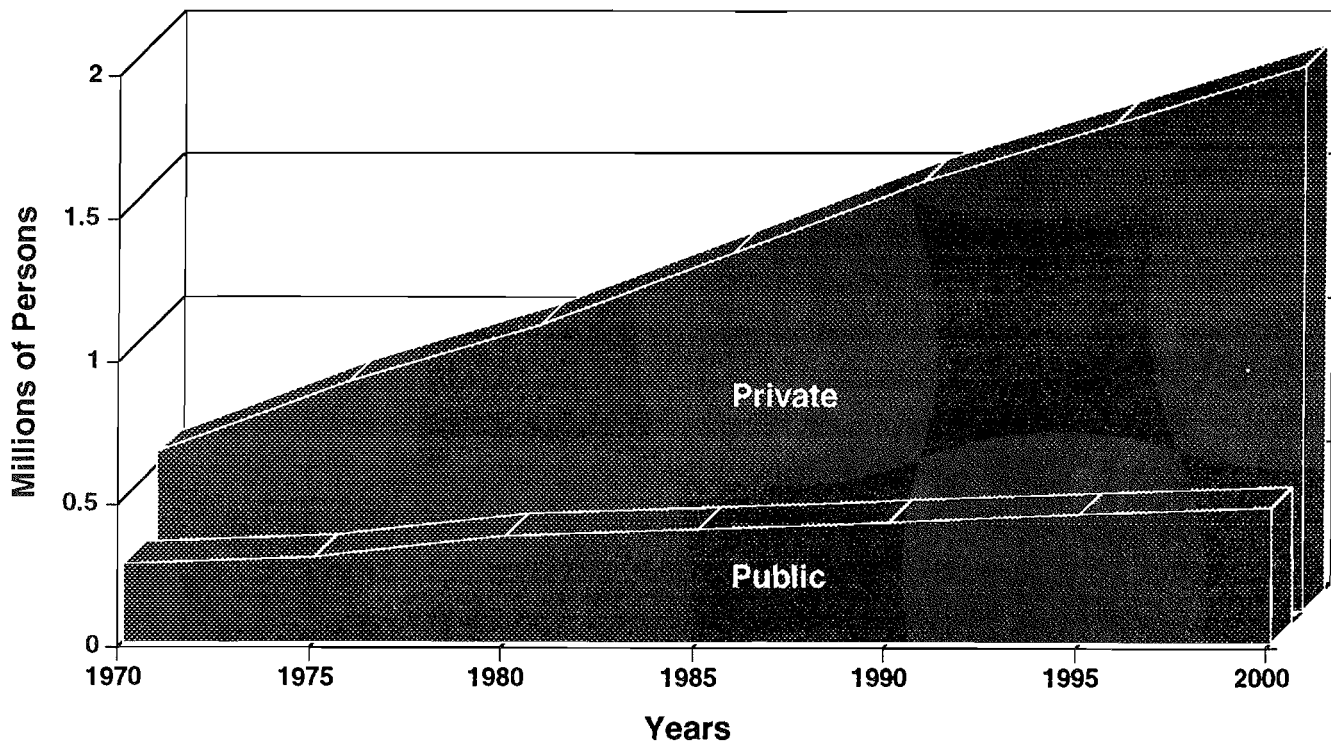
- Private security guards — 1.5 million in 1990 — outnumber public law enforcement officers by nearly three to one.¹⁹ [See Figure III.]
- Businesses, communities and individuals spent \$52 billion on private security in 1990, almost twice the amount collected in taxes for police expenses.²⁰ [See Figure IV.]
- At least 10 percent of U.S. homes are connected to central alarm systems — up from only 1 percent in the late 1970s.²¹

Central alarm systems have become a \$3.3 billion annual industry, led by ADT, Honeywell and Borg-Warner’s Wells Fargo unit. And casual observation suggests that these systems are making a difference. Since burglary rates (unlike most felony crimes reported to the police) have declined over the last decade, alarm systems and other private measures appear to have deterred burglaries.

Many police officers, of course — probably a majority, according to some surveys — also “moonlight” in security jobs. The ranks of private security firms are filled with former police officers. Police and private security managers often cooperate. In the New York City area, for example, they meet regularly in a police-sponsored group called APPL (Area Police/Private

FIGURE III

Number of Police Officers



Source: *Private Security Trends, 1970 to 2000: The Hallcrest Report II* (Boston: Butterworth-Heinemann, 1990).

Security Liaison). APPL also arranges for training of private security supervisors at the Police Academy. After the bombing of the World Trade Center in New York in 1993, private security representatives were called in at the suggestion of Police Commissioner Raymond W. Kelly to trade information and help gather leads.²²

“Because of private security forces, casinos are safe, even when the streets outside are not.”

The effectiveness of private security forces is on display every day in Las Vegas and Atlantic City casinos, where old ladies serenely stumble around with large sums of cash in rooms crowded with gamblers, some of whom are less than model citizens. These ladies would not be nearly as safe on the streets (patrolled by public police) of any major city, even if they carried little or no money.

The security forces in casinos have the specific objectives of protecting money and protecting people carrying money in — and sometimes around — those casinos. They have a high success rate because they are able to concentrate on those objectives and those locations. Other businesses, industries and groups of homeowners have recognized this, which is one of the major reasons private security forces have grown so rapidly. They are able to supplement public law enforcement.

Contracting with the Private Sector for Crime Control. Although private policing is common in Switzerland, where more than 30 Swiss villages and townships contract for police services with a large European firm, Securitas,²³ there has been little movement in the United States toward contracting out overall operation of a town or city police force to a private company. One of the very few instances of directly contracting for police services quickly ended — not because of poor performance but because of opposition from the Police Benevolent Association and the Fraternal Order of Police, two organizations of public police officers.

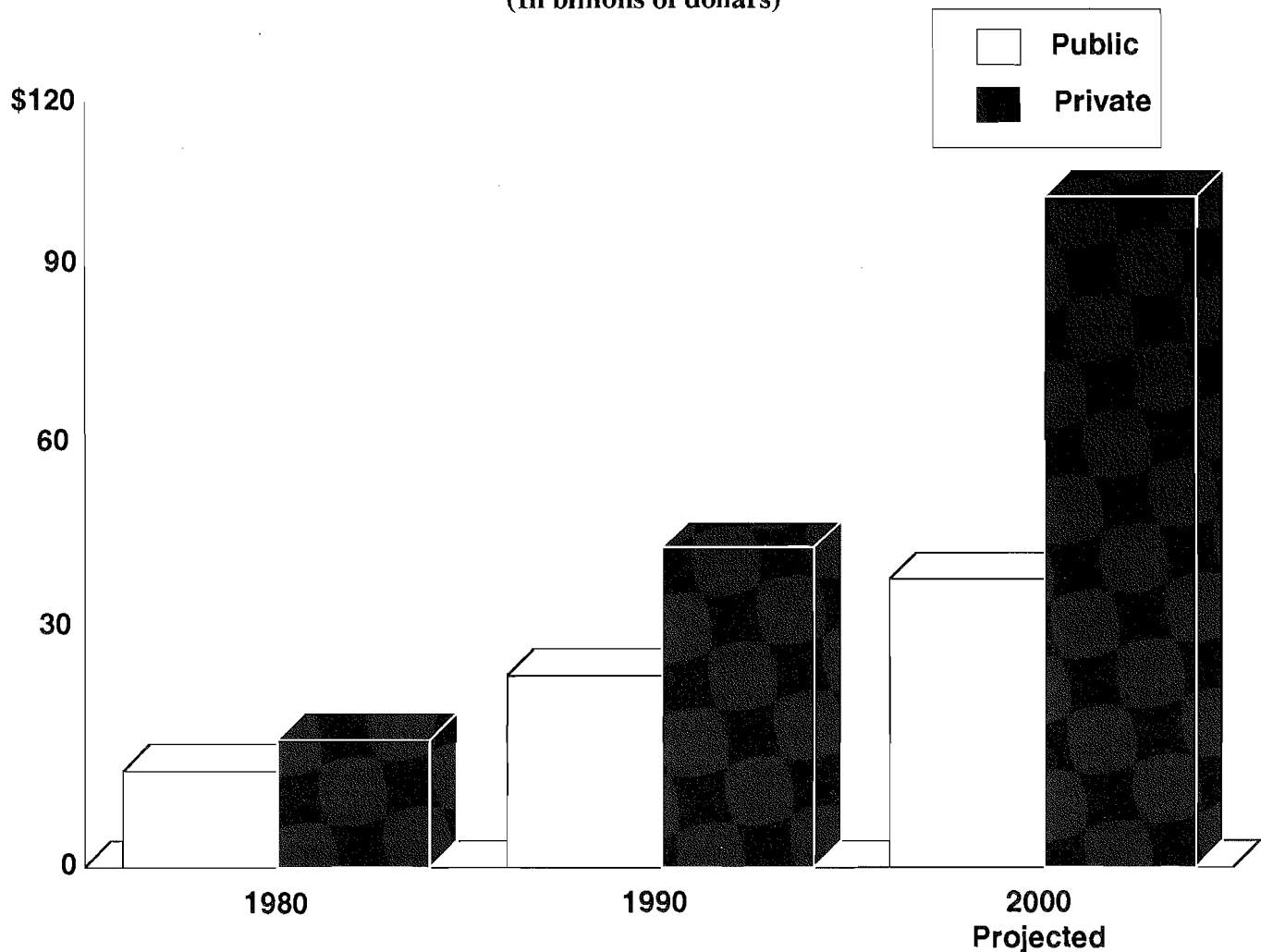
In 1992, the four police officers of Sussex, N.J., (population 2,200) were dismissed after a drug scandal and the city replaced them with private police supplied by Executive Security & Investigative Services Inc., of Totowa, N.J., at considerable savings.²⁴ However, state officials forced Sussex to discontinue the contract after only about two months as a result of protests by the public police organizations against private operation of a police force. Since that time, Sussex has had no police force at all, and now depends on the state police that patrol that part of the state from a nearby barracks as its only means of law enforcement.

Besides political pressures, private policing faces legal obstacles, including questions about their powers of arrest. The American Civil Liberties Union has raised questions about the accountability of all private security forces. Norman Siegel, executive director of the New York Civil Liberties Union, said, “I foresee private groups will be able to do things that public law

FIGURE IV

Expenditures on Law Enforcement Officers

(In billions of dollars)



Source: *Private Security Trends, 1970 to 2000: The Hallcrest Report II* (Boston: Butterworth-Heinemann, 1990).

enforcement can't do constitutionally."²⁵ However, private security firms are constrained by self-interest; those committing abuses are subject to market disciplines and civil litigation. In fact, legislation and custom effectively give public police an immunity from punishment for violation of citizen rights that private security personnel do not have.²⁶

Contracting for Other Police Services. The real trend in the future is likely to be contracting out the functions of public police that do not involve crimes or emergencies. Generally speaking, police now spend less than 20 percent of their time on crime-related matters.²⁷ In California, the rule of thumb is that a police officer costs \$100,000 a year, taking into account salary, fringe benefits and overhead expenses like squad cars. Faced with rising calls for service, this is very expensive labor to use for transporting prisoners, court security, traffic control and serving summonses. Financially hard-pressed city

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managers and budget directors, like major companies and downtown merchants, are increasingly turning to less expensive private security firms to handle many support roles.

- Wackenhut Services, Inc., a leading private investigation and security firm, transports prisoners in Maryland, provides security for courthouses in Texas and Florida, provides armed patrols for the Miami Downtown Development Authority and provides guards to ride the high speed trains of the Miami Metro Rail and the Tri-Rail from West Palm Beach to Dade County.²⁸
- The Chicago Housing Authority employs 400 private security guards under federal contract to police housing projects.²⁹
- Police departments in 18 states use, or plan to use, private security guards to fill support roles, according to the National Institute of Justice.³⁰
- Property owners in the commercial hubs of Philadelphia; Portland, Ore.; Baltimore, Md.; Tacoma, Wash.; Oceanside, Calif., and other cities have banded together to provide private security to supplement police protection.³¹
- In New York City the public police respond to burglar alarms from banks and jewelry stores only, and other businesses must rely on private security companies.³²

Perhaps the most extensive plan for contracting out by a big city police department was Kansas City's 1989 proposal — never implemented — to have private security firms take over 22 police tasks, including assisting stranded motorists, recovering property not involved in crimes, taking walk-in reports, guarding crime scenes and the like.³³ The department projected that contracting out these tasks could reduce its costs by 37 percent. The proposal stalled when Police Chief Larry Joiner left and political and bureaucratic opposition arose. But while the police department may not be contracting with private security firms, some 4,000 security guards are licensed to work in Kansas City, 1,400 of them armed, compared with 1,100 police officers.³⁴

Case Study: Railroad Police. Railroads have long employed private police forces. Between the end of World War I and 1929, railroad police averaged 60,000 arrests per year with a 97 percent conviction rate, a record unmatched by public police.³⁵

In 1992 major U.S. railroads employed 2,565 police, who were fully commissioned law enforcement officers but privately employed. Table II suggests that the railroad police are more efficient than public police. The arrest clearance rate (percentage of reported crimes “cleared” by an arrest) is a time-honored index of police efficiency. The railroad police statistics show

“The private sector spends almost twice as much on security as we pay in taxes to support the public police.”

superiority in this category, with an overall clearance rate of 30.9 percent versus 21.4 percent for public police. The 30 percent clearance rate is better than the overall public police record, even in the low-crime era of the 1950s. The railroad police also do better than the public police in the percentage of stolen property value recovered, although railroad police officers average eight fewer arrests per year than do public police.

The comparison does not produce completely one-sided results, though. The clearance rate for felony crimes is superior for public police for murder and theft/larceny. And the railroad clearance rate is only two-thirds that reported by the public police if trespassing offenses are ignored. On the other hand, some railroad crimes are cleared by eventual arrest without knowledge or participation of railway police. More importantly, crime is seriously underreported: only 38 percent of crime is reported to the police,³⁶ while an estimated 75 percent or more is reported to the railroad police. Reporting is high because railroads employ their own police to protect life and property. The overall clearance rate of the railroad police is nearly three times higher than that of the public police, once adjusted for the discrepancy in reporting (as shown in Line 7 of Table II). The railroads also experience remarkably few violent crimes each year; only 14 forcible rapes in 1992 versus 109,000 reported nationally, for example.³⁷

“Railroad police have an arrest clearance rate almost one-third higher than public police.”

Using Private Investigators. One of the reasons railroads employ private police is that public police tend to be less interested in recovery of property than in arrests and convictions. As shown in Table II, in 1992 railroad police recovered 42.7 percent of the total value of stolen property, compared to 35.6 percent for public police. This is not surprising because the police are rewarded for arrests and convictions, not for recovery. Other industries have also long recognized this fact and have depended heavily on private investigators. For example, the American Banking Association and the American Hotel-Motel Association have retained the Wm. J. Burns International Detective Agency to investigate crimes “because the public police and investigative forces were too busy to devote the amount of effort required.”³⁸

Using Reserve Law Enforcement Officers.³⁹ The number of public law enforcement officers is increased by more than one-third if the estimated 225,000 to 250,000 reserve police officers and deputy sheriffs across the United States are counted. (They are known in some departments as “auxiliaries” and in some as “specials.”) There are an estimated 18,000 reserve officers in Ohio, the most of any state. The San Bernardino, Calif., sheriff’s department, with 1,091 reserve officers as of February 1994, has a larger contingent than any other department. Most reservists are required to receive the same training as regular law enforcement officers, wear a badge, carry a gun and take part in regular law enforcement operations when they are on duty. Reservists work when they choose to, but they are required to serve a

TABLE II

Public Police vs. Private Railroad Police¹

	<u>Public Police</u>	<u>Railroad Police</u>
1. Percent of Reported Crimes Cleared by Arrest	21.4%	30.9%
2. Percent of Value of Stolen Property Recovered	35.6	42.7
3. Criminal Arrests Per Officer Per Year	25.9	17.4
4. Arrest Clearance Rates for Selected Crimes:		
Murder/Nonnegligent Manslaughter	64.6	47.0
Robbery	24.0	61.0
Aggravated Assault	56.2	57.0
Burglary	13.4	11.0
Motor Vehicle Theft	13.8	14.0
Theft/Larceny	20.2	9.0
5. Percent of Reported Nontrespassing Crimes Cleared by Arrest	21.4	14.3
6. Estimated Percent of Crimes Reported to Police	38.0	75.0
7. Overall Arrest Clearance Rate, Adjusted for Underreporting²	8.1	23.2

¹ Statistics are for 1992.² Line 1 multiplied by line 6.

“There are as many as 250,000 reserve law enforcement officers in the United States.”

minimum number of hours each month and to attend in-service training. They usually do not receive pay. Although there are exceptions, reservists generally are not considered employees of the police or sheriff’s departments.

The level of reserve activity varies widely from city to city and county to county. No nationwide statistics are available, but the Center for Reserve Law Enforcement estimates that reserve law officers volunteer an average of 16 hours a month. In some counties where reserves are especially active, it is not unusual to have a majority of sheriff’s patrol units operated by two-person reserve teams on some nights.

Reservists represent a pool of trained law enforcement personnel for use in emergency situations. At these times, they serve much the same function that the National Guard and military Reserve units serve during times of war, other emergencies and natural disasters. Some police and sheriff’s departments try to hire regular replacements from the reserve forces because they already know the officer’s ability — and also because the officer already has much of the expensive training required.

An “us versus them” mentality pervades many public law enforcement agencies, with members of the force encouraged to look with suspicion on “civilians.” One valuable contribution of reserve law enforcement is to break down this wall. The most important contribution made by reserve law enforcement is to encourage citizens to take more responsibility for their own safety and that of their families and neighborhoods and rely less on government to look out for their interests.

Incentives for Public Police

Private-sector businesses often use bonuses as incentives for employees and managers to meet certain targets, such as revenue growth, productivity gains, profitability and cost control. There is evidence that the same sort of financial incentives, if implemented with adequate controls, could be used to advantage in improving crime control by public police.

Case Study: Paying for Crime Reduction.⁴⁰ A few years ago the city of Orange, near Los Angeles, started paying its police according to how much crime was reduced. The incentive plan applied to four crimes — burglary, robbery, rape and auto theft. Orange used pay raises rather than bonuses. For every 3 percentage point reduction in the crime rate, the police got a 1 percent raise. The results were encouraging. During the first seven months of the program, the selected crime categories fell by 17.6 percent. Other crimes held steady, suggesting that the police were not merely reallocating their efforts. Among other changes, detectives, on their own time, began sharing information by video-taping briefings with leads for patrol officers on specific beats. The whole force developed a campaign to encourage safety precautions in residents’ homes.

“Orange, California, reduced crime by giving the police financial incentives.”

A skeptic might inquire whether the decline in Orange's reported crime wasn't due to the financial incentive to "unrecord" crimes. This incentive explains why private-sector businesses use systems of checks and balances as well as monitoring by boards of directors and outside auditors to ensure fidelity. In the case of the Orange Police Department, records were audited by the California Bureau of Criminal Justice Statistics. The bureau found that, if anything, the Orange Police had overreported crime to play it safe.

Wider use of the incentive system developed by Orange would require accuracy in crime reporting. Independent public accounting for crime rates probably would be essential. Another problem is determining baseline performance. Other factors besides activities of the police determine crime rates, so the base point for judging incrementally superior performance would have to be adjusted for population changes, social changes, new court practices and other factors. Neither problem is insurmountable, but both warrant careful attention in practice.⁴¹

Bounty Hunting: Making the Bail System Work

In accord with our precious civil liberties, the American criminal justice system allows most people who are arrested and charged with a crime to be released on bail pending trial. The private bail bondsman who guarantees the appearance of the defendant in court makes the bail system work with the aid of his enforcement agent, the bounty hunter.

Because of the portrayal of bounty hunters in Western movies and on television, they are perhaps the best known of private law enforcement agents. Hollywood usually does not treat bounty hunters sympathetically. For example, Marshal Matt Dillon of the TV series "Gunsmoke" did not consider a bounty hunter to be on the right side of the law. However, the "Bounty Hunter" series starring Steve McQueen portrayed bounty hunting as an honorable business and was closer to historical fact. Real live bounty hunters were marshals, sheriffs and detectives. They included Pat Garrett, Bat Masterson, the Texas Rangers and the Arizona Rangers. Most people think of bounty hunters as a relic of the Old West, but they flourish today, primarily as private bail enforcement agents. These bail enforcement agents have an astonishing record of effectiveness. Currently there are about 7,000 bounty hunters, mostly part-time workers, in the United States. Some are women. These are people who find defendants who "jump" private bail.

"Currently, there are about 7,000 bounty hunters in the United States."

The Commercial Bail Bonding System. Bail operates on the principle that the criminally accused will be freed from jail once he guarantees his presence in court on a certain date by posting a significant sum of money. If he shows up, he gets his money back; if he doesn't, he suffers a major finan-

cial loss. Since most criminal defendants do not have enough money to post the full amount, the market provides the professional bail bondsman. If the bail agent is willing, he posts the entire bond in exchange for a fee, customarily 10 percent of the total bond. The bail agent loses all of the bond and usually his 10 percent commission if the defendant fails to show up in court.

The private bail agent can only stay in business if at least 95 percent of his clients show up in court. Uncounted numbers of agents have gone broke for failure to run their bonding business as a business. That is why surviving private bail agents are so efficient at ensuring the appearance of their clients — at no cost to the taxpayers. Frank Callahan, a bail agent in New Jersey, says, “I lose 100 percent of my profit if the guy jumps bail. That’s a real incentive for me to monitor my people.”⁴² Bail bondsmen expend a great deal of energy and ingenuity in getting their defendants to court. Usually bondsmen require a cosigner for the defendant’s bond, typically a family member. Callahan says, “I try to get Mom and Dad on the hook.” With family members’ property at risk, the odds improve that the defendant will come to court. If he is a no-show, his family as well as the bondsman lose a lot of money. This arrangement resembles the “bonding” of ancient Anglo-Saxon tradition.

How Bounty Hunters Make Private Bail Work. A significant reason that private bail works is the use of bounty hunters, or “bail enforcement agents,” to recover fugitives. Most work part-time because their primary business is bail bondsman or private investigator. Every state requires that they be licensed and regulated. In a majority of cases, bounty hunters directly apprehend the fugitives. In the remaining cases, they locate and identify the fugitive and let the police make the arrest. They are driven by a powerful incentive: they receive no compensation unless the fugitive is returned to the court. Bounty hunters generally earn between \$20,000 and \$30,000 a year (at \$1,000 to \$2,000 per fugitive recovered) for their part-time efforts.

Once a defendant skips, the bondsman authorizes the hunt by sending out notices to relevant bondsmen and bounty hunters in their national network. The program bears a resemblance to Crime Stoppers. Any person can engage in the search, but most of the time professionals make the recovery. The national network of agents provides great flexibility and is less hindered by restrictions and local jealousies than are police. According to Gerald Monks, a Houston bail agent and former executive director of the Professional Bail Agents of the United States (PBUS), “They are the only ones in the criminal justice system to have an economic reason to ensure the defendant’s appearance in court.”⁴³

“The fugitive rate for defendants out on private bail is under 1 percent.”

On the whole, the private bail bonding system seems to work well.

- According to one source, the fugitive rate for defendants out on private bail (defined as the percentage of defendants not apprehended three years after failure to appear in court) is under 1 percent.
- An Alexander Grant study claims that private bail agents have a 0.8 percent fugitive rate versus 8.0 percent for public bail.⁴⁵ [See the discussion of public bail below.]
- A U.S. Department of Justice study of the 75 largest counties in 1990 found that only 14 percent of felony defendants released on surety bonds initially failed to appear in court versus 27 percent of those released through other methods.⁴⁶

And at the end of one year the fugitive rates were 3 percent and 9.5 percent respectively.

The Legal Status of Bail Enforcement. The U.S. Supreme Court in 1873 expressed its support for commercial bail bonding and affirmed wide latitude for bondsmen in recovering a fugitive from justice:

When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever [bondsmen] choose to do so, they may seize [the fugitive] and deliver him up in their discharge, and if that cannot be done at once, they may imprison him until it can be done.... They may pursue him into another state; may arrest him on the Sabbath; and if necessary, may break and enter into his house for that purpose. The seizure is not made by virtue of new [legal] process. None is needed.⁴⁷

A state court could ignore this U.S. Supreme Court decision if it conflicted with a state statute, but most courts uphold sureties' right to apprehend fugitives. As one court said:

The bondsmen are as the four walls for the jail, and in order to fully discharge their obligations they are obliged to secure their principal's [defendant's] presence and put him as much in the power of the court as if he were in the custody of the proper officer.⁴⁸

The private bail bonding system has been so successful that this report proposes private bonding to privatize the probation and parole systems and to aid in restitution to victims of crime. These proposals are analyzed below.

"The fugitive rate for public bail is about ten times that of private bail."

Public Bail: A System That Doesn't Work

In addition to the commercial bail bonding system, we have a public bail system administered by tax-funded pretrial release (PTR) bureaus. These are usually operated by county governments, which historically were administrative subdivisions of state government. PTR staff members interview defendants and recommend to judges whether they should be released. In the public bail system, defendants rarely post any kind of monetary bond, usually being released under a personal recognizance bond. The defendant simply promises the judge that he or she will appear in court. As a consequence, the defendant has little or nothing to lose if he or she fails to appear.

"About 27 percent of defendants supervised on public bail fail to appear in court."

Origins of Public Bail. Why do we have tax-funded bail? The system originated in the mid-1960s. Its original intent was to provide selective help for indigents charged with nonviolent crimes who couldn't afford to post bond. But it rapidly evolved into an indiscriminate release mechanism to cap the jail population. It has failed miserably to accomplish any of its aims. According to Gerald Monks, the Houston bail bondsman, defendants who can get no help from family, friends or coworkers usually "have robbed, lied to, or otherwise mistreated their friends, relatives, employees, or coworkers to the extent that they will not come to their rescue to pay bond. Many of them believe they (the defendants) should stay in jail."⁴⁹

Higher Fugitive Rates. Since the salaries of PTR staff members do not go down when defendants fail to appear, they do not have the same incentives as private bail bondsmen to keep their fugitive rate to a minimum. And since the defendants bear no cost when they fail to appear, predictably the no-show rate is high. Studies show that:⁵⁰

- As many as half of the criminal defendants released before trial by PTR agencies have previously jumped bail.
- Half of the defendants released have one or more prior felony convictions.
- Overall, about 27 percent of defendants supervised by PTR agencies fail to appear in court.

"Defendants on public bail commit twice as many crimes as those on private bail."

Higher Costs. This poor performance harms the general public in two ways. First, the taxpayers pay a small fortune in rearrest warrants. Second, while on release, the defendants commit more crimes. In these respects, the PTRs contrast unfavorably with private agencies.⁵¹

- A 1986 Department of Justice study found that PTR defendants committed twice as many crimes while awaiting trial as did defendants released on private bail.
- This poor performance persists despite the fact that PTR often releases the most attractive or eligible prisoners while private bail bondsmen deal with the remainder.

Administering public bail is expensive for taxpayers. For example, public bond cost \$356 per defendant in Harris County (Houston), Texas, in 1992. The Harris County PTR agency had one staff employee for every 16 defendants it supervised, compared to one staff person for every 87 defendants supervised by a private bail bond company in Houston.⁵² Yet, as noted above, commercial bail agents have a fugitive rate that is less than one-third that of the public agencies.⁵³ The only time the public police are likely to get prisoners on PTR release who jump bail is during a routine traffic stop when they check to see if the driver is wanted for any offense.⁵⁴ Detectives, already burdened with caseloads of 60 to 200 cases, do not have the incentive or wherewithal to track them down. Many urban counties have more than 50,000 fugitives and the national total surely exceeds 1 million — and that does not include parole and probation violators.

Inadequate Standards. Some criminal court judges refuse to deal with pretrial release agency bonds because they release felony defendants on their “honor” with “little or no recourse against them for failure to appear in court,” according to Judge Ted Poe, 228th District Court in Houston.⁵⁵ The agencies should be abolished but, as with any government agency, this is a politically difficult feat. Failing that, some state legislators have tried to force PTR agencies to apply more responsible release criteria (the so-called Uniform Bail Act), including no release of those with prior criminal convictions or those who have “jumped” previous free recognizance bonds. These efforts have been prompted by high-profile, vicious crimes committed by felons released on PTR agency recommendations.⁵⁶

Encouraging Irresponsibility. Perhaps the worst thing about public bail is that it removes the pressure on the criminal to depend on his family and begin to rehabilitate himself. All recovery programs recommend support groups to help prevent relapses. Free bail separates the criminal from the support group that matters most — his family. “If you go over to the jail after a bond hearing, you’ll see these people getting out on pretrial release and they’ll all be high-fiving each other and they’ll be saying, ‘I can’t believe they bought that crap again.’ These guys have the system figured out,” says Frank Di Rocco, private bail bondsman.⁵⁷

“There are more than one million fugitives nationwide.”

How to Expand the Role of the Bounty Hunter

If bounty hunting is interpreted as all private apprehension of criminals, everyone is a potential bounty hunter. National television shows like “America’s Most Wanted” demonstrate that people will step forward to identify criminals even when there is no reward — provided they can maintain anonymity. Bounties accomplish two desirable objectives at once. First, financial incentives encourage more private citizens to become involved in detecting and apprehending criminals. Second, because of the increased effort to detect and apprehend, bounties raise the cost of crime to criminals and therefore reduce crime. If potential criminals know they will have a bounty on their heads after their crimes, they also know that the likelihood of being caught is higher and that committing a crime is riskier.

Use of Bounties by Government. There is some recognition of the value of bounties, both in the public and private sectors. The federal government has offered bounties of \$1 million or more in some cases of terrorism, and federal and state agencies often post bounties for killers and kidnapers.⁵⁸ For example, two bail enforcement agents recently tracked down a murder suspect in Dallas after the federal government offered a \$2,500 reward for his capture.⁵⁹ Among notable uses of bounties in the private sector: for many years, armored truck companies and art galleries have offered rewards when they have been robbed or burglarized. In addition, governments, police and bounty hunters pay “snitches” for information. And the federal government has long been authorized to pay rewards to those who identify tax evaders.

Expanding the Role of Private-Sector Bounties. In principle, bounties could routinely be given to people whose help leads to an arrest and conviction for every crime. Public methods for communicating information about crimes and rewards could include advertisements on television and radio and in newspapers, magazines and other publications. As the activity became more common, special bounty hunting magazines might emerge. More programs like “America’s Most Wanted” and “Unsolved Mysteries” would be likely. The Fox Television Network reports that of 717 fugitives profiled on “America’s Most Wanted” through early February 1994, 292 were captured as a direct result of viewer participation.⁶⁰

Funding for Private Bounties. Under the current system, the priorities of the police often are not the same as the priorities of the victims. A system in which victims could promise cash rewards to people whose help leads to the arrest and conviction of criminals would help change that. Bounties could come from at least four sources:

“Of 717 fugitives profiled on ‘America’s Most Wanted,’ 292 were captured as a direct result of viewer participation.”

- Interested, public-spirited citizens could set up an organization to fund bounties.
- Victims of crimes could fund their own rewards.
- Association and insurance policies covering theft and other loss or casualty due to crime could include posting of bounties as an integral part of the policy.
- Developers, businessmen, building owners and homeowner associations could institute a system of bounties covering crimes in residential and business districts.

“Crime Stoppers has led to the recovery of almost \$3 billion in stolen property and narcotics and helped authorities attain a 97 percent conviction rate.”

Case Study: Crime Stoppers. Begun in Albuquerque, N. M., in 1976 and now an international organization, Crime Stoppers is a privately organized and funded program to help apprehend criminals and recover stolen property. Residents in a community set up a nonprofit corporation, raise funds and determine the amount of rewards and how they will be paid. Crime Stoppers encourages people to come forward with information by offering both anonymity and money. The organization works closely with police, and police detectives staff a special Crime Stoppers telephone. Callers are assigned code numbers and do not give their names. Over the years, Crime Stoppers estimates that callers encouraged by its program have helped police to recover nearly \$3 billion in stolen property and narcotics and to attain a 97 percent conviction rate for defendants who are tried.⁶¹

Case Study: Crime Stoppers for Horses. An example of funding by victims is the union of the Texas Horse Owners Association and Crime Stoppers to form the “Crime Stoppers Missing Horse Alert.” The project has proven highly successful in discouraging horse thieves in the Greater Houston area. Seventy percent of the horses reported missing have been recovered, and charges have been filed on 30 percent of those. Cooperation with horse auctions and packing plants has been vital, as have rewards for tips leading to the arrest of horse thieves.⁶²

Case Study: WETIP. Founded 21 years ago with \$14,000 by Miriam and Bill Brownell, a shop owner and a former sheriff’s deputy, this nonprofit business has grown to a nationwide operation with \$1 million in revenues per year paid by subscribers, service organizations like Kiwanis and Lions clubs and supporting members. In 1993 WETIP received more than 40,000 anonymous crime reports. For example, an insurance company plagued by arson claims can subscribe and obtain arson-related fliers that publicize the 800-47-ARSON hot line. The standard reward for a tip leading to a conviction is \$1,000, but a subscribing company can supplement that. In a case in which a Corona, Calif., sniper murdered a policewoman and paralyzed a passenger in a police car, local firefighter and police associations sweetened the reward to \$15,000. WETIP spots ran nightly on a Los Angeles television station and led to the arrest and conviction of the sniper, who is now on death row.

“Insurance companies should be encouraged to write policies that include offering rewards.”

Expanding the Role of Insurers. As noted above, insurance companies frequently offer rewards for information leading to conviction in arson cases. Arson losses resulting from 46,000 fires each year exceed \$1 billion, cause over 5 percent of all structural fires, and result in 15,500 arrests each year, with nearly half of those arrested being under age 18.⁶³ The practice of offering rewards could be extended to other losses of property involving criminal activity. Insurance companies should be encouraged to write policies that not only reimburse policyholders for crime losses but also promise clients that they will post a reward for information leading to identification, arrest and conviction of those who harm or steal from the policyholder, as well as for the recovery of stolen property. This would raise the arrest rate sharply and boost the recovery rate of stolen property from today’s meager one-third. Crime would fall.

The market in theft insurance remains surprisingly small despite the vast dollar value of property to protect from criminals and the high losses to crime.

- In 1981 the insurance industry wrote \$127 million in burglary, robbery and larceny policies, and in 1990 only \$108 million.⁶⁴
- In 1992 the reported dollar loss from robbery was \$534 million, burglary \$3.4 billion, larceny/theft \$3.4 billion and motor vehicle theft \$5.4 billion — a total of \$12.7 billion.⁶⁵

Potential Abuses under Private Law Enforcement

An ancient question is, Who polices the police? Three types of police abuse might seem peculiar to private law enforcement. The first is the possibility of an alliance between private police and the underworld for mutual profit. A special case would be criminal firms that integrate the functions of stealing and recovering insured property. (“My brother steals property, I recover it and we split the reward.”) A second problem is the incentive to victimize innocent people with false arrests, prosecutions and penalties. A special case would be artificially increasing the supply of criminals and thereby increasing the “catch” and the associated bounties collected. A third problem is the incentive to let criminals off the hook in exchange for criminal payments larger than the bounty.

The first problem is the familiar stuff of graft and abuse of police authority. The second problem (prosecuting innocent people) might occur in various ways. For example, a private enforcement agency might:

- Fabricate an offense and then arrest and prosecute someone.
- Select an innocent person to prosecute for an actual crime.
- Induce a person to commit an offense that he would not otherwise commit and then prosecute (so-called entrapment).
- Knowing a crime is about to occur, wait until it occurs and then prosecute to obtain a higher reward than by prosecuting an attempted crime.

The third form of corruption occurs if there is a large gap between the fine owed by the criminal and the amount paid to the successful enforcer.⁶⁶ Under these circumstances, the criminal could pay the enforcer an amount larger than the reward he will recover but less than the total fine owed by the criminal. Both would profit from this arrangement, at least in the short run, other considerations aside. For example, suppose the enforcer will be paid \$2,000 for the arrest, and the criminal faces an 80 percent chance of a \$20,000 fine upon conviction. The criminal could offer \$2,500 to the enforcer and both would profit by the exchange.⁶⁷

Yet all these temptations exist for government officials as well. Police scandals involving participation in burglary rings, drug dealing, bribes and abuse of innocents is familiar fare.⁶⁸ Logic implies that corruption problems exist in even greater degree in public than private law enforcement because private market mechanisms make corruption and betrayal of public trust more expensive for offenders. To understand why, consider each problem in turn.

With regard to the first problem — integrated theft and recovery firms in a privatized law enforcement regime — insurance companies would have to guard against and discourage such criminal exploitation more vigilantly than they do now. The same techniques aimed at stopping all types of insurance fraud would be employed. One such technique is to use rewards more extensively to successfully prosecute perpetrators of fraud.

More generally, the real disciplinary device for malfeasance is the marketplace. There is far less incentive for private enterprise enforcers to abuse rights. Competing private enforcement agencies must preserve a market reputation for fair and reliable dealing. Collaboration with criminals and abuse of innocents severely damages business reputation and therefore profitability. This market discipline is supplemented by bonding, licensing and common lawsuits. For example, unsuccessful searches and prosecutions cost time and money and add nothing to the bottom line. It pays private enforcers to avoid harming the innocent because it's just too expensive. They are acutely aware of the costs of harassing innocents on the street and of prosecuting them. These activities do not yield the financial return to the business that successful apprehensions do.

“Private enforcers have stronger incentives not to abuse rights.”

Lawsuits are more potent against private enforcers than public enforcers. Victims of erroneous arrests and prosecutions can successfully sue private agents for damages. Although a wrongfully arrested person may have little status or money, lawyers are available on a contingency basis and the arrestor's employer usually would be a suable (insured) "deep pocket." The employer is responsible for the on-the-job damages of his or her employees under the doctrine of *respondent superior*. Nor will abusive firms receive many contracts for enforcement services. Competition and the common law promote quality protective services at prices customers are willing to pay.

Government, by contrast, encourages authoritarian behavior. It retains sovereign immunity from lawsuits against a wide range of actions. Its employees have effective immunity from private suits, and it attracts those who enjoy wielding power over others. Public police are notoriously difficult to discipline.⁶⁹

Integrating Tort Law and Criminal Law

The balance between civil and criminal law has shifted over centuries, from Anglo-Saxon reliance on civil remedies to Norman reliance on government prosecution. Today, a person accused of a criminal wrong typically goes through the normal steps of the criminal justice system: arrest, prosecution or not, indictment or dismissal, plea bargain or trial, conviction or acquittal, appeal or not, fine, probation or prison. But not every offense is appropriately handled by this cumbersome mechanism. Sometimes private action is more productive than turning to the police and courts. Businesses, for example, often find informal internal handling of white collar crime more effective than private or public prosecution. And civil prosecution may be an attractive supplement or alternative to criminal prosecution. These approaches are worth examination.

"Civil prosecution may be an attractive supplement or alternative to criminal prosecution."

Private Nonjudicial Remedies. When businesses are victims of crime, especially internal economic crimes, they often bypass the public criminal justice system because they do not expect prosecution to be worthwhile. Why? Public police are poorly equipped to investigate business crimes, prosecutors may not be interested in such cases, substantial delays are involved, business victims may not want to disclose confidential information, they may want to avoid higher insurance premiums and the courts may be unsympathetic toward business losses due to crime. Companies often prefer to settle internal crimes informally rather than risk adverse publicity over employee theft, management fraud and other offenses. Further, businesses sometimes consider certain losses as prohibitively costly to eliminate and as a cost of doing business.⁷⁰

Internal business crime is most effectively controlled by sound personnel and management controls. If a theft occurs, managers reexamine private security, internal controls and audit functions for improvement. The emphasis is on prevention. For guilty employees, the range of company sanctions includes suspension without pay, reassignment, elimination of some duties, restitution agreements, dismissal or criminal prosecution. Little is known about these private justice processes.⁷¹

Interviews by the Hallcrest organization in 1989 show that both large and small businesses are instituting more civil actions for restitution (and often for damages, too) against alleged offenders — employees, competitors, contractors and others.⁷² Unfortunately, there is no statistical information about the scope of this development.

Seeking Civil Damages. In civil law, a tort is a wrongful injury that does not involve a breach of a contract between the parties. Victims can sue to recover damages from the defendant or the defendant's insurer. Approximately 90 percent of tort suits are settled without a trial through private negotiation. In general, the private legal system promotes responsible individual behavior and social efficiency as well. The most common tort — unintentional — is automobile accidents; but some torts are intentional: trespass, libel, fraud, conversion (the tort counterpart of theft) and simple battery (an unlawful beating).

A plaintiff can bring a tort suit in civil court against a defendant, even if the accused is also a defendant in criminal court for the same offense, because the same act is often both a crime and a tort. There are distinct advantages to more civil suits directed against criminals.

“Only a preponderance of evidence is required to win in civil suits.”

- Since victims collect compensation from the liable defendants, the suits encourages victims to sue in other cases.
- The payoff to crime is lowered and crime discouraged because criminals experience a higher risk of suffering a financial loss.
- It is easier for victims to win because only a preponderance of evidence is required to prevail, whereas a criminal conviction requires evidence of guilt beyond a reasonable doubt.
- The defendant in a civil suit can be deposed and compelled to answer questions, unlike in a criminal trial.
- The plaintiff can benefit financially if the defendant profits from his crime (say, by writing a book about it) because the profits can be used to pay restitution, unlike in a criminal conviction.

The son of one of the victims of Charles Manson and his followers won a \$500,000 federal lawsuit against Manson in 1971 and although he had to wait 22 years, he began collecting royalties due Manson from a song on a 1993 record album.⁷³

A Dallas judge awarded \$6 million in damages in 1993 to the family of an Irving, Texas, martial arts instructor shot to death by an acquaintance during an argument over a debt.⁷⁴ A jury already had found the same defendant guilty of voluntary manslaughter and sentenced him to 20 years in prison. In this case, the defendant remained free on \$250,000 bail and “drove a beautiful Corvette to and from the courthouse.”⁷⁵

Obstacles to Civil Suits. At least three problems arise with private prosecution:

- Victims generally wait until a criminal prosecution is complete before they decide to pursue a civil remedy.
- The law treats most criminal offenders as judgment-proof or insolvent (“indigent”). A majority, for example, have court-appointed attorneys.⁷⁶
- Private litigation is expensive.

The Fifth Amendment to the U.S. Constitution states that a person cannot be compelled “to be a witness against himself,” which hampers a plaintiff in obtaining civil testimony from the defendant. The problem can be partially circumvented by postponing a civil suit until after the criminal trial, but this is not very satisfactory when the criminal trial is long delayed. On the other hand, by waiting until after the criminal trial, the plaintiff can usually use work already done by the prosecutor for the criminal case.

“The law could be changed to allow the joining of civil litigation with criminal prosecution.”

In urban areas especially, courts specialize by law in either civil or criminal cases. This strict barrier can hamper innovative approaches such as having the same judge hear a civil proceeding involving the same defendant immediately after the criminal trial.

A more important obstacle to civil actions against criminals seems to be the poor prospect of compensation for plaintiffs. The plaintiff must identify the criminal responsible, bring forward enough evidence to win a decision, convince the court to award substantial compensation and, finally, find assets belonging to the criminal that can be seized.

Overcoming the Obstacles. Many of the problems that make it difficult to integrate tort law and criminal law can be remedied. Here are some possible ways:

First, the law could be changed to give criminal courts concurrent civil jurisdiction where it is requested and to allow the joining of civil litigation with criminal prosecution. Thus, if a defendant were convicted, immediately after the sentencing the same judge who presided over the criminal trial could hear the civil suit against the defendant. Perhaps the victim should be allowed to ask for compensation in the criminal trial.

“In France, crime victims can file civil claims at the same time as the criminal prosecution and before the same court.”

In France, a crime victim may file a civil claim for reparations against the accused at the same time as the criminal prosecution is brought by the public prosecutor, and before the same court.⁷⁷ Contrary to U.S. practice, the French crime victim also has the right to file his or her private suit in a criminal court before the public prosecutor has begun a criminal proceeding. In effect, this is a private prosecution and obligates the public prosecutor to begin the criminal proceeding. According to one observer, “Private prosecution (*action civil*) is very popular in France, since it enables the victim to collect damages quickly and inexpensively.”⁷⁸

What about false accusations? The French impose a proper element of risk in bringing civil action before criminal judges. If the *action civil* is dismissed because the judge finds the complaint groundless, the plaintiff must pay court costs and damages to the defendant. If the court believes the plaintiff made a false accusation, the judge will conduct a criminal examination against the plaintiff and, if bad faith is proved, the plaintiff will be convicted.⁷⁹

German public prosecutors are in a monopoly position like their counterparts in the United States with two exceptions: (1) crime victims can prosecute for a narrow class of misdemeanor offenses like trespass on domestic premises, and (2) a crime victim can formally demand that the prosecutor prosecute in a particular case. If the prosecutor refuses, the victim is entitled to an explanation. A dissatisfied victim may appeal to the state appellate court, and if the court finds sufficient evidence for a prosecution, it may order the prosecutor to bring charges. At trial, the victim may then join the prosecution as a “supplementary prosecutor” to ensure that the public prosecutor does not sabotage the case he has been ordered to prosecute against his will.

“In Germany, a victim may join the prosecutor as a ‘supplementary prosecutor.’”

Second, legislatures and courts might allow more liberal use of restitution through performance of in-kind services like yard mowing and house painting as well as repayment through wages withheld, with supervision financed and operated by a private bonding agent at no cost to taxpayers. These remedies may require modification of personal bankruptcy laws and state prohibitions on garnishing of wages. Suppose, for example, that the harm to a victim of crime was \$8,000 and the cost of apprehension and conviction was \$2,000. Then the criminal would have to repay \$10,000 in present value terms via deductions from wages under supervision of a private bondsman. If the criminal became a fugitive before completing restitution, the criminal’s ultimate chances of escape would be slim because of the efficiency of the private bonding system. The use of private bonding agencies to supervise probationers and parolees is discussed more fully below.

If there are legal prohibitions against this approach, they should be repealed. Bounty hunters are permitted to cross state lines and operate under fewer restrictions than police in pursuing bail jumpers in criminal cases. They would need the same flexibility of pursuit under civil law.⁸⁰

“Only 16 percent of convicted felons are ordered to pay victims restitution; and most of those never pay.”

Third, the law could allow the victim to be a party to the negotiation of settlements in criminal trials. If the criminal and civil trials were joined, settlements in both could be negotiated at the same time.

If the legal system tilted toward plaintiff restitution instead of criminal punishment, it would move us away from unproductive imprisonment. [See the sidebar on the failure of restitution in the criminal justice system.] The accused, having less at stake, would be more likely to agree to a settlement instead of demanding a trial. Still, the ultimate sanction would have to be criminal prosecution and incarceration at varying levels of prison security for the really serious offenders. But the financial obligation for restitution through productive labor within prisons should remain in this hybrid system. The most recalcitrant criminals could be employed by private employers outside and inside prison walls in a kind of debtors’ workhouse.⁸¹ The employment of prisoners is discussed in greater detail below.

Paying for Civil Remedies. One of the obstacles that has severely limited the use of civil law against criminals is the cost of litigation coupled with the poor prospect of restitution. A possible reform is to adopt the English custom of requiring the loser to pay the attorneys’ fees and other direct costs of civil litigation. This would give guilty defendants better incentives. They would be inclined to settle out of court rather than making their debt even higher by demanding a trial they expect to lose. This makes it easier for victims to successfully sue criminals. Another approach to covering these costs would be to provide funding for litigation as part of homeowners’ and renters’ insurance policies. And residential and business development owners, trade associations, social or community groups and others could dedicate part of the premiums they collect from members or subscribers to these litigation costs.⁸²

Privatizing the Prosecution of Criminals

One of the frustrations faced by many businesses is that after the perpetrators of crimes have been identified, the District Attorney’s office will not pursue the case. One option is for victims to sue the DA in an attempt to compel him to prosecute, but this would be costly and proving dereliction of duty would be difficult. The DA is effectively immune. Other options are more promising.

Private Preparation of the Prosecution’s Case. The law should encourage (and prosecutors’ offices should welcome) private preparation of criminal cases. Prosecutors’ budgets simply do not allow vigorous prosecution of all the available criminal cases. Logic and evidence show that in private law, plaintiffs win about 50 percent of the cases that are tried.⁸³ This is because the parties are more likely to settle lopsided cases out of court. Public prosecutors, by contrast, win far more than 50 percent of their trial cases because they have budget constraints and so elect whenever possible to go to court with only the cases they are likely to win.⁸⁴

The Failure of Restitution in the Criminal Justice System

Florida Circuit Judge Charles McClure looked down at the young thief's two gold necklaces and pierced earring and told the teenager that he still owed his victim restitution. Then the fed-up judge stared at the shocked offender and barked, "Cough it up." The jewelry was locked in the court clerk's safe until the defendant paid his restitution.

Current Practice. The criminal justice system currently administers a system of restitution, but its performance has been woeful.

- In 1990, state courts ordered 16 percent of convicted felons to pay fines and 16 percent to pay restitution to their victims; this included 26 percent of property offenders.
- In 1986, 36 percent of probationers were ordered by state courts to pay restitution, including 52 percent of burglars.
- Only 14 percent of nonprobationary felony convictions included restitution.

Problems. A central problem has been collecting the restitution owed. Circuit Judge Charles McClure says, "In the great majority of cases, it's just a legal exercise." Probation Officer John McLaughlin says, "All of [them] have good stories about why they can't pay. You've got one-third who are trying."

Probationers typically have their entire term of probation to repay. If money is still owed, their probation term cannot end. They must see the judge, who usually extends the probation. Only if nonpayment is "willful and substantial" can probation be revoked. Court decisions prohibit locking anyone up for a monetary debt (except tax liabilities). Once sent to jail or prison, there is little practical chance that restitution will be paid under the current governmental system. Even if a probationer comes into an inheritance, wins the lottery or acquires other assets, victims and probation officers probably won't find out or recover the restitution money because of bureaucratic inertia.

Solutions. Turn over probation and parole administration to a private, competitive bonding industry. This technique makes it much more expensive for the probationer to commit another crime or evade his responsibilities. If arrested for another crime, he is surrendered without refund of bond premium. The bondsman has a vested interest in the probationer's conduct and welfare, improving crime control. Bonded supervision would improve self-discipline and control over crime and reduce taxes. At a minimum, the collection of restitution fees can be contracted out to private collection agencies. And if productive prison jobs are available, there are few good reasons that restitution cannot be recovered from prison cells.

Sources: *Felony Sentences in State Courts, 1990*, U.S. Bureau of Justice Statistics Bulletin, March 1993; *Felons Sentenced to Probation in State Courts, 1986*, U.S. Bureau of Justice Statistics, NCJ-124944, November 1990; *Tallahassee (Fla.) Democrat*, January 3, 1993.

Victims should be allowed to hire private attorneys and other professionals to prepare cases against the accused and thereby extend public prosecutors' resources. The attorneys can be retained *pro bono* (for the good) or for compensation. This is already done in some white collar cases where financial complexities exceed the prosecutors' expertise, such as complicated embezzlement cases, some oil and gas swindles and cases involving the misapplication of construction trust funds.

Using Private Attorneys as Deputy DAs. At present, many cases are never prosecuted for one reason or another. For example, in about 40 percent of federal embezzlement and fraud cases, charges are dropped because of insufficient evidence to convict, given the resources at hand.⁸⁵ In some instances prosecutors "deputize" attorneys to try cases, too. Many private attorneys have criminal experience as former prosecutors or public defenders. A logical extension of private preparation for trial is the complete privatization of the prosecutor's job by contracting out. Private attorneys, of course, are often appointed on a *pro bono* basis for criminal defense. Private attorneys could be deputized for a single trial or for ongoing prosecutor's work, either *pro bono* or under contract.⁸⁶

Funding for Privatized Criminal Prosecution. The same remedies are available to finance criminal prosecution as civil litigation. (See "Paying for Civil Remedies" above.) Commercial insurance policies could be expanded or created for this market. Associations and community groups could cover these costs for members and subscribers.

Privatizing the Probation and Parole Systems

In mid-1991, 2.7 million people in the United States were on probation and 531,000 on parole.⁸⁷ Half of all sentences for convicted felons are probated. Further, the system releases more than 99 percent of prisoners from prison to serve the remainder of their sentence outside prison walls under public parole supervision. To say that there are problems with both the probation and parole systems is putting it mildly. A large amount of crime is committed by people on probation or parole. Some of the crimes are brutal and highly publicized. For example:

- Kenneth McDuff, a rapist and multiple killer from Texas whose death sentence was commuted to life imprisonment, was paroled — and shortly raped and killed another woman.
- A California parolee abducted and killed 12-year-old Polly Klaas in a case that claimed national attention.
- One of the killers of basketball star Michael Jordan's father was out of prison on parole; the other was under indictment.

"Victims should be allowed to hire private attorneys who act as deputy DAs."

But the notorious cases are only the tip of the iceberg. Thirty-eight percent of persons arrested for felonies are under some sort of criminal justice supervision — either probation, parole or pretrial release.⁸⁸ Probation workers have more cases than they can effectively handle, and in the face of shortages of prison capacity parole boards are not as selective about whom to parole as they once were.

We can put the competitive market mechanism to work on this problem. Privatizing the probation and parole systems could quickly become one of the most important and most effective private methods of crime deterrence.⁸⁹ The commercial bail system used for criminal defendants can be adapted for convicts probated or paroled, both to make the probation and parole systems function better and to reduce costs to the taxpayer.

Using the Commercial Bail System for Probation and Parole.

Prisoners eligible for probation and parole should be required to post a financial bond against specified violations of the terms of their probation or parole (e.g., reporting regularly to their bondsman, submitting to drug tests, etc.). The amount should be set by the courts or parole boards based on the criminal's history and prospects for a productive, noncriminal life. A typical bond might be \$10,000. As with bail bonds currently, many criminals would have to seek the help of family and friends in order to acquire the cosigners and wherewithal to pay the bondsman's fee and receive probation or parole. An important source of funds for parolees could be wages earned while in prison. But if no intimate of the criminal nor any private bondsman cared enough to risk their own money on the probationer or parolee, why should the general public risk that person on the streets? Privatizing the probation and parole systems provides a market mechanism for deciding whom to release on probation or parole and whom to continue incarcerating.

There would be no cost to the taxpayers. A flat fee of, say, \$500 per year per probationer or parolee for supervision and processing by private bondsmen should be paid privately by the probationer or parolee. For this there is ample precedent: over half the states already allow local probation departments to collect fees from probationers.⁹⁰ Persons violating the terms of their probation or parole would forfeit their bond, generating revenues for the criminal justice system, victim compensation and other uses.

Advantages of Private Bonding. This voluntary, privately financed market would be a tremendous help to parole boards and courts in sorting out promising parolees from the unpromising. A private bonding system would reduce, if not eliminate, the need for probation and parole officers on the public payroll. At the same time, with considerable sums of their own money at risk, bondsmen would supervise their charges closely and the fugitive rate would be low.

"Thirty-eight percent of persons arrested for felonies are already under some sort of criminal justice supervision."

"Why not let private bail bondsmen run the parole system?"

Pursuit of those who violate probation or parole would be more effective because, unlike police, bounty hunters have every financial incentive to recover fugitives, and they can go to any jurisdiction and use any means within the boundaries of the law to apprehend a fugitive.

Privatizing the entire probation and parole system would not only save taxpayers money but would also result in a far more effective system than the one we now have. Crime would plummet.

Privatizing the Prison System

Studies show that prisons can be built and maintained less expensively in the private sector. A number of studies find savings of 20 percent for private construction costs and 5 to 15 percent for private management of prison units.⁹¹ Further, independent observers who monitor, for example, the contracts of Corrections Corporation of America (CCA), a Nashville, Tenn., company, praise the quality of the company's operations.⁹² George Zoley of Wackenhut Corp. in Coral Gables, Fla., years ago predicted a gradual building process in which the private sector establishes a "good track record and proves it can do the job."⁹³ It has come to pass:

"Studies find savings of 20 percent for private prison construction and 5 to 15 percent for private operation."

- With 20,698 adult prisoners in private correctional facilities on June 30, 1993, the market share of private prisons has risen to 1.5 percent of the prison and jail population.⁹⁴
- The number of management firms with contracts for prison operations rose from 17 to 21 between 1992 and 1993.
- Private facilities under contract also rose from 62 to 71 (including 65 in the United States), a one-year increase of 14.5 percent.
- The Federal Bureau of Prisons awarded its first contract to design, construct and manage a 1,000-bed medium security prison (to be located in Eloy, Ariz.) to Concept, Inc., of Louisville, Ky.
- Texas leads the nation with 28 private adult correctional units, followed by California with seven.
- CRSS Constructors, Inc., has over \$1 billion in corrections construction across 12 states under way.⁹⁵

Major companies in the industry include CCA, with a rated capacity of 9,045 including facilities under construction and planned expansions, Wackenhut Corrections Corporation with 6,109 and Concept, Inc. with 4,044. Profits, however, remain elusive.⁹⁶ For example, CCA reports that it makes a small profit, but Prigor, Inc., of Murfreesboro, Tenn., an early leader in the industry, recently exited adult corrections after suffering a series of losses.

The evidence indicates that if there were a formal market to buy, sell and rent prison cells, there would be much less of a problem in funding and efficiently allocating prison space for convicts. And there are numerous — but unexploited — opportunities to reduce the net costs of prisons by creating factories behind bars, having prisoners earn their keep and compensating victims.

The most promising ways to control taxpayer costs involve the privatization of prison construction and operation. Short of full privatization, government-operated correctional facilities could be corporatized and operated like private businesses.

Prison Operation. There is no insurmountable legal obstacle to total privatization of prison operation.⁹⁷ Unlike government agencies, private firms must know and account for all the costs of prison operation, including long-run costs.⁹⁸ If they can do so and still operate prisons for less than the government — and all indications are that they can — then government should set punishments for felons and let the private sector efficiently supply prisons.

- CCA charges Harris County, Texas, and the Immigration and Naturalization Service only \$35 per inmate per day to operate a 350-bed minimum security facility in Houston, a charge that includes recovery of the cost of building the facility.⁹⁹
- Operating costs for government-run prisons can run twice that amount, even without taking construction and land costs into account.¹⁰⁰

Employing Prisoners. Prisons originally were intended to be self-supporting and during the 19th century many state prisons ran surpluses, returning excess funds to their state governments. In 1885 three-fourths of prison inmates were involved in productive labor, the majority working in contract and leasing systems. Fifty years later only 44 percent worked, and almost 90 percent worked in state rather than private work programs.¹⁰¹ Today, prison inmates are a huge drain on taxpayer wallets despite the millions of available hours of healthy, prime-age labor they represent.

Increasing productive work for prisoners requires the repeal of some federal and state statutes and clearing away bureaucratic obstacles. The federal Hawes-Cooper Act of 1935 authorized states to prohibit the entry of prison-made goods produced in other states. The Walsh-Healy Act of 1936 prohibited convict labor on government contracts exceeding \$10,000. The Sumners-Ashurst Act of 1940 made it a federal offense to transport prison-made goods across state borders, regardless of state laws.¹⁰²

“Prisons originally were intended to be self-supporting.”

Throughout the nation, a score of exceptions to the federal restrictions on prison labor have been authorized, *provided* the inmates were paid a prevailing wage, labor union officials were consulted, other workers were not adversely affected and the jobs were in an industry without local unemployment.¹⁰³

A survey commissioned by the National Institute of Justice identified more than 70 companies that employ inmates in 16 states in manufacturing, service and light assembly operations.¹⁰⁴ Prisoners sew leisure wear, manufacture water-bed mattresses and assemble electronic components. PRIDE, a state-sponsored private corporation that runs Florida's 46 prison industries — from furniture making to optical glass grinding, made a \$4 million profit in 1987.¹⁰⁵

Such work benefits everyone. It enables prisoners to earn wages and acquire marketable skills while learning individual responsibility and the value of productive labor. It also ensures that they are able to contribute to victim compensation and to their own and their families' support while they are in prison.

South Carolina and Nevada have become leaders in private sector use of prison labor, yet nationally only 5,000 prisoners (far less than 1 percent) work for private companies because of the additional costs of doing business in prisons.¹⁰⁶ By the end of 1992, South Carolina prisoners in the start-up phases of two private-sector programs had already earned \$2.4 million in wages, of which nearly \$500,000 went to taxes, \$119,000 to victim compensation, \$322,000 to room and board and \$364,000 to family support. The prisoners retained \$1.1 million in inmate savings accounts.¹⁰⁷

Fred Braun, Jr., president of Workman Fund in Leavenworth, Kan., has been a key promoter of Private Sector Prison Industries — PSPI. Organized as a nonprofit foundation, Workman lends venture capital to private enterprises interested in training and employing prisoners on-site in “real world” work. Workman reported promising results from an enterprise in which convicts worked along side nonconvict labor. Braun also is president of Creative Enterprises, the umbrella company for two plants, Zephyr Products, Inc. (sheet metal products and Heatron, Inc. (electric heating elements), which train and employ minimum-custody inmates at the Lansing East Unit in Leavenworth.¹⁰⁸ Braun's original vision was an industrial park of three or four firms employing 200. Thirteen years after opening Zephyr, no more businesses had been added, but the two original plants were employing about 150 prisoners.¹⁰⁹

Bureaucratic inertia slows the transition to private work for prisoners. For example, the state corrections system in Texas traditionally was a leader in state-run prison industries, which probably has hindered the initiation of private-sector opportunities for prison employment and production there.

“South Carolina and Nevada have become leaders in private sector use of prison labor.”

Conclusion: Reforms That Work

The ineffectiveness and abuses created by our state-run criminal justice system are manifest. As government has grown ever larger, by every measure, the amount of protection supplied per tax dollar or per public employee (their productivity) against criminals has declined. The growth of the criminal justice system might please certain interest groups, police, politicians and bureaucrats, but the general taxpaying public is not pleased. The citizenry feels, with justification, that the public criminal justice system is failing and has lost much of its confidence in the police, courts and prisons. Many criminals practice their mayhem with contempt for the ability of the public sector to do anything about it.

"The public has lost confidence in the police, courts and prisons."

More of the burden of identifying, capturing, prosecuting and punishing criminals can be shouldered by the more efficient and innovative private sector. Crime would fall sharply if expected punishment reached the levels that prevailed in the 1950s (two to three times higher than today).¹¹⁰ Here are 10 ways to reduce crime at less expense to taxpayers:

1. Contract out noncrime, nonemergency functions of police and sheriff's departments to private security firms, allowing public law enforcement officers to concentrate more of their efforts on crime. Pay bonuses or special incentives to departments that achieve independently verified reductions in crime.
2. Make greater use of reserve law enforcement officers and explore ways to expand their ranks.
3. Shut down pretrial release bureaus and so-called "free bonds" in favor of competitive, commercial bail bonds.
4. Increase the use of private rewards for criminal convictions, including bounties offered by commercial insurance policies.
5. Pay bounty hunters for recovery of criminals who are wanted on bench warrants (orders by judges or courts to arrest persons charged with criminal offenses).
6. Make greater use of private attorneys to prepare and/or litigate criminal cases at private expense in order to expand prosecutor resources at no cost to taxpayers.
7. Reduce legal obstacles to integration of criminal prosecution and civil remedies in order to raise the price of crime to criminals and compensate victims more adequately.
8. Require convicts eligible for probation and parole to post a private bond to guarantee good behavior.
9. Accelerate private construction and operation of prisons to bring down cost and raise quality.
10. Accelerate the private employment of prison labor, creating more "factories behind bars."

“The private sector should shoulder more of the burden of identifying, capturing, prosecuting and punishing criminals.”

The debate over crime has been in a rut for decades, with conservatives emphasizing tough policies and liberals emphasizing softer remedies and improved economic opportunities. Privatizing the criminal justice system on an incremental basis would allow both sides to win; the innovation and productivity of private enterprise can reduce crime, reduce taxes and improve the protection of civil liberties.

NOTE: Nothing written here should be construed as necessarily reflecting the views of the National Center for Policy Analysis or as an attempt to aid or hinder the passage of any bill before Congress.

Notes

- ¹ Author's estimate based on straight-line projection. As this is written, President Clinton and Congress are preparing to authorize much more spending on anticrime measures.
- ² The nation's other major crime measure — the National Crime Victimization Survey — is based on a representative sample of approximately 49,000 households. It shows a steady decline in both violent and property crime since it began in 1973. While no one has satisfactorily explained the differences between the victimization survey and the FBI Uniform Crime Reports, the two crime measures differ in many respects, including the crimes covered, the reporting populations and so on. Part of the difference, however, is attributable to improved reporting procedures by the police forces across the nation and a gradual increase in the percentage of all crime reported to the police by victims. See Federal Bureau of Investigation, *Crime in the United States, 1992*, pp. 386-87; U.S. Bureau of Justice Statistics, *Criminal Victimization 1991*, October 1992, p. 4; and U.S. Bureau of Justice Statistics, *Crime and the Nation's Households 1992*, August 1993, p. 2.
- ³ The Anglo-Saxon legal system is described in Sir Frederick Pollock and Frederick W. Maitland, *The History of English Law*, vol. 1 (New York: Cambridge University Press, 1968 [1895]), 2d ed., pp. 25-63; Sir William Holdsworth, *A History of English Law*, vol. II (London: Methuen, 1966 [1936]), 4th ed., chapter 2; Bruce Lyon, *A Constitutional and Legal History of Medieval England* (New York: W. W. Norton, 1980), 2d ed., p. 83; and Frederick Seebohm, *Tribal Custom in Anglo-Saxon Law* (South Hackensack, N.J.: Rothman Reprints, 1972 [1911]).
- ⁴ According to Alfred R. Lindesmith, in primitive societies which do not have central governments capable of exercising coercive control over the subgroups that constitute their society, it would not be logical to speak of either crime or formal punishment. The standard example of this type of society is the Ifugao of Luzon as described by Hoebel. In Ifugao society the kinship groups are sovereign, and most offenses are handled essentially as torts or private wrongs to be settled by restitution, that is, by payments made to the offended party by the offender or his kinship group. See Lindesmith, "Punishment," David L. Sills, ed., *International Encyclopedia of the Social Sciences*, vol. 9 (New York: Macmillan, 1968), pp. 217-22; and E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge: Harvard University Press, 1954), pp. 219-20.
- ⁵ In this period England had not arrived at the distinction between the law of crime and the law of tort. Economic restitution was the major form of punishment for most crimes. A lord or the king sometimes collected additional fines as a form of punitive damages. See Holdsworth, *A History of English Law*, p. 43.
- ⁶ As Bruce Benson puts it, "In effect, everyone who wanted to participate in and benefit from the social order was bonded," because his kindred had to guarantee his behavior. Revocation of the bond took the form of exile or slavery. See Bruce Benson, *The Enterprise of Law: Justice without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990), p. 23.
- ⁷ *Ibid.*, pp. 21-30.
- ⁸ On occasion, however, a plaintiff who failed to get his cause heard in the jurisdiction of his own "hundred" (tribe) would ask a nobleman or king to intervene.
- ⁹ When accused clerics were tried by ordeal, they were given a dry morsel of consecrated bread. If they could swallow it, they were considered not guilty, but if it stuck in their throat, they were considered guilty. For a brief description of the Anglo-Saxon legal customs, see *Encyclopedia Americana*, vol. 1 (Danbury, CT: Grolier, 1991), p. 844.
- ¹⁰ Richard S. Post and Arthur A. Kingsbury, *Security Administration: An Introduction to the Protective Services*, 4th ed. (Boston: Butterworth-Heinemann, 1991), p. 34.
- ¹¹ Benson, *The Enterprise of Law: Justice without the State*, pp. 62-63.
- ¹² Juan Cardenas, "The Crime Victim in the Prosecutorial Process," *Harvard Journal of Law & Public Policy*, vol. 9, Spring 1986, p. 365.
- ¹³ For example, from 1870 to 1885, the five Kansas railheads of Abilene, Caldwell, Dodge City, Ellsworth and Wichita had a total of 45 homicides, an average of three per year. See Robert R. Dykstra, *The Cattle Towns* (New York: Knopf, 1968), p. 44.
- ¹⁴ Roger D. McGrath, *Gunfighters, Highwaymen and Vigilantes* (Berkeley: University of California Press, 1984), p. 247.
- ¹⁵ For further discussion of this point, see "The War on Gun Ownership Still Goes On! Dial 911 and Die!" *Guns & Ammo*, July 1992, p. 23, p. 87; and Morgan O. Reynolds and W.W. Caruth III, "Myths about Gun Control," NCPA Policy Report No. 176, National Center for Policy Analysis, December 1992, pp. 25-27.

16 *South v. Maryland*, 1856.

17 *Bowers v. DeVito*, U.S. Court of Appeals, Seventh Circuit, 686F.2d 616 [1982].

18 *New American*, April 20, 1992, p. 16.

19 William C. Cunningham, John J. Strauchs and Clifford W. Van Meter, *Private Security Trends, 1970 to 2000: The Hallcrest Report II* (Boston: Butterworth-Heinemann, 1990), p. 176 (hereafter referred as *Hallcrest Report II*); see also *Wall Street Journal*, June 1, 1993, p. B1.

20 *Hallcrest Report II*, p. 175.

21 Robert McCrie, publisher of the semimonthly *Security Letter*, quoted in the *Wall Street Journal*, June 22, 1993, p. A17. Another report claims 25 percent of residences have alarm systems.

22 Ira A. Lipman, president of Guardsmark, the nation's fifth largest private security company, expansively says, "What's going on in this country is private security has replaced the police." See Ralph Blumenthal, "As the Number of Private Guards Grows, Police Learn to Enlist Their Help," *New York Times*, July 13, 1993. George Shollenberger, an expert on law enforcement trends at the National Institute of Justice, says, "The essential conclusion is that the [public] police can't do it alone any more." *Wall Street Journal*, June 1, 1993, p. B1.

23 See Morgan O. Reynolds, *Crime by Choice* (Dallas: Fisher Institute, 1985), p. 101.

24 Blumenthal, "As the Number of Private Guards Grows, Police Learn to Enlist Their Help."

25 *Ibid.*

26 For example, see Douglas T. Cohen, Cox News Service, "Bad Cops Hard to Get Off Street," *Houston Chronicle*, June 20, 1993, p. 6C.

27 George L. Kelling, "What Works — Research and the Police," *Crime File Study Guide* (Washington, DC: U.S. Department of Justice, National Institute of Justice, 1988).

28 Author's telephone interview with Patrick Cannan, director of corporate relations, Wackenhut Services, Inc., July 14, 1993.

29 *Wall Street Journal*, June 1, 1993, p. B1.

30 *Ibid.*

31 *Hallcrest Report II*.

32 Author's communication with New York City Police, Community Affairs Department, February 23, 1994.

33 Cunningham, Strauchs and Van Meter, *Private Security Trends*, p. 280.

34 *Kansas City Star*, October 22, 1990, p. D3. Vince McInerny, a spokesman for the police department, said in a telephone interview in November 1993 that the only contracting out ever done was for some school crossing guards.

35 William C. Wooldridge observes that the railroad police developed "an expertise not realistically within the grasp of public forces." William C. Wooldridge, *Uncle Sam, the Monopoly Man* (New Rochelle, N.Y.: Arlington House, 1970), p. 117.

36 U.S. Bureau of Justice Statistics, *Criminal Victimization in the United States, 1990*, NCJ-134124, February 1992, p. 8. Also see "Crime and the Nation's Households, 1992," *Bulletin*, August 1993.

37 FBI, *Crime in the United States, 1992*.

38 James S. Kakalik and Sorrel Wildhorn, *The Private Police Industry: Its Nature and Extent* (Santa Monica, CA: The Rand Corporation, 1971), pp. 112-13; and Benson, *The Enterprise of Law*, p. 263.

39 This section is based on interviews with Richard B. Weinblatt, president of the Center for Reserve Law Enforcement, and Bill Martin of the International Reserve Law Officers Association.

40 Reynolds, *Crime by Choice*, pp. 96-97.

41 It would be important to establish a new, lower baseline each year geared to reductions in crime. Otherwise, the incentive scheme would be self-defeating once the police department had earned the highest allowable pay increases.

42 John Carlisle, "Criminal Welfare: A Jail Reduction Failure," *Policy Insights*, April 1992, No. 406, Free Congress Research and Education Foundation, Washington, DC, pp. 1-2.

43 Author's interview, February 19, 1993.

⁴⁴ Carlisle, "Criminal Welfare: A Jail Reduction Failure." According to Bob Burton, bounty hunter and author of *Bounty Hunter* (Boulder, CO: Paladin Press, 1984) and *Bail Enforcer: The Advanced Bounty Hunter* (Boulder, CO: Paladin Press, 1990), five out of six who skip private bail get picked up.

⁴⁵ Jane Marino Reed and Rhonda Sue Stallings, "Bounty Hunting: The Alternative Justice System," publication of the Professional Bail Agents of the United States, Houston, Texas, August 1992, p. 5.

⁴⁶ Calculated from U.S. Bureau of Justice Statistics, "Pretrial Release of Felony Defendants, 1990," NCJ-139560, November 1992, p. 9.

⁴⁷ *Taylor v. Taintor*, 83 US (16 Wall.) 366 (1873).

⁴⁸ Quoted in New York City Police Department, Office of the Deputy Commissioner, Legal Matters, *Legal Bureau Bulletin*, 1991. See Reed and Stallings, "Bounty Hunting."

⁴⁹ Author's interview, February 19, 1993.

⁵⁰ See Carlisle, "Criminal Welfare: A Jail Reduction Failure;" U.S. Bureau of Justice Statistics, "Pretrial Release of Felony Defendants, 1990;" and Martin D. Sorin, *Out on Bail* (Washington, DC: National Institute of Justice, U.S. Department of Justice, 1986).

⁵¹ *Ibid.*

⁵² Reed and Stallings, "Bounty Hunting."

⁵³ John Burns, a private bondsman from Texas, contrasted the two types of bail when he spoke before the Association of (public) Pre-Trial Services Agencies in 1985.

"Really," Burns said, "there are very few differences between public bail and private bail, in spite of the fact that I am the only free enterprise bail agent in this room. Let me give you an example. Would all of you please hold up your hand when you agree that you do similar things that I do?"

"How many here interview and get people out of jail? Please hold up your hand." Every hand in the room, including Burns', went up.

"How many here pay for their house notes, their groceries and so on because of the work we do?" Again, every hand, including Burns', was raised.

"How many of you go out if the man does not show up for court, find the man and bring him to court or are personally responsible to pay the bond if it forfeits?" Burns' was the only hand raised.

He looked at the crowd and said, "You see, the only difference is that *we* (the private bondsmen) are responsible." Then he sat down.

Recounted in Gerald Monks, "Public Bail — A National Disaster," ch. 8 in Patrick B. McGuigan and Jon S. Pascale, eds., *Crime and Punishment in Modern America* (Washington, DC: Free Congress Resource and Educational Foundation, 1986).

⁵⁴ "No Body, No Booty," interview with Bob Burton, *Paladin Press Magazine*, June 1993, pp. 28-29. See also Bob Burton, *Bounty Hunter* (Boulder, CO: Paladin Press, 1984) and Bob Burton, *Bail Enforcer*.

⁵⁵ Remarks before the Professional Bail Agents of the United States National Convention, Las Vegas, February 8, 1993.

⁵⁶ Another problem is that information provided by an arrested person during the PTR interview has often been passed on to the state. Some claim that this practice compromises the civil right of the accused against self-incrimination. See David Mitcham, "Free Bond-Free Lawyer Bondsmen Reconsidered," *Docket Call*, official magazine of the Harris County Criminal Lawyers Association, March/April 1989.

⁵⁷ David Villano, "Get Out of Jail Free," *New Times*, July 1991.

⁵⁸ See Stephen Labaton, "Now Bounty Hunters Can Make Out Like Bandits," *New York Times*, October 17, 1993, p. 4E.

⁵⁹ *Dallas Morning News*, July 24, 1993, p. 1A.

⁶⁰ Author's telephone interview with Sharon Greene, assistant producer, February 9, 1994.

⁶¹ Author's communication with Crime Stoppers International, Inc.

⁶² Steven Long, "Team Has Horse Thieves Running Scared," *Houston Chronicle*, March 2, 1993, p. 18A.

⁶³ Federal Bureau of Investigation, *Crime in the United States 1992*, and *Statistical Abstract of the United States 1993* (Washington, DC: U.S. Bureau of the Census, 1993), pp. 199, 214.

⁶⁴ A.M. Best Company, Inc., *Best's Aggregates & Averages*, annual.

⁶⁵ FBI, *Crime in the United States, 1992*, p. 205.

⁶⁶ Also see Richard Posner, *The Economic Analysis of Law*, 4th ed. (Boston: Little, Brown, 1992), pp. 597-98.

⁶⁷ Later, however, the enforcer (or anyone else) can blackmail the criminal in exchange for not prosecuting, presenting a continuing problem for the criminal.

⁶⁸ No city exceeds New York City in the exposure of massive police corruption each generation. Because of the large fixed monthly levies received by each police officer in the 1880s and 1890s, the Lexow Committee found that police jobs and promotions had to be purchased from those in power. Appointments to patrolman cost \$300 and a promotion to "roundsman" cost an equal sum; making sergeant cost \$1,600 and captaincy required as much as \$15,000. See Carl Sifakis, *The Encyclopedia of Crime* (New York: Facts on File, 1982), p. 423. The Knapp Commission (1970-72) found that building contractors added 5 percent to construction costs for bribes to police (Sifakis, p. 402).

⁶⁹ Cohen, "Bad Cops Hard to Get Off Streets." See also the open letter of January 10, 1994, to President Clinton asking him to appoint a national commission to investigate the widespread abuses of civil liberties by federal law enforcement agencies (53 separate federal agencies have the authority to make arrests and carry firearms), including the disastrous siege of the Branch Davidian compound at Waco, Texas. The letter was signed by officials of 10 organizations, including Ira Glasser of the American Civil Liberties Union, Arnold S. Trebach of the Drug Policy Foundation, James J. Baker of the National Rifle Association and Alan Gottlieb of the Second Amendment Foundation, and made public by the ACLU.

⁷⁰ For example, an executive for the Association of General Contractors said, "Some contractors routinely add 5 percent to their estimates to cover the costs of internal and external theft." Quoted in *Hallcrest II*, p. 300.

⁷¹ For a discussion, see Clifford Shearing and Philip Stenning, "Private Security: Implications for Social Control," *Social Problems*, vol. 30, no. 5, June 1983, pp. 503-04.

⁷² *Hallcrest II*, pp. 299-300.

⁷³ "Victim's Son Gets Manson Royalties," Associated Press story, *New York Times*, December 26, 1993.

⁷⁴ Anne Belli Gesalman, "Slaying Victim's Family Gets \$6 Million in Damages," *Dallas Morning News*, June 18, 1993, p. 31A.

⁷⁵ *Ibid.*

⁷⁶ In a survey of more than 1,000 Texas felons in 1988, Ben Crouch, professor of sociology at Texas A&M University, found that 740 had court-appointed attorneys and 280 had private attorneys to defend them. The district attorney of Brazos County, Texas, said that 85 to 90 percent of defendants had court-appointed attorneys. Author's telephone interview, April 13, 1993.

⁷⁷ Cardenas, "The Crime Victim in the Prosecutorial Process," pp. 357-98; French example pp. 384-86.

⁷⁸ "Prosecution: Comparative Aspects," in S. Kadish, ed., *Encyclopedia of Crime and Justice*, 1303, cited by Cardenas, p. 385.

⁷⁹ "The Civil Action for Damages in French Criminal Procedure," 39 *Tul. L. Rev.*, 698 (1965), cited by Cardenas, p. 386.

⁸⁰ One obstacle is the unwillingness of civil courts to administer damages more complicated than lump sum money payments. The liberties of private bondsmen to recover bail jumpers under criminal law could be extended to bonding arrangements for civil restitution.

⁸¹ Imprisoning debtors was an English custom readily imported into the American colonies; debtors once were sold into service for limited lengths of time in order to pay off debt. Reformers eventually achieved an absolute and total ban on jailing debtors when Florida became the last state to forbid imprisonment for simple debt in 1868. See Sifakis, *The Encyclopedia of Crime*, pp. 200-01.

⁸² While their mechanisms were not identical to financing private civil suits against criminals, private associations were formed in England in the 1760s to prosecute criminals. Prosecution was selective and dues-paying members could refuse to prosecute or could negotiate informal settlements with the accused. Organized "thief takers," including the Bow Street Runners and the notorious McDaniel gang, operated in response to this system of rewards for securing the conviction of felons in

London, but it is not clear whether the thief takers always operated legitimately. Some writers allege that they defrauded the system by integrating thievery and recovery; others claim that what they did was all merely a prelude to public policing. See David Philips and Peter King in Douglas Hay and Francis Snyder, eds., *Policing and Prosecution in Britain 1750-1850* (Oxford: Clarendon Press, 1989).

⁸³ Posner, *The Economic Analysis of Law*, 4th ed., pp. 603.

⁸⁴ Prosecutors drop the charges in 25 percent of arrests. About 85 percent of prosecuted cases are plea bargained. See *Sourcebook of Criminal Justice Statistics, 1992*, pp. 483, 527 and 528.

⁸⁵ Calculated from U.S. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics, 1992*, pp. 483-85.

⁸⁶ This idea is not without precedent. However, the author's local district attorney said he could only remember private preparation of a criminal case (a capital murder case) happening once during a 10-year period.

⁸⁷ U.S. Bureau of Justice Statistics, *Prisoners in 1991*, May 1992.

⁸⁸ *Felony Defendants in Large Urban Counties, 1990*, National Institute of Justice, U.S. Department of Justice, NCJ-141872, May 1993.

⁸⁹ The author thanks Gerald Monks of Houston, a former executive director of the Professional Bail Agents of the United States, for suggesting this idea.

⁹⁰ *Making the Offender Foot the Bill: A Texas Program*, National Institute of Justice, U.S. Department of Justice, NCJ-136839, October 1992.

⁹¹ Gary W. Bowman, Simon Hakim and Paul Seidenstat, eds., *Privatizing Correctional Institutions* (New Brunswick, N.J.: Transaction Publishers, 1993).

⁹² For a comparison of the quality of private and public prisons, see Charles H. Logan, "Well Kept: Comparing Quality of Confinement in Private and Public Prisons," in *Journal of Criminal Law and Criminology*, vol. 83, no. 3, Fall 1992, pp. 577-613. In a comparison of privately and publicly operated corrections facilities in Kentucky and Massachusetts, both staff and inmates generally gave higher ratings to the services and programs at the privately operated facilities, while escape rates were lower and disturbances by inmates were fewer. See Dana C. Joel, "The Privatization of Secure Adult Prisons: Issues and Evidence," in Bowman, Hakim and Seidenstat, eds., *Privatizing Correctional Institutions*.

⁹³ Benson, *The Enterprise of Law*, p. 345.

⁹⁴ *Private Adult Correctional Facility Census*, 5th edition, Private Corrections Project, University of Florida, Gainesville, June 30, 1993.

⁹⁵ *Corrections Today*, December 1992, p. 14.

⁹⁶ *Wall Street Journal*, June 10, 1993, p. B2.

⁹⁷ CCA offered to operate the entire prison system for the state of Tennessee in the 1980s but the state government declined the proposal. See Bowman, Hakim and Seidenstat, eds., *Privatizing Correctional Institutions*, p. 29.

⁹⁸ Charles H. Logan, *Private Prisons: Cons and Pros* (New York: Oxford University Press, 1990).

⁹⁹ Author's telephone conversation with CCA Program Director, Houston, TX, July 15, 1993.

¹⁰⁰ Ibid. For the hidden costs of public corrections, see Charles H. Logan and Bill W. McGriff, "Comparing Costs of Public and Private Prisons: A Case Study," National Institute of Justice, U.S. Department of Justice, no. 216, September/October 1989.

¹⁰¹ Alexis M. Durham, "The Future of Correctional Privatization: Lessons from the Past," in Bowman, Hakim and Seidenstat, eds., *Privatizing Correctional Institutions*, p. 39.

¹⁰² Barbara Auerbach, "Federal Government Involvement in Private Sector Partnerships in Prison Industries," in Bowman, Hakim and Seidenstat, eds., *Privatizing Correctional Institutions*, pp. 91-104.

¹⁰³ Bruce Fein and Edwin Meese III, "Have to Fight Crime within Our Limited Means," *Houston Chronicle*, May 3, 1989, p. 29A.

¹⁰⁴ James K. Stewart, director, National Institute of Justice, U.S. Department of Justice, in a letter to the *Wall Street Journal*, July 26, 1989.

¹⁰⁵ See Jack Eckerd, "Responsibility, Love and Privatization: A Businessman's Guide to Criminal Rehabilitation," *Policy*

Review 45, Summer 1988, p.52; and Judith Schloegel, "PRIDE of Florida: A Working Model for Inmates," in Bowman, Hakim and Seidenstat, eds., *Privatizing Correctional Institutions*, pp. 105-11. PRIDE is an acronym for Prison Rehabilitative Industries and Diversified Enterprises.

¹⁰⁶ *Business Week*, February 17, 1992, p. 42.

¹⁰⁷ Author's telephone conversation with Tony Ellis, director of Division of Prison Industries, South Carolina Department of Corrections, Columbia, January 20, 1993.

¹⁰⁸ "Governor Praises Heatron, Zephyr," *Leavenworth (Kan.) Times*, October 7, 1992, p. A1.

¹⁰⁹ See also Rod Miller, George E. Sexton and Victor J. Jacobsen, "Making Jails Productive," National Institute of Justice, U.S. Department of Justice, NCJ-132396, October 1991; and "Private Sector Prison Industries" and "Prison-Based Joint Ventures," both by Criminal Justice Associates, Philadelphia, PA, December 7, 1990.

¹¹⁰ On crime and punishment, see Morgan O. Reynolds, "Why Does Crime Pay?" NCPA Policy Backgrounder No. 123, National Center for Policy Analysis, December 1992.

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