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# Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest

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## ARTICLES

### VILIFYING THE VIGILANTE: A NARROWED SCOPE OF CITIZEN'S ARREST

*Ira P. Robbins\**

*The doctrine of citizen's arrest in the United States has been ignored for far too long. In every jurisdiction in the United States, a private person may lawfully detain another and often may even use physical force to do so. Placing such power in the hands of ordinary, untrained individuals creates the possibility that citizens will misuse or abuse the privilege, sometimes with serious consequences for both the arrestor and the arrestee. This risk is compounded by the disparate treatment of the citizen's arrest doctrine in different jurisdictions and the ambiguities inherent in many of the doctrine's key features—such as whether one may arrest another only on suspicion of a felony, or also for a misdemeanor or breach of the peace; the level of probable cause required to make an arrest; the length of detention that is legally permitted; and the appropriate amount of force used to effectuate the arrest.*

*Citizen's arrest arose in medieval times as a direct result of the lack of an organized police force and practical modes of transportation to get to the scene of a crime expeditiously. Citizens had a positive duty to assist the King in seeking out suspected offenders and detaining them. However, citizen's arrest is a doctrine whose time should have passed many decades—or centuries—ago. As official police forces became the norm, the need for citizen's arrest dissipated. Yet these arrests are still authorized throughout the United States today, whether by common law or by statute.*

*With the core principles of citizen's arrest in flux, it is exceedingly difficult for private individuals to understand the doctrine's subtleties and to effectuate arrests lawfully, safely, and without fear of reprisal. Implementation is ripe for abuse. Moreover, citizen's arrests performed by private persons acting collectively as volunteer watch groups, such as*

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*the Guardian Angels, are equally susceptible to misuse. Therefore, this Article recommends drastic restrictions on the scope of the citizen’s arrest doctrine in general and that its use be confined to three categories: shopkeepers, out-of-jurisdiction police, and private police forces with appropriate training and oversight. In all other instances, the doctrine of citizen’s arrest should be abolished.*

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INTRODUCTION

Ask any adult and, more likely than not, a significant number played the childhood game called cops and robbers. However, ask the same group of adults and few will know that they can actually play this game in real life. Citizens are legally permitted to play the role of police officer under the doctrine of citizen’s arrest. Citizens have the ability—but not the duty—to arrest for misdemeanors or felonies, or both, depending on the jurisdiction.<sup>1</sup> Most states have statutes that permit some form of citizen’s arrest with various conditions and permutations, resulting in a fragmented application of the doctrine in the United States.<sup>2</sup> While it is impossible for a police officer to be present at the commission of every crime, the remedy for this reality should not include granting arrest powers to ordinary citizens. The potential abuses associated with

<sup>1</sup> See, e.g., CAL. PEN. CODE § 837 (West 2015) (authorizing a citizen to arrest for “a public offense” and for a felony); OR. REV. STAT. § 2935.04 (West 2015) (permitting a citizen to arrest only for felonies). *But see* 725 ILL. COMP. STAT. 5/107-3 (West 2015) (allowing a citizen to broadly arrest for any offense other than an ordinance violation).

<sup>2</sup> See *infra* Part I.C (outlining the varying state statutes on citizen’s arrest).

citizen's arrest outweigh its uses, illustrating the need to substantially refine the doctrine.

Power in the hands of untrained citizens can lead to disastrous results, not only for the arrestor, but also for the arrestee. In March 2014, a disgruntled citizen, Jonathan Pendleton, attempted to arrest law school professor Tyler Cowen.<sup>3</sup> While a class was in progress, Pendleton entered Tyler's classroom carrying pepper spray, handcuffs, and a Taser-like device.<sup>4</sup> When Cowen resisted the arrest, Pendleton sprayed him in the eyes with pepper spray.<sup>5</sup> Pendleton was arrested and charged with abduction and malicious injury with a caustic substance.<sup>6</sup> He argued that he was falsely arrested while in the process of making a legal citizen's arrest.<sup>7</sup> Acting on an alleged personal vendetta, Pendleton decided to take the law into his own hands, leading to unfortunate results for the citizen arrestor and arrestee.<sup>8</sup>

Citizen's arrest can also be abused in the context of neighborhood watch groups. In 2006 in California, a group of citizens dressed in superhero costumes founded a citizen's patrol group—called the Xtreme Justice League—to stop crime and violence in the San Diego area.<sup>9</sup> Mr. Xtreme, the founder of the league, calls the members “the eyes and ears of the streets.”<sup>10</sup> Members dress in costume while on patrol, receive training on citizen's arrest, and carry weapons for self-defense.<sup>11</sup> Unlike citizens who inadvertently witness crimes, the members of the Xtreme

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<sup>3</sup> See Arin Greenwood, *Tyler Cowen Pepper Sprayed While Teaching Law School Class on Vigilantism*, HUFFINGTON POST (Mar. 27, 2014, 1:21 PM), [http://www.huffingtonpost.com/2014/03/27/tyler-cowen-pepper-sprayed\\_n\\_5042358.html](http://www.huffingtonpost.com/2014/03/27/tyler-cowen-pepper-sprayed_n_5042358.html); see also Rachel Weiner, *Tyler Cowen's Attacker Thought the Professor Was Controlling His Mind, Cowen Testifies*, WASH. POST (Apr. 29, 2014), [http://www.washingtonpost.com/local/crime/tyler-cowens-attacker-thought-the-professor-was-controlling-his-mind-cowen-testifies/2014/04/29/a4c5b9f4-cfb9-11e3-b812-0c92213941f4\\_story.html](http://www.washingtonpost.com/local/crime/tyler-cowens-attacker-thought-the-professor-was-controlling-his-mind-cowen-testifies/2014/04/29/a4c5b9f4-cfb9-11e3-b812-0c92213941f4_story.html) (reporting that the alleged attacker posted a threat on the professor's economist blog ten days before the attack: “If the police and FBI won't arrest you for hacking my computer and sexually harassing me over the past several months, I will do it myself . . . Either way, one of us is going to prison.”).

<sup>4</sup> Weiner, *supra* note 3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> For another example of citizen's arrest gone wrong, see Debra Cassens Weiss, *Lawyer Attempts Citizen's Arrest in Court; His Attorney Client Calls Murder Charge 'Stupid.'* A.B.A. J. (Oct. 5, 2015, 6:15 AM), [http://www.abajournal.com/news/article/lawyer\\_attempts\\_court\\_room\\_citizens\\_arrest\\_his\\_attorney\\_client\\_calls\\_murder](http://www.abajournal.com/news/article/lawyer_attempts_court_room_citizens_arrest_his_attorney_client_calls_murder) (detailing an incident where a lawyer unsuccessfully attempted to arrest an armed investigator in a court room).

<sup>9</sup> See *About Xtreme Justice League*, XTREME JUSTICE LEAGUE, <http://www.xtremejusticeleague.org/about.html> (last visited Jan. 21, 2016) (providing a description of the group).

<sup>10</sup> David Sim, *Xtreme Justice League: Real-Life Superheroes Fight Crime on the Streets of San Diego*, INT'L BUS. TIMES (Oct. 28, 2014, 4:07 PM), <http://www.ibtimes.co.uk/xtreme-justice-league-real-life-superheroes-fight-crime-streets-san-diego-1472158>.

<sup>11</sup> See *Frequently Asked Questions*, XTREME JUSTICE LEAGUE, <http://www.xtremejusticeleague.org/faq.html> (last visited Jan. 21, 2016).

Justice League actively patrol high crime areas to catch wrongdoers.<sup>12</sup> The gay and lesbian community was similarly aroused to action following a rise in hate crimes against homosexuals.<sup>13</sup> In 1990, a group called Queer Nation was formed in New York City to focus on eradicating “discrimination, violence, and repression against the LGBT community.”<sup>14</sup> Despite some successes, these types of groups can abuse and have abused the power of citizen’s arrest, raising questions about the quality of training and oversight that members receive.<sup>15</sup> In particular, some online groups have gone far beyond the parameters of citizen’s arrest and promoted violent vigilantism over a measured intervention.<sup>16</sup>

Instead of using the power to arrest criminals, some people use it as a propaganda or protest tool. In response to an increase in police shootings, several protestors in Albuquerque, New Mexico, attempted to place the police chief under a citizen’s arrest, charging him with “harboring fugitives from justice at the Albuquerque police department” and “crimes against humanity.”<sup>17</sup> Similar to the protestors in Albuquerque, the co-founder of an Illinois group, Illinois Leaks,<sup>18</sup> made a citizen’s arrest of

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<sup>12</sup> See, e.g., Sherene Tagharobi & Andie Adams, ‘Xtreme Justice League’ Seeks to Save North Park, NBC NEWS (Aug. 12, 2014), <http://www.nbcсандiego.com/news/local/Xtreme-Justice-League-Patrols-Streets-of-North-Park-270677561.html> (reacting to a recent surge in attacks, members of the Xtreme Justice League were dispatched to protect the area).

<sup>13</sup> See Kristin S. Dodge, “Bashing Back”: Gay and Lesbian Street Patrols and the Criminal Justice System, 11 LAW & INEQ. 295, 314–30 (1993) (describing the gay and lesbian mobilization in response to the lack of police effort to confront and resolve the hate and anti-gay violence); see also *id.* at 318 (“The message is simple: queer folk are banding together and walking the streets in cities around the United States to protect their own.”). This commentator argues that the concerns associated with giving citizens the power to arrest are outweighed by the “current context of violence” against the gay and lesbian community. *Id.* at 356–57.

<sup>14</sup> *Queer Nation NY History*, QUEER NATION NY, <http://queernationny.org/history> (last visited Jan. 21, 2016) (describing the origins of Queer Nation).

<sup>15</sup> See John Sodaro, *Neighborhood Watch Groups in the Cross Hairs*, SALON (June 14, 2012), [http://www.salon.com/2012/06/14/neighborhood\\_watch\\_groups\\_in\\_the\\_crosshairs/](http://www.salon.com/2012/06/14/neighborhood_watch_groups_in_the_crosshairs/) (explaining the conviction of a neighborhood watch group member for assault and false imprisonment after he beat up a sixteen-year-old).

<sup>16</sup> *The Facebook Vigilantes Catching Thieves?and Punishing Them*, BBC TRENDING (Sept. 14, 2015), <http://www.bbc.com/news/blogs-trending-34224196> (explaining the Facebook phenomenon of “Catch your thief” in Peru, where individuals film themselves imposing often violent vigilante justice on perpetrators of crimes). However, Peru’s interior minister has suggested that this violent movement could be harnessed to promote the proper use of citizen’s arrest: “Catch your thief yes, but hand him or her over to the police. Don’t take justice into your own hands.” *Id.*

<sup>17</sup> See *Albuquerque Residents Attempt Citizen’s Arrest of Police Chief*, GUARDIAN (May 8, 2014, 9:54 AM), <http://www.theguardian.com/world/2014/may/08/albuquerque-police-citizens-arrest-chief-protests> (documenting the events that led to the attempted arrest of the local police chief). The protestors marched into the city council chambers where the city leaders were meeting. While they demanded the arrest of the police chief, he was not arrested and quickly left the building without any altercation with the protestors. *Id.*

<sup>18</sup> This group is focused on exposing abuses within the state’s local governments. See ILLINOIS LEAKS, <http://edgarcountywatchdogs.com> (last visited Jan. 21, 2016) (focusing on the group’s posted tag line, “Edgar County Watchdogs”).

Park District Board members for not allowing public comments at the board meeting, alleging a violation of the Illinois Open Meetings Act.<sup>19</sup> The arrest spurred changes to the open-meetings policy and now the Board permits up to thirty minutes of public comments at every meeting.<sup>20</sup> While this story illustrates that citizen's arrest can be an effective measure for legislative reform, using it to subvert political processes expands the scope of the doctrine beyond keeping the public safe.<sup>21</sup>

There are clear cases in which the ability for a citizen to arrest is beneficial—for instance, when a citizen witnesses a hit-and-run accident.<sup>22</sup> Yet, these heartening stories detract from the risks that arise from permitting citizens to legally make arrests. An arrest has a profound and enduring effect on the arrestee.<sup>23</sup> An arrestee is publicly humiliated and stigmatized as a deplorable member of society.<sup>24</sup> In addition, the arrestee can suffer from emotional distress and lost employment opportunities. Since the risks associated with citizen's arrest are significant and the consequences are severe, the ability for citizens to make arrests must be severely curtailed.<sup>25</sup>

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<sup>19</sup> Phil Rogers & Patrick McCraney, *Entire Park District Board Placed Under Citizen's Arrest*, NBC CHICAGO (June 26, 2014, 5:56 AM), <http://www.nbcchicago.com/investigations/Entire-Park-District-Board-Placed-Under-Citizens-Arrest-264660331.html>.

<sup>20</sup> See Debra Cassens Weiss, *Citizen's Arrest of Park District Board Spurs Change in Open-Meetings Policy*, A.B.A. J. (July 7, 2014, 1:56 PM), [http://www.abajournal.com/news/article/citizens\\_arrest\\_of\\_park\\_district\\_board\\_spurs\\_change\\_in\\_open-meetings\\_policy](http://www.abajournal.com/news/article/citizens_arrest_of_park_district_board_spurs_change_in_open-meetings_policy) (reporting on the changes the Board made in response to the attempted citizen's arrest). See generally Paul H. Robinson, *The Moral Vigilante and Her Cousins in the Shadows*, 2015 U. ILL. L. REV. 401, 477. Professor Robinson describes the concept of "shadow vigilantism," in which protestors "manipulat[e] the system to their own ends as they see others doing to escape deserved punishment." *Id.* at 477. One example is jury nullification as a form of protest. See *id.* at 464–66.

<sup>21</sup> In fact, a recent example shows that some citizens intend to threaten both the political process and public safety through the use of citizen's arrest. See Kaitlyn Schallhorn, *Activist Vows to Arrest Democratic Lawmaker 'Under Article 3 Section 3 of the Constitution'*, BLAZE (Sept. 23, 2015), <http://www.theblaze.com/stories/2015/09/23/activist-vows-to-arrest-democratic-lawmaker-under-article-3-section-3-of-the-constitution> (relating the story of a former Marine who intends to gather armed troops to arrest lawmakers who voted in favor of a nuclear deal with Iran).

<sup>22</sup> See, e.g., *People v. Harris*, 63 Cal. Rptr. 849, 851 (Ct. App. 1967) (characterizing the arrest as a valid citizen's arrest when the citizen witnessed the defendant commit a hit-and-run, followed him, stopped him, and asked him to wait for the police to arrive).

<sup>23</sup> See generally *Foley v. Connelie*, 435 U.S. 291, 298 (1978) ("An arrest . . . is a serious matter for any person even when no prosecution follows or when an acquittal is obtained."); *Chimel v. California*, 395 U.S. 752, 776 (1969) (White, J., dissenting) ("[T]he invasion and disruption of a man's life and privacy which stem from his arrest are ordinarily far greater than the relatively minor intrusions attending a search of his premises.").

<sup>24</sup> See *In re Fried*, 161 F.2d 453, 458 (2d Cir. 1947) ("The stigma [of a wrongful arrest] cannot be easily erased . . . . [It] is seldom wiped out by a subsequent judgment of not guilty.").

<sup>25</sup> In its current application, the doctrine of citizen's arrest has even risen to the level of absurdity. See *Self Arrest Form*, EAST POINT POLICE, <http://www.eastpointpolice.org/SelfAr>

Part I of this Article examines the history of the citizen's arrest doctrine, beginning with its origins in English common law. It then surveys the two ways states have incorporated citizen's arrest into their jurisprudence, whether through common law development or codification. Part II reviews the confusion and risks faced by ordinary citizens in performing a citizen's arrest, highlighting the need to reduce the scope of the doctrine as it has been applied in most situations, including private citizen watch groups. Part III argues that the fundamental principles of arrestor training and oversight lie at the heart of an effective use of the doctrine and advocates for restricting its use to three categories: shopkeepers detaining suspected shoplifters, police operating outside of their jurisdiction, and private police forces that have completed mandated training and have received accreditation from a state-sponsored entity. In all other instances, the doctrine of citizen's arrest should be abolished. Part IV provides a model statute that substantially curtails the scope of citizen's arrest.

## I. ANALYZING THE RIGHTS CONFERRED UNDER CITIZEN'S ARREST

### A. *Common Law Origins*

The right<sup>26</sup> of a citizen to perform an arrest under common law arose in England during the medieval period.<sup>27</sup> The Statute of Winchester in 1285 outlined the important role of private citizens in the criminal justice system.<sup>28</sup> Citizens were not only given the right to arrest others who committed a crime, but they also had a positive duty to participate in the apprehension of a criminal when the "hue and cry" was raised.<sup>29</sup> The hue and cry was the process by which either a constable or private citizen would alert nearby able-bodied men to the commission of a crime. If the criminal actor refused to be arrested, these citizens had a duty to "follow them with all the town and the towns near, with hue and cry from town to town until that they be taken and delivered to the sheriff."<sup>30</sup> The distinction between an ability to arrest and a duty to arrest is

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restForm.htm (last visited Jan. 21, 2016) (providing citizens with a step-by-step process on how to execute a citizen's arrest on themselves).

<sup>26</sup> The question of whether citizen's arrest is a "right" or a "privilege" is beyond the scope of this Article, so the terms are used interchangeably throughout. For a brief discussion on this distinction, see M. CHERIF BASSIOUNI, *CITIZEN'S ARREST: THE LAW OF ARREST, SEARCH, AND SEIZURE FOR PRIVATE CITIZENS AND PRIVATE POLICE* 8 (1977) (explaining that the authority of a citizen to lawfully perform an arrest is more appropriately labeled a privilege because no duty to honor an arrest exists).

<sup>27</sup> *Id.* at 9.

<sup>28</sup> Statute of Winchester 1285, 13 Edw. 1 c. 1–6 (1285), reprinted in *SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY* 76–79 (George Burton Adams & H. Morse Stephens eds., 1901).

<sup>29</sup> *Id.* at 77–78.

<sup>30</sup> *Id.* at 78.

an important one that can be traced from common law to modern statutes. At common law, this distinction hinged on the nature of the crime committed and whether the private citizen actually witnessed the crime.<sup>31</sup> These factors help to explain the general structure of statutes extant in the United States.

At early common law, little or no distinction was made between arrests performed by a private citizen and those performed by a peace officer;<sup>32</sup> an officer of the King and a private person had the same right to arrest without a warrant.<sup>33</sup> Nor at early common law was any distinction made regarding the possible liability of the arrestor, either for false imprisonment or because a crime had not in fact been committed.<sup>34</sup> The Statute of Winchester itself stated that “for the arrestments of such strangers none shall be punished.”<sup>35</sup> As the common law developed, however, both private citizens and peace officers bore the burden of accuracy—the crime must have actually been committed in order for a proper arrest to occur.<sup>36</sup>

As the common law continued to evolve, distinctions arose between the rights of private citizens to arrest and the rights afforded to peace officers. One such distinction concerned the level of suspicion required by the arrestor to perform the arrest. A private citizen was required to have suspicion originating from his own observations, whereas a peace officer could rely on accounts provided by third parties.<sup>37</sup> Although this distinction appears minor, its importance lies in recognizing that those responsible for enforcing the law were deemed presumptively more reliable than the average private citizen.<sup>38</sup> Consequently, peace officers were given greater leeway to investigate and arrest for criminal conduct that they did not personally witness.

Common law citizen's arrest doctrine progressed in conjunction with societal developments in England through the seventeenth century. As population density increased and greater urbanization took hold, the citizen's arrest doctrine adapted to place less power in the hands of private citizens and more power in the hands of professional law enforce-

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<sup>31</sup> See BASSIUNI, *supra* note 26, at 9–10 (citing commentators who have specified that the committed crime must be a felony).

<sup>32</sup> See Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 567 (1936) (summarizing several scholars' views on the lack of distinction, including those of Stephen, Dalton, and Hale).

<sup>33</sup> BASSIUNI, *supra* note 26, at 9.

<sup>34</sup> See Statute of Winchester, *supra* note 28, at 78.

<sup>35</sup> *Id.*

<sup>36</sup> Hall, *supra* note 32, at 568–69.

<sup>37</sup> See *id.* (explaining that peace officers were punishable by law if they neglected their duty, thus encouraging proper enforcement of the law).

<sup>38</sup> *Id.*



ment.<sup>39</sup> Private citizens formed organized groups to assist law enforcement in effectuating citizen's arrests, but the small scale and questionable ethics of these groups prevented them from offering substantial assistance.<sup>40</sup> By the eighteenth century, courts began to create more tangible rules for both law enforcement and private citizens.<sup>41</sup> In 1780, in *Samuel v. Payne*,<sup>42</sup> for example, the King's Bench definitively established that a law enforcement official could lawfully arrest based on suspicion that a felony had been committed, even if his suspicion was incorrect.<sup>43</sup> Since private citizens had never been granted such a right, this development laid the foundation for the modern day principle that a private citizen making an arrest bears the risk and responsibility where the citizen incorrectly believes a crime has taken place. A law enforcement official, on the other hand, need only reasonably believe the crime has taken place to avoid liability.<sup>44</sup> As private citizens no longer had a duty to arrest criminals, they continued to face liability for false arrests, while public officials were granted greater latitude pursuant to their official duties.

The common law doctrine of citizen's arrest as developed by the early nineteenth century has remained largely unchanged to modern times. While the doctrine narrowed significantly between the Statute of Winchester in 1285 and the nineteenth century, judicial decisions over the last two hundred years have done little to further distill and clarify it. The rise of more organized and widespread law enforcement entities rendered the standards governing arrests by private citizens an afterthought.<sup>45</sup> In painstakingly prescribing the powers of police as state actors, legislatures and courts depreciated the citizen's arrest doctrine by not imbuing it with a similar level of specificity. Therefore, the historical common law doctrine of citizen's arrest can be summarized succinctly: A private citizen may arrest another for a crime committed in his or her presence, but can be held liable for false imprisonment if no crime was in fact committed. The reasonableness and diligence of the ar-

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<sup>39</sup> See BASSIOUNI, *supra* note 26, at 10 (positing that the role of private citizens in the law enforcement process appeared likely to remain limited).

<sup>40</sup> See *id.* (clarifying that some of these groups consisted of people who were thieves themselves, thereby undercutting the effectiveness of their vigilantism).

<sup>41</sup> See Hall, *supra* note 32, at 570 (asserting that until at least 1765, no distinction was made between a public official and a citizen when arresting a felon, but that by 1780 judicial decisions started to recognize more concrete rules).

<sup>42</sup> 99 Eng. Rep. 230 (K.B. 1780).

<sup>43</sup> *Id.* at 231.

<sup>44</sup> See *Hunter v. Bryant*, 502 U.S. 224, 226 (1991) (holding that officers who fall into this category are entitled to qualified immunity).

<sup>45</sup> See BASSIOUNI, *supra* note 26, at 13 (recognizing that arrest laws became largely focused on state action and the acts of public officers, thereby marginalizing the citizen's arrest doctrine by not developing it as robustly in statutory law).

restor's conduct will not protect the arrestor if the arrestee is innocent of the crime. Due to the vagueness and lack of specificity in the common law doctrine, many states have chosen to codify and expand upon these rights in an attempt to provide more clarity to citizens. Other states, however, have continued to rely on their own formulations of the common law.

### B. *The Common Law States*

In large part, the lack of specificity and coherence in common law doctrine stems from the rise of modern police forces and the way in which those forces diminished the importance of the private citizen as a potential arrestor.<sup>46</sup> Once states began to carefully prescribe arrest powers for trained law enforcement officials, the need to similarly instruct private citizens dissipated.<sup>47</sup> As a result, a handful of states never codified the law of citizen's arrest and instead are still governed by a common law approach.<sup>48</sup> One example is the Commonwealth of Massachusetts, which illuminates how a circumscribed citizen's arrest doctrine can arise from common law without official codification.

Massachusetts explicitly recognized a common law right of citizen's arrest as early as 1850.<sup>49</sup> The right was described as "a much more restricted authority" than the authority granted to peace officers, and one that was "confined to cases of the actual guilt of the party arrested . . . ."<sup>50</sup> Only when the guilt of the arrestee was proven was the citizen's arrest deemed justified.<sup>51</sup> This mid-nineteenth century ruling has been echoed in more recent jurisprudence.<sup>52</sup> The burden of correctness placed on the arrestor mirrors the historical trend in citizen's arrest and represents a significant restriction on a private person's arrest powers.<sup>53</sup> The requirement of the arrestee's actual guilt continued to be a cornerstone of Massachusetts common law for the next century, until courts began to provide more detail to guide private citizens.<sup>54</sup>

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<sup>46</sup> See *id.* (explaining the resulting disparity in the treatment of public officers and private citizens despite the fact that they were performing essentially the same function).

<sup>47</sup> *Id.*

<sup>48</sup> The jurisdictions that rely on the common law of citizen's arrest are Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, Pennsylvania, Vermont, West Virginia, and Wisconsin.

<sup>49</sup> See *Rohan v. Sawin*, 59 Mass. (5 Cush.) 281, 283 (1850).

<sup>50</sup> *Id.* at 285.

<sup>51</sup> *Id.*

<sup>52</sup> See *Commonwealth v. Harris*, 415 N.E.2d 216, 221 (Mass. App. Ct. 1981) (recognizing the deterrence benefits provided by reducing the scope of the citizen's arrest privilege and highlighting the risk of false imprisonment claims incurred by arrestors).

<sup>53</sup> See *supra* Part I.A.

<sup>54</sup> See *Commonwealth v. Grise*, 496 N.E.2d 162 (Mass. 1986); *Commonwealth v. Lussier*, 128 N.E.2d 569 (Mass. 1955); *Harris*, 415 N.E.2d at 219–21.

The Massachusetts Supreme Judicial Court in 1955 stated unequivocally that a “private person may lawfully arrest one who in fact has committed a felony . . . .”<sup>55</sup> While this made the rights of a citizen clear regarding felonies, it did little to show what rights a citizen had to arrest for a misdemeanor or breach of peace. In 1986, the court addressed this possible expansion of citizen’s arrest power in hopes of clarifying the confusion.<sup>56</sup> In affirming the trial court’s ruling, the Supreme Judicial Court held that private persons could not perform a citizen’s arrest for a misdemeanor or breach-of-peace violation.<sup>57</sup> To allow an arrest for these offenses might encourage vigilantism due to citizens’ interpretations of a “breach of peace” as elastic.<sup>58</sup> This updated common law doctrine is similar to other states’ formal codifications.

Several other states have similarly decided not to codify citizen’s arrest, relying instead on some variant of the common law doctrine. Pennsylvania’s law exemplifies a common thread throughout the common law states: a private citizen may arrest another for a felony, but the citizen does so at his or her peril because the citizen’s suspicion must ultimately be correct.<sup>59</sup> Pennsylvania’s stance on a private citizen’s legal right to arrest another for a misdemeanor or breach of peace is less clear.<sup>60</sup> The Pennsylvania Supreme Court established that the probable cause burden on the arrestor is considerably higher when the arrestor is a private citizen than when the arrestor is an officer of the law, but it did not clarify whether this standard applies to felonies, misdemeanors, or both.<sup>61</sup> Although Pennsylvania courts have been divided on the validity of a citizen’s arrest for a non-felony, some have recognized that a purely common law approach to citizen’s arrest would allow private persons to arrest for misdemeanors and breaches of the peace.<sup>62</sup> The questions sur-

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<sup>55</sup> *Lussier*, 128 N.E.2d at 575.

<sup>56</sup> *See Grise*, 496 N.E.2d at 163–65.

<sup>57</sup> *See id.* at 164–65 (excluding intoxication and traffic offenses from the scope of the doctrine).

<sup>58</sup> *Id.*

<sup>59</sup> *See Commonwealth v. Chermansky*, 242 A.2d 237, 239–40 (Pa. 1968) (stating that a private person in fresh pursuit of a felon may arrest him, and if the felon flees and the arrest cannot be performed without killing the felon, such a killing is allowed, but only for an enumerated list of felonies: “treason, murder, voluntary manslaughter, mayhem, arson, robbery, common law rape, common law burglary, kidnapping, assault with the intent to murder, rape or rob, or a felony which normally causes or threatens death or great bodily harm”).

<sup>60</sup> *See generally Commonwealth v. Corley*, 462 A.2d 1374 (Pa. 1983) (providing a sequential history of Pennsylvania holdings and dicta that paints a contradictory picture of a private citizen’s right to arrest for a misdemeanor or breach of peace).

<sup>61</sup> *See id.* at 1378.

<sup>62</sup> *See id.* at 1379 (outlining the common law rule); *see also Samuel v. Blackwell*, 76 Pa. Super. 540, 547 (1921) (dictum) (concurring with the common law rule); *Commonwealth v. Giles*, 57 Pa. D. & C.2d 13, 17 (Ct. Com. Pl. 1972) (dictum) (allowing a citizen’s arrest for a breach of peace occurring in the presence of the arrestor). *But see Commonwealth v. Gregg*, 396 A.2d 797, 798 n.9 (Pa. Super. Ct. 1979) (dictum) (clarifying that a private citizen may

rounding whether such an approach is currently employed in Pennsylvania illustrate the uncertainty that can come with a state's decision not to codify the common law. Ultimately, it appears that common law citizen's arrest in Pennsylvania is allowed for a felony, misdemeanor, or breach of the peace,<sup>63</sup> but the jumbled case history and lack of codification provide insufficient guidance for private persons to understand the boundaries of the doctrine.

Reading the common law to restrict citizen's arrest powers to offenses that the citizen actually witnesses is another recurring theme among common law states. In Wisconsin, a citizen can arrest only for felonies and breaches of the peace so long as that citizen has personally witnessed the crime.<sup>64</sup> Massachusetts, Pennsylvania, and Wisconsin all agree that a felony committed in the arrestor's presence is sufficient for arrest and that the arrestor bears the burden of correctness. Each state's varying treatment of misdemeanors and breaches of the peace, however, highlights the importance of statutory codification as a means of concretizing the modern citizen's arrest doctrine and avoiding confusion among ordinary citizens.<sup>65</sup>

While these three jurisdictions have relatively robust precedent to indicate their common law stance on citizen's arrest, other jurisdictions that have similarly declined codification provide scant case law to offer guidance. The result of this lack of relevant jurisprudence is that in some states, such as Maryland, one singular definition of citizen's arrest has been outlined and followed for decades without much evaluation or development.<sup>66</sup> The Court of Appeals of Maryland determined that the common law authority for a private person to arrest exists only when

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arrest another only for a felony committed in the arrestor's presence); *In re Stanley*, 201 A.2d 287, 289 (Pa. Super. Ct. 1964) (dictum) (stating that a constable's right to arrest for breach of peace was not similarly conferred to private citizens).

<sup>63</sup> See *Kopko v. Miller*, 892 A.2d 766, 774–75 (Pa. 2006) (holding that a private citizen may arrest for a breach of peace that the citizen personally observes and that a police officer's power to arrest for crimes committed in the citizen's presence is no different from that of a private citizen).

<sup>64</sup> See *City of Waukesha v. Gorz*, 479 N.W.2d 221, 223 (Wis. Ct. App. 1991) (disagreeing with the trial court's view that citizen's arrest would be allowed for any violation of law as long as the arrestor was a witness).

<sup>65</sup> See *Radloff v. Nat'l Food Stores, Inc.*, 123 N.W.2d 570, 571 (Wis. 1963) (specifying that a private citizen has a right to arrest for a misdemeanor committed in his or her presence only if public security is at stake and the act threatens to incite violence, a standard that common theft does not meet); *City of Waukesha*, 479 N.W.2d at 223 (holding that operating a motor vehicle while intoxicated involves violence and threatens overall public security, thereby making it a breach of peace sufficient to support a citizen's arrest); *State v. Slawek*, 338 N.W.2d 120, 121 (Wis. Ct. App. 1983) (reaffirming that a private citizen and a police officer outside of the jurisdiction may make a citizen's arrest for both a misdemeanor or a breach of peace committed in their presence).

<sup>66</sup> See *Great Atl. & Pac. Tea Co. v. Paul*, 261 A.2d 731, 738–39 (Md. 1969) (clarifying that a private shopkeeper has the same rights—and restrictions—as a private citizen).

(a) there is a felony being committed in [the arrestor's] presence or when a felony has in fact been committed whether or not in [the arrestor's] presence, and the arrestor has reasonable ground (probable cause) to believe the person he arrests has committed it; or (b) a misdemeanor is being committed in the presence or view of the arrestor which amounts to a breach of the peace.<sup>67</sup>

This definition—while not formally codified—was subsequently quoted and followed in Maryland in recent years.<sup>68</sup> The clear-cut status of Maryland's common law standard through jurisprudence, or lack thereof, essentially creates a state codification of the citizen's arrest doctrine.

Some common law states' jurisprudence offers clarity only on specific elements of the citizen's arrest doctrine, rather than on the doctrine as a whole. In West Virginia, for example, a nearly hundred-year-old partial definition of when, with respect to felonies and misdemeanors, a private citizen may arrest still proves influential to modern courts.<sup>69</sup> While the definition does not address breaches of the peace and is confusing at best in its description of a private citizen's right to arrest for a misdemeanor, the West Virginia Supreme Court of Appeals cited it as recently as 2013.<sup>70</sup> The right of West Virginia citizens to arrest for misdemeanors is governed by the common law, but case law has not sufficiently developed to lend greater clarity to what that common law standard actually is.<sup>71</sup> This highlights one of the most basic benefits of formal codification: a citizen can look to an official state statute to determine his or her legal rights, rather than having to rely on piecemeal readings of judicial opinions.

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<sup>67</sup> *Id.*

<sup>68</sup> *See, e.g.,* *United States v. Atwell*, 470 F. Supp. 2d 554, 565 (D. Md. 2007) (reiterating the probable cause standard outlined in *Great Atlantic & Pacific Tea Co.* as it applies to breaches of the peace); *Williams v. State*, 79 A.3d 931, 946 n.13 (Md. 2013) (implying that the definition in *Great Atlantic & Pacific Tea Co.* is still controlling and has remained unchanged for nearly forty-five years).

<sup>69</sup> *See Allen v. Lopinsky*, 94 S.E. 369, 369–70 (W. Va. 1917) (“Under no circumstances, can a private person justify an arrest made without a warrant, by himself, or by an officer at his instance, for a misdemeanor, nor for a felony, unless the felony has been actually committed.”).

<sup>70</sup> *See State v. Horn*, 750 S.E.2d 248, 262 (W. Va. 2013) (clarifying the doctrine slightly by examining the responsibilities of police officers outside their jurisdiction); *see also State v. Muegge*, 360 S.E.2d 216, 218–19 (W. Va. 1987) (noting that a peace officer making an arrest outside his or her jurisdiction acts in the same capacity as a private citizen making such an arrest).

<sup>71</sup> *See Muegge*, 360 S.E.2d at 218–19 (maintaining that, under common law, a private citizen may arrest another who “commits a misdemeanor in his presence when that misdemeanor constitutes a breach of the peace”).

### C. State Codifications of the Common Law

Despite the advantages that codification is intended to provide, many statutes derived from the common law are similarly ambiguous. While states have enacted several different versions of the citizen's arrest doctrine, California provides one of the more typical formulations.<sup>72</sup> It distinguishes between the right to arrest for misdemeanors and felonies.<sup>73</sup> Similar to the common law, a citizen can arrest for a misdemeanor committed in his presence.<sup>74</sup> In California, the presence requirement has been interpreted broadly and is not contingent upon physical proximity or sight;<sup>75</sup> the arrestor can become aware of the misdemeanor through his other senses and external information.<sup>76</sup> Some states, California included, omit the phrase "breach of the peace" as a qualification to the commission of misdemeanors<sup>77</sup> and allow citizens to arrest for misdemeanors committed or attempted.<sup>78</sup> However, Arizona, Indiana, and Mississippi specifically qualify the misdemeanor as one involving a

<sup>72</sup> CAL. PEN. CODE § 837 (West 2015).

<sup>73</sup> The statute provides:

A private person may arrest another:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

*Id.* States that replicate California's law include: Alabama, Alaska, Arizona, Idaho, Indiana, Iowa, Kansas, Minnesota, Mississippi, Nevada, North Dakota, Oklahoma, South Dakota, Tennessee, and Utah. ALA. CODE § 15-10-7 (2015); ALASKA STAT. § 12.25.030 (2015); ARIZ. REV. STAT. ANN. § 13-3884 (2015); IDAHO CODE ANN. § 19-604 (2015); IND. CODE ANN. § 35.33.1.4 (West 2015); IOWA CODE § 804.9 (2015); KAN. STAT. ANN. § 22-2403 (2015); MINN. STAT. § 629.37 (2015); MISS. CODE ANN. § 99-3-7 (2015); NEV. REV. STAT. ANN. § 171.126 (West 2015); N.D. CENT. CODE § 29-06-20 (2015); OKLA. STAT. ANN. tit. 22 § 202 (West 2015); S.D. CODIFIED LAWS § 23A-3-3 (2015); TENN. CODE ANN. § 40-7-109 (2015); UTAH CODE ANN. § 77-7-3 (West 2015).

<sup>74</sup> See CAL. PEN. CODE § 837(1); see also IDAHO CODE ANN. § 19-604; N.D. CENT. CODE § 29-06-20.

<sup>75</sup> See *People v. Lee*, 204 Cal. Rptr. 667, 669 (App. Dep't Super. Ct. 1984) (describing the application of the presence requirement in California).

<sup>76</sup> See *People v. Bloom*, 111 Cal. Rptr. 3d 710, 714 (Ct. App. 2010) (finding a valid citizen's arrest of a person who incessantly called and harassed a 911 dispatcher). While the dispatcher never saw or witnessed the harasser place the phone calls, the misdemeanor offense was still made in the dispatcher's presence through the use of the telephone—"an electronic device that aids a person's auditory perception." *Id.*

<sup>77</sup> See, e.g., CAL. PEN. CODE § 837(1) (suggesting that a citizen can arrest for misdemeanors that would not be characterized as breaches of the peace, since that phrase is purposely omitted from the statute); OKLA. STAT. ANN. tit. 22 § 202 (same); TENN. CODE ANN. § 40-7-109 (same); UTAH CODE ANN. § 77-7-3 (omitting "breach of peace" in defining when a private citizen can arrest for misdemeanors).

<sup>78</sup> CAL. PEN. CODE § 837(1); see also ALASKA STAT. § 12.25.030(a)(1) (allowing a citizen to arrest for misdemeanors committed or attempted); NEV. REV. STAT. ANN. § 171.126(1) (same); S.D. CODIFIED LAWS § 23A-3-3(1) (same). *But see* ARIZ. REV. STAT. ANN. § 13-3884(1) (2015) (limiting the ability for the citizen to arrest for misdemeanors to those actually

breach of the peace.<sup>79</sup> A judge or jury often determines whether a crime was a completed or attempted felony, misdemeanor, breach of the peace, or nothing at all long after the crime was committed. Citizens effectuating an arrest for anything less than an obvious felony are therefore less able to make calculated decisions and may face liability for false arrest.

All of the states that follow the California framework permit a citizen to arrest for felonies not committed in his or her presence, but the statutes differ when characterizing the reasonableness a citizen must have in believing that the arrestee is guilty of the offense.<sup>80</sup> In California, a citizen can arrest for a felony in two situations: (1) the arrestee actually committed a felony, although not in the citizen's presence;<sup>81</sup> or (2) a felony has been committed and the citizen has reasonable or probable cause to believe the person arrested committed it.<sup>82</sup> California's statute—like other similarly worded statutes—thus adopts a partial strict liability approach to arrests for felonies. Even if the person arrested did not actually commit a felony, the citizen arrestor will not be liable for his mistake if he or she can articulate reasonable or probable cause that the arrestee was the perpetrator.<sup>83</sup> Arkansas' statute, on the other hand, is much more favorable to arrestors; a citizen need only show that he or she had "reasonable grounds for believing" that the arrestee committed a felony, but not that a felony was actually committed.<sup>84</sup> Furthermore, rea-

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committed); IND. CODE ANN. § 35-33-1-4(a)(3) (2015) (same); TENN. CODE ANN. § 40-7-109 (same).

<sup>79</sup> See ARIZ. REV. STAT. ANN. § 13-3884 (specifying that a citizen can arrest for a misdemeanor "amount[ing] to a breach of peace"); IND. CODE ANN. § 35-33-1-4 (West 2015) (permitting arrest for the commission of a misdemeanor "involving a breach of peace" in his presence and "the arrest is necessary to prevent the continuance of the breach of peace"); MISS. CODE ANN. § 99-3-7 (2015) ("[A] private person may arrest any person without warrant [for] . . . a breach of the peace threatened or attempted in his presence . . ."); see also TEX. CODE CRIM. PROC. ANN. art. 14.01(a) (West 2015) (allowing arrest for an offense classified as one "against the public peace").

<sup>80</sup> Compare CAL. PEN. CODE § 837(3) (stating that the citizen must have "reasonable cause for believing the person arrested to have committed [the felony]"), and TENN. CODE ANN. § 40-7-109(a)(3) (same), with KAN. STAT. ANN. § 22-2403(1) (requiring the citizen to show that he or she had "probable cause" to believe that the arrestee committed the crime), and S.D. CODIFIED LAWS § 23A-3-3(2) (same).

<sup>81</sup> CAL. PEN. CODE § 837(3); accord ALA. CODE § 15-10-7(a)(3) (2015) (stating that a private person may arrest for a felony not committed in his presence, but only if the arrestee committed it); see *State v. Duren*, 123 N.W.2d 624, 632 (Minn. 1963) (presuming that the presence element, which is required for misdemeanor arrests, is not a prerequisite for felony arrests because a felon at large presents a greater danger to the public).

<sup>82</sup> See CAL. PEN. CODE § 837(3).

<sup>83</sup> See *id.* (providing that a private person may arrest a suspect for a felony that has been committed when he has reasonable cause to believe that the suspect committed it).

<sup>84</sup> ARK. CODE ANN. § 16-81-106(d) (2014); cf. *State v. Johnson*, 930 P.2d 1148, 1154 (N.M. 1996) (concluding that a citizen's arrest is lawful when based upon "a good faith, reasonable belief that a felony had been or was being committed based on the arrestee's overt acts or other trustworthy information"). New Mexico follows the common law doctrine of citizen's arrest. See *Downs v. Garay*, 742 P.2d 533, 535 (N.M. Ct. App. 1987) (stating that the common

sonable cause is relatively easy to prove.<sup>85</sup> By contrast, in New York, no matter how reasonable the arrestor's action may appear at the time of arrest, if a felony was not actually committed, he will be liable for false arrest.<sup>86</sup> New York's statute provides the strictest form of liability in effectuating a citizen's arrest, leaving no room for mistakes.

One commentator has suggested that strict liability for mistaken arrests conflicts with the purpose of citizen's arrest because citizens should be encouraged to help the police in protecting the public and apprehending criminals.<sup>87</sup> This perspective, however, largely ignores the difference between a police officer and a common citizen: an officer receives training on how to safely arrest a criminal and ordinary citizens do not. While recruiting citizens to aid in eradicating crime is a noble idea, the possibility for citizens to abuse the power suggests that a standard less stringent than strict liability is dangerous for arrestors and arrestees alike.

Some states choose to either specify the precise offenses for which a private citizen can arrest or broadly authorize a citizen to arrest for any crime. In Maine, for example, a citizen can arrest the suspect if he or she has probable cause to believe that the person committed murder or "any Class A, Class B or Class C crime," and for a Class D or Class E crime if the offense is committed in the arrestor's presence.<sup>88</sup> Hawaii states that "any person present" can arrest "anyone in the act of committing a crime,"<sup>89</sup> and the Attorney General determined that the term "crime" should be interpreted "in its broadest sense."<sup>90</sup> Illinois and Montana both restrict the general authorization to arrest for any offense. In Illinois, a

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law right for a citizen to arrest controls in New Mexico). The Supreme Court of New Mexico has explicitly rejected the adoption of a strict liability citizen's arrest statute and instead supports a statute that fully protects the citizen in making the arrest. *Johnson*, 930 P.2d at 1154.

<sup>85</sup> See *Stutte v. State*, 432 S.W.3d 661, 664 (Ark. Ct. App. 2014) ("Probable cause to arrest is defined as 'a reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that a crime has been committed by the person suspected.'" (quoting *Hilton v. State*, 96 S.W.3d 757, 760 (Ark. Ct. App. 2003))).

<sup>86</sup> N.Y. CRIM. PROC. LAW § 140.30(1)(a) (McKinney 2015) (authorizing a private person to arrest another for a felony when "the latter has in fact committed such felony"); see also TEX. CODE CRIM. PROC. ANN. art. 14.01(a) (West 2015) (requiring the felony to have been committed in the citizen's presence).

<sup>87</sup> See Note, *The Law of Citizen's Arrest*, 65 COLUM. L. REV. 502, 511 (1965) ("The rule of absolute liability is inconsistent with the theory that citizen's arrests are a desirable and necessary adjunct to official law enforcement."); *id.* (finding fault with holding citizen arrestors strictly liable for mistaken arrests because doing so will "seriously undermine the citizen's willingness to arrest").

<sup>88</sup> ME. STAT. tit. 17, § 16 (2015); see also WYO. STAT. ANN. § 7-8-101 (2015) (retaining the misdemeanor-felony distinction, but specifying the misdemeanors for which a citizen can arrest as only theft offense or property destruction).

<sup>89</sup> HAW. REV. STAT. § 803-3 (2015).

<sup>90</sup> 76 Haw. Op. Att'y Gen. 4 (1976).



citizen cannot arrest for an ordinance violation,<sup>91</sup> while Montana specifies that a citizen can arrest when “the existing circumstances require the person’s immediate arrest.”<sup>92</sup> It would likely be difficult for an ordinary citizen to lawfully comply with either the Maine or Illinois statute without previously knowing the particular conduct that may qualify as an “ordinance violation” in Illinois or a “Class A” crime in Maine. Accordingly, it would behoove a cautious citizen to research the state code and corresponding citizen’s arrest statute thoroughly in the particular jurisdiction prior to testing his arrest powers.

## II. CITIZENS BEWARE: THE MISAPPLICATION OF CITIZEN’S ARREST

As the law currently stands, a citizen can basically arrest anytime he or she witnesses the commission of a felony or misdemeanor, depending on the specific statute. It is difficult to guide a common citizen on how to make a correct and lawful citizen’s arrest when the states are unclear on the limits of a citizen’s authority. This confusion is magnified in states that have retained the common law doctrine of citizen’s arrest instead of codifying it.<sup>93</sup> Many citizens do not comprehend the parameters of their authority. In a California case, a citizen testified that he did not understand the legal definition of a citizen’s arrest and had no intention of arresting the suspect, yet a court still concluded that he had performed a valid citizen’s arrest.<sup>94</sup>

In addition to the confusion surrounding when citizens are permitted to execute a valid arrest in a particular state, people are currently allowed to roam the streets looking for wrongdoers to arrest, thus increasing the potential for abuse. Unlike police officers, private citizens are not restricted to a certain jurisdiction within the state and have not been trained extensively.<sup>95</sup> Recent cases highlight the dangers of individuals taking the law into their own hands, for both the arrestor and the arrestee.<sup>96</sup>

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<sup>91</sup> 725 ILL. COMP. STAT. 5/107-3 (2015).

<sup>92</sup> MONT. CODE ANN. § 46-6-502 (2015).

<sup>93</sup> See *supra* Part I.B (describing the confusing labyrinth of citizen’s arrest rules in common law jurisdictions).

<sup>94</sup> See Padilla v. Meese, 229 Cal. Rptr. 310, 311, 316 (Ct. App. 1986) (concluding that the citizen’s “definitional misunderstanding” of the doctrine does not make the arrest unlawful). The court dismissed the citizen’s subjective mindset at the time of the alleged arrest and focused solely on his objective actions. Since he had told the suspect to pull his car over and wait until the police arrived, the court believed these acts demonstrated that he detained the suspect even though he testified that he had no intention of arresting him. *Id.*

<sup>95</sup> See Katherine Marsh, *Playing Police*, LEGAL AFFAIRS, July–Aug. 2004, at 16, 17 (“It’s not uncommon for people who make citizen’s arrests—some of whom seem to have only reruns of *Cops* to draw upon for their knowledge of due process—to get in trouble for making false or otherwise improper arrests.”).

<sup>96</sup> See, e.g., State v. Lisko, No. 2013AP2132-CR, 2014 Wis. App. LEXIS 917, at \*2 (Wis. Ct. App. Nov. 5, 2014) (detailing circumstances in which the private arrestor attacked the arrestee); see also Katie Mettler, *Man Shopping for Coffee Creamer at Walmart Attacked*

This confusion and risk of misuse presents an insurmountable barrier to a clear and effective citizen's arrest doctrine. As to private citizens, therefore, jurisdictions should abolish the doctrine. This abolition should also apply to volunteer organizations, such as the Guardian Angels, that encourage and train private citizens to make citizen's arrests. The same issues of confusion and risk of misuse apply to these organizations because there is no oversight or assurance that these individuals are properly trained to safely effectuate a citizen's arrest.

#### A. *Confusion in Making a Citizen's Arrest*

Whether a state uses the common law or a statute, and regardless of the status of the arrestor, certain features of the citizen's arrest doctrine are essential in determining a lawful arrest.<sup>97</sup> These core features include the nature of the crime committed, whether probable cause for suspicion exists, the temporal reasonableness of detention, and the appropriate use of force on the part of the arrestor.<sup>98</sup> These concepts are consistently the subject of judicial concern, and violating any of them places an arrestor at risk for claims of false imprisonment or unlawful detention.<sup>99</sup>

Private persons can encounter legal difficulties in jurisdictions that require them to differentiate between a felony and a misdemeanor, with the commission of a felony allowing for citizen's arrest, while the com-

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*by Vigilante for Carrying Gun He Was Legally Permitted to Have*, TAMPA BAY TIMES (Jan. 20, 2015, 7:45 PM), <http://www.tampabay.com/news/publicsafety/man-shopping-for-coffee-creamer-at-walmart-attacked-by-vigilante-for/2214432> (reporting a situation in which a person was charged with battery after tackling a man who was legally carrying a firearm in a Walmart store); Jesse Wells, *Man Dies in Oklahoma City After Being Tied Up During Citizen's Arrest*, NEWS CHANNEL 4 (May 28, 2015, 8:00 AM), <http://kfor.com/2015/05/28/oklahoma-city-police-investigating-after-man-dies-in-their-custody>; *infra* Part II.B (describing additional abuses of citizen's arrest).

<sup>97</sup> See generally *The Law of Citizen's Arrest*, *supra* note 87 (providing a comprehensive overview of the citizen's arrest doctrine and recognizing the underlying basic concepts required to lawfully effectuate an arrest).

<sup>98</sup> See *id.* at 507–10 (explaining these principles in depth while also examining the importance of other factors, such as the arrestor's physical observation of the criminal act and liability arising from an arrestor's mistake). A critical concept underlying the citizen's arrest doctrine is urgency as it relates to public safety; any comprehensive citizen's arrest statute should recognize that the most pressing concern of the doctrine is to prevent present dangers rather than to redress past wrongs. *Id.* at 513. Some argue that while a private person should defer to the police where it is practical to do so, he or she should also be allowed to perform an arrest where delay would allow the perpetrator to escape. *Id.*

<sup>99</sup> See, e.g., *K-Mart Corp. v. Lovett*, 525 S.E.2d 751, 754 (Ga. Ct. App. 1999) (holding that conducting a citizen's arrest was unreasonable where the arrestor admitted she did not actually suspect the arrestee of shoplifting); *State v. Adams*, 738 P.2d 988, 990 (Or. Ct. App. 1987) (holding that further detention of a suspect after initial investigation for an hour before contacting the sheriff was unreasonable); *Giant Food, Inc. v. Scherry*, 444 A.2d 483, 488 (Md. Ct. Spec. App. 1982) (holding that use of deadly force is allowed when effectuating a citizen's arrest, but firing bullets at a fleeing suspect in an area where innocent bystanders could be injured was unreasonable).

mission of a misdemeanor does not.<sup>100</sup> Such a discrepancy illustrates one of the problems inherent in the citizen's arrest doctrine in these jurisdictions—individuals are often placed in a tenuous position when forced to decide in real time whether they are witnessing a felony or a misdemeanor.<sup>101</sup> In these jurisdictions, the arrestor essentially acts at his peril when arresting for a crime that approaches the often nebulous line between the two levels of misconduct.

When the underlying crime is of a serious nature that a reasonable person could believe constituted a felony, requiring an arrestor to understand which crimes are felonies and which are misdemeanors compounds the risk assumed by the arrestor.<sup>102</sup> Driving while intoxicated, for example, is most commonly categorized as a misdemeanor or a breach of peace, preventing a citizen from arresting an intoxicated driver in a jurisdiction that only allows citizen's arrests for felonies.<sup>103</sup> This categorization is counterintuitive, because of the serious nature of intoxicated driving.<sup>104</sup> At the same time, encouraging confrontation with intoxicated drivers can lead to unsafe situations for everyone involved. Moreover, requiring an arrestor to know not only the intricacies of the felony/misdemeanor divide in the jurisdiction, but also having to know which crimes justify a citizen's arrest, can create immensely difficult terrain for an arrestor to navigate.<sup>105</sup> Some jurisdictions present an additional issue by

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<sup>100</sup> See, e.g., *Jackson v. Gossard*, 549 N.E.2d 1234, 1236 (Ohio Ct. App. 1989) (holding that a citizen's arrest for a misdemeanor was unlawful within the jurisdiction, thereby allowing the arrestee to use force equal to that of the arrestor in resisting the arrest).

<sup>101</sup> See *id.* at 1235–36 (noting the bright-line rule allowing for citizen's arrest for a felony and not for a misdemeanor, but maintaining that the arrestor had no reason to believe that the arrestee's conduct—damaging the arrestor's automobile—rose to the level of a felony).

<sup>102</sup> See Anelli Xavier, *Misdemeanor vs. Felony*, DUI FOUND., <http://www.duifoundation.org/legalguide/finespenalties/misdemeanorvsfelony> (last visited Jan. 21, 2016) (explaining that although laws vary by jurisdiction, a DUI or DWI generally is considered a misdemeanor unless it is the perpetrator's third or fourth offense or if the driver causes an accident or damage to persons or property).

<sup>103</sup> See, e.g., *State v. Houlton*, 416 N.W.2d 588, 589 (Neb. 1987) (holding that an arrestor could arrest only for a felony or petit larceny, meaning that an off-duty police officer could not arrest a citizen whom he reasonably believed was driving while intoxicated). The citizen's alcohol blood content was nearly four times the legal limit, but driving while intoxicated is a misdemeanor in Nebraska and thus not a crime for which a citizen's arrest could lawfully be effectuated. *Id.* The arrest was upheld, however, because the arrestor provided probable cause to police to investigate. *Id.* at 590. But see *City of Waukesha v. Gorz*, 479 N.W.2d 221, 223 (Wis. Ct. App. 1991) (allowing a citizen's arrest for driving while intoxicated because it is a dangerous act with high possibility of violence, while recognizing that driving while intoxicated is a breach of peace and not a felony).

<sup>104</sup> Justin Worland, *Why Police Aren't Catching Drunk Drivers*, TIME (Dec. 31, 2014), <http://time.com/3650196/police-drunk-driving> (explaining that police officers have struggled with enforcing laws against intoxicated driving).

<sup>105</sup> See Xavier, *supra* note 102 (highlighting the varying iterations of laws that surround driving while intoxicated, implying that it would be extremely difficult for the average citizen to know when such a crime would constitute a misdemeanor or a felony).

allowing citizen's arrest for a breach of peace, but not for other misdemeanors, thereby requiring citizens to further comprehend the nuances of these types of offenses.<sup>106</sup>

Illustrating this dilemma, a Texas appellate court embarked on an in-depth analysis to determine whether driving while intoxicated amounted to a breach of peace, which would allow for a legal citizen's arrest in Texas.<sup>107</sup> The court concluded that there are different degrees of erratic driving, the categorization of which determines whether particular conduct constitutes a breach of peace or a mere moving violation.<sup>108</sup> The court was split on whether a driver who crossed the dividing line on a road about twenty times in a quarter mile and repeatedly bumped the curb with her tires committed a breach of peace.<sup>109</sup> The majority held that the conduct was dangerous enough to qualify as erratic driving,<sup>110</sup> while the dissent concluded that the driver did not endanger the public.<sup>111</sup> The failure of the court to establish the driver's actions unambiguously as a breach of peace portends that private citizens will be in a precarious position when deciding whether to effectuate a citizen's arrest in similar circumstances.

In addition to distinguishing between a felony and a misdemeanor, a private arrestor must generally have probable cause to effectuate a lawful arrest,<sup>112</sup> and a lack of probable cause is a basis for a wrongful arrest claim.<sup>113</sup> Similarly, the arrestor often bears the burden of correctness in his or her probable cause assertion, and a mistake-of-fact defense does not absolve the arrestor of liability.<sup>114</sup> While these restrictions on ar-

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<sup>106</sup> See, e.g., TEX. CODE CRIM. PROC. ANN. art. 14.01(a) (West 2015) (allowing a lawful citizen's arrest only "if the offense is classed as a felony or as an offense against the public peace").

<sup>107</sup> See *Kunkel v. State*, 46 S.W.3d 328, 330–32 (Tex. App. 2001) ("What constitutes a breach of the peace is to be determined on a case-by-case basis, looking to the facts and circumstances surrounding the act.").

<sup>108</sup> *Id.* at 331.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (concluding that the citizen's arrest was properly carried out); see also *Miles v. State*, 241 S.W.2d 28, 42 (Tex. Crim. App. 2007) (concluding that a truck driver's arrest of a drunk driver was proper because the drunk driver "posed an ongoing threat of violence or harm to . . . others").

<sup>111</sup> *Kunkel*, 46 S.W.3d at 332 (Hutson-Dunn, J., dissenting).

<sup>112</sup> See, e.g., *Mason v. Sullivan*, 266 F. App'x 609, 610 (9th Cir. 2008) (holding that a college official had probable cause to make a citizen's arrest against anti-abortion protesters based on the college's campus permit policy); *State v. Schubert*, 244 P.3d 748, 753 (Mont. 2010) (concluding that a private citizen had probable cause to arrest a drunk driver because she observed the "vehicle being operated dangerously and with clear manifestations of an impaired driver").

<sup>113</sup> See *K-Mart Corp. v. Lovett*, 525 S.E.2d 751, 754 (Ga. Ct. App. 1999) (holding that a citizen's arrest without probable cause is unreasonable and unlawful).

<sup>114</sup> See *United States v. Hillsman*, 522 F.2d 454, 460–61 (7th Cir. 1975) (explaining that the principal difference between an arrest conducted by a private citizen and one conducted by a police officer is that the former must turn out to be correct in the assumption that a crime has

restors vary by jurisdiction, the overarching message is that the arrestor must reasonably believe that the arrestee has committed a crime before a citizen's arrest is valid.<sup>115</sup> While the probable cause standard can act as a safeguard for arrestees, having ordinary citizens traverse the confusing concept of probable cause places them in a problematic position, especially if they have limited legal knowledge.

Even if a crime is readily recognizable as one that allows for a lawful citizen's arrest in that jurisdiction and the arrestor has probable cause, citizen arrestors face other hurdles in avoiding liability for wrongful detention. One such impediment is temporal reasonableness, whereby an arrestor cannot detain an arrestee beyond what courts determine to be an acceptable amount of time.<sup>116</sup> Factors in determining such reasonableness include the length of time required to perform an adequate investigation of the suspect's guilt, the cooperation of the suspect in that inquiry, and the amount of time taken to contact the police.<sup>117</sup> To avoid an unlawful detention claim, for instance, the arrestor must expedite the investigative process where possible to limit the amount of time that the suspect is detained.<sup>118</sup> A person performing a citizen's arrest must also know what courts in his or her jurisdiction have determined to be a reasonable detention period for the arrestee.<sup>119</sup> The fact that courts make this determination on a case-by-case basis increases the difficulty for private citizens to know what constitutes a reasonable amount of time.<sup>120</sup>

These alone are significant restrictions on an arrestor, but he or she must also anticipate using force when making a citizen's arrest. In general, an arrestor may use as much force as is reasonably required to de-

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been committed, whereas the latter is forgiven for reasonable mistakes of fact). The defendants in *Hillsman* could reasonably have assumed that a felony had been committed, but because arrestors act at their own peril and because no felony had in fact been committed, their reasonable belief did not absolve them of guilt. *Id.*

<sup>115</sup> See, e.g., *The Law of Citizen's Arrest*, *supra* note 87, at 510–12 (discussing how different jurisdictions handle this restriction and debating the costs and benefits of a strict liability standard for mistakes of fact).

<sup>116</sup> See, e.g., *State v. Adams*, 738 P.2d 988, 990 (Or. Ct. App. 1987) (stating that reasonableness is determined under a totality of the circumstances test, pursuant to which, in the instant case, the length of the detention was unreasonable).

<sup>117</sup> See *id.* (holding that one hour to contact the sheriff was unreasonable); *State v. Miller*, 698 P.2d 554, 556 n.1 (Wash. 1985) (stating that a person may be held only as long as required for a peace officer, merchant, or other agent to conduct an investigation, including time necessary for the alleged shoplifter to either make a statement or refuse to make a statement pertaining to his or her alleged guilt).

<sup>118</sup> See *Adams*, 738 P.2d at 990 (explaining the totality of the circumstances test in conjunction with a one-hour detainment).

<sup>119</sup> See *supra* notes 116–18 and accompanying text.

<sup>120</sup> See, e.g., *Adams*, 738 P.2d at 990.

tain the arrestee and effectuate the arrest.<sup>121</sup> How much force is reasonably required is, of course, subject to much debate and is traditionally viewed under a totality-of-the-circumstances test.<sup>122</sup> This test puts an arrestor on uncertain footing when attempting to detain a suspect, because the arrestor knows that his or her conduct will be examined after the fact for reasonableness, which could result in the arrestee taking legal action against the arrestor.<sup>123</sup> The amount of force required to detain the arrestee—including deadly force—must be weighed against the risk posed to the public in using that force or by allowing the arrestee to escape.<sup>124</sup>

The potential for legal action against the arrestor is a common theme through all the grey areas of the citizen's arrest doctrine, whether in terms of the felony/misdemeanor dichotomy, the probable cause requirement, the temporal reasonableness standard, or the use of force. The consequence is that the doctrine is tremendously difficult for the average citizen to comprehend and to apply. Nearly every jurisdiction in the United States treats the doctrine differently, and most jurisdictions handle it in complicated ways. While law enforcement officers operating outside their jurisdiction and private police officers have some training to guide them through this underbrush, the average citizen generally does not. If this thicket is not proof enough that the ill-defined nature of the citizen's arrest doctrine will continue to be problematic in its current form, severe abuses of the doctrine lend additional support.

### B. *Abuses of Citizen's Arrest*

Some police officers attempt to use the citizen's arrest doctrine as a blanket authorization to arrest anyone for almost anything and eliminate

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<sup>121</sup> See *The Law of Citizen's Arrest*, *supra* note 87, at 508–09 (reviewing the general standards for use of force while recognizing that use of deadly force requires a far less deferential examination).

<sup>122</sup> See *Nelson v. Howell*, 455 So. 2d 608, 611 (Fla. Dist. Ct. App. 1984) (acknowledging that the arrestor has the right to use as much force as necessary to detain a suspect, but maintaining that the reasonableness of the use of deadly force is a question to be determined by a jury based on the facts of the case).

<sup>123</sup> See, e.g., Murray Weiss, *Retired Corrections Officer Shooting Puts Spotlight on Citizen's Arrest Law*, DNAINFO (Mar. 13, 2015, 12:27 PM), <http://www.dnainfo.com/new-york/20150313/downtown-brooklyn/retired-corrections-officer-shooting-puts-spotlight-on-citizens-arrest-law> (noting that the citizen's arrest law in New York sets a high bar for the use of deadly force, requiring an arrestor to retreat when fearing for his or her safety and to use deadly force only when faced with deadly force). The lawful use of deadly force to effectuate a citizen's arrest is extremely limited and requires that an objective, reasonable person would fear for his or her safety, rather than the lower standard of a subjective fear that had previously been required. *Id.*

<sup>124</sup> See *Giant Food, Inc. v. Scherry*, 444 A.2d 483, 486–87 (Md. Ct. Spec. App. 1982) (formulating a reasonableness standard for when the use of deadly force may be appropriate, while recognizing that great caution should be exercised in instances in which innocent third-party bystanders may be put at risk by the arrestor's conduct).

the usual restraints that are placed on an officer's arrest power, such as arresting an individual without actually witnessing the incident. In one instance, an officer had a private citizen sign a blank citizen's arrest form as a precautionary measure to permit the officers to arrest protestors if they became rowdy.<sup>125</sup> The U.S. Court of Appeals for the Ninth Circuit declared the use of the blank citizen's arrest form to be invalid "because the citizen who signed the form did not see [the defendant] describe her alleged offense, or point her out to the police."<sup>126</sup> After concluding that the defendant was not arrested pursuant to a valid citizen's arrest, the arresting officers had the burden to prove that they had probable cause to arrest the defendant, which they ultimately could not show.<sup>127</sup>

In a similar case in Minnesota, police officers argued that an arrest was valid based on the power of citizen's arrest, rather than pursuant to their official authority. The defendant was arrested for driving under the influence after he crashed his car into the citizen arrestor's parked car.<sup>128</sup> The arrestor never had any contact with the defendant other than the initial crash and testified that she did not see the defendant driving.<sup>129</sup> The officers who arrived at the scene concluded that the defendant was drunk and told the arrestor to sign the citizen's arrest form.<sup>130</sup> The arrestor signed the form after the officers explained that they did not have the power to arrest since the offense was not committed in their presence.<sup>131</sup> The court held that the citizen's arrest was invalid because the arresting citizen was not aware that the defendant was intoxicated at the time of the incident or the arrest.<sup>132</sup> Police officers should not be permitted to rely upon a private citizen's arresting power when their own authority is lacking.

Similar to police officers unlawfully expanding their arrest authority, some private arrestors improperly extend the power of citizen's arrest to detain a suspect in order to obtain a confession. One arrestor detained

<sup>125</sup> *Dubner v. City of San Francisco*, 266 F.3d 959, 962 (9th Cir. 2001) (stating that the blank citizen's arrest form provided spaces for the police officers to write in the name of the offender and the offense).

<sup>126</sup> *Id.* at 964.

<sup>127</sup> *Id.* at 965–66 (concluding that the officers did not testify to seeing the defendant at the demonstration or observe the defendant violating any laws).

<sup>128</sup> *State v. Duren*, 123 N.W.2d 624, 626 (Minn. 1963).

<sup>129</sup> *Id.* at 627 (indicating that the arrestor testified that she never talked to the defendant throughout the entire night).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 628 (noting that the officers explained to the private citizen that "she would have to be the one that would make the arrest"). The arrestor testified that she did not "have [any] opinion one way or the other as to whether the defendant was intoxicated or not." *Id.*

<sup>132</sup> *Id.* at 632. According to Minnesota's citizen's arrest statute, the citizen can arrest only for misdemeanors committed in the person's presence. *Id.* at 630–31. Second-hand knowledge of an offense does not meet the in-person requirement, but sensory perception does. *Id.* at 631–32.

the suspect, bound him, hung him from his feet, and struck him while he was questioned about items missing from a shop.<sup>133</sup> Prosecutors charged the defendant-arrestors with false imprisonment, among other things.<sup>134</sup> In response to this charge, the defendants attempted to use citizen's arrest as an affirmative defense.<sup>135</sup> This defense failed; the court concluded that the defendants had detained the suspect in order to "bludgeon a confession out of him or administer his version of vigilante justice."<sup>136</sup> In a similar case, a private arrestor attacked the suspect by punching him, hanging him upside down by his ankles, and commanding his dog to repeatedly attack and bite him as a ploy to get a confession.<sup>137</sup> The arrestor explained that he tied up the suspect "so he would not run away and [so he could] get to the bottom of the recent spate of thefts."<sup>138</sup> In response to a charge of false imprisonment, the private arrestor argued, unsuccessfully, that he believed the suspect had burglarized his home and, therefore, that he was permitted to detain him as part of a valid citizen's arrest.<sup>139</sup> While both private arrestors failed in using citizen's arrest to justify their behavior, the fact that they used the doctrine as a tool of vigilantism highlights its dangers.

In addition to using citizen's arrest as a vigilantism tool, a private arrestor successfully used the doctrine to escape a first-degree murder conviction. In *People v. Whitty*,<sup>140</sup> the decedent had robbed the defendant's store, and the defendant told the police that if he found the perpetrator before the police, he would kill him.<sup>141</sup> The defendant found the robber and attempted to detain him, but he resisted.<sup>142</sup> During this altercation, the defendant shot and killed the perpetrator.<sup>143</sup> The Michigan appellate court overturned and remanded the defendant's murder conviction because the defendant was entitled to a jury instruction on the ability of a private citizen to use force to stop a fleeing felon.<sup>144</sup> Although other states prohibit the use of deadly force by private citizens,<sup>145</sup> Michigan retained the common law doctrine because police "cannot be everywhere

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<sup>133</sup> *McPetrie v. State*, 587 S.E.2d 233, 236 (Ga. Ct. App. 2003).

<sup>134</sup> *Id.* The other charges were kidnapping, aggravated assault, and battery. *Id.*

<sup>135</sup> *Id.* at 237.

<sup>136</sup> *Id.*

<sup>137</sup> *State v. Lisko*, No. 2013AP2132-CR, 2014 Wis. App. LEXIS 917, at \*2 (Ct. App. Nov. 5, 2014).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at \*2-3.

<sup>140</sup> 292 N.W.2d 214 (Mich. Ct. App. 1980).

<sup>141</sup> *Id.* at 216-17.

<sup>142</sup> *Id.* at 217.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 218-19.

<sup>145</sup> *See, e.g., State v. Weddell*, 43 P.3d 987, 991 (Nev. 2002) (indicating that the Nevada Legislature abolished the common law rule allowing a private citizen to use deadly force against a fleeing felon).



that they are needed at once” and sometimes deadly force is required to detain a fleeing felon.<sup>146</sup> For a defendant to be acquitted, he or she must show that his use of deadly force was necessary either in self-defense or to prevent the perpetrator’s escape.<sup>147</sup> Since private citizens do not typically have the same training as police officers, the *Whitty* case exposes the deadly dangers of giving private citizens the authority to act like police officers. Moreover, absolving a man who had expressed his intent to kill another demonstrates the concern with extending the use of deadly force within the citizen’s arrest doctrine.<sup>148</sup> Ultimately, these cases demonstrate the potential for serious abuse that comes with the power of citizen’s arrest, particularly in the hands of private citizens.

### C. *Neighborhood Watch Groups*

Volunteer watch groups present an additional problem within the realm of citizen’s arrest. The Guardian Angels, an organization that began in New York City, is an example of a prominent private citizen’s volunteer watch group. The volunteer organization was founded in 1979 to patrol the New York City subway system.<sup>149</sup> The Guardian Angels focus on deterring crime, reporting violations, and making citizen’s arrests when necessary.<sup>150</sup> The group’s prevalence is due in large part to the relationships it formed with local governmental entities. Mayor Ed Koch at first refused to recognize the group, calling them vigilantes.<sup>151</sup> In 1981, however, Curtis Sliwa, founder of the Guardian Angels, and Robert G.M. Keating, coordinator of criminal justice for Mayor Koch, announced a memorandum of understanding among the Angels, the Police Department, and the Metropolitan Transit Authority, pursuant to which they vowed to “work together cooperatively.”<sup>152</sup> The Angels

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<sup>146</sup> *Whitty*, 292 N.W.2d at 220 (“Elimination or severe curtailment of the citizen’s justifiable use of deadly force would ignore the practical limitations on the ability of law enforcement authorities to arrest every felon.”).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 216–18 (noting that, while the defendant denied that he planned to kill the decedent, the defendant told police officers that he would have killed him).

<sup>149</sup> See *Mission*, GUARDIAN ANGELS, <http://www.guardianangels.org/about/mission> (last visited Jan. 21, 2016) (setting forth the group’s mission statement). The original members rode the subway between the “toughest stops,” unarmed, in order to “find the gang members who had been mugging the straphangers in the subway and detain them for the police to arrest.” *Id.* But see Dennis Jay Kenney, *Crime on the Subways: Measuring the Effectiveness of the Guardian Angels*, 3 JUST. Q. 481, 482 (1986) (“Despite these claims [of a sense of security and crime reduction], many critics of active citizen action have pointed out that historically these groups have a tendency to degenerate into socially destructive forces.”).

<sup>150</sup> See William Robbins, *Effectiveness of Guardian Angels Called Uncertain*, N.Y. TIMES (Aug. 7, 1981), <http://www.nytimes.com/1981/08/07/us/effectiveness-of-guardian-angels-called-uncertain.html>.

<sup>151</sup> See *id.*

<sup>152</sup> *The City; Guardian Angels Get City Recognition*, N.Y. TIMES (May 30, 1981), <http://www.nytimes.com/1981/05/30/nyregion/the-city-guardian-angels-get-city-recognition.html>

agreed to register with the Police Department and to wear identification cards issued by the Department.<sup>153</sup> This agreement provided some legitimacy to the group by showing that the Guardian Angels were loosely connected with the police.<sup>154</sup>

At the same time, an agreement to share information does not guarantee adequate oversight of a private organization. Police officers have expressed their skepticism and concern about the ability of Guardian Angels to effectively intervene in dangerous situations without harming themselves or other citizens.<sup>155</sup> While the Guardian Angels have published training manuals on the subject of citizen's arrest and the use of force surrounding an arrest, their guidelines are overly general and have the potential to be misapplied by members.<sup>156</sup> The *Guardian Angels Use of Force Training Manual: Arrest Force* indicates that force should only be used when necessary, but it provides numerous detailed explanations of tactics to overcome an individual with force.<sup>157</sup> With no guarantee that Guardian Angels members are properly trained, this lack of transparency can lead to tragic results.<sup>158</sup> Moreover, the *Official Guardian Angels Training Book* provides its members only with excerpts from the Nevada citizen's arrest statute, which leaves members in other states guessing as to the legality of their actions in performing a citizen's arrest.<sup>159</sup> In Illi-

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(reporting that the police and the Guardian Angels agreed to share information and remain in contact with each other); see also Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 100 (2011) (describing the memorandum as "an important stabilizing mechanism for the group and arguably lent considerable legitimacy to their activities, even as those activities were deemed controversial"); Robbins, *supra* note 150 ("[Under the agreement,] Mr. Sliwa . . . provided the police with a list of 569 of his members for the department's records, as well as for a check into any possible criminal past. In return, the department [agreed to] issue identification cards bearing photographs that the Angels [had to] wear on patrol.").

<sup>153</sup> *The City: Guardian Angels Get City Recognition*, *supra* note 152.

<sup>154</sup> New York City Mayor Rudolph Giuliani later fully supported the group by including the Guardian Angels in his law and order campaign. See Katharine Q. Seelye, *Giuliani's Angel Posse*, N.Y. TIMES BLOG (Dec. 28, 2007, 6:13 PM), <http://thecaucus.blogs.nytimes.com/2007/12/28/giulianis-angel-posse> (reporting on the small group of Guardian Angels that showed up at forum for Mayor Giuliani in Fort Dodge, Iowa).

<sup>155</sup> Susan Pennell et al., *Guardian Angels: A Unique Approach to Crime Prevention*, 35 CRIME & DELINQ. 378, 389–90 (1989).

<sup>156</sup> See GUARDIAN ANGELS, USE OF FORCE TRAINING MANUAL 2 (2004) ("Arrest Force is only to be used when arresting someone for committing a crime (a misdemeanor crime in your presence or a felony crime with reasonable suspicion)"). This statement is inaccurate because not every state allows citizen's arrest for misdemeanors. See *supra* Part I.B–C.

<sup>157</sup> GUARDIAN ANGELS, *supra* note 156, at 2–52.

<sup>158</sup> See, e.g., *4 Guardian Angels Stabbed While Intervening in Armed Robbery on CTA Red Line*, HUFFINGTON POST (May 16, 2012, 9:53 AM), [http://www.huffingtonpost.com/2012/05/16/4-guardian-angels-stabbed\\_n\\_1520767.html](http://www.huffingtonpost.com/2012/05/16/4-guardian-angels-stabbed_n_1520767.html) (describing an incident in which four Guardian Angels were stabbed while attempting to intervene during an armed robbery).

<sup>159</sup> INT'L ALLIANCE OF GUARDIAN ANGELS, THE OFFICIAL GUARDIAN ANGELS TRAINING BOOK: PATROL MANUAL 11 (2004) (failing to mention that different states have different approaches to citizen's arrest).

nois, for example, a Guardian Angel was arrested for battery while attempting to execute a citizen's arrest to clear the area of gang members.<sup>160</sup>

While the Guardian Angels provide a prevalent example of a private citizen's volunteer watch group, lack of training and potential for abuse are common concerns among these types of organizations.<sup>161</sup> In many situations, these groups are functioning as police officers without the requisite training that police receive. George Zimmerman is a contemporary example of a neighborhood watch group member taking the law into his own hands.<sup>162</sup> Despite instructions from a police dispatcher to refrain from following Trayvon Martin, he continued to pursue the unarmed teenager, eventually killing Martin. A jury acquitted Zimmerman of second-degree murder and the lesser included crime of manslaughter.<sup>163</sup> Citizen patrol groups on the U.S.-Mexico border have also abused the power of citizen's arrest.<sup>164</sup> These groups have been the subject of litigation and unsuccessfully tried to justify their actions via the doctrine of citizen's arrest.<sup>165</sup> The foregoing examples demonstrate the potential

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<sup>160</sup> Desiree Chen, *Guardian Angels End Rogers Park Patrols After Police Run-in*, CHI. TRIB. (July 24, 1991), [http://articles.chicagotribune.com/1991-07-24/news/9103220271\\_1\\_guardian-angels-angels-role-citizen-s-arrest](http://articles.chicagotribune.com/1991-07-24/news/9103220271_1_guardian-angels-angels-role-citizen-s-arrest) (noting that Illinois allows a citizen's arrest only for a felony).

<sup>161</sup> Sharon Finegan, *Watching the Watchers: The Growing Privatization of Criminal Law Enforcement and the Need for Limits on Neighborhood Watch Associations*, 8 U. MASS. L. REV. 88, 105 (2013) ("Despite their prevalence and popularity, [neighborhood watch programs] are rife with challenges. Lack of training, poor organization, tendencies to target certain demographic groups, and overzealous interactions with suspects are common complaints regarding neighborhood watch programs."). "Often, vigilantes lack police training, but are attempting to perform essentially a policing function. Vigilantes also have a personal stake in the problem, rather than the dispassionate professionalism that we would hope for in police." Robinson, *supra* note 20, at 426.

<sup>162</sup> Finegan, *supra* note 161, at 119–20. General tenets of neighborhood watch groups advise against pursuing suspicious persons and advocate contacting law enforcement. See Michael Muskal & Tina Susman, *Rules for Neighborhood Watch Discussed in George Zimmerman Trial*, L.A. TIMES (June 25, 2013), <http://articles.latimes.com/2013/jun/25/nation/la-na-nn-george-zimmerman-neighborhood-watch-20130625>.

<sup>163</sup> Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), <http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html>.

<sup>164</sup> See Peter Yoxall, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 519 (2006) (explaining that while citizen border patrols fulfilled a societal need and "acted within the legal framework of a citizen's arrest," they were often "motivated by racist, xenophobic agendas, and often used violent and abusive tactics that were beyond any permissible self-help privileges").

<sup>165</sup> Brooke H. Russ, *Secrets on the Texas-Mexico Border: Leiva et al. v. Ranch Rescue and Rodriguez et al. v. Ranch Rescue and the Right of Undocumented Aliens to Bring Suit*, 35 U. MIAMI INTER-AM. L. REV. 405, 410–12 (2004) (describing the facts of two cases for assault and false imprisonment where a citizen's border patrol group attempted to rely on the affirmative defense of citizen's arrest).

abuses that stem from affording groups of private citizens the ability to make a citizen's arrest.

If the goal of citizen patrol or neighborhood watch groups is to prevent and deter crime, these goals can still be achieved without the doctrine of citizen's arrest. A study conducted on the Guardian Angels, which covered 672 patrols, indicated that, "during a six-month period, only two citizen arrests were recorded."<sup>166</sup> This figure signifies the minor role that citizen's arrest plays in the activities of the Guardian Angels. Even without the power of citizen's arrest, these groups can function in the same capacity as before.<sup>167</sup> With target patrols, members of the Angels and similar organizations can still act as a powerful deterrent.<sup>168</sup> Other groups and government programs provide additional mechanisms to report suspicious activity without necessitating direct intervention in a given situation.<sup>169</sup> Moreover, the prevalent use of cell phones and other technology allow private individuals to record evidence and report it to the police with very little interaction or involvement.<sup>170</sup>

Further, ordinary citizens still retain other legal tools that allow them to intervene in certain circumstances. In particular, the doctrines of

<sup>166</sup> Pennell et al., *supra* note 155, at 387.

<sup>167</sup> Dana Hedgpath, *DC Guardian Angels Group Says It Will Patrol Metro More This Weekend After Attacks*, WASH. POST (Jan. 8, 2016), <https://www.washingtonpost.com/news/dr-gridlock/wp/2016/01/08/dc-guardian-angels-group-says-it-will-patrol-metro-more-this-weekend-after-attacks> (illustrating that the Guardian Angels can still patrol areas without the ability to effectuate an arrest).

<sup>168</sup> See, e.g., Lisa Finn, *Guardian Angels Patrol Greenport, Say Latino Store Owners Threatened If They Don't Pay Gangs*, SOUTHDOLD LOCAL (Mar. 12, 2015, 8:23 AM), <http://southoldlocal.com/2015/03/12/guardian-angels-patrol-greenport-say-latino-store-owners-threatened-if-they-dont-pay-gangs> ("Businesses that have seen Guardian Angels presence say they no longer have gang members hanging around, intimidating employees or issuing threats."); see also Chris Lisinski, *Have the Guardian Angels Made a Difference in Greenport?*, SUFFOLK TIMES (July 30, 2015, 6:00 AM), <http://suffolktimes.timesreview.com/2015/07/60975/have-the-guardian-angels-made-a-difference-in-greenport> (reporting on the pros and cons of having the Guardian Angels in the community). But see Nikki Usher, *Guardian Angels Return to L.A. Streets*, L.A. TIMES (July 26, 2004), <http://articles.latimes.com/2004/jul/26/local/me-angels26/2> (indicating that Guardian Angels patrols are less valuable in a sprawling city like Los Angeles because there is less of a police presence to provide additional support).

<sup>169</sup> See, e.g., *About Citizen Corps*, CITIZEN CORPS, <http://www.ready.gov/about-citizen-corps> (last visited Jan. 21, 2016) (establishing a network for communities to strengthen public safety and crime prevention); *About Neighborhood Watch*, NAT'L NEIGHBORHOOD WATCH, <http://www.nnw.org/about-neighborhood-watch> (last visited Jan. 21, 2016) (encouraging citizens to be an extra set of "eyes and ears" for law enforcement in reporting suspicious activity); *National Strategy*, U.S. DEP'T OF JUSTICE, [http://www.amberalert.gov/ntl\\_strategy.htm](http://www.amberalert.gov/ntl_strategy.htm) (last visited Jan. 21, 2016) (encouraging community involvement to help locate missing children).

<sup>170</sup> Most of the media coverage has focused on the recording of police interactions with private citizens. See, e.g., Farhad Manjoo & Mike Isaac, *Phone Cameras and Apps Help Speed Calls for Police Reform*, N.Y. TIMES (Apr. 8, 2015), <http://www.nytimes.com/2015/04/09/technology/phone-cameras-and-apps-help-speed-calls-for-police-reform.html>. Nevertheless, this technology can also be used to help in police investigations.

self-defense,<sup>171</sup> defense of others,<sup>172</sup> and defense of property<sup>173</sup> all permit citizens to legally protect themselves and others. These defenses generally allow an individual to intervene and use proportional force.<sup>174</sup> The difference between these protective doctrines and the power of citizen's arrest is that citizen's arrest gives private citizens the power to detain a suspect. This additional power alone necessitates a determination of what kind of crime was committed, whether probable cause existed to detain the suspect, whether the suspect was detained for a reasonable amount of time, and whether the arrestor used reasonable force, further complicating the doctrine of citizen's arrest. The doctrines of self-defense, defense of others, and defense of property allow individuals to protect themselves or others without the additional confusion and legal nuances of detaining a suspect within the parameters of citizen's arrest. Ultimately, private citizens, alone or together, do not need the doctrine of citizen's arrest to keep their communities safe.

### III. GOOD APPLICATIONS OF CITIZEN'S ARREST

A private citizen's ability to arrest another inherently creates legally tenuous confrontations. However, certain forms of citizen's arrest are less controversial than others, reflecting a communal understanding that some exercises of the doctrine are safer and more appropriate. These specific variations of citizen's arrest function to further societal goals with minimal risk of abuse.

#### A. *Shopkeeper's Privilege*

One beneficial form of citizen's arrest is commonly referred to as the shopkeeper's privilege, which allows a retail merchant to detain suspected shoplifters until their guilt can be definitively ascertained.<sup>175</sup>

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<sup>171</sup> See generally 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 132 (2014) (allowing the use of force as self-defense generally when three conditions are present: the initial aggressor must have used unlawful force against the individual, the responding force must be necessary, and the responding force must be reasonable and proportionate under the circumstances).

<sup>172</sup> See generally *id.* § 133 (allowing the use of force to defend another generally when three conditions are present: the initial aggressor must have used unlawful force against another person, the responding force must be necessary to protect that person, and the responding force must be reasonable and proportionate under the circumstances).

<sup>173</sup> See generally *id.* § 134 (allowing the use of force to defend property generally when three conditions are present: the initial aggressor must have used unlawful force threatening one's property, the responding force must be necessary to protect that property, and the responding force must be reasonable and proportionate under the circumstances).

<sup>174</sup> See *supra* notes 171–73 (highlighting the similarities among the three defenses, including that each allows a reasonable and proportional force in response to unlawful force by an initial aggressor).

<sup>175</sup> See, e.g., ALA. CODE § 15-10-14(a) (2015) (“[A] merchant or merchant’s employee who has probable cause that goods . . . have been unlawfully taken . . . may . . . take the person into custody and detain him in a reasonable manner.”); IND. CODE § 35-33-6-2(a)(1)(A) (2015)

Shopkeeper's privilege statutes arose as a result of a dilemma faced by merchants: whether to absorb the loss by turning a blind eye to a suspected shoplifter or to apprehend the suspect, risking a lawsuit if the shopkeeper's reasonable beliefs turn out to be erroneous or cannot be proven in court.<sup>176</sup> Similar to the citizen's arrest doctrine as a whole, the shopkeeper's privilege is recognized by courts in some jurisdictions and codified in others.<sup>177</sup> Several general precepts of the shopkeeper's privilege are widely followed and accepted as appropriate uses of citizen's arrest power. These precepts, which are similar to those to which private citizens are subject, are the level of suspicion, the amount of time a suspect is detained, and the manner in which the suspect is detained.<sup>178</sup>

The first tenet guiding shopkeepers is the level of suspicion required before detaining a suspect. Under both the common law and most statutory provisions, a shopkeeper's reasonable grounds for detaining a suspect tracks closely with the standard notion of probable cause.<sup>179</sup> Probable cause generally entails a good faith belief or reasonable grounds to believe that a suspect has attempted or committed shoplifting

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("[A]n owner or agent of a store who has probable cause to believe that a theft has occurred . . . and who has cause to believe that a specific person has committed or is committing the theft may detain the person and request the person to identify himself or herself."); R.I. GEN. LAWS § 11-41-21(b) (2015) ("Any merchant who observes any person concealing or attempting to conceal merchandise on his person . . . may detain the person for a reasonable time sufficient to summon a police officer to the premises.").

<sup>176</sup> See generally Robert A. Brazener, Annotation, *Construction and Effect, in False Imprisonment Action, of Statute Providing for Detention of Suspected Shoplifters*, 47 A.L.R. 3d 998 (1973 & Supp. 2012) (providing an overview of shopkeeper's privilege statutes).

<sup>177</sup> See, e.g., *State v. Santiago*, 217 P.3d 89, 98 (N.M. 2009) (recognizing the existence of a common law shopkeeper's privilege); *State v. Garcia*, 193 P.3d 181, 184–85 (Wash. Ct. App. 2008) (asserting the common law shopkeeper's privilege even in a state that has also codified the doctrine, illustrating how the shopkeeper's privilege is one area in which common law and codification approaches are often indistinguishable).

<sup>178</sup> See *supra* note 175 (highlighting selected statutory provisions addressing the shopkeeper's privilege).

<sup>179</sup> See ALA. CODE § 15-10-14(a) ("[A] merchant or merchant's employee who has probable cause . . ."); IND. CODE § 35-33-6-2(a)(1)(A) ("An owner or agent of a store who has probable cause . . ."); *Sauceda v. United States*, No. CV-07-2267-PHX-DGC, 2009 U.S. Dist. LEXIS 103363, at \*10–11 (D. Ariz. Nov. 5, 2009) (noting that, in Arizona, the reasonable grounds required under the shopkeeper's privilege mirror the probable cause required for a private person to make a citizen's arrest). *But see Henry v. J.C. Penney Co.*, No. 01-99-00739-CV, 2000 Tex. App. LEXIS 2461, at \*14 (Tex. App. Apr. 13, 2000) (stating that the reasonable cause standard for an investigative detention requires something less than probable cause).

or theft.<sup>180</sup> Probable cause for detention is usually determined on a case-by-case basis<sup>181</sup> and can take on creative forms.<sup>182</sup>

The reasonable grounds standard is more deferential to shopkeepers than it is in normal instances of citizen's arrest due to the narrow, controlled nature of the relationship between a shopkeeper and a customer. The shopkeeper has in-depth knowledge of his or her premises and inventory, has a financial motivation to thwart potential shoplifters, and generally has no concurrent motivation to wrongfully detain a customer. Put differently, the shopkeeper gains nothing—and likely loses business overall—by detaining innocent customers.

The second tenet of shopkeeper's privilege is a merchant's ability to detain a suspect for a reasonable period of time.<sup>183</sup> Courts are hesitant to enunciate precisely what constitutes a reasonable amount of time,<sup>184</sup> but it is generally considered to be the amount of time it takes to sufficiently investigate the suspect and determine whether he or she has committed a crime.<sup>185</sup> This standard is largely deferential to the shopkeeper.<sup>186</sup>

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<sup>180</sup> See *Pasquinelli v. Target Corp.*, No. 2:08-CV-163-TS, 2009 U.S. Dist. LEXIS 117331, at \*22 (N.D. Ind. Dec. 15, 2009) (indicating that probable cause requires only a substantial probability of criminal activity, not actual proof that the activity occurred (citing *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983))). Compare *Moore v. Federated Retail Holdings, Inc.*, No. 6:07-cv-1557-Orl-31GJK, 2009 U.S. Dist. LEXIS 3500, at \*11–12 (M.D. Fla. Jan. 20, 2009) (“Probable cause need not be based on firsthand knowledge and the receipt of information from someone whom it seems reasonable to believe is telling the truth is adequate.”), with *Cruz v. Johnson*, 823 A.2d 1157, 1160–61 (R.I. 2003) (stating that the privilege to detain a suspected shopkeeper exists only if a merchant or its agent actually observes any person shoplifting or attempting to shoplift).

<sup>181</sup> See *Guijosa v. Wal-Mart Stores, Inc.*, 6 P.3d 583, 592 (Wash. Ct. App. 2000) (holding that the probable cause requirement under a Washington statute was to be treated as a question of fact determined on a case-by-case basis).

<sup>182</sup> See *Snyder v. Kohl's Dep't Stores, Inc.*, 580 F. App'x 458, 459 (6th Cir. 2014) (determining that observing a suspect in a high-theft area contributed to probable cause); *Riley v. Wilbanks*, No. 4:12cv62, 2013 U.S. Dist. LEXIS 58343, at \*11 (E.D. Tex. Apr. 24, 2013) (finding probable cause when a woman placed her finger over a barcode to prevent the register from scanning); *Moore*, 2009 U.S. Dist. LEXIS 3500, at \*13–14 (deciding that a man wearing a fleece jogging suit on a hot day, coupled with a visible price tag, sufficed as probable cause).

<sup>183</sup> See *Guijosa*, 6 P.3d at 592–93 (holding that a reasonable amount of time to detain a suspected shoplifter is to be determined on the facts of each case, but that the twenty to thirty minutes the suspect was detained was reasonable because the shopkeeper was engaging in an investigation of possible shoplifting while also waiting for the police to arrive to question the suspect).

<sup>184</sup> See *Wal-Mart Stores, Inc. v. Resendez*, 962 S.W.2d 539, 540 (Tex. 1998) (deciding the temporal reasonableness of the current detention without indicating the outer parameters of a permissible time period for detention).

<sup>185</sup> See *Raiford v. May Dep't Stores, Inc.*, 2 S.W.3d 527, 529 (Tex. App. 1999) (stating that a reasonable amount of time is determined by how long it takes to search the suspect, check the store inventory, and await the arrival of police to investigate the suspect further).

<sup>186</sup> See *Wal-Mart Stores, Inc. v. Cockrell*, 61 S.W.3d 774, 778 (Tex. App. 2001) (stating that the burden of proof to establish that a detainment was unreasonable is on the suspect, and that a shopkeeper would be presumptively reasonable in detaining a suspect until the suspect's guilt or innocence could be ascertained). But see *Pasquinelli v. Target Corp.*, No. 2:08-CV-

The final tenet of the shopkeeper's privilege is that the detention must be conducted in a reasonable manner.<sup>187</sup> The use of force is one factor that contributes to detaining a suspected shoplifter in a reasonable manner.<sup>188</sup> Use of force in the realm of shopkeeper's privilege is treated the same as with citizen's arrests in general—the arrestor may use force to ensure the detainment of the arrestee, but only such force as is required to prevent the arrestee's escape.<sup>189</sup> Courts usually assess whether the force used was reasonable on a case-by-case basis.<sup>190</sup> Allowing the use of reasonable force makes sense; shoplifters caught in the act are unlikely to comply while waiting for the police to arrive.<sup>191</sup>

Another factor contributing to the detention of a suspected shoplifter in a reasonable manner involves whether the suspect was embarrassed, harassed, or humiliated during the detention process. Some jurisdictions hold that a shopkeeper's privilege defense can be negated if a suspect is harassed or is treated with rudeness.<sup>192</sup> Further, a shop-

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163-TS, 2009 U.S. Dist. LEXIS 117331, at \*25 (N.D. Ind. Dec. 15, 2009) (noting that the Indiana Shoplifting Detention Act dictates that a detention must last a reasonable time, and not extend beyond the arrival of law enforcement or two hours, whichever happens first); *Rhymes v. Winn-Dixie La. Inc.*, 58 So. 3d 1068, 1069–70 (La. Ct. App. 2011) (stating a reasonable amount of time cannot exceed sixty minutes, unless it is reasonable under the circumstances to detain the suspect longer).

<sup>187</sup> See *Commonwealth v. Rogers*, 945 N.E.2d 295, 305 (Mass. 2011) (stating that most state shopkeeper's privilege statutes contain the phrase "in a reasonable manner" to describe a detention).

<sup>188</sup> See *Guijosa*, 6 P.3d at 591 ("[T]he authority to make the arrest . . . must necessarily carry with it the privilege of using all reasonable force to effect it." (quoting *State v. Miller*, 698 P.2d 554, 795 (Wash. 1985))); *Hainz v. Shopko Stores, Inc.*, 359 N.W.2d 397, 401 (Wis. Ct. App. 1984) (concluding that a reasonable manner does not allow using unjustifiable force or physical detention in a dark room).

<sup>189</sup> See *Gortarez v. Smitty's Super Valu, Inc.*, 680 P.2d 807, 814–15 (Ariz. 1984) (holding that a shopkeeper must first demand return of the stolen property before resorting to physical force and that, even then, the force used must be evaluated under a reasonableness standard given all the circumstances of the case and must not be "calculated to inflict serious bodily harm"); see also LA. CODE CRIM. PROC. ANN. art. 215(A)(1) (2014) ("A . . . merchant . . . may use reasonable force to detain a person for questioning on the merchant's premises . . ."); MINN. STAT. § 629.366(1)(c) (West 2015) ("The person detained shall . . . not be subjected to unnecessary or unreasonable force . . .").

<sup>190</sup> Compare *Ferdinand v. Save-A-Lot/Supervalu*, No. 07-3305, 2008 U.S. Dist. LEXIS 30683, at \*16 (E.D. Pa. Apr. 14, 2008) (deciding that grabbing a suspect's hand to stop her from leaving with shoplifted merchandise was reasonable), with *Altman v. Knox Lumber Co.*, 381 N.W.2d 858, 863 (Minn. Ct. App. 1986) (holding that a jury could easily conclude that unreasonable force was used when a twenty-eight-year-old weightlifter pinned a seventy-three-year-old man to his chair because he refused to surrender his utility knife).

<sup>191</sup> See *Rogers*, 945 N.E.2d at 306 (noting that the shopkeeper's privilege would be meaningless without the ability to use reasonable force).

<sup>192</sup> See *Poole v. City of Prentiss*, No. 2:07cv74-KS-MTP, 2008 U.S. Dist. LEXIS 62795, at \*7 (S.D. Miss. Aug. 14, 2008) (stating that the Mississippi Supreme Court has ruled that the shopkeeper's privilege does not give a merchant the right to embarrass or harass a suspect in a rude public manner); *Adams v. Zayre Corp.*, 499 N.E.2d 678, 685 (Ill. App. Ct. 1986) (indicating that rudeness and harassment of suspects are factors that can lead to a finding of unreasonableness); *Hainz v. Shopko Stores, Inc.*, 359 N.W.2d 397, 400 (Wis. Ct. App. 1984) (stating



keeper's detention of a suspect can be unreasonable if it occurs outside the immediate vicinity of the retail location.<sup>193</sup>

The deference shown by courts and legislatures, however, does not grant shopkeepers *carte blanche* to detain suspects without fear of legal reprisal. Careless merchants can be found liable for false imprisonment if they wrongfully or unreasonably detain a suspect.<sup>194</sup> This relates to the general public policy surrounding the shopkeeper's privilege. Shopkeepers have the benefit of the doubt when detaining a suspect for a reasonable amount of time based on probable cause. But they lose this presumption when the arrest takes place off the premises, or when excessive force is used to detain a suspect.

Shopkeepers can protect themselves against wrongful imprisonment and other criminal and civil charges by having the suspect sign a voluntary waiver.<sup>195</sup> This waiver acts as a *quid pro quo*, absolving the merchant of civil liability for false imprisonment in return for absolving the alleged shoplifter of criminal charges.<sup>196</sup> Such a waiver allows for the detention of a suspect until his or her actual guilt is ascertained, but without the use of force to effectuate a citizen's arrest. One crucial aspect of the waiver, however, is that it must be voluntary; the suspect cannot be coerced into signing it.<sup>197</sup> If the alleged offender is led to believe that he or she will not be allowed to leave the premises unless the waiver is signed, it is deemed overly coercive and therefore not enforceable.<sup>198</sup> Thus, while an alleged shoplifter can voluntarily waive the right to bring false imprisonment claims later, he or she cannot be coerced into

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that, where the reasonableness of a suspect's detention is raised, the inquiry focuses partially on whether the shopkeeper's behavior was rude to the point of public embarrassment).

<sup>193</sup> See OHIO REV. CODE ANN. § 2935.041(A) (LexisNexis 2015); *Guijosa*, 6 P.3d at 589–90 (noting that the requirement that a suspect still be on the premises is an integral and indispensable aspect of the shopkeeper's privilege).

<sup>194</sup> See *H.E. Butt Grocery Co. v. Saldivar*, 752 S.W.2d 701, 704 (Tex. App. 1988) (sustaining a false imprisonment claim on the ground that the suspect was not detained “under authority of law” because the shopkeeper did not have sufficient reasonable grounds or probable cause to believe that the suspect was guilty of a crime).

<sup>195</sup> See, e.g., 11 R.I. GEN. LAWS § 11-41-21(c)(1) (2015) (allowing a shopkeeper to “request a person detained for shoplifting to sign a statement waiving his or her right to bring a civil action arising from the detention in return for a signed statement from the merchant waiving the right to bring criminal charges based upon the alleged shoplifting”).

<sup>196</sup> See *id.* (providing that any written statement must clearly notify the alleged shoplifter of his or her right to remain silent and the right to call an attorney before signing or agreeing to any such waiver).

<sup>197</sup> See *Bourque v. Stop & Shop Cos.*, 814 A.2d 320, 323 (R.I. 2003) (holding that a waiver provided by the store exceeded what was allowed under § 11-41-21(c)(1) of title 11 of the Rhode Island General Laws because it required the alleged shoplifter to admit to some form of wrongdoing by signing the document).

<sup>198</sup> See *id.* at 324 (noting that the “defendant's security personnel pressured plaintiff into signing the release by leading her to believe that she had to sign it before she would be allowed to leave the store”).

signing a waiver that contains a confession to a crime.<sup>199</sup> If the suspect is unwilling to be detained for a reasonable amount of time, the *quid pro quo* waiver is another option at the merchant's disposal.

The elements of shopkeeper's privilege serve to curtail the abuses of the citizen's arrest doctrine. The lack of incentive to wrongfully detain customers, coupled with time, place, and manner limitations, support the conclusion that shopkeeper's privilege statutes should be treated as appropriate exercises of the citizen's arrest doctrine.

### B. *Police Outside of Jurisdiction*

A police officer acting without a warrant outside of his jurisdiction is permitted to arrest when in hot pursuit of a suspect.<sup>200</sup> Absent the circumstances of hot pursuit, however, the authority to make extra-jurisdictional arrests is not as apparent. Some states, through common law jurisprudence, uphold a warrantless arrest by a police officer outside of his jurisdiction if a private citizen in that situation would have been permitted to make a lawful citizen's arrest.<sup>201</sup> Other states have opted to enact statutory provisions specifying the occasions in which an officer may make an arrest outside of his jurisdiction. Pennsylvania, for example, established a statewide municipal police jurisdiction, which bestowed some police power to Pennsylvania officers when outside of their primary jurisdictions.<sup>202</sup> The Supreme Court of Pennsylvania applauded the statutory objective, stating that it "fosters local control over the po-

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<sup>199</sup> See *id.* at 323–24 (finding that security personnel went too far when one of them explicitly stated, "You can't go. You got to sign this.").

<sup>200</sup> See *Warden v. Hayden*, 387 U.S. 294, 298–99 (1967) (upholding a warrantless search of the premises and arrest of the defendant because the officers had been informed that an armed robbery had taken place and that the suspect had entered the premises "less than five minutes before they reached it"). The Supreme Court noted that "[s]peed here was essential" because the police needed to ascertain quickly whether the suspect was still in the house and whether there were other accomplices on the premises or weapons that could be used to harm the officers or to be used in an escape. *Id.*

<sup>201</sup> See *State v. Stevens*, 603 A.2d 1203, 1208 (Conn. App. Ct. 1992) (acknowledging that police officers acting extraterritorially generally have the same authority as private citizens), *aff'd*, 620 A.2d 789 (Conn. 1993); *City of Missoula v. Iosefo*, 330 P.3d 1180, 1181, 1183–84 (Mont. 2014) (noting that an off-duty police officer's observation of the defendant's erratic driving allowed the police officer to make a lawful citizen's arrest based on the threat to public safety); *State v. Updegraff*, 267 P.3d 28, 32 (Mont. 2011) ("[I]n order to make a warrantless arrest, an out-of-jurisdiction officer must meet the arrest standard that would apply to a private person in the same circumstances, but if . . . this standard is met, the officer may then follow the procedures applicable to peace officers in processing the arrest.").

<sup>202</sup> 42 PA. CONS. STAT. ANN. § 8953(1)–(6) (2015) (authorizing extra-jurisdictional arrests in six instances: (1) pursuant to a court order; (2) when "the officer is in hot pursuit of any person for any offense which was committed . . . within his primary jurisdiction;" (3) "to aid or assist [another] law enforcement officer;" (4) when the officer obtains the other jurisdiction's prior consent; (5) when the officer is "on official business and views an offense, or has probable cause to believe . . . a felony, misdemeanor, breach of the peace or other act which presents an immediate clear and present danger [has been committed];" and (6) when the

lice, and discourages extra-territorial forays by outside law enforcement officers who are not subject to the control of the municipality: certainly a laudable goal.”<sup>203</sup> Courts have interpreted the statute broadly and generally upheld extra-jurisdictional arrests.<sup>204</sup>

Similarly, Ohio enacted a statute that addresses extra-jurisdictional arrest, but it is more restrictive than Pennsylvania’s law.<sup>205</sup> Three requirements must be met before an officer in Ohio can effectuate an extra-jurisdictional arrest: (1) the officer must pursue the offender without unreasonable delay after the offense is committed; (2) the offense must be committed within the officer’s jurisdiction; and (3) the offense must be a felony, misdemeanor, or any offense chargeable pursuant to section 4510.036 of the Revised Code (dealing with motor vehicle violations).<sup>206</sup> Consequently, the officer must possess reasonable suspicion or probable cause of criminal conduct within his or her own jurisdiction, otherwise the subsequent stop and arrest would be improper under the extra-jurisdictional statute.<sup>207</sup> Pennsylvania and Ohio enacted these provisions to avoid impeding the duties of law enforcement officers, as well as to provide explicit accountability for officers making extra-jurisdictional arrests.

Despite the general rule that a police officer acting outside his jurisdiction essentially acts like a private citizen in making arrests, the officer is still limited by constitutional requirements, particularly the Fourth Amendment, even though a private citizen would not be similarly restricted.<sup>208</sup> In addition, some states hold that the use of the indicia of the office or the apparent authority of police officers precludes the use of the state’s private citizen arrest statute to validate the extra-jurisdictional ar-

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officer “views an offense which is a felony, or has probable cause to believe . . . a felony has been committed”).

<sup>203</sup> Commonwealth v. Merchant, 595 A.2d 1135, 1138 n.7 (Pa. 1991).

<sup>204</sup> See, e.g., *id.* at 1138 (applying the rules of statutory construction before concluding that the Act should be liberally construed); Commonwealth v. Sestina, 546 A.2d 109, 112 (Pa. Super. Ct. 1988) (stating that the Act must be liberally construed because its purpose is to expand rather than limit local police power); Commonwealth v. Ebersole, 492 A.2d 436, 438 (Pa. Super. Ct. 1985) (deciding that the statute must be liberally construed to effectuate its purpose and promote justice).

<sup>205</sup> OHIO REV. CODE ANN. § 2935.03(D) (LexisNexis 2015).

<sup>206</sup> *Id.*

<sup>207</sup> See State v. Coppock, 659 N.E.2d 837, 841–42 (Ohio Ct. App. 1995) (finding that the officer failed to comply with Ohio’s extra-jurisdictional arrest statute because the officer did not obtain probable cause that the defendant was intoxicated until outside of his jurisdiction). In addition, the officer violated the statute because he did not initiate his pursuit of the defendant until he was outside of his territorial boundaries. *Id.* at 842. The officer testified that he decided to stop the defendant once she was outside of his jurisdiction and that, prior to that point, he was “just observing her.” *Id.*

<sup>208</sup> See, e.g., Graham v. State, 406 So. 2d 503, 505 (Fla. Dist. Ct. App. 1981) (invalidating an extra-jurisdictional arrest of the suspect because the officers had made a warrantless entry into his home in making the arrest).

rest. The Supreme Court of Illinois, for example, determined that an officer's use of a radar gun invalidated an otherwise lawful extra-jurisdictional arrest because radar guns were limited to the use of police officers and "was an assertion of the officer's police authority."<sup>209</sup> A District Court of Appeal in Florida invalidated an extra-jurisdictional arrest for growing and possessing marijuana. The officers did not obtain the evidence for the arrest until they gained entrance to the defendant's motel room pursuant to their official position as police officers.<sup>210</sup> The court concluded that the defendant did not let the officers into his motel room as private citizens, but rather as police officers, since the officers were dressed in their uniforms.<sup>211</sup> If the officers in this case had been undercover and not dressed in their official uniform, the arrest would have been upheld as a viable citizen's arrest.<sup>212</sup> A subsequent ruling clarified that an officer is permitted to make an extra-jurisdictional arrest even if dressed in uniform, but only if the evidence for making the arrest could have been obtained by a private citizen.<sup>213</sup> As these cases illustrate, courts believe that police officers making arrests outside of their jurisdiction, even when abiding by state authority, are not truly private citizens and, therefore, cannot rely on the doctrine of citizen's arrest. However, if an officer does not rely on his or her authority as a law enforcement officer, but instead acts as a private citizen, then he or she can make an extra-jurisdictional arrest.

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<sup>209</sup> *People v. Lahr*, 589 N.E.2d 539, 541 (Ill. 1992). The court noted that it was possible for a private citizen to obtain a radar gun, but dismissed this notion as a remote possibility. *Id.*

<sup>210</sup> *Collins v. State*, 143 So. 2d 700, 702–03 (Fla. Dist. Ct. App. 1962). Once the officers entered the room, they saw a marijuana plant in plain view and seized other incriminating evidence after searching the room. *Id.* at 702.

<sup>211</sup> *Id.* at 703 (indicating that the officers showed up at the defendant's door in uniform "signifying their official position as police officers").

<sup>212</sup> *Cf. State v. Crum*, 323 So. 2d 673, 674 (Fla. Dist. Ct. App. 1975) (noting that the officer was not wearing a uniform and was working undercover at the time of the arrest before concluding that the officer "was substantially in the same position as any private citizen"). In this case, the defendant wanted to suppress the evidence collected subsequent to his arrest on the grounds that the officer had no authority to make the extraterritorial arrest. *Id.* at 673. The court concluded that the officer had held himself out as a private citizen and had not used his official powers as a police officer in making the arrest or collecting the incriminating evidence. *Id.* at 674.

<sup>213</sup> *See State v. Phoenix*, 428 So. 2d 262, 266 (Fla. Dist. Ct. App. 1982) ("When officers outside their jurisdiction have sufficient grounds to make a valid citizen's arrest, the law should not require them to discard the indicia of their position before chasing and arresting a fleeing felon."); *see also State v. Williams*, 366 So. 2d 135, 136–37 (Fla. Dist. Ct. App. 1979) (acknowledging that, while the officer was outside of his jurisdiction and dressed in his uniform at the time of the arrest, the evidence needed for the arrest was acquired merely by looking for and finding the vehicle that matched the license plate number of the getaway car used in a robbery—information that also would have been readily available to a private citizen).

### C. *Private Police Forces*

The privatization of police forces reflects a societal desire to accomplish public law enforcement tasks at a local level.<sup>214</sup> Companies hire security guards to protect their business premises, investigate crimes, and deter criminal behavior.<sup>215</sup> Colleges and shopping malls hire guards to patrol the campus grounds and monitor shoppers in department stores.<sup>216</sup> Private police forces are employed in response to the failures of the public criminal justice system and an overall diminished police presence in certain areas.<sup>217</sup> Neighborhoods armed with ample resources hire private police forces to patrol and protect their communities.<sup>218</sup> Ensuring a sense of safety and security, private police forces fill a gap that public police officers often cannot fill.<sup>219</sup>

At the same time, these groups operate in a grey area of the law in which the only oversight stems from the desires and needs of their employers.<sup>220</sup> Private police forces are subject to tort and criminal law doctrines such as assault, trespass, and false imprisonment, instead of the constitutional requirements that govern public police conduct.<sup>221</sup> Moreover, these private security officers undergo little, if any, security or weapons training and often are not instructed on proper arrest procedures or limitations on their power.<sup>222</sup> As a result, the actions of private police

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<sup>214</sup> Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 917 (2007) (“[P]rivate police’ are everywhere: conducting residential security patrols; monitoring shoppers in department stores; safeguarding warehouses; patrolling college campuses and shopping malls; and guarding factories, casinos, office parks, schools, and parking lots.”).

<sup>215</sup> See generally Finegan, *supra* note 161, at 98–99 (describing the current trend toward employing for-profit officers to provide additional security to areas in which public police resources are inadequate).

<sup>216</sup> See, e.g., Jeffrey S. Jacobson, *The Model Campus Police Jurisdiction Act: Toward Broader Jurisdiction for University Police*, 29 COLUM. J.L. & SOC. PROBS. 39, 46 (1995) (describing the evolution of campus police in the United States); Michael Barbaro, *Hot Off the Shelves: Shoplifting Gangs Are Retailing’s Top Enemy*, N.Y. TIMES (Nov. 8, 2005), [http://www.nytimes.com/2005/11/08/business/08theft.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2005/11/08/business/08theft.html?pagewanted=all&_r=0) (discussing retail security efforts).

<sup>217</sup> See Simmons, *supra* note 214, at 924 (“Both the shift in attitude regarding public and private police and the dramatic growth in the private security industry can be traced to the failure of the public criminal justice system to satisfy the needs of the citizens.”).

<sup>218</sup> See Finegan, *supra* note 161, at 100–06 (addressing an overall dissatisfaction with public policing).

<sup>219</sup> See Simmons, *supra* note 214, at 924 (“Frequently, the reason for turning to private law enforcement may be dissatisfaction not only with the level of response but also with the *outcome* or the *method* of response.”).

<sup>220</sup> *Id.* at 924–25 (contrasting the goals of public law enforcement with the goals of private actors). While “ensuring a fair and just criminal justice process” is a goal of public law enforcement, it is not likely a key objective of private security groups. See Finegan, *supra* note 161, at 100.

<sup>221</sup> Finegan, *supra* note 161, at 106 (“The Fourth, Fifth, Sixth, and Fourteenth Amendments all limit an officer’s ability to intrude upon the civil liberties of a criminal suspect.”).

<sup>222</sup> See *id.* at 99.

officers are not restricted in the same way and do not have the same oversight as the actions of public police officers.<sup>223</sup> To be sure, private policing has sometimes compromised private citizen's rights.<sup>224</sup>

Since private security forces are not employed by the state, they are not subject to the same constitutional limitations as the police.<sup>225</sup> But these entities could gain accountability if legislatures enacted specific laws to govern their activities or if public law enforcement authorities entered into agreements with the private actors operating within their jurisdictions. While private security groups are somewhat unregulated (since, for example, they are not required to report the number of stops and arrests made),<sup>226</sup> their activities are confined to the oversight of their private employers.

Although private police forces generate the potential for abuse, their presence and function arguably are greatly needed.<sup>227</sup> By limiting their power and instituting a comprehensive framework that includes increased training and oversight, these groups can become more effective and reliable. Currently, these actors receive little pay, as the positions often do not require a high level of training or education.<sup>228</sup> Private police forces could become more acceptable by increasing the required training of their personnel to, for instance, 400 hours or more—roughly

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<sup>223</sup> Joan E. Marshall, Comment, *The At-Will Employee and Coerced Confessions of Theft: Extending Fifth Amendment Protection to Private Security Guard Abuse*, 96 DICK. L. REV. 37, 44–45 (1991) (“When faced with issues of private security misconduct, most courts have held that the actions of private security agents are private actions, and thus the Fourth, Fifth, and Fourteenth Amendments do not apply.”); see also *Commonwealth v. Corley*, 491 A.2d 829, 830 (Pa. 1985) (finding that the exclusionary rule does not suppress evidence obtained by a private security officer executing a citizen's arrest); *Commonwealth v. Green*, 63 Pa. D. & C.2d 388, 392 (Ct. Com. Pl. 1973) (deciding that private security guards are not required to give *Miranda* warnings when questioning individuals).

<sup>224</sup> See generally Marshall, *supra* note 223, at 44–47 (providing examples of private security agents abusing their powers, such as interrogating and threatening employees who were accused of stealing from the company).

<sup>225</sup> See Finegan, *supra* note 161, at 105–07 (arguing that private citizens effectuating citizen's arrests do not require the same level of suspicion that a police officer must have in order to “justify an intrusion into an individual's freedom of movement”). Procedural safeguards exist to ensure that public police officers conform their conduct to the rules of criminal procedure. *Id.* at 111.

<sup>226</sup> See David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1278–79 (1999) (arguing that states should require private police groups to “file regular, public reports on their activities”). Information regarding the number of individuals questioned, the type of searches conducted, or the number of suspects handed over to the police are important to hold these groups accountable for their actions. *Id.*

<sup>227</sup> While it is clear that private police forces need to have more oversight and undergo more hours of training, they have become an integral part of our society, and as such often provide essential services in places in which the public police simply do not have adequate resources to operate.

<sup>228</sup> See Manuel Gamiz, Jr., *Private Security Industry Grows as Pay Rate Stays Flat*, MORNING CALL (Mar. 9, 2008), <http://www.mcall.com/business/outlook/all-security-030908-story.html>.

half that of public police officers.<sup>229</sup> Increased training can ensure that private police are able to perform their jobs in an appropriate and responsible manner. As discussed in the next section, the Virginia Legislature has enacted a statute that puts the Commonwealth in the forefront of providing accountability for private police forces.<sup>230</sup>

#### D. *Special Conservators of the Peace*

Recognizing the increased role of non-traditional actors in law enforcement, Virginia created the legal designation of “Special Conservator of the Peace” (“SCOP”) to grant legal authority to private actors and, most importantly, to make them accountable to the public.<sup>231</sup> Citizens or legal aliens at least eighteen years of age must submit an application to their local circuit courts for approval and must meet several requirements before they can be appointed as a SCOP.<sup>232</sup> Recently, the Virginia Legislature passed a bill affecting the training and regulation of the SCOPs; the number of training hours increased from 40 to 130,<sup>233</sup> and SCOP candidates are required to register with the Department of Criminal Justice Services for fingerprinting, drug testing, and background checks.<sup>234</sup> The training includes a basic overview of criminal law, specifying the elements of certain crimes; Virginia law and regulations regarding SCOPs; proper firearm and shotgun handling; and the use of deadly force.<sup>235</sup>

The approval order issued by the judge<sup>236</sup> states that the SCOP has “all the powers, functions, duties, responsibilities and authority of any other conservator of the peace,” and defines the geographical boundaries of the SCOP’s authority.<sup>237</sup> In other words, in the jurisdiction, which in

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<sup>229</sup> See Justin Jouvenal, *Private Police Carry Guns and Make Arrests, and Their Ranks Are Swelling*, WASH. POST (Feb. 28, 2015), [http://www.washingtonpost.com/local/crime/private-police-carry-guns-and-make-arrests-and-their-ranks-are-swelling/2015/02/28/29f6e02e-8f79-11e4-a900-9960214d4cd7\\_story.html](http://www.washingtonpost.com/local/crime/private-police-carry-guns-and-make-arrests-and-their-ranks-are-swelling/2015/02/28/29f6e02e-8f79-11e4-a900-9960214d4cd7_story.html) (indicating that municipal police officers in the state of Virginia require between 580 and 1200 hours of training).

<sup>230</sup> VA. CODE ANN. § 19.2-13 (2015).

<sup>231</sup> See *id.* (delineating, among other things, the authority, registration, and jurisdiction of the SCOPs); MATTHEW AUGUST LEFANDE, COMMONWEALTH PROTECTION INSTITUTE, SPECIAL CONSERVATORS OF THE PEACE UNDER CODE OF VIRGINIA § 19.2-13, at 18–19 (2006), <http://www.commonwealthprotection.org/scoppaper.pdf> (stating that the SCOPs were meant to breach the inherent disconnect between the need for private security forces and their diminished authority to act as public police officers within the state).

<sup>232</sup> See *Special Conservators of the Peace*, VA. DEP’T OF CRIM. JUST. SERVS., <http://www.dcj.virginia.gov/pss/special/scop.cfm> (last visited Jan. 21, 2016).

<sup>233</sup> S.B. 1195, 2015 Gen. Assemb., Reg. Sess. (Va. 2015); see *Special Conservators of the Peace*, *supra* note 232.

<sup>234</sup> *Special Conservators of the Peace*, *supra* note 232.

<sup>235</sup> *Id.*

<sup>236</sup> A judge has discretion to deny an appointment for good cause. VA. CODE ANN. § 19.2-13(A) (2015).

<sup>237</sup> *Id.*

most cases is a specific piece of real property,<sup>238</sup> a SCOP can effectuate an arrest just as a public police officer could. A sheriff or chief of police who sponsors an application may request that the SCOP operate within a broader geographic jurisdiction limited to the city or county in which the application was made.<sup>239</sup> SCOPs are permitted to wear badges and uniforms displaying the title “police,” as long as they first receive permission from the court.<sup>240</sup>

Notwithstanding the official authority conferred upon these private actors and the doubling of their numbers to about 750 in the last decade,<sup>241</sup> issues concerning accountability and management of the SCOPs remain. For example, there is no state authority that continuously monitors their activities, nor is there a grievance board to address complaints of abusive conduct.<sup>242</sup> Moreover, citizens may assume that SCOPs who look and act like police officers represent the city or the county, which might be confusing and could impact a community's relationship with public police—especially in cases in which power is abused.<sup>243</sup> Another issue is the disparity between the amount of training that SCOPs and police officers receive, even though both are authorized to perform arrests. The SCOPs sponsored by sheriffs are potentially unrestricted by the bounds of a specific physical location, giving them free rein to function in an official law enforcement capacity, but without comparable training.

Despite the shortcomings in the current legislation governing SCOPs in Virginia, however, their statutory recognition and appointment by a judge provide needed legitimacy and create important procedural safeguards. As it stands, the SCOP framework embraces many of the features that could serve as a model for private police requirements. If all private police forces were limited to specific pieces of real property, had full employer accountability, and received adequate state-mandated training, these entities would have an appropriate amount of power to arrest—with the corresponding amount of training—and the potential for abuse of this power would be limited. These principles, combined with

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<sup>238</sup> *Application for Appointment of Special Conservator of the Peace*, SUP. CT. OF VA., <http://www.courts.state.va.us/forms/circuit/cc1430.pdf> (last visited Jan. 21, 2016) (requiring applicants to specify the proposed geographical limitations of their authority, including the address and a description of the real property to which their authority is confined).

<sup>239</sup> VA. CODE ANN. § 19.2-13(F).

<sup>240</sup> *Id.* § 19.2-13(A) (“[T]he order may also provide that the special conservator of the peace may use the title ‘police’ on any badge or uniform worn in the performance of his duties as such.”); Jouvenal, *supra* note 229 (describing how a local SCOP had worn a vest displaying the word “police” while checking in on a teenager who had gotten into trouble with neighbors).

<sup>241</sup> Jouvenal, *supra* note 229.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*



an accountability mechanism—such as a grievance board and mandatory reporting requirements—would further reduce the risk of inappropriate incidents and abuse.

#### IV. MODEL STATUTE FOR CITIZEN'S ARREST

##### **The Anti-Vigilante Act (AVA)**

###### § 1 – Purpose

The purpose of this Act is to restrict the scope of the citizen's arrest power to minimize the confusion and abuse associated with this power. The Act outlines training and authorization mechanisms required before one may lawfully perform a citizen's arrest.

###### § 2 – Definitions

(a) **Merchants:** an owner or operator, and the agent, consignee, employee, lessee, or officer of an owner or operator, of any merchant's premise.

(b) **Private citizen:** a citizen who does not hold any public position or any public official who is not authorized to arrest pursuant to his or her official duties.

(c) **Private police officers:** law enforcement officers employed and/or controlled by non-governmental entities responsible for promoting public safety, and preventing and detecting crime.

(d) **Public police officers:** law enforcement officers employed by the government responsible for preserving public order, promoting public safety, and preventing and detecting crime.

###### § 3 – Power to arrest

(a) Private citizens other than those listed in (b) shall not have the power to arrest.

(b) The following categories of persons shall have the power to arrest:

- (1) merchants;
- (2) private police officers; and
- (3) public police officers outside of their jurisdiction.

###### § 4 – Merchants

(a) A merchant may detain an individual on the premises of his or her establishment if the merchant has reasonable grounds for believing that the individual has stolen property from the establishment.

(b) A merchant may detain a suspect only for a reasonable amount of time and in a reasonable manner until the suspect's guilt can be definitively ascertained.

#### § 5 – Private police officers

(a) A private police officer may detain an individual within the physical location determined by the officer's employer if the officer has reasonable grounds for believing that the individual committed a felony or misdemeanor.

(b) Individuals must be certified by the state in order to take on the role of private police officer. A private police officer must complete the following requirements in order to attain certification:

(1) individuals must register with [the state entity that oversees the implementation of private police training and employment activities];

(2) individuals must complete no less than [specified number of hours] of training. Training should include information on general principles of criminal law and constitutional law, when private police officers can make arrests within their jurisdiction, the limits on the use of force in making arrests, the jurisdiction's law on self-defense and defense of others, the use of deadly force, and the proper use of firearms;

(3) individuals must complete a background check, a drug test, and register fingerprints with [the appropriate state entity]; and

(4) individuals must petition [the appropriate state entity] to complete the certification process and confirm their employment jurisdiction.

#### § 6 – Public police officers outside their jurisdiction

A public police officer may arrest an offender outside the officer's jurisdiction:

(a) when in immediate pursuit of an offender for an offense committed within the officer's jurisdiction;

(b) while aiding or assisting another public police officer; or

(c) when the officer witnesses a felony or misdemeanor or has probable cause to believe that a felony or misdemeanor has been committed.

### Commentary

1. Definitions – The definitions in section 2 have been adapted from various state statutes and legal authorities. In particular, the definition of merchants under subsection 2(a) is derived from the Nevada statute dealing with shopkeeper’s privilege. *See* NEV. REV. STAT. § 597.850(1)(b) (2014). The definition of public police officer in subsection 2(d) is derived from BLACK’S LAW DICTIONARY (10th ed. 2014).

2. Shopkeeper’s privilege – Arrest powers for merchants listed in subsections 4(a)–(b) are based on the requirements commonly seen in shopkeeper’s privilege statutes. *See, e.g.*, ALA. CODE § 15-10-14(a) (2015); IND. CODE § 35-33-6-2(a)(1)(A) (2015).

3. Private police officers – The requirements for private police officer training and authorization in section 5 are loosely adapted from the Virginia statute on special conservators of the peace (“SCOPs”). *See* VA. CODE ANN. § 19.2-13 (2015). Currently, SCOPs must undergo 130 hours of training, but this number should be increased in order to obtain adequate information on criminal law, arrest procedures, and firearms. While the SCOP statute requires individuals to petition the courts and register with the Department of Criminal Justice Services to achieve SCOP status, this method is but one example of how individuals can be trained and authorized by a state to act as private police officers.

4. Public police officers outside their jurisdictions – The statutory recommendations related to when public police officers can arrest outside their jurisdiction listed in section 6 are roughly based on Ohio and Pennsylvania statutes that address extra-jurisdictional arrest powers. *See* OHIO REV. CODE ANN. § 2935.03(D) (LexisNexis 2015); 42 PA. CONS. STAT. ANN. §§ 8953(1)–(6) (2015).

### CONCLUSION

The logic underlying the citizen’s arrest doctrine at the time of its creation was sound. In medieval England, allowing private citizens to enforce local law reflected the lack of an organized police force and helped to create order and safety. Limited mobility and technology made a widespread police force infeasible, and the citizen’s arrest doctrine arose to fulfill a need. As organized police slowly became the norm, however, the common law citizen’s arrest doctrine became outdated and was no longer an essential component for the maintenance of law and order. Individual jurisdictions in the United States handled this trend differently, with some honing the common law doctrine through case law while others limited its scope through statutory codification. Either way, the goal of the states was the same: to curtail the citizen’s arrest doctrine

and place law enforcement power where it belonged—in the hands of the police.

Despite this sensible trend, citizen's arrest remains legal throughout the United States. Yet the requirements of a lawful citizen's arrest, whether through case law or codification, are insufficiently clear to allow the average citizen to navigate the doctrine successfully. When applied to the shopkeeper's privilege, police outside their jurisdiction, or private police and security forces, the citizen's arrest doctrine is less ripe for abuse because the arrestors have some level of training and may effectuate arrests only in carefully prescribed areas. These arrestors are less likely to place themselves or their arrestees at risk because they have superior knowledge of the laws and their powers are contained. For the average citizen, however, whether alone or in a watch group such as the Guardian Angels, the doctrine presents significant potential for abuse because untrained citizens may make arrests virtually anywhere in public. This vast power requires that the arrestor have knowledge of local felony and misdemeanor laws as well as jurisprudential holdings regarding the probable cause required to make an arrest, the length of detention permitted, and the amount of force they are permitted to use in doing so. To expect the ordinary citizen to master these hurdles is unreasonable and dangerous.

The solution is to abolish citizen's arrest for the private citizen and for private citizen watch groups. It is a doctrine whose time should have passed many decades—or centuries—ago. In instances in which a citizen's arrest previously would have been justified, the individual or volunteer watch group member could still serve as a witness and immediately notify the police of a crime in progress. In the age of smartphones and other hi-tech devices, private citizens can easily gather photographic and video evidence of a crime without subjecting themselves or the suspect to the risks associated with a citizen's arrest. Abrogation of the general authority to perform a citizen's arrest would allow the doctrine to reflect the current state of affairs in the world, just as it did when it was first established nearly a millennium ago. The scope of the citizen's arrest doctrine has ebbed and flowed in response to societal needs throughout its history. The best course today is to reject general citizen's arrest authority and to restrict its use to trained individuals in specific contexts.

