

Privatized Criminal Justice

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Abstract

Privatizing part of criminal justice is a good thing. The Roeder case illustrates it.

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The Question

What part of criminal justice should be private, and what part publicly implemented?

There was an old debate on this.

PRIVATIZE: Gary S. Becker & George J. Stigler (1974) “ Law Enforcement, Malfeasance, and Compensation of Enforcers,” *The Journal of Legal Studies*, Vol. 3, No. 1 (Jan., 1974), pp. 1-18.

SOCIALIZE: William M. Landes and Richard A. Posner (1975) The Private Enforcement of Law *The Journal of Legal Studies*, Vol. 4, No. 1 (Jan., 1975), pp. 1-46.

These authors did not pay much attention to using a mixed system for criminal law, which is what we have.

Laws are set up to get out of prisoner's dilemmas.

I agree not to steal from you so that you will agree not to steal from me.

We are both better off if we can enforce that agreement.

We set up a third party, the government, which enforces it.

The government has five functions concerning rule of behavior, organized into three branches of government.

The legislature is authorized to (1) make certain kinds of laws .

The judiciary is authorized to (2) determine whether a law has been broken.

The executive is authorized to (3) detect and (4) prosecute violations and, if the judiciary so determines, to (5) punish them.

Burglary. The state legislature makes a rule that nobody can enter another person's house and steal his television. Badguy enters Goodguy's house and steals Goodguy's television. The government police track down Badguy and arrest him. The government prosecutor and the public defender assemble information on the situation and go to court. Badguy asks for a bench trial, and the government judge certifies that Badguy committed burglary. The governor then keeps Badguy in the state prison for a year. Everything is done by the government.

(1) make laws (legislature)

(2) determine whether a law has been broken (judge)

(3) collect information on possible violations (police)

(4) prosecute violations (prosecutor, plaintiff)

(5) punish (prisons)

We usually think of these functions as purely governmental, but they are not.

Contracting -Mixed. Badguy and Goodguy make a rule that Goodguy will give Badguy a TV and Badguy will later give Goodguy \$100. Badguy fails to pay. Goodguy. Goodguy assembles information on the situation and sues Badguy for breach of contract, in a government court. The judge certifies that Badguy should have paid. If Badguy does not now pay, the government seizes \$100 from his wages and gives it to Goodguy (“attachment of earnings”). Private citizens legislate, investigate, and prosecute, but the government judges and punishes.

- (1) make laws (legislature)
- (2) determine whether a law has been broken (judge)
- (3) collect information on possible violations (police)
- (4) prosecute violations (prosecutor, plaintiff)
- (5) punish (prisons)

Contracting-Privatized. Badguy and Goodguy make a rule that Goodguy will give Badguy a lawnmower and Badguy will later give Goodguy \$100, and include in this rule a security interest and arbitration. Badguy fails to pay Goodguy. Goodguy takes back the lawnmower from where it is parked on Badguy's lawn. Badguy objects, and after both assemble information they go to the private arbitrator. He decides in favor of Goodguy. Everything is done privately.

- (1) make laws (legislature)
- (2) determine whether a law has been broken (judge)
- (3) collect information on possible violations (police)
- (4) prosecute violations (prosecutor, plaintiff)
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Max Weber said in his Politics as a Vocation that the state is defined by having a "monopoly violence" (Gewaltmonopol des Staates).

That is false, unless perhaps we stretch the definition by saying that the state is defined by having the authority to decide which government and private parties are allowed to use violence.

Constitutions, customs, and governmental laws have all authorized private citizens to use violence, merely restricting when it may be used, just as they restrict government agents in their use of violence.

When someone says that a private citizen should not be allowed to use force because "that would infringe on the government monopoly on violence," they are talking nonsense.

A government monopoly on violence is neither the system in the America of 2010, nor the system in most governments throughout history, nor desirable.

Killing in self defense show why a monopoly on violence is undesirable

When Badguy brandishes a pistol at Goodguy, and Goodguy pre-emptively attacks by shooting Badguy first, Goodguy, a private citizen, has used violence.

Goodguy does not have to be a policeman or an executioner, and he does not have to ask permission from a judge.

Goodguy may legally kill Badguy. It is not murder.

Badguy's friends may, of course, ask the government police to investigate and see if Goodguy has committed murder, but the police will respond by telling them that this is legal killing, not murder.

Why is it desirable to allow this kind of private violence?

I will consider only efficiency reasons in this paper.

The main efficiency reason here is that it would be impossibly expensive to have the state provide self defense, since it would have to provide a police bodyguard to everyone in the country.

Goodguy is on the spot, and the police will arrive too late.

Goodguy has both the information about the situation, and the means to do something about it.

Self-enforcing.

Corruption advantage.

De Maistre— anybody know the quote about every law being backed up by the death penalty?

The Imminence Issue in Self Defense

John Doe, a citizen of Cicero Illinois, approaches Al Capone on December 1, 1926 and shoots him through the head. The Cook County Prosecutor arraigns him for murder.

Mr. Doe admits to the judge, who is controlled by the mob, that he killed Al Capone, but he pleads innocence of murder. He pleads self defense, saying that he has evidence that Capone publicly threatened to personally kill him on December 31 and has carried out similar threats against other people. Doe can show that he approached the police and prosecutors, who told him that they were good friends of Mr. Capone and wouldn't do anything about it. The law says,

“A person is justified in the use of force against another when he reasonably believes that such force is necessary to defend himself against such other's imminent use of unlawful force.”

Should the judge allow Doe to present his evidence before the jury?

Another Imminence Hypothetical

Goodguy has discovered that Badguy has been taking young women to his mountain cottage, killing them, and scattering their bones in his garden there. Goodguy has told the police, but they don't believe him. Goodguy sees two cars leaving a parking lot. The one in front is driven by a young woman. The one behind is driven by Badguy. Badguy stops his car, rolls down his window, and says to Goodguy, "In three hours that girl and I will arrive at my cabin, and I'll kill her like the others. Bye-bye!" Badguy drives off at high speed. Goodguy does not have a car, but he does have a rifle with him. He knows that if he shoots at Badguy's tires, there is a good chance Badguy will crash and die. He does shoot, and Badguy dies.

Is Goodguy guilty of murder? Is he entitled to subpoena Badguy's heir for any bone evidence that might be on Badguy's property, and to present such evidence to the jury?

Examples of Privatization

1. Private police to protect property.
2. The Self-Defense, Defense of Others, and Necessity defenses to use of violence or to theft.
3. Repossession allows what would otherwise be burglary.
4. Shooting your wife's lover.
5. Shooting your husband because he beats you.
6. Shooting a burglar.
7. Requiring people to testify in court, instead of just using the police.
8. Public prosecutors vs. private prosecution.
9. Bounty hunting
10. Citizen's arrest.
11. Juries and grand juries.
12. Treble action suits in antitrust.
13. Punitive damages for intentional torts.
14. The weregild system.

A Model

The government has a cost of prosecution, and so does the citizen.

The government and citizen each have an error probability in deciding whether the criminal will commit or has committed a crime.

The criminal has the option of bribing the government, but not the citizen (because there are too many of them)

The time interval question: What about time elapsing from when the prevention must be done and when the crime will occur?

TERM: imminent. TEXT: Overhanging, about to materialize, especially something of a dangerous nature. Threatening; full of danger. AUTHORITY: Collins v Liddle, 67 Utah 242, 247 P 476. BALLENTINE'S LAW DICTIONARY

TERM: imminent peril. TEXT: Threatened peril; danger immediately at hand. BALLENTINE'S LAW DICTIONARY

TERM: imminent insolvency. TEXT: Insolvency likely to occur at any moment. AUTHORITY: Arnold v Globe Exchange Bank, 40 F2d 555. BALLENTINE'S LAW DICTIONARY

imminent; eminent; immanent. Imminent means "certain and very near, impending," as in the legal phrases imminent bodily harm and imminent death. E.g., "Obviously there should be some bar to letting the owner transfer solely for the purpose of cutting down his estate tax at a time when that tax becomes imminent."

The Roeder Case

Tiller, a Kansas abortionist, specialized in late-

term abortions, some of which were of babies who could have lived if labor were induced instead of an abortion.

Abortion of viable infants is legal under Kansas and Federal law if necessary to prevent grave harm to a major bodily function of the mother, which includes mental functioning. Tiller clearly was doing abortions illegal under this rule. Other Kansas laws:

1. Abortion of a viable baby requires a second opinion of the necessity from a doctor with no financial connection to the first. Tiller was charged with violating this, but was acquitted.

2. Killing a viable baby is a class A misdemeanor if the mother consents, but first-degree murder if the mother does not consent.

The General Necessity Defense

[C]onduct which would otherwise constitute an offense is justifiable and not criminal when:...

2. Such conduct is necessary . . . by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury sought to be prevented by the statute defining the offense in issue. N.Y. PENAL LAW 35.05 (McKinney 1965)

Serjeant Pollard in *Peniger v. Forgossa*, 75 Eng. Rep. 1 (1550), one of the first cases formally recognizing the defense of necessity:

[I]n every law there are some things which when they happen a man may break the words of the law, and yet not break the law itself; and such things are exempted out of the penalty of the law, and the law privileges them although they are done against the letter of it, for breaking the words of the law is not breaking the law, so as the intent of the law is

not broken. . . . [I]t is a common proverb, Quod
necessitas non habet legem.

Id. at 29-30.

A Special Statutory Defense of Self-Defense or Defense-of-Others

Kansas statute 21-3211

Chapter 21.—CRIMES AND PUNISHMENTS

PART I.—GENERAL PROVISIONS

Article 32.—PRINCIPLES OF CRIMINAL LIABILITY

21-3211. Use of force in defense of a person; no duty to retreat.

(a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force.

(b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.

(c) Nothing in this section shall require a person

to retreat if such person is using force to protect such person or a third person.

Tiller is a major political donor. One Kansas attorney general tried to investigate and prosecute Tiller, but was blocked because the county prosecutor disagreed, and then he lost the next election. The next Kansas attorney general said that if two doctors signed off on an abortion, that was enough for him and he would disregard evidence of illegality. That AG resigned after a sex and privacy violation scandal.

Tiller was protected by bodyguards and his abortion center was heavily protected too.

Roeder took a gun to Tiller's church and shot him dead. He confessed to this in court. He tried making three defenses:

1. Defense of others. The killing was necessary to prevent illegal harm to other persons.

2. Necessity. The killing was necessary to prevent the greater evil of illegal abortions.

3. Voluntary Manslaughter. The defendant thought, unreasonably, that the killing was necessary to prevent the greater evil of illegal abortions.

The judge refused to allow him to present these defenses or evidence relevant to them to the jury, which convicted Roeder quickly. He is now appealing.