

Why is Criminal Justice Only Partially Privatized?

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Ric Simmons, [*Private Criminal Justice*](#), 42 Wake Forest L. Rev. 911 (2007).

Ric Simmons has written an article that makes sense of two long-term trends in the privatizing of criminal justice. He links a growing body of legal scholarship about private policing to an enormous academic literature on restorative justice, and reframes them both as part of a long-term trend toward co-existing public and private systems for delivery of criminal justice.

Simmons begins this enterprise by describing the enormous growth of private law enforcement in the United States over the last few decades. It is an exceptionally timely topic. Much of our criminal procedure framework builds on the assumption that law enforcement is a public function, performed by state actors, but that vision is increasingly removed from reality. By some estimates, private security and investigative workers outnumber public police officers by more than a three-to-one ratio. Simmons capably summarizes here the groundbreaking work of [David Sklansky](#) and [Elizabeth Joh](#), who brought these developments to light for the legal academy over the last ten years. Simmons then observes that the relative lack of legal regulations that apply to private police actors may not matter as much as we once thought. Many users of private policing do not bother to invoke the public adjudicative system, so the admissibility of the evidence that private police collect is not relevant in many cases.

The second major component of this article is a review of the far-flung literature on “restorative justice,” a method of responding to crimes that emphasizes the experience of the crime victim, both during the adjudication of the charge and in the selection and execution of the punishment. After summarizing the diverse literature on this topic (drawn from criminology, psychology, and other disciplines) Simmons moves to the heart of his project: he draws out the connections between these two phenomena.

Both private policing and restorative justice emphasize the experience of the crime victim, and both grow out of frustration with the public enforcement system. Just as private couriers respond to shortcomings at the U.S. Postal Service, private policing and restorative justice appear when victims of crime get no satisfaction from public prosecutors, criminal court judges, and public corrections officials. In this economic analysis, private firms spring up to meet a demand.

Simmons then confronts a dilemma: private firms have largely succeeded in the realm of policing, but not so in the arenas of criminal adjudication or criminal punishment. Private police now identify an enormous number of criminal suspects after the fact, but there is nowhere to send them. The victims of the alleged crimes have few satisfying alternatives to public criminal adjudication or public criminal punishment. The capacity of restorative justice programs such as victim-offender mediation is tiny, typically measured in the hundreds.

Private capacity to impose something akin to criminal penalties is expanding when it comes to small crimes. In some of the most interesting and original research presented here, Simmons surveys journalistic sources for evidence that the purchasers of private enforcement impose their own low-level punishments. For instance, many large retailers (including Wal-Mart) only issue warnings to persons they accuse of stealing small amounts of merchandise for the first time. Property owners eject perpetrators from the premises; employers fire their employees accused of theft and other crimes.

What about private adjudication and punishment for more serious crimes? Simmons suggests (pages 962-967) that parties should resort more frequently to victim-offender mediation in a broader range of cases, without waiting for public prosecutors to file charges or for criminal court judges to refer cases to mediation. The article explores the possible uses of mediation in serious property crimes, a few crimes of violence in organizational settings (such as employee assault cases), and even intra-family violence. He envisions public prosecutors as monitors of this private system, standing ready to file charges in the public system if the private outcome does not adequately protect public interests.

As a matter of positive theory, this is a wonderful synthesis. Simmons offers an economic and historical lens for connecting several different unstable trends in criminal justice today. Each of these trends can be understood as part of long-term fluctuations between public and private control of criminal sanctions. This article explains why the privatizing trend reaches law enforcement at the start of the process and punishment at the end of the process, but not the adjudication stage in the middle. Readers can see why dissatisfaction with plea bargaining, sentencing guidelines, crowded prisons, and domestic violence arrests—critiques of criminal courts that span from right to left on the political spectrum—all flow together into a demand for private criminal justice.

At the same time, I believe that this article is less fully developed in terms of normative theory. Simmons does not explain in a satisfying way why the private-initiated adjudications that he imagines have not already taken off, given the obvious sources of demand and funding for it. The article also raises a few questions about the desirability of the private criminal justice system for some important groups of “customers.” Is there any reason to believe that innocent defendants will opt out of the private system at rates any higher than factually guilty defendants? If not, this is troubling, since criminal mediation begins with the shared premise that the accused person has harmed the victim.

Finally, there are many unexplored questions here of institutional competence. While Simmons declares—in a bit of overstatement—that “the Constitution is the source of all significant limits on public police powers” (page 929), we actually see a great deal of legislative activity in arenas such as wiretapping and (more recently) eyewitness identification procedures. Much fruitful work in the future might explore which aspects of private criminal justice are likely to attract the attention of legislatures.

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