

## Introduction: The Rise of Private Criminal Justice

Every year, over twenty-seven million crimes are committed in the United States, including nearly four million violent crimes. In many of these cases, the victim or another witness reports the crime to the police, thereby initiating a case in the public criminal justice system. However, this course of action is an *atypical* response to criminal activity. Surveys of crime victims show that over half of violent crimes, and about two-thirds of all property crimes, are never reported to the police. This translates to over eighteen million crimes annually that never enter the public criminal justice system.<sup>1</sup> Since that number only counts crimes with identifiable victims, such as assault and theft, it does not include most “victimless” crimes, such as narcotic sales, drug or firearm possession, prostitution, driving while intoxicated, and vandalism against state property. As there are no reporting statistics for these crimes, it is likely that many millions of them are witnessed by private individuals but not reported to the police. This raises a critically important question: When witnesses do not report crimes to the police, what actions do they take?

Many times the answer is: nothing. The witness or victim may not know the identity of the perpetrator. In other cases, the perpetrator is a friend or a family member, and the victim wishes to forgive and forget. Or perhaps the perpetrator is able to intimidate or otherwise persuade the witness not to report the crime. Or perhaps the injury – whether to person or property – is so slight that it is simply easier for the witness to move on rather than take any action (especially if the witness was not a victim of the crime).<sup>2</sup> Any of these reasons could result in a witness taking no action in response to criminal activity.

However, many non-reporting witnesses and victims do take some action.<sup>3</sup> Instead of calling the police, these individuals pursue private justice, whether by making a deal with the perpetrator to obtain something of value, bringing the case to a private adjudicative body, or taking direct action against the perpetrator themselves. These private responses are so common that it is fair to say that they – not the process and punishment imposed by the state – constitute our society’s primary response to criminal activity. However, little is known about these private responses.

They are often conducted in secret and they are regulated lightly, if at all, by a patchwork of rules and norms.

The vast private criminal justice system begins at the law enforcement stage. Private security officers outnumber public police officers by nearly a two to one margin.<sup>4</sup> They conduct residential security patrols; monitor shoppers in department stores; safeguard warehouses; patrol college campuses and shopping malls; and guard factories, casinos, office parks, schools, and parking lots. Companies maintain internal security personnel to monitor their workers, investigate employee theft, and detect customer fraud. The rise of the internet has created an entirely new branch of the private security industry, as companies, governments, and nonprofit organizations hire specialists to ensure that their presence on the web is secure.<sup>5</sup> Beyond this diverse army of paid private security are reserves of volunteers who form neighborhood watch groups or safety patrols, like the Guardian Angels in New York City or the Minutemen Project along the southern border.

When these private police or volunteers apprehend a suspect, they have no duty to refer them to a state prosecutor. Private police serve the interests of their clients – private companies or homeowners’ associations – which, for a variety of reasons, often have no interest in traditional prosecution and prefer a private alternative response. Volunteers who engage in private law enforcement respond to criminal activity in ways that are based on their own interest and values, which often does not include contacting the authorities. And these formal private organizations are not the only on-ramp to the private criminal justice system: As noted above, other private individuals may see criminal activity and decide that the optimal response to the crime – whether it is vigilante justice, public shaming, or simply threatening to call the police if the alleged perpetrator does not take some remedial action – is preferable to involving the authorities.

Private responses often involve a sophisticated procedure for dealing with suspected criminals. For example, many universities and professional associations operate private tribunals, with their own versions of due process. Other private parties contract with third party companies to deal with alleged criminals. For many years, major retail stores in the United States, including Walmart and Bloomingdale’s, maintained a contract with the Corrective Education Company (CEC), a private corporation. When store security caught a suspected shoplifter, the store gave the alleged perpetrator a choice: either the store would call the police or the shoplifter could enroll in one of the CEC’s “restorative justice programs” at the cost of \$400–\$500 in “tuition.”<sup>6</sup> The vast majority of those who were apprehended chose to pay the money rather than enter the public criminal justice system.

Other private entities and individuals operate similarly, but on a smaller scale. In some communities, local neighborhood boards seek to rehabilitate those suspected of committing crimes in their neighborhood; in other communities, neighborhood watch officers record the license plate numbers of individuals who come to their street to buy drugs and then send the buyers letters threatening to call the police if

they return to the neighborhood. After a company detective identifies financial malfeasance by an employee, the business might choose to quietly fire the perpetrator rather than contact the authorities. A wife who suffers from abuse could threaten to leave her husband and take the children with her unless he stops drinking. Some individuals or groups act as vigilantes, imposing their own punishment upon those whom they believe have committed a crime. All of these are examples of private responses to criminal behavior – methods of resolving the criminal dispute without involving the public criminal justice system. In these and many other contexts, the response to criminal activity is kept completely private; there are no police, no prosecutors, no courts, and no jails involved.

Most Americans are familiar with the basic processes of our public criminal justice system. The process always starts with the enforcement stage: Police officers patrol neighborhoods, investigate crime, and make arrests. Next comes the adjudication stage, in which prosecutors file charges and argue cases to judges and juries, defense attorneys represent their clients, and judges oversee hearings and trials. The final step is the disposition stage: After a trial verdict or a plea bargain, a judge will impose a sentence, such as a fine, probation, or incarceration.

Enforcement, adjudication, and disposition are the component parts of any criminal justice system. The goals of the public criminal justice system underpin these components and determine when the state decides to bring its unique coercive power against its own citizens. Criminal justice systems exist for both a moral and a practical purpose. Morally, the state attempts to punish individuals who violate society's shared values and restores the dignity of the victim of the crime. Practically, the state tries to prevent future crimes – by deterring future criminal conduct, incarcerating the most dangerous individuals to incapacitate them, or (less often) rehabilitating them so that they no longer engage in criminal activity.

Conventional wisdom holds that the state is an essential party to the criminal justice system because only the state can define what conduct is criminal, and the state's monopoly on the legitimate use of force means that only state actors should apprehend lawbreakers, coerce them into standing trial, and impose punishment. Meanwhile, the same conventional wisdom states that the goals of the criminal justice system – punishment for moral wrongs and preventing future harms – are primarily the concerns of the state, and it is inappropriate and even dangerous for private parties to take matters into their own hands. When private parties try to enforce criminal laws, they are labelled as vigilantes pursuing vengeance, and their actions in responding to crime are often considered crimes in themselves.

However, it is increasingly clear that this conventional wisdom is wrong. The public criminal justice system that every American knows about is only a part of the story – and perhaps not even the most important part. While most policymakers and criminal law scholars focus on the public criminal justice system, a large proportion of our society's response to criminal activity is occurring outside the public sphere. As the earlier examples show, these responses go far beyond vigilante actions.

They include sophisticated adjudicative procedures, formal agreements, and informal understandings, as well as threats, promises, and rehabilitative efforts. The actors who make up the private criminal justice system are sprawling and diverse: They include sizeable entities such as major universities, retail stores, and large corporations, as well as smaller companies and even individuals who detect criminal activity and decide to deal with the suspected perpetrator on their own rather than call the police. This parallel criminal justice system – the private criminal justice system – has become the primary way that our society responds to criminal activity. Thus, we cannot truly understand our country’s criminal justice policy without acknowledging and understanding the private criminal justice system.

Most Americans are at least vaguely aware of some aspects of the private criminal justice system. In fact, both victims and the general public often expect private institutions to resolve criminal cases and are highly critical when they perceive that private institutions fail to reach a just disposition. When a professional athlete is accused of domestic violence, society looks to the professional sports organization rather than the state to impose a suitable punishment. When a sexual assault allegedly occurs on a college campus, the victim often turns to university disciplinary proceedings rather than to the criminal courts to resolve the case. However, the private criminal justice system extends beyond these well-known examples. Most people do not realize the degree to which private entities have taken over our criminal justice system and the implications that this has on our criminal justice policy. This book seeks to uncover the surprising breadth and scale of the private criminal justice system and describe its various incarnations, from individual agreements between victims and perpetrators to entire industries that have developed around adjudicating criminal disputes.

In addition to describing the private criminal justice system, this book has two other goals. The first is to examine why the private system has become so prevalent. There are many reasons why private parties might decide to bypass the police, prosecutors, courts, and jails of the traditional public criminal justice system, such as streamlined procedures and dispositions that are tailored to the needs of the victims. Structural reasons have also contributed to this shift. A growing number of people are dissatisfied with both the means and the ends of the public criminal justice system. In 1999, 75 percent of Americans stated they were in favor of “totally revamping the way the criminal justice system works.”<sup>7</sup> If anything, that number has increased in subsequent decades: A 2021 Gallup Poll found that only 20 percent of Americans have “a great deal” or “quite a lot” of confidence in the criminal justice system, ranking the institution below public schools, banks, and organized labor – the only institutions it beat were big business, television news, and Congress.<sup>8</sup> Many communities of color do not trust the police to treat them fairly, and calls to reduce police footprints or even to abolish the police reached a peak during the summer of 2020. Many public courthouses are associated with assembly-line justice, overworked public defenders, overzealous prosecutors, and the widespread substitution of plea bargains for trials.

At the back end of the system, we seem to have given up on rehabilitation altogether, and mass incarceration imposes an enormous economic, social, and personal cost on society, a cost that – like every other aspect of the public criminal justice system – disproportionately affects minority populations.

Perhaps most significantly, victims are rarely satisfied with how they are treated or with the outcomes of their criminal cases. Studies show that involvement with the criminal justice system can exacerbate the harm of the initial crime, and that the system does not meet the needs of victims.<sup>9</sup> Victims' rights groups have worked over the last forty years to pass legislation that gives victims the right to be notified and heard at various points in the criminal proceedings. However, such efforts are limited by the very nature of the public criminal justice system, which is designed to meet the needs of the state, using the victim as a means to that end. As the United States Supreme Court held in the 1970s, "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another,"<sup>10</sup> such that, in most cases, a victim has no formal legal status beyond that of a witness.<sup>11</sup> In contrast, the private criminal justice system gives the victim agency in both its process and its result.

This is not to say that the public criminal justice system is irrelevant to these private resolutions. Many of the private responses take place "in the shadow of the law." Often, the victim and the alleged perpetrator know that their choice is to either resolve the dispute among themselves or take the case to the police. The threat of the public criminal justice system can persuade suspects to accept a punishment at the hands of the private entity. In addition, the procedures used by private entities are often judged by whether they are as robust as those used by criminal courts. Thus, the outcomes and processes of the public criminal justice system have a significant effect on the outcomes and processes of the various aspects of the private criminal justice system.

But, make no mistake, the methods, goals, and ultimate effects of the private criminal justice system are distinct from those of its public counterpart. In fact, some versions of the private criminal justice system operate not in the shadow of the public system, but rather in parallel with it. Private organizations occasionally institute their own proceedings and impose their own punishments, regardless of whether the public system is involved. Compared with its public counterpart, the private criminal justice system is far more likely to detect criminal activity; it imposes more lenient punishments; and it operates more efficiently. At the same time, the private criminal justice system is less concerned with individual rights and due process; it often involves massive power imbalances; and it is much less transparent.

This leads to the final goal of the book: to evaluate the social desirability of the private criminal justice system. When private entities respond to criminal conduct, are they only serving their own interests or are they also serving the public interest? Is the private criminal justice system something that we should support and encourage, or something that should be limited and discouraged? In many contexts, relying on

private individuals to set our criminal justice policy leads to undesirable results. However, in evaluating the system as a whole, we should compare the procedures and the outcomes of the private system not to some utopian ideal, but to the alternatives offered by the public system. In the end, I will argue that, contrary to popular wisdom, the private criminal justice system is a positive development that can fill the gaps in our public criminal justice system and help lower the crime rate while addressing problems of mass incarceration. The private criminal justice system can facilitate a process I call “soft decriminalization,” in which many activities that are now considered criminal – and that usually result in incarceration – are deterred by various private entities, and punished through a variety of non-carceral means. Private entities can also be more effective than their public counterparts in detecting crime, and can do so with fewer resources – and certainly with fewer state resources – leading to greater deterrence and, potentially, lower crime rates overall. Finally, the private criminal justice system can help reform the traditional public system, making it more responsive to the needs of the people it is serving.

Before moving forward, it is important to distinguish between the *private criminal justice system* and the *privatization* of the public criminal justice system. The former occurs whenever private parties respond to criminal activity on their own, without direction from the state. The latter, which is beyond the scope of this book, involves agencies in the public criminal justice system contracting private companies to carry out certain jobs. Many aspects of the post-conviction phase in the public criminal justice system are contracted out to private parties: Approximately 8 percent of prisoners in this country are serving time in a privately run correctional facility.<sup>12</sup> Private organizations also manage some of the treatment, counseling, and rehabilitation programs to which many convicted criminals are sentenced or referred.<sup>13</sup> Public police sometimes pay private companies or individuals to engage in investigations or conduct forensic work. However, this type of “contracting out” does not in itself represent any significant change in criminal justice policy.<sup>14</sup>

Privatization of criminal justice services carries its own costs and benefits,<sup>15</sup> but ultimately a state agency controls the provision of services, which means a prison guard or law enforcement officer is subject to the same rules and restrictions under the law whether hired directly by a state agency or by a company that is in turn hired by a state agency. More importantly, the goals and policies of the police force or prison institution will ultimately be set by the state agency in charge, regardless of whether the services are managed and coordinated by a private corporation.<sup>16</sup>

For example, when Wackenhut Services runs a juvenile detention facility for the federal government, it decides how to design the prison, how many employees to hire, how much to pay them, and what kind of training to give them. However, Wackenhut’s treatment of the prisoners must still abide by the statutory and constitutional regulations set out for prison management. There may be abuses, but these abuses are the responsibility of the state entity that hired the private company.

They occur either because the state entity failed to set out the appropriate standards in the contractual arrangement or because it failed to appropriately monitor the actions of the private company for the duration of the contract. In other words, the failure of a state-contracted private corrections company to provide appropriate care for prisoners is doctrinally no different from the failure of a public civil servant (such as a warden of a public prison) to provide appropriate care. The purpose of the private prison's actions is identical to the purpose of the state agency that hired it – or, more accurately, it aligns with the incentives that the state agency put into the contract: To punish the prisoners in accordance with the sentence that the state courts have found to be appropriate.<sup>17</sup>

In contrast, in the private criminal justice system, a private citizen or private entity sets the rules, the goals, and the policies for the provision of the criminal justice services. The rules may be similar to those that regulate the public criminal justice system, but often they are not. Likewise, as noted above, the goals of the parties in the private criminal justice system may coincide with the goals of the public system, but sometimes the two will diverge.

Thus, when Macy's hires guards to watch for shoplifters inside its stores, or a neighborhood watch association hires a security company to patrol its streets, the private entities' undertakings are not bound by any of the constitutional restrictions that impede public entities: They can search a suspect without probable cause or consent, for example, and they can elicit confessions without concern for Miranda rights. Of course, these private law enforcement entities are still bound by the same laws that apply to any other private citizen, so these private actors may not commit a crime or a tort (e.g., assault or kidnapping) against the suspect. However, many states give private citizens significant powers to apprehend suspected criminals, and the professional private law enforcers are well aware of their rights and entitlements under the law. Most importantly, the goals of private law enforcers are the goals of the private entity that hired them – which, as we have seen, may or may not be consistent with the goals of the public criminal justice system.

With that clarification aside, we can begin our examination and evaluation of the private criminal justice system. Chapter 1 addresses how we define crime and establish the appropriate response to criminal activity. Chapters 2 and 3 provide a brief review of how the criminal justice system has evolved into its modern incarnation, including a description of the shortcomings of the modern public criminal justice system that encourage victims and defendants to opt out of the public system and seek resolutions in the private sphere.

The core of the book, in Chapters 4–8, discusses the development and efficacy of the private criminal justice system. Chapter 4 addresses the law enforcement stage of the system, which includes not just the enormous and growing army of private police that enforces the criminal law in our country, but also the rise of neighborhood watch groups and new technologies that allow private individuals to engage in law enforcement activities. The next three chapters examine the adjudicative stage by

exploring how private parties resolve criminal disputes either through settlements (Chapters 5 and 6) or through various forms of adjudication, such as the disciplinary procedures of a university or a professional licensing organization (Chapter 7). Chapter 8 describes the consequences and punishments that criminals face in the private criminal justice system, from the often extra-legal punishments meted out by traditional vigilantes to the more subtle responses from employers, companies, and other private individuals.

Finally, Chapter 9 sets out some proposals for regulating the private criminal justice system and Chapter 10 evaluates the overall costs and benefits of private criminal justice.

The discussions in this book are particularly timely today because society is undergoing a significant reevaluation of our criminal justice system. Cities across the country are reconsidering how to fund, train, and regulate the public police. Dozens of prosecutors throughout the country have been elected on progressive platforms, promising to focus on defendants' rights and to reduce the footprint of the criminal justice system. There is even a rare bipartisan consensus that too many people are being incarcerated in our jails and prisons. However, any national dialogue on reforming our criminal justice system is incomplete without a thorough understanding of the private criminal justice system, since it processes more criminals than its public counterpart. The experimentation and innovation in the private criminal justice system can teach us valuable lessons about how – and how not – to reform our public system. Finally, reformers should be aware that, if they succeed in reducing the size of the public criminal justice system – by reducing police funding, electing prosecutors who bring fewer cases, shortening the length of sentencing, or a combination of these approaches – the inevitable and perhaps unintended result will be an increase in the size of the private criminal justice system. Private parties will move in to fill the gaps created by the retreating public criminal justice system. Therefore, it is imperative that we understand the mechanisms at work when private parties respond to criminal actions.

Our first step is to answer some fundamental questions. What is the purpose of a criminal justice system? How do we distinguish criminal activity from other socially undesirable activity? Can you even have a criminal justice system without the participation of the state? The next chapter will discuss these questions.



## 1

## Criminal Justice without the State

The title of this book will strike many readers as an oxymoron: How can criminal justice be private? Most people believe that the state is an essential part of the criminal justice system. This belief is often based on one of three assumptions.

The first assumption is that only the state can delineate exactly which acts constitute a crime. BLACK'S LAW DICTIONARY defines "crime" as "[a] positive or negative act in violation of penal law."<sup>1</sup> In other words, governments define criminal behavior by passing laws that tell us what actions constitute a crime; thus, the argument goes, without the state we would have no way of distinguishing criminal behavior (such as rape, theft, and assault) from any other kind of socially undesirable behavior (such as lying, carelessly damaging property, or breaking a promise).

The second assumption involves the purpose of the criminal justice system. Our legal system is divided into two types of law. Civil law comprises issues such as property disputes, personal injury, and breach of contract, in which one private party sues another, claiming that the other party harmed them in some way. The alleged injury is specific and personal, so we expect the private parties to enforce their own rights in court without needing the state to intervene on one side or the other. In a criminal case, on the other hand, the perpetrator has allegedly committed a wrong not just against one person but against society at large. The social contract has been broken; the community as a whole has suffered and it will continue to suffer until the perpetrator is brought to justice. Under this theory, criminal law acts as a tool of "collective condemnation" of the actor and, more specifically, of the act that has been committed.<sup>2</sup> As the legal theorist Henry M. Hart put it: "What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition."<sup>3</sup> By extension, if the state is not a party to a dispute, even if the dispute arose from criminal conduct, the dispute is not part of the criminal justice system.

The third assumption involves the methods that are used in the criminal justice system. Coercion and even violence are sometimes necessary to apprehend suspected criminals, and these tools are usually used to punish criminals after they have been found guilty. Within the last 150 years, the United States (as well as most

Western industrialized states) has achieved a monopoly on the legitimate use of force, whether for policing, punishment for criminal activity, or military action. Since the state enjoys a legal monopoly on using force, this theory contends that only the state can lawfully use coercion to apprehend and punish criminals.<sup>4</sup>

Given that the state defines crime, and that it is the only entity with the legitimacy and the means to respond to criminal activity, how can we have a private system of criminal justice? The simplest answer to this question, and one that describes a good number of private responses to criminal activity, is to see the private realm of criminal justice as a supplement to the public criminal justice system. Private police merely enforce the laws set out by the state, and when private parties resolve their criminal disputes, the perpetrators agree to the deal only because they face greater coercive punishment from the state if they refuse. In this view, the private criminal justice system acts like a parasite of the public criminal justice system – the state defines the crimes, the state ensures that the consequences of committing a crime are commensurate with the harm the crime has done to society, and the state provides a coercive club that can be threatened against those who commit crimes. Private actors then leverage the infrastructure created by the state to supplement the public criminal justice system with additional enforcement and punishment.

The parasite theory has some truth to it, as we will see in future chapters, but it overstates the dependency that the private criminal justice system has on its public counterpart. In fact, a significant portion of the private criminal justice system is not dependent on the threats of the public system; rather, it exists in parallel to the public system. Its sanctions can also have a greater impact on the defendant and on society as a whole than the punishments imposed by the public criminal system. As we will see in the next chapter, this is not a historical anomaly; for most of the past 1,000 years, the link between crime control and the state has been relatively weak, with private parties playing a dominant role a majority of that time. The state has rarely been the sole – or even the primary – enforcer and punisher of criminal activity. As noted in later chapters, modern criminal activity is more likely to be detected and resolved by private parties than government actors, and private methods of resolving criminal disputes are becoming increasingly commonplace.

In order to truly appreciate the extent and nature of the private criminal justice system, we need to question the assumptions surrounding the link between the state and crime. First, do we need the state to define what is criminal? In the narrowest sense, an act is technically criminal only because the state has passed a law that deems it so, but this ends up being a very cramped definition of the term. BLACK'S LAW DICTIONARY provides a further definition of a "crime" as "any act done in violation of those duties which an individual owes to the community."<sup>5</sup> As I note later in this chapter, there are many sources other than the penal law that we use to distinguish criminal actions from other kinds of wrongful conduct, ranging from "natural law" to cultural norms to our own innate genetic predisposition about right and wrong. Indeed, philosophers for centuries have debated whether crimes are