

THE COMMUNITY BOOKSHELF

A Libertarian-Communitarian Bridge?

David R. Karp

Bruce Benson, *To Serve and Protect: Privatization and Community in Criminal Justice* (New York: New York University Press). 372 pp.

In Garrett Hardin's classic essay, "The Tragedy of the Commons," he argued that individuals in a commons who pursue their own interest without regard to the aggregate outcomes of their decisions will surely and quickly destroy the resource. "Freedom in a commons," he wrote, "brings ruin to all." To resolve this conflict between individual interest and the collective good, he proposed two solutions—one communitarian and one libertarian. The former he characterized as "mutual coercion mutually agreed upon," implying that social regulation is necessary, but can be exercised democratically. Alternatively, he suggested privatization of the commons. Private property owners would better husband their resources than individuals who share a public resource. Both seem reasonable solutions to the social dilemma.

In criminal justice, these alternatives are manifest in two visions of "community justice." Both seek to diminish the role of the state as the sole arbiter of justice and crime control. One vision, however, relies upon the market in lieu of the state, and promotes privatization of justice services. The second relies upon the normative institutions

of a civil society. Bruce Benson's recent book, *To Protect and Serve: Privatization and Community in Criminal Justice*, promotes the market-based vision, but speaks often, though more quietly, to the second vision as well. In this comprehensive and well-documented text, an economist promotes the cause of his discipline, but also expands its boundaries. Where I expected this libertarian approach to state-based criminal justice to consistently conflict with a communitarian alternative, I was surprised by the frequency of my own sympathetic reactions. Perhaps complementarity might supersede conflict in the cause of criminal justice reform.

Benson's book is divided into three parts, sequentially developing a case for privatization of the justice system. In Part I, he examines the various ways in which the criminal justice system has already experimented with privatization—for example, private prisons and private security—and how privatization alters incentives to produce higher quality services more efficiently. In Part II, the conceptualization of privatization is expanded beyond government contracts or corporate investment in private security to include a wide array of "private" activities. This list blurs the line between economic markets and community action to include citizen patrols, gated communities, victim-offender mediation, and other activities that I would characterize as collectivist rather than private. This section also includes a thoughtful examination of the criticisms typically leveled against privatization. Part III examines the history behind state-based justice in order to suggest that criminal law has its roots in civil law, and a return to such roots is the objective of privatization. Benson proposes that this return will redirect attention to crime victims, and that they should occupy much more of our attention than is currently the case.

Pondering my sympathetic reaction to this libertarian examination, I remain uncertain about whether its source is a reconciliation of liberal-communitarian discourse in the text or whether Benson crosses boundaries that a more careful critic would argue are not so easily traversed. To be sure, the language of Benson's reformed criminal justice is the language of economics. Criminal justice is to be concerned with efficiency and product quality, responsive to the profit motive, guided by supply and demand, and made productive through flexibility and economies of scale. This nomenclature is in vivid

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contrast to the language of communitarian critics of state-based criminal justice. If I were to content analyze my own writing, for example, Benson's terms would be few and far between. The terms that would appear frequently—citizen participation, moral order, reintegration, social ties, deliberation, shame, norm affirmation, rights, responsibility—are rarely used by Benson.

This discourse divide can be traced to the overarching frameworks that guide the development of each strand of critique and reform. Benson reveals his framework succinctly: "When questions about crime policy are asked, they should be framed more broadly: 'What is the most cost-effective way to reduce crime?'" While this is certainly consistent with an economic perspective, Benson later suggests this narrow characterization is insufficient. In this, he leaves traditional economic/public management territory to explore the moral domain more characteristic of communitarian discourse:

Efficiency need not be the paramount concern in deciding how to produce criminal justice. It is one of several normative criteria that may be relevant. Indeed, a common and perhaps justifiable complaint against economists is that they tend to emphasize efficiency issues to the virtual exclusion of other norms. And in this regard, some of the objections to private involvement in crime control are not economic in nature. . . . A broader range of potential normative objectives is considered here than might be expected from an economist. Efficiency, including efficient gains in crime prevention and in rehabilitating criminals through privatization, is still extensively discussed (I am an economist, after all), but justice for victims of crime is actually the primary normative objective underlying my recommendations.

Thus, Benson moves beyond narrow considerations of efficiency and prioritizes justice for victims. Although this quotation appears early in the text, it turns out not to be a disarming platitude, but indeed guides the development of the privatization argument. For this reason among others, Benson's argument deserves serious attention.

Means as Ends

Underlying Benson's attempt to transcend the liberal-communitarian divide are some difficult questions primarily having to do with the adjudication of means and ends. Economic rationality is almost

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exclusively concerned with finding the most efficient means to narrowly defined ends, while communitarian idealists often seek the stars with scant attention to the constraints of astrophysics. Since Benson primarily resides in the home of efficiency, the communitarian skeptic will be troubled at times. For example, Benson is comfortable with a rational choice analysis of gun control. The hypothesis contends that gun control hinders defensive action by potential crime victims, therefore increasing the probability of criminal offending. We have all seen the bumper sticker, "An Armed Society Is a Polite Society." Some economists argue that states that allow law-abiding citizens to carry concealed weapons will have lower crime rates than those states that regulate gun carrying. From a crime control perspective, the end justifies the means. I would ask, however, if we ought to narrow the determination of ends so definitively. Is a good society an "armed" society? Are there other, more desirable, means to accomplish the same end?

Similarly, Benson is comfortable with "defensible space" strategies that alter the built environment in the service of public order. Of course, we are all comfortable with these strategies to a certain extent. Few protest the imposition and inconvenience of street lights to coordinate traffic flow. Benson discusses the privatization of public spaces to take advantage of the greater commitment private property owners have to the protection of their own spaces than to the protection of public spaces. Again, a near-term public safety end is served by such privatization: gated communities are a good example. But are the demarcation of boundaries, division, and exclusion indicative of a good society? Communitarians worry about the precarious balance between particularism and universalism. In this case, it would seem that economic rationality does not share that concern.

Benson is no stranger to the criticisms of privatization. The fact that he provides an insightful review and response to these criticisms is another strength of the text. Among the criticisms examined in detail are the following: Privatization driven by the profit motive will inevitably lead to cost-cutting and the delivery of poor quality service. We might worry, for example, that a private prison will be understaffed. Privatization will exacerbate social inequalities. For example, only the wealthy can afford to live in gated communities with private

security details. Privatization will undercut constitutional guarantees of due process, either because private citizens will "take the law into their own hands," or because government oversight of the private sector is inadequate compared with direct government control. From a slightly different angle, Benson also examines the criticism that privatization is unlikely to be successful for the same reason that public criminal justice is unsuccessful—both face Hardin's commons dilemma. All citizens would like public safety, but each would rather have others supply it (through taxation or privately) and, so, this pursuit of self-interest will prevent the provision of the public good.

While Benson offers insight into these issues of privatization, I will conclude this review by referring again to his economist-transcending goal of providing justice to crime victims. First, he provides a solid critique of the criminal justice system's effectiveness in this regard. He reminds us, for example, of the circumstances of the famous *Miranda v. Arizona* ruling by the Supreme Court, which established the necessity of reminding suspects of their rights. In this case, Ernesto Miranda was arrested for kidnapping and forcible rape. The victim identified him in a line-up and he provided a detailed oral and written confession. The case was dismissed because he was not advised that he could have a lawyer present during his confession. Rights questions aside, the victim's need for justice played a small role, if any, in this case. Benson notes that the Warren decision refers to the victim only as "the complaining witness."

More generally, Benson reviews the victim's (nonexistent) role in the plea-bargaining process, which accounts for over 90% of criminal proceedings. "The fact is," Benson writes, "plea bargaining often makes victims feel violated by the system as well as by the criminals because of plea bargained forgiveness of the crimes."

Benson argues forcefully for returning the crime victim to the center of the justice process, and this is wholly consistent with emerging community justice and restorative justice philosophies. Criminal accountability becomes defined by the responsibility of offenders to make restitution to their victims. (In Benson's system, of course, this is a monetary obligation.) He makes his case effectively by examining the history of restitution practices, its philosophy in light of other criminal justice objectives such as retribution, and the details of

implementing restitution policies. He also provides a fascinating comparative analysis by examining the role of restitution in Japan's criminal justice system, a discussion that dovetails with communitarian considerations of informal social control and offender reintegration into the fabric of community life.

To Serve and Protect provides a detailed account of privatization in the criminal justice system—what has occurred in the past, what currently exists, and possibilities for the future. It is a substantial and coherent work that provides theory with evidence. This makes it a book that cannot be easily dismissed, even if one is not as inclined as Benson is to trust in the "power" of the free market. The irony for me, and I suspect for communitarians more generally, is that Benson arrives at many seemingly communitarian conclusions, but travels quite a different path to get there. Perhaps moral and economic theories are not mutually exclusive solutions to the commons dilemma.

Especially Noted

Jay Rosen, *What Are Journalists For?* (New Haven: Yale University Press, 1999). 338 pp.

As told by Rosen, on a wall at the National Press Club in Washington, D.C., there is a plaque titled "The Journalist's Creed." The creed reads, in part, "I believe that the public journal is a public trust; that all connected with it are, to the full measure of their responsibility, trustees for the public; that acceptance of a lesser service than public service is a betrayal of that trust." Believing such ideals were being neglected, Rosen and others began the "public journalism" movement. Also called "civic journalism," proponents argue that journalists should make a deliberate effort to treat their audience as active participants in public affairs, to help communities address their problems, and to facilitate public deliberation. Now, after a few years of implementation, and more

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than a few rounds of criticism, Rosen gives us his overview, both responding to critics and speculating on what is ahead.

The Templeton Guide: Colleges that Encourage Character Development (Radnor, Pennsylvania: Templeton Foundation Press, 1999). 408 pp.

In the crowded college guidebook market, this entry attempts to stand out by addressing the character growth that students should expect a university to foster. In each of ten categories—including academic honesty, civic education, student leadership, and volunteering—the top college programs are profiled. Also listed are 50 college and university presidents who have emphasized character development. Finally there is the Templeton Honor Roll: those 100 schools that rated highest overall. For those who want to look beyond SAT averages, this is a good place to start.

Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge: Cambridge University Press, 1999). 266 pp.

Corruption—a quintessential case of public versus private good—is a problem everywhere. In developing countries, however, it is of particular concern: those nations making the transition from socialism are particularly susceptible to corruption, and high levels of it can hinder the investment that is vital to their economic growth. In order to bring about the desired effects, Rose-Ackerman calls for action by both the international community and domestic leaders. But instead of periodic purges of guilty parties, the goal should be to reduce the opportunities for people to gain from either paying or receiving bribes. As a source of optimism, Rose-Ackerman provides accounts of efforts that were successful in ending or massively reducing various forms of corruption.

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THE MORAL DIMENSION OF THE MEDIA

Sex, Sadness, and the City

Wendy Shallit

If you've heard the hype for HBO's hit comedy series *Sex and the City*, you might have assumed that the show celebrates the wonders of sexual liberation for Manhattan single women. Mimi Avins of the *Los Angeles Times* gushes that "the smart women of *Sex and the City* aren't afraid of their femininity or their appetites." *Newsweek* reports that "*Sex and the City* shows us single women who are anything but desperate. . . . As our favorite TV foursome prowls through New York hunting down new men and discarding the old ones like last year's Prada bags, they reinforce this fact: women who make their own money don't have to depend on a man, and they don't have to settle."

Yet despite the hype, *Sex and the City* is not about girls who just want to have fun. While promoters offer the show as one more brave step in the sexual liberation of women, leading to ever greater fulfillment, in fact it is a lament for all the things of inestimable value that the sexual revolution has wrecked. If Candace Bushnell—whose *New York Observer* columns sparked the series—were a practicing Catholic, she couldn't have produced a more effective proselytizing tool for continence and modesty.

The show follows the life of New York sex-columnist Carrie (Sarah Jessica Parker), as she tries to find Mr. Right. Until he shows up, Carrie dates Mr. Big (Chris Noth), a fickle 42-year-old who sleeps with