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# The Future of Crime Control

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*For some time now, we have recognised that police cannot be everywhere. More so than ever, law enforcement agencies require the cooperation and assistance of the community in order to control crime. This is especially the case in the climate of fiscal austerity which will be a fact of life for the foreseeable future. Consequently, creative law enforcement planners have begun to think about new ways in which resources and energies outside the public sector may be harnessed in furtherance of public safety.*

*This Trends and Issues paper identifies a number of ways in which non-governmental institutions may contribute to criminal justice. Such approaches are not totally without downside risk; they can, however, enable law enforcement and other agencies of criminal justice to achieve more with less.*

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**T**he increasingly complex nature of crime, both in Australia and elsewhere in the world, is such that conventional law enforcement responses are often no longer adequate. Crime is becoming more sophisticated, and is increasingly interlinked with economic and social systems. This will necessitate the invention of supplementary organisational forms for crime control.

These new organisational forms will not necessarily reside within the public sector. Just as we recognise that the most effective countermeasures to conventional crime lie in the cultivation of such *informal* institutions of social control as family and neighbourhood, and in private avenues of crime prevention, so too must our approaches to sophisticated crime and related emerging threats rely on non-governmental actors and embrace private institutions.

This paper will discuss means of enlisting non-governmental institutions and resources, both commercial and voluntary, in furtherance of crime control.

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## New Administrative Mechanisms

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Instruments of public policy appear increasingly to involve a blend of public and private resources. In some respects, Australia is well advanced in this regard. Australian government agencies contract with private security companies for fraud investigation services. Australia has a larger proportion of its prisoners in privately managed correctional institutions than any other nation.

There are various basic forms by which state activity can be shared with or devolved upon private interests. The following

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pages present an application of these to the crime control process, in descending order of what might be described as state intrusion or coerciveness.

### *Conscription*

Perhaps the most direct of these is conscription. Governments may simply command third parties to assist with one or more processes of law enforcement or regulation. Cash transaction reporting requirements have become increasingly common in western democracies over the past quarter century. In essence, these mandate that banks and other defined cash dealers systematically report transactions in excess of a certain amount, and other transactions which might appear suspect, to regulatory authorities.

In some jurisdictions, members of certain professions are required by law to report suspected cases of child abuse or neglect to the appropriate authorities. As is the case with other forms of conscription, this dramatically enhances the surveillance capacity of the state.

### *Required private interface*

In contrast to conscription, this approach entails governments requiring that targets of crime control engage the machinery of private institutions.

Social security authorities and other agencies which bestow public benefits usually require that recipients maintain a bank account into which the benefits may be paid directly. As well as reducing the agency's clerical expenses and the risk to the beneficiary of loss or theft, it also reduces opportunities for fraud.

Governments may require independent certification of some aspect of a private actor's conduct. The idea that departures from law-abiding behaviour can only be monitored by public servants is no longer realistic. Accordingly, governments have begun to rely increasingly on independent certification by third parties. Shapiro

(1987, p. 205) refers to "private social control entrepreneurs for hire".

Because of their strategic situation and unique knowledge, some professionals are often ideally situated to prevent, detect, and disclose illegality on the part of their clients. For this reason, such actors have been called "gatekeepers" (Kraakman 1986).

The classic model for this form of co-production is the requirement that the financial accounts of public companies be audited on a regular basis by formally accredited professionals. This exposes such accounts to a degree of scrutiny which arguably would not occur if audits were left up to public agencies to perform. The very existence of such surveillance by independent professionals is an important deterrent to illegality.

In addition, regulatory authorities can make it obligatory that regulated entities hold liability insurance as a condition of doing business. Conditions of a private insurance contract may equal or exceed government licensing conditions in terms of stringency, and surveillance on the part of the insurer may surpass that of government.

### *Required record-keeping and disclosure*

In order to encourage introspection, or with a view to informing markets or other private institutions in a position to foster compliance, governments may require disclosure of certain aspects of one's activities. The simple process of enumeration and record keeping has a regulatory function. When subject to disclosure, these accounts increase a subject's visibility to the world. They provide a record of conduct which regulators and, often, other interested parties, can scrutinise. Enumeration can also lead to a degree of self-awareness and peer awareness, which can have a significant impact on compliance. When the phenomenon enumerated is undesirable, as, for example, workplace injuries, or related party transactions involving

the directors of public companies, the necessity of enumeration focuses managerial attention on the underlying phenomenon.

### *Cooperation with private interests*

In some settings, public agencies may actively seek the cooperation of private interests in furtherance of surveillance and detection. Airline staff are encouraged to report suspicious passengers to customs or drug enforcement authorities. Operators of taxis and other forms of public transport may be invited to assist law enforcement. The formality of these arrangements can vary from detailed contractual specification to the relatively casual. The very idea of community policing embodies collaboration with the public to identify issues of grassroots concern, and to identify appropriate remedial strategies.

### *Conferring entitlements*

One avenue by which governments can empower private interests to enforce the law entails the creation of certain specified rights, conferring them upon private parties, and leaving it up to those private parties to enforce. Many systems of patent, trademark and copyright rely on such private enforcement. In Australia, the vast majority of actions brought under the *Trade Practices Act 1974* (Cwlth) are brought by private parties. Companies and securities regulators also encourage private actions on the part of aggrieved parties. Successful private litigation may result in damage awards that exceed penalties available to the state; the deterrent effect posed by many potential private enforcers should not be underestimated. Thus can the pursuit of private interest serve the public.

A second avenue of private enforcement entails empowering third parties to undertake enforcement actions on behalf of the state. The principle is by no means a modern one. A 14th century English statute specified that 25 per cent of fines

imposed on stallholders engaged in trade after the close of a fair be paid to citizens intervening on behalf of the King (5 Edw III, ch.5 (1331)).

Private enforcement operates in many jurisdictions, including the United States, where most federal environmental laws contain provisions for private enforcement. Regimes for the control of fraud against the US federal government also provide for citizen litigation. In Britain, the generally available right of private prosecution has been exercised in the public interest by third parties. Each year, the Royal Society for the Prevention of Cruelty to Animals investigates tens of thousands of complaints and successfully prosecutes about 2000 cases. This private vigilance far exceeds that wielded by the state.

### *Incentives*

Governments may offer incentives directly to targets of regulation to induce compliance, or to engage in a desired course of conduct. This could include the engagement of professional services. Many systems of taxation provide that costs incurred in furtherance of compliance are tax deductible. Alternatively, companies which have an approved compliance program in place, or which subject themselves to a regular compliance audit by an independent assessor, may qualify for licence fee rebates, or may receive less scrutiny by regulatory authorities.

Other incentive systems may be structured in a manner to facilitate crime control. Consider, for example, how a system of deposit refunds for irreparably damaged or unserviceable motor vehicles would, if priced appropriately, reduce the number of abandoned vehicles and render more difficult the “rebirthing” of stolen cars.

Governments may also offer incentives to third parties for the co-production of law enforcement services. Rewards and bounties for surveillance and enforcement activity are common in many regulatory

settings. In the United States, for example, private citizens may receive rewards for information leading to the successful prosecution of tax evasion and insider trading. In Australia, the proposed Financial Management and Accountability Act contains provisions for rewards. Such mechanisms can significantly enhance the surveillance capacity of government authorities.

### *Contracting out*

There are times at which governments, for one reason or another, might seek to engage private consultants rather than rely upon in-house resources. They might seek to achieve the appearance or the reality of disinterested independence. They may seek to access skills and other resources not available “in-house”, or they may simply seek to save money. Governments may also contract out one or more regulatory functions, from specialised testing to an entire regulatory regime.

The increasing sophistication of crime will require the enlistment of very specialised skills by law enforcement agencies. Certain forms of fraud investigation are now routinely outsourced to private investigators. One imagines that as telecommunications-related crime becomes increasingly refined, the role of private computer security professionals and “forensic systems analysts” will become that much greater, with their specialised knowledge hired on a case by case basis by law enforcement authorities.

### *Delegation of deference to private parties*

In some instances, governments may become aware that certain functions relating to compliance are already being performed or could be performed by private parties. In such cases, governments may be content to rely upon this activity rather than duplicate it with public sector resources.

Standards developed in the private sector are often accepted and

given official status by public agencies. In some regulatory systems, the task of developing rules is delegated to private interests. The US Securities and Exchange Commission has delegated considerable rule making functions to professional self-regulatory organisations. Galanter (1981) refers to such mechanisms as “regulatory endowments”.

Other professional roles may be encouraged by special accreditation or other considerations accorded their practitioners by regulatory authorities. One example are tax advisers who are formally accredited by taxation authorities. Professions may be created and invested with legitimacy by the state in order to facilitate just such a role.

### *Abdication*

Finally, the state may simply abdicate some regulatory functions, and leave allocative and ordering decisions to the market.

Private interests, left to their own devices, can market services in furtherance of crime control. The private security industry, broadly defined, represents a familiar example. At another level, holders of home contents insurance are often required to have a certain degree of security hardware as a condition of insurance. The pricing of policies may depend upon the level of security measures in place.

Markets are also arenas of surveillance. In addition to the surveillance normally exercised in the market by competitors, the scrutiny accorded compliance behaviour by banks, insurers and institutional investors can be formidable.

The solution to the availability of objectionable material on the Internet, for example, may lie not in censorship, but in the development of software to screen out offensive content. While this might not suit everyone, at the very least it can protect individuals from personal intrusion.

The criminal risks faced by Australian enterprises doing business

abroad may lie beyond the jurisdiction of Australian authorities to address. Authorities in the host nation may be preoccupied with their own concerns, or indeed, may even be part of the problem, whether it entails industrial espionage or other activity directed against Australian business. Thus entire markets in specialised loss prevention services are becoming available to private industry.

One of the virtues of abdicating a regulatory role in deference to markets is that market based orderings tend to be perceived as less coercive than government commands. Thus market signals, no matter how dictatorial they may be in reality, create less resentment than government direction.

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### **Some Problems**

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Relaxing one's hold upon the reins of law enforcement, or releasing them altogether, is not without risk. Some of the problems which might arise when governments seek to use leverage to achieve crime control objectives are discussed below.

#### *Accountability*

Perhaps the greatest risk in devolving law enforcement functions to private interests is the potential loss of accountability. Even for those who may be unconcerned with the legitimacy of handing certain powers of the state over to private actors, tracking the exercise of that power may become problematic. At least in theory, private institutions and actions, one step removed from the democratic process, are less accessible to public scrutiny. The decentralised, dispersed nature of law enforcement activity may be less visible and less amenable to control.

#### *Market failure*

One should not overlook the fact that many law enforcement problems arise from market failures in the first place. From tainted food, to anti-competitive conduct, to foul air and water, to depleted fisheries, to professional

misconduct, entire new fields of regulation have sprung from the flawed operation of unrestrained, or insufficiently restrained, market forces. To the extent that governments rely upon market mechanisms to foster compliance, there still exists the risk of market failure. Not all markets punish poor performers. Illicit markets can richly reward the unscrupulous player. Some of the more common market failures acting to the detriment of regulatory compliance occur in markets for professional services.

Market failures can also arise from undersupply. The challenge of contracting out can be made extremely difficult when the number of available vendors is limited. The purchaser becomes a captive of the market, and risks being stuck with an inferior product. For all their potential virtues, markets require oversight.

#### *Gatekeeper failure*

The requirement that one engage the services of gatekeeping professionals is by no means a failsafe bulwark against illegality. Gatekeepers may be "captured" by their clients, in the sense that they come to view reality not through a lens of professional detachment, but from the client's perspective. Professionals may be financially dependent upon a continuing engagement, and may thus bend over backward to accommodate a client, thereby fostering non-compliance.

Market forces themselves may contribute to professional failure. Not all professions can be relied upon to inform their membership of regulatory responsibilities or to police compliance. Nor can all gatekeepers be trusted to prevent, detect, or disclose illegality on the part of their clients. Many corporate collapses which took place during the 1980s occurred in the aftermath of "clean" audits.

#### *Capture of the policy process*

There is also the risk that the policy process may be captured if too much enforcement activity is delegated or

contracted to private institutions. At the extreme, government agencies can exist as hollow shells, with the real work of enforcement being performed by private interests. To the extent that these private interests dominate the public agenda, there is a problem. Even in settings which may be designed to further the public interest, third parties can have their own priorities.

#### *Conflicts of interest*

The behaviour of private actors may at times diverge from that which may be desirable from the standpoint of the general public. Reliance on contractors for enforcement may lead to conflicts of interest.

Contractors may also engage in "rent seeking", to the detriment of the public interest. In other words, many contractors seek to generate a continued or, better yet, an increased demand for their services. In a sense, they have an incentive to accentuate the magnitude of the task for which they have been engaged, or worse, to fabricate new and larger problems which they would be available to address in the course of a return engagement. Opportunism remains an essential element of commercial success.

#### *Transformation of social relations*

The extent to which professions or other mediating institutions are conscripted or coopted by the state may force a change in the relationship between them and the citizen. Professional-client relations may be significantly transformed. Under regimes which require a degree of disclosure or notification, the professional, previously more or less a servant of the client, becomes to some degree an agent of the state. Once the client's champion, the professional may become more of an adversary.

Thus, the role of the banker or cash dealer is transformed from that of serving the consumer, to one of exercising regulatory vigilance on behalf of government. The impact of

such a change on the willingness of the client to be candid or forthcoming may be substantial. Similar reservations have been voiced against mandatory disclosure of suspected child abuse by health professionals.

Excessive reliance on rewards, bounties, and other incentives to private individuals for the co-production of regulatory services may have its dark side. A society in which any person may be a spy for the government is in danger of being blighted by mistrust and suspicion. The risk that such intrusive devices will be applied against relatively minor offenders rather than the sharks of this world is all too real.

### *Erosion of civic commitment*

With the devolution of so many public functions to private interests, there exists the real risk that a sense of public duty or civic obligation will be lost. Commercial activity may not encourage self-sacrifice for the greater good.

The idea embodied in the words “public service” is at risk of becoming significantly tainted when the activity is undertaken by a private contractor. To the extent to which public service becomes commodified, it may lose its public meaning and become nothing more than a contractual relationship. To the extent that market relationships predominate, the bonds of community are weakened. There may be a real risk that cultural values will move away from the spirit of voluntarism and civic obligation toward those suited to a society of mercenaries as citizens. Few would favour any system of social control which is largely driven by opportunistic bounty hunters or profiteers.

### *Lack of policy coherence*

When governments loosen the reins of enforcement, relying instead on decentralised and independent interests, there may be a loss of policy coherence or an imbalance in enforcement activity. Critics of private enforcement under the US Clean Water Act, for example, argue that

enforcement targets are selected on the basis of convenience and potential damage award, rather than the actual harm they may be causing to the environment (Greve 1989). Others would contend that private actions in furtherance of public agenda setting might be misplaced, that intense minorities might distort priorities, and that weak minorities may suffer.

All of the above risks point to one broader issue—that of the public interest. A shift from the exercise of state authority to a crime control process based on exchange and collaboration will significantly reduce the government’s ability to manage results. Who looks out for the interests of the public? Who ensures the rule of law? In the conclusion which follows, we suggest some of the means by which the remaining officials of the shrinking state may oversee and guide decentralised processes of crime control.

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## **Conclusion**

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We are currently in the midst of a drastic change in the nature of criminal justice. Governments may achieve greater law enforcement leverage by engineering a system in which they themselves play a less dominant role, facilitating the constructive participation of private interests, and relying on more or less naturally occurring institutional orderings. These private institutions and orderings will vary in terms of their distance from governmental influence. Outside of direct state command, there are those institutions which might be described as hybrid forms, combining elements of state and non-governmental resources. Beyond these are naturally occurring orderings, arising more or less spontaneously; orderings for which governments establish a basic legal foundation and little else.

Rather than merely implementing their own programs and monitoring their impact, the role of law enforcement agencies will become one

of oversight, and the management of contracts. Whilst it may appear at first glance that police will be relinquishing certain functions, it is more likely that their capacity will be enhanced. In addition, a degree of strategic surveillance will be important to observe the operation of new relational forms and natural orderings which operate beyond the immediate ambit of government.

What will be the role of the 21st century police agency? What will tomorrow’s police executive look like? It would appear that law enforcement agencies will invest more in strategic intelligence than they have in the past. The need to anticipate emerging policy issues will be greater than ever. So, too, will the need to oversee all of the activity, public sector and private, which occurs in a given policy space.

The role of law enforcement will be one of monitoring the overall crime control system, broadly defined, and one of “fine tuning”—manipulating incentives, accrediting private competencies, and auditing third party performance in order to facilitate the constructive contributions of non-government interests. Traditional law enforcement agencies will be less prominent on centre stage, but rather will remain authoritative and be unobtrusively influential from a position off-stage.

Governments may also exert subtle influence on elements of citizen co-production. At one extreme, they can actively discourage officious intermeddlers, or ignore them. Alternatively, they may accept surveillance and enforcement assistance passively, offering no incentives. Beyond this, they may reward unobtrusively, or at the other extreme offer highly publicised rewards and bounties for enforcement co-production.

Governments can act as facilitators and brokers, rather than commanders. Through the judicious use of incentives, or by wielding their own purchasing power, governments are often able to structure a

marketplace so that market outcomes fulfil public purpose (Osborne & Gaebler 1992, pp. 280-1).

The risk that criminal justice will become “commodified” can be lessened by emphasising the public nature of private activity. Most professions already have codes of ethics which invoke the public interest as a fundamental principle; all but the most aggressive capitalists recognise a sense of civic obligation and social responsibility. Indeed, this ethos may be fostered more successfully from within the private sector than by government.

Whether it is the public or private sector which carries out law enforcement has become a misplaced question. One must now inquire what institutional form, or what blend of institutional forms, is best suited to a given task. The design and guidance of hybrid law enforcement systems is an essential task for government in the next century.

This invites two ironic observations. One may speculate whether the fiscal constraints which have contributed to the shrinking state will nevertheless permit investment in the new and more sophisticated forms of managerial capacity which will be required to oversee and guide these hybrid systems.

In addition, Kettl (1993, p. 14) has remarked that some of these new relational forms entail not the privatising of public sector activity, but rather the governmentalising of activity which to date has been largely private. Changes wrought to private relationships as a result of emerging crime control forms are even more dramatic. There has always been more to law enforcement than the activity of police; there is likely to be even more still.

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