Watching the Watchers: The Growing Privatization of Criminal Law and the Need for Limits on Neighborhood Watch Associations

Sharon Finegan, South Texas College of Law
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Sharon Finegan*

Abstract

On the night of February 26, 2012, George Zimmerman, a member of a neighborhood watch program, was patrolling his community in Sanford, Florida when he spotted Trayvon Martin, a 17-year-old African-American high school student, walking through the neighborhood. Zimmerman called 911 and indicated that he was following "a real suspicious guy." Zimmerman then disregarded the police dispatcher's request that he discontinue following Martin and approached the teenager. In the resulting confrontation, Zimmerman used his legally-owned semi-automatic handgun to shoot and kill Martin. Martin had been returning from a local convenience store to his father's fiancée's house, where he was spending the night. He was unarmed.

George Zimmerman is currently being charged with second-degree murder. It is unclear whether Zimmerman will be proven guilty of the offense, but what is certain is that despite the fact that Zimmerman was engaged in law enforcement activities, Zimmerman's conduct in approaching and confronting Martin is not governed by the same constitutional restrictions that limit the actions of police. The Fourth and Fifth Amendments that restrict police in detaining, searching, and interrogating suspects do not apply to neighborhood watch organizations. At the same time, in many states neighborhood watch members can carry firearms and are protected under Stand Your Ground laws from having to retreat when confronted by a suspect. Thus, neighborhood watch members wield significant authority, but with neither the training that police officers receive nor the restrictions that govern their conduct.

While neighborhood watch groups, just like police, perform a valuable service to the community, they are also in need of statutory oversight and restrictions, just like the police. This Article proposes statutory provisions that could effectively address the problems posed by the growing privatization of criminal law enforcement as it relates to neighborhood watch associations. By enacting statutes that limit the abilities of neighborhood watch members to confront suspects, mandate training for those engaged in law enforcement activities, and expand the exclusionary rule to bar evidence seized illegally by private citizens engaged in law enforcement functions, legislatures would better ensure that due process guarantees are not abandoned when private actors participate in law enforcement activities.
INTRODUCTION

The privatization of criminal law has been a heavily debated topic among legal scholars and practitioners.\(^1\) As the number and scope of criminal laws increase, so do community needs to investigate, try, and incarcerate those who violate the laws.\(^2\) Yet federal and state systems of justice have not been able to fully meet these increased demands.\(^3\) Thus, reliance on private groups and organizations to help fulfill these needs has become more prevalent.\(^4\) The use of private entities to assist in performing criminal justice functions has, in many ways, allowed for better detection, prevention, and punishment for criminal acts.\(^5\) However,

\(^*\) Associate Professor of Law, South Texas College of Law.


\(^2\) See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223-24 (2007) (noting that "[t]he politics of crime are perennially perverse: the electorate demands that legislatures enact more crimes and tougher sentences, and no interest groups or countervailing political forces lobby against those preferences").


\(^4\) Slansky, *supra* note 1, at 1174 (noting that "[a]t this point, security guards in the United States actually outnumber law enforcement personnel; there are roughly three private guards for every two sworn officers").

\(^5\) Id. at 1177-78. In the context of private police, "[i]ncreasingly, government agencies are hiring private security personnel to guard and patrol government buildings, housing projects, and public parks and facilities." Id. In addition, some municipalities have gone so far as to hire privates security to conduct public police functions such as neighborhood patrols. *Id.* Where the municipality itself does not hire private police, neighborhoods with resources
this reliance on private actors to accomplish criminal justice tasks is rife with both constitutional and practical concerns.

One area in which the public has long been involved in criminal justice efforts is in the policing of neighborhoods to deter and identify potential criminal actors. Neighborhood watch programs have increasingly become a part of community efforts to stem or reduce criminal activity. These programs can vary widely in organization, association with law enforcement, training, and purpose. But at their core, neighborhood watch programs consist of private citizens who are engaged in the detection and deterrence of crime -- in other words, law enforcement activities.

may do so by "receiv[ing] permission to tax themselves (and their dissenting neighbors) to pay for private patrols." Id.

6 This function has been accomplished through both neighborhood watch programs and the hiring of private security patrols by members of the community. Id. at 1173.


In 2012 neighborhood watch programs came under heightened scrutiny with the shooting death of an unarmed African-American teenager in Florida by the member of a neighborhood watch association. The actions taken by a private individual acting on behalf of a private group in order to serve the public function of crime prevention highlighted some of the problems presented by these programs, and, in turn, the challenges raised by the increased privatization of criminal justice.

This Article examines the difficulties presented by the privatization of criminal justice through the lens of neighborhood watch programs. The Article first examines some of the ways in which criminal justice functions have become privatized. The Article then examines neighborhood watch programs specifically, focusing on their history and effectiveness as a means of detecting and deterring crime. The Article next addresses some of the legal mechanisms that both fail to restrict and empower these programs, thereby undermining many of the procedural protections that form the basis of the American system of criminal justice. Finally, this Article suggests ways in which these challenges can be resolved in the context of neighborhood watch associations.

I. THE TREND TOWARD PRIVATIZATION IN CRIMINAL LAW

The increased privatization of criminal justice functions is a phenomenon that has been both criticized and lauded by practitioners and academics alike. "Privatization" can be accomplished in a host of ways, but at its most basic it is the adoption of public functions by private

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entities or individuals. In the civil justice system, privatization has led to the use of mediation and other alternative dispute resolution techniques. In the criminal justice system, the trend toward privatization has heavily impacted law enforcement and punishment systems. This shift toward using private groups or entities to handle public criminal justice tasks is the result of numerous factors, but in fact reflects a return to historical norms rather than the emergence of a new phenomenon.

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As Professor Fisher points out, to state that there is only one basis for or type of privatization is a fallacy. Talia Fisher, A Nuanced Approach to the Privatization Debate, 5 LAW & ETHICS HUM. RTS. 71, 74 (2011). There is the "market-based approach to privatization [in which] the market is conceived of as the alternative to state supply of legislation. According to this paradigm, law is put on the market by for-profit firms and arises from the processes of the market economy – supply and demand, competition and bargaining." Id. at 74. On the other hand, "[t]he community-based model of legal privatization is premised upon the delegation of lawmaking powers to sub-state political units consisting of tribal, religious, or ethnic communities." Id. at 76.


Ric Simmons, Private Criminal Justice, 42 WAKE FOREST L. REV. 911, 911 (2007).

Id. at 921 ("This growth in private security is a relatively recent phenomenon in modern times, but in fact it reflects more accurately the bulk of our history where private criminal justice was the norm more than the aberration."). The historical trend away from privatization can be seen in many branches of government, not just law enforcement. Forst, supra note 1, at 4 (noting that "[p]olicing, like most functions of modern government, was once exclusively the domain of private enterprise"). Further, this trend is not confined to the United States, but "has been mirrored in Canada, the United Kingdom, Australia, New Zealand, and, to a lesser extent, the rest of the world." Slansky, supra note 1, at 1181.
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Prior to the nineteenth century, criminal justice functions were left largely in the hands of private individuals or groups.\(^{14}\) Reliance on government officials to conduct investigations into criminal activity was the exception, rather than the rule.\(^{15}\) Indeed, there were few, if any, public entities tasked with ferreting out and prosecuting criminal conduct.\(^{16}\) For much of modern history, private individuals and groups were responsible for investigating crimes and seeking punishment for the wrongdoer.\(^{17}\) In England, it wasn’t until the twelfth century that certain types of torts were declared to be crimes.\(^{18}\) Prior to that, an individual would file a civil suit as the victim of what we could today consider to be a "crime."\(^{19}\) This change resulted in the prosecution of defendants for their criminal activity and, upon a finding of guilt, the forfeiture of their property to the State.\(^{20}\) Yet, despite the creation of this new form of justice, private individuals were still responsible for prosecuting criminal defendants.\(^{21}\) Thus, while the State profited from the punishment of an individual in a criminal action, it did not take on the responsibilities of investigating and

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\(^{14}\) Simmons, supra note 12, at 921-22.

\(^{15}\) Id. at 922 ("Before the nineteenth century, public criminal justice was essentially a form of 'mandatory community service' although most towns relied upon night watchmen to guard or patrol the community, these watchmen were unpaid and were simply ordinary citizens who served in the positions on a rotating basis; if any trouble occurred, they were meant to raise an alarm, at which point all citizens were required to assist in the arrest.").

\(^{16}\) Id.

\(^{17}\) Id.

\(^{18}\) In 1116 Henry I decreed that certain torts (robbery, arson, murder) would be considered "crimes." Id.

\(^{19}\) Id.

\(^{20}\) Id. One of the reasons this new system of justice emerged was to provide an additional source of funding for the state.

\(^{21}\) Id.
prosecuting criminal offenders. Rather, this task remained largely in the hands of the citizenry.

This private pursuit of criminal justice was prevalent in the United States, just as it was in England. And the use of private actors to perform criminal justice functions continued until the nineteenth century. While governments adopted some criminal justice functions, for the vast majority of criminal prosecutions the private sector was left to fend for itself. It wasn’t until the Industrial Revolution that State actors began to take over criminal justice functions. As the population of urban areas exploded, criminal activity also increased and the government stepped in to assist in the control of those activities.

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22 Id.

23 Id. at 922-23 (noting that the watchmen employed prior to the advent of public police departments were "incompetent and poorly trained, which led wealthier individuals to hire their own private guards, while the government offered large rewards for apprehending criminals").

24 Forst, supra note 1, at 5 (Indeed, "[t]he United States was much slower [than England] to adopt an effective public policing service.").


26 Id. (describing a survey which reveals that Philadelphia's lower classes "enthusiastically invok[ed] the criminal process against each other, often for relatively petty offenses that might not attract the resources or attention of public authorities today").

27 Forst, supra note 1, at 5. On the heels of the Industrial Revolution, private security was often inadequate to address the growing population and crime rates of urban environments. Thus, governments found a public response necessary to address increased criminal activity. Id.

28 Id.
As the nineteenth century progressed, the use of public forces to conduct criminal investigations and prosecutions spread beyond urban centers to smaller communities.\textsuperscript{29} By the mid-twentieth century, the public’s view of the criminal justice system had dramatically shifted.\textsuperscript{30} The perception of the criminal justice system now accepted its functions as fundamentally public in nature, and the expectations were that the government exercised the power to investigate and prosecute crimes through professional law enforcement forces and prosecutorial offices.\textsuperscript{31}

As the public nature of criminal investigations and prosecutions became the norm, so too did expectations that these public actors abide by certain rules and standards.\textsuperscript{32} Thus, the law began imposing more restrictions on public actors engaged in criminal justice tasks.\textsuperscript{33} These restrictions attempted to ensure that the power of the government was not abused and that the rights of individuals suspected and accused of crimes were protected.\textsuperscript{34} Yet even with these restrictions in place, the resources and lack of meaningful oversight of public criminal justice officials led to

\textsuperscript{29} Simmons, \textit{supra} note 12, at 922-23 (“The birth of widespread public policing did not occur in Great Britain until 1829, and not in the United States until 1845.”).

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} \textit{Id.}

\textsuperscript{32} Yeazell, \textit{supra} note 25, at 694 (noting that the criminal justice process in the United States was fundamentally changed by providing representation for indigent defendants and controlling "police and prosecutorial behavior through a series of interpretations of the Fourth, Fifth, and Sixth Amendments to the Federal Constitution").

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{Id.} ("These developments made the process more fair" and focused on the rights of the defendant, rather than the rights of victims of crime or the public at large.).
severe abuses in the system. In the latter half of the twentieth century the public grew increasingly distrustful of public law enforcement. By the 1980’s a strong movement to become less reliant on law enforcement began to take hold in many communities. Thus, while the current trend toward privatization has only existed for a few decades, for the better part of modern history private actors performed criminal justice functions.

One basis for the current trend toward privatization stems from the distrust that the public felt in the latter half of the twentieth century regarding police officers and public prosecutors. Corruption, abuses of power, and other injustices led to public investigations into law enforcement practices. These investigations brought to light many of the

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36 Id. (describing findings of a 1968 governmental commission that found "animus toward police symbolized deeper problems – with the society as a whole and the role of blacks within it, and especially with the entire system of law enforcement and criminal justice").

37 Simmons, supra note 12, at 911 (noting that this trend was "an effort by private citizens to obtain greater and more responsive crime control"); see also Slansky, supra note 1 at 1220-21 ("By the early 1980's, it was apparent that something different had happened: the private security industry was growing much faster than public law enforcement.").

38 Id. at 922-23.

39 Forst, supra note 1, at 12 ("Even in the absence of brutality, professional policing was viewed by large segments of the minority community as cold and cruel.").

40 See Jon D. Michaels, Deputizing Homeland Security, 88 TEX. L. REV. 1435, 1451 (2010). Significant concerns have been raised over the intrusion upon civil liberties by public police officers engaged in community patrol activities. In particular, concerns have been voiced over the violation of the civil rights of members of poor minority groups living in urban neighborhoods. "Critics worry
abuses the public had long suspected inherent in law enforcement agencies and led many to turn away from public officials in pursuing criminal justice initiatives.\textsuperscript{41}

This return to privatization of law enforcement also reflects dissatisfaction with the results of public policing.\textsuperscript{42} A failure of public law enforcement to adequately address the needs of individual victims and the community as a whole led the citizenry to look to alternatives methods to achieve their desired objectives.\textsuperscript{43}

Another significant motivator behind the current shift toward privatization is the funding behind law enforcement functions.\textsuperscript{44} During economic downturns when governments seek to limit spending, law enforcement and prosecutorial agencies may have limited or reduced budgets that restrict their ability to perform certain duties.\textsuperscript{45} Private actors that order-maintenance policies present opportunities for police abuses by increasing the frequency and intensity of police-citizen interactions and failing to channel the discretion that officers necessarily exercise during them.\textsuperscript{Id.} Further, concerns have been raised that increased interactions between police and the citizenry brought about through community policing efforts will "politicize police practices" and lead to corruption. \textit{Id.}

\textsuperscript{41} Skolnick, \textit{supra} note 35, at 40-41.

\textsuperscript{42} Simmons, \textit{supra} note 12, at 911 (noting that the return to privatization has "grown out of a failure of the public justice system to satisfy the needs of potential and actual crime victims").

\textsuperscript{43} \textit{Id.} at 913 (noting that the "public criminal justice system is failing" which "inevitably lead[s] to the development of a private alternative").

\textsuperscript{44} Fairfax, \textit{supra} note 3, at 275-76 (2010) (noting that governmental budget cuts are often directed at prosecutors' offices, leading to fewer personnel and "diminished criminal enforcement capacity").

\textsuperscript{45} \textit{Id.} at 265 ("In an era of scares public resources, many jurisdictions are being forced to take drastic measures to address severe budgetary constraints on the administration of criminal justice").
can often perform these same functions at a reduced cost, and so may be tapped to supplement or replace the public entities.\textsuperscript{46} And when public police officers are not available to detect or prevent criminal activity, private actors may seek out alternatives to public law enforcement to meet their needs.\textsuperscript{47}

The current trend toward privatization is most easily observed in the American criminal justice system in the areas of law enforcement and punishment.\textsuperscript{48} While some scholars have argued that privatization should extend to adjudicative functions, these activities are still largely considered inherently public in nature and not delegable to private

\textsuperscript{46} Id.

\textsuperscript{47} Simmons, supra note 12, at 924. In order to be effective, public law enforcement needs to meet the needs of the citizenry. "Primary among these needs is the need to feel safe and secure: if the public police are scarce or nonresponsive to crimes being committed in a certain company or neighborhood, the company or neighborhood will likely respond with its own measures to improve security by hiring private guards, contracting with a private security firm, forming a neighborhood watch association, etc." \textit{Id}. Prior to the creation of public police departments, the ability to secure police presence or ensure prosecution was not something with which individual citizens concerned themselves. Yeazell, supra note 25 at 696. "In the world before the socialization of criminal justice, victims had the power to make some of these decisions. They did not need to convince a police chief or a district attorney to drop murder charges and go after unruly drunken neighbors; they could do so themselves." \textit{Id}.

\textsuperscript{48} Simmons, supra note 12, at 911.
entities. Thus, it is at the beginning and end of the criminal justice process that we see private actors having the greatest impact.

Looking first to the increased use of private actors in the punishment phase of the criminal justice process, a significant shift has occurred over the last several decades toward increased use of private prisons. As the prison population has dramatically grown, so too has the need for more prison space to house those prisoners. States with limited resources and large bureaucracies have relied more and more on private companies to build and operate prisons. These private actors can operate without

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49 Id. ("Private criminal law . . . has grown into an immense industry operating completely outside of the public criminal justice system, but it is currently limited to the law enforcement stage of the process"). Indeed, in some areas prosecutorial functions have also been placed into the hands of the private sector. Fairfax, supra note 3 at 266.

50 Fairfax, supra note 3, at 266.

51 "At least 35 states and the District of Columbia now have private prisons . . . [and] [t]he Federal Bureau of Prisons pays private providers to house approximately 11.5% of federal inmates." Mary Sigler, Private Prisons, Public Functions, and the Meaning of Punishment, 38 FLA. ST. U. L. REV. 149, 149-50 (2010). The use of private actors to detain individuals is not limited to the criminal justice system. Indeed, in 2007 "Immigration and Customs Enforcement housed about 38% of its detainees in privately managed facilities." Id.

52 Simmons, supra note 12, at 933 (noting that currently "approximately seven percent of prisoners in [the United States] are serving time in a privately run correctional facility").

53 Id. at 934-35 (noting that a private prison must conform to statutory and constitutional restrictions on confinement and punishment); see also Sigler, supra note 51 at 150 (noting that "[d]uring the present economic crisis, many states are poised to increase their reliance on private prisons").
some of the red tape associated with publicly operated prisons and are often more cost efficient than the public prison system.⁵⁴

In addition to the increased use of private actors in the punishment phase of the criminal justice process, a trend toward privatization can also be seen in the area of law enforcement.⁵⁵ Private security forces have existed throughout modern history.⁵⁶ The current trend toward privatization reflects a growing use of private security to accomplish public law enforcement tasks.⁵⁷ Businesses hire private security to deter criminal activity from occurring.⁵⁸ Most people are familiar with the sight of a security guard patrolling a company’s offices.⁵⁹ Businesses also hire private security forces to investigate crimes committed against the organization and bring those crimes to the attention of public

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⁵⁴ See Fairfax, supra note 3, at 271 (noting that "[p]rivate prisons are a prominent example of outsourcing in criminal justice at both the federal and state levels"); see also Sigler, supra note 51 at 150 (indicating that "studies have found that private prisons may reduce the cost of housing inmates by as much as 15%").

⁵⁵ Simmons, supra note 12, at 920-21 ("Although the immense breadth of the industry makes definite numbers hard to come by, it is undisputed that private security officers vastly outnumber public law enforcement officers, and spending on private security is approximately double the spending for law enforcement.").


⁵⁷ Simmons, supra note 12, at 919. The increase in the use of private security to accomplish law enforcement tasks is staggering. Id. "Today, the so-called 'private police' are everywhere: conducting residential security patrols; monitoring shoppers in department store; safeguarding warehouses; patrolling college campuses and shopping malls; and guarding factories, casinos, office parks, schools, and parking lots." Id.

⁵⁸ Id.

⁵⁹ Id.
prosecutors. The desire to prevent and detect crime coupled with the resources available to many companies leads to reliance on private law enforcement as a more effective and efficient means of protecting the business’ interests.

Similarly, neighborhoods with resources at their disposal may hire private security forces to patrol those neighborhoods and guard against criminal activity. These neighborhood security forces are not comprised of public law enforcement officers, but private for-profit officers who seek to accomplish the goals of the neighborhood that hired them. Typically those goals are to deter criminal activity within the geographic limits of the neighborhood and arrest those engaged in criminal activity within those same geographic limits.

The increased use of private security forces presents a number of legal challenges. In large part these challenges involve the lack of legal

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60 For example, when Apple, the manufacturer of the iPhone, discovered a prototype version of their product was in the hands of a journalist, they enlisted their private security forces to investigate the breach and track down the missing equipment. See Will Cane, Lost Iphone: SF Police Aided Apple Investigators, S.F. CHRONICLE, http://www.sfgate.com/crime/article/Lost-iPhone-SF-police-aided-Apple-investigators-2311231.php (Sept. 4, 2011).

61 See Fairfax, supra note 3, at 274.

62 See id. (noting that "[m]any private police are retained by private communities and business groups to serve as an adjunct to the publicly paid and maintained police force").

63 Id. (explaining that "[t]he rationale underlying the explosion in the private police presence is that public police resources are not sufficient to protect the property and personal interests of those segments of society able to afford additional security").

64 See Slansky, supra note 1, at 1179 ("About the actual activities of private security personnel there is little reliable information. Plainly, though, they often do a good deal more than observe and report.")
standards and oversight of private security.\textsuperscript{65} There is little if any law regarding the training of private security officers, methods by which they engage in law enforcement activities, ways in which they identify suspects and make arrests, and limitations on the scope of their powers.\textsuperscript{66} Thus, private security officers operate in a gray area where little law controls their conduct and the exercise of the powers they have been given.\textsuperscript{67} Not bound by many of the constitutional restraints that restrict public law enforcement, private security officers often are able to engage in conduct that would lead to the exclusion of evidence or dismissal of a criminal case were the same conduct engaged in by a public law enforcement officer.\textsuperscript{68}

In addition, private actors are often motivated by different incentives than those which motivate public law enforcement.\textsuperscript{69} Whereas the goal of public law enforcement is to preserve and protect public interests, the goals of private security forces are often tied to the distinct desires and needs of their employers.\textsuperscript{70} For example, ensuring a fair and just criminal justice process is not likely a primary objective of most private security actors but is a purported goal of public law enforcement officers.\textsuperscript{71} The

\textsuperscript{65} Michaels, \textit{supra} note 40, at 1451.

\textsuperscript{66} Slansky, \textit{supra} note 1, at 1179 (noting that residential security guards frequently detain suspects and "the security industry as a whole carries out significantly more stops, searches, and interrogations than is often imagined").

\textsuperscript{67} \textit{Id.} at 1166-67 (noting that "private security personnel find their conduct governed by a hodgepodge of private contract provisions, state and local regulations, and tort and criminal law doctrines of assault, trespass, and false imprisonment").

\textsuperscript{68} \textit{See infra}, Part III.

\textsuperscript{69} Sigler, \textit{supra} note 51, at 154.

\textsuperscript{70} \textit{Id.} (noting that "[p]rivate firms and public agencies tend to have different capacities, cultures and priorities . . . and respond to different incentives").

\textsuperscript{71} \textit{See id.}
disparity between the purposes behind private law enforcement and public law enforcement can lead to concerns about the methods by which private actors conduct their investigations and the people whom they target for investigation.\footnote{See, e.g., id. (explaining that "the fact that public and private providers may be animated by a different set of norms and goals gives rise to a range of concerns about the privatization of governmental responsibilities"); see also Slansky, supra note 1, at 1191-92 (noting that private policing leads to less public control over law enforcement and accountability only to customers, rather than public at large).}

But it is not just businesses and neighborhoods with resources that have begun to lean more heavily on private actors to accomplish public law enforcement goals. Indeed, lower income neighborhoods have exhibited a greater disillusion with public law enforcement than wealthier segments of the population.\footnote{A significant concern over the increased privatization of law enforcement functions is that this trend provides more justice to those with resources at their disposal than those in poorer communities. Indeed, well-funded private groups can not only afford their own private security forces to deter and detect criminal activity, but can impact the criminal laws themselves to most effectively address their community concerns. Thus, private groups can lobby for laws that affect change. For example, "business improvement districts – coalitions of business and property owners, many of which have their own private security forces – have lobbied municipalities for, among other things, aggressive panhandling ordinances." Alexander Volokh, Privatization and the Law and Economics of Political Advocacy, 60 STAN. L. REV. 1197, 1198 (2008).} In addition to this dissatisfaction with and distrust of public law enforcement, neighborhoods with fewer resources are often areas in which there are higher crime rates.\footnote{It should be noted that, while lower-income urban neighborhoods may participate community watch programs, such programs are not always effective in higher-crime areas. This is attributed to the fact that "high crime areas are often devoid of the social organization that we generally associate with definitions of 'community.' Field experiments have revealed that poor inner-city areas tend not to show the gains found in other areas after community policing} Thus, these
communities have found alternative methods to deal with the criminal activity that occurs within their confines. Without resources to hire private security forces, many communities rely upon neighborhood watch programs to aid in the prevention and deterrence of criminal activity. However, much like the use of private security forces, use of neighborhood watch programs is not without its own challenges.

II. THE RISE OF NEIGHBORHOOD WATCH PROGRAMS

Neighborhood watch programs have a long history in the United States, but have grown in popularity since the “community policing” efforts of the 1980’s. The community policing movement attempted to change the way in which police met law enforcement goals. Rather than interventions are applied – improved satisfaction with police service, reduced fear of crime, improvements in perceived quality of life." Forst, supra note 1, at 14.

75 See Slansky, supra note 1, at n. 115 (noting that "the line between private security and citizen patrols can indeed be indistinct").

76 See Ivan K. Fong, The Current State of Homeland Security, 63 Rutgers L. Rev. 1135, 1140 (2011). While the term "neighborhood watch" may be a more recent addition to the American vocabulary, communities have historically coordinated with public law enforcement to provide security for their neighborhoods. "Americans have long helped to secure their hometowns as well as their homeland, from our tradition of civil defense, to more recent efforts like neighborhood watches and community-oriented policing initiatives." Id. See also, Skolnick, supra note 35, at 4 (noting that "Neighborhod Watch is an American invention of the early 1970's").

77 Holloway, supra note 7, at 6.

78 Nicole Stelle Garnett, The People Paradox, 2012 U. Ill. L. Rev. 43, 49 (2012); Forst, supra note 1 at 13-14 (noting that "[a]bove all, the community policing movement amounts to a return to fundamental democratic principles of governance: that the police serve the public, that they are accountable to the
devoting most police resources and attention to more severe crimes, community policing efforts by police departments shifted the focus to increased use of foot patrols, community revitalization, fostering ties to the communities, and encouraging the involvement of community members in crime deterrence. By attempting to control smaller-scale crimes in specific communities, it was reasoned that larger-scale criminal activity would gain less of a foothold in those same communities.

One aspect of the community policing movement “promoted greater involvement of citizens in the prevention of crime.” This movement also tied into concerns that communities were becoming overly reliant on police protection. Thus, neighborhood watch programs grew in number as part of the efforts made by police and communities to encourage citizen involvement in crime prevention.

The number of programs has grown.

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79 Id.; see also Forst, supra note 1, at 12-13 (noting that this new trend "meant getting closer to the community – a worthy end in itself – but also to become more familiar with the problems that were unique to specific areas and to develop contacts that would help the police, in partnership with the public, to both prevent and solve crimes").

80 Id.

81 Holloway, supra note 7, at 6.

82 Id. at 4. See also Forst, supra note 1, at 15 (noting that "municipal police departments have limited capacities" and that the public has "taken matters into their own hands" by hiring private security, forming neighborhood watch associations, and engaging in other activities that help to prevent or detect crime).

83 Community policing efforts have also become prevalent in the realm of national security. In order to discover potential terrorist activity law enforcement has relied heavily on private actors to report suspicious activity. Michaels, supra note 40, at 1443. This "deputization" of private citizens to detect security risks is, in many ways, similar to neighborhood watch patrolling. Id. "By and large, the government asks deputies to report on suspicious events viewed either in
continued to increase. It is estimated that over 40% of the population in the United States “live[s] in communities covered by neighborhood watch.”  

The structure of neighborhood watch programs can vary from community to community. While some programs are initiated and guided by police, other programs begin as a grass-roots effort amongst the citizenry. The connection between law enforcement and community watch programs also varies greatly. Some programs have strong ties to law enforcement and receive training and financial support from law enforcement organizations. Other programs have minimal ties to law

plain sight or in the course of having privileged access to private space, privileged access given to the deputies in their personal capacities; or, the government requests access to the deputies' stores of data.”  *Id.* In rarer circumstances, private citizens will be asked to intervene more directly by "opening suspicious packages [or] independently analyzing data patterns for terrorist activities."  *Id.*

Indeed, the federal government sought to institute what amounted to a nationwide neighborhood watch program to ferret out suspected terrorist activity; however this program was vehemently opposed and ultimately shut down. Diane Webber, *Can We Find and Stop the "Jihad Janes"?*, 19 CARDOZO J. INT'L & COMP. L. 91, 110 (2011).

*84* Holloway, *supra* note 7, at 6. Such programs are also popular in England, where more than a quarter of residences are part of a neighborhood watch program.

*85* *Id.*

*86* *Id.* at 10.

*87* *Id.* at 11. "The funding of Neighborhood Watch programs is nearly always a joint venture between the local police department and the program members through their fundraising activities. The relative contribution of the two sources varies considerably."  *Id.*
enforcement, with little-to-no training and no official connections. Still more programs fall in the middle of these two extremes, receiving materials and having some connection to law enforcement organizations, but without substantial training or oversight.

Because of the variety in neighborhood watch programs, it is difficult to attribute one organizational structure to these groups. Typically, however, neighborhood watch programs operate with a “block captain” who is in charge of the program for a specific area. These block captains report up to a block coordinator, who supervises the watch over all of the areas within that community. The coordinator often acts as a liaison between the police department and the neighborhood watch. The size of the area covered by a neighborhood watch can vary significantly, but these programs tend to be smaller-scale in order to capitalize on residents’ knowledge of their neighbors and community needs.

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89 Holloway, *supra* note 7 at 10-11.

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* In addition, meetings of neighborhood watch programs can vary in participation. Some such meetings are closed to all but participants in the program, while others are open to the public. *Id.*
There are various ways in which these types of programs are purported to prevent criminal activity. First, the presence of visible surveillance might deter potential offenders from committing crimes in a particular location. Second, the opportunities to commit crimes might be reduced because of awareness and precautions taken by a more vigilant community. Third, community involvement may foster “informal social

94 See, e.g. Matthews Municipal Ordinances § 42.59.

Neighborhood watch groups. Crime prevention officers shall encourage and assist in the formation of neighborhood watch groups. These groups shall provide opportunities for neighbors to know each other, to recognize when a stranger or an unfamiliar vehicle is in the neighborhood, to recognize suspicious activities and circumstances that may involve burglaries or other crimes, and to report suspicious circumstances or activities to the police. Neighborhood watch groups shall not be for the purpose of making arrests or doing other police work. Appropriate signs shall be furnished at no cost, to be placed on street signs in neighborhoods protected by a neighborhood watch group.

Id. Crime Model Municipal ordinances lay out some of the foundational elements of a neighborhood watch program, but may diverge widely from these principles in practice. Cf. Louisiana v. Harrell, No. 11-887, 2012 WL 280658 (La. App. Feb. 1, 2012) (demonstrating that neighborhood watch members may confront suspects, in addition to merely observing and reporting observations to police).

95 Holloway, supra note 7, at 14 ("It has been argued [] that visible surveillance might reduce crime because of its deterrent effect on the perceptions and decision-making of potential offenders.")

96 Id. Neighborhood watch programs may deter crime by reducing opportunities for criminal activities. For example, "creation of signs of occupancy, such as removing newspapers from outside neighbor's homes when they are away, mowing the lawn, and filling up trash cans" can all reduce opportunities for potential criminal actors to identify empty homes. Id. But see Nicole Stelle Garnett, The Order-Maintenance Agenda as Land Use Policy, 25 NOTRE DAME
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control” by creating “acceptable norms of behavior and by direct intervention of the residents.” Finally, neighborhood watch programs may affect criminal activity through heightened communications between the community and law enforcement. Thus, when police receive more useful information from the public about criminal activity, they may have greater success at arresting and incarcerating those individuals engaging in the illegal behavior.

It should be noted that, despite these commonly-held perceptions about the ways in which neighborhood watch programs reduce criminal activity, it is far from certain that such programs actually produce the desired effect. Studies examining the effectiveness of neighborhood watch

J.L. ETHICS & PUBL. POL’Y 131, 141 (2010) (noting that "[t]he private deterrence measures that fearful individuals are most likely to take – including neighborhood watch groups, alarm systems, extra locks, bars on windows, etc. – tend to signal that crime is prevalent in a community").

97 Holloway, supra note 7, at 14.

98 Id. at 6 ("The main method by which Neighborhood Watch is supposed to help reduce crime is when residents look for and report suspicious incidents to the police and thereby perhaps deter potential offenders from committing a crime.")

99 “An increase in information concerning crimes in progress and suspicious persons and events might lead to a greater number of arrests and convictions and, when a custodial sentence is passed, result in a reduction in crime through the jailing of offenders.” Id. at 14. See, e.g. Weber v. Bland, No. 97 C 5227, 1998 WL 341823 (N.D. Ill. June 17, 1998).

Neighborhood watch programs also frequently have access to information on criminal activity available to police. Thus, a Wisconsin Statute provides that "Neighborhood watch programs are entitled upon request to the names and information of all [persons registered with a sex offender registry who are currently] residing, employed, or attending school in the community, district, jurisdiction or other applicable geographic area of activity." Wisconsin v. Schwarz, 630 N.W.2d 164 (Wis. 2001) (citing Wis. Stat. § 301.46(4)).

100 Holloway, supra note 7, at 8.
programs show results that are far from compelling.\textsuperscript{101} Analyses done on the reduction of crime in areas with neighborhood watch programs have led to conflicting results.\textsuperscript{102} Yet effective or not, neighborhood watch programs are popular and growing in number.

Perhaps because of their prevalence and popularity, these 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. Yet perhaps the most troubling problem associated with neighborhood watch programs are their tendency to impinge upon the civil liberties of those living within the community.\textsuperscript{103} Without training or oversight, members of neighborhood watch programs often to not have the tools or insight to exercise the discretion or restraint that police often are called upon to use in order to ensure that individuals’ rights are protected and constitutional safeguards are not violated.\textsuperscript{104}

Indeed, the legal framework that in many ways restricts actions by law enforcement provides generous loopholes for the public acting as members of a neighborhood watch.\textsuperscript{105} It is these laws that allow for

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\textsuperscript{101} Id. at 29 (noting that "there is some evidence that Neighborhood Watch can be effective in reducing crime; however, the results of evaluations are mixed and show that some programs work well while others appear to work less well or not at all").

\textsuperscript{102} Id.

\textsuperscript{103} “Among the concerns critics raise, perhaps the most troubling is the assertion that order-maintenance policing techniques threaten civil liberties, especially of poor minorities who live in struggling urban neighborhoods.” Michaels, supra note 40, at 1451.

\textsuperscript{104} See infra, Part III.

\textsuperscript{105} See id. ("Deputy relationships that provide something more – e.g., special access or the bypassing of legal restrictions imposed exclusively on government actors – pivot in no small part on the diffusion, distortion, and reinvention of traditional status designations of the private-actors-turned-deputies.").
members of the public to skirt procedural protections guaranteed to criminal suspects, and leads to the diminution of civil liberties.

III. LEGAL MECHANISMS THAT EMPOWER NEIGHBORHOOD WATCH PROGRAMS

When a police officer investigates a crime, that investigation is governed by constitutional principles that restrict the officer’s conduct in a myriad of ways. The Fourth, Fifth, Sixth, and Fourteenth Amendments all limit an officer’s ability to intrude upon the civil liberties of a criminal suspect.\textsuperscript{106} Further, Supreme Court precedent has created additional rules that control an officer’s actions in conducting an investigation.\textsuperscript{107} These limitations purport to prevent injustice in the investigative process and protect individuals from overly intrusive government conduct.

Thus, when an officer first determines the need to investigate, she must justify any intrusion into an individual’s freedom of movement by certain proscribed standards.\textsuperscript{108} If an officer wants to detain or arrest an individual, further rules govern the circumstances under which such detention can be achieved.\textsuperscript{109} If an officer seeks to search the individual, their vehicle, or their home they are restricted in doing so by a number of legal doctrines.\textsuperscript{110} Finally, if the officer wants to question the individual they are further limited by rules that mandate that certain requirements must be met before an interrogation can occur.\textsuperscript{111} These legal limitations

\textsuperscript{106} Slansky, \textit{supra} note 1, at 1183.

\textsuperscript{107} \textit{Id.}


\textsuperscript{109} \textit{Id.} ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").


\textsuperscript{111} \textit{Id.} at § 5:2.
on an officer’s powers are largely the result of nineteenth and twentieth century jurisprudence that dealt with a growing public police force charged with investigating criminal activity and providing for public safety. In many ways, these limitations were the direct result of abuses by public officials that the law sought to remedy. Yet no such limitations were imposed on private actors conducting investigative activities. Indeed, doctrines of self-defense and the right to bear arms have been expanded upon, allowing private citizens greater power to conduct police-like activities without the legal restrictions found in the principles of criminal procedure.

1. Constitutional Restrictions on Public Law Enforcement

The Fourth Amendment and jurisprudence interpreting its provisions govern the ability of a police officer to stop an individual. Under these rules, a police officer may only stop an individual under limited circumstances. Thus, if an officer wants to detain an individual, she must be able to articulate a certain level of suspicion. Further, that level of suspicion is not merely the subjective belief of the officer, but must hold up to an objective assessment of the circumstances surrounding the detention. If the officer desires to go beyond mere detention of the individual and arrest the suspect, she must either obtain a warrant from a

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112 Simmons, supra note 12, at 935 (explaining that a private security guard may "search a suspect without probable cause or consent . . . and [] can elicit confessions without concern for Miranda rights").

113 Cook, supra note 110, at § 2:1.

114 Richard E. Myers, II, Challenges to Terry for the Twenty-First Century, 81 Miss. L. J. 937, 940 (2012).

115 Id.

116 Terry, 379 U.S. at 20.
neutral and detached magistrate or the circumstances must satisfy specific enumerated exceptions to the warrant requirement.\footnote{117}{Slansky, supra note 1, at 1184 (noting that "[a]n officer, as a general matter, may arrest anyone [without a warrant] he or she has probable cause to believe has committed a felony, and anyone who commits a misdemeanor in the officer's presence").}

Fourth Amendment jurisprudence also places limits on an officer’s ability to conduct searches of a suspect, his belongings, his residence, and his vehicle.\footnote{118}{See Cook, supra note 110, at §3:1.} Indeed, search and seizure law is an enormous body of jurisprudence designed to guide and limit officers’ discretion in conducting searches.\footnote{119}{See id.} An officer is only permitted to conduct such searches if she has obtained a warrant or if a specific legal exception to the warrant requirement exists.\footnote{120}{Arizona v. Gant, 556 U.S. 332, 338 (2010) (noting the "basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'").} Thus, an officer may conduct a warrantless pat-down of a suspect to search for weapons if she reasonably believes the suspect is armed and dangerous, but may not conduct such a search without this belief nor may she search for anything other than weapons.\footnote{121}{Terry, 379 U.S. at 24-25.} Further, an officer’s ability to search a car is restricted by several doctrines allowing for the search only when certain circumstances are present.\footnote{122}{Robert H. Whorf, “Coercive Ambiguity” in the Routine Traffic Stop Turned Consent Search, 30 Suffolk L. Rev. 379, 382-90 (1997).} The list of these exceptions to the warrant requirement is long, and thus provides many ways in which police can justify searches without a
warrant.¹²³ Yet despite the number of exceptions to the warrant requirement, it is important to note that police are still governed by the exceptions, and must tailor their conduct to the rules proscribed by the courts.

Further constitutional restrictions require that police provide certain warnings to a suspect in custody before asking that suspect questions designed to elicit an incriminating response.¹²⁴ In addition, if the suspect requests the presence of an attorney, the law mandates that the police officer cease all questioning until the attorney’s presence is obtained.¹²⁵ The types of questions able to be asked and the circumstances under which a police officer may interrogate an individual are also restricted in order to ensure the voluntariness of any confession obtained.¹²⁶ For example, police may not make certain types of promises in order to obtain incriminating information from a suspect.¹²⁷

The enforcement of these rules is primarily accomplished through the exclusionary doctrine, whereby evidence illegally obtained by police is inadmissible at trial.¹²⁸ This rule ensures that police do not benefit from violating the mandates of the Constitution or constitutional jurisprudence.¹²⁹ As the Supreme Court stated in Elkins v. United


¹²⁵ United States v. Fouche, 776 F.2d 1398, 1405 (9th Cir. 1985); United States v. Cherry, 73 F.2d 1124, 1130 (5th Cir. 1984).

¹²⁶ Cook, supra note 110, at §5:5.

¹²⁷ Id.

¹²⁸ Wayne R. LaFave, SEARCH & SEIZURE § 11.1.

States, the purpose of the rule is to deter illegal conduct on the part of the police, thereby "compel[ling] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Further, by preventing fruits of illegal police conduct from becoming evidence used to support a conviction, the exclusionary rule ensures that the courts do not become "a party to lawless invasions of constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." Thus, when public law enforcement officers engage in unconstitutional conduct in order to seize evidence, the exclusionary rule bars the use of such evidence at trial.

Due process guarantees may be further protected by civil actions against government agents under 42 U.S.C. § 1983. This statute provides that an individual may sue government officials who have violated the individual’s civil rights. Section 1983 is limited in scope, however. First, the plaintiff must prove that he was denied a federally

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131 Id. at 217.

132 Terry, 392 U.S. at 13.

133 Id. Further, the exclusionary rule also prohibits the use of secondary or derivative evidence, obtained as a result of the initial illegal conduct.

134 The statute provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.


135 Id.
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protected right by a government official who acted "under color of state law."\textsuperscript{136} Second, police officers, acting within the course of their duties, are often protected by qualified immunity.\textsuperscript{137} Therefore, unless the officer engaged in violation of a clearly established law, the officer will not be liable in a § 1983 action.\textsuperscript{138} These actions are also limited in that lawsuits require resources that many criminal defendants lack.\textsuperscript{139} Therefore, successful actions under § 1983 by a criminal defendant are rarer than successful use of the exclusionary rule to remedy the illegal seizure of evidence.

Thus police are faced with numerous procedural rules that govern their conduct in any given investigation. These rules attempt to ensure that police do not impinge upon the civil rights of individual suspects and ensure conformity by prohibiting the use of evidence obtained in violation of criminal procedure principles. Whether these rules are routinely followed or effective is the subject of much scholarly debate, but for purposes of this Article, the important point is that the rules exist and do limit police conduct in investigating crimes. Therefore, public police officers must, to some extent, conform their conduct to the doctrines espoused in criminal procedure jurisprudence.

2. Powers Available to Neighborhood Watch Programs and their Members

It is important to emphasize that it is “public” officers that must conform their conduct to these rules of criminal procedure.\textsuperscript{140} Time and

\textsuperscript{136} Gomez v. Toledo, 446 U.S. 635, 640 (1980).
\textsuperscript{137} Harlow v. Fitzgerald, 457 U.S. 800 (1982).
\textsuperscript{139} Although under the Civil Rights Attorney's Fee Awards Act of 1976, permits the courts to award attorney's fees to plaintiffs who bring suit successfully under § 1983. 42 U.S.C. § 1988(b).
\textsuperscript{140} Slansky, supra note 1, at 1183 (noting that "the 'criminal procedure revolution' of the past half century has left private security largely untouched").
again the Supreme Court has held that the application of the Fourth, Fifth, Sixth, and Fourteenth Amendments is limited to governmental conduct. Under the state action doctrine, “the Fourth Amendment exclusionary rule, the Miranda protections, and the underlying guarantees of the Fourth, Fifth, and Sixth Amendments [are] inapplicable to investigative activity carried out by private citizens.” Therefore, unless the investigating party is a public officer or acting at the direction of a public officer,

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141 See Forst, supra note 1, at 21. (explaining that private agents "enjoy the powers to arrest, to search for and seize evidence, and to file criminal charges in court, but the are not held to due process requirements routinely followed by police, such as those specified in Mapp v. Ohio").

142 Slansky, supra note 1, at 1229. It is important to note that while much of the literature on this issue has focused on the rights of private security guards and patrols, in general there is no legal distinction between hired private security forces and members of a neighborhood watch patrol. Id. Both are subject to the same legal rules and benefit from the lack of clear restrictions on their conduct. Id. Constitutional principles apply to the actions of a private security guard or a private citizen only when that individual has been officially deputized and is acting as an agent of the government. Id.

Further, "[v]irtually without exception, state constitutional restrictions on criminal investigations are similarly limited." Id. at 1233. Although some states, such as Texas, do extend constitutional limitations to the actions of private actors. Tex. R. Crim. Pro. 38.23. Thus, under the Texas Rules of Criminal procedure, any evidence obtained in violation of the law is inadmissible at trial. Id. The rule specifically provides, that "no evidence obtained by an officer or other person in violation of the Constitution or laws of the State of Texas, or of the Constitution of laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." Id. (emphasis added). Courts have interpreted this rule to mean that evidence illegally obtained by a private citizen is subject to the exclusionary rule. Miles v. State, 241 S.W.3d 28, 39 (Tex. Crim. App. 2007). However, this extension of constitutional principles to private actors by state law is the exception and not the rule. Slansky, supra note 1, at 1233.
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criminal procedure rules that limit the investigator’s conduct and protect individuals’ civil rights are inapplicable.  

Thus, under the state action doctrine, private security companies employing guards that patrol businesses and neighborhoods are not subject to the same criminal procedure rules that govern a police officer’s conduct. Similarly, the actions of a private citizen are not restrained in any way by the constitutional principles that limit the actions of a public officer conducting and investigation. Therefore, members of a community patrol engaged in law enforcement functions are not restricted in the same ways that public law enforcement officers are limited. Indeed, there is little guidance on what laws govern community watch members acting in the course of their duties. Further, in recent years

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143 Simmons, supra note 12 at 929 (noting that courts have "refused to apply the standard constitutional restrictions on law enforcement (such as the exclusionary rule and Miranda warnings) to private security forces"); Slansky, supra note 1 at 1232. Courts have interpreted the state action doctrine narrowly, and have refused to treat private citizens as state actors unless they have been formally deputized or are acting at the direct behest of a government actor. See, e.g., Flagg Bros. v. Brooks, 436 U.S. 149 (1977).

144 Id. at 930 ("[G]iven the current status of the state action doctrine for criminal procedure cases, there is no way to legally distinguish between private police and private citizens.").

145 Fairfax, supra note 3, at 274 (noting that "[a]lthough those apprehended by private officers may be turned over to public authorities for prosecution, most private police are not in privity with the state and are not state actors for purposes of constitutional remedies").

146 Simmons, supra note 12, at 929 (Arguing that the refusal to extend constitutional restrictions to private actors is a "significant area of neglect, as the Constitution is the source of all significant limitation on public police powers, regulating how the public conduct investigations, searches, arrests, and interrogations").

147 See id.
there has been an expansion of the self-defense doctrine that has provide more power to private individuals, which directly impacts the powers of neighborhood watch patrols.

\textit{a. Detention and Arrest}

Much like a public police officer, a private citizen has certain rights to detain and arrest an individual without a warrant.\textsuperscript{148} Derived from historical doctrines permitting citizen arrest, current legal standards permit citizens to detain and arrest individuals under certain proscribed circumstances.\textsuperscript{149} Indeed, the ability of a police officer to arrest a suspect without a warrant is not much broader than the ability of a private citizen to do the same.\textsuperscript{150} Most statutes permit a citizen to arrest an individual when he observes the individual engaged in misdemeanor criminal conduct or has probable cause to believe an individual has committed a felony.\textsuperscript{151} Thus, a member of a neighborhood watch may detain any

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\footnote{\textsuperscript{148} Slansky, \textit{supra} note 1, at 1197.}
\footnote{\textsuperscript{149} Lester Bernhardt Orfield, \textsc{Criminal Procedure from Arrest to Appeal}, at 7 (Greenwood Press 1947) (noting that "[a]t common law, arrests might be made either by a private person or by a police officer").}
\footnote{\textsuperscript{150} Slansky, \textit{supra} note 1, at 1184 (noting that "the arrest powers of ordinary citizens in most states are not strikingly different, in some significant respects, from those of police officers"). Indeed, in the absence of a warrant, the only significant difference between the power of a police officer to arrest and the power of a private citizen to arrest is that the private citizen is liable for false arrest if she arrests for a felony that later turns out not to have been committed. \textit{Id.} at 1185}
\footnote{\textsuperscript{151} It should be noted that another way in which private individuals are given greater latitude in law enforcement activities is in the discretion they have to arrest and seek charges against an individual. "Unlike sworn officers, who are bound to file criminal charges when probable cause exists, private security personnel have discretion to prosecute offenders." Forst, \textit{supra} note 1, at 21-22.}
\end{footnotesize}
individual they observe engaging in particular criminal activity.\textsuperscript{152} Indeed, because the private individual is not restricted by the principles of the Fourth Amendment in stopping and arresting an individual, the member of a neighborhood watch need not abide by any of the numerous rules governing the ability of police to conduct such an arrest.\textsuperscript{153} Further, if the member of the neighborhood watch later turns out to be incorrect in his observations, the law does not require that any evidence seized pursuant to the arrest be inadmissible.\textsuperscript{154} Because the exclusionary rule does not apply to private conduct in most circumstances, even when a private citizen acts in an egregious manner in seizing an individual, such behavior will not prevent the admissibility of evidence obtained as a result.\textsuperscript{155}

\textit{b. Searches}

Similarly, the Fourth Amendment’s provisions do not apply to searches conducted by private citizens.\textsuperscript{156} Thus, a member of a neighborhood patrol may, upon stopping a suspect, search their person, their effects and their vehicle without concern about the applicability of

\textsuperscript{152} Slansky, \textit{supra} note 1, at 1184 ("A private citizen typically may [] arrest for a misdemeanor committed in his or her presence, and for a felony he or she has probable cause to believe the arrestee has committed – as long as the felony has in fact been committed, by the arrestee or someone else."). \textit{See} Turnbull v. Arkansas, 731 S.W.2d 794 (Ark. App. 1987) (holding that an individual acting as a member of a neighborhood watch does not have any greater power to arrest than a private citizen does).

\textsuperscript{153} \textit{See, e.g.} Forst, \textit{supra} note 1, at 21 (noting that "[p]rivate agents have the authority to stop and challenge any person, without probable cause, for trespassing in a designated private area, and they can make arrests without having to give Miranda warnings to arrestees").

\textsuperscript{154} \textit{See} Burdeau v. McDowell, 256 U.S. 465 (1921).

\textsuperscript{155} \textit{See} Simmons, \textit{supra} note 12, at 929.

\textsuperscript{156} Slansky, \textit{supra} note 1, at 1183.
search and seizure law.\textsuperscript{157} As long as the person conducting the search is not acting at the behest of a government agent, they need not abide by rules governing governmental searches.\textsuperscript{158} Any items seized in the course of such a search by a neighborhood watch member would be admissible at trial, as again, the exclusionary rule is inapplicable to such conduct.\textsuperscript{159}

c. Interrogation and the Right to Counsel

The interrogation of a suspect by a private citizen member of a neighborhood watch group is also not governed by the principles espoused in Fifth and Sixth Amendment jurisprudence.\textsuperscript{160} A member of a neighborhood watch need not read a suspect his Miranda rights before questioning the suspect, nor need the interrogation cease if the suspect requests an attorney.\textsuperscript{161} Indeed, lower courts have consistently held the Sixth Amendment protection against uncounseled interrogation inapplicable to interrogations by private parties.\textsuperscript{162} The information gleaned by the neighborhood watch member in the course of the interrogation would be admissible at trial and not subject to the exclusionary rule.\textsuperscript{163}

d. Concealed Weapon and Stand Your Ground Statutes

\textsuperscript{157} See id.

\textsuperscript{158} Id. at 1232.

\textsuperscript{159} Id. (noting that "[p]rivate searches fall outside the coverage of the Fourth Amendment, and evidence they uncover is almost always admissible").

\textsuperscript{160} Id. at 1229.

\textsuperscript{161} A private citizen, acting as a member of a neighborhood watch, is no more restricted by these principles than a private security guard, and "suspects interrogated by security guards are not entitled to Miranda warnings." Id.

\textsuperscript{162} Id. at 1233.

\textsuperscript{163} Id. at 1232-33 (noting that "lower courts without exception have refused to impose the prophylactic protections of Miranda on private interrogators").
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Thus, just as any other private citizen acting in her own capacity, the member of a neighborhood watch need not conform her actions to constitutional criminal procedure requirements. In some respects, this is not overly concerning. A member of a neighborhood watch does not exhibit the same indicia of authority as a public law enforcement officer: they typically do not wear a uniform or badge, nor do they openly carry weapons. Nor do they possess all of the powers that public law enforcement officers maintain: they cannot force an individual to stop or permit a search nor can they force an individual to remain in their presence while they pose questions. Yet the ability of these private citizens to conduct law enforcement activities is troubling, in part because of laws that have expanded upon and cemented the ability of individuals to carry weapons and to act in self-defense.

i. Expansion of Concealed Weapon Legislation

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to bear Arms, shall not be infringed." From early American jurisprudence to modern times, courts have consistently affirmed the right of the people to carry firearms. But the circumstances under which the "People" had the right to bear arms have altered dramatically over the centuries. Early American jurisprudence

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164 Id. at 1233 ("[T]he Due Process Clauses prohibit prosecutions based upon 'outrageous' investigative techniques, but only when they are employed by the government.").

165 U.S. CONST. amend II.


167 Robert J. Spitzer, THE RIGHT TO BEAR ARMS, at 84 (ABC-CLIO 2001) (noting that up until the second half of the twentieth century, the Second Amendment received little attention as it was thought to relate to citizen-militias,
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premised this right on the need for armed militias.\textsuperscript{168} Thus, in the eighteenth and nineteenth centuries those individuals who were part of the military were not only permitted to bear arms, but required to do so.\textsuperscript{169} It wasn't until the twentieth century that scholars began to argue that the Second Amendment was a source of individual rights.\textsuperscript{170} This more recent development has lead to statutes and cases explicitly providing for an individual right to bear arms.\textsuperscript{171} This right has not been interpreted to be absolute, however, and courts have held that legislatures may constitutionally regulate gun ownership in various ways.\textsuperscript{172}

Historically, many states have limited gun ownership through the requirement that a gun owner must receive a permit to carry the weapon.\textsuperscript{173} Thus, the state can regulate and limit those eligible to own a

however a shift in the latter half of the twentieth century has led to current jurisprudence interpreting the amendment to provide an individual right).

\textsuperscript{168} \textit{Id.} at 16-17.

\textsuperscript{169} \textit{Id.} at 17 (noting that there were two ways gun ownership was restricted in early American law – first by requiring that eligible males own a firearm to participate in the militia, second by barring certain groups, such as slaves, from owning guns).

\textsuperscript{170} \textit{Id.} at 50-51. In a law journal article published in 1960, the argument was first put forward that the right to bear arms was an individual right. In other words, "that the Second Amendment supported an individual or personal right to have firearms, in particular for personal self-defense, separate and apart from citizen service in a government militia." \textit{Id.} at 51; Michael C. Dorf, \textit{What Does the Second Amendment Mean Today, in THE SECOND AMENDMENT IN LAW AND HISTORY, at 247 (The New Press 2000)}.

\textsuperscript{171} See O'Shea, \textit{supra} note 166, at n. 24 (noting that "nearly all American jurisdictions authorize private individuals to carry handguns in public in at least some limited circumstances").

\textsuperscript{172} \textit{Id.} at 592-93.

\textsuperscript{173} \textit{Id.}
weapon by heightening the burden for obtaining a permit. While some states continue to use this ability to severely restrict gun ownership, the majority of jurisdictions currently authorize "shall issue" gun permits, allowing most individuals not specifically excluded by statute to own a gun.174 These states grant "presumptive carry" rights, which allow individuals "the opportunity, if they so choose, to carry defensive weapons in most places and times."175 Therefore, in most states, individuals need not have a specific need to carry a weapon in order to do so.176 This shift away from more restrictive gun control laws toward greater rights to bear arms has continued since the 1990s.177

Another way by which states regulate gun use is the method by which an individual can carry a weapon.178 In early American jurisprudence, laws permitting individuals to carry guns mandated that the weapon must be carried openly.179 This is in dramatic contrast to the current trend in state legislation, authorizing individuals to carry concealed weapons.180 Indeed, some states have barred the open display of guns and mandate that weapons may only be carried in a concealed manner.181 Since the 1990s, more and more states have allowed individuals to carry

174 Id. at 599 (explaining that "[t]irty-five states make available shall-issue handgun permits [and] [f]our more states dispense with a permit requirement").

175 Id. at 595.

176 Id.


178 O'Shea, supra note 166, at 596.

179 Id.


181 James Bishop, Hidden or on the Hip: The Right(s) to Carry after Heller, 97 CORNELL L. REV. 907, 924 (2012).
concealed weapons.\textsuperscript{182} Indeed, currently, more than forty states authorize concealed-carry permits for gun owners.\textsuperscript{183}

This shift away from more restrictive gun regulation to more permissive laws has lead to an increase in gun ownership. Indeed, while a precise number is hard to achieve, approximately one in three Americans currently owns a gun.\textsuperscript{184} This shift further reflects a change in the ability of citizens to use force to protect themselves.\textsuperscript{185} Individuals armed with weapons can use those weapons to defend themselves and their homes. Further, individuals organized as members of neighborhood watch programs may use weapons to protect themselves as they patrol their communities.\textsuperscript{186} Whether openly carrying weapons, or carrying a concealed weapon, a neighborhood watch member is empowered through his ability to wield a firearm.\textsuperscript{187}

\textit{ii. Stand Your Ground Legislation}

\textsuperscript{182} \textit{Id.} at 910 (“In a stunning cultural sea-change that began in the early 1990's, demand for concealed-carry permits exploded in popularity across the nation, and today more than forty states issue permits to anyone who meets the relatively modest eligibility criteria.”).

\textsuperscript{183} \textit{Id.}


\textsuperscript{185} Forst, \textit{supra} note 1, at 15 (“Laws permitting private citizens to carry concealed weapons became increasingly popular in the 1990s. The police no longer monopolize public safety.”).


The powers of private individuals to use force against others has also greatly expanded through the doctrine of self-defense. At its foundation, the doctrine of self-defense permits an individual to respond to an attacker with force.  This right is limited in that initial attack must be imminent and the response must be necessary and proportional. However, as long as those limitations are met, self-defense permits an individual to use force, even deadly force, in response to an attack.

In English common law, self-defense was an excuse available in certain cases but required the sovereign’s pardon. Self-defense was generally disfavored by English jurists and thus limitations were put in place on its applicability. One such limitation was the duty to retreat. In English law, a defendant must have “retreated until his back was ‘to the wall’” in order to successfully claim the defense.

The doctrine of self-defense was also incorporated into early American jurisprudence, as was the duty to retreat under the doctrine. Yet “[d]espite the significant precedent establishing the duty to retreat in the English and Anglo-American common law, there was a dramatic movement to abandon the duty in the United States during the late

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189 *Id.* at 5-6.

190 *Id.*

191 *Id.*


193 *Id.*

194 Ross, *supra* note 188, at 5-6.

195 Levin, *supra* note 192, at 529.
This movement to abandon the duty to retreat is often attributed to a unique early-American mindset and what is known as the “true man” ideal: that a true man need not retreat when attacked by another. Thus, if an individual was attacked by another, the “true man” principle would permit him to respond to that attack with deadly force without being criminally liable for murder.

Despite this nineteenth century movement to abandon the duty to retreat, the duty remains a significant part of modern American jurisprudence on self-defense. Yet, over time, the duty to retreat has been narrowed in numerous ways. The most broadly adopted exception to the duty to retreat is commonly referred to as the “Castle Doctrine.”

Under this doctrine, an individual may defend himself in his own home and need not retreat before doing so. Over time, this doctrine has been expanded by many states to include the curtilage of a home. Other states have expanded the Castle Doctrine to include vehicles. Thus, this expansion of the doctrine has allowed for individuals to exercise deadly force and refuse to retreat when attacked in the area surrounding the home or their car.

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196 Id.

197 Id. See also Catherine L. Carpenter, Of the Enemy Within, the Castle Doctrine, and Self-Defense, 86 MARQ. L. REV. 653, 655 (2003) (noting that in early-American jurisprudence "most American courts were hesitant to adopt any rule that required a non-aggressor to retreat from an unprovoked deadly attack").

198 Id.

199 Ross, supra note 188, at 2.

200 Id.

201 Id.

202 Id. at 23 (noting that Indiana, Kansas, Louisiana, and South Dakota have all extended the Castle Doctrine to apply to vehicles).
Watching the Watchers

The more recent trend has been to expand the Castle Doctrine much further, nearly doing away with the duty to retreat altogether. This recent trend abandons the duty to retreat in public places where the individual has a right to be. This new expansion invokes some of the “true man” arguments of the latter part of the nineteenth century and grounds itself in the principle that an individual need not avoid a confrontation with an unprovoked attacker so long as he is rightfully in a public place. Statutes reflecting this expansion of the Castle Doctrine are often referred to as “Stand Your Ground” laws.

Stand Your Ground legislation has been considered in well over half of the states and has been adopted by twenty-four states. In those states that have adopted Stand Your Ground statutes, “defendants need only show that they were not the first aggressor and had a legal right to be in the location where they remained; if those conditions are met, they have no duty to retreat and may meet ‘force with force.’”

Other protections of the right to self-defense have been incorporated into these Stand Your Ground laws. For example, in Alabama, if the use of deadly force is justified, the defendant who used such force is immune from both criminal and civil liability. Further,

203 Id. at 2.
204 Donald Braman, Cultural Cognition and the Reasonable Person, 14 LEWIS & CLARK L. REV. 1455, 1461 (2010).
205 Levin, supra note 192, at 533.
206 Ross, supra note 188, at 2.
207 See Carpenter, supra note 196, at 663 (explaining that “[m]ost jurisdictions do not impose the duty to retreat on one who is lawfully attacked, whether in public or private space”); Cora Currier, The 24 States That Have Sweeping Self-Defense Laws Just Like Florida’s, PRO PUBLICA, http://www.propublica.org/article/the-23-states-that-have-sweeping-self-defense-laws-just-like-floridas.
208 Braman, supra note 204, at 1461.
209 Ross, supra note 188 at 23.
Watching the Watchers

Alabama law places the burden on law enforcement to make an initial determination as to whether the use of deadly force is justified and a suspect may only be arrested if there is probable cause to find that the use of such force was unlawful.\textsuperscript{210} Thus, by shifting the burden from the defendant to defend his actions to the state to determine whether a defense exists, Alabama’s Stand Your Ground statute gives individual defendants a much greater chances at success in asserting the defense.

Court cases interpreting Stand Your Ground statutes have often interpreted them quite broadly, providing defendants great protections under the defense. For example, in Florida, an appellate court held that the Stand Your Ground statute allowed for a defendant to use deadly force "even if other less extreme measures are available for them to protect themselves and the attacker is unarmed."\textsuperscript{211} Thus, the Stand Your Ground defense can be used in circumstances where the law historically would not allow for the use of deadly force to respond to an attacker.

This broadening of self-defense and gun ownership laws has led to private citizens wielding greater powers against one another. This empowerment extends to members of neighborhood watch programs. When confronted by a suspect while on a neighborhood patrol, in most states the member of the patrol may not only be carrying a firearm, but may use it against the suspect should he feel attacked – even if the suspect later turns out to have been unarmed an innocent of any criminal conduct. Because of these powers, and the lack of restrictions on the conduct of neighborhood watch associations, actions of neighborhood watch members may lead to significant concerns about due process protections and the fairness of the criminal justice process as a whole.

\hspace{1cm} e. Problems Posed by the Powers Available to Neighborhood Watch Members

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\hspace{1cm} 210 Id.

Watching the Watchers

This right to “stand your ground” against an attacker, and the increasing number of laws protecting the right to carry a weapon, have led to a citizenry that may use deadly force in numerous circumstances. But perhaps nowhere is this more concerning than in situations where that citizenry has taken on law enforcement duties. Neighborhood watch patrols comprised of untrained citizens, armed and empowered, without constitutional limitations restricting their behavior, will likely lead to a failure to adequately protect the civil liberties of individuals confronted by such patrols.

While there are not significant concerns over a single citizen stopping, searching, and questioning an individual suspect, when that citizen becomes a member of a group charged with protecting a neighborhood, and empowered with laws that allow him to carry a weapon and refuse to back down in a confrontation, legitimate concerns arise over the protection of civil liberties. Certainly a suspect can refuse to respond to questions posed by a member of the neighborhood watch, or refuse to stop or allow a search of his person. But when that neighborhood watch member carries a weapon and is authorized to defend himself with deadly force should a confrontation ensue, the power of the neighborhood watch to coerce a suspect into stopping or permitting a search greatly increases.

Further, because private actors have total discretion in determining whom to investigate and against whom to seek criminal sanctions, there is

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212 See, e.g. Boget v. Texas, 40 S.W.3d 624, 627 (Tex. App. 2001) (holding that a member of a neighborhood watch could assert self-defense when he damaged the windshield of a car whose driver appeared to be intoxicated, but later turned out to be sober).

213 Neighborhood watch members have other methods of coercion, as well. Cases in which neighborhood watch members have been accused of threatening or harassing suspects demonstrate the more subtle powers that neighborhood watch groups can wield. See, e.g. Amarillas v. Campolong, No H030971, 2008 WL 4606528, at *3 (Cal. App. 2008); Turnage v. Kasper, 704 S.E.2d 842, 846 (Ga. Ct. App. 2010).
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concern that those private actors are engaging in behavior that may violate the due process and equal protection rights of suspects.\textsuperscript{214} Bias against certain demographic groups is a problem that has long plagued public law enforcement entities.\textsuperscript{215} Police departments and prosecutorial offices have attempted to remedy this concern through various methods.\textsuperscript{216} Procedural rules and case law have attempted to limit the use of racial profiling by law enforcement officers.\textsuperscript{217} While such conduct certainly still occurs, the race or ethnicity of an individual cannot in and of itself provide suspicion to stop or detain that individual.\textsuperscript{218} Further, police departments have invested in training and educational programs designed to attack biases within the department.\textsuperscript{219} The effectiveness of such programs is a matter of debate, but for purposes of this Article the important point is that there have been attempts at limiting the impact of bias on law enforcement decisions.

No such limitations exist in realm of private law enforcement. While private security companies may decide to train their guards on unbiased ways of targeting suspects, such training is not legally required.

\textsuperscript{214} Forst, supra note 1, at 22.

\textsuperscript{215} Braman, supra note 204, at 1479.

\textsuperscript{216} See, e.g. Abe Markman, Overcoming Hidden Biases, 72 Humanist 2 (Mar. 1, 2012) (describing a training program recently adopted by the New York City Police Department which is aimed at helping "officers recognize and overcome bias"); Police Academy Class Focuses on Civil Rights, Montgomery Advertiser (Aug. 27, 2011) (describing a training program for Alabama police officers "focus[ing] on cultural diversity, civil rights and bias-based policing").


\textsuperscript{219} See supra, note 216 and accompanying text.
Even less likely to receive such training are neighborhood watch members. Burdened by (and perhaps unaware of) their own individual biases and without procedural rules or training to restrict them from acting on those biases, neighborhood watch members may target individual suspects based upon their race or ethnicity. The targeting of individuals based on such considerations raises significant due process and equal protection concerns, and is yet another reason to reexamine the powers conveyed upon private citizens engaged in law enforcement activities.

220 See Braman, supra note 204, at 1479 (noting that implicit bias is difficult to identify and remedy because it "works not through overt reference to our conscious consideration of race, but rather through subtle effects on cognition that subtly shape actors' perceptions and reactions").

221 In the aftermath of the Trayvon Martin shooting, much attention was directed at the reason he was identified as "suspicious" by a neighborhood watch volunteer. Audra D.S. Burch, After Trayvon Martin, hoodie goes from fashion statement to socio-political one, MIAMI HERALD, http://www.miamiherald.com/2012/03/24/v-fullstory/2712545/after-trayvon-martin-hoodie-goes.html#storylink=cpy (Mar. 25, 2012). Media reports speculated that George Zimmerman likely targeted Martin because he was a young African-American male wearing a hooded sweatshirt. Robin Givham, Hoodies, Trayvon Martin, and America’s Racial Fears, THE DAILY BEAST, http://www.thedailybeast.com/articles/2012/03/29/hoodies-trayvon-martin-and-america-s-racial-fears.html (Mar. 29, 2012). This coverage sparked further national debate over what should be considered "suspicious." Peter Grier, Trayvon Martin case: Is hoodie a symbol of menace or desire for justice?, CHRISTIAN SCIENCE MONITOR, http://www.csmonitor.com/USA/Justice/2012/0326/Trayvon-Martin-case-Is-hoodie-a-symbol-of-menace-or-desire-for-justice-videoChristian Science Monitor (Mar. 26, 2012). The fact is, however, that with no laws governing the conduct of neighborhood watch organizations, these community members can use whatever criteria they like in identifying suspects. While Zimmerman was ultimately criminally charged with the murder of Martin, less egregious civil rights violations are unlikely to get the attention of police and prosecutors.
Watching the Watchers

Through the expansion of self-defense laws and the individual right to bear arms, private citizens engaged in law enforcement duties as members of a neighborhood watch wield power and authority that nears that exercised by public police officers. Yet these neighborhood watch groups are not restricted in any way by the constitutional limitations that govern the actions of public law enforcement officers. This is not to say that there are no limitations on the private exercise of power in this context, but that such limitations are ineffective and fail to address the enormity of the potential problem.

f. Limitations on Private Actors

An individual member of a neighborhood watch and the neighborhood watch organization is not immune liability for illegal or tortious conduct merely because they are acting as members of a private law enforcement group. Neighborhood watch members may be criminally prosecuted for illegal conduct. Thus, if a member uses force to stop an individual he could be prosecuted for assault or false

222 See Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 NO. 2 CRIM. L. BULL. ART. 1, n. 95 (2012) (asserting that "[w]ith the constitutionalization of personal gun ownership, a proliferation of 'stand your ground' laws, and a possible rise of a vigilante mentality as government services are cut back, such cases may create substantial questions of justice").

223 Some advocates of criminal justice reform have argued that the rules and limitations imposed upon private actors are the same rules that should be used in the context of public law enforcement. These advocates have argued that the legal regime governing public actors should be "deconstitutionalized, defederalized, tort based, and heavily reliant both on legislatures and juries." Slansky, *supra* note 1, at 1168.

224 See, e.g. id. at 1183 (noting that "the main legal limitations on the private police today are tort and criminal doctrines of assault, trespass and false imprisonment").
imprisonment. Further, if he searches property without the owner's consent, he could be prosecuted for criminal trespass. Any myriad of criminal laws could be used to punish the behavior of a neighborhood watch member who reaches beyond the conduct permissible for private citizens.

Further, neighborhood watch members and the organization itself could be sued for tortious conduct. While state actors often have immunity from suit for conduct occurring in the course of their official duties, no such immunity extends to private actors. Thus, an individual whose rights were violated by a neighborhood watch has the ability to sue the members and the organization itself for under common law tort doctrines.

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225 Id. (explaining that "arrests or detentions not authorized by state law generally will expose a security guard to civil and criminal liability for false imprisonment and, if force is involved, assault"). Further, a suspect who resists arrest by a public police officer can be charged with a crime. No such crime exists for resisting a citizen's arrest. Id. at 1187

226 Id.

227 Id. at 1186. See, e.g. Bradford v. SLC Police Dep't, No. 2:09CV144 DAK, 2010 WL 681659 (D. Utah Feb. 23, 2010).

228 Id. at 1186. See, e.g. Turnage, 704 S.E.2d at 846 (Landowner sued members of neighborhood watch for malicious prosecution, intentional infliction of emotional distress, and defamation). On the other hand, a suit for violating an individual's civil liberties under § 1983 will not succeed against members of a neighborhood watch because they are not state actors. See, e.g. Ben v. Garden District Ass'n, No. 12-174, 2012 WL 2374641 (E.D. La. June 22, 2012); Spetalieri v. Kavanaugh, 36 F. Supp. 2d 92 (N.D.N.Y 1998). Spetalieri involved a § 1983 action against law enforcement officials and members of a neighborhood watch group for taping phone conversations of the plaintiff and then disseminating the tapes. The court dismissed the claims against the neighborhood watch member
Despite these two avenues for relief, the remedies available to individuals whose rights were violated by a neighborhood watch are often ineffective and inefficient. Criminal prosecutions of neighborhood watch members are unlikely to occur except in the most egregious circumstances.\textsuperscript{230} Public police and prosecutors are unlikely to pursue criminal charges against individuals engaged in law enforcement activities if their actions do not go well beyond the law. Indeed, law enforcement officials can benefit from the illegal activities of these neighborhood watch members.\textsuperscript{231} When a neighborhood watch member conducts an illegal search and obtains evidence that will later be used at trial, the police and prosecutor benefit from that search without the penalty of having it declared inadmissible under the exclusionary rule.\textsuperscript{232} Similarly, when a neighborhood watch member coerces a suspect into confessing without Miranda warnings or a requested lawyer, public law enforcement officials benefit from the member’s conduct, and will likely be able to enter that admission into evidence at trial.

A civil suit is also unlikely to be an effective remedy for conduct that violates an individual’s civil rights. Just as a criminal suspect is unlikely to have the resources or knowledge to file a § 1983 action against a public officer who violates his civil liberties, so too is a suspect unlikely because her "participation in a neighborhood watch group [did] not transformer her actions in to state action. \textit{Id.} at 103.

\textsuperscript{230} See, \textit{e.g.} \textit{id.} at 1186 (asserting that "[s]uccessful criminal prosecutions in [instances of false arrest] appear virtually nonexistent").

\textsuperscript{231} Fairfax, \textit{supra} note 3, at 274 (noting the "possibility that evidence will be collected [by private actors] in a way that offends constitutional norms, but that can still be shared with government prosecutors for use in establishing criminal liability").

\textsuperscript{232} See, \textit{e.g.} United States v. Powell, No. 2:10-cr-36-FtM-36DNF, 2010 WL 3156559, at *5 (M.D. Fla. July 9, 2010) (demonstrating that neighborhood watch programs can provide information to police that enables them to obtain search warrants).
to file such an action against private individuals who encroach upon his civil liberties. In addition, even if an individual has the resources to take the case to trial and the evidence to support liability, the likely recovery in such a case is typically quite small.\textsuperscript{233} Thus, there is not great financial incentive for an individual to file a civil suit to recover for civil rights violations.

Further, if the illegally obtained evidence results in a criminal conviction, the defendant’s success in a criminal or civil action will not overturn the conviction. Exclusion of evidence, the remedy available to defendants in criminal prosecutions where the police acted illegally, is simply not a remedy available to defendants who claim evidence was illegally seized by a private actor.\textsuperscript{234}

\textbf{IV. IMPOSING LEGAL RESTRICTIONS ON NEIGHBORHOOD WATCH ACTIVITIES}

As noted above, current legal restrictions on private citizens engaged in law enforcement duties are not effective to address the potential problems posed by such activities. The powers available to private citizens engaged in law enforcement functions are in many ways as great as those available to public law enforcement officers. Yet private citizens are not limited by the constitutional doctrines that restrict the behavior of government actors engaged in law enforcement activities. As neighborhood watch programs continue to grow in popularity, and laws permitting the ownership of guns and self-defense expand, it is easy to foresee the potential problems that could ensue. Indeed, in February 2012, the shooting death of an African-American teenager by a neighborhood watch member in Florida sparked a national debate over neighborhood watch activities.

\textsuperscript{233} Slansky, \textit{supra} note 1, at 1185-86 (noting that the low recovery "may explain why such cases appear to be rare").

\textsuperscript{234} Id. at 1186 (explaining that "evidence generated by an illegal arrest by a police officer is, as a general matter, inadmissible against a criminal defendant; the fruits of private illegality are not similarly excluded").
watch programs generally, and Stand Your Ground Laws specifically.235 This incident is an extreme example of what can happen when private citizens are engaged in law enforcement activities without the restrictions and training of police officers. But even less extreme results present significant concerns about fairness in the criminal justice process. Unreasonable detentions, illegal searches, and coerced confessions all can result from a neighborhood watch member acting to detect and prevent crime in his community. And all of these circumstances lead to concerns about the erosion of due process protections and the violation of civil rights. Thus, limitations need to be put in place to restrict the ability of neighborhood watch members to wield these powers and ensure a fairer system of law enforcement.

The most drastic solution to the problem presented is the abandonment of the state action doctrine. By limiting constitutional rules to government actors, the state action doctrine fails entirely to address private actors engaged in law enforcement activities.236 This failure becomes all the more egregious when examined in light of the growing privatization of law enforcement functions.237 While more and more private actors are performing the tasks previously associated with police officers, constitutional restrictions have not been extended to govern the conduct of those private citizens.


236 See discussion, supra, Part III.

237 See Slansky, supra note 1, at 1228-1230.
Abandonment of the state action doctrine, or a significant curtailment of the principles behind it, would allow the procedural rules derived from the Fourth, Fifth, and Sixth Amendments to extend to conduct engaged in by private law enforcement. This would ensure that due process rights were protected, regardless of the party engaged in the law enforcement activity. Further, rejection of the state action doctrine would more adequately ensure the overall fairness of criminal investigations and prosecutions. Thus, the rights of criminal suspects would be better protected by limiting the use of illegally obtained evidence and providing a more meaningful remedy to those suspects whose rights have been violated by private law enforcement.

However, abandonment of a doctrine so entrenched in constitutional jurisprudence is unlikely. Thus, a far more practical solution to the problems presented by neighborhood watch associations is legislation addressing and limiting the powers and abilities of neighborhood watch members.

Currently, there is little to no law governing the activities of neighborhood watch associations. This black hole has allowed for private actors to engage in activities with little oversight, training, or governing rules. Legislation that limits the ability of a private citizen acting as a member of a group tasked with detecting and preventing crime and engaged in law enforcement activities would better ensure that due process guarantees are met even though the citizen is not a public officer.

Any number of statutory provisions could help to restrict the activities of neighborhood watch members and therefore better protect the rights of individual suspects. For example, statutory law could limit the ability of neighborhood watch groups to carry weapons while on patrol. This would lessen the coercive power of neighborhood watch members and might reduce the number of illegal detentions, searches, and interrogations.

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238 See discussion, supra, Part III.
Further, statutes could limit the ability of neighborhood watch members to confront suspects in the course of their duties. While some neighborhood watch guides provide instructions that members avoid confrontation and limit themselves to observation and reporting, no statutes legally restrict neighborhood watch organizations in this way. By preventing members from engaging with suspects while on patrol, such statutes would limit the opportunity for neighborhood watch organizations to impinge upon the due process rights of individuals.

Statutes could further encourage criminal prosecution of neighborhood watch members engaged in illegal activities by mandating arrest under certain proscribed circumstances. This would discourage members from taking the law into their own hands and engaging in criminal activity in order to find evidence of a crime or prevent a suspect from leaving. Statutes could also provide more resources to those seeking to file a civil suit for the tortious actions of a neighborhood watch member.

In addition, statutes could provide certification of neighborhood watch programs, mandating a certain amount of training in order to participate in law enforcement activities. That training could involve anything from exploration and rejection of bias in targeting suspects to appropriate use of weapons while on patrol.

Finally, perhaps the most effective statutory remedy would be an extension of the exclusionary rule to cover evidence illegally seized by anyone, not just state actors. Indeed, one state, Texas, currently has such a law in place.\(^{239}\) Interestingly, Texas extended the exclusionary rule to apply to evidence illegally seized by private citizens as a direct response to concerns about vigilantism and the lack of constitutional restrictions on private individuals engaged in law enforcement activities.\(^{240}\)

\(^{239}\) See, e.g. Tex. R. Crim. Pro. 38.23; While the legislature has since considered eliminating this expansion of the exclusionary rule, it has never acted to change the rule, and thus it remains a part of the Texas Code of Criminal Procedure. Id.

\(^{240}\) Adam M. Gershowitz, *Is Texas Tough on Crime but Soft on Criminal Procedure?*, 49 AM. CRIM. L. REV. 31 (2012). As Professor Gershowitz notes, in
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While the exclusionary rule typically only leads to the exclusion of evidence illegally seized by government actors or those acting at the direction of government officials, an expansion of the rule to generally cover those engaged in law enforcement duties would better protect due process guarantees. While this rule, in and of itself, might not deter private individuals from engaging in illegal conduct to obtain evidence, it would prevent the police and prosecutors from benefitting from such illegal conduct. Thus, the use of illegally obtained evidence to convict an individual would be prohibited, regardless of its source; thereby protecting due process guarantees and ensuring a fairer criminal justice process. Further, expansion of the exclusionary rule would provide defendants with a meaningful remedy to violations of their civil rights. While damages resulting from a civil action or prosecution of the neighborhood watch member might provide some relief to a defendant whose rights have been violated, a more important remedy would be to prevent the fruits of such illegal conduct from supporting a conviction in the first place.

Because of the utter lack of statutory law governing private criminal justice actors, neighborhood watch members act outside of the constraints of most criminal justice principles. Without guidance or restrictions, these citizens are able to exercise great powers without the constitutional restrictions imposed upon those who are employed by the state. Yet neighborhood watch members can, and do, perform many of the same functions as public law enforcement. Thus, restrictions on their activities are necessary to ensure that they do not violate the law. By enacting legislation that guides and governs the activities of neighborhood watch associations, state legislatures would not only recognize their growing

1925, the Texas legislature enacted an exclusionary rule in response to concerns about vigilantism. Id. These concerns specifically dealt with private citizens engaging in law enforcement activities and turning over illegally seized evidence to the police for use at trial. Id. In order to discourage such vigilantism and prevent police from benefitting from illegal behavior, the Texas exclusionary rule bars the use of evidence illegally seized by private citizens, in addition to barring evidence illegally seized by police. Id.
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importance in the prevention and detection of crime, but also limit the powers they wield within communities.

CONCLUSION

The powers granted by the state to police are significant. To balance out these powers and ensure that individual liberties are not unnecessarily intruded upon, federal and state law provides rigorous procedural protections to individuals who are the subject of police action. Yet when private organizations take on the role of law enforcement, these procedural safeguards are often abandoned or ignored. At the same time, laws permitting the ownership of weapons and extending the right to use deadly force in self-defense have empowered private individuals engaged in the task of law enforcement.

Perhaps nowhere is this more concerning than in the realm of neighborhood watch associations. Without the training or oversight that private security guards often receive, let alone the training and oversight provided to police officers, the individual participants in neighborhood watch programs are given many of the powers of public law enforcement with little guidance or limitation. These neighborhood watch members can patrol the streets of their community and engage in illegal detentions, searches, seizures, and interrogations without impacting the ability of the state to obtain a conviction based upon the illegally obtained evidence. Indeed, police and prosecutors alike can benefit from the illegal activities of neighborhood watch participants by utilizing evidence that would be inadmissible if obtained by a public law enforcement officer. Thus, neighborhood watch associations wield significant enforcement power without any meaningful statutory restrictions. This can and has led to civil rights violations, in addition to far more tragic consequences.

A simple solution to this growing dilemma is for state legislatures to enact laws that address private criminal justice actors. The current black hole of legislation addressing private law enforcement needs to be supplanted with clear rules governing the actions of neighborhood watch participants. By establishing laws that restrict the ability of a neighborhood watch member to carry a weapon while on patrol or
confront individual suspects, legislatures would limit the ability of the members to engage in coercive or illegal behavior. By enacting statutes that provide for mandatory training of neighborhood watch participants, legislatures could limit the impact of individual bias in targeting suspects by those participants. By statutorily providing for more probable and significant criminal and civil penalties for those engaged in illegal conduct while acting as members of a neighborhood watch program, legislatures would deter such illegal conduct. Finally, and perhaps most significantly, by extending state statutory exclusionary rules to include the exclusion of evidence illegally obtained by private individuals, state legislatures could better ensure the fairness of the criminal justice process. By refusing to use evidence obtained in violation of the laws to convict individuals, legislatures would more adequately protect due process rights essential to the American criminal justice system.

Thus, state legislatures could effectively address the problems presented by the growing number of neighborhood watch programs and expansion of self-defense and gun ownership laws. By enacting statutes designed to limit the behavior of those engaged in private law enforcement activities, legislatures could better preserve due process guarantees and ensure the fairness of the criminal justice process.