

# THE PRIVATE POLICE

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Legal scholars have largely neglected private policing, and the neglect is increasingly indefensible. The private security industry already employs more guards, patrol personnel, and detectives than the federal, state, and local governments combined, and the disparity is growing; to a striking extent, private firms now perform many of the beat-patrol tasks once thought central to the mission of the public police. In this Article, Professor David Sklansky describes what is known and unknown about the private security industry, traces the industry's history, assesses the challenges and opportunities it creates for judges and scholars, and provides an agenda for future research and doctrinal development. Private security firms furnish tangible evidence about what some people want but are not receiving from public law enforcement, and the legal regime governing private security—deconstitutionalized, defederalized, tort based, and heavily reliant both on legislatures and on juries—offers important opportunities to test some of the most persistent proposals for reforming criminal procedure law. In addition, because maintaining order and controlling crime are paradigmatic governmental functions, private policing presents a unique and underused vantage point for reexamining the public-private distinction and the state action doctrine. Finally, and perhaps most importantly, police privatization provides occasion for reconsidering the focus of constitutional law on negative obligations of government, and the focus of constitutional criminal procedure on fairness to individual criminal defendants; the dramatic spread of policing-for-hire should prompt us to rethink what it means to guarantee all citizens, regardless of wealth, the equal protection of the laws.

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## INTRODUCTION

For most lawyers and scholars, private security is *terra incognita*—wild, unmapped, and largely unexplored. Criminal procedure, the branch of constitutional law that aims to regulate the conduct of the police, is a well-developed field of jurisprudence and of legal scholarship. The complaint is heard increasingly often that contemporary criminal procedure is *too* well developed—*too ornate, too complicated, too far removed from first principles*. No one makes that complaint about private security law. Indeed, no one even speaks of “private security law,” for the very phrase suggests a unified and specialized body of rules that does not exist. Instead, 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. On those rare occasions when private security employees become "state actors," constitutional criminal procedure gets added to the mix. Partly as a result of this disarray, legal scholars have tended to ignore private security.<sup>1</sup>

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1. With a few notable exceptions. Wayne LaFave's treatise on Fourth Amendment law has a thoughtful section on private searches, see 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.8 (3d ed. 1996), and John Burkoff and Tamar Frankel have both published insightful articles on private security—one more than 15 years ago and the other almost 30 years ago, see John M. Burkoff, *Not So Private Searches and the Constitution*, 66 CORNELL L. REV. 627 (1981); Tamar Frankel, *The Governor's Private Eyes*, 49 B.U. L. REV. 627 (1969). Of similar vintage is Cherif Bassiouni's helpful monograph on the law of citizen's arrests. See M. CHERIF BASSIOUNI, CITIZEN'S ARREST: THE LAW OF ARREST, SEARCH, AND SEIZURE FOR PRIVATE CITIZENS AND PRIVATE POLICE (1977).

The vast majority of legal scholarship on security guards has come from law students and recent law school graduates, who perhaps lack their teachers' "trained incapacity" to see the significance of private policing for the problems of criminal procedure. THORSTEIN VEBLEN, THE INSTINCT OF WORKMANSHIP 347 (1914). Like the articles by Burkoff and Frankel, these works focus on the threats to privacy posed by the burgeoning business of private security, not on the question at the heart of this Article: what lessons does private policing offer about policing more generally, criminal procedure, and constitutional law? See, e.g.; Heather Barr, *More Like Disneyland: State Action, 42 U.S.C. § 1983, and Business Improvement Districts in New York*, 28 COLUM. HUM. RTS. L. REV. 393 (1997); Steven Euller, *Private Security and the Exclusionary Rule*, 15 HARV. C.R.-C.L. L. REV. 649 (1980); John B. Owens, *Westec Story: Gated Communities and the Fourth Amendment*, 34 AM. CRIM. L. REV. 1127 (1997); Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039 (1971); Alan D. Axelrod & Thomas Elkind, Note, *MERCHANTS' RESPONSES TO SHOPLIFTING: AN EMPIRICAL STUDY*, 28 STAN. L. REV. 589 (1976); Michael A. Braun & David J. Lee, Comment, *Private Police Forces: Legal Powers and Limitations*, 38 U. CHI. L. REV. 555 (1971); Marco Caffuzzi, Note, *Private Police and Personal Privacy: Who's Guarding the Guards?*, 40 N.Y.L. SCH. L. REV. 225 (1995); Gloria G. Dralla et al., Comment, *Who's Watching the Watchman? The Regulation, or Non-Regulation, of America's Largest Law Enforcement Institution, the Private Police*, 5 GOLDEN GATE U. L. REV. 433 (1975); Peter Fine, Note, *Private Assumption of the Police Function Under the Fourth Amendment*, 51 B.U. L. REV. 464 (1971); Lynn M. Gagel, Comment, *Stealthy Encroachments upon the Fourth Amendment: Constitutional Constraints and Their Applicability to the Long Arm of Ohio's Private Security Forces*, 63 U. CIN. L. REV. 1807 (1995); Robert A. Hillman, Note, *Admissibility of Evidence Seized by Private University Officials in Violation of Fourth Amendment Standards*, 56 CORNELL L. REV. 507 (1971); Terrance L. O'Connor, Comment, *Search and Seizure by Private Parties: An Exception to the Exclusionary Rule*, 5 LAND & WATER L. REV. 653 (1970); R. Scott Palmer, Comment, *Sticky Fingers, Deep Pockets, and the Long Arm of the Law: Illegal Searches of Shoplifters by Private Merchant Security Personnel*, 55 OR. L. REV. 279 (1976); B.C. Petroziello, Comment, *The Platinum Platter Doctrine in Ohio: Are Private Police Really Private?*, 2 U. DAYTON L. REV. 275 (1977); Susan E. Pfeifer, Comment, *Unreasonable Private Searches and Seizures and the Exclusionary Rule*, 16 AM. U. L. REV. 403 (1967); Note, *Regulation of Private Police*, 40 S. CAL. L. REV. 540 (1967); Comment, *Shoplifting Law: Constitutional Ramifications of Merchant Detention Statutes*, 1 HOFSTRA L. REV. 295 (1973) [hereinafter *Shoplifting Law*]; Joan Canale Szuberla, Comment, *Reality and Illusion: Defining Private Security Law in Ohio*, 13 U. TOL. L. REV. 377 (1982); Brian L. Williams, Case Note, 18 WM. MITCHELL L. REV. 175 (1992); Harvey L. Ziff, Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608 (1967).

The neglect is increasingly indefensible. The private security industry already employs significantly more guards, patrol personnel, and detectives than the federal, state, and local governments combined, and the disparity is growing.<sup>2</sup> Increasingly, private security firms patrol not only industrial facilities and commercial establishments but also office buildings, shopping districts, and residential neighborhoods. Private policing poses no risk of supplanting public law enforcement entirely, at least not in our lifetime, and it is far from clear to what extent the growing numbers of private security employees are actually performing functions previously carried out by public officers. Still, if criminal procedure scholars continue to focus exclusively on the public side of law enforcement, our work is likely to become of steadily more marginal importance.

More importantly, ignoring private policing has impoverished our thinking about the public police and about constitutional criminal procedure. Private security firms offer tangible evidence about what some people want but are not receiving from public law enforcement, and what the public may increasingly pressure police departments to provide. The legal regime governing private security, moreover, is strikingly similar to the legal regime that many reformers have advocated for public law enforcement: deconstitutionalized, defederalized, tort based, and heavily reliant both on legislatures and on juries. It therefore offers tantalizing opportunities to test some of the most persistent objections to modern criminal procedure law.<sup>3</sup> And because maintaining order and controlling crime are paradigmatic governmental functions, private policing offers a unique and underused vantage point for reexamining the public-private distinction and the state action doctrine. Finally, police privatization furnishes an opportunity to reconsider the focus of constitutional law on negative obligations of government, and the overwhelming focus of constitutional criminal procedure on fairness to individual criminal defendants. The dramatic spread of policing-for-hire may require rethinking, for example, what it means to guarantee all citizens, regardless of wealth, the equal protection of the laws.

This Article seeks to demonstrate why private policing deserves more attention from legal scholars, to suggest what forms that attention should take, and to draw some tentative lessons from the little we already know.

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2. See *infra* notes 26–28 and accompanying text.

3. See, e.g., CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION (1993); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994), reprinted in AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 1 (1997); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 930, 953–56 (1965); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49.

Necessarily, given the longstanding disregard of private security, the Article is preliminary and exploratory. It offers more questions than answers, and more suggestions than conclusions. It aims not to exhaust a subject of study, but to begin one.

To do even that much requires some background. Part I of the Article thus sets forth what every scholar of criminal procedure or constitutional law needs to understand about today's private police: who they are, what they do, the rules that govern them, and the broad questions they present. I start by examining what is known, and what is unknown, about the private security industry and its recent, dramatic growth. To a striking extent, private firms now perform many of the beat-patrol tasks once thought central to the mission of the public police, although the manner in which private patrols operate has been largely hidden from view. I then turn to the legal rules governing private security personnel. I note the ways in which the rules differ from those applicable to public law enforcement, and the often overlooked ways in which they do not. Finally, I explore the conflicting reactions provoked by police privatization; those reactions, I try to show, reflect broader ambivalence about the boundary between public and private.

To understand that ambivalence and the manner in which it affects thinking about the private police, we need to appreciate not only the current contours of the private security industry, but also the manner in which the industry has developed. Part II therefore describes the history of private policing, which turns out to be tightly entwined with the history of public law enforcement. I trace how nineteenth-century police departments arose out of private patrol and investigative services, how twentieth-century law enforcement followed in the footsteps of nineteenth-century detective agencies, and how private security firms in the twentieth century moved into patrol niches vacated by the public police. I describe dramatic changes in what aspects of policing are thought most centrally public, but also observe the remarkable persistence of the notion that policing, however ill defined, should not be left in private hands. Part II concludes by drawing provisional lessons from the history of policing about the causes of the recent expansion of private security, the considerable but finite malleability in the forms and conceptions of policing, and the limits of legal rules in structuring the police as a social institution.

Having laid the groundwork in Parts I and II, I turn in Part III to perhaps the most obvious challenges that private policing poses for criminal procedure jurisprudence and scholarship: the unresolved and possibly irresolvable dilemmas it creates for the state action doctrine in criminal procedure. I consider here not only the problems that private policing presents for the

concept of state action, but also the lessons it may offer. Because it touches so strongly our ambivalence about the public-private divide, the private security industry places great strain on the doctrine that constitutional rights constrain only action attributable to the government. The manner in which courts have responded to that strain throws light on the centrality of symbolism in our understanding of the police and on the inevitability of a certain kind of formalism in state action law. Along with the formalism, I suggest, comes an unavoidable amount of arbitrariness and incongruity. Once recognized, however, those defects can perhaps become strengths.

Ultimately, I argue that police privatization raises challenges more important than determining whether to view security guards as state actors. Part IV addresses two of these challenges. The first is to learn more about the dimensions of the private police and about how they operate. This information is necessary for a sensible assessment of the rules governing private security personnel and could help test any number of proposals for reforming public law enforcement. The second challenge, more difficult than the first, is to reconsider whether the state owes all its citizens some minimally adequate level of police protection. An affirmative entitlement to policing may seem far from the concerns most immediately raised by the vaguely threatening private guards that increasingly patrol our daily lives. The chief task of this Article, however, is to demonstrate that private policing raises questions far deeper, and far more interesting, than we generally have recognized.

The private security industry forms part of at least two larger phenomena in contemporary criminal justice. The first is criminal justice privatization, a trend that includes private policing as well as private prisons and private adjudication.<sup>4</sup> The second is the "pluralizing of policing"—that is, the partial displacement of public policing not only by private security personnel, but also by community volunteers.<sup>5</sup> Although much of what follows will bear on those larger trends, I will have little to say about them directly.<sup>6</sup> This is not because they are uninteresting or unimportant, but rather

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4. See, e.g., PRIVATIZING THE UNITED STATES JUSTICE SYSTEM: POLICE, ADJUDICATION, AND CORRECTIONS SERVICES FROM THE PRIVATE SECTOR (Gary W. Bowman et al. eds., 1992).

5. David H. Bayley & Clifford D. Shearing, *The Future of Policing*, 30 L. & SOC'Y REV. 585, 585-88 (1996); see also *Policing for Profit: Welcome to the New World of Private Security*, ECONOMIST, Apr. 19, 1997, at 21, 22 [hereinafter *Policing for Profit*].

6. For brief discussion of the often indistinct line between private security and volunteer patrols, see *infra* notes 115, 125 and accompanying text. For equally brief discussion of the relationship between private policing and private adjudication, see *infra* notes 601-603 and accompanying text.

because the private police, for reasons I hope to make clear, pose special challenges and opportunities for judges and scholars.

Calvino's Marco Polo found it easiest to discuss Venice by describing other, more exotic cities.<sup>7</sup> So the paramount benefit of studying private security, I will suggest, is the new insight we can gain into old, familiar problems: the regulation of the public police, the limits of state action, and the affirmative duties of government. The cities Polo visited were worthy subjects of narrative in their own right, and private policing merits examination first and most obviously because we know so little about it, and because it increasingly is the rule rather than the exception. Ultimately, however, the greatest attraction of this new terrain is what it can teach us about what we thought we already knew.

## I. A PRIVATE POLICE PRIMER

### A. The Quiet Revolution

Among the least noticed of the plentiful witnesses at the murder trial of O.J. Simpson was Susan Silva, then director of administration at Westec Security, Inc. The prosecution called Silva to describe for the jury certain security devices Westec had installed in Simpson's house. Asked to describe Westec itself, Silva explained, "We're in the business of installing, monitoring, providing service and patrolling alarm systems."<sup>8</sup>

Westec is not always so modest. Promotional brochures bill the company as the nation's "largest full-service security provider,"<sup>9</sup> offering not only alarms but "sentry officers,"<sup>10</sup> "escort services,"<sup>11</sup> "roving patrols" in "highly visible" vehicles,<sup>12</sup> and "rapid deployment"<sup>13</sup> of "highly trained armed personnel,"<sup>14</sup> prepared "for virtually any situation in the field."<sup>15</sup> Outside Simpson's house, three Westec signs warned of "armed response."

Drive for ten or fifteen minutes through any residential part of West Los Angeles and you likely will pass a hundred or more of these Westec signs, along with a comparable number of similar placards announcing the

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7. See ITALO CALVINO, LA CITTÀ INVISIBILI 93-94 (1972).

8. Official Transcript at \*4, People v. Simpson, No. BA097211, 1995 WL 139885 (Cal. Super. Ct. Mar. 30, 1995).

9. WESTEC SECURITY, INC., DEDICATED TO PROTECT . . . YOUR HOME, COMMUNITY AND BUSINESS (1994) (on file with author).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. WESTEC SECURITY, INC., SECURITY FOR YOUR LIFESTYLE (1994) (on file with author).

15. WESTEC SECURITY, INC., *supra* note 9.

armed protective services of Bel-Air Patrol or Protection One, Westec's two largest local rivals.<sup>16</sup> Over the past twenty years, the home security business has grown dramatically in Southern California.<sup>17</sup> A decade ago Westec signs already seemed almost "as common as weeds on Southland lawns";<sup>18</sup> since then Westec has tripled its local clientele.<sup>19</sup> Just within the city limits of Los Angeles—which exclude, *inter alia*, the affluent communities of Beverly Hills, Manhattan Beach, and Santa Monica—about 800 private guards patrol residential neighborhoods,<sup>20</sup> more than one-tenth the entire patrol strength of the Los Angeles Police Department.<sup>21</sup>

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16. I have one of Bel-Air Patrol's placards in my own front yard.

17. See Ceil Goldberg, *New Roles for Private Patrols*, SECURITY MGMT., Dec. 1994, at 11; Ronald L. Soble, *On Patrol: Security Is Big Business*, L.A. TIMES, May 21, 1985, pt. I, at 1; Linda Williams, *Safe and Sound: Behind the Proliferation of Private Home Security Services: Proposition 13—and Fear Itself*, L.A. TIMES, Aug. 29, 1988, pt. IV, at 5.

18. Soble, *supra* note 17.

19. Compare *id.* (reporting that "Westec says its patrol and burglar alarm services cover about 20,000 homes"), with Thomas Rollins & Dennis Buster, *Westec Guards Its Competitive Edge*, PERSONNEL J., Aug. 1995, at 84 (noting that Westec has "more than 60,000 monitored clients"), and WESTEC SECURITY, INC., *supra* note 9 (claiming that Westec "has over 67,000 clients in California"). Residential security accounted for 90% of Westec's business in 1994, see Goldberg, *supra* note 17, at 12, and at least 80% in 1996, see Interview with L. Earle Graham, Vice President, Patrol and Central Station Services, Westec Security, Inc., in Newport Beach, Cal. (June 25, 1996).

Security company placards are so common in Southern California that they have begun to trigger complaints on aesthetic grounds. See Richard Winton, *Signs Could Become Crimes in San Marino*, L.A. TIMES, Nov. 12, 1997, at A1 (reporting efforts in one municipality "to limit most homes to one visible security sign no more than 10 feet from the structure").

20. Private patrols on Los Angeles streets must be licensed by the city. See LOS ANGELES, CAL., CODE § 52.34 (1994). As of July 1998, there were 50 licensed patrol companies and 800 licensed patrol personnel—a two-thirds increase from the 479 private patrol officers licensed in 1988. See Dan Gordon, *Alarming Trend: Private Security Companies' Popularity Grows as Police Response Times Rise*, L.A. TIMES, July 12, 1998, at K1; Telephone Interview with Detective R.K. Rudell, Los Angeles Police Department (June 25, 1996).

Westec alone has over 300 patrol personnel in Southern California, see Telephone Interview with Kris Mills, Communications Manager, Westec Security, Inc. (Oct. 1, 1995), and Bel-Air Patrol has about 250, see Interview with Peter Berty, General Manager, Bel-Air Patrol, in Santa Monica, Cal. (Sept. 21, 1995). Protection One, a newer but rapidly growing company, "employs over 100 patrol officers operating in 25 regular patrol 'beats'" in Southern California and Las Vegas. PROTECTION ONE, INC., 1997 ANNUAL REPORT 9 (1998).

21. As of June 1996, the Los Angeles Police Department had 6955 sworn officers assigned to "patrol services," which the department defines to include all nondetective field work. See Telephone Interview with Officer Jeff Van Ness, Los Angeles Police Department (June 25, 1996).

In one sense, though, companies like Westec basically are in the business of installing and monitoring alarms; that is how they generate the bulk of their profits. See Interview with L. Earle Graham, *supra* note 19; cf. *Profit Alerts Are Ringing for Home-Security Stocks*, MONEY, Jan. 1996, at 54 (discussing the high profitability of alarm installation and monitoring). Indeed, for at least some home security companies, if not for the industry as a whole, patrol service is a loss leader. See, e.g., PROTECTION ONE, INC., *supra* note 20, at 39–40 (conceding that "[t]he cost of providing patrol and alarm response services exceeds revenues generated by such services," but explaining that these services "contribute to the generation and retention of alarm monitoring subscribers");

Private residential patrols remain much less common outside Southern California,<sup>22</sup> but they are growing in popularity throughout the country.<sup>23</sup> Increasingly, moreover, private guards patrol not just the properties of individual customers but entire communities. Some of this is the result of the surge in walled-off, gated housing developments, which commonly use homeowner fees to pay for patrols by private security guards. As many as four million Americans may already live in these enclaves, and that number is growing rapidly; in Southern California, an estimated one-third of all new communities are gated.<sup>24</sup> But even ungated communities are increasingly hiring private patrols, either with homeowner fees or with government-approved special assessments.<sup>25</sup>

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Interview with Jeff Knowles, Guard & Patrol Manager, Bel-Air Patrol, in Santa Monica, Cal. (Nov. 2, 1995) (noting that Bel-Air Patrol loses money on patrol operations and earns money on alarm monitoring, but that the availability of patrol services helps to convince customers to purchase alarm monitoring).

22. See Brae Canlen, *Insecurity Complex*, CAL. LAW., June 1998, at 30, 84; Interview with L. Earle Graham, *supra* note 19. Protection One, for example, provides alarm-monitoring services in Arizona, California, Georgia, Kansas, Missouri, Nevada, New York, North Carolina, Oregon, Tennessee, Texas, and Washington, but offers patrol and alarm response only in Southern California and Las Vegas. See PROTECTION ONE, INC., *supra* note 20, at 2, 9.

23. See, e.g., Jay Apperson, *Scared Suburbia Finds Peace of Mind in Private Security*, BALTIMORE SUN, Apr. 1, 1996, at A1; Hillary Durgin, *Crime Pays: At Least, It Does for Rent-A-Cop Firm*, CRAIN'S CHICAGO BUS., Nov. 29, 1993, at 4; Larry Hicks, *Private Security Patrols Ease Homeowners' Fears*, SACRAMENTO BEE, Mar. 4, 1994, at A1; *Profit Alerts Are Ringing for Home-Security Stocks*, *supra* note 21, at 54. But cf. Bruce Lambert, *Private Security Proposal Is Fading*, N.Y. TIMES, July 9, 1995, § 13 (The City), at 6 (noting that a developer has "dropped" a plan for "a private security force for the entire Upper East Side," despite some continuing support for the proposal).

24. See David Dillon, *Fortress America*, PLANNING, June 1994, at 8; Owens, *supra* note 1, at 1131-37; Andrew Stark, *America the Gated*, WILSON Q., Winter 1998, at 58; Edward J. Blakely & Mary Gail Snyder, *Fortress Communities: The Walling and Gating of American Suburbs*, LANDLINES (Lincoln Inst. of Land Policy), Sept. 1995, at 1; Timothy Egan, *Many Seek Security in Private Communities*, N.Y. TIMES, Sept. 3, 1995, § 1, at 1; Maggie Jessup, *Suburbanites Putting Their Backs to the Wall*, ATLANTA CONST., Apr. 14, 1994, at J1.

Although gated communities have been primarily "a metropolitan and coastal phenomenon, with the largest aggregations being in California, Texas and Florida," they are now emerging "in almost every state." Blakely & Snyder, *supra*, at 1; see also Egan, *supra* (describing gated communities in the States of Washington and Minnesota); Alan Scher Zagier, "Gated" Living Inspires Debate, NEWS & OBSERVER (Raleigh, N.C.), June 7, 1998, at A1 (noting growth of gated communities in North Carolina).

25. See, e.g., Laura Green, *Community Hit by Vandals May Hire Own Guards*, THE CAPITAL (Annapolis, Md.), Mar. 19, 1998, at B4; Arthur Hirsch, *Georgetown Wears Polish, Tarnish*, BALTIMORE SUN, Feb. 18, 1996, at 2A; Joan Jacobson, *Paying Extra for Hope*, BALTIMORE SUN, Oct. 17, 1995, at 1B; Mary A. Johnson, *Private Marquette Pk. Patrol Hits the Streets*, CHICAGO SUN-TIMES, May 14, 1995, at 15; Marcia Myers, *Midtown Tax District Aims to Fund Services Government Can't*, BALTIMORE SUN, Apr. 22, 1996, at 1B. Although it has greatly accelerated in recent years, the early signs of this trend were apparent in the early 1970s. See Thomas M. Scott & Marlys McPherson, *The Development of the Private Sector of the Criminal Justice System*, 6 L. & SOC'Y REV. 267, 277 (1971).

Residential security guards, moreover, are but one part—a relatively small but rapidly growing part—of the much larger workforce of private police personnel. That larger workforce has itself grown substantially faster over the past quarter century than both the population and the ranks of public law enforcement, effecting “a quiet revolution in policing.”<sup>26</sup> At this point, security guards in the United States actually outnumber law enforcement personnel; there are roughly three private guards for every two sworn officers.<sup>27</sup> In California, the ratio is well over two to one.<sup>28</sup>

These figures are necessarily imprecise, for at least two separate reasons. The first, to which I will return later,<sup>29</sup> is empirical: reliable information on the size and composition of the private security industry is notoriously sparse.<sup>30</sup> The second reason is definitional. One of the hallmarks of private

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26. C.D. SHEARING & P.C. STENNING, PRIVATE SECURITY AND PRIVATE JUSTICE: THE CHALLENGE OF THE 80S 1 (1982). The trend toward “community policing” has also been termed a “quiet revolution,” George L. Kelling, *Police and Communities: The Quiet Revolution*, PERSP. ON POLICING (Nat'l Inst. of Justice, U.S. Dep't of Justice, June 1988), although discussions of that phenomenon have hardly been muted, see, e.g., DAVID H. BAYLEY, POLICE FOR THE FUTURE 104 (1994).

27. The most reliable recent report on the private security industry estimates that, as of 1990, there were 393,000 “proprietary,” or in-house, security guards throughout the United States (i.e., guards employed directly by the owner of the property they protect), and 520,000 employees of “contract” guard companies (i.e., companies that hire out guards). See WILLIAM C. CUNNINGHAM ET AL., HALLCREST SYSTEMS, INC., PRIVATE SECURITY TRENDS 1970–2000, at 185, 196 (1990). The principal author of the report estimates that guards constitute all but 2–5% of those employed by contract guard companies. See Telephone Interview with William C. Cunningham, President, Hallcrest Systems, Inc. (June 20, 1996).. The more conservative figure of 5% yields 484,000 contract guards and 877,000 guards overall. There were roughly 600,000 sworn law enforcement officers throughout the country in 1990. See CUNNINGHAM ET AL., *supra*, at 229; cf. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1995, at 39 (Kathleen Maguire & Ann L. Pastore eds., 1996) [hereinafter 1995 SOURCEBOOK] (reporting that there were 622,913 full-time sworn employees of state and local law enforcement agencies in 1993); *id.* at 58 (reporting that there were 51,074 fulltime federal law enforcement officers authorized to carry firearms and make arrests, and assigned to police response and patrol, criminal investigation or enforcement, or security protection, as of 1993).

28. In 1996, there were 155,806 licensed security guards in California. Telephone Interview with Noreen DeKonig, Assistant to the Chief, California Bureau of Security & Investigative Services (June 14, 1996). This number excluded unarmed, in-house guards, who need no license under California law; moonlighting police officers, who also need no special permit; and 8149 private investigators, who are separately licensed. See *id.* At approximately the same time, California had 59,340 sworn state and local law enforcement officers, see LAW ENFORCEMENT INFORMATION CENTER, CALIF. DEP'T OF JUSTICE, CALIFORNIA CRIMINAL JUSTICE PROFILE 1994, at 20 (1995) (reporting statistics and data for 1994), and 7213 full-time federal law enforcement officers assigned to police response and patrol, criminal investigation or enforcement, or security protection, see 1995 SOURCEBOOK, *supra* note 27, at 58 (reporting data for 1993).

29. See discussion *infra* Parts III.C.1, IV.A.

30. See CUNNINGHAM ET AL., *supra* note 27, at 1, 3–4. “The only consistent and reliable statement that is continually made about the size and scope of the private security industry today is that it is hard to obtain consistent and reliable information about it.” NIGEL SOUTH, POLICING FOR PROFIT 23 (1988); *see also id.* at 12.

security is "its non-specialized character,"<sup>31</sup> its tendency to be implemented in part by employees—such as store clerks,<sup>32</sup> insurance adjusters,<sup>33</sup> and amusement park attendants<sup>34</sup>—whose principal duties at least ostensibly lie elsewhere.<sup>35</sup>

Still, there can be no doubt that specialized private security personnel play a large and growing role in policing America. Uniformed private officers guard and patrol office buildings, factories, warehouses, schools, sports facilities, concert halls, train stations, airports, shipyards, shopping centers, parks, government facilities—and, increasingly, residential neighborhoods. On any given day, many Americans are already far more likely to encounter a security guard than a police officer;<sup>36</sup> in the words of one industry executive, "[t]he plain truth is that today much of the protection of our people, their property and their businesses, has been turned over to private security."<sup>37</sup>

Nor is private policing limited to uniformed security guards. America has over 70,000 private investigators and over 26,000 store detectives;<sup>38</sup> together these individuals outnumber FBI agents by almost ten to one.<sup>39</sup> The ranks of private investigators, in particular, have swelled in recent

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31. Clifford D. Shearing & Philip C. Stenning, *Private Security: Implications for Social Control*, 30 SOC. PROBS. 493, 498 (1983).

32. See *id.* at 499.

33. See Nancy Reichman, *The Widening Webs of Surveillance: Private Police Unraveling Deceptive Claims*, in PRIVATE POLICING 247, 250–53 (Clifford D. Shearing & Philip C. Stenning eds., 1987).

34. See Clifford D. Shearing & Philip C. Stenning, Say "Cheese!": *The Disney Order That Is Not So Mickey Mouse*, in PRIVATE POLICING, *supra* note 33, at 317.

35. Particularly disturbing examples of this phenomenon are the "outreach" employees of New York City's Grand Central Partnership—the city's oldest and largest business improvement district—some of whom reportedly kept homeless people away by physically attacking them and destroying their belongings. See Barr, *supra* note 1, at 400–03. On business improvement districts generally, see discussion *infra* note 56 and accompanying text.

36. This is particularly true for the relatively well-off, much less true for those who live in the nation's poorest areas. "[I]n some middle class enclaves . . . residents will hardly ever see a city policeman; the ordinary patrol work is done by private security guards, and the city police are relegated to the neighborhoods outside the enclaves." PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 6 (1995). Regarding the implications of this relegation, see discussion *infra* Part IV.B.

37. Hearings Regarding Private Security Guards Before the Subcomm. on Human Resources of the House Comm. on Education and Labor, 103d Cong. 132 (1993) [hereinafter Hearings Regarding Private Security Guards] (statement of Ira Lipman, President, Guardsmark, Inc.).

38. See CUNNINGHAM ET AL., *supra* note 27, at 196, 210 (providing statistics as of 1990).

39. See 1995 SOURCEBOOK, *supra* note 27, at 57. As of 1993, the FBI had 10,000 full-time agents assigned to criminal investigation and enforcement, and the federal government as a whole had 40,002. See *id.* at 57–58.

years, growing by nearly 50% during the 1980s.<sup>40</sup> Private detectives increasingly are hired not only to watch for shoplifters,<sup>41</sup> but also to investigate, and not infrequently to spy on, everyone from insurance claimants<sup>42</sup> and litigation opponents<sup>43</sup> to employees,<sup>44</sup> business partners,<sup>45</sup> and even prospective neighbors.<sup>46</sup>

In addition to these wholly private personnel, an estimated 150,000 police officers moonlight as private security guards, often in police uniform.<sup>47</sup> This practice, too, appears to have escalated sharply; more than half of the officers in many metropolitan police departments now supplement their income with private security work.<sup>48</sup> In a growing number of cases police departments themselves contract to supply their personnel to groups of merchants or residents, and then pay the officers out of the proceeds.<sup>49</sup>

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40. See CUNNINGHAM ET AL., *supra* note 27, at 195, 197, 210 (estimating that there were 45,000 private investigators in 1980).

41. Store surveillance is more extensive than many shoppers realize. At one metropolitan department store, security personnel watch "thirty television monitors connected to cameras mounted in plastic bubbles in the ceiling throughout the store," and use a computer keyboard "to direct a picture from one of the small monitors to a large monitor and VCR," and "to follow and record suspicious looking shoppers." Melissa G. Davis et al., *Private Corporate Justice: Store Police, Shoplifters, and Civil Recovery*, 38 SOC. PROBS. 395, 398 (1991). "Radios are used to instruct 'floor men' to bring those videotaped shoplifting to the Loss Prevention office." *Id.* Using their surveillance equipment, store detectives can observe and record shoppers from the moment they arrive in the parking lot until the moment they return to their cars. "The only exceptions [are] the changing rooms and restrooms, and these the store's private police lamented." *Id.* at 407.

42. See, e.g., Reichman, *supra* note 33, at 253-57.

43. See Jeff Barge, *Thanks Partly to Lawyers, PI Income Soars*, A.B.A. J., Dec. 1994, at 18.

44. See Jonathan S. Franklin, *Undercover in Corporate America*, N.Y. TIMES, Jan. 29, 1989, § 3, at 1; James J. Kouri, *Going Undercover for Drugs*, SECURITY MGMT., Mar. 1994, at 36-37.

In addition to its alarm and patrol services, Westec now offers background checks for household employees. See WESTEC SECURITY, INC., SHE SEEMS PERFECT FOR THE JOB, BUT . . . (1998) (on file with author).

45. See Barge, *supra* note 43, at 18.

46. See Harriet Modler, *Spy Before You Buy?*, L.A. TIMES, June 23, 1996, at K1 (noting that "investigations of prospective neighbors and neighborhoods are not [yet] common," but that Southern Californian private investigators report "doing more and more of them, mostly for high-end home buyers").

47. See CUNNINGHAM ET AL., *supra* note 27, at 290, 293 (estimating statistics as of 1990).

48. See *id.* at 294; *Too Much Police Moonlighting?*, WASH. POST, Apr. 29, 1998, at A20. Rules regarding police moonlighting vary widely; some departments prohibit the practice, and others do not allow moonlighting officers to wear police uniforms. But most departments impose neither restriction. See CUNNINGHAM ET AL., *supra* note 27, at 290; cf. David Kocieniewski, *Wall St. to Pay to Add a Base for the Police*, N.Y. TIMES, Feb. 17, 1998, at B1 (reporting an NYPD plan to allow officers to moonlight in uniform for businesses the department approves).

49. See CUNNINGHAM ET AL., *supra* note 27, at 292; ALBERT J. REISS, JR., PRIVATE EMPLOYMENT OF PUBLIC POLICE 11 (1988); Albert J. Reiss, Jr., *Private Employment of Public Police*, in PRIVATIZATION AND ITS ALTERNATIVES 226, 227-30 (William T. Gormley, Jr. ed., 1991); Iver Peterson, *Walking the Beat from Macy's to Sears*, N.Y. TIMES, Dec. 23, 1998, at A3; Amy Scherzer, *Hyde Park Residents Initiate Evening Police Patrols*, TAMPA TRIB., Jan. 15, 1998, at 1;

This public-to-private personnel leasing is the mirror image of the much larger practice of out-contracting, in which government agencies hire private security companies to perform work previously carried out by law enforcement officers.<sup>50</sup> According to one estimate, the fraction of security work contracted out by federal, state, and local governments increased from 27% to 40% between 1987 and 1995.<sup>51</sup> The trend seems likely to continue.<sup>52</sup> Much out-contracted security work consists of parking enforcement, traffic direction, and other tasks unlikely to bring the private employees into contact with the criminal justice system.<sup>53</sup> Increasingly, though, government agencies are hiring private security personnel to guard and patrol government buildings, housing projects, and public parks and facilities,<sup>54</sup> and a small but growing number of local governments have begun to experiment with broader use of private police. A few municipalities have hired private security companies to provide general patrol services;<sup>55</sup> more commonly, groups of residents or business owners in particular

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Andrew Stark, *Arresting Developments: When Police Power Goes Private*, AM. PROSPECT, Jan.-Feb. 1999, at 41.

Increasingly, police departments have found private financing not only for patrol officers but for their support facilities as well. See, e.g., Stark, *supra* note 24, at 75; Kocieniewski, *supra* note 48; Peterson, *supra*; J.J. Pope, *These Rent-A-Cops Are the Real Thing*, L.A. TIMES (Orange County ed.), Sept. 13, 1997, at B4; Timothy Williams, *Police Drawn by the Lure of Free Stations*, L.A. TIMES, Nov. 7, 1992, at B1 (describing police substations financed by shopping malls, amusement parks, and local businesses).

50. See MARCIA CHAIKEN & JAN CHAIKEN, PUBLIC POLICING—PRIVATELY PROVIDED (1987).

51. See Privatization: Security Services Among Top Five Activities for Out-Contracting, SECURITY LETTER, Oct. 16, 1995, at 2.

52. See, e.g., CUNNINGHAM ET AL., *supra* note 27, at 273–74. One sign of the times: when New York City Police Commissioner William Bratton resigned, he took a job with First Security Services Corporation, a Northeast guard company, to help the company expand its work for government and private agencies. See David Firestone, *Bratton Quits Police Post; New York Gains over Crime Fed a Rivalry with Giuliani*, N.Y. TIMES, Mar. 27, 1996, at A1. One factor driving out-contracting may be the pervasive unionization of public policing. See Yolanda K. Kodrzycki, *Fiscal Pressures and the Privatization of Local Services*, NEW ENG. ECON. REV., Jan.–Feb. 1998, at 39; see also discussion *infra* note 338 and accompanying text.

53. See CHAIKEN & CHAIKEN, *supra* note 50, at 8, 43–44.

54. See *id.*; Paul Baldwin, *Hall of Justice Raises Security After Rape: More Private Guards to Patrol Public Areas of Louisville Building*, COURIER-J., Jan. 26, 1998, at 1A; Canlen, *supra* note 22, at 84.

55. See, e.g., CUNNINGHAM ET AL., *supra* note 27, at 278 (describing a contract under which a private security firm provides 30 unarmed, uniformed security personnel to patrol the town of East Hills, Long Island, New York); Dennis O'Leary, *Reflections on Police Privatization*, FBI L. ENFORCEMENT BULL., Sept. 1994, at 21 (describing an aborted effort by Sussex, New Jersey to replace its police force with a private security company); Lola Sherman, *Oceanside to Keep Private Security Company*, SAN DIEGO UNION-TRIB., Nov. 2, 1995, at B1 (reporting the renewal of a contract under which Bel-Air Patrol provides security guards to patrol the civic center and parks in Oceanside, California).

areas have received permission to tax themselves (and their dissenting neighbors) to pay for private patrols.<sup>56</sup>

If the precise size and contours of our national private police force remain unclear, its activities are even foggier. Security firms regularly assure the public that private guards, unlike law enforcement officers, serve only to observe and to report.<sup>57</sup> But clients often receive a different message. Protection One, for example, bills itself to customers as "your personal police force";<sup>58</sup> its competitors make similar, if more circumspect, claims.<sup>59</sup>

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56. See, e.g., CUNNINGHAM ET AL., *supra* note 27, at 277-78 (describing a special taxing district formed to hire 17 "Community Service Representatives" to patrol downtown Tacoma); Barr, *supra* note 1, at 395-98 (discussing business improvement districts in New York); Tucker Carlson, *Safety Inc.*, POL'Y REV., Summer 1995, at 66-68 (describing an 18-officer private patrol employed by a special tax on businesses in the business improvement district surrounding Manhattan's Grand Central Station); Hirsch, *supra* note 25 (reporting the approval of a business improvement district in Georgetown, in part to pay for private security); *Times—They Are a Changing: Private Security Patrols Cut Crime in Times Square*, SECURITY, Aug. 1994, at 10 (noting that the Times Square Business Improvement District, funded by a city-approved special property tax, pays for patrol by 42 "public safety officers").

America now has more than 1000 business improvement districts (BIDs), funded by self-imposed property taxes, see Thomas J. Lueck, *Business Districts Grow at Price of Accountability*, N.Y. TIMES, Nov. 20, 1994, § 1, at 1, and on average these bodies spend roughly one-fifth of their budgets on security, see Lawrence O. Houstoun, Jr., *Betting on BIDs*, URBAN LAND, June 1994, at 13, 13; cf. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1199 (1996) (noting that among the "central functions" of business improvement districts has been "the control of disorderly street people").

For a discussion of the recent sprouting of similar initiatives in residential areas, see sources cited *supra* note 25.

57. See, e.g., *Hearings Regarding Private Security Guards*, *supra* note 37, at 71 (statement of Eugene R. Fink, President, Winfield Security Corp.) ("A police officer has powers of arrest and a duty to apprehend; security officers observe, report and deter."); Johnson, *supra* note 25 (quoting a claim by the co-owner of American Security Services, Inc. that "[w]e are the extra set of eyes and ears for residents"); Ronald L. Soble, *Patrolmen See Selves as Ears, Eyes of Police*, L.A. TIMES, May 21, 1985, pt. I, at 21 (quoting a similar statement by a Westec guard); Williams, *supra* note 17 (quoting a claim by Westec's president that "[t]he company views itself as playing an "observe and report" role for the police").

58. PROTECTION ONE, INC., HIRE YOUR PERSONAL POLICE FORCE FOR \$1 A DAY (on file with author).

59. See, e.g., BEL-AIR PATROL, PROTECTION FOR YOUR RESIDENCE, FAMILY AND COMMUNITY (on file with author) ("Armed Bel-Air Patrol officers are highly trained to identify and discreetly deal with any threat to your safety."); WESTEC SECURITY, INC., *supra* note 9 ("[L]aw enforcement and other local services are stretched to their limits. Many concerned citizens and communities are turning to private security companies for that added level of property protection and personal security."); *supra* text accompanying notes 9-15 (quoting Westec brochures); cf. Owens, *supra* note 1, at 1139-40 (noting that "[p]rivate security firms, their guards, and their clients send mixed messages as to the exact purpose of the private police"); Soble, *supra* note 17, at 1 (quoting claim by vice president of Blue Shield Protective Services that "[w]e're like a small-town constable").

Residential patrol companies are typically at pains, however, to point out that part of their role is to "call for fire, police or medical help if needed." BEL-AIR PATROL, *supra*; see also PROTECTION ONE, INC., *supra* note 58 ("Emergency Response Centers . . . link Protection One

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. Generalizations beyond that are difficult, partly because the industry is secretive,<sup>60</sup> and partly because security personnel do not all perform the same functions. Store detectives, for example, make frequent arrests;<sup>61</sup> residential security guards typically do not.<sup>62</sup> Even residential security guards, however, may carry out brief detentions with some frequency.<sup>63</sup> And the security industry as a whole probably carries out significantly more stops, searches, and interrogations than is often imagined.<sup>64</sup> More generally,

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Priority Patrol to local police and fire departments."); WESTEC SECURITY, INC., *supra* note 9 ("In emergencies, Westec will promptly dispatch Police, Fire or Medical Services. Westec's armed response officers provide primary or secondary response to local authorities.").

60. See Scott & McPherson, *supra* note 25, at 267, 275. One sign of the industry's commitment to secrecy is the absence of any reported judicial decisions, jury verdicts, or settlements involving Westec or Bel-Air Patrol, Southern California's two largest providers of private patrol services.

61. See, e.g., *People v. Moreno*, 135 Cal. Rptr. 340, 341 (App. Dep't Super. Ct. 1976) (noting that a department store security guard arrested approximately 36 persons in 18 months); Davis et al., *supra* note 41, at 398, 402, 407 (finding that 10 part-time store detectives employed in a single department store "apprehended" 549 suspected shoplifters over a three-year period and "arrested" 60% of them); Read Hayes, *When Shoplifters Attack*, SECURITY MGMT., June 1998, at 14 (reporting that approximately 4% of suspected shoplifters physically resist detention).

62. See, e.g., Interview with L. Earle Graham, *supra* note 19 (representing that the roughly 300 Westec patrol personnel together make an average of approximately 120 arrests annually).

63. In one of the few studies of a private residential patrol, roughly 60% of surveyed patrol personnel in Starrett City reported "follow[ing] suspicious persons" and "request[ing] identity of persons" on a daily basis. William F. Walsh & Edwin J. Donovan, *Private Security and Community Policing: Evaluation and Comment*, 17 J. CRIM. JUST. 187, 192 (1989). Starrett City consists of 46 high-rise apartment buildings in Brooklyn, New York, together with community and commercial facilities. See *id.* at 188. Starrett City Realty Corporation, which owns the apartment buildings, employs a 59-person private police department, composed of 10 supervisors and 49 patrol personnel. See *id.* at 189. Unlike most private guards, Starrett City patrol officers have "full police powers"—including the power to conduct brief investigatory detentions based on "reasonable articulable suspicion." *Id.* at 189–90; cf. *Terry v. Ohio*, 392 U.S. 1 (1968).

64. In a landmark study of 11,000 contract guards and private investigators in Ontario, 34% of surveyed guards reported that they "frequently" searched employees, and 16% said they "frequently" searched vehicles. See CLIFFORD D. SHEARING ET AL., *CONTRACT SECURITY IN ONTARIO* 169–70, 190 (1980). In the same study, 37% of surveyed private investigators reported that they "frequently" questioned suspects. See *id.* at 174, 192.

In a smaller, 1982 survey of 188 security personnel in Baltimore County, Maryland and Multnomah County, Oregon, 84% of in-house security employees, 50% of contract guards, and 87% of alarm response personnel reported having detained someone. See WILLIAM C. CUNNINGHAM & TODD H. TAYLOR, *HALLCREST SYSTEMS, INC., PRIVATE SECURITY AND POLICE IN AMERICA* 92 (1985). Among in-house security personnel, 39% had used force to evict trespassers, 37% had used force to "carry out a lawful search," and 56% had used force to make an arrest. *Id.* The comparable figures for contract guards and alarm response personnel were lower. See *id.* Fully one-half of 194 law enforcement officers surveyed in the same two counties reported personal experience with private security employees exceeding their authority—most commonly "improper arrests, excessive physical force, attempting traffic arrests, and improper stop, interrogation and search." *Id.* at 93.

despite the frequent claim by security firms that they are not "playing police," large numbers of private security personnel today appear chiefly engaged in what is, in essence, patrol work—work once understood as the principal function of public law enforcement. "[T]he modern . . . security guard's job, while different from that of modern public policemen, is very much like that of the traditional 'cop on the beat.'"<sup>65</sup>

Not coincidentally, the traditional "cop on the beat" has been something of a vanishing species for much of the past half century; this much-bemoaned development plainly has had more than a little to do with the proliferation of private guards during the same period.<sup>66</sup> The past few years, in fact, have seen increasing calls for a revival of traditional beat policing—calls, in other words, for police officers to act more like security guards.<sup>67</sup> The response to these calls has been limited, in part, by the hard fact that police patrols are expensive.<sup>68</sup> Even a greatly accelerated revival of beat

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65. SHEARING ET AL., *supra* note 64, at 169; see also, e.g., Darryl Holter, *BIDs and Employment Policy: Emerging Issues*, HARRT Q., Fall/Winter 1996-97, at 10, 12 (quoting a statement by the director of Los Angeles's Fashion District BID that "customer service ambassadors" employed by the BID "walk a thin line between law enforcement and community service"); Walsh & Donovan, *supra* note 63, at 191 (finding that private police in Starrett City "practiced a highly visible proactive form of foot patrol that included service to the residents").

66. See, e.g., Reiss, *supra* note 49, at 227 ("[P]rivate policing in the twentieth century has grown into a major private security industry that fills a niche left vacant by the transformation of the public police from a client-centered to a bureaucratic police organization."); cf. Lueck, *supra* note 56 (quoting New York Mayor Rudolph Giuliani's approving observation that business improvement districts "are filling in for government").

67. This notion is close to the heart of the many reform initiatives variously described as "community policing," "neighborhood policing," or "problem-oriented policing." See, e.g., CHEVIGNY, *supra* note 36, at 115 (noting that "community policing . . . is supposed to put 'a cop on the beat' . . . and to make that cop a problem solver for the community"); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 30 (1998) (noting that "many suburban police forces perform work more like security guards than that of a major city's police department"); Lawrence W. Sherman, *The Police*, in CRIME 327, 338-39 (James Q. Wilson & Joan Petersilia eds., 1995) (observing that, "[f]or all the diverse definitions of community policing, it may boil down to this: police treating a neighborhood the way a security guard treats a client property"); Walsh & Donovan, *supra* note 63, at 194 (noting that private police at Starrett City practice the kind of "community-oriented, crime-prevention policing" favored by some police reformers and "currently being utilized experimentally by American and Canadian public police departments").

On current police reform efforts generally, see, for example, BAYLEY, *supra* note 26, at 79-120; JEROME H. SKOLNICK & DAVID H. BAYLEY, *THE NEW BLUE LINE: POLICE INNOVATION IN SIX AMERICAN CITIES* (1986); MALCOLM K. SPARROW ET AL., *BEYOND 911: A NEW ERA FOR POLICING* (1990); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

68. See, e.g., BAYLEY, *supra* note 26, at 48, 52 (estimating that 85-90% of police expenditures are for personnel, and that deterring crime by providing a visible police presence in public places "is no longer affordable"); Bayley & Shearing, *supra* note 5, at 599-600 (noting that "the cost[s] of increasing the 'visible presence' of the police, that is, police on the streets, remains dauntingly high"); Lois Pilant, *Spotlight on . . . Creative Funding*, POLICE CHIEF, Mar. 1998, at 42

policing, though, would be unlikely to reverse the massive growth of private security, because, as I discuss later,<sup>69</sup> changing patterns of public policing have not been the only factor contributing to that growth.

Indeed, one of the most striking aspects of police privatization is its "pervasive, international character."<sup>70</sup> The exponential growth of private security in the United States has been mirrored in Canada,<sup>71</sup> the United Kingdom,<sup>72</sup> Australia,<sup>73</sup> New Zealand,<sup>74</sup> and, to a lesser extent, the rest of the world.<sup>75</sup>

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(estimating that "the cost of outfitting a police officer, car included, can run upwards of \$50,000, depending on the area and jurisdiction").

69. See discussion *infra* Part II.F.1.

70. Clifford D. Shearing & Philip C. Stenning, *Reframing Policing*, in *PRIVATE POLICING*, *supra* note 33, at 9, 9; see also Bayley & Shearing, *supra* note 5, at 587.

71. See, e.g., SHEARING ET AL., *supra* note 64 (describing contract security services in Ontario); *Intl. Security Briefs*, SECURITY LETTER, Jan. 18, 1996, at 3 (noting that from 1971 to 1991 security guards in Canada increased by 126%, compared to a population increase of 27.7% and an increase of 41% in Canadian police officers); Paul Palango, *On the Mean Streets: As the Police Cut Back, Private Cops Are Moving In*, MACLEAN'S, Jan. 12, 1998, at 10 (reporting that, "[i]n major urban areas across the country, vehicles owned by companies such as Primcorp Security in Vancouver and Montreal's Garda Security Group have become as visible as police cars").

72. See, e.g., LES JOHNSTON, *THE REBIRTH OF PRIVATE POLICING* (1992); SOUTH, *supra* note 30; Trevor Jones & Tim Newburn, *Bobbie Beat?*, GUARDIAN (London), Mar. 25, 1998, at 4; *Policing for Profit*, *supra* note 5.

73. See JOHNSTON, *supra* note 72, at 83–84; Christopher Reynolds & Paul Wilson, *Private Policing: Creating New Options*, in *AUSTRALIAN POLICING: CONTEMPORARY ISSUES* 219 (Duncan Chappell & Paul Wilson eds., 2d ed. 1996).

74. See Trevor W.A. Morley, *Private Security or Private Police?*, in *PRIVATE SECTOR AND COMMUNITY INVOLVEMENT IN THE CRIMINAL JUSTICE SYSTEM* 223, 224 (David Biles & Julia Vernon eds., 1994) (estimating that "the number of people employed in the private security and investigating industries in New Zealand exceed in total the current number of employees of the Police Department"); *Number of Security Firms Nearly Doubles in 15 Years*, PRESS (Christchurch), Jan. 7, 1998, at 3.

75. See, e.g., CHEVIGNY, *supra* note 36, at 211 (noting that Jamaica in 1986 was estimated to have 30,000 security guards—"more than three times the number of police"); JOHNSTON, *supra* note 72, at 80–86 (describing the expansion of private security in France, Belgium, Netherlands, Spain, Italy, Israel, Finland, Eastern Europe, and China); A.H. Aydin, *Private and Voluntary Policing Service in Turkey*, 7 SECURITY J. 129 (1996) (describing the private security industry in Turkey); Charles Hou & Chuen-Jim Sheu, *A Study of the Determinants of Participation in a Private Security System Among Taiwanese Enterprises*, 17 POLICE STUD. 13, 13 (1994) (noting that, "[b]y the end of 1991, private security officers [in Taiwan] outnumbered public police"); Setsuo Miyazawa, *The Private Sector and Law Enforcement in Japan*, in *PRIVATIZATION AND ITS ALTERNATIVES*, *supra* note 49, at 241 (noting the development of private security services in Japan); Frédéric Ocqueteau & Marie-Lys Pottier, *Analysis of the Private Handling of a Class of Cases: Shoplifting in Supermarkets*, PENAL ISSUES, Mar. 1996, at 6 (reporting that, "[f]or nearly a decade now, the [French] Ministry of Justice, in collaboration with the representatives of large-scale retailers, has attempted to deal with the rampant problem of shoplifting in supermarkets by partially handing over the management of cases to these private concerns, monitored by the public prosecutor's offices"); Jaap de Waard, *The Private Security Industry in the Netherlands: Developments and Future Perspectives*, 7 SECURITY J. 227, 230 (1996) (documenting an approximate tripling of contract security personnel in the Netherlands between 1983 and 1993).

Private security is global in another sense as well: ownership and operation of the industry is increasingly multinational.<sup>76</sup>

Other than its international character, however, little about private policing is entirely new. As we shall see, it was not until the nineteenth century in England and America that private law enforcement, and amateur, quasi-public constabularies and night watches, gave way to organized public policing; “[t]he modern police are indeed a ‘new police’ and in some important respects it is they and not the modern phenomena of agencies within the private security sector that are out of step with the historical lineage of policing forms.”<sup>77</sup> Even professional, bureaucratic policing was pioneered by private firms: Allan Pinkerton founded his detective company before the Civil War, and well into the twentieth century he and his competitors provided America’s only national law enforcement organizations.<sup>78</sup>

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Unfortunately, information about the nature and extent of private policing in countries other than the United States is almost uniformly even paltrier than information about the domestic private security industry. See SOUTH, *supra* note 30, at 12; Philip Stenning, *Private Policing—Some Recent Myths, Developments and Trends*, in PRIVATE SECTOR AND COMMUNITY INVOLVEMENT IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 74, at 145, 146–47; Keith Bryett, *Privatisation of Policing*, in UN-PEELING TRADITION: CONTEMPORARY POLICING 58, 60–61 (Keith Bryett & Colleen Lewis eds., 1994).

76. Between 1985 and 1989, for example, foreign companies invested more than \$4 billion in American security firms. See CUNNINGHAM ET AL., *supra* note 27, at 219. Westec has been owned since 1982 by Secom, “Japan’s dominant private security company.” Jim Schachter, *Iida Sells Security in One of World’s Safest Nations*, L.A. TIMES, June 27, 1988, pt. IV, at 3, but sold its residential security divisions in 1998 to Edison International, a large electric utility based in Southern California. See *Edison in \$300 Million Deal for Westec Security Units*, N.Y. TIMES, July 22, 1998, at D1. Also in 1998, Bermuda-based Tyco International purchased Wells Fargo Alarm, the parent company of Bel-Air Patrol. See *Tyco International Acquiring a Borg-Warner Business*, N.Y. TIMES, Apr. 21, 1998, at D4. Protection One plans to expand soon into Western Europe. See Deborah Vrana, *Protection One is No. 2 Through Acquisitions*, L.A. TIMES, Jan. 11, 1999, at C1. And in early 1999 Securitas, an international security firm based in Sweden, purchased Pinkerton’s, America’s largest contract guard company, which itself operates in 17 foreign countries. See CUNNINGHAM ET AL., *supra* note 27, at 217; PINKERTON’S, INC., PEOPLE AND TECHNOLOGY: THE PINKERTON DIFFERENCE 5 (1995); Barnaby J. Feder, *Securitas of Sweden to Acquire Pinkerton’s in \$384 Million Deal*, N.Y. TIMES, Feb. 23, 1999, at C6.

This internationalization of the industry is part of a broader pattern of economic centralization, in which “[t]he provision of private police services has progressively assumed the character of a modern industry—an industry dominated by major corporations.” Steven Spitzer & Andrew T. Scull, *Privatization and Capitalist Development: The Case of the Private Police*, 25 SOC. PROBS. 18, 18–19 (1977). More than 40% of contract guards in America are employed by the 10 largest companies. See CUNNINGHAM ET AL., *supra* note 27, at 217. The British contract security industry is “heavily dominated by just five companies.” SOUTH, *supra* note 30, at 25; see also JOHNSTON, *supra* note 72, at 76 (noting that, “despite justified concern about the growth of small ‘cowboy’ guard operations, employment is concentrated in a few major companies”).

77. Nigel South, *Law, Profit, and “Private Persons”: Private and Public Policing in English History*, in PRIVATE POLICING, *supra* note 33, at 72, 72 (footnote omitted).

78. See discussion *infra* Part II.D.

The shared, complex history of public and private policing—traced in Part II of this Article—bears heavily on contemporary understandings of the proper roles for the public and private sectors in enforcing law and maintaining order. Those understandings, however, are murkier than sometimes thought, and that murkiness is reflected in the legal regime under which the private security industry operates.

## B. Private Security Law

Criminal procedure law—the vast set of interrelated constitutional doctrines that regulate the day-to-day operations of police officers throughout the United States—has almost nothing to say about the activities of private security guards. That law consists chiefly of the Fourth, Fifth, and Sixth Amendments, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, along with the Supreme Court's elaborate efforts to implement those provisions through rules of evidentiary exclusion and the restrictions on interrogations imposed by *Miranda v. Arizona*<sup>79</sup> and its progeny. All of this has been deemed applicable only to government action, not to private conduct.<sup>80</sup> As a result, the “criminal procedure revolution”<sup>81</sup> of the past half century has left private security largely untouched. Private searches fall outside the coverage of the Fourth Amendment, and evidence they uncover is almost always admissible; similarly, suspects interrogated by security guards are not entitled to *Miranda* warnings and generally do not receive them.<sup>82</sup>

The main legal limitations on the private police today are tort and criminal doctrines of assault, trespass, and false imprisonment—variants of the same doctrines that once defined the principal boundaries of permissible public policing. Unless the owner has given consent, a security guard's search of private property will generally constitute a trespass. And 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, for assault.

Private security companies eager to appear unthreatening often stress that their personnel are limited to the search and arrest powers of ordinary citizens. It is a mistake, though, to make too much of this limitation. In the first place, it is not always true that security guards have only the powers of ordinary citizens. Many private guards, for example, are “deputized” or

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79. 384 U.S. 436 (1966).

80. See discussion *infra* Part III.A.

81. E.g., BRADLEY, *supra* note 3.

82. See discussion *infra* Part III.B.2.

otherwise given full or partial police powers by state or local enactment,<sup>83</sup> and most states have codified a "merchant's privilege" that allows store investigators, and in some instances other categories of private security personnel, to conduct brief investigatory detentions that would be tortious or criminal if carried out by ordinary citizens.<sup>84</sup>

In the second place, the arrest powers of ordinary citizens in most states are not strikingly different, in some significant respects, from those of police officers. Officers can execute arrest warrants; private persons generally cannot. But the vast majority of arrests are made without a warrant, and the arrest powers of officers and civilians in that circumstance are relatively narrow. An officer, as a general matter, may arrest anyone he or she has probable cause to believe has committed a felony, and anyone who commits a misdemeanor in the officer's presence. A private citizen typically may also 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 by someone else.<sup>85</sup>

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83. See, e.g., GA. CODE ANN. § 35-2-71 (1993); S.C. CODE ANN. § 40-17-130 (Law. Co-op. 1986); Walsh & Donovan, *supra* note 63, at 189–90; Joanna Kakissis, *Real Cops Patrol Mall's Clean Streets*, NEWS & OBSERVER (Raleigh), May 24, 1998, at B1. But cf. ARIZ. REV. STAT. ANN. § 32-2634 (West 1992) (noting that "[a] person employed as a security guard shall not possess the authority of a regularly commissioned police or peace officer"). Courts typically treat deputized security guards as state actors subject to constitutional constraints. See discussion *infra* note 444 and accompanying text.

84. See, e.g., 7 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 27:19 (1990); *Shoplifting Law*, *supra* note 1, at 298–99, 312–14. For representative state statutes, see, for example, ALASKA STAT. § 11.46.230 (Michie 1996); ARIZ. REV. STAT. ANN. § 13-1805 (West Supp. 1998); CAL. PENAL CODE § 490.5 (West Supp. 1998) (covering amusement parks and movie theaters in addition to stores); CONN. GEN. STAT. ANN. § 53a-119a (West 1994); FLA. STAT. ANN. § 812.015 (West Supp. 1999); GA. CODE ANN. § 51-7-60 (1982); IDAHO CODE § 48-704 (1997); 720 ILL. COMP. STAT. ANN. 5/16A-5 (West 1993); IND. CODE ANN. § 35-33-6-2 (Michie 1998); KY. REV. STAT. ANN. § 433.236 (Michie 1985); LA. CODE CRIM. PROC. ANN. art. 215(A)(1) (West 1991); ME. REV. STAT. ANN. tit. 17, § 3521 (West Supp. 1998); MD. CODE ANN., CTS. & JUD. PROC. § 5-402 (Supp. 1997); MASS. ANN. LAWS ch. 231, § 94B (Law. Co-op. 1986); MICH. COMP. LAWS ANN. § 600.2917 (West Supp. 1998); NEB. REV. STAT. § 28-315 (1995); N.M. STAT. ANN. § 30-16-23 (Michie 1998); N.Y. GEN. BUS. LAW § 218 (McKinney Supp. 1999); OR. REV. STAT. § 131.655 (1990); R.I. GEN. LAWS § 11-41-21 (1994); TENN. CODE ANN. § 40-7-116 (1997); UTAH CODE ANN. §§ 77-7-12, 77-7-14 (1995); VA. CODE ANN. § 18.2-105.1 (Michie 1996); WASH. REV. CODE ANN. § 4.24.220 (West 1988); W. VA. CODE § 61-3A-4 (1997).

Most states also license and impose administrative regulations on segments of the private security industry, but the regulations are generally quite minimal. See discussion *infra* notes 536, 610–617 and accompanying text.

85. See, e.g., ALA. CODE §§ 15-10-1, 15-10-7 (1995); ARIZ. REV. STAT. ANN. §§ 13-3883 to -3884 (West 1989 & Supp. 1998); CAL. PENAL CODE §§ 836–837 (West 1985 & Supp. 1998); IDAHO CODE §§ 19-603 to -604 (1997); IND. CODE ANN. § 35-33-1-1 (Michie 1998); IOWA CODE ANN. §§ 804.7, 804.9 (West 1994); KAN. STAT. ANN. §§ 22-2401, 22-2403 (Supp. 1997); N.Y.

The difference between the arrest powers of police officers and private citizens, then, comes down to this: a private citizen, unlike a police officer, is liable for false arrest if he or she arrests someone based on probable cause to believe the arrestee committed a felony, but it turns out that the felony had not actually been committed. Neither is liable if it turns out the felony has been committed, but not by the defendant.

This distinction between the arrest powers of officers and those of private persons was not always drawn,<sup>86</sup> and not all states draw it today.<sup>87</sup> Even when the distinction is drawn, moreover, there is less to it than meets the eye. For if the defendant's good faith does not defeat tort liability for false arrest, it generally does preclude punitive damages<sup>88</sup> and can mitigate actual damages,<sup>89</sup> not to mention dampen the case's jury appeal. As a result, the recovery in a false arrest case brought successfully against a private person

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CRIM. PROC. LAW § 140.25 to .30 (McKinney 1992); OKLA. STAT. ANN. tit. 22, §§ 196, 202 (West 1991 & Supp. 1997); S.D. CODIFIED LAWS §§ 23A-3-2 to -3 (Michie 1988); TENN. CODE ANN. §§ 40-7-103, 40-7-109 (1997); UTAH CODE ANN. §§ 77-7-2 to -3 (1995). But see COLO. REV. STAT. ANN. § 16-3-201 (West 1997) (allowing a private person to arrest another person only "when any crime has been or is being committed by the arrested person in the presence of the person making the arrest"); 725 ILL. COMP. STAT. ANN. 5/107-3 (West 1993) (allowing a private person to "arrest another when he has reasonable grounds to believe that an offense other than an ordinance violation is being committed"); LA. CODE CRIM. PROC. ANN. art. 214 (West 1991) (allowing a private person to arrest another only when that person "has committed a felony, whether in or out of his presence"); N.C. GEN. STAT. §§ 15A-404 to -405 (1997) (disallowing any arrest by private persons except when assisting law enforcement officers in effecting arrests and preventing escapes from custody when requested to do so by the officer, but allowing a private person to "detain" anyone he has probable cause has committed in his presence a felony, breach of the peace, or crime involving physical injury to another or theft or destruction of property); RESTATEMENT (SECOND) OF TORTS §§ 119, 121 (1965); 1 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 3.18 (3d ed. 1996).

86. Until the late eighteenth century, officers and private persons alike were strictly liable for arrests for felonies that had not actually been committed. See Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 569–70 (1936).

87. See Partin v. Meyer, 639 S.W.2d 342, 343 (Ark. 1982) (noting that Arkansas law allows a private person "to make an arrest upon reasonable grounds for believing that the arrested person has committed a felony"), overruled on other points by United Ins. Co. v. Murphy, 961 S.W.2d 752, 756 (Ark. 1998).

Many other states immunize merchants and their agents from liability arising from arrests or detentions based on probable cause. See, e.g., ARIZ. REV. STAT. ANN. § 13-1805(D) (West Supp. 1998); CAL. PENAL CODE § 490.5(f)(7) (West Supp. 1998); DEL. CODE ANN. tit. 11, § 840(c) (1995); FLA. STAT. ANN. § 812.015(3)(c) (West Supp. 1998); NEV. REV. STAT. § 597.850(3)–(4) (1995); N.Y. GEN. BUS. LAW § 218 (McKinney Supp. 1999); N.C. GEN. STAT. § 14-72.1(c) (1997); OKLA. STAT. tit. 22, § 1343 (1991); TENN. CODE ANN. § 40-7-116(c) (1997); UTAH CODE ANN. § 78-11-18 (1996).

88. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11, at 49 (5th ed. 1984); 7 SPEISER ET AL., *supra* note 84, § 27:8, at 974.

89. See, e.g., 7 SPEISER ET AL., *supra* note 84, § 27:8, at 973; W.E. Shipley, Annotation, *Pleading Good Faith or Lack of Malice in Mitigation of Damages in Action for False Arrest or Imprisonment*, 49 A.L.R.2d 1460 (1956).

who acted reasonably and with probable cause is likely to be quite low—which may explain why such cases appear to be rare. Successful criminal prosecutions in such instances appear virtually nonexistent.<sup>90</sup>

When it comes to arrests, the real differences between police officers and private persons lie not in their powers, but in the consequences that ensue when those powers are exceeded. On the one hand, police officers who act reasonably and in good faith generally are immunized from tort or criminal liability for false arrest—even if they make a mistake about what is “objectively legally reasonable.”<sup>91</sup> Private persons, including security guards, typically lack this protection.<sup>92</sup> On the other hand, 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.<sup>93</sup> Instead of two separate doctrines of arrest, we have two separate remedial systems: tort actions for violations committed by private police, and suppression motions for evidence obtained illegally by public law enforcement.

Actually, even the remedial systems overlap, because tort actions can be brought against public officers as well as private security personnel. True, public officers can claim qualified immunity when they operate in good faith, but it is unclear how much the lack of such immunity hurts private security firms, given the practical obstacles to recovery against a defendant who has acted in good faith. Moreover, in at least one important respect tort suits are easier to bring against public police officers than against private security personnel: suits alleging constitutional violations by officers acting “under color of state law” can proceed under 42 U.S.C.

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90. Cf. MODEL PENAL CODE §§ 3.07(1), 3.09(1) (1985) (making a reasonable, good-faith arrest by an officer or a private person arrest noncriminal, except when the arrest is based on conduct, real or imagined, that the arrestor believes to constitute a crime but that actually does not).

91. *Anderson v. Creighton*, 483 U.S. 635, 644 (1987). *Anderson* thus immunizes from a federal damages action not only officials who act mistakenly but with probable cause, but also officials who “reasonably but mistakenly conclude that probable cause is present.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (citing *Anderson*, 483 U.S. at 641); see also Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1998). State tort law generally appears to operate analogously. See, e.g., *Louisiana Farms v. Louisiana Dep’t of Wildlife & Fisheries*, 685 So.2d 1086, 1099 (La. Ct. App. 1996); *Elwood v. County of Rice*, 423 N.W.2d 671, 678–79 (Minn. 1988); *Ortega v. Reyna*, 953 P.2d 18, 23 (Nev. 1998).

92. This is true even when they are deemed to have acted under “color of state law” for purposes of 42 U.S.C. § 1983 (1994). See *Richardson v. McKnight*, 117 S. Ct. 2100, 2108 (1997) (denying qualified immunity to private prison guards). However, some states immunize merchants and their agents from false-arrest liability for reasonably detaining suspected shoplifters. See, e.g., *Mitchell v. Walmart Stores, Inc.*, 477 S.E.2d 631, 633 (Ga. Ct. App. 1996); *Dutton v. Roo-Mac, Inc.*, 426 N.E.2d 604, 608 (Ill. App. Ct. 1981).

93. See discussion *infra* Parts III.A, III.B.2.

§ 1983, which entitles victorious plaintiffs to recover not only damages but attorneys' fees as well.<sup>94</sup>

None of this is to suggest that there are no significant legal distinctions between the powers of public and private police. The public police obviously have some well-defined powers that private security personnel lack. This is particularly true with regard to searches. Law enforcement officers but not private citizens can apply for and execute search warrants and electronic surveillance orders,<sup>95</sup> and in many circumstances the Supreme Court has granted police officers, but not private citizens, broad powers to search without a warrant.<sup>96</sup> In addition, police officers but not private citizens generally are empowered to command the assistance of bystanders.<sup>97</sup> There are also differences in the consequences that attach to a failure to submit to arrest. Resisting even a lawful citizen's arrest typically is not a crime,<sup>98</sup> although it frequently will be tortious.<sup>99</sup> In contrast, most states now criminalize resisting an arrest by a law enforcement officer even when the arrest is illegal.<sup>100</sup>

But the greatest differences in the powers of the public and private police are implicit. As we will see, they flow from the social understandings that surround the role of the public law enforcement officer.<sup>101</sup> Before tracing the roots of those understandings, however, we need to survey their current manifestations.

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94. See, e.g., PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 50 (1983).

95. See, e.g., 18 U.S.C. § 2516 (1994); FED. R. CRIM. P. 41; CAL. PENAL CODE §§ 1523, 1528, 1530 (West 1982 & Supp. 1998).

96. See, e.g., California v. Acevedo, 500 U.S. 565, 573 (1991); Maryland v. Buie, 494 U.S. 325, 337 (1990); United States v. Robinson, 414 U.S. 218, 236 (1973); Terry v. Ohio, 392 U.S. 1, 30 (1968).

97. See, e.g., CAL. PENAL CODE § 723 (West Supp. 1998); Jon C. Blue, *High Noon Revisited: Commands of Assistance by Peace Officers in the Age of the Fourth Amendment*, 101 Yale L.J. 1475, 1475–76 & nn. 2–3 (1992) (citing statutes).

98. See, e.g., CAL. PENAL CODE § 69 (West 1988); *In re J.J.C.*, 835 P.2d 553, 555–56 (Colo. Ct. App. 1992). But see FLA. STAT. ANN. § 812.015(6) (West Supp. 1999) (criminalizing resistance to a lawful detention pursuant to a merchant's privilege).

99. See, e.g., Smitherman v. McCafferty, 622 So.2d 322, 324 (Ala. 1993); People v. Garcia, 78 Cal. Rptr. 775, 779–80 (Ct. App. 1969); State v. Nall, 404 S.E.2d 202, 207 (S.C. Ct. App. 1991); BASSIOUNI, *supra* note 1, at 54–59 (citing cases).

100. The common law recognized a right to resist unlawful arrests by officers or private persons, and as late as 1948 the Supreme Court called the right "undoubted." *United States v. Di Re*, 332 U.S. 581, 594 (1948); see also *Bad Elk v. United States*, 177 U.S. 529, 537 (1900); Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128 (1969). But since then "[t]he overall trend has been toward abrogation of the right"; 17 states have done so by statute and 12 by judicial decision. *State v. Hobson*, 577 N.W.2d 825, 834 & n.19 (Wis. 1998) (citing cases and statutes).

101. See discussion *infra* Part II.F.3.

### C. Policing and the Public-Private Distinction

Thinking about private policing unavoidably involves thinking about the public-private distinction more generally. This is partly because policing—peacekeeping, property protection, and law enforcement.touches on deep and contradictory intuitions regarding the proper allocations of responsibilities between the public and private spheres. On the one hand, peacekeeping, property protection, and law enforcement are often considered the clearest examples of functions that are essentially and necessarily public, and therefore essentially and necessarily the job of government.<sup>102</sup> The idea here—loosely shared by John Locke and Max Weber, and latterly by Robert Nozick and Ronald Reagan—is that the very point of government is to monopolize the coercive use of force, in order to ensure public peace, personal security, and the use and enjoyment of property.<sup>103</sup> (Hence the classic description of the libertarian ideal: “the night watchman state.”) One reflection of this idea is the common notion that it is wrong to “take the law into your own hands.” Another is the view, taken as self-evident by the Supreme Court, that “the most basic function of any government is to provide for the security of the individual and of his property.”<sup>104</sup>

On the other hand, private policing can easily be understood as the natural product of three paradigmatically private functions. The first is self-defense, widely viewed as an inherent right, particularly in America, just as “taking the law into your own hands” is seen as obviously wrong.<sup>105</sup> The

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102. See, e.g., Clifford D. Shearing, *The Relation Between Public and Private Policing*, in MODERN POLICING 399, 403-09 (Michael Tonry & Norval Morris eds., 1992) (describing policing as “a quintessentially public service”); Robert H. Smith, *Private Policing—No Way*, in PRIVATE SECTOR AND COMMUNITY INVOLVEMENT IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 74, at 197, 197 (arguing that because “Australia is a constitutional monarchy . . . all matters relating to law enforcement should remain vested in the Crown”).

103. See JOHNSTON, *supra* note 72, at 24 (“In the twentieth century . . . it has generally been assumed that policing is an inherently public good, whose provision has to reside in the hands of a single, monopoly supplier, the state.”); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

104. *United States v. United States District Court*, 407 U.S. 297, 312 (1972) (quoting *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting)); accord, *Illinois v. Gates*, 462 U.S. 213, 237 (1983); see also, e.g., David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53, 53 (“Whatever else the government is supposed to do, it is supposed to protect citizens against violence by other citizens.”). For a helpful discussion of this sentiment, tracing its origins and finding it incorporated in the Fourteenth Amendment, see Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

105. See Shearing, *supra* note 102, at 411 (discussing the view of private policing as “self-defense writ large”).

A growing number of scholars see the right of self-defense partially codified in the Second Amendment “right of the people to keep and bear arms.” See, e.g., Robert J. Cottrol & Raymond

second is economic exchange, the "free market" that, as we will see, transformed the eighteenth-century constabulary from a civic duty to a specialized form of employment.<sup>106</sup> The third is the use and enjoyment of property, generally thought to include the right of owners to place conditions on those invited onto their property.<sup>107</sup>

Not surprisingly, therefore, the recent growth of private policing has elicited conflicting reactions, reflecting broader conflicts about government in general. The trend has been applauded on three different grounds. First, private policing has been welcomed as more *flexible* than traditional, public law enforcement. Private guard companies, unlike public police forces, are free from civil service rules, reporting requirements, and the range of other rules characteristically imposed on government agencies. In addition, private companies lack many of the bureaucratic traditions that may handicap the effectiveness of the public police, and they are often free from the constraints associated with a unionized workforce.<sup>108</sup> These factors allow guard companies to act in ways in which government either cannot or will not.<sup>109</sup>

Second, private policing has been celebrated as more *accountable* than its public counterpart. Unlike public police forces, private guard companies have to answer to the discipline of the market. In the words of one enthusiast, a privately employed police officer inevitably "recognizes the

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T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998). For dissenting views, see, for example, Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993); Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661 (1989); David C. Williams, *The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822 (1998).

106. See discussion *infra* notes 157–181 and accompanying text.

107. See Rick Sarre, *The Legal Powers of Private Police and Security Providers*, in PRIVATE PRISONS AND POLICE: RECENT AUSTRALIAN TRENDS 259, 264–65 (Paul Moyle ed., 1994) (tracing the power of private police in part to property law); Shearing & Stenning, *supra* note 31, at 497 (arguing that "[t]he close association between private security and private property provides its most important source of social legitimization as an alternative to systems of public justice, and helps to explain why its development has proceeded with so little opposition").

108. On the limits unions place on the way public police departments can be run, see, for example, Margaret Levi, *Conflict and Collusion: Police Collective Bargaining*, in POLICE ACCOUNTABILITY 113, 115–20 (Richard C. Larson ed., 1978).

109. Cf., e.g., BAYLEY, *supra* note 26, at 44–66. Bayley concludes that "because of the constraints on the use of personnel functionally, territorially, and organizationally, increasing or decreasing budgets has little effect on the way police work is done. The most fundamental resource of policing—people—is not being utilized flexibly according to strategic and community needs." *Id.* at 52.

importance of establishing positive relationships with the consumers of the service and develops innovative approaches to community problems," whereas, "the public police are paid through the compilation of public taxes and are, therefore, answerable to every business and citizen in the city but are not accountable to them."<sup>110</sup> Private policing thus can be understood in part as a reaction against the excessive independence and insularity of modern police forces—an answer to the common complaint "that a police force should be responsive to those policed, while autonomous professionals . . . have a notorious tendency to believe that they know what is 'really' best for the clients, and therefore what the client 'ought' to want."<sup>111</sup>

Third and finally, private policing has been thought beneficial because it *empowers* those it protects. Unlike the first two advantages of private policing, this third one does not have to do with the improved performance of those doing the policing, but rather from the effect on those who hire them. The argument here has two strands. The first is *individualistic*: it appeals to the notion that every citizen should take responsibility for his or her own protection, that it is ultimately enfeebling to depend on the government for protection.<sup>112</sup> The second is *communitarian*: the idea here is that arranging for private policing generally entails a more or less voluntary association of residents or business owners that, in the process of providing joint security, also builds social capital<sup>113</sup>—which itself can help reduce crime.<sup>114</sup> The first strand of the empowerment argument thus envisions pri-

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110. James J. Vardalis, *Privatization of Public Police: Houston, Texas*, 3 SECURITY J. 210, 211 (1992).

111. Maureen Cain, *Trends in the Sociology of Police Work*, 7 INT'L J. SOC. L. 143, 151 (1979); see also, e.g., JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 154 (1989) (describing "the accelerated privatization of policing" as a "form of devolution of social control from the state to more proximate groups"); Stenning, *supra* note 75, at 152 (praising private security for its "imaginativeness" in finding forms of order maintenance that "are inclusive of the community served rather than exclusive of it").

112. See, e.g., James P. Murphy, *The Private Sector and Security: A Bit on BIDs*, 9 SECURITY J. 11, 13 (1997) (suggesting that private security provided through business improvement districts "is 'empowerment' at its best" because its advocates are "willing to take on the responsibility that comes with being truly empowered"). Regarding private policing through BIDs, see *supra* note 56.

113. See, e.g., ROBERT J. BURSIK & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL 109 (1993). "[S]ocial capital" refers to features of social organization such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit." Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, J. DEMOCRACY, Jan. 1995, at 65, 67; see also JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 300-21 (1990); ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 167 (1993).

114. See Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997).

vate security as the natural outgrowth of individual self-defense; the second strand sees it as a commercial variant on citizen patrols.<sup>115</sup>

Each of these claimed advantages of private policing, of course, has a flip side.<sup>116</sup> For example, the greater flexibility of private guard companies stems from their freedom from regulations and traditions that have developed largely because they were thought necessary to control the uniformed, armed, quasi-military forces patrolling our streets. Where some see the greater flexibility of private policing, others see the threat of policing that is *uncontrolled*. Indeed, the most persistent complaint about private guard companies—a complaint that, we will see, has deep roots in the nineteenth century, and that today serves as a perennial focus of television exposés—is that they are insufficiently regulated.

The frequency with which this complaint is raised serves as a reminder that the supposed accountability of private policing has a troubling side as well. Private companies are thought more accountable than government because they answer to their particular customers instead of to the general public. But this is not clearly to everyone's advantage: In particular, those who come into contact with private guards but do not help to pay for them may not welcome the fact that such guards are accountable exclusively to their customers. And even some of the customers, when they venture outside their own territory, may wish that the various uniformed patrol

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115. The line between private security and citizen patrols can indeed be indistinct. Some shopping malls, for example, have augmented their paid security services "with internships and other volunteer auxiliary security personnel such as local ROTC cadets or members of local community service organizations. The volunteers walk the inside or outside areas of the mall and serve as extra eyes and ears for the security department without increasing the need for security funding." Brian R. Johnson & Greg L. Warchol, *Giving Security Space at the Mall*, SECURITY MGMT., June 1997, at 87, 89; cf. Daryl W. Poe & Mark E. Hurling, *At Work with Neighborhood Watch*, SECURITY MGMT., June 1998, at 68, 68 (describing how "the security manager at Hughes Aircraft . . . appl[ied] the principles of Neighborhood Watch to the workplace"). One sign of the progress of police privatization is that security personnel, often legitimized as "extra eyes and ears" for the police, now find need for their own "extra eyes and ears."

Further blurring the distinction between private security and citizen patrols are security firms such as those tied to the Nation of Islam, several of which have been hired to patrol public housing projects. Although for a time "none of the Nation's business ventures offered a better chance of commercial success or garnered more favorable publicity for [Nation leader Louis] Farrakhan's message of black empowerment," more recently the firms have been troubled by mounting debt, charges of mismanagement, and complaints of Nation guards shirking their duties, proselytizing, and distributing anti-Semitic pamphlets. Lorraine Adams, *A Breach in Guards' Invincibility: Debt, Mismanagement Plague Security Firms*, WASH. POST, Sept. 2, 1996, at A1; see also, e.g., Raymond Hernandez, *Nation of Islam Guards Ordered to Leave Housing Project*, N.Y. TIMES, Sept. 13, 1996, at B3; *Confrontational but Successful Security Guard Firm Loses Govt. Contracts*, SECURITY LETTER, Apr. 1, 1997, pt. III, at 2 (reporting that "[e]thnic-oriented security firms have sprung up across the nation to provide protection to embattled neighborhoods").

116. For the time being I put to one side concerns about the distributional effects of police privatization. For discussion of these concerns, see *infra* Part IV.B.

personnel they encounter were less *proprietary*, more answerable to the general public.<sup>117</sup>

More broadly, there are grounds for doubting that market forces will deliver optimum levels of police protection. In the lingo of economics, policing gives rise to three sorts of externalities.<sup>118</sup> First, there is the free-rider problem: if my neighbors pay for a private patrol car to drive by their homes periodically, burglars may be scared away from my house, too.<sup>119</sup> Because there is no practical way to limit all the benefits of patrol service to those who pay for it, markets might be expected to supply a suboptimal level of patrolling.<sup>120</sup> Second, there is the problem of displacement. The patrol car in my neighborhood may push burglars into surrounding neighborhoods, increasing crime there while decreasing it where I live.<sup>121</sup> Indeed, some industry executives boast that private patrols, once established in an area, create further marketing opportunities by moving crime to adjacent, underpatrolled areas.<sup>122</sup> Alarm systems, advertised by lawn placards and window decals, may have a similar effect within neighborhoods.<sup>123</sup> Third, there is the problem mentioned above: policing protects some people by interfering with other people, and there is no obvious way to require those who are protected to pay for the burdens imposed on those they are pro-

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117. See Bayley & Shearing, *supra* note 5, at 596.

118. On externalities generally, see, for example, DAVID N. HYMAN, MODERN MICROECONOMICS 632–63 (2d ed. 1989).

119. Within a particular neighborhood, policing is to a great extent a “public good”: it can be jointly consumed (the presence of my neighbors’ patrol car can deter burglars from my house without significantly reducing the similar protection it provides to my neighbors), and it is “non-excludable” (my neighbors have no practical way of limiting the benefits of the patrol car to those who help pay for it). See *id.* at 665–66; J.G. Head, *Public Goods and Public Policy*, 17 PUB. FIN. 197 (1962); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954).

120. See, e.g., HYMAN, *supra* note 118, at 667–69; Head, *supra* note 119, at 206. But cf., e.g., R.H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974) (suggesting that lighthouses, often cited by economists as an example of a public good, can be and have been amply provided by private enterprise).

121. See, e.g., Koo Hui-Wen, *Private Security: Deterrent or Diversion?*, 14 INT'L REV. L. & ECON. 87 (1994).

122. See Jerry A. Usher, *Privatization in Criminal Justice: One Perspective in Southern California*, in *PRIVATIZING THE UNITED STATES JUSTICE SYSTEM: POLICE, ADJUDICATION, AND CORRECTIONS SERVICES FROM THE PRIVATE SECTOR* 138, 141 (Gary W. Bowman et al. eds., 1992).

123. See, e.g., Charles T. Clotfelter, *Private Security and the Public Safety*, 5 J. URB. ECON. 388, 398 (1978). To avoid this effect in the context of automobile theft, police departments reportedly have conditioned their use of Lojack technology on the company’s agreement not to identify cars in which its antitheft transmitters are installed. The invisibility of the device, however, has created a free-rider problem because most of the deterrent benefit from installation of the device is now externalized. See Ian Ayres & Steven D. Levitt, *Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of Lojack*, 113 Q.J. ECON. 43, 45 n.4, 47 (1998).

tected from. All these externalities can be anticipated to warp private expenditures for police protection away from what economists would consider socially efficient. One might expect the private sector to overfund crime control strategies with large negative externalities, and to underfund strategies with large positive externalities: more money for home alarms than for private patrols, and more for private patrols than for antipoverty foundations.

Nor, finally, are the broad effects of private policing on its employers unambiguously positive. Public law enforcement has been celebrated as "socializing" the coercive use of force.<sup>124</sup> To the extent that private policing is seen as an extension of self-defense, it can be—and has been—deplored as a retreat from that process. On the other hand, to the extent that private policing is seen as a commercial variant on citizen patrols, the commercial aspect may be thought to eliminate much of the civic value.<sup>125</sup> And not everyone is enthusiastic about citizen patrols even in their pure form;<sup>126</sup> American history gives ample cause for disquiet about amateur law enforcement.<sup>127</sup> Indeed, as we shall see, the history of policing, both in England and in America, throws doubt on most easy answers to the problems presented by private policing.

## II. A SHORT HISTORY OF PUBLIC AND PRIVATE POLICING

Although written by a lawyer and aimed principally at readers interested in the legal issues raised by the growth of private policing, what follows is not, at least not self-consciously, a "lawyer's history" in the sometimes dismissive, sometimes apologetic sense in which that phrase is often used: it is not a story about the past strung together to serve an argument

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124. Cf. Spitzer & Scull, *supra* note 76, at 23 (describing the "socialization" of order maintenance in the 1920s and 1930s); Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2315 (1998) (book review) (noting "that vigorous police enforcement of the criminal law is a form of government intervention designed to curb the exercise of private power," and "also a form of redistribution"); Murray Kempton, *Son of Pinkerton*, N.Y. REV. BOOKS, May 20, 1971, at 22 (describing the replacement of the Pinkerton agency by the FBI as "the only episode in our social history to realize Marx's prescription for the transformation of capitalist private property into socialized property").

125. Nation of Islam guards, for example, received high praise as volunteers, but have generated increasing complaints since they incorporated and began to sell their services. See discussion *supra* note 115. For an extended argument that commodification of policing and other city services undermines their "community building" potential, see Frug, *supra* note 67.

126. See, e.g., MIKE DAVIS, *ECOLOGY OF FEAR: LOS ANGELES AND THE IMAGINATION OF DISASTER* 387–91 (1998); Lloyd Klein et al., *Perceived Neighborhood Crime and the Impact of Private Security*, 35 CRIME & DELINQ. 365, 373–75 (1989).

127. See discussion *infra* notes 245–250 and accompanying text.

about the present.<sup>128</sup> It does reflect, however, my beliefs that history can teach lessons, and that those lessons can be pursued with some degree of objectivity. Readers who do not share these beliefs—who think the past too foreign<sup>129</sup> or indeterminate<sup>130</sup> to serve as tutor—may find in the following pages some support for their skepticism, for among the lessons I draw from the complex, shared history of public and private policing is the danger of drawing easy lessons. Nevertheless I hope to show that the past offers other suggestions as well, albeit less clearly.

Some of these have to do with the causes of the recent, dramatic increases in private policing. Private organizations have a long tradition of filling perceived gaps in the policing services provided by government. I argue that there is reason to believe this is happening again today, and that the demand for private security should not be discounted as irrational.<sup>131</sup>

Other lessons pertain to the nature of policing. Many people today view crime control and order maintenance as inherently public functions—perhaps the paradigms of jobs assigned traditionally and uncontroversially to government. Others regard the preference for public policing as an arbitrary, possibly transient fancy of the postwar decades. History throws doubt on both views. Policing as a concept has been remarkably malleable, and no part of the job has ever been monopolized by government. But the malleability of policing can easily be exaggerated; the continuities in organized policing since the early nineteenth century have in some ways been as striking as the changes. Moreover, if the police functions deemed appropriately public have varied over time, the sense that *some* aspects of order maintenance and crime control should be kept in public hands turns out to be both old and durable. In the context of policing, at least, the

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128. For criticism of this sort of lawyer's history, see, for example, Martin S. Flaherty, *History 'Lite' in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Morton J. Horwitz, *Republican Origins of Constitutionalism*, in *TOWARD A USABLE PAST* 148 (Paul Finkelman & Stephen E. Gottlieb eds., 1991); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119. For various kinds of apologies, see Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 114–19 (1997); Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601 (1995); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909 (1996).

129. Cf., e.g., Kalman, *supra* note 128, at 114 (commenting that “[t]he idea of a usable past has fallen into disfavor among historians, who now concentrate on the pastness of the past”); Tushnet, *supra* note 128, at 916 (suggesting that “[m]ostly . . . historians try to emphasize the pastness of the past”).

130. See, e.g., PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY” QUESTION AND THE AMERICAN HISTORICAL PROFESSION* (1988); Theodore Y. Blumoff, *The Third Best Choice: An Essay on Law and History*, 41 HASTINGS L.J. 537, 538, 540 (1990).

131. See discussion *infra* Part II.F.1.

public-private distinction is both more flexible and more confining than sometimes thought.<sup>132</sup>

Finally, history offers humbling lessons about the limited salience of legal rules in constructing the police as a social institution. The special powers of law enforcement officers have never been well defined, but they have always been assumed to exist; the police have been defined more by culture than by law.<sup>133</sup> I argue that understanding this fact is the first step to thinking more sensibly about the state action problem in criminal procedure, and possibly about the state action doctrine more generally. The special role of the state, like the special role of police officers, may be part of our cultural baggage, and harder to jettison than often imagined.<sup>134</sup>

#### A. Constables, Watchmen, and Thief-Takers

The earliest origins of Anglo-American law enforcement are obscured both by "a jungle of archaic terms"<sup>135</sup> and by the celebrated ability of English institutions to change their function while keeping their form.<sup>136</sup> In broad outline, however, the story runs as follows.

Before the Norman Conquest, Saxon society maintained order through "a well-understood principle of social obligation, or collective security."<sup>137</sup> The system may have originated in voluntary associations for mutual protection against theft,<sup>138</sup> but by the tenth century it had evolved into a hierarchical system of mandatory community service.<sup>139</sup> Every adult male was enrolled in a group of about ten families called a "tything," headed by a tythingman, and tythings were in turn organized into groups called "hundreds," headed by a hundred man or royal reeve.<sup>140</sup> Among the responsibilities of the hundred man was holding trials. If any member of a tything committed a crime, "the others had to produce him for trial; if they failed to do so they could be fined or called upon to make compensation."<sup>141</sup> Tythings

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132. See discussion *infra* Part II.F.2.

133. See discussion *infra* Part II.F.3.

134. See discussion *infra* Part III.C.2.

135. T.A. CRITCHLEY, A HISTORY OF POLICE IN ENGLAND AND WALES 900-1966, at 1 (1967).

136. See *id.* at 16.

137. *Id.* at 2.

138. See *id.*

139. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 7-8 (3d ed. 1990); CRITCHLEY, *supra* note 135, at 3.

140. See CRITCHLEY, *supra* note 135, at 2. These were rural units. In towns the equivalent of hundreds were boroughs, and in London they were wards. See BAKER, *supra* note 139, at 8-9.

141. CRITCHLEY, *supra* note 135, at 2. Of course these were not trials in the modern sense of a "weighing up of evidence and arguments." BAKER, *supra* note 139, at 85. Ordeals were not abolished until 1215, see JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 75 (1977);

and hundreds also served as tax collection units, and they operated independently of the larger geographical units of shires, or counties.<sup>142</sup> Each shire was headed by a shire reeve, or sheriff, who "had a general responsibility under the King for the conservancy of the peace in the shire."<sup>143</sup> The concept of the "king's peace"—the sovereign's separate and distinct interest in maintaining order—thus predates, and indeed laid the groundwork for, the development of the common law.<sup>144</sup>

The Normans retained the principle of communal liability and enforced it through the "frankpledge," "a system of compulsory, collective bail, fixed for individuals, not after their arrest for crime but as a safeguard in anticipation of it."<sup>145</sup> The Normans also introduced the position of "constable," originally a royal military office, but by the twelfth or thirteenth century "the direct lineal descendant of the ancient tythingman," with feudal manors and then parishes taking the place of tythings.<sup>146</sup> The constable, "a local man with a touch of regal authority about him," became the linchpin of a system of law enforcement that then "endured with remarkable stability for almost 500 years."<sup>147</sup>

In 1285, the Statute of Winchester "crystallized" that system in a form that "[f]or several centuries . . . afforded authoritative guidance to courts and writers."<sup>148</sup> Reaffirming and refining the collective responsibility of communities for law enforcement, the statute imposed liability on the hundreds for any robberies committed within them unless the offenders were caught, provided for appointment on a rotating basis of specified numbers of

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John W. Baldwin, *The Intellectual Preparation for the Canon of 1215 Against Ordeals*, 36 *SPECULUM* 613 (1961), and for several centuries thereafter juries relied heavily if not exclusively on information they themselves brought to court, see, e.g., John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 *AM. J. LEG. HIST.* 313, 314–15 (1973) (suggesting that juries remained "self-informing" until approximately the fifteenth century); but cf. George Fisher, *The Jury's Rise as Lie Detector*, 107 *YALE L.J.* 575, 591–94 (1997) (casting doubt on the view that "the early jury was entirely self-informing").

142. See BAKER, *supra* note 139, at 8. Alongside and in addition to the hierarchy of hundreds and tythings, some shires were divided into units known variously as lathes, parts, rapes, and ridings. *See id.* But we can leave those alone.

143. CRITCHLEY, *supra* note 135, at 2–3.

144. See BAKER, *supra* note 139, at 10–11; CRITCHLEY, *supra* note 135, at 2.

145. WILLIAM ALFRED MORRIS, *THE FRANKPLEDGE SYSTEM* 2 (1910); *see also* STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 43–44 (1987).

146. CRITCHLEY, *supra* note 135, at 1–2, 4–5. "Originally an ecclesiastical community, [the parish] was beginning by the reign of Henry VIII to acquire civil functions," and by "late Tudor times . . . had become an important unit of local administration. It was natural to this development that the parish should attract and take over some of the functions of the obsolescent remnants of feudalism, and in this way the constable came to be associated with it." *Id.* at 9.

147. *Id.* at 2, 7.

148. Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 *HARV. L. REV.* 566, 579 (1936).

night watchmen for every city and borough, and called for arrest of strangers the watchmen encountered. If a stranger or criminal resisted arrest, the watchman was to raise a "hue and cry," which obligated "all the Town, and the Towns near" to join in the pursuit.<sup>149</sup> For these purposes, the statute required every man between the ages of fifteen and sixty to maintain specified weaponry, which varied according to his wealth.<sup>150</sup>

Law enforcement under the Statute of Winchester thus remained "a community affair."<sup>151</sup> Constables and watchmen were not paid for their service,<sup>152</sup> and "police duties were the duties of every man."<sup>153</sup> This arrangement heavily influenced the development of the law of arrest. The earliest manuals and treatises on the subject, written in the seventeenth century, drew no sharp distinction between the powers of constables and those of what were already called "private persons": both could arrest individuals "probably suspected of felonies," but only if a felony had in fact been committed.<sup>154</sup> The same rules appeared in Blackstone's eighteenth-century *Commentaries*.<sup>155</sup>

Although the Statute of Winchester remained in force until the nineteenth century, the system of constables and watchmen began to show strain as early as the sixteenth century, and by the eighteenth century it was more or less a shambles.<sup>156</sup> The basic problem was that medieval notions of universal, unpaid service worked poorly in a mercantile society, let alone an industrial one. Those with sufficient funds hired deputies to serve their stints as constable or watchman, the deputies in turn often hired their own deputies, and in this manner the constabulary and watch gradually were

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149. *Id.*

150. See *id.* at 579–80; see also CRITCHLEY, *supra* note 135, at 6–7.

151. Spitzer & Scull, *supra* note 76, at 19.

152. See CRITCHLEY, *supra* note 135, at 7, 9.

153. Hall, *supra* note 148, at 579.

154. *Id.* at 567–80. Constables, however, "were often required to arrest in situations where truly private persons were, at most, permitted to do so." Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 57 (1996).

155. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*292. Blackstone noted, however, that peace officers, but not private persons, were authorized to "break open doors" to arrest "upon probable suspicion"; private persons could force entry only to arrest someone who had committed a felony in their presence. Furthermore, killing an officer to resist a "probable suspicion" arrest was murder, but killing a private person in the same circumstances was manslaughter. Neither of these distinctions applied to arrests by officers or private persons for felonies carried out in their presence; in that situation, anyone was authorized to "break open doors," and any killing to resist arrest was murder. See *id.*

156. Even earlier, by the fifteenth century at the latest, frankpledge had "degenerated into merely another form of petry taxation," and "no one was insisting rigorously on the organization of all English males into tithing groups with communal responsibility for each other." YEAZELL, *supra* note 145, at 120–21; see also CRITCHLEY, *supra* note 135, at 7.

relegated to those who could find no other employment.<sup>157</sup> The predictable results were constables and watchmen of notorious incompetence.<sup>158</sup>

One consequence of this incompetence, and one reason it was tolerated for so long, was that the constabulary and watch were not relied upon for the arrest of most criminals. The core function of the watch was preventive: keeping an eye out for trouble, raising an alarm when it was spotted, and perhaps deterring some of it by mere presence. No doubt even the most bumbling officer served these purposes to some extent. When crimes occurred, the victims were responsible themselves for catching the offenders, turning them over to the authorities, and then prosecuting the cases.<sup>159</sup> The state reinforced this system in two principal ways.

The first was through preliminary examinations conducted by justices of the peace, later known as magistrates. Beginning in the sixteenth century, these Crown-appointed officials functioned something "like a US district attorney or a French *juge d'instruction*."<sup>160</sup> The justice of the peace typically supervised the work of the local constable,<sup>161</sup> issued warrants for searches and arrests,<sup>162</sup> and, following a suspect's arrest, questioned the suspect, the complainant, and any other witnesses. Unless it appeared that no crime had been committed, the justice of the peace ordered the suspect jailed or released under bond pending trial, ordered the complainant to prosecute the case, and ordered the witnesses to appear and give testimony

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157. See CRITCHLEY, *supra* note 135, at 10, 18–19, 24–25; 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 184 (1956); Hall, *supra* note 148, at 580. In the eighteenth century, the market for deputy services was supplemented by a trade in so-called "Tyburn tickets," named after the London execution site. Parliament had decreed in 1699 "that a person who prosecuted a felon to conviction should enjoy lifelong exemption from all parish offices, and these certificates changed hands for substantial sums of money, their sale or auction occasionally being advertised in the newspapers." CRITCHLEY, *supra* note 135, at 18.

158. See, e.g., CRITCHLEY, *supra* note 135, at 10 (noting that by the seventeenth century the office of constable "was commonly regarded as appropriate only to the old, idiotic, or infirm"); FRANK MCLYNN, CRIME AND PUNISHMENT IN EIGHTEENTH-CENTURY ENGLAND 20 (1989) (reporting "the received opinion during the first half of the eighteenth century that the Watch was incompetent"); Hall, *supra* note 148, at 582 (describing the general agreement in the early nineteenth century about "the ineptitude, inefficiency, even absurdity of the parish watchmen"). For a telling, comic portrayal of constabulary ineptitude at the beginning of the seventeenth century, see WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 1.

159. See J.A. Sharpe, *Enforcing the Law in the Seventeenth-Century English Village*, in CRIME AND THE LAW: THE SOCIAL HISTORY OF CRIME IN WESTERN EUROPE SINCE 1500, at 97 (V.A.C. Gatrell et al. eds., 1980). For thoughts on how the persistence of lay prosecution in England may have helped shape modern-day trial procedures in common-law countries, see MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 113–20 (1997).

160. MCLYNN, *supra* note 158, at 18.

161. See CRITCHLEY, *supra* note 135, at 7–9; Hall, *supra* note 148, at 581 n.59.

162. See TELFORD TAYLOR, *Search, Seizure, and Surveillance*, in TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19, 24 (1969).

at trial. In addition to providing some rudimentary state-supervised investigation, the preliminary examination helped protect against complainants who lost interest in the proceedings between arrest and trial.<sup>163</sup>

The second way the state reinforced the system of private law enforcement was by offering rewards. Monetary incentives for arresting and successfully prosecuting criminals were offered as early as the sixteenth century for what we would today classify as regulatory offenses, particularly violations of trade statutes.<sup>164</sup> Precisely because they were motivated by want instead of duty, informers were never popular; Coke reflected a common complaint in noting that they acted "for malice or private ends and never for love of justice."<sup>165</sup> By the eighteenth century, however, rewards had become Parliament's "main weapon against crime and public disorder," notwithstanding a series of statutes in the early 1700s reaffirming the principle of collective liability and the duties of hue and cry.<sup>166</sup> Lavish financial inducements,<sup>167</sup> often coupled with pardons<sup>168</sup> or other benefits,<sup>169</sup> made informing widespread and eventually provided, along with the rampant lawlessness of the 1700s, "the ideal breeding-ground for that distinctive eighteenth-century phenomenon, the thief-taker."<sup>170</sup>

Thief-takers recovered stolen property in exchange for fees and rewards; sometimes they also captured criminals, but more often they worked in unsavory coordination with the thieves they were supposed to "take."<sup>171</sup> If medieval constables represented the feudal approach to law enforcement, thief-takers exemplified the market approach: "[a]lthough their principal pursuit was profit, crime control and the apprehension of

163. See JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE (1974). Justices of the peace also issued warrants, and they had general responsibility for maintaining public order. See, e.g., MCLYNN, *supra* note 158, at 18.

164. See M.W. Beresford, *The Common Informer, The Penal Statutes and Economic Regulation*, 10 ECON. HIST. REV. 221, 221 (1958).

165. *Id.* (quoting 3 EDWARD COKE, INSTITUTES 194 (1644)).

166. MCLYNN, *supra* note 158, at 20-22; see also JOHNSTON, *supra* note 72, at 6-9; 2 RADZINOWICZ, *supra* note 157, at 33-161; John H. Langbein, Albion's Fatal Flaws, 98 PAST & PRESENT 96, 102 (1983); South, *supra* note 77, at 72, 92-96.

167. Monetary rewards for informing "were of a very high order by the standards of the day. The standard fee for information leading to the capture of a highwayman was £40. In the case of damage to a turnpike, the reward for identifying the offender could go as high as £400." MCLYNN, *supra* note 158, at 21-22. For further description of the authorized awards, see 4 BLACKSTONE, *supra* note 155, at \*294-95. After about 1750, "the government offered rewards only for offences against its own property," but "rewards continued to be offered by private individuals throughout the century." MCLYNN, *supra* note 158, at 22.

168. See MCLYNN, *supra* note 158, at 22; 2 RADZINOWICZ, *supra* note 157, at 40-56.

169. The most important of these was the Tyburn ticket. See discussion *supra* note 157.

170. MCLYNN, *supra* note 158, at 22.

171. See JEROME HALL, THEFT, LAW AND SOCIETY 169 & n.28 (2d ed. 1952); MCLYNN, *supra* note 158, at 22-31.

criminals were the by-products.”<sup>172</sup> They flourished in part because “[t]here was little conception of the public good or of civic duty in eighteenth-century England.”<sup>173</sup> Indeed, constables themselves increasingly acted like thief-takers, as hired deputies “found that profits could also be gained from selling protective and investigative services, or demanding rewards and fees in return for recovered goods.”<sup>174</sup>

The two vocations found their perfect merger in London at midcentury, when the novelist, reformer, and newly appointed Bow Street magistrate Henry Fielding recruited six thief-takers, all former constables, to work for rewards and private fees under his command.<sup>175</sup> This force quickly grew into the Bow Street Runners, widely celebrated as crime fighters par excellence in their own time,<sup>176</sup> but commonly dismissed in our century as “self-seeking knaves”<sup>177</sup> and “glorified bounty-hunters.”<sup>178</sup> In truth, the runners were both “the most perfect creation and ultimately the most complete travesty of the system of incentives . . . a closely knit caste of speculators in the detection of crime, self-seeking and unscrupulous, but also daring and efficient when daring and efficiency coincided with their private interest.”<sup>179</sup> If they were in many ways “closer to being a private police force than the noble precursor to the Metropolitan Police,”<sup>180</sup> they were soon also “all that an average constable aspired to be.”<sup>181</sup>

## B. The Birth of Preventive Policing

The law enforcement functions of the Bow Street Runners, like those of earlier constables and thief-takers, were not preventive but reactive: inves-

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172. South, *supra* note 77, at 81.

173. MCLYNN, *supra* note 158, at 21.

174. Spitzer & Scull, *supra* note 76, at 19.

175. See ANTHONY BABINGTON, *A HOUSE IN BOW STREET: CRIME AND THE MAGISTRACY, LONDON 1740-1881*, at 89 (1969). Like earlier justices of the peace, “[t]he metropolitan magistrates, especially the one at Bow Street, combined judicial, administrative, and executive duties.” Hall, *supra* note 148, at 581 n.59. In particular, they supervised the constabulary. “[I]ndeed some of the ablest magistrates themselves participated in detective work, sometimes in disguise.” *Id.*

176. See 2 RADZINOWICZ, *supra* note 157, at 264-69. Some of the celebration may be credited to the “relentless propaganda on the runners’ behalf” penned by John Fielding—“a man of the J. Edgar Hoover stamp”—who served with his brother as magistrate at Bow Street and took over supervision of the runners following Henry’s death in 1754. MCLYNN, *supra* note 158, at 32-33. It was John Fielding who first popularized the use of the word “police” to refer to law enforcement personnel. See BABINGTON, *supra* note 175, at 126-27; MCLYNN, *supra* note 158, at 33.

177. W.L. MELVILLE LEE, *A HISTORY OF POLICE IN ENGLAND* 367 (1901).

178. MCLYNN, *supra* note 158, at 32.

179. 2 RADZINOWICZ, *supra* note 157, at 263.

180. South, *supra* note 77, at 81.

181. 2 RADZINOWICZ, *supra* note 157, at 263.

tigation, recovery, and sometimes apprehension. Organized prevention was left to the watchmen, which meant it was haphazard at best. In the second half of the eighteenth century, however, increasing calls were heard for effective, state-sponsored patrols.<sup>182</sup> Those favoring such patrols were distinctly in the minority: a "surprising consensus of public opinion"<sup>183</sup> maintained "that professional police on the French model would be the death of traditional English liberties."<sup>184</sup> Nonetheless, several small-scale patrols were established at the Bow Street Office, and by the end of the century a much larger force of sixty salaried officers was established to patrol the Thames waterfront. Each of these operations was supervised by one or more magistrates, and each received a mixture of public and private funds; the Thames River Police, for example, initially received four-fifths of its money from shipping interests.<sup>185</sup>

By 1800, London had eight additional "public offices" or "police offices" modeled on Bow Street and chartered by Parliament.<sup>186</sup> Each was staffed by a handful of salaried constables who regularly supplemented their pay with private employment;<sup>187</sup> "[p]ayment of fees and expenses by individuals seeking police assistance appears to have been the rule, not the exception."<sup>188</sup> The Bow Street Office itself received sporadic public funds to patrol particular areas,<sup>189</sup> and Parliament regularly authorized merchants and groups of private individuals to form special, privately funded constabulary forces.<sup>190</sup> In London and in smaller towns, watchmen typically were paid with public funds, although often not very much.<sup>191</sup> In rural areas, the wealthy employed gamekeepers to protect their property.<sup>192</sup> Throughout the country, merchants and landowners formed hundreds if not thousands of

182. Particularly influential, in the long run, were writings by Jeremy Bentham, the reformer Edwin Chadwick, the Fielding brothers, and the later metropolitan magistrate Patrick Colquhoun. For citations, summaries, and analysis, see 3 *id.* at 11–28, 211–51, 431–41, 448–74.

183. E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 82 (1963).

184. MCLYNN, *supra* note 158, at 17; *see also*, e.g., Hall, *supra* note 148, at 587; David Philips, 'A New Engine of Power and Authority': The Institutionalization of Law-Enforcement in England 1780–1830, in CRIME AND THE LAW: THE SOCIAL HISTORY OF CRIME IN WESTERN EUROPE SINCE 1500, *supra* note 159, at 155, 171–74.

185. See BABINGTON, *supra* note 175, at 193–96; CRITCHLEY, *supra* note 135, at 42–45; 2 RADZINOWICZ, *supra* note 157, at 349–404; 3 *id.* at 58–62.

186. See 2 RADZINOWICZ, *supra* note 157, at 188, 190–91.

187. See CRITCHLEY, *supra* note 135, at 37, 42–43; 2 RADZINOWICZ, *supra* note 157, at 255–62.

188. Hall, *supra* note 148, at 583.

189. See BABINGTON, *supra* note 175, at 120–21; CRITCHLEY, *supra* note 135, at 34, 43–45.

190. See 2 RADZINOWICZ, *supra* note 157, at 202.

191. See CRITCHLEY, *supra* note 135, at 25–27; MCLYNN, *supra* note 158, at 20. Public financing led to a "dramatic improvement" of the watch in London, MCLYNN, *supra* note 158, at 20, but elsewhere watchmen still tended to be elderly, infirm, or "employed out of motives of charity," CRITCHLEY, *supra* note 135, at 26.

192. See CRITCHLEY, *supra* note 135, at 28; South, *supra* note 77, at 98–101.

"felon associations" to offer rewards for information leading to the arrest and conviction of thieves, to assist members in prosecuting those arrested, and sometimes to carry out patrol activities or to hire others to do so.<sup>193</sup> English policing in the late eighteenth and early nineteenth centuries thus was a loosely coordinated patchwork of public and private arrangements.

Despite almost constant complaints about the inadequacy of these arrangements and continued ridicule of parish constables and watchmen, "[r]esistance to an effective police force continued well into the 19th century."<sup>194</sup> Even the Gordon Riots of 1780—a week of urban mayhem that left hundreds dead and more than seventy-five buildings destroyed or seriously damaged<sup>195</sup>—led in the short term, after the army had quelled the disturbance, to "growth in lay [protective] organization, not in public police."<sup>196</sup> In 1785, a government-sponsored bill to establish a professional police force failed miserably in Parliament, as did similar suggestions in 1816, 1818, and 1822.<sup>197</sup>

The tide turned in 1829, when Home Secretary Robert Peel maneuvered the Metropolitan Police Act through Parliament. The act called for the creation of a tax-supported police force for the London metropolitan area, under the centralized control of the Home Office.<sup>198</sup> In several respects, the Metropolitan Police created by this legislation provided the model for modern policing throughout England and America. First, the officers were independent from the courts, intentionally severed from their "centuries-old link with the magistracy and the parishes."<sup>199</sup> Second, the force was uniformed, and quasi-military in organization.<sup>200</sup> Patrols were

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193. See CRITCHLEY, *supra* note 135, at 28; JOHNSTON, *supra* note 72, at 10–12; 2 RADZINOWICZ, *supra* note 157, at 203–09. Forerunners of these groups "can be found as early as the eleventh century when numerous peace gilds were formed in London and other towns." HALL, *supra* note 171, at 168.

194. THOMPSON, *supra* note 183, at 81; see also 3 RADZINOWICZ, *supra* note 157, at 354–64.

195. See, e.g., MCLYNN, *supra* note 158, at 232–36. The riots began as anti-Catholic agitation led by Lord George Gordon but quickly became an all-out "assault on symbols of elite authority: prisons, banks, toll-gates, and the houses of judges." *Id.* at 238. Lord Mansfield's house was burned, and the Bow Street office was sacked. See BABINGTON, *supra* note 175, at 160–61; MCLYNN, *supra* note 158, at 234.

196. Hall, *supra* note 148, at 587; see also BABINGTON, *supra* note 175, at 164–65; CRITCHLEY, *supra* note 135, at 35–36; 3 RADZINOWICZ, *supra* note 157, at 100–07.

197. See CRITCHLEY, *supra* note 135, at 35–37, 46.

198. See *id.* at 47–50, 66. For political reasons, the act exempted the City of London, opposition from which had contributed strongly to the failure of earlier police bills. See *id.* at 37, 48, 50.

199. *Id.* at 50.

200. The uniform was carefully designed, however, not to appear too military: it was blue rather than red, and it followed contemporary civilian fashions. See WILBUR R. MILLER, COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830–1870, at 33 (1977). The result has been characterized as "just homely enough to save the situation." LEE, *supra* note 177, at 249, quoted in CRITCHLEY, *supra* note 135, at 51. But cf. ANTHONY TROLLOPE, THE LAST

assigned to constables, who were supervised by sergeants, who in turn reported to inspectors, who were under the command of superintendents, who reported to the commissioner.<sup>201</sup> Third, policing was a full-time occupation, and officers were not allowed to demand or to accept supplemental private payments for their work.<sup>202</sup>

Despite an initially hostile reception,<sup>203</sup> the Metropolitan Police quickly gained strong public support.<sup>204</sup> One important reason for this was the discipline and restraint the new officers displayed;<sup>205</sup> another was their apparent success in making the streets of London dramatically safer.<sup>206</sup> Perhaps equally important was the success that Peel and others enjoyed in appropriating and transforming the idea of liberty—in “teach[ing] people,” in Peel’s words, “that liberty does not consist in having your house robbed by organised gangs of thieves, and in leaving the principal streets of London in the nightly possession of drunken women and vagabonds.”<sup>207</sup>

Reflecting this notion that liberty could be enhanced by protecting property and maintaining order, the Metropolitan Police at inception was entirely devoted to patrol work. Peel’s first set of instructions to the new officers stressed that “the object to be attained is the prevention of crime,”

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CHRONICLE OF BARSET 73 (Stephen Gill ed., Oxford University Press 1980) (1867) (describing a rural policeman as wearing “the helmet-looking hat which has lately become common, and all the ordinary half-military and wholly disagreeable outward adjuncts of the profession”).

201. See CRITCHLEY, *supra* note 135, at 50–51. Initially there were two commissioners, and they were known as “justices.” See *id.*

202. See *id.* at 63–64. Actually, “private hiring [of constables] was allowed to continue,” but efforts were made to change what was essentially a contract between two interested parties into a controlled public service. In particular, the selection of the officer and his rate of pay were no longer to be the sole concern of the prospective employer. Henceforth when a ‘Public Body, Gentleman, or others’ wished to apply ‘for the assistance of Police Constables at Balls, Dinner Parties, or on any other occasion,’ they were to be referred to the Commissioners. Officers were no longer free to undertake long term commitments: a new application was required for each occasion. A ‘scale of allowances’ was fixed, and payments were to be made not directly to the officers whose services had been hired, but to the Superintendents of their divisions.

2 RADZINOWICZ, *supra*, note 157, at 259 (quoting Metropolitan Police Orders of July 14, 1831 and June 21, 1833).

203. See MILLER, *supra* note 200, at 105–06. The nicknames for Peel’s new officers—“Peeler” and “Bobby”—were not at first terms of affection. See CRITCHLEY, *supra* note 135, at 53.

204. See MILLER, *supra* note 200, at 106. Strong, but of course not universal, particularly among the working class. See *id.* at 120–28, 138–39.

205. See CRITCHLEY, *supra* note 135, at 53–56; MILLER, *supra* note 200, at 12–16, 106–07.

206. See MILLER, *supra* note 200, at 109–10 (noting that “[u]pper- and middle-class Londoners felt that their persons and property were increasingly secure from 1830 up to the early 1860s”). Not all of this improvement was due to the police; “a variety of social, intellectual, and economic factors” made the 1850s, in particular, “a decade of stability” in England. *Id.* at 110.

207. CRITCHLEY, *supra* note 135, at 54; see also MILLER, *supra* note 200, at 108; Hall, *supra* note 148, at 588.

and that “[t]o this great end every effort of the police is to be directed.”<sup>208</sup> This was soon softened—the second draft of the instructions described crime prevention as the officers’ *principal object*<sup>209</sup>—and a small “detective department” was established in 1842.<sup>210</sup> But the detective force grew slowly, in part because, even as late as 1869, the public tended to view it “with the greatest suspicion and jealousy.”<sup>211</sup> It was not until 1877, and the creation of the Criminal Investigations Division, that detection became a major part of the work of the Metropolitan Police, and even then it remained clearly secondary to patrol.<sup>212</sup> Whereas the Bow Street Office had started as an investigation unit and then expanded into patrol work, the Metropolitan Police thus began as a patrol force and later developed investigation as a sideline.

The idea of professional policing spread slowly and sporadically from London to the rest of England.<sup>213</sup> By the 1860s, the so-called “old police” of unpaid constables and watchmen had been replaced throughout the country by “new police”—professional, full-time employees.<sup>214</sup> The practice of giving constabulary powers to privately organized forces was increasingly criticized as “investing private hands with public powers for their own use.”<sup>215</sup> But the size and organization of police forces varied widely,<sup>216</sup> and so

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208. CRITCHLEY, *supra* note 135, at 52. The instructions explained that “[t]he security of person and property and the preservation of a police establishment will thus be better effected than by the detection and punishment of the offender after he has succeeded in committing crime.” *Id.* at 52–53.

209. See *id.* at 52 & n.\*.

210. See CRITCHLEY, *supra* note 135, at 160. Though few in number, London’s “detective policemen” became widely known in the 1850s, in large part because of Charles Dickens, who celebrated their prowess first in a series of popular articles and then through the character of Inspector Bucket in *Bleak House*. See PHILIP COLLINS, DICKENS AND CRIME 196–219 (1962).

211. CRITCHLEY, *supra* note 135, at 161 (quoting Metropolitan Police Commissioner Edmund Henderson).

212. See *id.*

213. It spread more quickly to Ireland, where a metropolitan police force for Dublin, modeled on the London prototype, was established in 1838. See *id.* at 38. Actually, police professionalization began much earlier in Ireland, albeit on a modest scale: the Dublin Police Act of 1786 “laid the first slender foundations for the Royal Irish Constabulary,” the predecessor to today’s Royal Ulster Constabulary. *Id.* Not incidentally, Peel served as chief secretary for Ireland between 1812 and 1818. See *id.* His success in bringing back to England policing methods first tried in Ireland, see Philips, *supra* note 184, at 184, was the start of a long tradition. The Special Branch of London’s Metropolitan Police, for example, was formed in 1884 as the Special Irish Branch, and at the outset focused entirely on combating Irish terrorism. See CRITCHLEY, *supra* note 135, at 161 n.\*.

214. See CRITCHLEY, *supra* note 135, at 111–18.

215. FIRST REPORT OF COMMISSIONERS APPOINTED TO INQUIRE INTO THE BEST MEANS OF ESTABLISHING AN EFFICIENT CONSTABULARY FORCE IN THE COUNTIES OF ENGLAND AND WALES 169 (1839), quoted in 2 RADZINOWICZ, *supra* note 157, at 203.

216. See CRITCHLEY, *supra* note 135, at 123–25.

did their duties. In many places, the police acted not just as patrolmen but also as "poor law relieving officers, inspectors of nuisances, market commissioners, impounders of stray cattle, and inspectors of weights and measures."<sup>217</sup> As the nineteenth century drew to a close, however, the police shed most of these functions and concentrated increasingly on crime control: patrol, detection, and arrest.<sup>218</sup>

### C. Early American Policing

Early American law enforcement for the most part resembled English law enforcement. Colonial towns, like their English counterparts, relied on the medieval institutions of the constable, the night watch, and the hue and cry<sup>219</sup>—institutions that "drew no clear lines between public and private."<sup>220</sup>

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217. CAROLYN STEEDMAN, POLICING THE VICTORIAN COMMUNITY: THE FORMATION OF ENGLISH PROVINCIAL POLICE FORCES, 1856–80, at 8 (1984); see also *id.* at 53–59. This happened in London as well:

The Police Act of 1839 greatly expanded official power over various urban 'nuisances,' and the Smoke Nuisances Act of 1855 made the police responsible for control of air pollution. After passage of the Common Lodging Houses Act of 1851 the police could inspect and control the cheap lodging houses of the very poor; the Contagious Diseases Acts of 1866 later gave the police power to regulate, by a form of licensing, prostitutes in areas near military bases; and the Habitual Criminals Act of 1869 and Prevention of Crimes Act of 1871 greatly expanded police surveillance and control of ex-convicts.

MILLER, *supra* note 200, at 18.

218. See STEEDMAN, *supra* note 217, at 54–55. Steedman argues that this change represented a "process of self-definition" in which police officers rejected "the role of executive agent of local government," in preference for "finding the misdeed, the offence, the improper act." *Id.* at 54.

219. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 28–29 (1993); ROGER LANE, POLICING THE CITY: BOSTON 1822–1885, at 7 (1967); JAMES F. RICHARDSON, THE NEW YORK POLICE: COLONIAL TIMES TO 1901, at 7–8 (1970); ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 238 (1930).

220. FRIEDMAN, *supra* note 219, at 29. The constable and the watch were not the only law enforcement institutions the American colonies copied from England. There were also coroners, who "conducted 'inquests' in cases of violent or unexplained death," and county sheriffs, who supervised "jury selection . . . jails, prisoners, and the like," and who also called up, when necessary, a posse comitatus of county residents to assist in maintaining order or enforcing the law. *Id.* Departing from English practice (and possibly drawing on Dutch traditions), "[t]he public prosecutor—a government officer in charge of prosecution—appeared quite early on this side of the Atlantic," *id.*, although private prosecution continued alongside its public version until well into the nineteenth century, see Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43 (1995); Allan Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568 (1984).

America also copied England's practice of releasing criminal defendants pending trial to the charge of a private surety. See Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 747–48 (1996). In time this practice gave rise to a commercial bonding industry, and an allied network of bounty hunters. See discussion *infra* note 227.

As in England, although the constables were, "legally and traditionally, agents of the courts,"<sup>221</sup> they not only served warrants and took responsibility for any daytime patrolling, but also "looked after the condition of streets, sidewalks, privies, slaughterhouses, and the miscellaneous activities which affected the health, safety, and well-being of the urban population."<sup>222</sup> Also as in England, serving as constable or watchman was generally, in theory, an unpaid civic obligation,<sup>223</sup> but in practice everyone who could afford to hire a substitute did so,<sup>224</sup> and in decades following independence "[t]here was a constant chorus of complaints about the constables and watchmen."<sup>225</sup> Those with sufficient resources hired additional protection, and the boundary between private guards and public watchmen often was indistinct.<sup>226</sup>

As for detection—the business of identifying and pursuing an initially unknown offender—this "was largely a private matter, with initiative encouraged through a system of rewards and fines paid to informers."<sup>227</sup> By the early 1800s, many urban constables in reality had become entrepreneurs, actively seeking private compensation, most often for the recovery of stolen property. This led here, as it had in England, to widespread collusion between officers and thieves.<sup>228</sup>

Americans in the early nineteenth century also echoed the objections raised in England to centrally organized, professional police forces—although Americans identified such forces not with the French, but with

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221. ERIC MONKKONEN, POLICE IN URBAN AMERICA, 1860-1920, at 62 (1981).

222. DAVID R. JOHNSON, POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE, 1800-1887, at 7-8 (1979); see also MONKKONEN, *supra* note 221, at 34.

223. See FRIEDMAN, *supra* note 219, at 28. New York and Boston both experimented with paid watches in the mid-seventeenth century but "abandoned the scheme because it was too expensive." *Id.*

224. See RICHARDSON, *supra* note 219, at 9-10. In New York, at least, "[w]omen were theoretically eligible" to serve on the watch, "but there is no record of any ever serving." *Id.* at 9. Still, "in 1734 one 'Deborah Careful' complained to the press of being 'forced to pay as much as the richest man in Town [for a substitute] tho' (God knows) I can hardly buy my bread.'" *Id.* (alteration in original).

225. FRIEDMAN, *supra* note 219, at 68; see also LANE, *supra* note 219, at 11; MONKKONEN, *supra* note 221, at 32; RICHARDSON, *supra* note 219, at 21.

226. Boston, for example, "routinely granted warrants" to additional watchmen privately hired by merchants; these supplemental officers "exercised full powers over limited areas, reporting each morning to the captain of the watch." LANE, *supra* note 219, at 12.

227. *Id.* at 7. This was also true—and remains largely true today—of the business of apprehending bail jumpers. By the mid-nineteenth century the pretrial surety system, copied from England, had led in America to our current reliance on entrepreneurial bail bondsmen, who serve as sureties for a fee, and professional bounty hunters, hired by bondsmen to catch defendants who flee before trial. See Drimmer, *supra* note 220, at 741-43, 747-50, 759-63.

228. See JOHNSON, *supra* note 222, at 9-10, 45-49; LANE, *supra* note 219, at 9-10; MONKKONEN, *supra* note 221, at 61-62.

the English.<sup>229</sup> Nonetheless, increasing urban disorder in the 1830s and 1840s eventually spurred the creation of professional, quasi-military forces modeled on the London police. New York established such a force in 1845, and other cities soon followed.<sup>230</sup> As in London, the new police explicitly emphasized crime prevention as their principal objective; the manuals for most of the new departments contained language echoing Peel's instruction that the officers' "every effort" should be directed toward "this end."<sup>231</sup>

The earliest professional police forces in America were not at first uniformed, reflecting strong opposition to uniforms among the public and even stronger opposition among the officers themselves. The public opposition had largely to do with the cost and the military overtones; much of the officers' opposition stemmed from the antidemocratic stigma attached in early-nineteenth-century America to liveried servants.<sup>232</sup> Some officers in London had also complained about their uniforms, but the opposition in America was far more impassioned.<sup>233</sup> Indeed, the uniform frequently served as the focal point in America for objections to professional police forces in general.<sup>234</sup> But the uniform also made the police more visible, and from a managerial standpoint the military overtones were not entirely negative; more broadly, the uniform symbolized, both to the officers and to the public, "the changed system of social control represented by the new police, asserting publicly and unequivocally the difference between the old and the new."<sup>235</sup> For all of

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229. See MONKKONEN, *supra* note 221, at 40; RICHARDSON, *supra* note 219, at 22.

230. See FRIEDMAN, *supra* note 219, at 68-69; MICHAEL STEPHEN HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 39 (1980); JOHNSON, *supra* note 222, at 7-9; LANE, *supra* note 219, at 26-38; MONKKONEN, *supra* note 221, at 30-64; RICHARDSON, *supra* note 219, at 23-50.

231. JOHNSON, *supra* note 222, at 93. For example, the first New York police manual contained the following exhortation: "The prevention of crime being the most important object in view, your exertions must be constantly used to accomplish that end." RICHARDSON, *supra* note 219, at 58. Unlike the situation in London, however, "these instructions were buried in the text instead of appearing at the beginning of the rule book"; the difference reflected the fact that the preventive focus of the new police was from the start less clear in America than in England. MILLER, *supra* note 200, at 36; see also LANE, *supra* note 219, at 35.

232. See FRIEDMAN, *supra* note 219, at 69; JOHNSON, *supra* note 222, at 96-97; RICHARDSON, *supra* note 219, at 64-65. Some officers refused even to wear badges. See RICHARDSON, *supra* note 219, at 58-59.

233. See MILLER, *supra* note 200, at 32-36.

234. See LANE, *supra* note 219, at 104-05; MONKKONEN, *supra* note 221, at 44.

235. MONKKONEN, *supra* note 221, at 53. One influential reformer called a "distinguishing costume" the most important remedy for the deficiencies of the New York police as compared to their London counterparts. He argued that "the great moral power of the policeman of London in preventing crimes lies in his coat." Not only did uniforms increase deterrence by making policemen more visible, he explained, but it also made the officers look and feel more "respectable":

[T]he dress is respectable, and they feel respectable. It inspires respect in others, knowing that they respect themselves. Their costume is a sure guaranty that they will never

these reasons, uniforms soon became ubiquitous. New York adopted them in 1853, Chicago followed in 1858, and Boston and Cincinnati in 1859. After the Civil War, opposition to quasi-military apparel virtually disappeared, and by the late nineteenth century every major American city had a uniformed police force.<sup>236</sup>

In contrast to the extensive—often seemingly endless—attention given in nineteenth-century America to the issue of what police officers should wear, much less attention was paid to the question of what they should have the power to do. New York statutes, for example, were “silent on the vital area of arrests without a warrant . . . despite the recommendation of a commission for codification of the criminal law that the powers and limitations of arrest without warrant be spelled out alongside those of arrest under a warrant.”<sup>237</sup>

In any event, the new American police, like their English counterparts, soon were called upon to perform tasks that had less to do with crime control *per se* than with the general control of urban disorder. “Original intentions and expectations fell by the wayside as city dwellers took initiative in putting the new police to new uses in which criminal arrest activities, at least for a long time, figured only peripherally.”<sup>238</sup> In America these activities often involved control of the “dangerous class,” a category that included not only criminals but also homeless poor people—“paupers” and “tramps.”<sup>239</sup> For example, throughout the second half of the nineteenth

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disgrace it; they know that they are known by it, and, therefore, while they are watching others, that they are watched themselves.

J.W. GERARD, LONDON AND NEW YORK: THEIR CRIME AND POLICE 17 (1853); *cf.*, e.g., JACK J. PREISS & HOWARD J. EHRLICH, AN EXAMINATION OF ROLE THEORY: THE CASE OF THE STATE POLICE 19–20 (1966) (finding that uniforms powerfully shape not only public attitudes toward the police, but also the self-perception of officers).

236. See MONKKONEN, *supra* note 221, at 46, 162–68.

237. MILLER, *supra* note 200, at 58; *see also*, e.g., Jacob Wheeler, Annotation, *People v. M'Ardle*, 1 Wheeler 101, 104 (N.Y. Sup. Ct. 1822) (commenting that “[t]here is, perhaps, no title of criminal jurisprudence less known, and more important to be known, than that relating to arrests”); *cf.* GERARD, *supra* note 235, at 14–18 (proposing changes in the numbers, appointment, tenure, and attire of New York police officers of the early 1850s, but omitting any discussion of their powers).

238. MONKKONEN, *supra* note 221, at 64; *see also* FRIEDMAN, *supra* note 219, at 151–52. For example, in 1844, New York “abolished some 1800 municipal functionaries, such as dock wardens, inspectors of hacks and stages, inspectors of pawnbrokers, and health wardens, and required the police to perform these duties. Policemen were also used as attendants at the various civil and criminal courts and as ringers of the fire alarm bells.” RICHARDSON, *supra* note 219, at 61. These assignments were popular because they were “easier and often more profitable than patrol duty”: they spared officers “the inconveniences of the beat and the station house,” and allowed them to “moonlight by acting as guards at art exhibitions or theaters,” or “to earn extra money in the form of rewards for special services performed or property recovered for citizens.” *Id.* at 61–62.

239. MONKKONEN, *supra* note 221, at 86–88, 105.

century, American police departments regularly provided the homeless with temporary lodging, and sometimes with food.<sup>240</sup> Indeed, “[d]uring very bad depression years or harsh winters, the number of overnight lodgings provided by a police department exceeded all annual arrests.”<sup>241</sup> As in England, however, the police largely shed these functions by the beginning of the twentieth century, shifting to their modern focus on crime control.<sup>242</sup>

With the creation of professional police forces in the mid-1800s, American law enforcement began to diverge in important ways from its English model. In part this was because American cities began “looking at each other rather than to London” for guidance,<sup>243</sup> with effects both on the institutional structure of the police and on their internal operations. For example, American forces were rarely if ever given as much political independence as Peel’s police, and they rarely if ever matched the discipline and restraint of the London force.<sup>244</sup> But American and English policing also diverged in another way: private law enforcement took on dramatic new forms in America.

The first of these, particularly widespread in the South and in the West, was vigilantism on a scale never seen in England.<sup>245</sup> Whether vigilantism in fact qualifies as a form of law enforcement is debatable: the standard definition of the vigilante tradition—“organized, extralegal movements, the members of which take the law into their own hands”<sup>246</sup>—nicely captures the vigilante’s ambiguous relationship with the law. Vigilantes practiced a kind of “lawless law,”<sup>247</sup> “breaking one law to uphold what [they] consider[ed] to be a higher one.”<sup>248</sup> Vigilante groups differed in this respect from English felon societies, but in other respects the two movements were similar. Both originated as collective efforts by wealthy landowners to provide law enforcement the government could not or would

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240. See *id.* at 86–88.

241. *Id.* at 87.

242. See *id.* at 64.

243. *Id.* at 40.

244. See FRIEDMAN, *supra* note 219, at 69–70, 148–50; MILLER, *supra* note 200, at 8–32, 37–44.

245. See FRIEDMAN, *supra* note 219, at 179–87; JOHNSTON, *supra* note 72, at 12–16. Vigilantism in the South drew in part from practices developed to keep slaves subjugated. These included not only horrific episodes of mob violence, but also summary punishment of slaves by their masters; amateur slave patrols modeled on the medieval watch; and frequent resort to professional slave catchers. See, e.g., SCOTT, *supra* note 219, at 54, 299–313; KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 153, 189–91, 212–15 (1956).

246. RICHARD MAXWELL BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM 95–96 (1975).

247. FRIEDMAN, *supra* note 219, at 172.

248. WILLIAM E. BURROWS, VIGILANTE! 13 (1976).

not provide,<sup>249</sup> even if most vigilante movements sooner or later crossed "the fine line between filling a vacuum of authority and outright terrorism."<sup>250</sup>

In late-nineteenth-century America, vigilantism was principally a phenomenon of the frontier and the rural South.<sup>251</sup> Private law enforcement in the East and the Midwest generally took a different form: policing for hire. Private police agencies offering patrol and detection services, and often run by former police officers, began to operate in major American cities in the 1840s.<sup>252</sup> The line between public and private policing was frequently hazy. Private detectives and privately employed patrol personnel often were publicly appointed as "special policemen,"<sup>253</sup> and "the means and objects of detective work," in particular, "made it difficult to distinguish between those on the public payroll and private detectives."<sup>254</sup>

But as the century progressed, the idea of policing as an inherently public function slowly took hold. Partly this was a matter of heightened expectations: uniformed, publicly funded police forces had fostered the notion among urban Americans that "freedom from crime and disorder is a right, not just a privilege of the privileged."<sup>255</sup> Moreover, the emergence of these new expectations coincided with the arrival of the public-private distinction at "the center of the stage in American legal and political theory."<sup>256</sup> So by midcentury one begins to find judicial opinions refusing to enforce contracts providing for private compensation to public law enforcement.

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249. See JOHNSTON, *supra* note 72, at 16; Craig B. Little & Christopher P. Sheffield, *Frontiers and Criminal Justice: English Private Prosecution Societies and American Vigilantism in the Eighteenth and Nineteenth Centuries*, 48 AM. SOC. REV. 796 (1983).

250. HINDUS, *supra* note 230, at 41.

251. See FRIEDMAN, *supra* note 219, at 180-87. An exception was "whitecapping," a "movement of violent moral regulation by local masked bands," which originated in the Midwest in the 1880s before spreading to the South. *Id.* at 186 (quoting BROWN, *supra* note 246, at 150-51); see also JOHNSTON, *supra* note 72, at 15.

252. See JOHNSON, *supra* note 222, at 59-60, 120; LANE, *supra* note 219, at 147; FRANK MORN, "THE EYE THAT NEVER SLEEPS": A HISTORY OF THE PINKERTON NATIONAL DETECTIVE AGENCY 26 (1982).

253. JOHNSON, *supra* note 222, at 120; see LANE, *supra* note 219, at 147.

254. LANE, *supra* note 219, at 147. Because "the primary object of detective work was still to recover stolen property rather than to prosecute," *id.* at 148, "American detectives were still essentially servants of private interests, made generally available by the city," *id.* at 150, and "[i]n major cases of robbery, private and public detectives often worked together," *id.* at 147. See also MORN, *supra* note 252, at 23 (observing that "occupational borders were fluid in these formative years of policing").

255. MONKKONEN, *supra* note 221, at 111; see also *id.* at 128. In much the same way, shifting expectations have helped fuel the current trend toward private policing. See discussion *infra* notes 341-342 and accompanying text.

256. Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982); see also HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 (1983); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

ment officers, on the ground that a police officer "is not the agent or employee of the private prosecutor, but the minister of the law, doing the work of the public."<sup>257</sup> The line grew more distinct between police officers and detectives, on the one hand, and private guards and investigators, on the other.<sup>258</sup>

Throughout the nineteenth century, public policing remained an urban phenomenon. Statewide police departments were mostly nonexistent,<sup>259</sup> and the federal government used private guards and detectives for its occasional police work;<sup>260</sup> outside city limits there thus was virtually no public police protection. The demand for such protection grew rapidly in the latter part of the nineteenth century as the railroads expanded, and with them the large-scale, geographically isolated industrial operations they made possible.<sup>261</sup> To answer this demand, two new forms of private policing emerged. The first of these was the "company police": forces of guards and detectives hired and supervised by railroads and industrialists to protect their own property and empowered as police officers by the state.<sup>262</sup> The second, of broader and more lasting importance, was the national private police agency, epitomized in the late nineteenth century by the Pinkerton agency.<sup>263</sup>

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257. Smith v. Whildin, 10 Pa. 39, 40 (1848); see also, e.g., Pool v. City of Boston, 59 Mass. 219 (5 Cush. 1849); Hatch v. Mann, 15 Wend. 45 (N.Y. 1835). Initially not all private compensation was disallowed. For example, although the Pennsylvania Supreme Court held in *Smith v. Whildin* that policemen could not collect rewards for executing arrest warrants, the court noted that "[t]here are things which a constable is not officially bound to do, such as to procure evidence, and the like, and for this he may perhaps be allowed to contract." 10 Pa. at 40. By the end of the nineteenth century, though, the Supreme Court of California found that American and English courts were "practically unanimous in declaring that a public officer working for a fixed compensation, or whose fees are prescribed by law, cannot demand or contract for . . . services rendered in the line or scope of his official duty." *Lees v. Colgan*, 52 P. 502, 503 (Cal. 1898). The federal government and most states now criminalize offering or accepting additional payment for performance of official services. See, e.g., 18 U.S.C. § 201(c)(1) (1994); CAL. PENAL CODE § 70 (West 1988); DEL. CODE ANN. tit. 11, § 1205 (1995); IDAHO CODE § 18-2704 (1997); IND. CODE ANN. § 4-2-6-5 (Michie 1996); MASS. GEN. LAWS ANN. ch. 268A, § 3 (West 1992); OKLA. STAT. tit. 21, § 269 (1991); 16 PA. CONS. STAT. ANN. § 7514 (West 1998).

258. See, e.g., MORN, *supra* note 252, at 31.

259. By the end of the 1800s, only Arizona, Massachusetts, and Texas had state police departments. See *id.* at 168.

260. See, e.g., *id.* at 22, 180. The only significant exception was the Secret Service, which performed intelligence work during the Civil War and afterward pursued counterfeiters. Before the war, this task, too, had been left to private detectives. See *id.* at 69.

261. See *id.* at 24–26, 33.

262. See *id.* at 93–94, 167–68; J.P. SHALOO, PRIVATE POLICE: WITH SPECIAL REFERENCE TO PENNSYLVANIA 1–134 (1933); Robert P. Weiss, *Private Detective Agencies and Labour Discipline in the United States, 1855–1946*, 29 HIST. J. 87, 93–95 (1986).

263. These were not entirely separate developments. Perhaps the best-known example of company police were Pennsylvania's Coal and Iron Police, which began operating in the 1870s

#### D. Pinkerton and Pinkertonism

Allan Pinkerton's early career nicely illustrates the "fluid" boundaries between various forms of policing in the mid-1800s.<sup>264</sup> The son of a Scottish constable, Pinkerton was born in Glasgow in 1819, made a minor name for himself as a Chartist, and fled to the United States in 1842.<sup>265</sup> He settled forty miles northeast of Chicago in Dundee, Illinois, where he established a cooperage and soon was hired part-time by local merchants to watch for counterfeiters.<sup>266</sup> In short order, he was appointed a deputy sheriff both in Kane County and in Cook County,<sup>267</sup> he spent a year as Chicago's first public detective,<sup>268</sup> and he began to take occasional detective assignments from the Treasury Department, the Post Office Department, and the railroads.<sup>269</sup> In 1855, Pinkerton created the North West Police Agency to perform detective work on the same basis throughout the old Northwest Territory.<sup>270</sup> In 1858, he formed Pinkerton's Protective Patrol, a smaller operation that, along with several competitors, offered uniformed night watch service to Chicago businesses.<sup>271</sup> In 1861, Pinkerton got himself hired to protect president-elect Lincoln from an alleged murder plot,<sup>272</sup> and later that year he took command of the Secret Service, the Union army's intelligence operation.<sup>273</sup> He quit this post the following year in protest over the ouster of his patron, General George McClellan, whose downfall may have been attributable, in part, to Pinkerton's exaggerated estimates of confederate troop strength.<sup>274</sup>

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and often were deputized Pinkerton operatives. See MORN, *supra* note 252, at 167-68; Weiss, *supra* note 262, at 91-92.

264. See MORN, *supra* note 252, at 23. Much of the following account is taken from Morn's book, the best available study of Allan Pinkerton and the company he created. For more recent treatments, see J. ANTHONY LUKAS, BIG TROUBLE 77-87 (1997); JAMES MACKAY, ALLAN PINKERTON: THE FIRST PRIVATE EYE (1996).

265. See MORN, *supra* note 252, at 19-20.

266. See *id.* at 20-21.

267. See *id.* at 22-23.

268. See JAMES D. HORAN, THE PINKERTONS: THE DETECTIVE DYNASTY THAT MADE HISTORY 23 (1967).

269. See MORN, *supra* note 252, at 22-25.

270. See *id.* at 25, 33.

271. See *id.* at 29.

272. See *id.* at 38-40. To get Lincoln safely through Baltimore, where the attack was feared, Pinkerton disguised him as an old woman, posted agents along the travel route, cut telegraph wires, and had the president-elect move through town secretly at 3:00 a.m. See *id.* at 40. "Whether a plan to kill Lincoln really existed or not is difficult to determine." *Id.* at 41.

273. See *id.* at 42-43.

274. See *id.* at 45; Weiss, *supra* note 262, at 88-89. For a more sympathetic account of Pinkerton's war service, see MACKAY, *supra* note 264, at 8-9, 116-17, 153-55.

Meanwhile, work for railroads and express companies—mainly spying on employees to test their honesty—had become the main source of income for the North West Police Agency, which had broadened its geographical scope and become Pinkerton's National Detective Agency.<sup>275</sup> Indeed, “[b]y 1870, with the exception of the Protective Patrol in Chicago, Pinkerton's agency was solely concerned with spying upon employees.”<sup>276</sup> Blurring the line between detective work and preventive patrol, the spies increasingly served less to discover crime than to deter it. Employees often could spot Pinkerton's “operatives,”<sup>277</sup> but they never could be sure that one was not around. “The possibility of a test was as threatening as its reality.”<sup>278</sup>

During the 1870s, the agency's work began to shift toward protecting clients against growing labor unrest,<sup>279</sup> and this shift accelerated after Pinkerton's death in 1884, when control of the agency passed to his two sons. By the late 1880s and early 1890s, the Pinkerton agency specialized in infiltrating labor unions, guarding industrial property, and, to a lesser extent, supplying substitute workers during strikes.<sup>280</sup> Of course this was not all it did; Pinkerton had become by this time America's de facto national law enforcement agency, albeit an agency whose services were available only to those of ample means.<sup>281</sup> But anti-union assignments came to be the company's mainstay, and the work for which it was best known.

The guard services it provided were carried out by an expanded, militarized version of Pinkerton's Private Patrol, and chiefly protected industrial

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275. See MORN, *supra* note 252, at 25, 36–37.

276. *Id.* at 47. This was not the agency's public image, however, in large part because of the care Pinkerton took to craft that image in a series of 15 books published under his name in 15 years. The books celebrated the success of Pinkerton operatives in chasing criminals and omitted any discussion of the testing program. See *id.* at 85. From the 1860s through the 1880s, the Pinkerton agency thus “maintained high visibility in matters of minor concern (the professional criminal) and low visibility in matters of major concern (the amateur criminal).” *Id.* at 111; see also *id.* at 52.

277. In the nineteenth century,

[a]n operative was someone who operated a machine in a factory. Skill was required, but, nonetheless, the person was merely a cog in a process, a process that transcended the individual. By naming his men operatives and himself the “principal,” Pinkerton declared his affiliation to the business world and made statements on his own administrative philosophy.

*Id.* at 53.

278. *Id.* at 47.

279. See *id.* at 63; Weiss, *supra* note 262, at 88.

280. See LUKAS, *supra* note 264, at 82; MORN, *supra* note 252, at 98–101.

281. See, e.g., Charles Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678 (1953) (recounting a bank's use of a Pinkerton detective to capture an embezzler who had fled to Peru). Pinkerton made it a point to work only for set fees rather than rewards, and his fees were high enough to exclude all but governments, large businesses, and the very wealthy. See MORN, *supra* note 252, at 57, 72–73.

facilities during labor disturbances.<sup>282</sup> The public generally did not distinguish between the plant guards and the industrial spies; both were referred to as "Pinkertons."<sup>283</sup> Often the same name was used for the growing number of operatives employed by agencies formed to compete with Pinkerton,<sup>284</sup> and by the end of the century the term "Pinkertonism" had become synonymous with the practice of employing large numbers of private security personnel in the service of industrial capitalism, and with the underlying laissez-faire ideology this practice grew to symbolize.<sup>285</sup> These terms generally were not used fondly. Hostility to private policing mounted during the second half of the nineteenth century, fueled by periodic stories of malfeasance and by a growing notion that the responsibility for peacekeeping should not be placed in private hands.<sup>286</sup> Pinkertonism increasingly was described as a throwback to feudalism.<sup>287</sup> By the 1890s, a growing number of Americans thought private police at best a necessary evil, and at worst an inexcusable one.<sup>288</sup>

This sentiment became particularly pronounced in 1892. In January of that year, the House of Representatives directed its Judiciary Committee to investigate the Pinkerton agency; William Jennings Bryant spoke for many members in voicing his support for the resolution on the grounds that "law and order should be maintained by the lawful authorities," and that the function of protecting life and property "should not be transferred to private individuals and hired detectives until we are ready to acknowledge government a failure."<sup>289</sup> The investigation did not actually begin, however, until July, in the aftermath of the disastrous involvement of Pinkerton guards in labor disturbances in Homestead, Pennsylvania, home of a mill operated by

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282. See MORN, *supra* note 252, at 99. "Occasionally, the patrol provided police protection for areas like Coney Island. In the 1890s and 1900s the guard system was used extensively at race tracks, but in the 1880s it was used primarily to protect property during strikes." *Id.*

283. *See id.* at 99.

284. "[The] labor unrest of the 1880s stimulated the growth of the private detective profession," *id.* at 101, and most agencies "provided strikebreakers as well as spies and guards," *id.* at 166.

285. *See id.* at 108; J. Bernard Hogg, *Public Reaction to Pinkertonism and the Labor Question*, 11 PA. HIST. 171, 178-79 (1944).

286. See, e.g., MORN, *supra* note 252, at 27-31, 74-76. Divorce detectives, who began to proliferate in the 1860s, developed a particularly poor reputation—so much so "that by the end of the 1880s most states required corroborated evidence before a private detective's testimony could be accepted in matrimonial cases." *Id.* at 77.

287. *See id.* at 74.

288. *See id.* at 100, 102.

289. 23 CONG. REC. 4225 (1892) (statement of Rep. Bryant); see also, e.g., *id.* at 4223 (statement of Rep. Watson). Some members saw the issue in a more starkly populist light. See, e.g., *id.* at 4225 (statement of Rep. Simpson) (referring to Pinkerton agents as "this bloody band of assassins that is organized in this country for the protection of capitalists").

Carnegie Steel Company. Facing a strike and lacking confidence in local law enforcement authorities, the plant manager arranged for 376 Pinkerton guards to sail by barge to Homestead from Youngstown, Ohio. The strikers saw the boats coming, thought the men on board were scabs, and opened fire. The Pinkerton guards shot back, three workers and twelve guards were killed, and the barges were held under siege for twelve hours until the guards surrendered.<sup>290</sup> These events were widely publicized, and they reinforced the views of many Americans, including many who were more sympathetic to capital than to labor, that order should be kept by lawfully constituted authorities, not by "private armies."<sup>291</sup> The deaths at Homestead also added impetus to the House investigation and spurred a similar investigation by the Senate.<sup>292</sup>

The investigating committees heard testimony not just about the Pinkerton agency but also about its growing number of competitors. The resulting congressional reports sharply disapproved the use of private guards for property protection and order maintenance, calling "the employment of armed bodies of men for private purposes" an "assumption of the State's authority by private citizens,"<sup>293</sup> and noting that "[n]othing is better calculated to incite [labor organizations] to deeds of violence than for Pinkerton men to be brought in contact with them."<sup>294</sup> But the reports blamed the use of private guards in large part on the inadequacy of public police protection, and they concluded that the problem was for the states and not the federal government to address.<sup>295</sup> A few states had already restricted the use of private guards brought in from out of state, and more states did so after the congressional hearings.<sup>296</sup> In addition, Congress passed what became known as the Anti-Pinkerton Act, prohibiting the federal government and the District of Columbia from hiring any "employee of the Pinkerton Detective Agency, or similar agency."<sup>297</sup> The most important results of the Homestead

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290. See MORN, *supra* note 252, at 102–03; Weiss, *supra* note 262, at 93.

291. See Hogg, *supra* note 285, at 179; Darryl Holter, *Labor Spies and Union-Busting in Wisconsin, 1890–1940*, 68 WISC. MAG. HIST. 243 (1985); Weiss, *supra* note 262, at 94.

292. 23 CONG. REC. 7005–13 (1892).

293. S. REP. NO. 52-1280, at I, XV (1893).

294. H.R. REP. NO. 52-2447, at I, XV (1893); see also S. REP. NO. 52-1280, at XII–XIII (1893).

295. See H.R. REP. NO. 52-2447, at XI, XV–XVI (1893); S. REP. NO. 52-1280, at XIV–XV (1893).

296. See MORN, *supra* note 252, at 107; Hogg, *supra* note 285, at 180–81. As Morn points out, these laws "probably had little practical effect" because "[a]ll an agency had to do to circumvent such legislation was establish an office in the state and recruit people for the watchman corps within the state." MORN, *supra* note 252, at 107–08. In addition, some state laws simply prohibited the importation of armed guards, a restriction that agencies circumvented by transporting the guards and arms separately. See Weiss, *supra* note 262, at 95.

297. Act of Mar. 3, 1893, ch. 208, 27 Stat. 572, 591. This law is still on the books; as amended and recodified, it provides that "[a]n individual employed by the Pinkerton Detective

investigations, however, were broader public knowledge of the extent of private policing in late-nineteenth-century America, and deeper discontent with that phenomenon, particularly in the context of labor relations.<sup>298</sup>

None of this, however, seriously impeded the growth of the Pinkerton agency and the industry it led. Indeed, the first two decades of the twentieth century proved a "golden age" for private detective firms.<sup>299</sup> In the wake of the Homestead investigations, Pinkerton deemphasized strike services,<sup>300</sup> but other agencies rushed to take its place.<sup>301</sup> Pinkerton itself found new roles protecting banks, jewelry stores, and other commercial operations against professional robbers and thieves—work that was more in line with the crime-fighting public image the agency had always tried to craft for itself.<sup>302</sup> More quietly, Pinkerton operatives continued to spy on labor unions.<sup>303</sup>

Gradually, however, the investigative and managerial techniques of private detective firms were adopted by the public sector. Following the lead of the Pinkerton agency, local police departments, increasingly supplemented by statewide forces, expanded their detective operations and became more professional, more bureaucratic, and more centrally controlled.<sup>304</sup> On a grander scale, the FBI became a kind of socialized version

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Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia." 5 U.S.C. § 3108 (1994). The Anti-Pinkerton Act emerged from debates over appropriations for the 1892 encampment of Union Army veterans in the capital, and was spurred in part by the employment of 25 Pinkerton guards at the 1889 presidential inauguration. See 23 CONG. REC. 6223–24 (1892). The bill's sponsor intended it as a statement against "the armed-guard principle"—that is, "the use [of] armed guards . . . and . . . the sending of [them] from one State into another." *Id.* at 7120 (statement of Rep. O'Neill). During the first half of the twentieth century, however, the government repeatedly interpreted the Anti-Pinkerton Act to permit the hiring of private guards, but only from organizations that did not also offer detective services. See 38 Comp. Gen. 881 (1959); 26 Comp. Gen. 303 (1946); 8 Comp. Gen. 89 (1928). Unsuccessful efforts were made to repeal the provision as obsolete in 1960 and 1963; the latter effort was reported favorably out of committee but never received a floor vote. See S. REP. NO. 88-447, at 8 (1963). In 1977, in the first and only judicial opinion squarely to address the meaning of the Anti-Pinkerton Act, the Fifth Circuit read the law to bar government contracts only with organizations that offer "quasi-military armed forces for hire." *United States v. Equifax, Inc.*, 557 F.2d 456, 462–63 (5th Cir. 1977). In line with that interpretation, today the statute is largely ignored. Many federal facilities are guarded by private firms, including Pinkerton, and even some federal investigative work is contracted out. See "Anti-Pinkerton Law" Could Slow Govt. Out-Contracting, but Unlikely, SECURITY LETTER, Nov. 1, 1995, at 2.

298. See MORN, *supra* note 252, at 108; Hogg, *supra* note 285, at 179–82.

299. MORN, *supra* note 252, at 169.

300. See *id.* at 110.

301. See *id.* at 186; Holter, *supra* note 291, at 243; Weiss, *supra* note 262, at 96.

302. See MORN, *supra* note 252, at 110–11.

303. See *id.* at 187–89; Holter, *supra* note 291, at 2–3, 22; Spitzer & Scull, *supra* note 76, at 22.

304. See MORN, *supra* note 252, at 151, 170, 189–90.

of Pinkerton's legacy.<sup>305</sup> And law enforcement agencies at all levels of government, prodded at first by the private detective firms and later by the FBI, increasingly saw their most important mission as controlling crime, not simply maintaining order.<sup>306</sup> All of this set the stage for the eventual transformation of private detective agencies, which filled part of the crime-fighting gap left by the patrol orientation of nineteenth-century public policing, into private security firms, which now fill part of the patrol gap left by the crime-fighting orientation of twentieth-century public policing.

#### E. From Detective Agencies to Guard Companies

Despite the proliferation and growth of private detective firms in the early twentieth century, or perhaps in part because of that proliferation and growth, public opinion about private policing remained equivocal. This was particularly true regarding private detective services. On the one hand, there were the famous crime-fighting exploits of Pinkerton operatives and

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305. See Kempton, *supra* note 124, at 22. The Department of Justice formed a Bureau of Investigation in 1908, despite a refusal by Congress to authorize the new agency—in part because Congress simultaneously directed Secret Service agents to perform investigative work only for the Treasury Department. See DAVID R. JOHNSON, *AMERICAN LAW ENFORCEMENT: A HISTORY* 168 (1981); MORN, *supra* note 252, at 180. (Federal criminal investigations had been carried out by Secret Service agents since the 1893 passage of the Anti-Pinkerton Act, which prohibited government use of private detectives. See MORN, *supra* note 252, at 180; discussion *supra* note 297.) J. Edgar Hoover took control of the bureau in 1924, replacing William Burns. Before his government service, Burns had built a private detective agency that was Pinkerton's most important rival, see MORN, *supra* note 252, at 172–80, and he staffed the bureau largely with former private detectives, laying the groundwork for Hoover's more dramatic transformation of the organization into a public version of the Pinkerton agency, see Weiss, *supra* note 262, at 102. As Murray Kempton noted,

most of Mr. Hoover's devices for protecting the public order had originally been discovered by Pinkerton, who created the Rogues' Gallery—that progenitor of the FBI's Public Enemy list—who first protected the confidential informant by assigning him a code name in his files, and who refined the undercover agent from a rudimentary workman into the skilled professional he is today.

Kempton, *supra* note 124, at 22. As a polemicist and promoter, too, Hoover followed in Pinkerton's footsteps, see *id.* at 23–25; discussion *supra* note 276, as well as those of John Fielding before him, see discussion *supra* note 176. For general discussion of Hoover and the image of the FBI, see RICHARD GID POWERS, *G-MEN: HOOVER'S FBI IN AMERICAN POPULAR CULTURE* 74–112 (1983); WILLIAM W. TURNER, *HOOVER'S FBI: THE MEN AND THE MYTH* 113–38 (1970).

306. See Nathan Douthit, *Police Professionalism and the War Against Crime in the United States, 1920s–30s*, in *POLICE FORCES IN HISTORY* 317 (George L. Mosse ed., 1975). Before Hoover's arrival at the FBI, perhaps the most important institutional force for making police forces more professional, more tightly controlled, and more focused on efficient crime control was the National Association of Chiefs of Police, which was formed in 1893 and became the International Association of Chiefs of Police in 1901. Robert and William Pinkerton, who inherited the Pinkerton agency from their father Allan Pinkerton, served as honorary members of the organization from its inception and played leadership roles well into the twentieth century. See MORN, *supra* note 252, at 123–27, 165.

their competitors;<sup>307</sup> on the other hand, there was the view, deemed widely accepted by the Supreme Court in 1929, "that men who accept such employment commonly lack fine scruples, often wilfully misrepresent innocent conduct and manufacture charges."<sup>308</sup>

As in the late nineteenth century, many of the concerns about private policing centered on its use by employers to break strikes and to spy on labor unions. During the 1930s, these concerns led to a series of hearings and reports by the Senate Committee on Education and Labor's newly formed Subcommittee on Civil Liberties, chaired by Senator Robert La Follette, Jr.<sup>309</sup> The reports of the La Follette committee echoed those of the Homestead investigations forty years earlier. Once again, fears were voiced about the use of quasi-feudal "private armies" to coerce laborers and to deprive them of their right to organize.<sup>310</sup> But there was a telling difference. Late-nineteenth-century reformers had focused on the dangers of leaving peacekeeping and property protection in private hands;<sup>311</sup> what the La Follette committee found most objectionable was not the order maintenance performed by private guards, but their work as undercover investigators. Indeed, the committee recommended that private policing in the industrial context should be "restricted to the protection of plant and property"<sup>312</sup>—a recommendation that would have seemed odd if not perverse in the immediate wake of the killings at Homestead. By the 1930s, however, the public

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307. See, e.g., MORN, *supra* note 252, at 156 (discussing the successes of Pinkerton "sleuth star[s]" James McParland and Frank Dimaio); *id.* at 172–81 (discussing the flamboyant and highly publicized activities of Pinkerton's chief competitor in the early twentieth century, William Burns). For a much more detailed discussion of McParland, see LUKAS, *supra* note 264, at 155–200.

308. *Sinclair v. United States*, 279 U.S. 749, 765 (1929). *Sinclair* was a jury-tampering case in which one of the defendants, ironically, was William Burns, whose popularity before he took charge of the federal government's Bureau of Investigation in 1921 was based in part on his supposed incorruptibility. See MORN, *supra* note 252, at 176. His involvement in the widespread corruption of the Harding Administration did much to tarnish that reputation and led to his resignation in 1924. See *id.* at 181–82; Weiss, *supra* note 262, at 102. In 1927, Burns's operatives were discovered shadowing jurors in the fraud trial of Harry Sinclair, the oil tycoon made infamous by Teapot Dome, and it developed that they had been hired by Sinclair. The trial court ordered a mistrial and cited Burns, Sinclair, and two others with contempt of court. The Supreme Court overturned the judgment against Burns for lack of evidence that he knew about the surveillance, *see* 279 U.S. at 761, but upheld the judgments against the other three, rejecting the suggestion that simply following jurors did not amount to jury tampering. Given the poor reputation of private detectives, the Court reasoned that being watched by "such persons" was "enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration." *Id.* at 765.

309. See JEROLD S. AUERBACH, LABOR AND LIBERTY: THE LA FOLLETTE COMMITTEE AND THE NEW DEAL 97–130 (1966); Holter, *supra* note 291, at 21–22.

310. E.g., S. REP. NO. 76-6, pt. 2, at 3 (1939); *see also id.* pt. 1; S. REP. NO. 75-46, pt. 3 (1938).

311. See, e.g., Hogg, *supra* note 285, at 179; Weiss, *supra* note 262, at 94.

312. S. REP. NO. 76-6, pt. 2, at 217.

conception of policing had begun to move away from keeping peace and toward fighting crime.

Like the Homestead investigations, the La Follette investigations had their greatest impact not in the form of legislation but in the form of accelerating shifts in public opinion and industry practices. In response to negative publicity generated by the work of La Follette's committee, in 1937 the Pinkerton agency abandoned industrial espionage work and all other assignments pertaining to labor relations.<sup>313</sup> More broadly, the La Follette investigations both reflected and helped to foster the increasingly common view that policing—particularly the investigation of crime and the apprehension of criminals—was “a quintessentially public service,”<sup>314</sup> and that private police therefore were “a legal anomaly, a constitutional contradiction.”<sup>315</sup> This view gained strength during the 1920s and 1930s not only from the revelations of the La Follette committee, but also from the widespread, Progressive Era reforms of local police departments,<sup>316</sup> and from the growing role of the FBI both as a national crime-fighting body and as a force for police professionalism.<sup>317</sup> By midcentury, “private policing was considered an anachronistic institution that had withered away in response to the growth of the ‘new police.’”<sup>318</sup>

There was some truth to this. The mainstays of private policing in the late 1800s and early 1900s had grown far less profitable: breaking strikes and infiltrating labor unions were too controversial, and professional robbers and thieves were no longer beyond the reach of public law enforcement.<sup>319</sup> The golden age was over, and by the late 1930s the industry appeared to be in retreat.<sup>320</sup>

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313. See MORN, *supra* note 252, at 188–89; Holter, *supra* note 291, at 1. The company continues, however, to conduct “integrity testing” of its own security employees. See Canlen, *supra* note 22, at 32.

314. Shearing, *supra* note 102, at 405–07, 409.

315. SHALLOO, *supra* note 262, at vii; see also S. REP. NO. 76-6, pt. 2, at 216 (calling “[t]he use of privately paid guards to suppress the civil liberties of workers in time of industrial peace, and to provoke riots and demoralize workers by inflicting injury to persons and property during strikes,” an “anomaly in an orderly democratic community”). The La Follette committee reasoned that private police forces “cannot be viewed as agencies of law and order,” because they are privately created, privately paid, and privately rather than publicly accountable. S. REP. NO. 76-6, pt. 2, at 2.

316. See MORN, *supra* note 252, at 189; Spitzer & Scull, *supra* note 76, at 23.

317. See FRIEDMAN, *supra* note 219, at 267, 270–71; Douthit, *supra* note 306, at 327–33.

318. Shearing, *supra* note 102, at 408.

319. See AUERBACH, *supra* note 309, at 99 n.7; MORN, *supra* note 252, at 189–92.

320. See HORAN, *supra* note 268, at 510; Shearing, *supra* note 102, at 408; Robert P. Weiss, *From ‘Slugging Detectives’ to ‘Labor Relations’: Policing Labor at Ford, 1930–1947*, in PRIVATE POLICING, *supra* note 33, at 110.

Some of what looked like retreat, however, was actually redeployment: Pinkerton and its rivals were turning from detective firms that also provided guards into security guard companies that offered detective services on the side.<sup>321</sup> Inverting the transformation undergone by public police agencies, which had moved from an emphasis on preventive patrol to an emphasis on detection and apprehension, the private sector moved from the detection and apprehension business to the preventive patrol business. This conformed with the suggestion of the La Follette committee that private policing in the industrial context should be "restricted to the protection of plant and property," although La Follette had called for that result to be secured by federal legislation.<sup>322</sup> The transition also made good financial sense, in part because it filled a gap, and in part because it took private policing out of the spotlight. As the public conception of police work moved from a cop walking a beat to a police car chasing a criminal, what Pinkerton and its rivals did in the years following World War II seemed less and less like policing. These postwar years, of course, were the period when sociologists, political scientists, legal scholars, and policymakers started paying more attention to the police; not surprisingly, they all tended to ignore private security.<sup>323</sup>

Through the 1950s and into the 1960s, this neglect could be partially defended on the ground that private security seemed the way of the past. The public sector of law enforcement not only did the lion's share of the work thought to be at the core of law enforcement, but it also appeared to be growing faster than the private sector. As late as 1971, when RAND researchers commissioned by the Department of Justice completed the first major study of the nation's private security industry since the La Follette investigations, the authors concluded that public law enforcement personnel outnumbered private security employees, and that the disparity would widen in coming years. By mid-decade, they predicted, public policing would employ twice as many Americans as private policing.<sup>324</sup>

By the early 1980s, it was apparent that something different had happened: the private security industry was growing much faster than public law enforcement, and there already appeared to be more private police than

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321. See MORN, *supra* note 252, at 184-85, 187. Reflecting this transformation, in 1965 the Pinkerton National Detective Agency became Pinkerton's, Inc. See HORAN, *supra* note 268, at 513.

322. S. REP. NO. 76-6, pt. 2, at 217 (1939).

323. See, e.g., Maureen Cain, *Trends in the Sociology of Police Work*, 7 INT'L J. SOC. L. 143, 144-45 (1979); Scott & McPherson, *supra* note 25, at 267; Shearing, *supra* note 102, at 408.

324. See JAMES S. KAKALIK & SORREL WILDHORN, THE PRIVATE POLICE INDUSTRY: ITS NATURE AND EXTENT 34 (1971).

public police.<sup>325</sup> At some point in the 1960s or 1970s, when few outside the private security industry were watching, the industry entered a period of rapid expansion from which it has yet to emerge, and during which growth in public law enforcement has remained slack.<sup>326</sup> As we have seen, private security guards now greatly outnumber uniformed law enforcement personnel and probably will outnumber them even more dramatically in coming years.<sup>327</sup>

#### F. Provisional Lessons

##### 1. The Roots of Police Privatization

At least three different explanations have been offered for the stunning growth of private policing in recent decades. The first, and perhaps the simplest, attributes it to ideological shift: police privatization, in this view, is part of a broader shift of resources and responsibilities away from government and toward the private sector. Police privatization in the United States, however, predates the broader national trend toward privatization by at least a decade.

A second, widely circulated explanation for the recent growth of private police was first offered fifteen years ago by Canadian criminologists Clifford Shearing and Philip Stenning. They attributed that growth to a significant increase in the amount of "public" activity taking place on what they called "mass private property": large, privately owned facilities such as shopping malls, office buildings, housing complexes, manufacturing plants, recreational facilities, and university campuses.<sup>328</sup> "The modern development of mass private property," they argued, "has meant that more and more public life now takes place on property which is privately owned."<sup>329</sup> This in turn, they contended, has led to a steadily increasing role for private security in the provision of public order, because the public police, whose patrol responsibilities traditionally have been limited to public property, generally have lacked both the resources and the desire to maintain order on private property, and because private owners, in any event, have preferred to keep control over the policing of their property.<sup>330</sup>

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325. See CUNNINGHAM & TAYLOR, *supra* note 64, at 108–09; Shearing & Stenning, *supra* note 31, at 494–96.

326. See CUNNINGHAM ET AL., *supra* note 27, at 237, 239.

327. See discussion *supra* Part I.

328. Shearing & Stenning, *supra* note 31, at 496.

329. *Id.*

330. See *id.* at 496–97; see also, e.g., *Policing for Profit*, *supra* note 5, at 24.

On its face this theory does a better job than ideological shift in explaining the timing of the recent growth in private policing, but it has two significant limitations. The first is a lack of convincing empirical support. Although Shearing and Stenning suggested that evidence of the growth of mass private property "surrounds every city dweller," they acknowledged there was little data to support their claim.<sup>331</sup> More importantly, much of the most visible growth of private security in recent years has occurred on public property, funded by groups of businesses or homeowners dissatisfied with public police protection.<sup>332</sup> That dissatisfaction, in fact, appears itself to have contributed to the growth of at least some highly visible forms of mass private property, including gated residential communities<sup>333</sup> and privately controlled shopping and recreational complexes.<sup>334</sup>

This leads us to the most widespread explanation for the dramatic postwar growth in private security: the failure of public law enforcement to provide the amounts and the kinds of policing that many people want.<sup>335</sup> This explanation has some intuitive plausibility, and it also comports with past experience. As we have seen, for over two centuries privately paid entrepreneurs in both Britain and America have been filling gaps in the police protection offered by public law enforcement. Private police today, moreover, tend at least in broad outline to do the kinds of things that public police departments are faulted for not doing: patrol visibly and intensively, consult frequently with the people they are charged with protecting, and—most basically—view themselves as service providers.<sup>336</sup>

Ironically, the labor-intensive patrolling provided by private security firms may depend on the same factor that causes many of the industry's

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331. Shearing & Stenning, *supra* note 31, at 496.

332. See discussion *supra* notes 25–56 and accompanying text.

333. See discussion *supra* note 24 and accompanying text.

334. See, e.g., Melinda Fulmer, *Entertaining Frivolous Shopping Impulses*, L.A. TIMES, June 16, 1998, at D1; Shelly Reese & Ellen Neuborne, *Malls Sell Shoppers on Security*, USA TODAY, Dec. 20, 1994, at 2B.

335. See, e.g., Palango, *supra* note 71. Some American scholars have attributed this failure in part to the new constraints the Supreme Court placed on public law enforcement in the 1960s and 1970s, most of which do not apply to private security. See, e.g., Livingston, *supra* note 67, at 631–32 ("By attempting to restrain police discretion in order maintenance through aggressive invalidation of the laws that authorize it, courts may contribute to the increasingly dominant role that private police now play in the provision of order maintenance policing."); Gary T. Marx, *The Interweaving of Public and Private Police in Undercover Work*, in PRIVATE POLICING, *supra* note 33, at 172, 185 ("It is ironic that a factor in the recent growth of private policing may be efforts to limit the power of state police."). Some responsibility for the growth of private security in the United States may indeed lie there, but the international nature of police privatization, see discussion *supra* notes 70–75 and accompanying text, suggest the main explanations will be found elsewhere.

336. See discussion *supra* notes 110–111 and accompanying text.

problems: low wages. Personnel expenditures, more than anything else, limit the ability of police departments to increase their "visible presence,"<sup>337</sup> and security guards cost far less than police officers.<sup>338</sup> Studies of the private security industry regularly blame the meager wages paid to security guards for "marginal personnel" and high turnover, and blame high turnover for the minimal training guards receive.<sup>339</sup> But a cheap pair of eyes may be just what many customers want. Private police may be the modern-day equivalents of eighteenth-century watchmen: poorly paid and marginally competent, but competent enough to perform a service.

Plainly not all of the growth in private policing has been driven by preexisting demand. Some of the growth has been fueled by crime-related anxieties that the marketing arms of private security firms, along with escalating coverage of crime by the news media, have helped to amplify and to sustain.<sup>340</sup> In addition, the privatization of policing has its own momentum; the process tends to sustain itself, as people get used to the idea of relying on private security. One way this happens is through the increased willingness of judges and juries to award tort damages for a landowner's failure to provide adequate private policing;<sup>341</sup> another is through the

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337. Bayley & Shearing, *supra* note 5, at 599–600; see also discussion *supra* note 68 and accompanying text.

338. See CUNNINGHAM ET AL., *supra* note 27, at 156 (estimating that the average police officer earns 50% more than the average guard). "For at least the past 20 years, most contract security guards have been hired at or slightly above the minimum wage rate." *Id.* Some of the wage differential may be due to the pervasive unionization of public policing. See, e.g., Peter Feuille & John Thomas Delaney, *Collective Bargaining, Interest Arbitration, and Police Salaries*, 39 INDUS. & LAB. REL. REV. 228 (1986). However, at least one study has concluded that unionization raises police salaries only modestly. See W. Clayton Hall & Bruce Vanderporten, *Unionization, Monopsony Power, and Police Salaries*, 16 INDUS. REL. 94 (1977).

339. NATIONAL ADVISORY COMMITTEE ON CRIM. JUST. STANDARDS & GOALS, PRIVATE SECURITY 12–13 (1976); see also, e.g., CUNNINGHAM ET AL., *supra* note 27, at 156; JAMES S. KAKALIK & SORREL WILDHORN, PRIVATE POLICE IN THE UNITED STATES: FINDINGS AND RECOMMENDATIONS 61 (1971).

340. See, e.g., MIKE DAVIS, CITY OF QUARTZ 224–26 (1990); Beth Schuster, *Living in Fear*, L.A. TIMES, Aug. 23, 1998, at A1.

341. The growth of private security "drives up the average level of 'care' taken in a community to prevent crime and accidents," so that "[t]hose organizations which do not keep up with that standard can become defined as 'negligent' by default." LAWRENCE W. SHERMAN & JODY KLEIN, MAJOR LAWSUITS OVER CRIME AND SECURITY: TRENDS AND PATTERNS, 1958–1982, at 13–14 (1984) (documenting an increase in the size and number of tort awards for negligent security, particularly since 1980); see also, e.g., ALAN KAMINSKY, A COMPLETE GUIDE TO PREMISES SECURITY LITIGATION 5 (1995) (observing that "premises security lawsuits are among the fastest growing segment of personal injury lawsuits"); Canlen, *supra* note 22, at 81 (reporting that "[m]ore and more businesses are providing security to guard against liability, which has led to greater expectations on the part of the public"); Johnson & Warchol, *supra* note 115, at 89 (noting that "[a]n inadequate number of security officers on duty has sometimes been cited as the basis for liability judgments against malls"); Daniel B. Kennedy, A Synopsis of Private Security in the United States, 6 SEC. J. 101, 104 (1995) (observing that "[o]ne factor stimulating the growth of private

decreased incentive that clients of private security firms have to support large public expenditures for police protection;<sup>342</sup> a third is through the new demand that can be created when private patrols in one area move crime to adjacent, underpatrolled areas.<sup>343</sup>

Still, it seems a mistake to write off the demand for private policing as irrational. Private policing would not have ballooned the way it has in recent decades if customers were unwilling to pay for it, and today's private guard companies—much like the thief-catchers of Georgian England or the national detective agencies of late-nineteenth-century America—provide an indication of the kinds of police services for which the government has left demand unmet.

Obviously, not all demands *should* be met, particularly not by government. The detective agencies of the Pinkerton era provide a good example: they certainly demonstrated that corporate America wanted more help breaking strikes than the government was providing, but that did not necessarily mean that the government should start providing that help. Today, some part of the demand for private security services is a demand for keeping certain kinds of people—typically poor or members of racial minorities—out of the business districts, amusement parks, and residential

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security is the increase in tort litigation for negligent security" (citations omitted)); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 649–50 (1992) (discussing appellate decisions in the 1970s and 1980s holding landlords liable for inadequate security).

The increased willingness of courts to hold private landowners liable for failing to provide adequate protection against crime stands in contrast to continued judicial reluctance to hold governments accountable for inadequate policing. See discussion *infra* Part IV.B. For a useful discussion of recent case law regarding the liability of landowners for crimes committed by third parties, see *Lefmark Management Co. v. Old*, 946 S.W.2d 52, 56–60 (Tex. 1997) (Owen, J., concurring).

342. See, e.g., SPARROW ET AL., *supra* note 67, at 49; Bayley & Shearing, *supra* note 5, at 593–94; Stark, *supra* note 49, at 46–48. Once again, Southern California provides the most striking example. Lou Cannon has suggested that ballot measures to raise taxes to pay for improved police protection in Los Angeles usually failed in the early 1990s "because white, conservative voters in well-off areas were unwilling to tax themselves to pay for extra police," despite the support of large majorities of South Central voters "who could not afford the luxuries of gated communities or private security forces." LOU CANNON, OFFICIAL NEGLIGENCE 17–18 (1997). He points in particular to the April 1993 defeat of Proposition 1, a municipal referendum that gained the approval of 57% of Los Angeles voters but fell short of the two-thirds majority required by state law. "Los Angeles Times exit polls showed that 68 percent of blacks had supported the measure, while a slight majority of white Protestant conservatives opposed it." *Id.* at 616 n.24. According to the director of the Times, "white home owners who are scared to death of crime were the least inclined to vote for Proposition 1." *Id.* (quoting John Brennan); cf. Frug, *supra* note 67, at 78 (suggesting that affluent urban residents moved to the suburbs in part to avoid paying for inner-city police).

343. See discussion *supra* note 122 and accompanying text.

areas that private guards are hired to patrol. Not only is this a demand the government has no business helping to meet; it is one that most people today believe that government should help suppress.

But private security firms also serve more benign interests, interests that a wide spectrum of Americans believe the government itself should pursue more aggressively. Chief among these are protecting people against serious crime—and protecting them against the *fear* of serious crime, in part by preserving public order. These are of course among the principal goals of current efforts at police reform.<sup>344</sup> Among the simplest lessons that police privatization offers to students of public law enforcement are not to dismiss these efforts, and not to underestimate the breadth and the depth of the dissatisfaction to which they respond.<sup>345</sup>

## 2. The Nature of Policing

The history of policing poses serious challenges for the view that policing is an inherently public function. It has never been an entirely public function, and only in the second half of the nineteenth century did a relatively clear dividing line emerge between public and private policing. The world of the 1990s, of course, is different from the worlds of the 1790s and 1890s; perhaps a case can be made that today's technological and social realities make a public monopoly on policing particularly important. But those who describe law enforcement as an essentially public function rarely attempt to make such a case; instead, they typically suggest that private policing is inherently inconsistent with the liberal state. The history of policing makes that view difficult to defend.

Past experience also poses challenges for other essentialist understandings of policing—for example, that policing is first and foremost about preventive patrol, or first and foremost about catching criminals, or that one of these functions is traditionally public and the other traditionally private. In the nineteenth century, police departments specialized in patrol work, often leaving detective work to the market. In the mid-twentieth century, police departments changed their principal claim of expertise—if not their principal area of practice—from prevention to apprehension, and private security firms, in reaction, made the opposite transition. Congressional reformers in the 1890s expressed their chief dismay at the use of

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344. See Livingston, *supra* note 67, at 573–81.

345. The nature and extent of today's private security industry thus provides support, for example, for Debra Livingston's suggestion that courts should avoid unnecessary restrictions on the ability of the public police to provide sufficient order maintenance to protect a community's "quality of life." *Id.* at 568–69, 646–50.

private police for maintaining order; by the 1930s, property protection struck the La Follette committee as the one proper function of private security.

Nevertheless, the malleability of public expectations about policing should not be overstated. The notion that protection from crime should be publicly provided is centuries old and has been a constant force in the development of modern police forces, even if the precise implications of that notion have rarely been clear. It thus would be a mistake to dismiss current concerns about private policing as simply reflecting an ignorance of the past.

One can also err by making too much of the distinction between patrol and detective work. This is not to say that the distinction is unimportant or unhelpful—far from it. It is hard to understand the changing roles of public and private police in the nineteenth and twentieth centuries without differentiating between preventive patrol work on the one hand and detection and apprehension of criminals on the other. And both the public and private sectors of policing sharply segregate patrol and investigative personnel, and have done so for well over a century.<sup>346</sup> Still, the distinction can be deceptive because patrol and detection are, to a great extent, unavoidably intertwined. Rarely has any important police organization, whether public or private, maintained an exclusive focus on patrol or investigation over any significant length of time. The Bow Street Runners branched out into patrol work, London's Metropolitan Police and its American copies all formed detective divisions, Pinkerton's nineteenth-century detective agency earned much of its money providing guards, and today "many, and probably most, guard companies provide some form of investigative service."<sup>347</sup>

In practice there is substantial overlap between patrol and detective work. Good patrol officers, whether public or private, necessarily engage in a large amount of detection: they must be alert to signs of criminal activity and adroit at determining the nature, causes, and possible solutions to the many low-level disturbances they encounter. In addition, because they are the first on the scene, patrol officers are often in the best position to do

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346. See, e.g., BAYLEY, *supra* note 26, at 25–26, 56–60 (discussing the organization of public police departments into patrol and detective divisions); CUNNINGHAM ET AL., *supra* note 27, at 184–87 (distinguishing between private guards and private detectives).

347. CUNNINGHAM ET AL., *supra* note 27, at 185. The most prominent exceptions are the FBI and certain other federal law enforcement agencies, which have never performed routine patrol functions. See, e.g., JAMES Q. WILSON, THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS 18 (1978). Their status as purely investigative organizations may say more about the federal role in criminal law than about the nature of policing. See Daniel Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999).

detective work of the more traditional, "crime-solving" sort—and, in fact, much of the most important crime solving is carried out by officers patrolling their beats.<sup>348</sup> Similarly, much of the work performed by detectives amounts to covert patrol work. This was true of the Pinkerton agency's industrial spies, and it is true today, for example, of vice detectives and narcotics investigators.<sup>349</sup> Detectives need patrol skills, just as patrol officers need detective skills.

And police organizations benefit from providing both services. Not only are there economies of scale,<sup>350</sup> but each operation helps to give the other credibility. Patrol officers are more likely to be feared, respected, and hired if they are part of an organization with a reputation for tracking down criminals. John Fielding and Allan Pinkerton both relied on this principle in building up their patrol business. Both also relied on a converse effect: patrol officers, highly visible by design, function as walking advertisements for investigative services.

### 3. Legal Roles and Legal Rules

For legal scholars, the most humbling lesson offered by the history of public and private policing is that the parameters of the police officer's role have not been set exclusively by the legal rules, and perhaps not even principally. One sign of this is the relatively low amount of attention paid throughout the nineteenth century, when modern police forces emerged and matured, to the precise powers of police officers. This topic never received anything approaching the care given to questions about what the police should wear and how they should be supervised. The authority of the police has been defined less by law than by culture and by politics. Even today, as we have seen, the arrest powers of police officers are, as a practical matter, not strikingly different from those of citizens and private guards.

Of course the police have important powers other than the power to arrest. Some of those other powers—for example, the ability to detain a suspect without carrying out a formal arrest—have been explicitly granted to some private security personnel, but other private security personnel have no special powers beyond those of ordinary citizens.<sup>351</sup> But even when dealing with powers other than arrest, the legal significance of the divide

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348. See BAYLEY, *supra* note 26, at 60.

349. See *id.* at 26.

350. See, e.g., LUKAS, *supra* note 264, at 255–56.

351. See discussion *supra* notes 83–84 and accompanying text.

between public and private police has always been hazy. The vagueness of police prerogatives is often seen as a modern phenomenon,<sup>352</sup> but in fact the general powers of law enforcement officers have never been very clear. Blackstone, for example, noted that constables and other peace officers were "armed with very large powers, of arresting, and imprisoning, of breaking open houses, and the like," but he left many of these powers uncataloged—suggesting it was "perhaps very well" that the officers generally did not know the extent of their own powers, "considering what manner of men are for the most part put into these offices"<sup>353</sup> And few if any grants of police powers to private constabularies in the eighteenth and nineteenth centuries specified the precise powers being granted.<sup>354</sup>

Nonetheless, the idea that the public police have unique and well-defined powers has long played an important role in the public perception, and the self-perception, of private police forces. When privately employed guards have been "deputized" or "commissioned" with the "full" powers of public police officers, this has helped to legitimize their authority—despite persistent ambiguity about what those powers entail. Conversely, private security firms without such commissions have legitimized their operations, and the relative absence of public oversight over those operations, by appealing to their lack of "police powers."<sup>355</sup> These firms in some ways have the best of both worlds: the uniforms their officers wear allow them to borrow the symbolic authority of the public police, while their formal status as private citizens exempts them from the legal requirements and extralegal expectations imposed on public law enforcement officers.<sup>356</sup>

This is not just a case of industry obfuscation coupled with popular naiveté. As we shall see, the idea that police officers exist as a separate, clearly identifiable category, with unique, clearly identifiable powers, has exercised a powerful hold on courts and legislators as well as the public.

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352. See, e.g., Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 83 (1988) (noting that "today's law enforcement officials, by virtue of their commission alone, seem to have broad, inherent authority—or perhaps merely de facto power—to search and seize").

353. 1 BLACKSTONE, *supra* note 155, at \*356. Blackstone did describe with some precision the arrest powers of public officers, but those powers differed only in detail from the arrest powers of private citizens. See discussion *supra* note 155 and accompanying text.

354. See discussion *supra* note 237 and accompanying text.

355. See Scott & McPherson, *supra* note 25, at 271–72; cf. Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENTARY 319, 319 (1993) (noting that "[o]ne of the main things a power-holder gains from successfully characterizing his power as 'private' is a degree of legitimacy and immunity from attack").

356. See Scott & McPherson, *supra* note 25, at 272; Spitzer & Scull, *supra* note 76, at 26.

"We live by symbols,"<sup>357</sup> and "few symbols are better recognized than the lawman's badge."<sup>358</sup>

### III. PRIVATE POLICE AND THE PROBLEM OF STATE ACTION

The persistent strength of law enforcement symbolism can be seen nowhere more vividly than in judicial responses to the difficulties private policing creates for the state action doctrine—the general principle that constitutional rights, at both the federal and state levels, operate only against the government.<sup>359</sup> In criminal cases, the state action doctrine has rendered the Fourth Amendment exclusionary rule, the *Miranda* protections, and the underlying guarantees of the Fourth, Fifth, and Sixth Amendments, inapplicable to investigative activity carried out by private citizens.<sup>360</sup> Private policing poses challenges for the state action doctrine because it straddles the divide between ordinary private citizens—a concerned neighbor or vigilant storekeeper—and uniformed police officers. Are private security personnel truly private in the sense pertinent to state action?

As we will see, a principled answer proves elusive. The Supreme Court has shied away from addressing the constitutional status of private police.<sup>361</sup> Outside the area of criminal investigations, the Supreme Court has developed an elaborate, notoriously muddled doctrine of state action; rigorously applied, that doctrine proves unable to distinguish private police convincingly either from public law enforcement or from the private citizenry.<sup>362</sup> For their part, lower courts by and large have resolved the matter by resort to symbols: private security personnel are treated as private persons

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357. OLIVER WENDELL HOLMES, *John Marshall*, in COLLECTED LEGAL PAPERS 266, 270 (1920). Justice Frankfurter can take credit for turning Holmes's aphorism into something approaching a cliché. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 596 (1940) ("We live by symbols."); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 662 (1943) (Frankfurter, J., dissenting) ("Even the most sophisticated live by symbols."); *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942) ("If it is true that we live by symbols, it is no less true that we purchase goods by them.").

358. *United States v. Boylan*, 898 F.2d 230, 236 (1st Cir. 1990).

359. See, e.g., *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978) (noting that "most rights secured by the Constitution are protected only against infringement by governments"); *State v. Long*, 700 P.2d 153, 156 (Mont. 1985) (observing that, "[h]istorically, constitutions have been means for people to address their government"). As *Flagg Bros.* itself demonstrates, this limitation is particularly well established for the Due Process Clause of the Fourteenth Amendment, which of course is the basis for applying the Bill of Rights in state prosecutions.

360. See discussion *infra* Part III.A.

361. See discussion *infra* Part III.B.1.

362. See discussion *infra* Part III.B.3.

unless they have been officially deputized—regardless what additional legal powers, if any, that formal process confers.<sup>363</sup>

This distinction is arbitrary, and it creates some conspicuous incongruities. But I will suggest that it makes rough sense. I will also argue that drawing a principled boundary between public and private policing is less important than recognizing the boundary as contingent and continually questioning whether rules found on one side could profitably be transported to the other. And I will suggest, ultimately, that the most urgent question raised by police privatization may not be whether to treat private security guards as state actors, nor even what substantive rules should govern the private police, but whether the state has some duty to provide everyone, rich or poor, with minimally adequate police protection.<sup>364</sup>

Given where we are eventually headed, even charitable readers may balk at yet another trudge through the state action mire. But the trek is worth taking.

To begin with, it is the only sure route to our destination. For the public-private boundary in policing to be a source of doctrinal vitality, the boundary must be recognized as arbitrary. And before concluding that other inquiries are likely to prove more fruitful, we need to satisfy ourselves that the state action problem in criminal procedure is to a great extent intractable.

In addition, there is much of interest to be seen along the way. The state action problem in criminal procedure has been largely neglected both by constitutional scholars and by criminal procedure scholars. Constitutional scholars have tended to view criminal justice as a field apart, and possibly a field beneath their consideration. Criminal procedure scholars have almost universally seen private security as outside their bailiwick—and, perhaps, as beneath *their* consideration. But judges have not had the liberty to ignore the state action problem in criminal procedure, and their responses to the problem throw light not only on the pervasive role of symbolism in our thinking about the police, but also on the challenges facing state action law more generally.

#### A. The State Action Doctrine in Criminal Procedure

Perhaps the most basic and invariable principle of criminal procedure is that constitutional restrictions on policing—the limitations imposed by

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363. See discussion *infra* Part III.B.2.

364. See discussion *infra* Part IV.

the Fourth, Fifth, and Sixth Amendments,<sup>365</sup> the prophylactic rules of evidentiary exclusion constructed to reinforce those limitations, and the analogous rules of state constitutional law—apply only to investigative action attributable to the government. As regards the Fourth Amendment, this principle received its definitive articulation more than seventy-five years ago, in *Burdeau v. McDowell*.<sup>366</sup> Suspecting McDowell of fraud, his employer fired him and, allegedly without right, searched his office. The search turned up incriminating documents. McDowell's employer handed over the documents to federal prosecutors. McDowell sued to get the documents back and for an order barring their presentation to the grand jury. The district court ruled in his favor, but the Supreme Court reversed.

Notwithstanding the apparent unlawfulness of the search and seizure,<sup>367</sup> the Court found the Fourth Amendment inapplicable because the government had played no role. Writing for the majority, Justice William Day reasoned that the "origin and history" of the amendment "clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon parties other than governmental agencies."<sup>368</sup> Accordingly, it was "manifest" that McDowell could complain of no violation of the Fourth Amendment because "no official of the Federal Government had anything to do with the wrongful seizure," and "whatever wrong was done was the act of individuals in taking the property of another."<sup>369</sup> Furthermore, the Court saw "no reason" why that wrong, by individuals "unconnected with the government," should prevent use of the documents in McDowell's prosecution.<sup>370</sup>

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365. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Fifth Amendment directs, in part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." *Id.* amend. V. The relevant language of the Sixth Amendment recognizes a criminal defendant's right "to have the Assistance of Counsel for his defense." *Id.* amend. VI.

366. 256 U.S. 465 (1921). For helpful discussions of the decision, see Burkoff, *supra* note 1, at 628–43; Owens, *supra* note 1, at 1142–49.

367. Professor Burkoff has pointed out that the search of McDowell's workplace "might conceivably be held lawful today, even if undertaken by law enforcement officers," but that, in any event, the items seized included personal papers, such as McDowell's diary, in which his employer lacked any property right. Burkoff, *supra* note 1, at 629 n.17.

368. *Burdeau*, 256 U.S. at 475.

369. *Id.*

370. *Id.* at 476. Justice Brandeis dissented, joined by Justice Holmes. It "may be true," they conceded, that "no provision of the Constitution" required return of McDowell's documents. Nonetheless they argued that the government should be ordered to return the papers because a private party holding them would be required to do so, and because using the stolen papers against

The Supreme Court has never revisited *Burdeau*; instead, it has treated both parts of the holding—the inapplicability of the Fourth Amendment and the inapplicability of the exclusionary rule—as obviously correct. Thus the Court has declared that “[i]t is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act.”<sup>371</sup> Similarly the Court has explained that it has “consistently construed” the Fourth Amendment “as proscribing only governmental action; it is wholly inapplicable ‘to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.’”<sup>372</sup>

The Court has interpreted the Fifth Amendment in a parallel fashion, although an unambiguous statement of this interpretation was longer in coming than *Burdeau*. At the close of the nineteenth century the Justices suggested that the Fifth Amendment barred the introduction against a federal defendant of any statement coerced from him, no matter by whom.<sup>373</sup> More recently, however, the Court has described “the sole concern of the Fifth Amendment” as “governmental coercion”<sup>374</sup> and has made clear that “coercive police activity is a necessary predicate” to a finding of involuntariness under either the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment.<sup>375</sup> Accordingly, lower courts without exception have refused to impose the prophylactic protections of *Miranda* on private interrogators.<sup>376</sup>

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their owner would “shock the common man’s sense of decency and fair play.” *Id.* at 477 (Brandeis, J., dissenting). In its emphasis on the importance of “procedural regularity” in law enforcement, *id.*, the *Burdeau* dissent thus anticipated the concluding paragraphs of Justice Brandeis’s more famous dissent several years later in *Olmstead v. United States*, 277 U.S. 438, 484–85 (1928).

371. *United States v. Janis*, 428 U.S. 433, 455 n.31 (1976) (citing *Burdeau*, 256 U.S. at 475); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (citing *Burdeau*, 256 U.S. at 465) (“Had Mrs. Coolidge, wholly on her own initiative, sought out her husband’s guns and clothing and then taken them to the police station to be used as evidence against him, there can be no doubt under existing law that the articles would later have been admissible in evidence.”).

372. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)); see also *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 614 (1989) (noting that “the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative”).

373. See *Bram v. United States*, 168 U.S. 532 (1897) (reversing a conviction based on statements obtained from a defendant in Nova Scotia by a Canadian police officer).

374. *Colorado v. Connelly*, 479 U.S. 157, 170 (1986).

375. *Id.* at 167; see also, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 287–88 & n.4 (1991) (deeming a confession elicited by a jailhouse informant “coerced” only after noting “[t]he parties agree[d] that [the informant] acted as an agent of the Government”).

376. See discussion *infra* notes 415, 429–435 and accompanying text.

Similarly, although the Supreme Court has never explicitly addressed whether the Sixth Amendment protection against uncounseled interrogation can apply to interrogations by private parties without government encouragement, the question has not bedeviled the lower courts, which have uniformly held the amendment inapplicable.<sup>377</sup> A contrary answer would be difficult to square with the Supreme Court's repeated suggestion that the amendment prohibits only action by "the police and their informant" that is "designed deliberately to elicit incriminating remarks."<sup>378</sup> So, too, the Due Process Clauses prohibit prosecutions based on "outrageous" investigative techniques, but only when they are employed by the government.<sup>379</sup> Virtually without exception, state constitutional restrictions on criminal investigations are similarly limited.<sup>380</sup> Even the entrapment doctrine, which both federal and state courts describe as statutory rather than constitutional in origin, protects suspects only against instigation by government agents.<sup>381</sup>

Although the state action doctrine has never received high marks for clarity,<sup>382</sup> even its fiercest critics rarely complain about its application in the

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377. See, e.g., *United States v. Stevens*, 83 F.3d 60, 64 (2d Cir. 1996); *United States v. Harris*, 9 F.3d 493, 500 n.2 (6th Cir. 1993); *Brooks v. Kincheloe*, 848 F.2d 940, 945 (9th Cir. 1988); *Lightbourne v. Dugger*, 829 F.2d 1012, 1020 (11th Cir. 1987); *United States v. Taylor*, 800 F.2d 1012, 1015 (10th Cir. 1986); *Thomas v. Cox*, 708 F.2d 132, 136 (4th Cir. 1983); *United States v. Malik*, 680 F.2d 1162, 1165 (7th Cir. 1982).

378. *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986). It would also be difficult to square with the manifest lack of interest the Court showed in *United States v. Henry*, 447 U.S. 264 (1980), to the circumstances surrounding Henry's uncounseled statements to a cellmate who had no working arrangement with the government, but who later testified against Henry. See *id.* at 267 n.3; *United States v. Calder*, 641 F.2d 76, 78–79 (2d Cir. 1981).

379. See, e.g., *Colorado v. Connelly*, 479 U.S. 157, 166 (1986); *United States v. Mosley*, 965 F.2d 906, 909 (10th Cir. 1992); *United States v. Cuervelo*, 949 F.2d 559, 565 (2d Cir. 1991); *United States v. Lard*, 734 F.2d 1290, 1292, 1296–97 (8th Cir. 1984); *United States v. Twigg*, 588 F.2d 373, 378 (3d Cir. 1978).

380. See, e.g., *Smith v. State*, 594 S.W.2d 255, 256 (Ark. Ct. App. 1980); *People v. Lopez*, 946 P.2d 478, 481 (Colo. Ct. App. 1997); *State v. Boynton*, 574 P.2d 1330, 1331 (Haw. 1978); *State v. Long*, 700 P.2d 153, 156 (Mont. 1985); *State v. Ludvik*, 698 P.2d 1064, 1067 (Wash. Ct. App. 1985); *State v. Heiner*, 683 P.2d 629, 636 (Wyo. 1984).

381. See, e.g., *United States v. Cruz*, 783 F.2d 1470, 1472 (9th Cir. 1986); *State v. Garcia*, 528 So. 2d 76, 76 (Fla. Dist. Ct. App. 1988); *Perez v. State*, 517 So. 2d 106, 107–08 (Fla. Dist. Ct. App. 1987); *People v. Gorski*, 494 N.E.2d 246, 250 (Ill. App. Ct. 1986); *State v. Farmer*, 510 P.2d 180, 182 (Kan. 1973); *Commonwealth v. Lindenmuth*, 554 A.2d 62, 65–66 (Pa. Super. Ct. 1989); John D. Lombardo, *Comment, Causation and "Objective" Entrapment: Toward a Culpability-Centered Approach*, 43 UCLA L. REV. 209, 231 & n.86 (1995). Government instigation of crime raises federal constitutional concerns only on those rare occasions when it is "so outrageous that due process principles . . . bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 431–32 (1973); *Lard*, 734 F.2d at 1292; *Twigg*, 588 F.2d at 378.

382. See discussion *infra* notes 451–452 and accompanying text.

field of criminal procedure.<sup>383</sup> When it comes to constitutional protections against overzealous policing, the state action doctrine has received something of a free pass. In part, no doubt, this dispensation is simply one manifestation of the general neglect of criminal procedure by constitutional scholars.<sup>384</sup> But the state action doctrine does have some heightened intuitive appeal in the area of criminal procedure. Many of the most controversial state action cases have centered around the Equal Protection Clause of the Fourteenth Amendment,<sup>385</sup> a provision which can easily be read—and may well have been intended—to require the government to redress certain abusive exercises of private power.<sup>386</sup> In contrast, the Bill of Rights, and particularly the Fourth Amendment, seem more obviously and exclusively aimed at reining in the government.<sup>387</sup> The libertarian thrust of these provisions bolsters the case for limiting their scope to abusive conduct by government agents.

So does the kind of conduct they prohibit. The most damaging private discrimination often has been carried out by institutions that are highly visible, easily regulated, and tightly affiliated with the government. Applying the Equal Protection Clause to these institutions makes a good deal of intuitive sense, both because these institutions often seem de facto arms of the state, and because, in any event, it seems reasonable to ask the government to ensure they act fairly. But the unofficial "searches" and "seizures" of greatest concern to most people are probably those carried out by criminals. It is one thing to assert that the Boy Scouts or the Elks are the state; it seems more of a stretch to say that of the Genovese crime family or

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383. Thus, for example, Larry Alexander and Paul Horton characterize the state action doctrine in general as "completely incoherent," and are particularly critical of the notion that the acts other than lawmaking can be unconstitutional only if performed by government officials. LARRY ALEXANDER & PAUL HORTON, WHOM DOES THE CONSTITUTION COMMAND? 22, 29–36 (1988). They find this notion "plausible," however, with regard to the Fourth Amendment, *id.* at 88, and do not criticize any aspects of criminal procedure doctrine. *Burdeau v. McDowell*, 256 U.S. 465 (1921), appears neither in the main portion of their book nor in their appended "chronological catalogue of the major post-Civil War Supreme Court cases that deal obviously with the 'state action' issues." ALEXANDER & HORTON, *supra*, at xii, 91–121. The case is similarly ignored in most other academic discussions of state action.

384. See, e.g., Amar, *supra* note 3, at 758; Wasserstrom & Seidman, *supra* note 352, at 21.

385. See, e.g., *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972); *Evans v. Abney*, 396 U.S. 435 (1970); *Evans v. Newton*, 382 U.S. 296 (1966); *Bell v. Maryland*, 378 U.S. 226 (1964); *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Pennsylvania v. Board of Dirs.*, 353 U.S. 230 (1957); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Terry v. Adams*, 345 U.S. 461 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

386. See generally JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); Heyman, *supra* note 104.

387. See, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 399–400 (1974).

the Crips. Calling criminals "state actors" seems silly.<sup>388</sup> It may not be so silly to claim that the government has some obligation to protect people against crime, a higher obligation even than fighting private discrimination. Some people have read the Equal Protection Clause to impose just such an obligation, and I will suggest later that police privatization should prompt us to give that reading new consideration.<sup>389</sup> But if affirmative duties of this kind are to be introduced into constitutional law, it seems more straightforward to use the Equal Protection Clause, not the back door of the Fourth Amendment.<sup>390</sup>

There are good reasons, then, for the continued vitality of the state action doctrine in criminal procedure. The problem is how to maintain that doctrine when private policing increasingly blurs the line between public and private. One natural approach is to emphasize the distinctive risks posed by the police,<sup>391</sup> and the distinctive costs to applying constitutional rights to private investigative activity.<sup>392</sup> We might expect courts to probe the extent to which private policing raises the same risks as public policing, and the extent to which constitutional regulation of the private police would entail the same costs as constitutional regulation of concerned

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388. See, e.g., *State v. Christensen*, 797 P.2d 893 (Mont. 1990) (upholding a search warrant based on evidence obtained from a burglar); Amar, *supra* note 3, at 793 n.135 (disavowing "the outlandish claim that the [Fourth] Amendment itself creates a legal right against wholly private action").

389. See discussion *infra* Part IV.B.

390. Cf. Amar, *supra* note 3, at 793 n.135 (declining to argue that "the [Fourth] Amendment requires government action to protect against private violence").

391. Cf., e.g., ALEXANDER & HORTON, *supra* note 383, at 78 (suggesting that arguably "the framers of the Constitution were concerned with abuses by those with whom citizens were forced to deal by virtue of possessing a *de jure* or *de facto* monopoly, usually the government, but sometimes private persons or enterprises as well"); Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENTARY 329, 343 (1993) (suggesting that "the creators of the Constitution were troubled by certain specific loci of power, from which, experience led them to believe, there were special dangers and insufficient safeguards"); Lombardo, *supra* note 381, at 253 (arguing that the entrapment doctrine is properly limited to inducements by government agents, because "individuals who succumb to government inducements are—by the very fact that the government is the one holding out the inducements—subjected to pressures to engage in crime beyond the pressures which the general population should normally be expected to endure").

392. Cf., e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) ("One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law."); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."); Kay, *supra* note 391, at 340–41 (arguing that the state action doctrine is necessary to avoid "subject[ing] all human conduct to ad hoc judicial supervision superior to any differing legislative judgment"); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 335 (1995) (suggesting that the state action doctrine "preserves a sphere of individual freedom of action").

neighbors and vigilant storekeepers. In fact, as we will see, such inquiries are vanishingly rare, and the reasons why are instructive.<sup>393</sup>

## B. State Action and Private Policing

### 1. The Supreme Court and Private Police

Although the Supreme Court has made clear through its unwavering adherence to *Burdeau* that the rules of the Fourth Amendment, and by implication the rest of constitutional criminal procedure, apply only to law enforcement activity "connected with" the government, it has provided remarkably little guidance regarding when if ever private policing should be deemed to satisfy that requirement.

The Court has directly addressed the state action problem in the context of private policing only once, in *Griffin v. Maryland*.<sup>394</sup> Although *Griffin* was a criminal case, the question it posed was not one of criminal procedure. The question was whether the Equal Protection Clause of the Fourteenth Amendment applied to the actions of a security guard employed by a private amusement park, but "deputized" by the county sheriff. The defendants were five black students who in 1960 visited the Glen Echo Amusement Park, flouting the park's unwritten policy excluding blacks.<sup>395</sup> Acting on the instructions of the park manager, security guard Francis Collins asked the students to leave and, when they refused, arrested them

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393. It may be worth noting at the outset that no reliance can be placed here on the structural justifications sometimes offered for the state action doctrine. The doctrine is said to promote both federalism and the separation of powers. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-2, at 1691 (2d ed. 1988); Kenneth L. Karst, *State Action—Beyond Race*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1736 (Leonard W. Levy et al. eds., 1986). Neither of these grounds, however, helps to explain the current contours of the state action doctrine in criminal procedure. Federalism fails as an explanation for two reasons. First, as discussed below, the state action doctrine in federal constitutional procedure is almost invariably mirrored by state courts applying state constitutional law. Second, no reason has been offered—not one obvious—for deeming the public police, but not the private police, a proper subject for national governance. (Indeed, there is a long tradition of arguing that law enforcement generally is appropriately left for local regulation. See, e.g., Friendly, *supra* note 3.) Separation of powers fails as an explanation for analogous reasons. First, the state action doctrine appears not only in rules of criminal procedure that limit legislative authority, such as those implementing the Fourth Amendment, but also in rules that purport to bow to legislative intent, particularly the entrapment doctrine. See discussion *supra* note 381 and accompanying text. Second, if some governmental authority is to be reserved to legislatures and others to courts, it is not apparent why ultimate authority over private police should fall in the former category and ultimate authority over public police in the latter.

394. 378 U.S. 130 (1964).

395. See *Griffin v. State*, 171 A.2d 717, 718 (Md. 1961), *rev'd*, 378 U.S. 130 (1964).

for trespassing.<sup>396</sup> It developed that Collins was employed by a private firm, the National Detective Agency, under contract with the amusement park.<sup>397</sup> It also developed that he had been deputized at the request of park management pursuant to a county ordinance authorizing the appointment of private-paid security personnel as "special deputy sheriffs"; this appointment gave him "the same power and authority as deputy sheriffs" within the boundaries of the park.<sup>398</sup>

The students claimed their arrest and subsequent conviction constituted racially discriminatory state action in violation of the Equal Protection Clause. The Maryland Court of Appeals rejected this claim, finding no state action. The court noted that at the time of the arrests Collins "had on the uniform of the agency,"<sup>399</sup> and that the arrests were carried out to further a private policy of segregation. His deputization, the court reasoned, "did not alter his status as an agent or employee of the operator of the park,"<sup>400</sup> and under Maryland law that status alone permitted him to make a citizen's arrest for any misdemeanor carried out in his presence.<sup>401</sup> But the court also suggested that the capacity under which Collins acted was ultimately immaterial: whether he acted as a private citizen or a public officer, the court reasoned that the state was no more implicated in the park's policy of segregation than it would be if the park had called "a regular police officer" to arrest the defendants for trespassing.<sup>402</sup>

The Supreme Court reversed. Writing for the majority, Chief Justice Warren concluded, first, that Collins qualified as a state actor because he had "purported to exercise the authority of a deputy sheriff. He wore a sheriff's badge and consistently identified himself as a deputy sheriff rather than as an employee of the park."<sup>403</sup> Second, Warren reasoned that the state action in this case violated the Equal Protection Clause because it amounted to public enforcement of a private policy of racial segregation. He analogized it to a public agency enforcing racially discriminatory provisions of a private trust, a practice the Court had deemed unconstitutional seven years earlier.<sup>404</sup>

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396. See 378 U.S. at 132-33.

397. See *id.* at 132.

398. *Id.* at 132 n.1 (quoting MONTGOMERY COUNTY, ALA., CODE § 2-91 (1955)).

399. 171 A.2d at 718.

400. *Id.* at 720-21.

401. See *id.* at 721.

402. *Id.* Whether the latter course would violate the Equal Protection Clause by implicating the state in a private policy of racial discrimination was the question the Supreme Court had purposely skirted in *Bell v. Maryland*, 378 U.S. 226, 228 (1964), and later answered in the negative in *Moose Lodge v. Irvis*, 407 U.S. 163, 172-73 (1972).

403. *Griffin*, 378 U.S. at 135. In particular, the Court noted, Collins had identified himself as a police officer in the affidavit he filed in support of the arrests. See *id.* at 133.

404. See *id.* at 135-36 (citing *Pennsylvania v. Board of Dirs.*, 353 U.S. 230 (1957)).

*Griffin* was one of a series of postwar decisions loosening the state action limitation to facilitate an assault on private discrimination, cases in which the Court may well have been less concerned with doctrinal niceties than with the bottom line.<sup>405</sup> Nonetheless the reasoning in *Griffin* merits close inspection, partly because the Supreme Court has said so little else about the constitutional status of private policing, and partly because there is a kind of submerged formalism to *Griffin* that foreshadows the lower court decisions we will survey later.

The *Griffin* majority rejected the argument that Collins had been "simply enforcing the park management's desire to exclude designated individuals from the premises"—not because such a practice would be unconstitutional whenever the "designated individuals" were selected on the basis of race, but because Collins had been specifically "instructed . . . to enforce the park's policy of racial segregation."<sup>406</sup> Ironically, the discrimination in *Griffin* therefore may have constituted state action precisely because the park enforced its policy through a privately paid security guard rather than by calling the police. Justice Clark's concurring opinion made this explicit:

If Collins had not been a police officer, if he had ordered the appellants off the premises and filed the charges of criminal trespass, and if then, for the first time, the police had come on the scene to serve a warrant issued in due course by a magistrate, based upon the charges filed, that might be a different case.<sup>407</sup>

*Griffin* is thus a paradoxical decision: on the surface it appears a blow against formalism, but deeper down things are not so clear. The state's complicity in the amusement park's policy of segregation seems dependent, in the Court's view, upon the merging of the roles of landowner's agent and police officer in one individual. Moreover, although the Court rejected the notion that law enforcement is state action only when carried out by public employees, it strongly suggested that Collins qualified as a state actor only because he held himself out as one: the result might have been different,

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405. See, e.g., Kenneth L. Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, 1989 SUP. CT. REV. 1, 5-11.

406. *Griffin*, 378 U.S. at 136-37.

407. *Id.* at 137-38 (Clark, J., concurring). Four members of the Court were unimpressed by this distinction. Justice Harlan, in a dissent joined by Justice Black and Justice White, conceded that Collins "was exercising his authority as deputy sheriff rather than his right as an individual," but reasoned, as had the Maryland Court of Appeals, that "the involvement of the State is no different from what it would have been had the arrests been made by a regular policeman dispatched from police headquarters." *Id.* at 138 (Harlan, J., dissenting). And Justice Douglas concurred in the Court's judgment "for the reasons stated in his opinion in *Bell v. Maryland*," 378 U.S. at 242-50, where he had concluded that the Equal Protection Clause barred public officers from enforcing trespass laws at the behest of a private landowner pursuing a policy of racial discrimination, see *Griffin*, 378 U.S. at 137.

the majority implied, if Collins had not worn a badge, and—more importantly—had relied explicitly on his power of citizen's arrest. Why these matters of form should be of such consequence was left unexplored,<sup>408</sup> as was the question whether the analysis would differ had the defendants' claims arisen under the Fourth, Fifth, or Sixth Amendment instead of under the Equal Protection Clause.

Any broad guidance *Griffin* could provide, moreover, was disavowed by the Court a decade later in *Flagg Bros. v. Brooks*.<sup>409</sup> That case involved whether a self-help remedy granted to certain merchants by New York law constituted state action and thus was subject to the Due Process Clause of the Fourteenth Amendment; the Court answered in the negative. Dissenting from that result, Justice Stevens suggested in passing that "it is clear that the maintenance of a police force is a unique sovereign function, and the delegation of police power to a private party will entail state action."<sup>410</sup> In support he cited *Griffin*.<sup>411</sup> Writing for the majority, Justice Rehnquist "express[ed] no view" regarding whether and to what extent a city or state could "avoid the strictures of the Fourteenth Amendment" by delegating police functions to private parties,<sup>412</sup> but he explicitly rejected Stevens' reading of *Griffin*:

Contrary to Mr. Justice Stevens' suggestion, this Court has never considered the private exercise of traditional police functions. In *Griffin v. Maryland*, the State contended that the deputy sheriff in question had acted only as a private security employee, but this Court specifically found that he "purported to exercise the authority of a deputy sheriff." *Griffin* thus sheds no light on the constitutional status of private police forces, and we express no opinion here.<sup>413</sup>

Nor has the Court expressed any opinion in the two decades following *Flagg Bros.*

## 2. Private Police in the Lower Courts

Unlike the Supreme Court, lower courts have been forced to address the constitutional status of private police. Like the Supreme Court, however, lower courts generally have avoided careful examination of the ways in which private police differ from their public counterparts and from

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408. Cf. Burkoff, *supra* note 1, at 648 (characterizing Collins's deputization as "entirely pro forma").

409. 436 U.S. 149 (1978).

410. *Id.* at 172 n.8 (Stevens, J., dissenting).

411. *See id.*

412. *Id.* at 163–64.

413. *Id.* at 163 n.14 (citations omitted).

ordinary citizens. Instead, less out of principle than out of habit, state and federal courts alike have simply declared the rules of constitutional criminal procedure inapplicable to private security personnel. Overwhelmingly, the lower courts have refused to treat private police as state actors, without ever offering a convincing explanation why. Private police have been held exempt from the Fourth Amendment<sup>414</sup> and the *Miranda* rules<sup>415</sup>—as well as from restrictions on entrapment<sup>416</sup> and statutory disclosure requirements<sup>417</sup>—all on the basis that they are private actors rather than government agents.<sup>418</sup> Three representative cases will suffice to convey the tenor of these decisions.

• Lynn Johnson, a plain-clothes security guard at a Washington, D.C. department store, followed a shopper, Adelaide Lima, to a fitting room. Peering through louvers in the door, Johnson—according to her own later testimony, credited by the trial judge—saw Lima remove tags from a blouse and place it in her purse. Lima then left the dressing room, and Johnson again followed her. When Lima left the store, Johnson confronted her, identified herself as a store detective, physically restrained Lima, and escorted her to the store's security office. At the office Lima was searched and the blouse was recovered. The trial judge suppressed the blouse in Lima's subsequent prosecution for petit larceny, but the District of Columbia Court of Appeals reversed, holding the Fourth Amendment inapplicable to the actions of "mere employees performing security duties."<sup>419</sup>

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414. See, e.g., *Wade v. Byles*, 83 F.3d 902 (7th Cir. 1996); *Gallagher v. "Neil Young Freedom Concert"*, 49 F.3d 1442 (10th Cir. 1995); *United States v. Francoeur*, 547 F.2d 891 (5th Cir. 1977); *People v. Taylor*, 271 Cal. Rptr. 785 (Ct. App. 1990); *United States v. Lima*, 424 A.2d 113 (D.C. 1980) (en banc); *People v. Toliver*, 377 N.E.2d 207 (Ill. App. Ct. 1978); *People v. Holloway*, 267 N.W.2d 454 (Mich. Ct. App. 1978); *State v. Buswell*, 460 N.W.2d 614 (Minn. 1990); *State v. Keyser*, 369 A.2d 224 (N.H. 1977); *People v. Horman*, 239 N.E.2d 625 (N.Y. 1968); *State v. McDaniel*, 337 N.E.2d 173 (Ohio Ct. App. 1975); *Commonwealth v. Corley*, 491 A.2d 829 (Pa. 1985); *Gillett v. State*, 588 S.W.2d 361 (Tex. 1979).

415. See, e.g., *United States v. Antonelli*, 434 F.2d 335 (2d Cir. 1970); *City of Grand Rapids v. Impens*, 327 N.W.2d 278 (Mich. 1982); cf. *Mervyn's, Asset Protection Division, Mervyn's Store Investigator Manual, Shoplift Interview*, at 3 (Mar. 13, 1995) (directing that suspects who ask about their rights should be told that "only a police officer is required to advise a person of their rights") (on file with author).

416. See, e.g., *United States v. Cruz*, 783 F.2d 1470, 1473 (9th Cir. 1986); *State v. Garcia*, 528 So. 2d 76 (Fla. Dist. Ct. App. 1988); *Perez v. State*, 517 So. 2d 106 (Fla. Dist. Ct. App. 1987); *People v. Gorski*, 494 N.E.2d 246 (Ill. App. Ct. 1986); *State v. Farmer*, 510 P.2d 180 (Kan. 1973); *Commonwealth v. Lindenmuth*, 554 A.2d 62 (Pa. Super. Ct. 1989).

417. See *Sipkema v. Reedy Creek Improvement Dist.*, 697 So. 2d 880 (Fla. Dist. Ct. App. 1997).

418. The same reasoning has been applied to professional bounty hunters. See *Drimmer*, *supra* note 220, at 763–65.

419. *Lima*, 424 A.2d at 115. While the government's appeal of the suppression order was pending, Lima won a civil judgment against the department store for conversion of the blouse she was alleged to have stolen. Lima argued this judgment should collaterally estop the government

In support of its holding, the court stressed that “[s]earches and seizures by private security employees have traditionally been viewed as those of a private citizen and consequently not subject to Fourth Amendment proscriptions.”<sup>420</sup> The court distinguished in this regard a “licensed security officer,” such as Johnson, from “commissioned or deputized special police officers,” who although privately employed are “commonly vested by the state with powers beyond that of an ordinary citizen.”<sup>421</sup> A licensed security officer, by contrast, “has only the power of arrest of an ordinary citizen.”<sup>422</sup> Far from “equat[ing] the powers of the security guard with the powers of police officers,” the licensing statute made “a conscious effort to distinguish the security guard from special policemen or regular policemen by prohibiting the wearing of uniforms or badges resembling those officers.”<sup>423</sup>

Lima argued “that security employees who go around ‘walking, talking, acting and getting paid like policemen’ should in fact be treated as policemen for the purposes of the Fourth Amendment.”<sup>424</sup> But the court of appeals expressly rejected the suggestion “that application of the Fourth Amendment can be resolved by looking at the nature of the activities performed by security employees.”<sup>425</sup> Like other private individuals, the court observed, private police are under no public duty to make arrests; they do so purely out of “[s]elf interest.”<sup>426</sup> The court further reasoned that “[s]olely permitting the act is insufficient ‘to support a finding of state action,’ ”<sup>427</sup> and “[t]he fact that the private sector may do for its own benefit what the state may also do for the public benefit does not implicate the state in private activity.”<sup>428</sup>

• Nicholas Antonelli, a New York dockworker, was driving off his worksite when he was stopped by a security guard. At the guard’s request, Antonelli opened the trunk of his car. Inside were six burlap bags filled with several thousand dollars’ worth of stolen clothing. Antonelli proceeded to make incriminating statements to the guard. He later sought to suppress these statements on the ground that the guard had not advised him

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from contending in the criminal case that she had stolen the blouse, but the court of appeals disagreed, pointing out that the government had not been a party to the civil action. See *id.* at 115–17.

420. *Id.* at 118.

421. *Id.*

422. *Id.* at 119.

423. *Id.*

424. *Id.* at 121.

425. *Id.*

426. *Id.* at 120 (quoting *Smith v. Brookshire Bros.*, 519 F.2d 93, 97 (5th Cir. 1975) (Gee, J., dissenting)).

427. *Id.* (quoting *Warren v. Cummings*, 303 F. Supp. 803, 806 (D. Colo. 1969)).

428. *Id.* at 121.

of his *Miranda* rights. His motion was denied, he was convicted, and the Second Circuit affirmed.<sup>429</sup>

The court assumed arguendo that Antonelli's statements resulted from "custodial interrogation"—that is, from the kind of actions that would trigger *Miranda* if carried out by public law enforcement officers.<sup>430</sup> But the court noted that the security guard "had no pertinent official or *de facto* connection with any public law enforcement agency," was employed "to protect the private property on the docks," and had not been influenced, instigated, or assisted in his dealings with Antonelli by any government officer.<sup>431</sup> *Miranda*, the Second Circuit reasoned, "was concerned solely with activity by the police or other . . . government agencies," and "[a] private security guard stands no differently from the private citizen who has employed him."<sup>432</sup>

The court opined that "[i]t would be a strange doctrine that would so condition the privilege of a citizen to question another whom he suspects of stealing his property that incriminating answers would be excluded as evidence in a criminal trial unless the citizen had warned the marauder that he need not answer."<sup>433</sup> This would be particularly strange, in the court's view, because "[t]he federal exclusionary rule enforcing adherence to the intentment of the Fifth Amendment, like the Fourth Amendment, has long been construed as 'a restraint upon the activities of sovereign authority' and not as 'a limitation upon other than government agencies.'"<sup>434</sup> Finally, the court pointed out that state courts addressing the question had held *Miranda* inapplicable to questioning by private parties.<sup>435</sup>

- Adam Taylor was sitting with three acquaintances under the Santa Cruz Beach Boardwalk when he was approached by two uniformed guards employed by Seaside Land Company, which owned the boardwalk. One of Taylor's companions was smoking a marijuana cigarette, and Taylor had on his lap a baggie containing something green. One of the guards, Officer Kerr, asked Taylor for the baggie and for identification. Taylor gave Kerr the baggie and said he had no identification. Kerr asked Taylor if he had any more drugs on him and if he would consent to a search. Taylor denied having drugs and agreed to a search, although exactly what kind of search is not completely clear. According to Taylor, he consented only to a search

429. See *United States v. Antonelli*, 434 F.2d 335, 336 (2d Cir. 1970).

430. *Id.* The facts, at least as recounted by the court, offered little support for this assumption. See *id.*

431. *Id.* at 336–37.

432. *Id.* at 337.

433. *Id.*

434. *Id.* (quoting *Bureau v. McDowell*, 256 U.S. 465, 475 (1921)).

435. See *id.*

of his fannypack, which he opened and handed to Kerr, and in which Kerr found no contraband. Kerr, however, proceeded to pat down Taylor's pants, and in this manner discovered four more baggies containing marijuana and two baggies containing LSD. Kerr then handcuffed Taylor, took him to a detention center operated by Seaside Land Company, and called the police.<sup>436</sup>

Following denial of his suppression motion, Taylor entered a conditional guilty plea and then appealed. The court of appeal affirmed. The court found no need to determine the legality of Kerr's search<sup>437</sup> because it concluded that the exclusionary rule and the Fourth Amendment applied only to the police, and "searches and seizures by private security employees have traditionally been viewed as those of a private citizen and consequently not subject to Fourth Amendment proscriptions."<sup>438</sup> The function of carrying out arrests was not one "traditionally exclusive to the state" because "[t]here have been citizen arrests for as long as there have been public police—indeed much longer."<sup>439</sup>

Nor, despite allegations that boardwalk security guards shared facilities with the police and had access to police radios, was the appellate court convinced that the security guards "operat[ed] jointly with the police," so that "their action should be imputed to the state."<sup>440</sup> The court noted that "the impetus for the arrests came from the security guards," and that there was no evidence of any "contracts or agreements" between the security force and the police.<sup>441</sup> Furthermore, and perhaps most basically, the appellate court stressed that the security guards simply were not the police:

[T]here is no evidence . . . that the security guards' uniform was in any way similar in color to that of the Santa Cruz police department. The guards wore badges and shoulder patches marked "security." They did not carry guns. Although they did not identify themselves verbally as security guards, they did not verbally claim to be police officers. The evidence showed that their private purpose was to patrol Seaside Land Company's property.<sup>442</sup>

Summing up, the court quoted an instructional pamphlet issued by state regulators: "A security guard is not a police officer. Guards do not have the

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436. See *People v. Taylor*, 271 Cal. Rptr. 785, 786–87 (Ct. App. 1990).

437. The court noted in passing that California's citizen arrest law does not authorize private individuals to search for or to seize contraband incident to an arrest. See *id.* at 787–88 (citing CAL. PENAL CODE § 846).

438. *Id.* at 789 (citing *United States v. Lima*, 424 A.2d 113, 118 (D.C. 1980) (en banc)).

439. *Id.* at 790 (quoting *Spencer v. Lee*, 864 F.2d 1376, 1380 (7th Cir. 1989)).

440. *Id.* at 790–92.

441. *Id.* at 791–92.

442. *Id.* at 792.

same job duties as police officers; they do not have the same training; and they do not have the same powers according to law."<sup>443</sup>

The decisions in *United States v. Lima*, *United States v. Antonelli*, and *People v. Taylor* are illustrative not only because, in each case, private security guards were treated as private rather than public actors, but also because the analysis in each case consisted largely of an appeal to precedent—how security guards have traditionally been viewed—coupled with the observation that private guards are distinguishable from public law enforcement officers—in their duties, in their powers, and in their dress. When private guards are more difficult to distinguish from the public police—either because the guards are in fact off-duty police officers, or because they have been sworn in as special patrolmen with police powers not shared by ordinary citizens—courts often treat the guards as agents of the state.<sup>444</sup> But so

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443. *Id.* (internal quotation marks omitted) (quoting CAL. DEP'T OF CONSUMER AFFAIRS, BUREAU OF COLLECTION AND INVESTIGATIVE SERVICES, POWERS TO ARREST—SECURITY GUARD TRAINING (1987 ed.)).

444. Cases involving moonlighting police officers typically examine a range of factors—including, for example, whether the officer was in uniform, whether he identified himself as a police officer, and whether department regulations declared officers always on duty—in an effort to determine whether the officer was “acting as” a law enforcement agent at the time of the events in controversy. See, e.g., *Laughlin v. Olszewski*, 102 F.3d 190, 192 n.1 (5th Cir. 1996); *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118 (7th Cir. 1995); *Owen v. State*, 490 N.E.2d 1130, 1134 (Ind. Ct. App. 1986); *State v. Carter*, 267 N.W.2d 385, 386 (Iowa 1978); *Alvarado v. City of Dodge City*, 702 P.2d 935, 940–41 (Kan. Ct. App. 1985); *State v. Wilkerson*, 367 So. 2d 319, 321 (La. 1979).

For “special patrolmen” cases, see, for example, *Woodward & Lothrop v. Hillary*, 598 A.2d 1142, 1144 & n.4 (D.C. 1991) (holding that store security guards were state actors because they were appointed as “special police officers” with “the same powers as a law enforcement officer to arrest without warrant for offenses committed within premises to which his jurisdiction extends” (quoting D.C. CODE ANN. § 23-582(a) (1989))); *Pratt v. State*, 263 A.2d 247, 250 (Md. Ct. Spec. App. 1970) (holding that *Miranda* rules apply to private security guards sworn in as “police officer[s]” in Maryland); *Commonwealth v. Leone*, 435 N.E.2d 1036, 1040 (Mass. 1982) (holding that the Fourth Amendment applies to investigatory activity of private guards commissioned as “special or deputy police officer[s]” because they “are formally affiliated with the sovereign and generally possess authority beyond that of an ordinary citizen in matters such as arrest and the use of weapons”); *People v. Eastway*, 241 N.W.2d 249, 250 (Mich. Ct. App. 1976) (holding that the Fourth Amendment applies to a security guard who is licensed by a state and has “the authority to arrest without a warrant in the same manner as a public police officer”); *People v. Mendoza*, 624 N.E.2d 1017, 1026 (N.Y. 1993) (holding that state action “may be present if a store detective functions as an agent of law enforcement . . . or is licensed to exercise police powers”). But cf. *State v. McDaniel*, 337 N.E.2d 173, 180 (Ohio Ct. App. 1975) (holding that a store security guard commissioned as a “special deputy sheriff” was not a state actor because there was “no statutory authority for a sheriff to commission special deputy sheriffs,” and no evidence “that the sheriff exercise[d] any control” over the guard).

Not surprisingly, courts have also found state action when private security guards carry out policies agreed to by local police departments. See, e.g., *El Fundi v. Deroche*, 625 F.2d 195, 196 (8th Cir. 1980). But cf., e.g., *State v. Buswell*, 460 N.W.2d 614, 619 (Minn. 1990) (holding that “[m]ere antecedent contact between law enforcement and a private party is inadequate to trigger

long as private police personnel occupy an awkward middle ground between public law enforcement and private citizens, courts overwhelmingly focus on the distinctions between the guards and the public police. Rare are the decisions questioning whether those distinctions should make a difference.

Partly because such decisions are so rare, they have a difficult time remaining good law. In the late 1970s and early 1980s, the highest courts of California and Montana, alarmed by the privatization of law enforcement, warmed to the proposition that private police, even without special powers, should be treated as state actors.<sup>445</sup> Writing in 1981, Professor Burkoff could express optimism that state courts, interpreting state constitutions, might lead the way toward a broad “[r]econsideration of the *Burdeau* private search doctrine.”<sup>446</sup> But the moment passed, and the renegade states returned to the fold—a return triggered in California by popular initiative,<sup>447</sup> and in Montana by further judicial contemplation of the vast weight of contrary case law.<sup>448</sup> In 1987, the increasing prominence of private security forces prompted West Virginia’s highest court to hold state

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the application of the exclusionary remedy under the Fourth Amendment,” and that “[i]t is only when the government takes some type of initiative or steps to promote the search, that a private citizen is deemed to be an agent or instrument of the government”).

445. See *People v. Zelinski*, 594 P.2d 1000, 1005–06 (Cal. 1979) (noting increased reliance on private security personnel, and holding state constitutional prohibitions applicable “when private security personnel conduct an illegal search or seizure while engaged in a statutorily-authorized citizen’s arrest and detention of a person in aid of law enforcement authorities”); *State v. Helfrich*, 600 P.2d 816, 819 (Mont. 1979) (holding that state constitutional restrictions on search and seizure “apply to private individuals as well as law enforcement officers”); see also *State v. Hyem*, 630 P.2d 202, 206 (Mont. 1981) (reaffirming *Helfrich* in part because of “the ever-increasing presence of private police”).

446. Burkoff, *supra* note 1, at 668.

447. Proposition 8, passed by California voters in 1982, amended the state constitution to prohibit “exclud[ing] evidence seized in violation of either the state or federal Constitution unless exclusion is compelled by the federal Constitution.” *In re Lance W.*, 694 P.2d 744, 753 (Cal. 1985); see also CAL. CONST. art. I, § 28(d). Both federal and state appellate courts have held that, “to the extent *Zelinski* expanded the concept of state action under the California Constitution beyond federal law, it was abrogated by Proposition 8.” *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989); accord *In re Christopher H.*, 278 Cal. Rptr. 577, 580 (Ct. App. 1991); *People v. Taylor*, 271 Cal. Rptr. 785, 789 (Ct. App. 1990).

448. See *State v. Long*, 700 P.2d 153, 156 (Mont. 1985) (holding the exclusionary rule inapplicable to nonfelonious private searches, in part because “[n]o other state has followed Montana’s lead in interpreting the privacy protections of a state constitution to be applicable to acts of private persons,” and, “[h]istorically, constitutions have been means for people to address their government”); see also *State v. Christensen*, 797 P.2d 893, 896–97 (Mont. 1990) (holding the exclusionary rule inapplicable even to felonious private searches, in light of “[t]he universal rule under both state and federal constitutions . . . that the exclusionary rule does not apply to evidence resulting from the actions of private individuals unless those individuals are acting as agents of the state”).

constitutional restrictions on searches, seizures, and custodial interrogations applicable to all statutorily authorized detentions, whether carried out by public officers or private citizens.<sup>449</sup> That decision, too, now appears a dead letter.<sup>450</sup>

Less out of principle than out of habit, state and federal courts alike resolve the ambiguous status of private police by grouping them with private citizens and distinguishing them sharply from the public police. Despite occasional rhetoric to the contrary, the decisions are conspicuously formalist; virtually everything turns on whether the state has vested private personnel with an official title. The enormous weight these cases place on symbolism and precedent, coupled with the Supreme Court's silence regarding the constitutional status of private police, suggests this is an area ripe for rigorous doctrinal analysis.

As we will see, however, the suggestion is overoptimistic. State action doctrine—famously dismissed as a “conceptual disaster area,”<sup>451</sup> and more charitably described by the Court itself as “not . . . a model of consistency”<sup>452</sup>—is all but useless in determining the proper treatment of private security personnel. But while state action doctrine has little to tell us about the private police, the private police have lessons to teach us about state action doctrine, and particularly about its application in the field of crimi-

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449. See *State v. Muegge*, 360 S.E.2d 216, 219–21 (W. Va. 1987).

450. See *State v. Farmer*, 454 S.E.2d 378, 383 n.7 (W. Va. 1994) (stating that evidence obtained in an illegal citizen's arrest is not excludable); *State v. Honaker*, 454 S.E.2d 96, 103–04 (W. Va. 1994) (holding that “police involvement must be evident before a statement is considered involuntary under the West Virginia Due Process Clause”); *State v. George Anthony W.*, 488 S.E.2d 361, 367 n.13 (W. Va. 1996) (citing *Honaker* for the broad proposition that “*State v. Muegge* has been overruled to the extent that it involves arrests by individuals other than the police”).

451. Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967). Later commentators have tended to echo Professor Black’s assessment. See, e.g., ALEXANDER & HORTON, *supra* note 383, at 82 (“No one disputes that ‘state action’ doctrine is hopelessly muddled.”); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 503–04 (1985) (“There still are no clear principles for determining whether state action exists.”); Julian N. Eule as completed by Jonathan D. Varat, *Transporting First American Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1545 (1998) (“The answer is seldom better than the question.”); Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982) (“[Black’s] statement would appear even more apt today.”); Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENTARY 379, 391 (1993) (“No area of constitutional law is more confusing and contradictory than state action.”); cf. TRIBE, *supra* note 393, § 18-2, at 1698 (“Plainly, the state action decisions fail as doctrine; the question is, do they make sense as anything else?”).

452. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting))).

nal procedure. It is therefore worth our time to try applying the general doctrines of state action to the private police.

### 3. The "Principles" of State Action

As good a starting point as any is *Lugar v. Edmondson Oil Co.*,<sup>453</sup> which has served as the touchstone for most of the Supreme Court's recent discussions of state action. The actual question in *Lugar* was not constitutional but statutory: whether a private creditor's prejudgment attachment of a debtor's property constituted conduct "under color of" state law within the meaning of 42 U.S.C. § 1983. The Court reasoned, however, that "the state-action and the under-color-of-state-law requirements are obviously related,"<sup>454</sup> and, more particularly, that any conduct that qualifies as state action necessarily is also action under color of state law.<sup>455</sup>

Writing for the Court, Justice White then set forth a two-part test for determining whether challenged conduct is "fairly attributable" to the government:

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.<sup>456</sup>

More recently, the Court has described the second inquiry as "often . . . factbound," but guided by "certain principles of general application."<sup>457</sup> Specifically,

[o]ur precedents establish that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies

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453. 457 U.S. 922 (1982).

454. *Id.* at 928.

455. *Id.* at 935.

456. *Id.* at 937. The Court found both requirements satisfied by a private party's invocation of a state law authorizing prejudgment attachment, but only to the extent that this action was challenged on the ground that the state statute was unconstitutional, and not on the ground that it was improperly invoked. "While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action." *Id.* at 941. The holding highlighted one of the oddities created by merging the state action and under-color-of-state-law inquiries: a private party is potentially liable under § 1983 only when part or all of the blame lies not with the private party but with the state.

457. *Edmonson*, 500 U.S. at 621.

on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority.<sup>458</sup>

The source for this list of relevant "principles," *Edmonson v. Leesville Concrete Co.*,<sup>459</sup> is one of two recent cases in which the Court has applied the *Lugar* "framework"<sup>460</sup> to the race-based use of peremptory challenges. These cases merit a brief detour, not only because they clarify *Lugar* but also because, like most criminal procedure cases, they involve claims raised in the context of trial proceedings.

In *Edmonson*, the Court held that a private litigant's exercise of peremptory strikes based on the race of potential jurors constituted state action in violation of the Equal Protection Clause of the Fourteenth Amendment; subsequently, in *Georgia v. McCollum*,<sup>461</sup> the Court reached the same conclusion about race-based peremptory challenges by a criminal defendant. In both cases, the Court thought it beyond question that peremptory strikes satisfy the first *Lugar* requirement because they "are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury."<sup>462</sup> Turning to the second *Lugar* requirement, both *Edmonson* and *McCollum* found that all three "principles" supported a finding of state action. First, civil litigants and criminal defendants exercising peremptory strikes rely heavily on "government assistance and benefits" because "the peremptory challenge system, as well as the jury system as a whole, 'simply could not exist' without the 'overt, significant participation of the government.'"<sup>463</sup> Second, peremptory challenges involve performance of a "traditional governmental function" because "the objective of jury selection proceedings is to determine representation on a governmental body."<sup>464</sup> Third, the harm produced by race-based challenges to jurors is "aggravated in a unique way by the incidents of governmental authority":<sup>465</sup> "the racial insult" inherent

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458. *Id.* at 621-22 (citations omitted); *accord Georgia v. McCollum*, 505 U.S. 42, 51 (1992).

459. 500 U.S. at 614.

460. *Id.* at 620; *McCollum*, 505 U.S. at 51.

461. 505 U.S. at 42.

462. *Edmonson*, 500 U.S. at 620; *accord McCollum*, 505 U.S. at 51.

463. *McCollum*, 505 U.S. at 51 (quoting *Edmonson*, 500 U.S. at 622).

464. *Edmonson*, 500 U.S. at 621, 626; *accord McCollum*, 505 U.S. at 52. The Court in *McCollum* found this conclusion particularly inescapable in the context of a criminal prosecution "because the selection of a jury in a criminal case fulfills a unique and constitutionally compelled governmental function." 505 U.S. at 52.

465. *Edmonson*, 500 U.S. at 621 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

in discrimination is “made more severe because the government permits it to occur within the courthouse itself.”<sup>466</sup>

To a reader uninitiated in the mysteries of state action jurisprudence, the reasoning of *Edmonson* and *McCollum* might seem oddly roundabout. Why bother searching for state action in the challenge raised by the criminal defendant or private civil litigant, when state action is so manifest in the trial court’s removal of the challenged juror? After all, race-based challenges affect the composition of juries only because trial judges go along with them.<sup>467</sup> By straining to find state action in the litigant’s request rather than in the judge’s compliance, the Court appeared to complicate things needlessly. Led by Justice O’Connor, three dissenters in *Edmonson* argued plausibly that “attorneys represent their clients,” and that “[i]t is antithetical to the nature of our adversarial process . . . to say that a private attorney acting on behalf of a private client represents the government for constitutional purposes.”<sup>468</sup> One of those three, Justice Scalia, separately characterized *McCollum* as reducing *Edmonson* “to the terminally absurd: [a] criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state.”<sup>469</sup> But even the *Edmonson* dissenters tacitly conceded that a peremptory challenge becomes effective only when the trial judge “acquiesce[s] . . . by excusing the juror.”<sup>470</sup> Why not simply declare the acquiescence unconstitutional and avoid the whole problem?<sup>471</sup>

The difficulty, of course, is that when trial judges acquiesce in peremptory challenges, they act with at least facial neutrality, and the Court has held that facial neutrality—that is, the absence of purposeful

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466. *Id.* at 628; accord *McCollum*, 505 U.S. at 53.

467. See *McCollum*, 505 U.S. at 53 (observing that, “[r]egardless of who precipitated the jurors’ removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race” (emphasis added)); *Edmonson*, 500 U.S. at 623–24 (noting that, “[w]hen a lawyer exercises a peremptory challenge, the judge advises the juror he or she has been excused”).

468. *Edmonson*, 500 U.S. at 641, 643 (O’Connor, J., dissenting).

469. *McCollum*, 505 U.S. at 69–70 (Scalia, J., dissenting); see also *id.* at 62–63 (O’Connor, J., dissenting) (calling “remarkable” and “perverse” the Court’s conclusion “that criminal defendants being prosecuted by the State act on behalf of their adversary when they exercise peremptory challenges during jury selection”).

470. *Edmonson*, 500 U.S. at 635 (O’Connor, J., dissenting); see also *McCollum*, 505 U.S. at 67 (O’Connor, J., dissenting) (arguing that the Court attaches too much significance to “the points that defendants exercise peremptory challenges in a courtroom and judges alter the composition of the jury in response to defendants’ choices”).

471. Even when the existence of state action is indisputable, it often matters whether that action can be imputed to private parties whom the government assisted or who assisted the government. This is true most obviously when a private plaintiff seeks money damages through a cause of action, like 42 U.S.C. § 1983, that lies only against defendants that are in some sense state actors. See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 945 (1982). *Edmonson* and *McCollum*, however, did not involve actions for damages; the sole question in each case was whether a verdict should be overturned on the ground that the jury was properly impaneled.

discrimination—generally suffices to satisfy the Equal Protection Clause.<sup>472</sup> If the only state action in *Edmonson* and *McCollum* was what the trial courts did, then the Constitution was violated only if the Equal Protection Clause prohibits the government not only from *making* discriminatory choices, but also from *honoring*—that is, giving legal effect to—discriminatory choices made by others. Delegating dirty work to private parties was the classic tactic of Jim Crow, and a tactic the Court was loath to countenance. But the central lesson of legal realism is that all legal rules giving effect to private decisions amount to a delegation of state authority.<sup>473</sup> As a consequence, if the Constitution prohibits the government from acquiescing in all private conduct in which the government could not itself engage, it goes far toward prohibiting private parties from doing what the government cannot, and precious little is left of the state action doctrine. This last result might not leave all observers dissatisfied, but it is one the Court has never been willing to accept.<sup>474</sup>

Among the lessons of *Edmonson* and *McCollum* is that even in cases in which some kind of state action appears obvious—and that may, after all, include all cases—application of constitutional norms may turn on who counts as part of the state. With this background in mind, let us consider the private police in light of the three factors the Court identified in *Edmonson* and *McCollum* as relevant to a determination whether particular conduct should be deemed “governmental in character”: the degree of reliance on “governmental assistance and benefits,” the presence or absence of a “traditional governmental function,” and the extent to which the harm is exacerbated in a “unique” fashion by “incidents of governmental authority.”<sup>475</sup> Each of these factors, we will see, suggests if taken at face value that private security guards should typically, or at least frequently, be categorized as state actors; the problem is that none of them provides a convincing basis for distinguishing private security guards from other private individuals.

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472. See *Washington v. Davis*, 426 U.S. 229, 238–48 (1976). On the connection between *Washington v. Davis* and the state action doctrine, see generally GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1717–25 (3d ed. 1996).

473. See, e.g., Morris R. Cohen, *Positivism and the Limits of Idealism in the Law*, 27 COLUM. L. REV. 237 (1927). For a recent, perceptive discussion of this lesson and its implications, see LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 26–48 (1996).

474. Hence the Court’s ambivalence regarding *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948), which held that judicial enforcement of racially restrictive covenants violated equal protection. The Court continues to treat *Shelley* as not only correct but canonical, see, e.g., *Edmonson*, 500 U.S. at 622, but it has steadfastly declined to extend the ruling. See discussion *infra* notes 548–550 and accompanying text.

475. *Edmonson*, 500 U.S. at 621–22.

### a. Governmental Assistance and Benefits

The Court in *Edmonson* cited two cases illustrating the relevance, for state action purposes, of "the extent to which the actor relies on governmental assistance and benefits": *Burton v. Wilmington Parking Authority*<sup>476</sup> and *Tulsa Professional Collection Services, Inc. v. Pope*.<sup>477</sup> In *Burton*, the Court concluded that a restaurant's refusal to serve blacks was state action, and hence covered by the Equal Protection Clause, because the restaurant leased space in a parking facility owned and operated by the State of Delaware, placing the restaurant and the state in "a position of interdependence."<sup>478</sup> *Pope* found state action in the operation of an Oklahoma statute requiring creditors to file claims with an estate within two months of public notice of the start of probate proceedings. The Court was quick to reaffirm that "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action,"<sup>479</sup> but reasoned that the involvement of Oklahoma probate courts in the operation of the two-month time bar was "so pervasive and substantial" as to constitute state action: a probate court appointed the executor or executrix, who then triggered the time bar by publishing notice to creditors; the court appeared routinely to order the executor or executrix to provide such notice; and Oklahoma law required proof of the notice to be filed with the probate court.<sup>480</sup>

Private security firms typically are not tenants in publicly owned buildings and do not work in close cooperation with the courts. But as Professor Burkoff among others has pointed out,<sup>481</sup> they enjoy other, arguably comparable forms of government assistance and benefits, even when they are not hired by the government. Cooperative arrangements between public and private police were already common in the 1970s,<sup>482</sup> and since then they have grown more common and more extensive.<sup>483</sup> The arrangements vary but usually involve, at a minimum, coordination of strategies and sharing of information, often including arrest and conviction

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476. 365 U.S. 715, 721-26 (1961).

477. 485 U.S. 478, 486 (1988).

478. *Burton*, 365 U.S. at 725.

479. *Pope*, 485 U.S. at 485; *accord*, e.g., *Edmonson*, 500 U.S. at 622.

480. *Pope*, 485 U.S. at 487. "The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given." *Id.*

481. See Burkoff, *supra* note 1, at 654-56.

482. See JAMES S. KAKALIK & SORREL WILDHORN, THE PRIVATE POLICE: SECURITY AND DANGER 94 (1977); Burkoff, *supra* note 1, at 654-55.

483. See CUNNINGHAM ET AL., *supra* note 27, at 245-65.

records.<sup>484</sup> Some police departments conduct training programs for private security personnel;<sup>485</sup> others share facilities and equipment.<sup>486</sup> And because so many police officers moonlight as security guards, “[p]rivate policing uses police that have been recruited, trained, and supported by government.”<sup>487</sup> Finally, in addition to these forms of tangible assistance, private security firms increasingly gain credibility and legitimacy by working in cooperation with the public police. In return, the police gain the opportunity to leverage their own resources—either by out-contracting<sup>488</sup> or simply by allowing private security to dampen the demand for public policing.<sup>489</sup> The road thus is straight and short from *Burton* and *Pope* to a conclusion that much if not all private policing constitutes state action.

The problem with this road is that it goes too many places. Public law enforcement officials cooperate with and assist all kinds of entities and individuals, not just private security firms. They work with banks to deter robberies, help train merchants to cut shoplifting, and consult with community groups on plans to make streets and parks safer. All these forms of cooperation, moreover, are sharply increasing: part of the point of “community policing” is to make “[m]obilizing communities for their own defense . . . a central strategy of policing, a mainline function that is the responsibility of every officer.”<sup>490</sup> If it is difficult to distinguish the government benefits enjoyed by private security firms from the assistance deemed dispositive in *Burton* and *Pope*, it is at least as hard to differentiate those benefits from the similar support the police provide to the broader community.<sup>491</sup>

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484. See *id.* at 255–62; KAKALIK & WILDHORN, *supra* note 482, at 94; *Policing for Profit*, *supra* note 5, at 22–24.

485. See CUNNINGHAM ET AL., *supra* note 27, at 256.

486. See, e.g., *People v. Taylor*, 271 Cal. Rptr. 785, 790–91 (Ct. App. 1990) (noting that private guards patrolling the Santa Cruz Boardwalk shared a detention center with the local police department and had access to police radios); Maureen Fan & John Marzulli, *Precinct to House Private, City Cops*, DAILY NEWS (New York), Feb. 17, 1998, at 20 (describing plans for New York City police officers and private guards to share a lower Manhattan substation).

487. Bayley & Shearing, *supra* note 5, at 590; see also Spitzer & Scull, *supra* note 76, at 26.

488. See discussion *supra* notes 50–56 and accompanying text.

489. See, e.g., Palango, *supra* note 71; Stark, *supra* note 49, at 47.

490. BAYLEY, *supra* note 26, at 104, 111; see also *id.* at 108–10; Bayley & Shearing, *supra* note 5, at 587–88.

491. Similar line-drawing problems have led to ambiguity regarding the reach of *Burton* in other contexts. In a pair of 1982 decisions, for example, the Court reasoned that private institutions funded and regulated by the state are not thereby transformed into state actors. See *Blum v. Yaretsky*, 457 U.S. 991, 1011–12 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 839–41 (1982). Both decisions refused to hold the state responsible in actions under 42 U.S.C. § 1983 for decisions made by private institutions—in one case a nursing home, in the other case a school—pursuant to their independent professional judgment. The Court reasoned that “a State normally can be held responsible for a private decision only when it has exercised coercive power or has

Nonetheless one's instinct is that the private police are different from banks, merchants, and community groups. Much of this instinct, of course, stems from the fact that the private police, unlike banks, merchants, and community groups, bear a particularly close resemblance to familiar government agents. They look and act like cops. So one turns naturally to the second of the *Edmonson-McCollum* factors: the presence of a "traditional governmental function."

#### b. Traditional Governmental Function

The idea that private parties become state actors when they step into the shoes of the government—the so-called "public function" doctrine—is traditionally associated with the Supreme Court's decisions in *Marsh v. Alabama*<sup>492</sup> and *Terry v. Adams*,<sup>493</sup> both of which were cited in *Edmonson* and *McCollum*. *Marsh* and *Terry*, decided half a century ago, are explosive in their potential but have been remarkably limited in their actual consequences. Indeed, few Supreme Court cases have been cited by litigants so frequently with such limited success. Litigants seeking to subject private security personnel to constitutional constraints have been particularly fond of *Marsh*. To see why that decision seems to promise them so much but has delivered so little, we need to examine, in some detail, both the case itself and the Supreme Court's subsequent efforts to make sense of it.

Like *Griffin*, *Marsh* was a trespassing prosecution. The case arose in Chickasaw, Alabama, a company town owned by the Gulf Shipbuilding Corporation. Grace Marsh, a Jehovah's Witness, was arrested—by a deputy sheriff paid by Gulf Shipbuilding—when she distributed religious literature on a sidewalk in Chickasaw, in violation of a company rule against unauthorized solicitation. She challenged her conviction on First Amendment grounds, but the Alabama courts reasoned that Gulf Shipbuilding, as a private party, was not governed by the First Amendment, or by the Due Process Clause of the Fourteenth Amendment, through which the First Amendment applies to the states.<sup>494</sup>

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provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004; *Rendell-Baker*, 457 U.S. at 838 n.6. Six years later, however, the Court unanimously found § 1983 applicable to medical care provided to prisoners by a private doctor under contract with the state. See *West v. Atkins*, 487 U.S. 42, 57 (1988). The key difference may have been that the prison doctor was "employed by the State to fulfill the State's constitutional obligations." *Id.* at 52 n.10. If so, then resolving the state action problem for private police may require addressing an even murkier issue: the extent of the state's obligation to provide minimally adequate police protection. See discussion *infra* Part IV.B.

492. 326 U.S. 501, 502–08 (1946).

493. 345 U.S. 461, 468–70 (1953).

494. See *Marsh v. State*, 21 So. 2d 558, 562–63 (Ala. App. 1945), *rev'd*, 326 U.S. 501 (1946).

The Supreme Court reversed. Writing for the Court, Justice Black observed that Chickasaw had "all the characteristics of any other American town," except that "all the property interests in the town are held by a single company."<sup>495</sup> Given the importance of free speech, the Court found this difference immaterial: "[w]hether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."<sup>496</sup> And the Court found the appeal to property rights unpersuasive in this context, reasoning that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."<sup>497</sup>

The phrase "public function" appeared in *Marsh* not to describe the streets and sidewalks of Chickasaw, but in reference to a comparison the Court drew to privately owned highways, bridges, ferries, and railroads. Because operation of these facilities "is essentially a public function," the Court noted, it was "subject to state regulation," and the Court reasoned that a state could neither require nor allow such regulated facilities to operate in a manner that discriminated against interstate commerce.<sup>498</sup> Justice Black conceded this situation was "not directly analogous"<sup>499</sup> to the case at hand, and Justice Frankfurter, concurring separately, specifically declined to join this portion of the majority opinion: "It does not seem to me to further Constitutional analysis to seek help for the solution of the delicate problems arising under the First Amendment from the very different order of problems which the Commerce Clause presents."<sup>500</sup>

The Court's reasoning in *Marsh* has never been easy to pin down. In his perceptive analysis of the case, Julian Eule identified "strands of no fewer than four theories—public function, appearance, waiver, and government complicity"—and hints of a fifth: "a suggestion of a guaranteed right to be informed and a concomitant government responsibility to ensure the free flow of information."<sup>501</sup> Over the past five decades, however, *Marsh* has come to be associated most closely with the idea that, at least in some cases,

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495. 326 U.S. at 502, 505; see also *id.* at 508 (noting that "Chickasaw does not function differently from any other town").

496. *Id.* at 507.

497. *Id.* at 506.

498. *Id.*

499. *Id.*

500. *Id.* at 511 (Frankfurter, J., concurring).

501. Eule & Varat, *supra* note 451, at 1555–56. Nor does this exhaust the possible readings. See, e.g., Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1010 n.17 (1987).

constitutional constraints should apply to private parties who carry out "public functions"<sup>502</sup>—or, in the language of *Edmonson* and *McCollum*, "traditional governmental functions."<sup>503</sup> Identifying such functions, however, has been difficult.<sup>504</sup> *Marsh* itself has been all but limited to its facts: Justice Black later characterized the holding as limited to private property that had "all the attributes of a town,"<sup>505</sup> and, after some vacillation, the Court echoed that view.<sup>506</sup> This may be why the Court today, when referring to the public function doctrine, commonly couples its reference to *Marsh* with a citation to *Terry*.<sup>507</sup>

At issue in *Terry* were the activities of a private organization, the Jaybird Democratic Association, which automatically enrolled as members all white voters in Fort Bend County, Texas and excluded blacks. For more than sixty years, the association had conducted elections to select candidates to run for nomination for county offices in the Democratic primary, and the winners of the Jaybird elections almost invariably had run unopposed in both the Democratic primaries and the general elections. The Court concluded this system violated the Fifteenth Amendment guarantee against racial abridgements of the right to vote, but was unable to produce a majority opinion identifying why constitutional limitations

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502. See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982); *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974); *Evans v. Newton*, 382 U.S. 296, 299 (1966).

503. *Georgia v. McCollum*, 505 U.S. 42, 51 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991).

504. The difficulty is exacerbated, as Professor Eule suggested, by confusion regarding the relative importance of conduct and appearance—whether performing a public function is principally a matter of acting like the state or of looking like the state. See Eule & Varat, *supra* note 451, at 1555 & n.68. This ambiguity has particular importance for efforts to apply the public function doctrine to private police. See discussion *infra* notes 532–537 and accompanying text.

505. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332 (1968) (Black, J., dissenting).

506. See *Hudgens v. NLRB*, 424 U.S. 507, 516–17 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 562 & n.10 (1972); see also *Flagg Bros.*, 436 U.S. at 158–59; Eule & Varat, *supra* note 451, at 1558 & n.80; Frederick F. Schauer, *Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433, 434 (1977).

For a widely cited lower court decision echoing the Court's current, narrow view of *Marsh*, see *United States v. Francoeur*, 547 F.2d 891, 893–94 (5th Cir. 1977) (finding that Disney World security personnel are not state actors, and distinguishing *Marsh* because "Disney World is not an open town fully accessible and available to all commerce," but rather "an amusement park to which admission is charged"). Such reasoning, of course, makes *Marsh* equally inapplicable to gated residential communities, which—by definition—are not "fully accessible" to the public. See Owens, *supra* note 1, at 1152. On private policing at Disney World, see CARL HIAASEN, TEAM RODENT: HOW DISNEY DEVOURS THE WORLD 27–35 (1998); Shearing & Stenning, *supra* note 34.

507. 345 U.S. 461 (1953). For a helpful discussion of *Terry*, see William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 23 (1961).

applied in the first place. A plurality, led by Justice Clark, found state action in the Jaybird election, concluding that the association operated, with the state's consent, as "the decisive power in the county's recognized electoral process."<sup>508</sup> Concurring separately, Justice Frankfurter reasoned that the Jaybird elections themselves were beyond constitutional purview, but that Texas had violated the Fifteenth Amendment by allowing the results of those elections to become, "by virtue of the participation and acquiescence of State authorities," the de facto results of the Democratic primaries.<sup>509</sup> The remaining three Justices concurring in the result nicely sidestepped the issue by locating the constitutional violation in "[t]he effect of the whole procedure, Jaybird primary plus Democratic primary plus general election."<sup>510</sup>

Given this ambiguity at the outset, it should come as no surprise that, as a state action decision, *Terry* has been little more generative than *Marsh*. The Supreme Court has relied significantly on the public function doctrine in only one subsequent case, *Evans v. Newton*,<sup>511</sup> which concerned a park operated for decades by the city of Macon, Georgia, but returned to private hands, under the terms of its original devise, when the city concluded it could not constitutionally continue to exclude blacks. Writing for the Court in *Evans*, Justice Douglas read *Marsh* and *Terry* to require imposition of constitutional constraints on any individuals or groups the state allowed to exercise "powers or functions governmental in nature,"<sup>512</sup> and he noted—tantalizingly for our present purposes—that a park, unlike a golf club or social center, "is more like a fire department or police department that traditionally serves the community."<sup>513</sup> In language bristling with implications for private policing in the 1990s, Justice Douglas reasoned that "[m]ass recreation through the use of parks is plainly in the public domain," and therefore that "state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment."<sup>514</sup>

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508. *Terry*, 345 U.S. at 484 (Clark, J., concurring). Joined by Chief Justice Vinson and by Justices Reed and Jackson, Justice Clark explained that "when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play." *Id.*

509. *Id.* at 477 (Frankfurter, J., concurring).

510. *Id.* at 469–70 (Black, J.). Justice Black's opinion was joined by Justices Douglas and Burton.

511. 382 U.S. 296, 299 (1966).

512. *Id.*

513. *Id.* at 302.

514. *Id.*

But what Justice Douglas gave with one hand he took away with the other, stressing that this particular park long had been, and apparently still was, "an integral part of the City of Macon's activities" being "swept, manicured, watered, patrolled, and maintained by the city."<sup>515</sup> Macon thus remained "entwined" in the park's management and control,<sup>516</sup> and Justice Douglas made clear, in the key sentence of his opinion, that the Court held only "that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector."<sup>517</sup>

Evans remains for all that the high point of the public function doctrine; today the doctrine holds far less promise for litigants hoping to apply constitutional restrictions to nominally private action. The pivotal move came in *Jackson v. Metropolitan Edison Co.*<sup>518</sup> Writing for the Court in that case, Justice Rehnquist reconceived the doctrine as applying only to the exercise of powers that "traditionally" have been "exclusively reserved to the State."<sup>519</sup> Since Jackson, no functions other than conducting elections for

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515. *Id.* at 301.

516. *Id.* at 299. In stressing the importance of this entwinement, Justice Douglas cited *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), in which the Court rejected, on the merits, a First Amendment challenge to piped music on buses operated by a private company under District of Columbia regulation. Justice Douglas read *Pollak* to find the bus company subject to constitutional limitations "because of the surveillance which federal agencies had over its affairs." *Evans*, 382 U.S. at 301; see also *id.* at 302. Later decisions, however, have read *Pollak* far more narrowly. In *CBS v. DNC*, 412 U.S. 94 (1973), the Court explained that *Pollak* had found "governmental action sufficient to trigger First Amendment protections on a record involving agency approval of the conduct of a public utility," but only because "Congress had expressly authorized the agency to undertake plenary intervention into the affairs of the carrier and it was pursuant to that authorization that the agency investigated the challenged policy and approved it on public interest standards." *Id.* at 119. A year later, in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the Court expressed doubt whether *Pollak* actually had held that the bus company's policy was state action, "or whether it merely assumed, *arguendo*, that it was and went on to resolve the First Amendment question adversely to the bus riders." *Id.* at 356. Furthermore, if there was state action in *Pollak*, the Court reasoned in *Jackson* that it was only because the District of Columbia Public Utilities Commission, acting on its own initiative, had conducted a full investigation into the piped music, and then had placed its "imprimatur" on the practice, concluding "not only that Capital Transit's practices were 'not inconsistent with public convenience, comfort, and safety,' but also that the practice 'in fact, through the creation of better will among passengers, . . . tends to improve the conditions under which the public ride.'" *Id.* at 356-57 (citation omitted). Dissenting in *Jackson*, Justice Marshall plausibly described the Court's opinion as "in effect restrict[ing] *Pollak* to its facts if . . . not discard[ing] it altogether." *Id.* at 371.

517. *Evans*, 382 U.S. at 301. Four years later, the Court whittled down the practical significance of *Evans v. Newton* even further, affirming a decision by the Georgia Supreme Court to return the park to the testator's heirs on the ground that the trust had become unenforceable. See *Evans v. Abney*, 396 U.S. 435, 437 (1970).

518. 419 U.S. at 345.

519. *Id.* at 352 (emphasis added).

public office and running an entire town have been deemed to qualify.<sup>520</sup> This has not troubled the Court. Writing again for the majority in *Flagg Bros. v. Brooks*,<sup>521</sup> Justice Rehnquist noted that, “[w]hile many functions have been traditionally performed by governments, very few have been ‘exclusively reserved to the State.’”<sup>522</sup> Resolution of debt disputes, *Flagg Bros.* held, falls outside the category of exclusive public functions because “[c]reditors and debtors have had available to them historically a far wider number of choices than has one who would be an elected public official, or a member of Jehovah’s Witnesses who wished to distribute literature in Chickasaw, Ala., at the time *Marsh* was decided.”<sup>523</sup>

In theory, policing may be different. The Court made a point to leave this question open in *Flagg Bros.*:

[W]e would be remiss if we did not note that there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of *Marsh* which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called “dispute resolution.” Among these are such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment.<sup>524</sup>

As I have discussed earlier, some common intuitions support the notion that policing is inherently public and governmental in a way that, say, resolution of debt disputes or even control of parklands is not.<sup>525</sup> Far from being twentieth-century inventions, these intuitions have ancient roots in the concept of the king’s peace—the original public function.<sup>526</sup> And they provide the basis for the most common argument for treating

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520. Strictly speaking, even these roles have not been performed “exclusively” by the government; otherwise the controversies in *Marsh* and *Terry* could never have arisen. Without the other qualifier in the *Jackson* test—“traditionally”—no private conduct could ever satisfy the test, even in theory.

521. 436 U.S. 149 (1978).

522. *Id.* at 158 (quoting *Jackson*, 419 U.S. at 352).

523. *Id.* at 162.

524. *Id.* at 163–64. In a footnote to this passage, the Court rejected the suggestion that this question was answered, or even addressed, in *Griffin v. Maryland*, 378 U.S. 130 (1964). See discussion *supra* notes 409–413 and accompanying text.

525. See discussion *supra* notes 102–104 and accompanying text; cf. *Gilmore v. City of Montgomery*, 417 U.S. 556, 574 (1974) (describing policing—along with “electricity, water, and . . . fire protection”—as “[t]raditional state monopolies”).

526. See discussion *supra* notes 137–144 and accompanying text.

private police as state actors.<sup>527</sup> Indeed, if policing is not a public function, it is hard to imagine that much else is. Policing, we might say, is a test case for the vitality of the public function doctrine.

But any effort to portray policing as a power "traditionally exclusively reserved to the State"<sup>528</sup> encounters two imposing obstacles. The first is that, despite the Court's suggestion in *Flagg Bros.*, no aspect of policing, neither patrol nor detection, has ever been "exclusively" performed by the government, and all have at one point or another been left largely to private initiative. Indeed, as we have seen, the history of public policing is virtually inseparable from the history of private policing.<sup>529</sup> A strong argument can be made that during the past century some part of policing has become "exclusively reserved to the state"—perhaps the role of public law enforcement as the peacekeepers of last resort. But that role remains public even in Southern California, where police privatization has gone further than anywhere else in the country. The roles in which private firms are increasingly supplanting public law enforcement—notably, routine patrol—are indeed roles that governments have exercised in most of the United States since the nineteenth century, but they are difficult if not impossible to characterize as exclusively reserved to the public sector.<sup>530</sup> If policing is a test case for the vitality of the public function doctrine, the doctrine can safely be declared moribund.

To some extent this problem can be traced to *Jackson* and *Flagg Bros.*: it arises because the Supreme Court has limited the public function doctrine to functions that traditionally have been exclusively public. Were the Supreme Court to retract that limitation, the difficulty would largely disappear. But then the Court would be faced with the forbidding task of finding some other basis for distinguishing functions that are essentially public from those that are essentially private. Not so long ago the Court abandoned this task as hopeless in the context of the Tenth Amendment, recognizing among other things that "the 'traditional' nature of a particular governmental

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527. See, e.g., Burkoff, *supra* note 1, at 644–58; Euller, *supra* note 1, at 683–84; Owens, *supra* note 1, at 1156–57; Braun & Lee, *supra* note 1, at 581–82; Caffuzzi, *supra* note 1, at 246–47; Gagel, *supra* note 1, at 1817–27, 1849; *Regulation of Private Police*, *supra* note 1, at 548–49; *Shoplifting Law*, *supra* note 1, at 310–11.

528. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).

529. See discussion *supra* Part II.

530. The same obviously is true of the more limited function of arresting suspected offenders, a point that has not escaped the lower courts: "Arrest has never been an exclusively governmental function . . . There have been citizen arrests for as long as there have been public police—indeed much longer." *People v. Taylor*, 271 Cal. Rptr. 785 (Ct. App. 1990) (quoting *Spencer v. Lee*, 864 F.2d 1376, 1380 (7th Cir. 1989)).

function can be a matter of historical nearsightedness; today's self-evidently 'traditional' function is often yesterday's suspect innovation."<sup>531</sup>

No doctrinal change, moreover, could obviate a second, more fundamental obstacle to deeming private policing state action on the ground that it carries out a "traditional governmental function": the problem of distinguishing private security personnel from other private individuals, like the agents of McDowell's employer in *Burdeau*. As long as we have a state action doctrine in criminal procedure, a focus on public function ultimately does little better than a focus on government benefits and assistance in making a case for treating private security guards but not neighbors, shopkeepers, and flight attendants as state actors.

There is one difference, of course, between security guards on the one hand and flight attendants on the other: security guards, by design, look like cops. They wear similar uniforms and similar badges; often they drive similarly marked patrol cars. As Adelaide Lima argued unsuccessfully, they "go around 'walking, talking, acting and getting paid like policemen.'"<sup>532</sup> Concentrating on such matters of form may not be as silly as it seems. After all, Justice Black's opinion for the Court in *Marsh* stressed among other things the physical resemblance between Chickasaw and "any other American town," noting that the property owned by Gulf Shipbuilding could not be distinguished from the surrounding neighborhood "by anyone not familiar with the property lines."<sup>533</sup> And uniforms, far more than powers, were a focal point—often the focal point—of nineteenth-century debates over the formation of centralized, professional police departments.<sup>534</sup> From a practical standpoint, as well, giving doctrinal significance to the appearance of security guards has some appeal: if private firms choose to "borrow the halo and symbols of authority (uniform, gun, badge, accessories) associated with public enforcement,"<sup>535</sup> perhaps they should also assume the responsibilities imposed on the public police.

The difficulty with this argument is twofold. First, of course, there is the familiar question of degree: how much resemblance should be required before private police become state actors? The second, more serious prob-

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531. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 544 n.9 (1985). The Court's opinion in *Jackson* reflected a similar recognition. See *Jackson*, 419 U.S. at 353–54.

532. *United States v. Lima*, 424 A.2d 113, 121 (D.C. 1980) (en banc). For discussion of *Lima*, see *supra* notes 419–428 and accompanying text.

533. *Marsh v. Alabama*, 326 U.S. 501, 502–03 (1946); see also *TRIBE*, *supra* note 393, § 12-24, at 995 & n.55 (noting the role of "imagery" in *Marsh*); Eule & Varat, *supra* note 451, at 1555 (suggesting that part of the Court's reasoning was that, "[i]f it looks like a duck, swims like a duck, and quacks like a duck, then it must be a duck").

534. See discussion *supra* notes 200, 232–237 and accompanying text.

535. Spitzer & Scull, *supra* note 76, at 26.

lem has to do with agency. Particularly in the field of criminal procedure, the state action doctrine typically is less about what constraints shall be placed on private action, and more about when the state shall be held accountable for private action. Allowing this decision to turn on how private agencies choose to clothe themselves seems odd: why should such private choices determine whether, for example, evidence should be admissible in a criminal case brought by the state? One possible answer is that the private choices here are made possible by a public choice: by allowing private guards to dress like police officers, the state in effect has delegated symbolic authority to private security firms.<sup>536</sup> But this answer simply brings

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536. Some jurisdictions regulate the uniforms worn by private security personnel. The regulations generally aim not to ration symbolic authority but simply to prevent public confusion; they restrict denotation but not connotation. See, e.g., ARIZ. REV. STAT. ANN. § 32-2635 (West 1992) (requiring that the uniforms worn by security guards "will not deceive or confuse the public or be identical with that of any law enforcement officer"); CAL. BUS. & PROF. CODE § 7539(e) (West 1995) (prohibiting private investigators from wearing uniforms "with the intent to give an impression" that they are government officers); *id.* § 7583.38 (allowing local governments to regulate uniforms worn by private patrol guards "to make the uniforms... clearly distinguishable" from those worn by "local regular law enforcement officers"); 225 ILL. COMP. STAT. ANN. 446/85(4) (West 1998) (requiring that the uniforms of private security officers do not cite the words "police, sheriff, highway patrol, trooper, or law enforcement"); MICH. COMP. LAWS ANN. § 338.1069 (West 1992) (requiring that security guard uniforms "shall not deceive or confuse the public or be identical with that of a law enforcement officer"); MINN. STAT. ANN. § 626.88 (West Supp. 1998) (allowing uniforms of security guards to be "any color other than those specified for peace officers"); N.H. REV. STAT. ANN. § 106-F:131 (Supp. 1998) (prohibiting use of the word "police" on any security guard badge); N.M. STAT. ANN. § 61-27A-12 (Michie 1998) (prohibiting private investigators from wearing uniforms "with the intent to give an impression" that they are government officers); OHIO REV. CODE ANN. § 4749.08(B) (Anderson 1998) (requiring uniforms to be designed so "as to avoid confusion of a private investigator, security guard provider, or registered employee with any law enforcement officer"); OKLA. STAT. ANN. tit. 59, § 1750.9 (West 1989) (prohibiting wearing of uniforms by security guards "that would lead a person to believe that [the guard] is connected in any way" with the federal or a state government); *id.* § 1750.10 (prohibiting use of the words "police," "deputy," or "patrolman" on any security guard uniform); TENN. CODE ANN. §§ 62-35-127 to -128 (1997) (requiring security guards to affix a badge or insignia over the left breast pocket of their uniform that is distinct in design from that used by any law enforcement agency in the state, and prohibiting any badge or insignia that "tends to indicate that such person is a sworn peace officer" or "includes the word 'police'"); VA. CODE ANN. § 52-9.2 (Michie 1998) (prohibiting guards from wearing any uniform identical to an official state uniform or "so similar in appearance as to be likely to deceive the casual observer"). But cf. HAW. REV. STAT. ANN. § 463-11 (Michie 1998) (prohibiting private investigators and guards from wearing any uniform "capable of being associated with" the "uniform of any government law enforcement organization").

Of course, the uniforms worn by private security guards rarely if ever carry all the symbolic authority of the public police; this is one reason why many merchants and community associations prefer to hire uniformed off-duty police officers. See Stark, *supra* note 49, at 42. And some private patrols try hard not to look like cops. In Los Angeles, for example, security guards employed by the Downtown Center Business Improvement District wear purple polo shirts, guards in the Fashion District BID wear yellow, "and officials in the fledgling Tarzana district are considering a bright green theme—in keeping with the jungle motif of Edgar Rice Burroughs, creator of both

the difficulty into sharper relief because it suggests that the state "action" here is really inaction—acquiescence—and, for reasons already discussed, once state action is understood to include acquiescence, the state action doctrine begins to unravel.<sup>537</sup>

### c. Incidents of Governmental Authority

One encounters similar problems when assessing private policing in light of the last of the three "principles" that the Court in *Edmonson* and *McCollum* suggested should guide determinations whether to treat particular conduct as "governmental in character," namely "whether the injury caused is aggravated in a unique way by the incidents of governmental authority."<sup>538</sup> As authority for this last principle, the Court cited "the most problematic and controversial of the state action cases,"<sup>539</sup> *Shelley v. Kraemer*.<sup>540</sup>

We have become so accustomed to thinking of *Shelley* as perplexing that it is easy to forget how straightforward the decision can appear at first reading. At issue in the case was whether judicial enforcement of racial restrictive covenants violated the Equal Protection Clause of the Fourteenth Amendment. Without dissent the Court held that it did. When judges enforce such agreements, the Court reasoned, they put "the full coercive power of government" and "the clear and unmistakable imprimatur of the State" at the disposal of those wishing to limit property ownership to whites; this goes beyond "merely abstain[ing] from action, leaving private individuals free to impose such discriminations as they see fit."<sup>541</sup> And for purposes of the Fourteenth Amendment, the Court explained, the phrase "[s]tate action . . . refers to exertions of state power in all forms,"<sup>542</sup> including the actions "of judicial officers in their official capacities,"<sup>543</sup> and specifically including the exercise by those officials of "the power of the State to create and enforce property interests."<sup>544</sup> Today, now that the lessons of legal real-

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Tarzan and Tarzana." Sue Fox, *Security Guards May Remain Force of a Different Color*, L.A. TIMES, Mar. 18, 1999, at B6.

537. See discussion *supra* notes 473–474 and accompanying text.

538. *Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991)).

539. LAURENCE H. TRIBE, *Refocusing the "State Action" Inquiry: Separating State Acts from State Actors*, in *CONSTITUTIONAL CHOICES* 246, 259 (1985).

540. 334 U.S. 1 (1948).

541. *Id.* at 19–20.

542. *Id.* at 20.

543. *Id.* at 14.

544. *Id.* at 22.

ism have become commonplace, the reasoning in *Shelley* can seem unremarkable, if not "irresistibly correct."<sup>545</sup>

The problem, of course, is that state action similar to that involved in *Shelley* can be found whenever a court does almost anything, from enjoining a trespass, to awarding damages for an assault, to enforcing a contract.<sup>546</sup> And if all the state action doctrine means is that our private conduct is free from constitutional constraint as long as we do not want government protection against trespasses, torts, or breaches of contract, it does not mean much.<sup>547</sup> Recognizing this difficulty, the Supreme Court simply refused to take *Shelley* to its logical conclusion,<sup>548</sup> and over time limited the decision for practical purposes to cases involving racially restrictive covenants.<sup>549</sup>

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545. Van Alstyne & Karst, *supra* note 507, at 44; see also *id.* at 49; Friendly, *supra* note 451, at 1292.

546. For elaboration of this familiar point, see, for example, Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENTARY 361, 362–64 (1993); Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1957); Seidman, *supra* note 451, at 391; Van Alstyne & Karst, *supra* note 507, at 45–46.

547. Cf., e.g., TRIBE, *supra* note 393, § 18-2, at 1697 (noting that the reasoning of *Shelley* "consistently applied, would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement"); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29–30 (1959) ("May not the state employ its law to vindicate the privacy of property against a trespasser, regardless of the grounds of his exclusion, or does it embrace the owner's reasons for excluding if it buttresses his power by the law?").

548. As did the lower courts. See, e.g., Van Alstyne & Karst, *supra* note 507, at 53.

549. See, e.g., *Evans v. Abney*, 396 U.S. 435 (1970). Regarding this case, see discussion *supra* note 517. Even in cases involving racially restrictive covenants, application of *Shelley* has not been free of controversy. The court orders struck down in *Shelley* gave equitable relief against non-whites who purchased property in violation of racially restrictive covenants. When the Court extended *Shelley* five years later to bar damage awards against whites who broke racially restrictive covenants by selling their property to nonwhites, the decision drew a sharp dissent from Chief Justice Vinson, who had written for the Court in *Shelley*. See *Barrows v. Jackson*, 346 U.S. 249, 260–61 (1953).

In contrast, the Court has repeatedly concluded without difficulty that "the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.51 (1982); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); TRIBE, *supra* note 393, § 18-6, at 1711–15 (juxtaposing *Shelley* and *Sullivan*). None of these cases cite *Shelley*, nor have they been extended beyond the area of the First Amendment.

The Court also omitted any mention of *Shelley* in *Pennsylvania v. Board of Directors*, 353 U.S. 230 (1957), which prohibited a municipally administered trust from carrying out the terms of a racially discriminatory bequest. The Court read this decision in *Griffin* "to establish that to the extent that the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination and violates the Fourteenth Amendment," *Griffin v. Maryland*, 378 U.S. 130, 136 (1964), but has construed it more recently to hold only that the college built and maintained pursuant by the trust "was nevertheless a governmental actor for

Writing for the Court recently, Justice Scalia summed up the now prevailing view of *Shelley*: “[a]ny argument driven to reliance upon an extension of that volatile case is obviously in serious trouble.”<sup>550</sup>

Nonetheless the decision remains on the books, and it hardly has to be stretched to reach the case of a criminal prosecution based in part on evidence obtained by private police. The Fourth, Fifth, and Sixth Amendments are all enforced, for the most part, by excluding evidence in criminal cases. The grounds for exclusion differ, depending upon which constraint is at issue. Where the Fifth Amendment is concerned, the introduction of compelled testimony at trial is understood to be the violation;<sup>551</sup> the Fourth Amendment exclusionary rule, in contrast, has been justified primarily as a means of deterring violations, or avoiding judicial acquiescence and complicity in violations;<sup>552</sup> whether the Sixth Amendment is more like the Fourth or the Fifth in this respect remains unclear.<sup>553</sup> But regardless whether evidentiary exclusion is required because admission of the evidence is itself wrongful, or because admission of the evidence would constitute judicial encouragement of, or acquiescence or complicity in, some collateral wrongdoing, it is hard to avoid seeing state action in the use of particular evidence against a criminal defendant—no matter whether the evidence was generated by a government agent or a private individual.

As Professor Burkoff has argued,

[w]hen the State affirmatively accepts illegally seized evidence in its criminal justice system, thereby authorizing or encouraging actions by private parties that would be unconstitutional if performed by

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constitutional purposes because it was operated and controlled by a board of state appointees, which was itself a state agency,” *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995).

550. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 282 n.14 (1993); cf., e.g., *Mahoney v. NOW*, 681 F. Supp. 129, 133 (D. Conn. 1987) (noting that “subsequent decisions have carefully limited Shelley to its facts”); *People v. Brown*, 660 N.E.2d 964, 970 (Ill. 1996) (observing that “courts and commentators have viewed the Shelley Court’s finding of State action with suspicion”); *Duncan Kennedy*, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1352 (1982) (suggesting that the reasoning in *Shelley* “succeeded so well that it failed”).

551. See, e.g., *United States v. Balsys*, 118 S. Ct. 2218, 2232 & nn.12–14 (1998). The Supreme Court’s puzzling characterizations of the *Miranda* protections have left unclear whether *Miranda* can be violated without introducing a suspect’s statements against him in court. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 305–06 (1985); *New York v. Quarles*, 467 U.S. 649, 654 (1984); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

552. See, e.g., *United States v. Leon*, 468 U.S. 897, 906 (1984).

553. Compare *Massiah v. United States*, 377 U.S. 201, 207 (1964) (“All that we hold is that the defendant’s own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial.”), with *United States v. Henry*, 447 U.S. 264, 274 (1980) (“By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry’s Sixth Amendment right to counsel.”).

governmental officials, it ignores reality to then assert that there is no "sufficiently close nexus between the State and the challenged action."<sup>554</sup>

In an important respect the nexus is closer than in *Edmonson*, which dealt with peremptory challenges by private civil litigants, and *McCollum*, which concerned peremptory challenges by criminal defendants, because evidence against the accused in a criminal case not only is ruled admissible by a judge, but also is offered in the first instance by a prosecutor, "a quintessential state actor."<sup>555</sup>

But this really is not an argument for treating private police as state actors: it is an argument for overruling *Burdeau* and altogether eliminating the state action requirement in criminal procedure, at least when, as is usual, the remedy sought is suppression of evidence against an accused. Like the other two factors listed in *Edmonson* and *McCollum* as guides for identifying state action, the third factor—"whether the injury caused is aggravated in a unique way by the incidents of governmental authority"—thus provides no basis for distinguishing private police either from public police or from other private individuals.

#### 4. Disaggregating the State Action Problem

Before turning to the lessons to be drawn from the remarkable uselessness of state action doctrine in cases involving the private police, one additional feature of that doctrine remains to be explored. In criminal procedure as elsewhere, state action doctrine is strikingly unified. Courts generally have treated as interchangeable the questions whether private security personnel are state actors for purposes of the Fourth Amendment exclusionary rule, the requirements of *Miranda*, and the color-of-law element of 42 U.S.C. § 1983.<sup>556</sup> But perhaps the most common scholarly suggestion for disentangling state action doctrine is to pay greater attention to the precise nature of the right asserted and the remedy requested.<sup>557</sup> One

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554. Burkoff, *supra* note 1, at 666 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

555. *Georgia v. McCollum*, 505 U.S. 42, 50 (1992). In this respect, the evidence at issue in a typical suppression motion most closely resembles the peremptory challenges not in *Edmonson* or *McCollum* but in *Batson v. Kentucky*, 476 U.S. 79 (1986), which provided the basis for *Edmonson* and *McCollum*, and in which state action was not even an issue.

556. See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982); *United States v. Antonelli*, 434 F.2d 335, 337 (2d Cir. 1970); *City of Grand Rapids v. Impens*, 327 N.W.2d 278, 280 (Mich. 1982).

557. See, e.g., ALEXANDER & HORTON, *supra* note 383, at 22; TRIBE, *supra* note 393, § 18-3, at 1698; Eule & Varat, *supra* note 451, at 1545-46.

might hope, therefore, that the problem sketched in the preceding pages could be dissolved by disaggregation, replacing a single, abstract question with a range of more concrete inquiries. Unfortunately, disaggregation leaves the dilemmas of state action doctrine intact, although it does allow us to see them more clearly.

Take, for example, a case like *Lima*<sup>558</sup> or *Taylor*,<sup>559</sup> presenting the question whether the exclusionary rule should apply to an allegedly illegal search by private police. There is no particular reason this question must be answered the same way as the separate question, posed in cases like *United States v. Antonelli*,<sup>560</sup> whether the *Miranda* rules should apply to security guards. The concerns in Fourth Amendment cases may differ from those in *Miranda* cases, and private policing—or some forms of some private policing—may raise one set of concerns but not the other. Furthermore, a case like *Lima* or *Taylor* can be viewed as asking not one state action question, but two. The first is whether the Fourth Amendment provides a substantive right against unreasonable searches or seizures by private police; the second is whether the Fourth Amendment or any other part of the Constitution requires the suppression of evidence obtained improperly by private police.

The answer to the second question could of course depend on what makes the search or seizure improper; the Constitution might require an exclusionary remedy for certain kinds of transgressions but not for others. For example, it might require suppression when the Constitution is violated, but not when statutes are violated. This is in fact how the Supreme Court has interpreted the remedial requirements of the Fourth Amendment for searches and seizures by public law enforcement personnel. Ever since *Olmstead v. United States*,<sup>561</sup> the Court consistently has found no constitutional right to suppression for nonconstitutional violations.<sup>562</sup> But the Court has never satisfactorily explained this result, and neither has anyone else. One possible explanation is that the Constitution requires no particular remedy to secure rights it does not itself grant: if the government remains free to repeal the right, it should have the lesser power to decline

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558. 424 A.2d 113 (D.C. 1980) (en banc); see discussion *supra* notes 419–428 and accompanying text.

559. 271 Cal. Rptr. 785 (Ct. App. 1990); see discussion *supra* notes 436–443 and accompanying text.

560. 434 F.2d 335 (2d Cir. 1970); see discussion *supra* notes 429–435 and accompanying text.

561. 277 U.S. 438 (1928), overruled on other points by *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967).

562. See, e.g., *United States v. Caceres*, 440 U.S. 741, 751 (1979); *On Lee v. United States*, 343 U.S. 747, 754 (1952).

enforcing the right through evidentiary exclusion.<sup>563</sup> The problem with this explanation is that, here as elsewhere,<sup>564</sup> it is not obvious that the greater power should include the lesser.

The Court itself seems to have recognized the problem. After concluding in *United States v. Caceres*<sup>565</sup> that IRS regulations on the use of electronic surveillance in tax investigations were not constitutionally mandated, the Court noted that "it does not necessarily follow . . . as a matter of either logic or law, that the agency had no duty to obey them."<sup>566</sup> Nonetheless the Court declined on prudential grounds to require suppression of evidence the IRS had obtained in violation of its own rules: "we cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures."<sup>567</sup> A similar argument could of course be made against applying the exclusionary rule to statutory violations: perhaps this would deter Congress and state legislatures from enacting further restrictions. The argument can even be—and has been—extended to constitutional violations: maybe "[j]udges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated."<sup>568</sup> No version of the argument is wholly implausible, but at this point only the last can claim to be anything more than pure speculation.

Just as exclusion could be warranted without a prior violation of the Fourth Amendment, so prior violation of the Fourth Amendment does not necessarily require exclusion.<sup>569</sup> The Supreme Court has instructed that the exclusionary rule should apply only when its incremental value in deterring constitutional violations outweighs its costs for "truth-finding" and law

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563. Cf. *Arnett v. Kennedy*, 416 U.S. 134, 153–54 (1974) (plurality opinion) (suggesting that when Congress grants a substantive right but restricts the procedures through which it may be invoked, litigants "must take the bitter with the sweet").

564. See, e.g., Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

565. 440 U.S. at 741.

566. *Id.* at 751 n.14.

567. *Id.* at 755–56.

568. Amar, *supra* note 3, at 799; see also, e.g., John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1036–37 (1974); cf. Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2015 n.66, 2022 (1998) (suggesting that the general practice of granting automatic reversal of any conviction tainted by race-based peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), has led courts in certain cases to credit "somewhat dubious prosecutorial explanations," and concluding that "when courts cannot calibrate the remedy, they fudge on the right instead").

569. Application of the Fourth Amendment to private policing could have important consequences regardless of whether the exclusionary rule also applies. For example, it could subject private security firms and their employees to tort liability under 42 U.S.C. § 1983, which in turn would make prevailing plaintiffs eligible for awards of attorneys' fees.

enforcement.<sup>570</sup> The Court has allowed the use, for example, of certain evidence "obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment."<sup>571</sup> In similar spirit, lower courts sometimes reason that applying the exclusionary rule to the activities of private police would do no good.<sup>572</sup> As Professor LaFave has expressed the point, "the exclusionary rule would not likely deter the private searcher, who is often motivated by reasons independent of a desire to secure criminal conviction and who seldom engages in searches upon a sufficiently regular basis to be affected by the exclusionary sanction."<sup>573</sup> But LaFave also concludes that

[w]here private police actually supplant the public police or deal regularly with the public, particularly if it may be said they are not disinterested in criminal convictions as an aid to the private objectives of their employer, it would be sound as a matter of law and policy to hold those police subject to the commands of the Fourth Amendment.<sup>574</sup>

LaFave's discussion is illuminating in two ways. First, LaFave recognizes, as most courts have not, that simple cost-benefit assessments cannot justify sharply limiting the exclusionary rule to searches and seizures performed by the public police. It may be true that the exclusionary rule does little to prevent improper actions not aimed at gathering evidence for use in a criminal prosecution.<sup>575</sup> It may also be true that private police generally care more about protecting their clients than about enforcing the law. But these two functions obviously overlap; this is why there are so many cases like *Lima* and *Taylor*, and why courts have had so much difficulty determining whether moonlighting police officers are acting as police officers or private employees.<sup>576</sup> Moreover, the mixed motives of private security personnel do little to distinguish them from the public police, who also spend most of their energies pursuing objectives other than evidence collec-

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570. *United States v. Leon*, 468 U.S. 897, 907 (1984) (quoting *United States v. Payner*, 447 U.S. 727, 734 (1980)).

571. *Id.* at 909 (quoting *Illinois v. Gates*, 462 U.S. 213, 255 (1983) (White, J., concurring)); see also *Arizona v. Evans*, 514 U.S. 1 (1995); *Illinois v. Krull*, 480 U.S. 340 (1987); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). For a helpful discussion of this and other restrictions on the scope of the exclusionary rule, see Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2504–32 (1996).

572. See, e.g., *State v. Long*, 700 P.2d 153, 157 (Mont. 1985).

573. *LAFAVE*, *supra* note 1, § 1.8(a), at 219–20.

574. *Id.* at 251.

575. Even this is far from certain. See, e.g., Adina Schwartz, "Just Take Away Their Guns": *The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317, 325, 347–59 (1996).

576. See discussion *supra* note 444.

tion.<sup>577</sup> The easy supposition that the exclusionary rule will deter police officers but not security guards is yet another manifestation of the powerful yet erroneous supposition that the public and private realms can be cleanly distinguished based on the functions they perform.

LaFave's discussion also illustrates how arguments about whether to apply the Fourth Amendment to private security personnel often get mixed up with arguments about whether to apply the exclusionary rule. The confusion is unfortunate because it perpetuates not only the prevailing, largely unexamined notion that the exclusionary rule must logically apply only to constitutional violations, but also the converse assumption that if the exclusionary rule does not apply to private policing, neither does the Fourth Amendment. Considering the two issues separately helps to bring them into sharper focus. But it does not begin to resolve them. For reasons already discussed, the wisdom of admitting evidence seized illegally by private security personnel is far from apparent. Similarly, setting aside the question of remedy does not make any easier the question when, if ever, the Fourth Amendment should apply to private policing. The most obvious manifestation of state action in a criminal case—the state's introduction of evidence to secure a criminal conviction—no longer is part of the picture. But the state remains present in other ways deemed significant by the Supreme Court's state action jurisprudence: it delegates arrest and detention authority, it enters into arrangements for cooperative policing, and it cedes to private firms responsibilities often viewed today as quintessentially governmental. Disaggregating state action doctrine clarifies the choices to be made, but it does not make those choices for us. Nor does it provide a way to avoid the inherent inconsistencies of the public-private divide.

### C. Provisional Lessons

#### 1. Doctrinal Disorder and Dialectic Development

In the previous pages, I have tried to show the difficulty of drawing a principled state action line in constitutional criminal procedure, and more particularly of reaching a principled determination regarding the proper

577. See, e.g., ERIC J. SCOTT, CALLS FOR SERVICE: CITIZEN DEMAND AND INITIAL POLICE RESPONSE 55 (1981); Egon Bittner, *The Police on Skid Row: A Study of Peacekeeping*, 32 AM. SOC. REV. 699 (1967), reprinted in EGON BITTNER, ASPECTS OF POLICE WORK 30 (1990); Jack R. Greene & Carl B. Klockars, *What Police Do*, in THINKING ABOUT POLICE 273 (Carl B. Klockars & Stephen D. Mastrofski eds., 2d ed. 1991). On the difficulties this poses for the deterrence function of the exclusionary rule, see, for example, *Terry v. Ohio*, 392 U.S. 1 (1968); Edward L. Barrett, Jr., *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 54–55; Kaplan, *supra* note 568, at 1033.

treatment of private security personnel. For many this difficulty will be unsurprising—yet another failure of the public-private distinction. Others, however, may have harbored hopes that in criminal procedure, at least, the distinction is unproblematic. Alas no. The Supreme Court's state action jurisprudence fails to provide firm reasons for distinguishing private police either from public police or from the public at large. State courts and lower federal courts have resolved the problem more out of habit than out of principle. Disaggregating the problem makes many things clearer, but not the answers.

One response to this predicament would be to jettison the state action doctrine altogether in criminal procedure.<sup>578</sup> I think that would be the wrong response, for three reasons.

First, if aimed at ridding criminal procedure of the troublesome distinction between public and private, attacking the state action doctrine would be futile. As Professor Seidman has stressed, the notion of a private realm, beyond the limits of government control and government responsibility, is integral not only to the state action doctrine, but also to the very notion of individual rights.<sup>579</sup> This is manifestly true of the Fourth Amendment, which the Supreme Court has interpreted to protect "reasonable expectations of privacy,"<sup>580</sup> and the Fifth Amendment, which the Court has construed to safeguard an area of autonomous choice.<sup>581</sup> It is true as well of the entrapment doctrine, which blocks prosecution only when "the criminal design originates with the officials of the government."<sup>582</sup> For better or worse, the public-private distinction permeates the law of criminal procedure. The whole edifice of protections assumes there are areas of private activity worth protecting, in part because the government is not implicated in them. And criminal procedure makes sense only against the background of substantive criminal law, which itself builds on the public-private distinction through pervasive reliance on the concept of individual guilt. That concept is incoherent without "the notion that individuals

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578. Cf., e.g., *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc) (Easterbrook, J.) (opining in a different context that a "line that cannot be policed is not a line worth drawing in constitutional law"); *Chemerinsky, supra* note 451, at 555 (arguing for abolition of the state action doctrine generally, in part because it "makes no sense").

579. See Seidman, *supra* note 451, at 393, 401. For a similar argument, see Karst, *supra* note 393, at 1737.

580. E.g., *Alderman v. United States*, 394 U.S. 165, 179 n.11 (1969); *Terry*, 392 U.S. at 8; *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

581. See, e.g., *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987); *Miranda v. Arizona*, 384 U.S. 436, 469 (1966); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

582. *Sorrells v. United States*, 287 U.S. 435, 442 (1932); *accord United States v. Russell*, 411 U.S. 423, 433 (1973); *Sherman v. United States*, 356 U.S. 369, 372 (1958).

can make some decisions without those decisions being attributed to the government.”<sup>583</sup>

Second, despite the difficulty of drawing a principled boundary between government conduct and private conduct, placing special restrictions on investigative activity carried out by the state makes sense. The police *do* differ from snooping, trespassing, or violent neighbors. They are better organized, they carry more weapons, they can get warrants, and they have closer ties to the government officials on whom we depend to regulate snooping, trespassing, and violence. For similar reasons, despite the recent growth of private policing, public law enforcement still poses risks different from those posed by private security.

Of course, the question still remains precisely where to draw the line between public and private policing. Should “specially commissioned” officers be treated as public police, even when privately employed and supervised? The courts have generally said yes. Should moonlighting officers be treated as public police, even when out of their official uniforms? Again, the courts have generally said yes, although only after engaging in surreal discussions about whether particular officers were “acting as” police officers or as security guards at the times in question. Recognizing that the line between public and private policing is necessarily formal, the ultimate results reached in these cases—minus the surrealism—make a certain amount of sense: individuals with official law enforcement status are distinguished from those without such status. There may be other, more sensible places to draw the line. But as long as we keep in mind the arbitrary nature of the line (which is what the surrealism tends to obscure), the precise location becomes significantly less important.

Indeed—and this is the third and final point—the arbitrary nature of the boundary between public and private policing could itself be a source of doctrinal vitality. We tend to assume that inconsistency is bad, and that the less inconsistency in our law, the better. But this is a prime example of the problem of the second best.<sup>584</sup> A flawless legal system, if there could ever be such a thing, would be wholly consistent. Inconsistency is not just a sign of imperfection; it is intrinsically undesirable for a legal system that views equal treatment as an element of fairness.<sup>585</sup> It does not follow,

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583. Seidman, *supra* note 451, at 401; see Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 242 (1973).

584. See R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956-57).

585. See, e.g., MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 48 (1988); HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* 81-82 (1990).

though, that among imperfect legal systems the most consistent will generally be the best. There are virtues other than consistency. One of those virtues is improvement over time, and the great lesson of the common law is that inconsistency, if used to advantage, can spur doctrinal development.<sup>586</sup> The arbitrary line between contract and tort, for example, allowed courts to experiment with different approaches to similar problems, and to borrow on one side of the doctrinal divide from approaches that had succeeded on the other.<sup>587</sup>

The rules governing public and private police are perfectly suited for this kind of dialectic development. The two groups resemble each other in many ways and present many of the same risks. Moreover, because they increasingly share the same personnel, it is often difficult to tell them apart. Nonetheless the legal regimes under which they operate differ strikingly. And the two legal regimes do not just differ randomly: each contains elements the other is commonly urged to adopt. Critics of the private security industry call for subjecting it to the same restrictions as the public police. Critics of criminal procedure law call for regulating the police under an open-ended standard of reasonableness, interpreted and applied by juries in civil actions for damages—precisely the system we have for private security. The situation is ideal for cross-fertilization.

There has been no cross-fertilization, however, because private security has been largely ignored, and not just by academics. Legislators have shown little interest in reforming the rules governing the private police, or even in collecting basic information about their operations. As a result, we are in a poor position to assess how well the tort system has worked to deter abuses by private security personnel, and no one has tried. We do not know whether tort suits adequately deter the private police, nor whether they

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586. I have made this point before. See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1313–15 (1995) [hereinafter *Cocaine*]; David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 327 [hereinafter *Traffic Stops*].

587. See S.F.C. Milsom, *Reason in the Development of the Common Law*, 81 LAW Q. REV. 496 (1965), reprinted in S.F.C. MILSOM, STUDIES IN THE HISTORY OF THE COMMON LAW 149 (1985). See generally, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 22–23, 179 (1921) (discussing the “experimental” nature of the common law). Professor Milsom pointed out that borrowing becomes possible “when two lines of reasoning which have developed, as it were, in different compartments, happen to have come sufficiently close for a situation which has traditionally fallen under the one to be represented as within the other.” Milsom, *supra*, at 499. This “method of development,” he noted, “produces great logical strength in detail” at the cost of “great overall disorder.” *Id.* at 513. Both results are apparent in free speech and search-and-seizure jurisprudence—two fields of constitutional law that have relied heavily on the common-law method of development. See *Board of Educ. v. Grumet*, 512 U.S. 687, 718–21 (1994) (O’Connor, J., concurring); *Amsterdam*, *supra* note 387, at 351–53; Seidman, *supra* note 124, at 2291; Sklansky, *Cocaine*, *supra* note 586, at 1315 & n.165.

overdeter. We need to find out: not just to determine whether and how the system should be reformed—perhaps by offering attorneys' fees to successful plaintiffs, perhaps by adopting a version of good-faith immunity, perhaps by importing rules of evidentiary exclusion from constitutional criminal procedure—but also to see whether it has anything to teach us about the sensible regulation of the public police.

## 2. The Illusion of Functionalism

To say that the state action doctrine should be retained is not to say that it cannot be improved. One benefit of examining the doctrine in the context of criminal procedure—the context almost always overlooked by constitutional scholars—is that certain defects become easier to see. Prominent among these is the illusion of a certain kind of functionalism in state action jurisprudence.

The kind of functionalism I have in mind purports to identify state action chiefly by reference to the purposes pursued. Some kinds of purposes are imagined to be inherently public, others inherently private. To distinguish between state action and private conduct, we are told to look not to the formal status of the participants—who employs them, what titles they hold—but rather to what they are doing. This kind of thinking lies behind the public function doctrine,<sup>588</sup> and it motivates the frequent assertion by courts that the legal treatment of private security guards depends on what roles the guards are performing.<sup>589</sup>

Functionalism of this variety enjoys widespread support among scholars because it promises an escape from a kind of legal formalism widely derided as superficial and obfuscatory. But functionalism in contemporary state action jurisprudence appears itself to be little more than a charade. The public function doctrine has been hemmed in so tightly that almost nothing qualifies as a public function. As we have seen, the doctrine is almost certainly inapplicable to crime fighting and peacekeeping, notwithstanding the common view of the police officer as the paradigmatic state actor. And despite what courts say, the legal status of private security guards rarely turns on the purposes the guards are pursuing; what matters far more is whether the guards have some special, formal status as law enforcement personnel—either because they are moonlighting police offi-

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588. See discussion *supra* notes 492–514 and accompanying text.

589. See, e.g., *Wade v. Byles*, 83 F.3d 902, 905–06 (7th Cir. 1996); *Carr v. City of Chicago*, 669 F. Supp. 1418, 1419 (N.D. Ill. 1987); *State v. Buswell*, 449 N.W.2d 471, 473–75 (Minn. Ct. App.), *rev'd*, 460 N.W.2d 614 (Minn. 1990); *State v. Murillo*, 824 P.2d 326, 329 (N.M. Ct. App. 1991).

cers, or because they have been "commissioned" or "deputized" by some legal authority.

The example of private policing offers some clues why functionalism in state action jurisprudence promises so much more than it delivers. Among the lessons taught by the history of policing is that social understandings often are structured less around rules than around roles, less around categories of actions than around categories of actors. In particular, the notion of the state officer as a distinct and salient legal entity has shown remarkable persistence, notwithstanding large shifts in what policing is thought chiefly to involve, and a surprising vagueness about what powers officers may exercise. We might say that the concept of the police runs deeper than any particular conception.<sup>590</sup> Any effort to define policing solely in terms of function divorced from form is thus bound to falter, because it fails to account for certain deep aspects of the way we think. This may explain why, when the Supreme Court in *Griffin*<sup>591</sup> found state action in a uniformed security guard's ejection of black teenagers from a Maryland amusement park, the Court relied on details—the guard's badge and his status as a "special deputy sheriff"—that have struck some readers as little more than technicalities.<sup>592</sup> Similarly, it may explain why lower courts have refused to resolve state action questions "by looking at the nature of the activities performed by security employees,"<sup>593</sup> and instead have stressed their formal status, explaining that "[a] security guard is not a police officer."<sup>594</sup> And it may help to explain the persistence of formalism in state action doctrine more generally. Linked as it is to the public-private distinction—and thus to the very notion of individual rights<sup>595</sup>—the concept of the state, like the concept of the police, may run deeper than any particular conception. If so, efforts to define state action solely in functional terms are probably futile.

Whether state action functionalism is worse than futile is a more difficult question. Functionalist rhetoric, even if it seldom becomes much more than rhetoric, could serve as a useful reminder that there are aspects of reality that formalism obscures. On the other hand, by suggesting that state action jurisprudence is less formalistic than it actually is, functionalist rhetoric may lead us to question the contours of that jurisprudence less than we should. Possibly it also reinforces the mistaken and dangerous notion that conduct that does not count as state action typically touches little if at

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590. Cf. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134–37 (1977).

591. 378 U.S. 130 (1964).

592. See discussion *supra* notes 394–408 and accompanying text.

593. United States v. Lima, 424 A.2d 113, 121 (D.C. 1980) (en banc).

594. People v. Taylor, 271 Cal. Rptr. 785, 792 (Ct. App. 1990).

595. See discussion *supra* notes 579–583 and accompanying text.

all on matters of public concern. This notion, in turn, may have more than a little to do with the general neglect scholars and legislators have shown to the problems of private policing; it may also explain why the rare attention the legal academy does pay to private policing focuses almost exclusively on the state action problem.

How we assess these countervailing possibilities depends on what kinds of reform we find most promising. The public-private distinction and the notion of individual rights are human constructs, sustained as well as reflected by legal doctrines such as those encountered in state action jurisprudence. Those who hope these constructs can ultimately be discarded may find that the slight oppositional potential of state action functionalism justifies retaining it. But others may conclude, in part based on the history of policing, that the public-private distinction is here to stay, and that we had better learn to live with it. If that means, in part, being as sensible as possible in constructing the formal categories of state and police, and in determining what the legal import of those categories should be, then rhetoric that falsely promises an escape from formalism probably does more harm than good.

#### IV. BEYOND STATE ACTION

The state action problem holds an enduring fascination. The stakes are weighty, the doctrine transparently makeshift, and the results, at times, strikingly incongruous. In criminal cases, moreover, the question of state action has the added allure of the unexplored, having attracted surprisingly little study. I have tried to show that this neglected aspect of the problem warrants more attention than it has received.

But I have also tried to show that efforts to "solve" the state action problem—to draw a sharp, principled boundary around the activities constitutional law should attribute to the government—are no more likely to prove successful in criminal procedure than elsewhere. Any line will be arbitrary. And there is a danger that questions about the line's location will distract us from other, more important challenges raised by the spread of private policing.

I end this Article by sketching two such challenges, both for scholars and for the courts. The first concerns the need to know more about the private police, not only to determine what rules should govern them, but also to help assess proposals for reforming public law enforcement. The second concerns the implications of police privatization for the common notion that the chief duty of government is to provide some level of protection against private violence.

### A. Private Criminal Procedure

Several decades ago legal scholars began noticing they did not know enough about the everyday world of law enforcement. They knew a lot about indictments, arraignments, and criminal trials, but little about the police—the entry point into the criminal justice system, and for many suspects the most important component of the process. From the 1930s through the 1960s it grew increasingly apparent that serious thinking about criminal justice reform required serious thinking about the police, and that serious thinking about the police required much better information about the everyday world of law enforcement. Governments needed to keep better statistics on police activities, and researchers needed to carry out independent, empirical studies of how the police operated.<sup>596</sup>

To an impressive extent, these goals have now been realized. The federal government collects and disseminates a vast array of police statistics, and many states do so as well.<sup>597</sup> There is a rich literature on the sociology of policing, both empirical and theoretical.<sup>598</sup> Partly as a result, when lawyers and scholars now use the phrase “criminal procedure,” they are generally referring to police methods and the rules that govern those methods, not to courtroom processes. Obviously this usage stems in part from the great growth, particularly in the 1960s, in the amount and complexity of constitutional rules governing the police. But that growth itself was fueled in part by an increased understanding of what the police do.

Much about policing is still shrouded in secrecy or obscurity.<sup>599</sup> But compared to the situation at midcentury, our knowledge today about the police is more striking than our ignorance. And the knowledge we have is important. It has permitted all kinds of discussions—about community policing, about investigative practices, about the Fourth and Fifth Amendment exclusionary rules, and so on—to be carried on with a degree of empirical sophistication that fifty years ago would have been unimaginable.<sup>600</sup>

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596. See, e.g., Cain, *supra* note 111, at 144; Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 493–95 (1955); Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 359 (1936).

597. See, e.g., 1995 SOURCEBOOK, *supra* note 27.

598. For a review essay, see Cain, *supra* note 111.

599. See, e.g., David A. Harris, “Driving While Black” and Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 579–82 (1997).

600. For discussion of community policing, see, for example, WHAT WORKS IN POLICING 138–74 (David H. Bayley ed., 1998); Sherman, *supra* note 67. On interrogation practices and the Miranda rules, see, for instance, THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING (Richard A. Leo & George C. Thomas III eds., 1998). Regarding search and seizure and the exclusionary rule, see, for example, Schwartz, *supra* note 575, at 347–59.

That kind of sophistication, however, remains impossible with regard to private policing. Indeed, we know less today about private policing than we knew in 1930 about public law enforcement. Our ignorance has made it difficult for us to think seriously about the rules that govern private policing. Those rules are important because they regulate a world of policing—of private criminal procedure—larger and faster growing than public law enforcement.

Private security, moreover, serves as an entry point not only into the public system of criminal adjudication, but also, and perhaps more frequently, into an alternative system of private adjudication. The sanctions in this private system range from dismissal or ejection, to a return of purloined merchandise, to fines or restitution extorted by the threat of a criminal complaint.<sup>601</sup> The adjudicatory processes preceding these sanctions tend to be informal and inquisitorial; the differences between public and private policing pale beside those between public and private adjudication.<sup>602</sup> And private adjudication is far less visible than private policing. If we know little about the private police, we know even less about private adjudication.<sup>603</sup> One way to start learning is by studying the operations of the least hidden component of the private adjudication system—the private police.

The parallel worlds of private criminal procedure and private adjudication are important not only in their own right, but also because they offer opportunities to assess the wisdom of certain aspects of our public systems of criminal procedure and adjudication. This is particularly true of the remedial rules now in place for the public police. The Fourth and Fifth Amendment exclusionary rules generally do not apply to private guards, nor does the good-faith tort immunity enjoyed by public law enforcement officers, nor the availability of awards of attorneys' fees to successful tort plaintiffs. All of these rules have been questioned as applied to the public police; in particular, there have been persistent suggestions for replacing evidentiary exclusion with expanded tort liability as the principal means of

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601. See CUNNINGHAM ET AL., *supra* note 27, at 296–302; James D. Calder, *New Corporate Security: The Autumn of Crime Control and the Spring of Fairness and Due Process*, *J. CONTEMP. CRIM. JUST.*, Dec. 1987, at 1; Canlen, *supra* note 22, at 81; Davis et al., *supra* note 41, at 406–07; Andrey Feuerverger & Clifford D. Shearing, *An Analysis of the Prosecution of Shoplifters*, *CRIMINOLOGY*, Aug. 1982, at 273. On decisions whether to file criminal charges against shoplifters, see also Erhard Blankenburg, *The Selectivity of Legal Sanctions: An Empirical Investigation of Shoplifting*, *11 L. & SOC'Y REV.* 109, 121–24 (1976).

602. See Calder, *supra* note 601, at 5–6. See generally Charles B. Craver, *The Inquisitorial Process in Private Employment*, *63 CORNELL L. REV.* 1 (1977); Shearing & Stenning, *supra* note 31, at 501–03.

603. See CUNNINGHAM ET AL., *supra* note 27, at 302; Calder, *supra* note 601, at 6.

enforcing the Fourth Amendment.<sup>604</sup> At least two thoughtful scholars have coupled this suggestion with a call to rely more on ad hoc decision making by juries, and less on *per se* rules promulgated by judges, in assessing the reasonableness of searches and seizures;<sup>605</sup> private criminal procedure complies with this recommendation as well.<sup>606</sup> In several important respects, private criminal procedure thus provides a test case.

The test case is not perfect. To begin with, the variety of differences between the two remedial regimes makes it difficult to isolate the effect of any particular difference. For example, denying fee shifting to successful tort plaintiffs may weaken the effects that would otherwise be caused by denying good-faith immunity to private police personnel. Moreover, as we have seen, the mix of functions performed by private guards today tends to differ from that carried out by the public police, albeit to a degree that remains unclear.<sup>607</sup> But the parallels are close enough to be intriguing. In assessing reform proposals for the remedial regime governing public law enforcement, it would be helpful to know how well the strikingly different remedial regime of private criminal procedure works. This information would be even more helpful if we knew more about how the day-to-day activities of private guards differ from those of the public police.

Empirical studies of the private police, and of the remedial regime under which they operate, are sorely needed. Studies of this kind are difficult to conduct, however, given the industry's penchant for secrecy.<sup>608</sup> One simple, practical, and important step would be for states to require—as apparently no state currently does—that security firms file regular, public reports on their activities, with due regard for legitimate privacy interests.

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604. See, e.g., *Stone v. Powell*, 428 U.S. 465, 500–01 (1976) (Burger, C.J., concurring); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 421–23 (1971) (Burger, C.J., dissenting); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 942 (1983); Francis A. Gilligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule?*, 66 J. CRIM. L. & CRIMINOLOGY 1, 22 (1975); Harvey Robert Levin, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 JUDICATURE 74, 76 (1974). But see *Mapp v. Ohio*, 367 U.S. 643, 652–53 (1961) (extending the exclusionary rule to state criminal cases because of the “obvious futility” of tort sanctions and internal disciplinary procedures as means of enforcing the Fourth Amendment). For scholarship supportive of the Court’s judgment in *Mapp*, see, for example, Amsterdam, *supra* note 387, at 430; Foote, *supra* note 596, at 493; Seidman, *supra* note 124, at 2294–303; Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 848–52 (1994).

605. See Amar, *supra* note 3, at 817–19; Posner, *supra* note 3, at 74–75.

606. See, e.g., Canlen, *supra* note 22, at 33.

607. See discussion *supra* Part I.A.

608. See discussion *supra* note 60 and accompanying text. Assessing the effectiveness of tort deterrents can be difficult even in less secretive industries, but information clearly helps. See Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994).

Given the growing role of private policing, there is scarce excuse for allowing security firms to continue to keep secret, for example, the number of people they accost and detain, when and how those individuals are questioned, how many suspects are turned over to the police, the number and type of searches conducted by private security personnel, or the circumstances and results of those searches. With or without such data, though, there will be no substitute for close, nuanced field studies of the private police, the sort of thing that we now have in abundance for public law enforcement.

Another aspect of private criminal procedure also warrants study. We need to know more not only about the activities of the private police and about the effectiveness of the rules governing those activities, but also about the manner in which those rules have evolved. For private criminal procedure differs in another salient way from the more familiar world of public criminal procedure: the rules of the former are almost exclusively a matter of state statutory law. Private criminal procedure is neither federalized nor constitutionalized. It therefore offers an opportunity to test the persistent suggestion that the Supreme Court has stunted the progressive improvement of the rules of public policing law by turning the Bill of Rights into a "code of criminal procedure," and thereby blocking legislative innovation and experimentation.<sup>609</sup>

Innovation and experimentation have not been notable in the regulation of the private security industry, despite complaints that have remained remarkably constant. For the past three decades it has been evident that price competition in the private security industry has kept wages low, turnover high, screening cursory, and training minimal.<sup>610</sup> Media investigations regularly report rampant incompetence and criminality in the ranks of the private police,<sup>611</sup> and every national study of the private security industry has called for stiffer regulation of the screening and training that guards

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609. Friendly, *supra* note 451; see also, e.g., BRADLEY, *supra* note 3, at 86, 95; Mark Berger, *Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogations*, 24 U. MICH. J.L. REFORM 1, 3 (1990); Ellickson, *supra* note 56, at 1213; Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda,"* 54 U. CHI. L. REV. 938, 949 (1987).

610. See, e.g., CUNNINGHAM ET AL., *supra* note 27, at 144-58; 1 JAMES S. KAKALIK & SORREL WILDHORN, *PRIVATE POLICE IN THE UNITED STATES: FINDINGS AND RECOMMENDATIONS* 46-61 (1971); NATIONAL ADVISORY COMMITTEE ON CRIM. JUST. STANDARDS & GOALS, *PRIVATE SECURITY* 1-13 (1976). For just as long, it has been apparent that we need better information about the activities of the private security industry, and that the secretive nature of the industry makes this information difficult to obtain. See 1 KAKALIK & WILDHORN, *supra*, at 57.

611. See CUNNINGHAM ET AL., *supra* note 27, at 160 n.16; Canlen, *supra* note 22, at 32-33.

receive.<sup>612</sup> Nonetheless the last such study found that little had changed over the course of two decades.<sup>613</sup> Ten states still leave private security entirely unregulated,<sup>614</sup> only two fewer than in 1971.<sup>615</sup> As of 1990, only four states required as much as twenty-four hours of preassignment training.<sup>616</sup> The typical guard received only four to six hours, and many received none.<sup>617</sup>

The apparent stagnation of regulatory efforts directed at private security may not mean that critics of constitutionalized criminal procedure are wrong. The problems posed by the public police differ from those posed by the private police; if the former are more pressing, they may well be more amenable to legislative solution. But this is not obvious. Once again, discussions about the rules governing public law enforcement—in this case, the wisdom of making those rules a matter of federal constitutional law—might benefit from careful study of aspects of private criminal procedure—in this case, how and why legislation has failed for so long to address such widely perceived problems with the private security industry.

## B. Minimally Adequate Policing

The recent, dramatic growth of private policing offers occasion for revisiting not just the relationship between the rules governing public and private policing, and the line the law draws between those two domains, but also, and more fundamentally, the overall mission of criminal procedure as a field of scholarship and jurisprudence. Since “hiving off” from constitutional law in the middle of the past century,<sup>618</sup> criminal procedure has been overwhelmingly focused on issues of fairness writ small: the procedural obligations owed by the state to an individual suspected of crime. That is to say, it has been all about what content to provide the Due Process Clauses of the Fifth and Fourteenth Amendments in the context of criminal investigation and prosecution. The content provided has been famously elaborate. The Supreme Court has read into the Due Process Clause of the Fourteenth Amendment the specific protections of the Fourth, Fifth, and Sixth Amendments, and has read into those protections an extensive code of police and prosecutorial conduct. As perhaps befitting a law of due proc-

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612. See CUNNINGHAM ET AL., *supra* note 27, at 150.

613. See *id.* at 150–54; see also Canlen, *supra* note 22, at 30 (reporting in 1998 that “[t]he screening and training requirements for private security guards are abysmally low”).

614. See Canlen, *supra* note 22, at 32.

615. See 1 KAKALIK & WILDHORN, *supra* note 610, at 38.

616. See CUNNINGHAM ET AL., *supra* note 27, at 148.

617. See *id.* at 155.

618. Karlan, *supra* note 568, at 2029–30.

ess, that code of conduct has been concerned almost exclusively with individualized fairness to suspects and defendants, not with questions of distributional justice.<sup>619</sup>

No comparable body of law has developed regarding the equitable allocation of criminal justice resources. The Supreme Court has refused to recognize a right to minimally adequate protection under the Due Process Clauses, reasoning that the clauses guard only against injuries directly inflicted by government. Due process limits government's "power to act," but does not "guarantee . . . minimal levels of safety and security."<sup>620</sup> The Fourteenth Amendment, of course, promises not only "due process of law" but also "the equal protection of the laws." In dicta, the Court has read this second promise to prohibit a state's selective denial of "protective services to certain disfavored minorities."<sup>621</sup> But the Court has also made clear that the Equal Protection Clause generally prohibits only decisions made with "discriminatory purpose"—that is, "'because of,' not merely 'in spite of,' . . . adverse effects upon an identifiable group."<sup>622</sup> As a result, equal protection generally offers no more help than due process in challenging inadequate policing.<sup>623</sup>

State tort law is equally unavailing.<sup>624</sup> The "overwhelming" weight of case law "reject[s] liability based on a general failure to provide police

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619. Even intentionally discriminatory policing, the Supreme Court has recently made clear, does not give rise to a claim under the Fourth Amendment, but is rather a matter for the Equal Protection Clause. See *Whren v. United States*, 517 U.S. 806, 813 (1996). Unfortunately, equal protection has proven a disappointing vehicle for combating discrimination in law enforcement—partly because of the evidentiary burden placed on criminal defendants alleging discrimination, see Sklansky, *Cocaine*, *supra* note 586, at 1318; Sklansky, *Traffic Stops*, *supra* note 586, at 307–08, 323–29, and partly because of "the distinctive set of remedial challenges posed in the context of criminal adjudication," Karlan, *supra* note 568, at 2030.

620. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

621. *Id.* at 197 n.3.

622. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979); *see also*, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987).

623. See, e.g., *Hayden v. Grayson*, 134 F.3d 449 (1st Cir. 1998), cert. denied, 118 S. Ct. 2370 (1998); *Sarantakis v. Village of Winthrop Harbor*, 969 F. Supp. 1095 (N.D. Ill. 1997); *Semple v. City of Moundsville*, 963 F. Supp. 1416 (N.D. W. Va. 1997).

For a discussion on the "disappearance of protection from 'equal protection of the laws,'" see Robert D. Goldstein, *Blyew: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 555–63 (1989). As Goldstein notes, in recent decades "the only major Supreme Court development arising from a concern for victims has been a retrenchment of the Warren Court's criminal justice decisions." *Id.* at 561.

624. Most state constitutions contain equal protection and due process clauses, but courts interpreting these provisions generally rely on federal constitutional doctrine. See *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1368 (1982); Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. LEGIS. 307, 312 (1991).

protection.”<sup>625</sup> The doctrinal basis for this result varies. Some courts describe it as a matter of governmental immunity; others declare simply that the state has no duty to furnish police protection, or that the duty is owed to the public at large, and not to any individual, so it cannot provide the basis for a tort claim by a particular plaintiff.<sup>626</sup> The formulation varies, but the result does not: state tort law provides no remedy for inadequate policing.<sup>627</sup>

Underlying this result is a belief that the level of police protection is an allocative question best left to the political branches.<sup>628</sup> To a great extent this notion also underlies the Supreme Court’s refusal to recognize a due process right to safety and security—although the Court justified that refusal chiefly by an appeal to original intent.<sup>629</sup> The idea that adequate

625. KEETON ET AL., *supra* note 88, § 131, at 1050; see also, e.g., 5 SPEISER ET AL., *supra* note 84, § 17:48, at 378–79; Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 1000–01 (1996). Some courts find liability, however, if the police breach a specific promise of protection, see, e.g., *Morgan v. County of Yuba*, 41 Cal. Rptr. 508 (Ct. App. 1964), violate a duty arising from a “special relationship,” e.g., *Sorichetti v. City of New York*, 482 N.E.2d 70 (N.Y. 1985), or negligently ignore a particularized threat, see, e.g., *Austin v. City of Scottsdale*, 684 P.2d 151 (Ariz. 1984) (en banc).

626. See, e.g., KEETON ET AL., *supra* note 88, § 131, at 1049; 2 SPEISER ET AL., *supra* note 84, § 6.11, at 64; Armacost, *supra* note 625, at 997 n.78.

627. Some states have codified this result. See Armacost, *supra* note 625, at 1001. For example, California’s Tort Claims Act provides that “[n]either a public entity nor a public employee is liable for failure to establish a police department or . . . for failure to provide sufficient police protection service.” CAL. GOV’T CODE § 845 (West 1997). California courts have consistently interpreted this provision to bar suits “for any failure to provide adequate police protection.” *Peterson v. San Francisco Community College Dist.*, 685 P.2d 1193, 1202 (Cal. 1984); *accord Gates v. Superior Court*, 38 Cal. Rptr. 2d 489, 503–04 (Ct. App. 1995).

Ironically, immunity for inadequate policing was less absolute in the nineteenth and early twentieth centuries, when sovereign immunity in general was far more sweeping. Many states, including California, had statutes making local governments liable for property damage caused by riots; these statutes were modeled on the Riot Act passed by Parliament in 1715, which in turn drew on the liability provisions of the Statute of Winchester. See *Gates*, 38 Cal. Rptr. 2d at 497; Russell Glazer, Comment, *The Sherman Amendment: Congressional Rejection of Communal Liability for Civil Rights Violations*, 39 UCLA L. REV. 1371, 1386–90 (1992); Heyman, *supra* note 104, at 541–43; discussion *supra* notes 148–150 and accompanying text. In 1963, two years after the California Supreme Court abolished the general defense of sovereign immunity in *Muskopf v. Corning Hospital District*, 359 P.2d 457 (Cal. 1961) (en banc), the state legislature—as part of a general overhaul of governmental liability rules, prompted by the decision in *Muskopf*—eliminated riot liability as an “anachronism” and adopted the current rule barring any recovery for inadequate policing, see *Gates*, 38 Cal. Rptr. 2d at 498 (quoting 4 CALIFORNIA LAW REVISION COMM’N, REPORTS, RECOMMENDATIONS AND STUDIES 817–18 (1963)). Even in states that still allow recovery for riot damage, “the circumstances that give rise to this liability are very limited.” KEETON ET AL., *supra* note 88, § 131, at 1055; see also, e.g., *Maus v. City of Salina*, 114 P.2d 808, 809–10 (Kan. 1941).

628. See 4 CALIFORNIA LAW REVISION COMM’N, *supra* note 627, at 860; Armacost, *supra* note 625, at 1002.

629. See *DeShaney v. Winnebago County Dep’t Soc. Servs.*, 489 U.S. 189, 195–97 (1989). Echoing views expressed by Judge Richard Posner both in the Seventh Circuit’s decision in *DeShaney* and in earlier cases, Chief Justice Rehnquist’s majority opinion in *DeShaney* reasoned

policing is best left to politicians rests in turn on three commonly advanced arguments. The first is that courts are poorly equipped to determine the amount of funding the public should spend on any particular service because they lack sufficient information about the budgetary trade-offs.<sup>630</sup> The second is that justiciable standards for the adequacy of public services are hard to find.<sup>631</sup> The third is that judicial involvement is unnecessary because elected officials will have a strong political incentive to provide adequate levels of police protection.<sup>632</sup>

Police privatization seriously undermines this third argument. Even when most policing was public, of course, there was reason to doubt that normal political processes would ensure adequate protection of the poor as well as the rich. But private policing greatly exacerbates the problem.

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that the Fourteenth Amendment Due Process Clause, like its Fifth Amendment model, was intended "to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes." *Id.* at 196; see also *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 812 F.2d 298 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). For a forceful argument that Posner and Rehnquist miscomprehended the original understanding of the Fourteenth Amendment, see Heyman, *supra* note 104.

630. See, e.g., Armacost, *supra* note 625, at 1003-09. Like other writers, Professor Armacost characterizes questions of resource allocation as "polycentric," *id.* at 1003, borrowing a term from Michael Polanyi by way of Lon Fuller. See MICHAEL POLANYI, THE LOGIC OF LIBERTY 171 (1951); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 645-49 (1982); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978). Polanyi defined "polycentric" problems as those that involve "balancing a large number of elements." POLANYI, *supra*, at 176. He proposed that "[t]he proper method of managing a polycentric task is not by collecting all the data at one centre and evaluating them jointly"—that is, in the manner that Armacost and others envision legislative budgeting—but rather by relying on an uncoordinated "team of independent calculators," each of whom solves the problem "in respect to one centre at a time, while pretending blindness in respect to all other conditions"—what Polanyi called "the Relaxation Method." *Id.* at 180-83. He was arguing, in other words, for the superiority of markets to central planning. Adopting Polanyi's term, Fuller reasoned that legislatures were better than courts at resolving polycentric problems, including the allocation of public funds, because political bargaining in a legislature could function like a market. See Fuller, *supra*, at 400. But even Fuller acknowledged that judicial decisions, if "liberally interpreted" and "subject to reformulation and clarification," could approximate Polanyi's Relaxation Method: "By considering the process of decision as a collaborative one projected through time, an accommodation of legal doctrine to the complex aspects of a problem can be made as these aspects reveal themselves in successive cases." *Id.* at 398. This is a good thing, because "[v]irtually all public norm creation is polycentric"—including that necessarily involved in the promulgation of any decision that will operate as precedent. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 43 (1979).

631. See, e.g., Armacost, *supra* note 625, at 1007.

632. Thus, for example, Judge Richard Easterbrook has reasoned that "[t]he body with the power to create a rule also has the right incentives to police it. Cities and states are not hostile to their own laws; they do not need federal courts to prod them to enforce rules voluntarily adopted." *Archie v. City of Racine*, 847 F.2d 1211, 1218 (7th Cir. 1988) (en banc); see also Armacost, *supra* note 625, at 1014.

When policing is public, inequalities in the level of protection require conscious, explicit decisions: patrol strength is cut *here* and increased *there*. It is thus politically cumbersome for wealthy taxpayers to boost the funding of police protection only for themselves. Private policing makes it simple—indeed, almost inevitable. Why should Bel Air residents vote for higher taxes to fund police cars throughout Los Angeles, when they can—and already do—hire private patrols for their own neighborhood? One might expect a vicious cycle: the wealthy rely on private security, so they are less willing to pay for public police, so public policing deteriorates, so the wealthy further increase their reliance on private security.<sup>633</sup> There is some evidence that the cycle has already begun, at least in Southern California.<sup>634</sup>

This kind of self-reinforcing “secession of the successful”<sup>635</sup> also has affected public services other than policing; one thinks in particular of education. But the problem with regard to policing is especially troubling, and not just for those who view protection against crime as “the most basic function of any government.”<sup>636</sup> When support is slashed for public schools, the results can be readily apparent in quantitative terms—fewer teachers, fewer textbooks, etc. Diminished expenditures for police protection, however, can be reflected not in an apparent decrease in policing, but in a qualitative shift in police strategies from prevention and protection to after-the-fact enforcement.<sup>637</sup> The latter strategy will not make inner-city residents safe and secure, but it may satisfy voters in surrounding communities that enough is being done. If so, “[t]he rich will be increasingly policed preventively by commercial security while the poor will be policed reactively by enforcement-oriented public police,” and “both the market and the government [will] protect the affluent from the poor—the one by barricading and excluding, the other by repressing and imprisoning.”<sup>638</sup>

Since the political process may be unable to avoid this dismal prospect, judges and scholars should begin to give fresh thought to whether law has a

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633. See Bayley & Shearing, *supra* note 5, at 593–94.

634. See discussion *supra* note 342 and accompanying text. The cycle may be accelerated, and its distributional consequences magnified, if private patrols push crime into other neighborhoods. See discussion *supra* notes 121–122 and accompanying text. In some instances, of course, private patrols may also free up police resources for reallocation to other neighborhoods. See, e.g., Palango, *supra* note 71, at 12; Stark, *supra* note 49, at 47. But nothing holds police expenditures constant over the long term.

635. Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at 16.

636. Illinois v. Gates, 462 U.S. 213, 237 (1983) (quoting *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting)); see also discussion *supra* notes 102–104 and accompanying text.

637. See CANNON, *supra* note 342, at 358; Livingston, *supra* note 67, at 567–68.

638. Bayley & Shearing, *supra* note 5, at 594, 602.

role to play in assuring minimally adequate police protection. The difficulties here are daunting. Courts may well have significant institutional disadvantages when addressing budgetary questions,<sup>639</sup> including the problem of developing standards that seem sufficiently judicial.<sup>640</sup> Among the questions that need to be confronted are these: If there is to be a right to adequate policing, is it best located in tort law, statutes, state constitutional law, or federal constitutional law? Should the right give rise to injunctive relief, to money damages for injuries suffered because of inadequate policing, to both, or to neither? And, most fundamentally, what constitutes minimally adequate policing?

This last question will prove particularly difficult. Not only is the question one of degree, but there is considerable controversy regarding whether police resources affect crime rates at all. Summarizing the conventional wisdom among many criminologists, David Bayley calls the notion that current police strategies can decrease crime "a myth."<sup>641</sup> And if the evidence on the effectiveness of the public police is largely discouraging, there is almost no reliable data on the ability of private patrols to reduce crime.<sup>642</sup> Still, a growing consensus of criminologists, including Bayley, believe that the police can cut crime if they shift toward some form of "community policing"—a catch-all term that may boil down to "treating a neighborhood the way a security guard treats a client property."<sup>643</sup> In part this may be because when residents feel safe, they themselves are more likely to act in ways that reduce crime: walking at night, offering assistance to

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639. See discussion *supra* note 630 and accompanying text.

640. See discussion *supra* note 631 and accompanying text. These disadvantages may or may not be disqualifying. If they are, it might be worth considering whether voters and elected officials have constitutional obligations, judicially unenforceable but nonetheless real, to assure that all citizens are provided some minimally acceptable level of police protection. On the constitutional duties of citizens and politicians, see generally, for example, SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Paul Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175 (1986); David A. Sklansky, *Proposition 187 and the Ghost of James Bradley Thayer*, 17 CHICANO-LATINO L. REV. 24 (1995).

641. BAYLEY, *supra* note 26, at 3. But see, e.g., Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 AM. ECON. REV. 270, 286 (1997) (concluding that cyclical boosts in police hiring have substantially reduced violent crime). For helpful reviews of the literature, see BAYLEY, *supra* note 26, at 3-9; Sherman, *supra* note 67.

642. However, there is some anecdotal evidence. See, e.g., Klein et al., *supra* note 126, at 368-71 (discussing the effect of private patrols on the perceived risk of crime in Starrett City); David Lamb, *How the Capital Has Crumbled*, L.A. TIMES, June 26, 1996, at A1 (reporting an 80% drop in robberies and burglaries in Georgetown since residents hired Wells Fargo guards to patrol the area). There is also evidence that security guards at commercial locations can decrease crime. See Timothy H. Hannan, *Bank Robberies and Bank Security Precautions*, 11 J. LEGAL STUD. 83, 89 (1982).

643. Sherman, *supra* note 67, at 338-39; see also, e.g., BAYLEY, *supra* note 26, at 102-20; Livingston, *supra* note 67, at 573-78.

strangers, etc.<sup>644</sup> And, of course, feeling safe has other advantages as well.<sup>645</sup> Plainly, though, adequate policing cannot be merely a question of the number of officers, let alone the amount of money.<sup>646</sup>

Courts and scholars exploring the possible contours of a right to minimally adequate policing might draw lessons from the history of school finance reform litigation, in which similar problems have already been confronted. The effectiveness of school finance lawsuits remains controversial, but the best evidence suggests that at the very least they have succeeded in drawing public and legislative attention to problems of educational funding, attention that in several states has led to meaningful reform.<sup>647</sup>

Duplicating this success in the field of policing will be anything but straightforward; in part because school finance litigation has relied heavily on state constitutional provisions guaranteeing that public education will be "equal," "uniform," or "efficient," or that it will meet some minimal standard of adequacy.<sup>648</sup> Similarly specific provisions about police protection are hard to find.<sup>649</sup> Doctrinal hooks are available, though, if courts and

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644. See BURSIK & GRASMICK, *supra* note 113, at 109–110; Frug, *supra* note 67, at 79–80; Sampson et al., *supra* note 114.

645. See, e.g., MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR (1989); Frug, *supra* note 67, at 68–72; sources cited *supra* note 113.

646. This may be yet another area in which instructive comparisons could be drawn across the public-private divide. Since 1970, appellate courts have shown increasing willingness to hold private landowners liable for failing to implement adequate security measures, including in some cases the hiring of private guards. See discussion *supra* note 341. Ironically, one factor slowing that trend may have been the view that, in the words of one frequently cited decision, "the duty to provide police protection is and should remain the duty of government." *Goldberg v. Housing Auth.*, 186 A.2d 291, 298–99 (N.J. 1962); c.f., e.g., *Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 56 (Tex. 1997) (Owen, J., concurring) ("I do not construe our decisions to shift the responsibility for police protection from law enforcement agencies to the private sector where violent crimes have occurred.").

647. See John Dayton, *Examining the Efficacy of Judicial Involvement in Public School Funding Reform*, 22 J. EDUC. FIN. 1, 1 (1996); Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 557–58 (1998); Phil Weiser, *What's Quality Got to Do with It?: Constitutional Theory, Politics, and Education Reform*, 21 N.Y.U. REV. L. & SOC. CHANGE 745, 788–89 (1994–95). Most scholars and reformers now believe lawsuits are more likely to improve the quality of public schools when they focus on ensuring all pupils minimally adequate education, rather than on equality of educational opportunity. See, e.g., Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995); McUsic, *supra* note 624, at 328–33, 339–40; Weiser, *supra*, at 787–89. But even old-fashioned equity litigation appears to have succeeded at least sporadically in putting educational reform on the political agenda. See Dayton, *supra*, at 26–27; Heise, *supra*, at 557.

648. See McUsic, *supra* note 624; Weiser, *supra* note 647, at 758 & n.81; cf. *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that a school finance scheme with a rational basis satisfied federal equal protection laws notwithstanding significant disparities in funding based on the wealth of surrounding communities).

649. Cf. 4 CALIFORNIA LAW REVISION COMM'N, *supra* note 627, at 860 ("Whether police protection should be provided at all, and the extent to which it should be provided, are political

scholars take seriously the often-expressed notion that providing safety and security is "the most basic function of any government."<sup>650</sup> Prominent among these hooks are the federal and state guarantees that all citizens will receive the equal protection of the laws, guarantees that can be understood—and may originally have been understood—to include some minimally adequate protection against private violence.<sup>651</sup> Today, equal protection is generally understood to require only nondiscriminatory disbursement of benefits or burdens, no matter how minimal the benefits or onerous the burdens.<sup>652</sup> But if the proliferation of private security prods us, as it should, to reconsider what aspects of policing deserve special constitutional attention, that reconsideration must include pondering afresh what it means to promise all citizens, poor or wealthy, the equal protection of the laws.<sup>653</sup>

### CONCLUSION

Private policing is not just a problem. It offers lessons about forms of policing the public sector has neglected, aspects of social organization scholars have ignored, and doctrinal possibilities judges have left unexplored. We would be foolish to close our ears.

But we would be at least as foolish to listen uncritically. The untrained, underpaid watchmen of the eighteenth century may have deserved more appreciation than they received at the time, and the Bow Street Runners may rate more retrospective praise than they get today. Nonetheless it is worth remembering the reasons both these systems were replaced by professional, public police forces. Private policing poses real dangers, and not the least is that it will teach us the wrong lessons.

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decisions which are committed to the policy-making officials of government."). But see discussion *infra* note 651.

650. *United States v. United States Dist. Court*, 407 U.S. 297, 312 (1972) (quoting *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting)); see also sources cited *supra* note 104.

651. See TENBROEK, *supra* note 386, at 104; Heyman, *supra* note 104, at 563–70. In addition, some state constitutions have provisions that could be read to promise minimally adequate policing. See CAL. CONST. art. 13, § 35(2) ("The protection of the public safety is the first responsibility of local government and local officials have an obligation to give priority to the provision of adequate public safety services."); GA. CONST. art. 5, § 2 (declaring that the governor shall serve as "conservator of the peace throughout the state"); MO. CONST. art. 4, § 2 (same); OKLA. CONST. art. 6, § 8 (same).

652. See, e.g., Sklansky, Cocaine, *supra* note 586, at 1303–06, 1309–11.

653. For a contemporary and particularly cogent account of the principle of equality as demanding something more than mere equivalence of treatment, see KENNETH L. KARST, BELONGING TO AMERICA (1989).

