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

Sharon Finegan

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ABSTRACT

On the night of February 26, 2012, George Zimmerman, a member of a neighborhood watch program, was patrolling his community in Sanford, Florida, when he spotted Trayvon Martin, a seventeen-year-old African-American high school student, walking through the neighborhood. Zimmerman dialed 911 and indicated that he was following "a real suspicious guy." The police dispatcher requested that Zimmerman discontinue following Martin, but he ignored the request and approached the teenager. In the resulting confrontation, Zimmerman used his legally owned semi-automatic handgun to shoot and kill Trayvon Martin. Martin, who was unarmed, had been returning from a local convenience store.

George Zimmerman was charged with second-degree murder. At the time of this writing, it is unclear whether Zimmerman will be proven guilty of the offense. What is certain is that despite the fact that Zimmerman was engaged in law enforcement activities, the Fourth and Fifth Amendments that restrict police efforts in detaining, searching, and interrogating suspects do not apply to neighborhood watch organizations. In many states neighborhood watch members may carry firearms and are protected from having to retreat when confronted by a suspect under "stand your ground" laws. Consequently, neighborhood watch members wield significant authority, but they lack the training and limitations to which police are subject.

This article proposes statutory provisions that would limit the ability of neighborhood watch members to confront suspects, mandate training for those engaged in law enforcement activities, and expand the exclusionary rule to evidence seized illegally by private citizens engaged in law enforcement functions. In this way, legislatures would better ensure that due process guarantees are not abandoned when law enforcement activities are privatized.

AUTHOR

Associate Professor of Law, South Texas College of Law. Many thanks to Adam Gershowitz, Dru Stevenson, Susan Crump, Terence Finegan, and Jason Dahlem for their helpful advice and comments.

I. INTRODUCTION

The privatization of criminal law has been a heavily debated topic among legal scholars and practitioners.[1] As the number and scope of criminal laws increase, so do community needs to investigate, try, and punish individuals who violate those laws.[2] Yet, federal and state systems of justice have not been able to fully meet these increased demands.[3] Consequently, reliance on private groups and organizations to help fulfill these needs has become more prevalent.[4] The use of private entities to assist in performing criminal justice functions has, in many ways, allowed for more crime detection, prevention, and punishment.[5] However, this reliance on private actors to accomplish criminal justice tasks is rife with both constitutional and practical concerns.

One area in which the public has long been involved in criminal justice efforts is in the policing of neighborhoods to deter and identify potential criminal actors.[6] Neighborhood watch programs increasingly have become a part of community efforts to stem or reduce criminal

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1 *See, e.g.*, BRIAN FORST & PETER K. MANNING, THE PRIVATIZATION OF POLICING: TWO VIEWS 3–4 (1999); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1171–83 (1999).

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

3 *See* Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 266–75 (2010).

4 Sklansky, *supra* note 1, at 1174 ("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.").

5 Sklansky, *supra* note 1, at 1177–78 ("Increasingly, though, government agencies are hiring private security personnel to guard and patrol government buildings, housing projects, and public parks and facilities . . . ."). In addition, some municipalities have gone so far as to hire private security to conduct public police functions such as neighborhood patrols. *Id*. at 1177. Where the municipality itself does not hire private police, neighborhoods have "received permission to tax themselves (and their dissenting neighbors) to pay for private patrols." *Id*. at 1178.

6 This function has been accomplished through both neighborhood watch programs and the hiring of private security patrols by members of the community. Sklansky, *supra* note 1, at 1173.

activity.[7] These programs can vary widely in organization, association with law enforcement, training, and purpose.[8] But at their core, neighborhood watch programs consist of private citizens who are engaged in the detection and deterrence of crime—in other words, law enforcement activities.

In 2012, neighborhood watch programs came under heightened scrutiny with the shooting death of an unarmed African-American teenager in Florida by a member of a neighborhood watch association.[9] The actions taken by a private individual acting on behalf of a private group to serve the public function of crime prevention highlighted some of the problems presented by these programs and the challenges raised by the increased privatization of criminal justice.

A significant problem associated with neighborhood watch programs is that there are no meaningful laws that specifically govern the police-like actions of the members of these programs. Further, constitutional amendments that restrict the actions of police officers engaging in law enforcement activities do not govern the actions of private citizens. Just as constitutional amendments and statutes relating to criminal investigations do not govern the actions of private security guards engaged in law enforcement functions, so too are there no constitutional restrictions or statutes governing the actions of private

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7 *See* Katy Holloway et al., *Does Neighborhood Watch Reduce Crime?*, 3 CRIME PREVENTION RES. REV. 6 (DEP'T OF JUST., 2008).

8 *Id*. For various examples of resources available to those interested in starting neighborhood watch programs, see *Neighborhood Watch Can Lower Your Crime Rate*, USEFUL CMTY. DEV., http://www.useful-community-development.org/neighborhood-watch.html (last visited Aug. 29, 2012); Edward J. Drew & Jeffrey M. McGuigan, *Prevention of Crime: An Overview of Gated Communities and Neighborhood Watch*, INT'L FOUND. FOR PROT. OFFICERS, http://www.ifpo.org/articlebank/gatedcommunity.html (last visited Aug. 29, 2012); *What is Crime Watch*, TARPON SPRINGS POLICE DEP'T, http://www.tspd.us/crime_watch.html (last visited Aug. 29, 2012); *Dallas Crime Watch Resource Package*, DALLAS POLICE DEP'T, (Mar. 8, 2011), http://www.dallaspolice.net/content/11/66/uploads/DallasCrimeWatchResourcePackage.pdf; USAONWATCH.ORG, http://www.usaonwatch.org/ (last visited Aug. 29, 2012).

9 *See, e.g.*, Brian Stelter, *In Florida Shooting Case, A Circuitous Route to National Attention*, N.Y. TIMES, Mar. 26, 2012, at B1; Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN.COM (May 23, 2012), http://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/index.html; Susan Jacobson, *Trayvon Martin Case: Panel Reviews Media Coverage*, ORLANDO SENTINEL (Aug. 11, 2012), http://articles.orlandosentinel.com/2012-08-11/news/os-trayvon-martin-black-journalists-20120811.

citizens engaged in the prevention and detection of crime as members of a neighborhood watch program.[10]

As a result, members of neighborhood watch programs regularly engage in law enforcement functions without any of the legal restrictions that limit the actions of police conducting the same tasks. Thus, to better preserve individual liberties, statutes should be enacted by state legislatures that would restrict the ability of neighborhood watch members to confront suspects, mandate that members receive training on law enforcement techniques, and require the exclusion of evidence illegally seized by neighborhood watch members. By enacting such laws, legislatures would better ensure that private individuals performing public law enforcement tasks do not erode due process guarantees.

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

II. THE TREND TOWARD PRIVATIZATION IN CRIMINAL LAW

The increased privatization of criminal justice functions is a phenomenon that has been both criticized and lauded by practitioners and academics alike. "Privatization" can be accomplished in a host of ways; in its most basic form, it is the adoption of public functions by private entities or individuals.[11] In the civil justice system,

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[10] *See* Sklansky, *supra* note 1, at 1229.

[11] *See* Talia Fisher, *A Nuanced Approach to the Privatization Debate*, 5 LAW & ETHICS HUM. RTS. 71, 74 (2011) (describing the market-based approach to privatization). "Under the market-based approach to legal privatization, the market is conceived of as the alternative to state supply of legislation and adjudication." *Id.* (citing MICHAEL TAYLOR, COMMUNITY, ANARCHY, AND LIBERTY 61 (1982)). According to this approach, "law is put on the market by for-profit firms and arises from the processes of the market economy—supply and demand, competition and bargaining." *Id.*

privatization has led to the use of mediation and other alternative dispute resolution techniques.[12] In the criminal justice system, the trend toward privatization has heavily impacted law enforcement and punishment systems.[13] This shift toward using private groups or entities to handle public criminal justice tasks, although the result of numerous factors, reflects a return to historical norms rather than the emergence of a new phenomenon.[14]

Prior to the nineteenth century, criminal justice functions were left largely in the hands of private individuals or groups.[15] Reliance on government officials to conduct investigations into criminal activity was the exception, rather than the rule.[16] Indeed, there was few, if any, public entities tasked with ferreting out and prosecuting criminal conduct.[17] For much of modern history, private individuals and groups were responsible for investigating crimes and seeking punishment for the wrongdoer.[18] In England, it was not until the twelfth century that certain types of torts were declared to be crimes.[19] Prior to that, the victim of what would today be considered a "crime" would file a civil suit.[20] This change resulted in the prosecution of defendants for their

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12 *See* Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 773–74 (2008) (discussing the growing privatization of "court-based processes across the docket").

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

14 *Id.* at 921. The historical trend away from privatization can be seen in many branches of government, not just law enforcement. FORST & MANNING, *supra* note 1, at 4 ("Policing, like most functions of modern government, was once exclusively in the domain of private enterprise."). Further, this trend is not confined to the United States, but "has been mirrored in Canada, the United Kingdom, Australia, New Zealand, and, to a lesser extent, the rest of the world." Sklansky, *supra* note 1, at 1181.

15 Simmons, *supra* note 13, at 921–23.

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

17 *Id.* at 921–22.

18 *Id.* at 922.

19 Simmons, *supra* note 13, at 922 ("In England, for example, King Henry I declared in 1116 that certain intentional torts—such as arson, robbery, and murder—would henceforth be considered crimes.").

20 *Id.*

criminal activity and, upon a finding of guilt, the forfeiture of their property to the State.[21] Despite the creation of this new form of justice, private individuals were still responsible for prosecuting criminal defendants.[22] Thus, while the State profited from the punishment of an individual in a criminal action, it did not take on the responsibilities of investigating and prosecuting criminal offenders.[23] This task remained largely in the hands of the citizenry.[24]

This private pursuit of criminal justice was prevalent in the United States just as it was in England.[25] The use of private actors to perform criminal justice functions, such as policing and prosecution, continued until the nineteenth century.[26] While governments began adopting some criminal justice functions, the private sector was left to fend for itself for the vast majority of criminal prosecutions.[27] It was not until the Industrial Revolution that state actors began to take over criminal justice functions, necessitated by the explosion in urban populations and the ensuing increase in crime.[28]

As the nineteenth century progressed, the use of public forces to conduct criminal investigations and prosecutions spread beyond urban centers and into smaller communities.[29] By the mid-twentieth century, the public's view of the criminal justice system had dramatically changed.[30] The perception of the criminal justice system shifted to accept its functions as fundamentally public in nature; the expectations

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21 *Id.* One of the reasons this new system of justice emerged was to provide an additional source of funding for the state. *Id*.

22 *Id.*

23 *Id.*

24 *Id.* at 922–23 ("The watchmen [were] incompetent and poorly trained, which led wealthier individuals to hire their own private guards, while the government offered large rewards for apprehending criminals . . . .").

25 FORST & MANNING, *supra* note 1, at 5 ("The United States was much slower [than England] to adopt an effective public policing service.").

26 Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 692–93 (2006).

27 *Id.* ("A well-documented survey of the system of litigation in nineteenth-century Philadelphia reveals its poorer enthusiastically invoking the criminal process against each other, often for relatively petty offenses that might not attract the resources or attention of public authorities today.").

28 FORST & MANNING, *supra* note 1, at 5.

29 Simmons, *supra* note 13, at 923 ("The birth of widespread public policing did not occur in Great Britain until 1829, and not in the United States until 1845.").

30 *Id*.

were that the government exercised the power to investigate and prosecute crimes through professional law enforcement forces and prosecutorial offices.[31]

As the public nature of criminal investigations and prosecutions became the norm, so too did expectations that public actors abide by certain rules and standards.[32] Thus, the law began imposing more restrictions on public actors engaged in criminal justice tasks. These restrictions attempted to ensure that the power of the government was not abused and that the rights of individuals suspected and accused of crimes were protected.[33] Yet, even with these restrictions in place, the resources and lack of meaningful oversight of public criminal justice officials led to severe abuses in the system.[34] In the latter half of the twentieth century, the public grew increasingly distrustful of public law enforcement.[35] By the 1980s, a strong movement to become less reliant on law enforcement began to take hold in many communities.[36]

One basis for the current trend toward privatization stems from the public distrust of police and public prosecutors felt in the latter half of the twentieth century.[37] Corruption, abuses of power, and other injustices led to public investigations into law enforcement practices.[38]

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[31] *Id*.

[32] Yeazell, *supra* note 26, at 694 (noting that the criminal justice process in the United States was fundamentally changed by providing representation for indigent defendants and controlling "police and prosecutorial behavior through a series of interpretations of the Fourth, Fifth, and Sixth Amendments to the Federal Constitution.").

[33] *Id.* (noting that these developments made for a more fair process, and focused on the rights of the defendant rather than the rights crime victims or the public at large).

[34] Jerome H. Skolnick & David H. Bayley, *Community Policing*, 1988 ISSUES & PRAC. IN CRIM. JUST. 40 (Dep't of Just., 1988).

[35] *Id.* ("The [1968] Commission recognized that animus toward police symbolized deeper problems—with the society as a whole and the role of blacks within it, and especially with the entire system of law enforcement and criminal justice.").

[36] Simmons, *supra* note 13, at 911 ("[P]rivate law enforcement initiatives . . . ar[o]se from . . . an effort by private citizens to obtain greater and more responsive crime control . . . ."); *see also* Sklansky, *supra* note 1 at 1220 ("By the early 1980s, it was apparent that something different had happened: the private security industry was growing much faster than public law enforcement").

[37] FORST & MANNING, *supra* note 1, at 12 ("Even in the absence of brutality, professional policing was viewed by large segments of the minority community as cold and cruel.").

[38] *See id.* at 11–18.

These investigations brought to light many of the abuses the public had long suspected inherent in law enforcement agencies and led many to turn away from public officials in pursuing criminal justice initiatives.[39]

The return to privatization of law enforcement also reflects dissatisfaction with the results of public policing.[40] A failure of public law enforcement to adequately address the needs of individual victims, and the community as a whole, led the citizenry to look to alternative methods to achieve their desired objectives.[41]

Another significant motivator behind the current shift toward privatization is the availability of funding for law enforcement functions.[42] During economic downturns, when governments seek to limit spending, law enforcement and prosecutorial agencies may have limited or reduced budgets that restrict their ability to perform certain duties.[43] Private actors can often perform these same functions at a reduced cost, and so may be tapped to supplement or replace public entities.[44] Additionally, when public police officers are not available to perform police functions, private actors may seek out alternatives to public law enforcement to meet their needs.[45]

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[39] Skolnick, *supra* note 34, at 40–41.

[40] Simmons, *supra* note 13, at 911 ("a failure of the public criminal justice system to satisfy the needs of potential and actual crime victims.").

[41] *Id.* at 913 ("The public criminal justice system is failing. . . . [A] failure of the public system will inevitably lead to the development of a private alternative.").

[42] Fairfax, *supra* note 3, at 275–76 (2010) (noting that governmental budget cuts directed at prosecutors' offices led to reduced staffing which in turn diminished criminal law enforcement capacity).

[43] *Id.* at 265 ("In an era of scarce public resources, many jurisdictions are being forced to take drastic measures to address severe budgetary constraints on the administration of criminal justice.").

[44] *Id.*

[45] Simmons, *supra* note 13, at 924. To be effective, public law enforcement needs to meet the needs of the citizenry:

> Primary among these needs is the need to feel safe and secure: if the public police are scarce or nonresponsive to crimes being committed in a certain company or neighborhood, the company or neighborhood will likely respond with its own measures to improve security by hiring private guards, contracting with a private security firm, forming a neighborhood watch association, etc.

Id. Prior to the creation of public police departments, the ability to secure police presence or ensure prosecution was not something with which individual citizens concerned themselves. Yeazell, *supra* note 26, at 696. "In the world

The current trend toward privatization is most easily observed in the American criminal justice system in the areas of punishment and law enforcement.[46] While some scholars have argued that privatization should extend to adjudicative functions, these activities are still largely considered inherently public in nature and not delegable to private entities.[47] Thus, we see private actors having the greatest impact on the criminal justice system at the beginning and the end of the criminal justice process.[48]

Looking first to the increased use of private actors in the punishment phase of the criminal justice process, a significant shift has occurred over the last several decades toward increased use of private prisons.[49] As the prison population has dramatically grown, so too has the need for more prison space to house those prisoners.[50] States with limited resources and large bureaucracies have relied more and more on private companies to build and operate their prisons.[51] These private actors can operate without some of the bureaucratic procedures

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before the socialization of criminal justice, victims had the power to make some of these decisions. They did not need to convince a police chief or a district attorney to drop murder charges and go after unruly, drunken neighbors; they could do so themselves." *Id.*

46 Simmons, *supra* note 13, at 911.

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

48 Fairfax, *supra* note 3, at 266.

49 Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 149–50 (2010) ("At least 35 states and the District of Columbia now have private prisons . . . . The Federal Bureau of Prisons pays private providers to house approximately 11.5% of federal inmates . . . ."). The use of private actors to detain individuals is not limited to the criminal justice system. Indeed, in 2007, "Immigration and Customs Enforcement housed about 38% of its detainees in privately managed facilities." *Id*. at 150.

50 Simmons*, supra* note 13, at 933 ("[A]pproximately seven percent of prisoners in [the United States] are serving time in a privately run correctional facility.").

51 *Id.* at 934–35 (noting that a private prison must conform to statutory and constitutional restrictions on confinement and punishment); *see also* Sigler, *supra* note 49 at 150 ("During the present economic crisis, many states are poised to increase their reliance on private prisons.").

associated with publicly operated prisons and are often more cost efficient than the public prison system.[52]

In addition to the increased use of private actors in the punishment phase of the criminal justice process, a trend toward privatization can also be seen in the area of law enforcement.[53] Private security forces have existed throughout modern history.[54] The current trend toward privatization reflects a growing use of private security to accomplish public law enforcement tasks.[55] For example, it has become customary for businesses to hire private security to deter criminal activity from occurring.[56] Most people are familiar with the sight of a security guard patrolling a company's offices.[57] Businesses also hire private security forces to investigate crimes committed against their interests and bring those crimes to the attention of public prosecutors.[58] The desire to prevent and detect crime coupled with the resources available to many companies, leads businesses to rely on private law enforcement as a more effective and efficient means of protecting business interests.[59]

Similarly, neighborhoods with resources at their disposal may hire private security forces to patrol their neighborhoods and guard against

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[52] *See* Fairfax, *supra* note 3, at 271 ("Private prisons are a prominent example of outsourcing in criminal justice at both the federal and state levels."); *see also* Sigler, *supra* note 49 at 150 ("[S]tudies have found that private prisons may reduce the cost of housing inmates by as much as 15%.").

[53] Simmons, *supra* note 13, at 920–21 ("Although the immense breadth of the industry makes definite numbers hard to come by, it is undisputed that private security officers vastly outnumber public law enforcement officers, and spending on private security is approximately double the spending for law enforcement.").

[54] *Id.* at 919–21.

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

[56] *Id*.

[57] *Id.*

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

[59] *See* Fairfax, *supra* note 3, at 274.

criminal activity.[60] These neighborhood security forces are not comprised of public law enforcement officers, but private, for-profit officers who seek to accomplish the goals of the neighborhood that hired them.[61] Typically, these goals are to deter criminal activity within the geographic limits of the neighborhood and arrest those responsible.[62]

The increased use of private security forces presents a number of legal challenges. In large part, these challenges involve the lack of legal standards and oversight of private security.[63] There is little, if any, law regarding the training of private security officers, methods by which they engage in law enforcement activities, ways in which they identify suspects and make arrests, and limitations on the scope of their powers.[64] Thus, private security officers operate in a gray area of the law where few controls govern their conduct and the exercise of the powers they have been given.[65] Not bound by many of the constitutional restraints that restrict public law enforcement, private security officers are able to engage in conduct that would lead to the exclusion of evidence or dismissal of a criminal case had identical conduct been engaged in by a public law enforcement officer.[66]

In addition, private actors are often motivated by different incentives than those which motivate public law enforcement.[67] Whereas the goal of public law enforcement is to preserve and protect public interests, the goals of private security forces are often tied to the

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60 *Id.* at 273 ("[A]ny private police are retained by private communities and business groups to serve as an adjunct to the publicly paid and maintained police force.").

61 *Id.* at 274 ("The rationale underlying the explosion in the private police presence is that public police resources are not sufficient to protect the property and personal interests of those segments of society able to afford additional security.").

62 *See* Sklansky, *supra* note 1, at 1179–80.

63 *See* Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1451 (2010).

64 Sklansky, *supra* note 1, at 1227.

65 *Id.* at 1166–67 ("[P]rivate 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.").

66 *See infra*, Part IV.

67 Sigler, *supra* note 49, at 154.

distinct desires and needs of their employers.[68] For example, ensuring a fair and just criminal justice process is not likely a primary objective of most private security actors, but it is a purported goal of public law enforcement officers.[69] The disparity between the purposes behind private law enforcement and public law enforcement can lead to concerns about the methods by which private actors conduct their investigations and the people whom they target for investigation.[70]

But it is not just businesses and neighborhoods with resources that have begun to lean more heavily on private actors to accomplish public law enforcement goals. Indeed, lower income neighborhoods have exhibited a greater disillusion with public law enforcement than wealthier segments of the population.[71] In addition to dissatisfaction with, and distrust of, public law enforcement, neighborhoods with fewer resources are often areas in which there are higher crime rates.[72]

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[68] *Id.* ("Private firms and public agencies tend to have different capacities, cultures and priorities . . . and respond to different incentives." (quoting Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 534, 550 (2000))).

[69] *Id.* at 151.

[70] *Id.* at 154. ("[T]he fact that public and private providers may be animated by a different set of norms and goals gives rise to a range of concerns about the privatization of governmental responsibilities."); *see also* Sklansky, *supra* note 1, at 1191–92 (noting that private policing leads to less public control over law enforcement and accountability only to customers, rather than public at large).

[71] *See* Simmons, *supra* note 13, at 982–87. A significant concern over the increased privatization of law enforcement functions is that this trend provides more justice to those with resources at their disposal than those in poorer communities. *Id.* Indeed, well-funded private groups can not only afford their own private security forces to deter and detect criminal activity, but can impact the criminal laws themselves to most effectively address their community concerns. *See* Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy,* 60 STAN. L. REV. 1197, 1199–1201 (2008) (listing instances where private contractors have been accused of using their influence to achieve increased privatization as well as changes in substantive policy). Thus, private groups can lobby for laws that affect change. *Id*. For example, "[b]usiness improvement districts—coalitions of business and property owners, many of which have their own private security forces—have lobbied municipalities for, among other things, aggressive panhandling ordinances." *Id.* at 1199.

[72] It should be noted that, while lower-income urban neighborhoods may participate community watch programs, such programs are not always effective in higher-crime areas. This is attributed to the fact that:

> high-crime areas are often devoid of the social organization that we generally associate with definitions of "community." Field experiments have revealed that poor inner-city areas tend not to show the gains found in other areas after community policing

Thus, these communities have found alternative methods to deal with the criminal activity that occurs within their geographic confines. Without resources to hire private security forces, many communities rely upon neighborhood watch programs to aid in the prevention and deterrence of criminal activity.[73] Much like the use of private security forces, use of neighborhood watch programs is not without its own challenges.

III. THE RISE OF NEIGHBORHOOD WATCH PROGRAMS

Neighborhood watch programs have a long history in the United States,[74] and have grown in popularity since the "community policing" efforts of the 1980s.[75] The community policing movement attempted to change the way in which police met law enforcement goals.[76] Rather than devoting most police resources and attention to more severe crimes, community policing efforts by police departments shift resources to increased use of foot patrols, community revitalization, fostering ties to the communities, and encouraging the involvement of community members in crime deterrence.[77] By attempting to control

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> interventions are applied—improved satisfaction with police service, reduced fear of crime, improvements in perceived quality of life.

FORST & MANNING, *supra* note 1, at 14.

73 *See* Robert A. Mikos, *"Eggshell" Victims, Private Precautions, and the Societal Benefits of Shifting Crime*, 105 MICH. L. REV. 307, 344 (2006).

74 *See* Ivan K. Fong, *The Current State of Homeland Security*, 63 RUTGERS L. REV. 1135, 1140 (2011). While the term "neighborhood watch" may be a more recent addition to the American vocabulary, communities have historically coordinated with public law enforcement to provide security for their neighborhoods. *Id.* ("Americans have long helped to secure their hometowns as well as their homeland, from our tradition of civil defense, to more recent efforts like neighborhood watches and community-oriented policing initiatives."); s*ee also* Skolnick & Bayley, *supra* note 34, at 4 ("Neighborhood Watch is an American invention of the early 1970's.").

75 HOLLOWAY, *supra* note 7, at 6.

76 Nicole Stelle Garnett, *The People Paradox*, 2012 U. ILL. L. REV. 43, 49 (2012); FORST & MANNING, *supra* note 1, at 14 ("Above all, the community policing movement amounts to a return to fundamental democratic principles of governance: that the police *serve* the public, that they are *accountable* to the public, and that the public has a *voice* in determining how the police will serve them.").

77 FORST & MANNING, *supra* note 1, at 12–14. This new trend:

smaller-scale crimes in specific communities, it was reasoned that larger-scale criminal activity would gain less of a foothold in those same communities.[78]

One aspect of the community policing movement "promoted greater involvement of citizens in the prevention of crime."[79] This movement also tied into concerns that communities were becoming overly reliant on police protection.[80] Neighborhood watch programs grew in number as part of the efforts made by police and communities to encourage citizen involvement in crime prevention;[81] and the number of programs continue to increase.[82] It is estimated that more than forty percent of the population in the United States "live[s] in communities covered by neighborhood watch" programs.[83]

> meant getting closer to the community, not only to improve relations between the police and the community—a worthy end in itself—but also to become more familiar with the problems that were unique to specific areas and to develop contacts that would help the police, in partnership with the public, to both prevent and solve crimes.

Id. at 13.

78 Garnett, *supra* note 76, at 49–50.

79 HOLLOWAY, *supra* note 7, at 6.

80 *See* FORST & MANNING, *supra* note 1, at 14–15.

81 Community policing-like efforts have also become prevalent in the realm of national security. For example, to discover potential terrorist activity law enforcement has relied heavily on private actors to report suspicious activity. Michaels, *supra* note 63, at 1442–43. This "deputization" of private citizens to detect security risks is, in many ways, similar to neighborhood watch patrolling. *Id*. "By and large, the government asks deputies to report on suspicious events viewed either in plain sight or in the course of having privileged access to private space, privileged access given to the deputies in their commercial capacities; or, the government requests access to the deputies' stores of data." *Id*. at 1443. In rarer circumstances, private citizens will be asked to intervene more directly by "opening suspicious packages [or] independently analyzing data patterns for evidence of terrorist activities." *Id*. Indeed, the federal government sought to institute what amounted to a nationwide neighborhood watch program to ferret out suspected terrorist activity; however this program was vehemently opposed and ultimately shut down. *See* Diane Webber, *Can We Find and Stop the "Jihad Janes"?*, 19 CARDOZO J. INT'L. & COMP. L. 91, 110 (2011) (discussing the Department of Justice's Terrorism Information and Prevention System program).

82 HOLLOWAY, *supra* note 7, at 6.

83 *Id*. Such programs are also popular in England, where more than a quarter of residences are part of a neighborhood watch program. *Id*.

The structure of neighborhood watch programs can vary from community to community.[84] While some programs are initiated and guided by police, other programs begin as a grass-roots effort amongst the citizenry.[85] The connection between law enforcement and community watch programs also varies greatly. Some programs have strong ties to law enforcement and receive training and financial support from law enforcement organizations;[86] while other programs have minimal ties to law enforcement, receiving little to no training.[87] Still more programs fall in the middle of these two extremes; these programs receive materials and have some connection to law enforcement organizations, but do not receive substantial training or oversight.[88]

Because of the variety in neighborhood watch programs, it is difficult to attribute one organizational structure to these groups. Typically, neighborhood watch programs operate with a "block captain" who supervises the program for a specific geographic area.[89] These captains report up to a "block coordinator," who supervises the

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84 *Id*. at 10–11.

85 *Id.* at 10.

86 *Id.* at 11 ("The funding of Neighborhood Watch programs is nearly always a joint venture between the local police department and the program members through their fund-raising activities. The relative contribution of the two sources varies considerably.").

87 Michael Levin Epstein, *Trayvon Martin's Death Places Increased Attention on Neighborhood Watch Groups*, QUINLAN L. ENFORCEMENT EMP. BULL., May 2012, at 1, 2–3 (noting that informal neighborhood watch groups can be problematic because of the lack of training and limited contact with police departments); *see also, e.g.*, Franklin v. Arkansas, 863 S.W.2d 268, 270 (Ark. 1993) ("After talking to the owner of the building about a neighborhood watch program, Campbell took it upon himself to become a security guard for the area. He bought a security guard uniform, a night stick, whistle, mace, and a flashlight. On the evening of July 10, 1991, Campbell asked Bryan if he also wanted to become involved as a guard. Bryan agreed and pinned a security guard patch on his shirt. Bryan took a baseball bat with him when he went out to join Campbell on patrol."), Utah v. Harmon, 956 P.2d 262, 264 (Utah 1998) ("The homeowners in the rural Frampton Heights area had an informal 'neighborhood watch' system of keeping an eye on one another's properties and investigating the names, license plate numbers, and activities of strangers seen in the area. Harmon, the only year-round resident, participated in the watch and reported suspicious tracks or people to the owners of the five other cabins in Frampton Heights.").

88 HOLLOWAY, *supra* note 7, at 11.

89 *Id.* at 10.

watch over all of the areas within that community.[90] The coordinator often acts as a liaison between the police department and the neighborhood watch.[91] The size of the area covered by a neighborhood watch can also vary significantly, however many programs tend to be smaller in order to capitalize on the residents' knowledge of their neighbors and community needs.[92]

There are various ways in which these types of programs are purported to prevent criminal activity.[93] First, the presence of visible surveillance might deter potential offenders from committing crimes in a particular location.[94] Second, the opportunities to commit crimes might be reduced because of awareness and precautions taken by a more vigilant community.[95] Third, community involvement may foster "informal social control" by creating "acceptable norms of behavior

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90 *Id*.

91 *Id*.

92 *Id*. In addition, meetings of neighborhood watch programs can vary in participation. Some such meetings are closed to all but participants in the program, while others are open to the public. *Id.* at 10–11.

93 *See, e.g.*, MATTHEWS MUNICIPAL ORDINANCES § 42.59 sec. 3(c) (West 2012) ("Crime prevention officers shall encourage and assist in the formation of neighborhood watch groups. These groups shall provide opportunities for neighbors to know each other, to recognize when a stranger or an unfamiliar vehicle is in the neighborhood, to recognize suspicious activities and circumstances that may involve burglaries or other crimes, and to report suspicious circumstances or activities to the police. Neighborhood watch groups shall not be for the purpose of making arrests or doing other police work."). Model municipal ordinances lay out some of the foundational elements of a neighborhood watch program, but may diverge widely from these principles in practice. *See, e.g.*, *Louisiana v. Harrell*, No. 11-887, 2012 WL 280658 (La. Ct. App. Feb. 1, 2012).

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

95 *Id*. Neighborhood watch programs may deter crime by reducing opportunities for criminal activities by, for example, "creation of signs of occupancy, such as removing newspapers from outside neighbor's homes when they are away, mowing the lawn, and filling up trash cans," all of which can reduce opportunities for potential criminal actors to identify empty homes. *Id.* But, it has been noted that "the private deterrence measures that fearful individuals are most likely to take—including neighborhood watch groups, alarm systems, extra locks, bars on windows, etc.—tend to signal that crime is prevalent in a community." Nicole Stelle Garnett, *The Order-Maintenance Agenda as Land Use Policy*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 131, 141 (2010).

and by direct intervention of the residents."[96] Finally, neighborhood watch programs may affect criminal activity through heightened communications between the community and law enforcement.[97] With increased communication from the community, police receive more information about criminal activity, which may in turn lead to greater success arresting and prosecuting criminal actors.[98]

It should be noted that it is far from certain that these programs actually produce the desired effect, despite commonly held perceptions about the ways in which neighborhood watch programs reduce criminal activity.[99] Studies examining the effectiveness of neighborhood watch programs show results that are far from compelling[100] and are not conclusive regarding their success.[101] Yet, effective or not, neighborhood watch programs are popular and growing in number.[102]

Despite their prevalence and popularity, these programs are rife with challenges. Lack of training, poor organization, tendencies to target certain demographic groups, and overzealous interactions with suspects are common complaints regarding neighborhood watch programs.[103] Yet perhaps the most troubling problem associated with

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96 HOLLOWAY, *supra* note 7, at 14.

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

98 *Id.* at 14 ("An increase in information concerning crimes in progress and suspicious persons and events might lead to a greater number of arrests and convictions and, when a custodial sentence is passed, result in a reduction in crime through the jailing of local offenders."). *See, e.g.*, Weber v. Bland, No. 97 C 5227, 1998 WL 341823 (N.D. Ill. June 17, 1998) (neighborhood watch members' tips to police led to arrests). Neighborhood watch programs sometimes have access to information on criminal activity similar to that which is available to police. For example, a Wisconsin Statute provides that, "Neighborhood watch programs are entitled upon request to the names and information of all [registered sex offenders] residing, employed, or attending school in the 'community, district, jurisdiction or other applicable geographic area of activity.'" Wisconsin v. Schwarz, 630 N.W.2d 164, 179 n.9 (Wis. 2001) (citing Wis. Stat. § 301.46(4) (2001)).

99 HOLLOWAY, *supra* note 7, at 8 (collecting studies).

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

101 *Id*.

102 *Id.* at 6.

103 *See* Michaels, *supra* note 63, at 1435–38.

neighborhood watch programs are their tendency to impinge upon the civil liberties of those living within the community.[104] Without the training or oversight that police receive, members of neighborhood watch programs often do not have the tools or insight to exercise the discretion or restraint that police utilize use to ensure that individuals' rights are protected and constitutional safeguards are followed.

Indeed, the legal framework that, in many ways, restricts actions by law enforcement personnel provides generous loopholes for the public acting as members of a neighborhood watch.[105] It is these laws that allow members of the public to skirt procedural protections guaranteed to criminal suspects and lead to the diminution of civil liberties.

IV. LEGAL MECHANISMS THAT EMPOWER NEIGHBORHOOD WATCH PROGRAMS

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

When an officer first determines the need to investigate, the officer must justify any intrusion into an individual's freedom of movement by certain prescribed standards.[108] If an officer wants to detain or arrest an individual, further rules govern the circumstances under which such detention can be achieved.[109] If an officer seeks to search

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104 *See infra*, Part IV.

105 *See* Michaels, *supra* note 63, at 1451 ("Deputy relationships that provide something more—e.g., special access or the bypassing of legal restrictions imposed exclusively on government actors—pivot in no small part on the diffusion, distortion, and re-invention of traditional status designations of the private actors-*turned*-deputies.").

106 Sklansky, *supra* note 1, at 1183.

107 *Id*.

108 *E.g.*, Terry v. Ohio, 392 U.S. 1, 20 (1964).

109 *Id.* at 21 ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational

the individual, their vehicle, or their home, they are restricted in doing so by a number of legal doctrines.[110] Finally, if the officer wants to question the individual they are further limited by procedural rules that must be met before an interrogation can occur.[111] These legal limitations on an officer's powers are largely the result of nineteenth and twentieth century jurisprudence that dealt with a growing public police force charged with investigating criminal activity and providing for public safety.[112] In many ways, these limitations were the direct result of abuses by public officials that the law sought to remedy.[113] Yet no such limitations were imposed on private actors conducting investigative activities.[114] Indeed, constitutional safeguards that govern the actions of police engaged in criminal investigations do not apply to private actors engaged in the same activities.[115] Further, while there are no constitutional limitations on private actors engaged in law enforcement functions, self-defense doctrines and the right to bear arms have been expanded, allowing private citizens greater power to conduct police-like activities without the legal restrictions found in the rules of criminal procedure.

A. Constitutional Restrictions on Public Law Enforcement

The Fourth Amendment and its interpretational jurisprudence govern the ability of a police officer to stop an individual.[116] Pursuant to the Fourth Amendment, a police officer may only stop an individual

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inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.").

110 JOSEPH COOK, THE CONSTITUTIONAL RIGHTS OF THE ACCUSED § 4:1 (3d ed. 1996).

111 *Id.* § 6:14.

112 *See generally* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004) (discussing the "criminal procedure revolution").

113 *Id.* at 1372.

114 Simmons, *supra* note 13, at 935 (explaining that a private security guard may "search a suspect without probable cause or consent . . . and . . . can elicit confessions without concern for *Miranda* rights.").

115 *See infra* Part IV.B.

116 COOK, *supra* note 110, § 4:1.

under certain, limited circumstances.[117] For example, if an officer wants to detain an individual, the officer must be able to articulate a certain level of suspicion.[118] Further, that level of suspicion is not merely the subjective belief of the officer, but must hold up to an objective assessment of the circumstances surrounding that particular detention.[119] If the officer desires to go beyond mere detention of the individual and arrest the suspect, the officer must either obtain a warrant from a neutral and detached magistrate or the circumstances must satisfy specific enumerated exceptions to the warrant requirement.[120]

The Fourth Amendment also places limits on an officer's ability to conduct searches of a suspect, a suspect's belongings, a suspect's residence, or a suspect's vehicle.[121] Indeed, search and seizure law is an enormous body of jurisprudence designed to guide and limit officers' discretion in conducting searches.[122] An officer is only permitted to conduct searches if the officer has obtained a warrant or if a specific legal exception to the warrant requirement exists.[123] Thus, an officer may conduct a warrantless frisk of a suspect to search for weapons if that officer reasonably believes the suspect is armed and dangerous, but may not conduct such a search without this belief nor may the officer search for anything other than weapons.[124] Further, an officer's ability to search a car is limited by several doctrines that restrict the officer's ability to search the vehicle unless certain circumstances are present.[125] The list of exceptions to the warrant

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117 *E.g.*, Richard E. Myers, II, *Challenges to Terry for the Twenty-First Century*, 81 MISS. L.J. 937, 940 (2012).

118 *Id*.

119 Terry v. Ohio, 392 U.S. 1, 20 (1964).

120 *See* Sklansky, *supra* note 1, at 1184 ("An officer, as a general matter, may arrest anyone [without a warrant] he or she has probable cause to believe has committed a felony, and anyone who commits a misdemeanor in the officer's presence.").

121 *See* COOK, *supra* note 110, § 4:1.

122 *See id*.

123 Arizona v. Gant, 556 U.S. 332, 338 (2010) ("[T]he basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'").

124 *Terry*, 392 U.S. at 24–25.

125 *See* Robert H. Whorf, *"Coercive Ambiguity" in the Routine Traffic Stop Turned Consent Search*, 30 SUFFOLK U. L. REV. 379, 382–90 (1997).

requirement is long, and thus provides many ways in which police can justify searches without first obtaining a warrant.[126] Yet despite the number of exceptions to the warrant requirement, it is important to note that police are still governed by these exceptions, and must conform their conduct to the rules prescribed by the courts.[127]

Constitutional restrictions further require that police provide certain warnings to a suspect in custody before asking that suspect questions designed to elicit an incriminating response.[128] In addition, if the suspect requests the presence of an attorney, the law mandates that the police officer cease all questioning until the attorney's presence is obtained.[129] The types of questions an officer can ask, and the circumstances under which a police officer may ask these questions, are also restricted to ensure the voluntariness of any confession obtained.[130] For example, police may not make certain types of promises to obtain incriminating information from a suspect.[131] Thus, there are numerous rules governing the conduct of police officers engaged in criminal investigations. These rules are designed to ensure that constitutional safeguards protecting the rights of criminal suspects are not violated.

The enforcement of these rules is primarily accomplished through the exclusionary rule, a doctrine whereby evidence obtained illegally by police is inadmissible at trial.[132] This rule ensures that police do not

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126 *See* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985).

127 *Id*.

128 Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.").

129 *See, e.g.*, United States v. Fouche, 776 F.2d 1398, 1405 (9th Cir. 1985); United States v. Cherry, 733 F.2d 1124, 1130 (5th Cir. 1984).

130 COOK, *supra* note 110, § 6:14.

131 *Id.*

132 Wong Sun v. United States, 371 U.S. 471, 485 (1963) ("The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion."); *see also* WAYNE R. LAFAVE, SEARCH & SEIZURE 4 (4th ed 2004).

benefit from violating the mandates of the Constitution.[133] As the Supreme Court stated in *Elkins v. United States*, the purpose of the rule is to deter illegal conduct on the part of the police, thereby "compel[ling] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[134] Further, by preventing fruits of illegal police conduct from becoming evidence used to support a conviction, the exclusionary rule ensures that the courts do not become a "party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."[135] Thus, when public law enforcement officers engage in unconstitutional conduct to seize evidence, the exclusionary rule bars the use of such evidence at trial.[136]

Due process guarantees may be protected further by civil actions against government agents under 42 U.S.C. § 1983.[137] This statute provides that an individual may sue government officials who have violated the individual's civil rights.[138] Section 1983 is limited in scope, however. First, the plaintiff must prove that he was denied a federally protected right by a government official who acted "under color of state . . . law."[139] Second, police officers acting within the

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133 Herring v. United States, 555 U.S. 135, 148 (2009) (Ginsburg, J. dissenting) ("The exclusionary rule provides redress for Fourth Amendment violations by placing the government in the position it would have been in had there been no unconstitutional arrest and search.").

134 364 U.S. 206, 217 (1960).

135 Terry v. Ohio, 392 U.S. 1, 13 (1964).

136 *Id*. Further, the exclusionary rule also prohibits the use of secondary or derivative evidence, obtained as a result of the initial illegal conduct. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1920).

137 The statute provides that:

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

42 U.S.C. § 1983 (2012).

138 *Id*.

139 Gomez v. Toledo, 446 U.S. 635, 640 (1980).

course of their duties are often protected by qualified immunity.[140] Therefore, unless the officer engaged in conduct that is a clear violation of established law, the officer will not be liable in a § 1983 action. These actions also are limited because lawsuits require resources that many criminal defendants lack.[141] Because of the hurdles a criminal defendant must overcome to sustain an action under § 1983, successful actions under this statute are more rare than the successful use of the exclusionary rule to remedy the illegal seizure of evidence.

Through these various legal mechanisms, police are faced with numerous procedural rules that govern their conduct in any investigation. These rules attempt to ensure that police do not impinge upon the civil rights of individual suspects and ensure conformity by prohibiting the use of evidence obtained in violation of criminal procedure safeguards. Whether these rules are routinely followed or effective is the subject of much scholarly debate. For purposes of this article, however, the important point is that procedural safeguards exist that limit police conduct while investigating crimes. Therefore, police officers must conform their conduct to these constitutional safeguards.

B. Powers Available to Neighborhood Watch Programs and their Members

It is important to emphasize that it is "public" officers who must conform their conduct to the rules of criminal procedure set forth above.[142] The Supreme Court has repeatedly held that the application of the Fourth, Fifth, Sixth, and Fourteenth Amendments are limited to governmental conduct.[143] Under the state action doctrine, "the Fourth Amendment exclusionary rule, the *Miranda* protections, and the underlying guarantees of the Fourth, Fifth, and Sixth Amendments

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[140] Pearson v. Callahan, 555 U.S. 223, 244 (2009) ("The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law.").

[141] Although, under the Civil Rights Attorney's Fee Awards Act of 1976, courts are permitted to award attorney's fees to plaintiffs who successfully bring suit under § 1983. Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988(b) (2012)).

[142] *See* Sklansky, *supra* note 1, at 1183 ("[T]he 'criminal procedure revolution' of the past half century has left private security largely untouched.").

[143] *See* FORST & MANNING, *supra* note 1, at 21 ("[Private agents] enjoy the powers to arrest, to search for and seize evidence, and to file criminal charges in court, but the are not held to due process requirements routinely followed by the police, such as those specified in *Mapp v. Ohio*.").

[are] inapplicable to investigative activity carried out by private citizens."[144] Unless the investigating party is a public officer or acting pursuant to the direction of a public officer, criminal procedure rules that limit the investigator's conduct and protect individuals' civil rights are inapplicable.[145] Thus, because of the state action doctrine, private security companies employing guards that patrol businesses and neighborhoods are not subject to the same criminal procedure rules that govern a police officer's conduct.[146] The actions of a private citizen are similarly unrestrained by the constitutional principles which

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[144] Sklansky, *supra* note 1, at 1229. It is important to note that while much of the literature on this issue has focused on the rights of private security guards and patrols, in general there is no legal distinction between hired private security forces and members of a neighborhood watch patrol. *Id*. Both are subject to the same legal rules and benefit from the lack of clear restrictions on their conduct. *Id*. Constitutional principles apply to the actions of a private security guard or a private citizen only when that individual is officially deputized and is acting as an agent of the government. *Id.* at 1229–30. Further, "[v]irtually without exception, state constitutional restrictions on criminal investigations are similarly limited." *Id.* at 1233. Some states, such as Texas, do extend constitutional limitations to the actions of private actors. *See* TEX. CODE CRIM. PROC. ANN. Art. 38.23 (West 1987). Under the Texas Rules of Criminal procedure, any evidence obtained in violation of the law is inadmissible at trial. *Id*. The rule specifically provides:

> No evidence obtained by an officer *or other person* in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

Id. (emphasis added). Courts have interpreted this rule to mean that evidence illegally obtained by a private citizen is subject to the exclusionary rule. Miles v. Texas, 241 S.W.3d 28, 39 (Tex. Crim. App. 2007) (citing Gillett v. State, 588 S.W.2d 361, 370 (Tex. Crim. App. 1979) (Roberts, J., dissenting)). However, this extension of constitutional principles to private actors by state law is the exception and not the rule.

[145] Simmons, *supra* note 13, at 929–30 (discussing state action). Courts have interpreted the state action doctrine narrowly and have refused to treat private citizens as state actors unless they have been formally deputized or are acting at the direct behest of a government actor. Sklansky, *supra* note 1, at 1232 (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)); s*ee also* Flagg Bros. v. Brooks, 436 U.S. 149, 164–65 (1978).

[146] Simmons, *supra* note 13, at 930 ("[G]iven the current status of the state action doctrine for criminal procedure cases, there is no way to legally distinguish between private police and private citizens.").

limit the actions of public officers conducting an investigation.[147] It follows then that members of a community patrol, engaged in law enforcement functions, are not restricted in the same ways that public law enforcement officers are limited.[148] Indeed, there is little guidance on what laws govern community watch members acting in the course of their duties.[149] Further, there has been an expansion in recent years of the self-defense doctrine; this expansion has provided more power to private individuals, which directly affects the powers of neighborhood watch patrols.[150]

1. Detention and Arrest

Much like a public police officer, a private citizen has certain rights to detain and arrest an individual without a warrant.[151] Derived from historical doctrines that permitted citizen arrests, current legal standards permit citizens to detain and arrest individuals under certain prescribed circumstances.[152] Indeed, the ability of a police officer to arrest a suspect without a warrant is not much broader than the ability of a private citizen to do the same.[153] Most statutes permit a citizen to arrest an individual when the citizen observes the individual engaged in misdemeanor criminal conduct or has probable cause to believe an

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

148 Simmons, *supra* note 13, at 929 ("Courts have also refused to apply the standard Constitutional restrictions on law enforcement . . . to private security forces. This refusal is perhaps the most significant area of neglect, as the Constitution is the source of all significant limitation on public police powers, regulating how the public police conduct investigations, searches, arrests, and interrogations.").

149 *See id.*

150 Sklansky, *supra* note 1, at 1190–91.

151 *Id.* at 1184.

152 LESTER BERNHARDT ORFIELD, NAT'L. CONFERENCE OF JUDICIAL COUNCILS, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 7 (1947) ("At common law, arrests might be made either by a private person or by a police officer.").

153 Sklansky, *supra* note 1, at 1184 ("[T]he arrest powers of ordinary citizens in most states are not strikingly different, in some significant respects, from those of police officers."). Indeed, in the absence of a warrant, the only significant difference between a police officer's arrest power and a private citizen's arrest power is that the private citizen is liable for false arrest if she arrests for a felony that later turns out not to have been committed. *Id.* at 1185.

individual has committed a felony.[154] Thus, a member of a neighborhood watch may detain any individual he or she observes engaging in particular criminal activity.[155] Because the private individual is not restricted by the principles of the Fourth Amendment in stopping and arresting an individual, a member of a neighborhood watch need not abide by any of the numerous rules governing the ability of police to conduct such an arrest.[156] Further, if the member of the neighborhood watch later turns out to be incorrect in his observations, the law does not require that any evidence seized pursuant to the arrest be inadmissible.[157] Because in most circumstances the exclusionary rule does not apply to private conduct—even when a private citizen acts in an egregious manner in seizing an individual—the exclusionary rule will not prevent the admissibility of the evidence obtained as a result.[158]

2. Searches

Similarly, Fourth Amendment guarantees do not apply to searches conducted by private citizens.[159] Thus, upon stopping a suspect, a member of a neighborhood patrol may search the suspect's person, effects, and vehicle, without concern for the applicability of search and

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154 *Id.* at 1184. It should be noted that another way in which private individuals are given greater latitude in law enforcement activities is in the discretion they have to arrest and seek charges against an individual. "Unlike sworn officers, who are bound to file criminal charges when probable cause exists, private security personnel have discretion to prosecute offenders . . . ." FORST & MANNING, *supra* note 1, at 21–22.

155 *See* Sklansky, *supra* note 1, at 1184 ("A private citizen typically may . . . arrest for a misdemeanor committed in his or her presence, and for a felony he or she has probable cause to believe the arrestee has committed—as long as the felony has in fact been committed, by the arrestee or someone else."); *see also id.* at 1184–85 n.85 (collecting citizen arrest statutes).

156 *See, e.g.,* FORST & MANNING, *supra* note 1, at 21 ("Private agents have the authority to stop and challenge any person, without probable cause, for trespassing in a designated private area, and they can make arrests without having to give *Miranda* warnings to arrestees.").

157 *See, e.g.*, Burdeau v. McDowell, 256 U.S. 465, 476 (1921) ("The papers having come into the possession of the government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character.")

158 *See* Simmons, *supra* note 13, at 929.

159 Sklansky, *supra* note 1, at 1183.

seizure laws or the admissibility of evidence obtained in violation of those laws.[160] As long as the person conducting the search is not acting at the behest of a government agent, they need not abide by rules governing governmental searches.[161] Any item seized in the course of a search by a neighborhood watch member would be admissible at trial as, again, the exclusionary rule is not applicable to such conduct.[162]

3. Interrogation and the Right to Counsel

The interrogation of a suspect by a citizen-member of a neighborhood watch group is also not governed by the principles of the Fifth and Sixth Amendments.[163] A member of a neighborhood watch need not read a suspect his *Miranda* rights before questioning the suspect, nor need the interrogation cease if the suspect requests an attorney.[164] Indeed, lower courts have consistently held that the Sixth Amendment protection against uncounseled interrogation is inapplicable to interrogations by private persons.[165] And since the information gathered by the neighborhood watch member in the course an interrogation would not be subject to the exclusionary rule, the information would be admissible in a trial.[166]

Just as a private citizen acting in his or her own capacity, the member of a neighborhood watch need not conform his or her actions to constitutional criminal procedure requirements.[167] In some respects, this is not overly concerning. Neighborhood watch members do not typically exhibit the same indicia of authority as public law enforcement officers: they typically do not wear a uniform or badge, they do not openly carry weapons, nor do they possess all of the powers that public law enforcement officers maintain. For example,

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160 *See* COOK, *supra* note 110, § 4:1.

161 Sklansky, *supra* note 1, at 1232.

162 *Id.* at 1231–32.

163 *Id.* at 1183.

164 A private citizen acting as a member of a neighborhood watch, is no more restricted by these principles than a private security guard, and "suspects interrogated by security guards are not entitled to Miranda warnings." Sklansky, *supra* note 1, at 1183.

165 *Id.* at 1233 & n.3 (collecting cases).

166 *Id.* at 1232 ("[L]ower courts without exception have refused to impose the prophylactic protections of *Miranda* on private interrogators.").

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

neighborhood watch members cannot force an individual to stop or permit a search, nor can they force an individual to remain in their presence for questioning. However, the ability of these private citizens to conduct law enforcement activities is particularly troubling, in part, because of laws that have expanded upon the ability of individuals to carry weapons and to act in self-defense.

C. Concealed Weapon and Stand Your Ground Statutes

The powers wielded by private actors acting as members of a neighborhood watch are further emboldened by laws that have expanded the ability of private citizens to carry weapons and to use deadly force in self-defense.

1. Expansion of Concealed Weapon Legislation

The Second Amendment to the United States Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to bear Arms, shall not be infringed."[168] From early American jurisprudence to modern times, courts have consistently affirmed the right of the people to carry firearms.[169] But the circumstances under which the "People" had the right to bear arms have altered dramatically since the eighteenth century.[170] Early American jurisprudence premised this right on the need for armed militias.[171] Thus, in the eighteenth and nineteenth centuries those individuals who were part of the military were not only permitted to bear arms, but required to do so.[172] It was not until the twentieth century that scholars began to argue that the Second Amendment was the source of an individual right.[173] This more recent

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168 U.S. CONST. amend II.

169 Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 589 (2012).

170 ROBERT J. SPITZER, THE RIGHT TO BEAR ARMS: RIGHTS AND LIBERTIES UNDER THE LAW 84 (2001) (noting that up until the second half of the twentieth century, the Second Amendment received little attention as it was thought to relate to citizen-militias, but a shift in the latter half of the twentieth century has led to the interpretation of the amendment to provide an individual right).

171 *Id*. at 16–17.

172 *Id*. at 17 (noting that early American law required eligible males to own a firearm to participate in the militia; the law also barred certain groups, such as slaves, from owning firearms).

173 *Id*. at 51. In a law review article published in 1960, the argument was first put forward that the right to bear arms was an individual right. *Id.* The argument was

development has led to statutes and cases explicitly providing for an individual's right to bear arms.[174] This right has not been interpreted to be absolute, however, and courts have held that legislatures may constitutionally regulate gun ownership in various ways.[175]

Historically, many states have limited gun ownership through the requirement that a gun owner must receive a permit to carry the weapon.[176] Through this mechanism, the State regulates and limits those individuals that are eligible to own a firearm by heightening the burden for obtaining a permit. While some states continue use permits to severely restrict gun ownership, most jurisdictions now authorize "shall-issue" gun permits, allowing most individuals not specifically excluded by statute to own a gun.[177] These states grant "presumptive carry" rights, which allow individuals "the opportunity, if they so choose, to carry defensive weapons in most places and times."[178] Therefore, in most states, individuals need not have a specific need to carry a weapon to do so. This shift away from more restrictive gun control laws toward greater rights to bear arms has gained support in the last ten years.[179]

Another way that states regulate gun use is to limit the method by which an individual can carry a weapon.[180] In early American jurisprudence, laws permitting individuals to carry guns mandated that the weapon must be carried openly.[181] This is in dramatic contrast to current legislation in many states authorizing individuals to carry

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"that the Second Amendment supported an individual or personal right to have firearms, in particular for personal self-defense, separate and apart from citizen service in a government militia." *Id.* at 51 (citing Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960)).

174 *See* O'Shea, *supra* note 169, at 593 n.24 (2012) ("[N]early all American jurisdictions authorize private individuals to carry handguns in public in at least some limited circumstances . . . .").

175 *Id.* at 592–93.

176 *Id*.

177 *Id.* at 599 ("Thirty-five states make available shall-issue handgun carry permits. Four more states dispense with a permit requirement . . . .").

178 *Id*. at 595.

179 Robert J. Spitzer, *Gun Law, Policy, and Politics*, N.Y. ST. B.A.J., Jul./Aug. 2012, at 35, 35–36.

180 O'Shea, *supra* note 169, at 596.

181 *Id.*

concealed weapons.[182] Indeed, some states have barred the open display of guns entirely and mandated that weapons must be carried in a concealed manner.[183] Since the 1990s, more and more states have allowed individuals to carry concealed weapons; more than forty states currently authorize concealed-carry permits for gun owners.[184]

This shift away from more restrictive gun regulation to more permissive laws has led to an increase in gun ownership.[185] Indeed, while a precise number is hard to ascertain, approximately one in every three Americans own a gun.[186] This shift further reflects a change in the ability of citizens to use force for self-protection.[187] Individuals armed with weapons can use those weapons to defend themselves and their homes. Further, individuals organized as members of neighborhood watch programs may use weapons to protect themselves as they patrol their communities.[188] Whether openly carrying weapons, or carrying a concealed weapon, a neighborhood watch member is empowered through his ability to wield a firearm.

This practice, and the problems associated with it, is highlighted by the facts of the Trayvon Martin case. George Zimmerman, who shot Martin, carried a semi-automatic handgun while patrolling his

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182 *See* Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 681 (1995).

183 James Bishop, *Hidden or on the Hip: The Right(s) to Carry after* Heller, 97 CORNELL L. REV. 907, 924 (2012).

184 *Id.* at 910 ("In a stunning cultural sea-change that began in the early 1990s, demand for concealed-carry permits exploded in popularity across the nation, and today more than forty states issue permits to anyone who meets the relatively modest eligibility criteria.").

185 *See* Lydia Saad, *Self-Reported Gun Ownership in U.S. Is Highest Since 1993*, GALLUP (Oct. 26, 2011), http://www.gallup.com/poll/150353/Self-Reported-Gun-Ownership-Highest-1993.aspx.

186 *Id*.

187 FORST & MANNING, *supra* note 1, at 15 ("Laws permitting private citizens to carry concealed weapons became increasingly popular in the 1990s. The police no longer monopolize public safety.").

188 *See, e.g.*, People v. Rios, 75 Cal. Rptr. 2d 184 (Cal. Ct. App. 4th 1998), *review granted and opinion superseded sub nom*. People v. Ramirez Rios, 962 P.2d 169 (Cal. 1998), *aff'd*, 2 P.3d 1066 (Cal. 2000) (neighborhood watch block captain charged with murder and acquitted, but convicted of voluntary manslaughter on retrial).

neighborhood as a member of a neighborhood watch.[189] During the course of his patrol, Zimmerman confronted Martin.[190] While at the time of this writing the facts of this case have yet to be determined in a court of law, what is known is that Zimmerman ultimately used his weapon against Martin, an unarmed teenager, killing him.[191] Permissive gun ownership laws and the ability of private actors to carry concealed weapons has led to the ability of neighborhood watch members to use such weapons in confrontations with suspects. Further, stand your ground laws have expanded upon the legal defenses available to actors who use those weapons in the course of their neighborhood watch duties.

2. Stand Your Ground Legislation

The powers of a private individual to use force against another has also greatly expanded through the doctrine of self-defense; specifically, stand your ground laws that allow for an individual to use deadly force against another when attacked, regardless of whether the individual has the ability to retreat. At its foundation, the doctrine of self-defense permits an individual to respond to an attacker with force.[192] This right is limited in that initial attack must be imminent and the response must be necessary and proportional.[193] However, as long as those limitations are met, self-defense permits an individual to use force, even deadly force, in response to an attack.[194]

In English common law, self-defense was an excuse available in certain cases but required the Sovereign's pardon.[195] Self-defense was generally disfavored by English jurists and thus limitations were put in

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189 Dennis A. Henigan, *The Woollard Decision and the Lessons of the Trayvon Martin Tragedy*, 71 MD. L. REV. 1188, 1189 (2012).

190 *Id.* at 1202.

191 *Id.* at 1189. *See also* Petition for Writ of Prohibition, Zimmerman v. State, No. 5D12-3198, 2012 WL 3776782 (Fla. App. 5 Dist. Aug. 13, 2012); Response to Petition for Writ of Prohibition, Zimmerman v. State, No. 5D12-3198, 2012 WL 3776807 (Fla. App. 5 Dist. Aug. 23, 2012).

192 P. Luevonda Ross, *The Transmogrification of Self-Defense by National Rifle Association-Inspired Statues: From the Doctrine of Retreat to the Right to Stand Your Ground*, 35 S.U. L. REV. 1, 1 (2007).

193 *Id.*

194 *Id.* at 1–2.

195 *Id.* at 5–6.

place on its applicability.[196] One such limitation was the duty to retreat.[197] In English common law, a defendant must have "retreated until his back was 'to the wall'" to successfully raise the defense.[198]

The doctrine of self-defense was also incorporated into early Anglo-American common law, as was the duty to retreat under the doctrine.[199] Yet "[d]espite the significant precedent establishing the duty to retreat in the English and Anglo-American common law, there was a dramatic movement to abandon the duty in the United States during the late nineteenth century."[200] The movement to abandon the duty to retreat is often attributed to a unique early-American mindset that is known as the "true man" ideal: a true man need not retreat when attacked by another. Thus, if an individual was attacked by another, the "true man" principle would permit him or her to respond with deadly force without being criminally liable for his or her actions.[201]

Despite this nineteenth century movement to abandon the duty to retreat, the duty remains a significant part of modern American jurisprudence on self-defense. Over time, however, this duty has been narrowed in numerous ways.[202] The most broadly adopted exception to the duty to retreat is commonly referred to as the "'Castle Doctrine.'"[203] Under this doctrine, an individual may defend himself within his own home without a duty to retreat.[204] Over time, this doctrine has been expanded by many states to include the curtilage of a home.[205] Other states have expanded the castle doctrine to include vehicles.[206] Thus, the expansion of this doctrine has increasingly allowed individuals to be able to exercise deadly force without first

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196 Benjamin Levin, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 528 (2010).

197 *Id*.

198 Ross, *supra* note 192, at 5–6.

199 Levin, *supra* note 196, at 529.

200 *Id.*

201 Levin, *supra* note 196, at 529.

202 Ross, *supra* note 192, at 1–3.

203 *Id.* at 12.

204 *Id*. at 12–13.

205 *See* United States v. Dunn, 480 U.S. 294, 300 (1987) ("The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself.").

206 Ross, *supra* note 192, at 28 (noting that Indiana, Kansas, Louisiana, and South Dakota have all extended the castle doctrine to apply to vehicles).

retreating when attacked outside of their home; specifically, an individual can use deadly force when attacked in the area surrounding his home or in his car.[207]

The more recent trend has been to expand the castle doctrine much further—nearly doing away with the duty to retreat altogether. The recent trend abandons the duty to retreat in public places where the individual has a right to be.[208] This expansion invokes some of the "true man" arguments of the latter part of the nineteenth century and grounds itself in the principle that an individual need not avoid a confrontation with an unprovoked attacker so long as that individual is rightfully in a public place.[209] Statutes reflecting this expansion of the castle doctrine are often referred to as "stand your ground" laws.[210]

Stand your ground legislation has been considered in well over half of the states in the country and has been adopted in twenty-four states.[211] In states that have adopted stand your ground statutes, "defendants need only show that they were not the first aggressor and had a legal right to be in the location where they remained; if those conditions are met, they have no duty to retreat and may meet 'force with force.'"[212]

Other protections of the right to self-defense have been incorporated into these stand your ground laws. For example, in Alabama, if the use of deadly force is justified, the defendant who used such force and stood his ground is immune from both criminal and civil liability.[213] Further, Alabama law places the burden on law enforcement to make an initial determination as to whether the use of deadly force was justified; a suspect may only be arrested if there is

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207 *Id.*

208 Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455, 1461 (2010).

209 Levin, *supra* note 196, at 529.

210 Ross, *supra* note 192, at 2.

211 *See* Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 663 (2003) ("Most jurisdictions do not impose the duty to retreat on one who is unlawfully attacked, whether in public or private space . . . ."); Cora Currier, *The 24 States That Have Sweeping Self-Defense Laws Just Like Florida's*, PRO PUBLICA, (Mar. 22, 2012 12:05 PM), http://www.propublica.org/article/the-23-states-that-have-sweeping-self-defense-laws-just-like-floridas.

212 Braman, *supra* note 208, at 1461.

213 Ross, *supra* note 192, at 22–23 (citing ALA. CODE § 13A-3-23(d) (as amended through Act 303, sec. 1, 2006 Ala. Acts 638, 640 (2006))).

probable cause to find that the use of such force was unlawful.[214] By shifting the defendant's burden to defend his actions onto the state to determine whether a defense exists, Alabama's stand your ground statute gives defendants a much greater chance at success in asserting this defense.

Courts have often interpreted stand your ground statutes quite broadly, providing defendants greater protection under this defense.[215] For example, in Florida, an appellate court held that the stand your ground statute allows a defendant to use deadly force "even if other means of self-protection are available, and . . . even if the attacker is unarmed."[216] Thus, the use of the stand your ground defense has been successful in circumstances where the law historically would not allow for the use of deadly force to respond to an attacker.

The broadening of self-defense and gun ownership laws has led to private citizens wielding greater powers against one another. This empowerment extends to members of neighborhood watch programs. When confronted by a suspect while on a neighborhood patrol, in most states, the member of the patrol may not only be carrying a firearm but may use it against the suspect should the member feel attacked—even if the suspect later turns out to have been unarmed and innocent of any criminal conduct.

The Trayvon Martin case demonstrates the problem with this paradigm. While on patrol for his neighborhood watch program, George Zimmerman shot and killed Martin, an unarmed teenager.[217] Because of Florida's expansive stand your ground statute, Zimmerman was not initially arrested by police.[218] Indeed, Zimmerman was not arrested for several weeks and not until there was a significant public outcry against the failure to charge him with a crime.[219] Even though Zimmerman was eventually arrested and charged with second-degree murder, charges against him may still be dismissed following a

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214 *Id.* at 23 (citing ALA. CODE § 13A-3-23(e)).

215 Pearl Goldman, *Criminal Law: 2007–2010 Survey of Florida Law*, 35 NOVA L. REV. 95, 106–110 (2010) (surveying recent decisions interpreting Florida's stand your ground statute).

216 *Id.* at 107 (citing McWhorter v. State, 971 So. 2d 154, 157 (Fla. 4th Dist. Ct. App. 2007)).

217 *See* sources cited *supra* notes 9, 189.

218 Curt Anderson, *Zimmerman Will Seek 'Stand Your Ground' Hearing*, HUFFINGTON POST, Aug. 9, 2012, http://www.huffingtonpost.com/2012/08/09/zimmerman-stand-your-ground_n_1759532.html.

219 *Id.*

hearing on his defense under the stand your ground Statute.[220] The Trayvon Martin case clearly shows the powers available to neighborhood watch members through expansive gun ownership laws and stand your ground legislation—and the tragic consequences that can result.

Because of the power wielded by private citizens engaged in law enforcement functions and the lack of restrictions on the conduct of neighborhood watch associations, actions of neighborhood watch members may lead to significant concern about due process protections and the fairness of the criminal justice process as a whole.

D. Problems Posed by the Powers Available to Neighborhood Watch Members

This right to "stand your ground" against an attacker as well as the increasing number of laws protecting the right to carry a weapon have led to a citizenry that may use deadly force in numerous circumstances.[221] But perhaps nowhere is this more concerning than in situations where that citizenry has taken on law enforcement duties. The existence of neighborhood watch patrols made up of untrained citizens, armed and empowered but without constitutional limitations on their behavior, will likely lead to a failure to adequately protect the civil liberties of individuals confronted by such patrols.

While concerns over a single, vigilant neighbor, keeping a watchful eye out for criminal activity may not pose many concerns, legitimate concerns for civil liberties do arise when that neighbor joins an organized group charged with protecting the neighborhood and is allowed to carry a concealed weapon and to refuse to back down in a confrontation. Certainly, a suspect can refuse to answer questions or have his person searched by a member of a neighborhood watch, and can walk away at will. But when that neighborhood watch member carries a weapon and is authorized to defend himself with deadly force

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220 *Id.*

220 *Id.*; *see also* Rene Stutzman and Jeff Weiner, *George Zimmerman Judge*, ORLANDO SENTINEL, Oct. 26, 2012, http://articles.orlandosentinel.com/2012-10-26/news/os-george-zimmerman-gag-order-20121026_1 ("[The Judge] also set Zimmerman's 'Stand Your Ground' hearing for late April [of 2013]. At that hearing, she must decide whether he shot Trayvon because he had a reasonable fear of great bodily injury or death.").

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

should a confrontation ensue, the power of the neighborhood watch to coerce a suspect into stopping or permitting a search greatly increases.[222]

Further, because private actors have total discretion in determining whom to investigate and against whom to seek criminal sanctions, there is concern that those private actors are engaging in behavior that may violate the due process and equal protection rights of those suspects.[223] Bias against certain demographic groups is a problem that has long plagued public law enforcement entities.[224] Police departments and prosecutorial offices have attempted to remedy this concern through various methods.[225] Procedural rules have attempted to limit the use of racial profiling by law enforcement officers.[226] While such conduct certainly still occurs, the race or ethnicity of an individual, by itself, cannot provide suspicion to stop or detain that individual.[227] Police departments have also invested in training and educational programs designed to attack biases within the department,

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222 Neighborhood watch members have other methods of coercion as well. Cases in which neighborhood watch members have been accused of threatening or harassing suspects demonstrate the more subtle powers that neighborhood watch groups can wield. *See, e.g.*, Turnage v. Kasper, 704 S.E.2d 842, 846 (Ga. Ct. App. 2010); Amarillas v. Campolong, No. H030971, 2008 WL 4606528, at *3 (Cal. Ct. App. 2008).

223 FORST & MANNING, *supra* note 1, at 21–22.

224 Braman, *supra* note 208, at 1479.

225 *See, e.g.*, Abe Markman, *Overcoming Hidden Biases*, THE HUMANIST, Mar.-Apr.–2012, at 40 (describing a training program recently adopted by the New York City Police Department which is aimed at helping "officers recognize and overcome bias"); Matt Okarmus, *Police Academy Class Focuses on Civil Rights*, MONTGOMERY ADVERTISER, Aug. 27, 2011, 3B (describing a training program for Alabama police officers "focus[ing] on cultural diversity, civil rights and bias-based policing").

226 *See, e.g.*, Dasha Kabakova, *The Lack of Accountability for the New York Police Department's Investigative Stops*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 539, 568 (2012) (discussing a settlement agreement in a class action suit against the N.Y.P.D. wherein the department "agreed to create and implement a written racial profiling policy that complies with the United States Constitution").

227 Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 GEO. MASON U. C.R. L.J. 219, 224–26 (2005) (citing United States v. Martinez-Fuerte, 428 U.S. 543 (1976)). *See also* Kristina M. Campbell, *Humanitarian Aid is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary*, 63 SYRACUSE L. REV. 71, 117–18 (2012) (discussing Arizona v. U.S., 132 S.Ct 2492 (2012); noting that the Court upheld an Arizona law that critics say causes racial profiling).

the effectiveness or ineffectiveness of such programs is a matter of debate. [228] For purposes of this article, the important point is that there have been attempts at limiting the impact of bias on law enforcement personnel.

Unfortunately, the same limiting attempts do not exist in the realm of private law enforcement. While private security companies may decide to train their guards on unbiased ways of targeting suspects, such training is not legally required.[229] As such, neighborhood watch members are less likely to receive such training. Burdened by (and perhaps unaware of) their own individual biases, coupled with the lack of procedural safeguards or training, neighborhood watch members may act on their biases and target individual suspects on the basis of race or ethnicity.[230] The targeting of individuals based on such improper considerations raises significant due process and equal protection concerns, and is yet another reason to reexamine the powers conveyed upon private citizens engaged in law enforcement activities.[231]

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228 *See* Sean Childers, *Discrimination During Traffic Stops: How an Economic Account Justifying Racial Profiling Falls Short*, 87 N.Y.U. L. REV. 1025, 1043 & n.85 (2012) (noting that policy measures may not remedy racial profiling which arises out of discretionary police functions).

229 Indeed, when police departments have created anti-bias policies or training programs, they often did so in response to a very powerful economic motivator: litigation. *See* Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1278 n.14 (2004). Save for limited circumstances, such as employment practices or federally funded projects, racial profiling is "perfectly legal" in the private sector. Nelson Lund, *The Conservative Case Against Racial Profiling in the War on Terrorism*, 66 ALB. L. REV. 329, 333–36 (2003).

230 *See* Braman, *supra* note 208, at 1479 (noting that implicit bias is difficult to identify and remedy because it "works not through overt reference to or conscious consideration of race, but rather through subtle effects on cognition that subtly shape actors' perceptions and reactions").

231 In the aftermath of the Trayvon Martin shooting, much attention was directed at the reason he was identified as "suspicious" by a neighborhood watch volunteer. Media reports speculated that George Zimmerman likely targeted Martin because he was a young African-American male wearing a hooded sweatshirt. Robin Givham, *Hoodies, Trayvon Martin, and America's Racial Fears*, THE DAILY BEAST, (Mar. 29, 2012 12:39 PM), http://www.thedailybeast.com/articles/2012/03/29/hoodies-trayvon-martin-and-america-s-racial-fears.html. This coverage sparked further national debate over what should be considered "suspicious." Peter Grier, *Trayvon Martin case: Is Hoodie a Symbol of Menace or Desire for Justice?*, CHRISTIAN SCI. MONITOR, (Mar. 26, 2012) http://www

Through the expansion of self-defense laws and individual rights to bear arms, private citizens engaged in law enforcement duties as members of a neighborhood watch wield power and authority that nears the powers exercised by police officers.[232] Yet these neighborhood watch groups are not restricted in any way by the constitutional limitations that govern the actions of public law enforcement officers.[233] This is not to say that there are no limitations on the private exercise of power in this context, but it is to say that the limitations in place are ineffective and fail to address the enormity of the potential problem.

E. Limitations on Private Actors

Individual members of a neighborhood watch and the neighborhood watch organization are not immune to liability for illegal or tortious conduct merely because they are acting as members of a private law enforcement group. Neighborhood watch members may be criminally prosecuted or sued civilly for illegal conduct.[234] Thus, if a member uses force to stop an individual the member could be prosecuted for assault or false imprisonment.[235] Further, if the

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.csmonitor.com/USA/Justice/2012/0326/Trayvon-Martin-case-Is-hoodie-a-symbol-of-menace-or-desire-for-justice-video. However, the fact is that with no law to govern the conduct of neighborhood watch organizations, these community members can use whatever criteria they like in identifying suspects. While Zimmerman was ultimately charged with murder in connection with Martin's death, less egregious civil rights violations are unlikely to get the attention of police and prosecutors.

232 *See* Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. ART. 222, 246, n. 95 (2012) ("With the constitutionalization of personal gun ownership, a proliferation of 'stand your ground' laws, and a possible rise of a vigilante mentality as government services are cut back, such cases may create substantial questions of justice.").

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

234 *Id.* at 1183 ("The main legal limitations on the private police today are tort and criminal doctrines of assault, trespass and false imprisonment . . . .").

235 *Id.* ("[A]rrests 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."). Further, a suspect who resists arrest by a public police officer can be charged with a crime. No such crime exists for resisting a citizen's arrest. *Id.* at 1187.

member searches property without the owner's consent, the member could be prosecuted for criminal trespass.[236] Any myriad of criminal laws could be used to punish the behavior of a neighborhood watch member who reaches beyond the scope of conduct permissible for private citizens.

Neighborhood watch members and the organization itself could also be sued for tortious conduct.[237] While State actors often have immunity from suit for conduct occurring in the course of their official duties, no such immunity extends to private actors.[238] Thus, an individual whose rights were violated by a neighborhood watch has the ability to sue the members and the organization under common law tort doctrines.[239]

Despite these two avenues for relief, the remedies available to individuals whose rights were violated by a neighborhood watch are often ineffective and inefficient. Criminal prosecutions of neighborhood watch members are unlikely to occur except in the most egregious of circumstances; circumstances where the member's conduct goes well beyond the letter of the law.[240] Indeed, law

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[236] *Id*.

[237] *Id.*

[238] *Id.* at 1186. *See, e.g.*, Lovelace v. Anderson, 785 A.2d 726, 739 (Md. 2001) (holding that an off-duty police officer working as a security guard is not entitled to public official immunity in a personal injury suit brought by hotel who was struck by a stray bullet during a robbery). Even in Michigan, where there is private security guard licensing statute, the courts have held that "nowhere in the statute does the Legislature provide that a private security guard is immune from Michigan laws. People v. Biller, 239 Mich. App. 590, 594 (2000).

[239] *E.g.*, Turnage v. Kasper, 704 S.E.2d 842, 846 (Ga. Ct. App. 2010) (landowner sued members of neighborhood watch for malicious prosecution, intentional infliction of emotional distress, and defamation). On the other hand, a suit for violating an individual's civil liberties under § 1983 will not succeed against members of a neighborhood watch because they are not state actors. *See, e.g.*, Ben v. Garden District Ass'n., Civ. Action No. 12-174 (E.D. La. June 22, 2012) (dismissing § 1983 suit by plaintiff who was forcibly detained and handcuffed by neighborhood watch); Spetalieri v. Kavanaugh, 36 F. Supp. 2d 92 (N.D.N.Y 1998). *Spetalieri* involved a § 1983 action against law enforcement officials and members of a neighborhood watch group for taping phone the plaintiff's phone conversations and disseminating the tapes. *Id.* at 102. The court dismissed the claims against the neighborhood watch member because "participation in a neighborhood watch group does not transform her actions into state action." *Id.* at 103.

[240] *See* Sklansky, supra note 1, at 1186 ("Successful criminal prosecutions in [instances of false arrest] appear virtually nonexistent.").

enforcement officials can benefit from the illegal activities of these neighborhood watch members.[241] When a neighborhood watch member conducts an illegal search and obtains evidence that will later be used at trial, the police and prosecutor benefit from that search without the penalty of having it declared inadmissible under the exclusionary rule.[242] Similarly, when a neighborhood watch member coerces a suspect into confessing without receiving his or her *Miranda* warnings or a requested lawyer, public law enforcement officials benefit from the member's conduct, and will likely be able to enter that admission into evidence at trial.[243]

A civil suit is also unlikely to be an effective remedy for conduct that violates an individual's civil rights under these circumstances. Just as a criminal suspect is unlikely to have the resources or knowledge to file a § 1983[244] action against a public officer who violates his or her civil liberties, it follows that a suspect would also be unlikely to file such an action against private individuals who encroach upon his civil liberties.[245] In addition, even if an individual has the resources to take the case to trial and has the evidence to support liability, the likely recovery in such a case is typically quite small.[246] Thus, there is not great financial incentive for an individual to file a civil suit to recover for civil rights violations committed by private neighborhood watch members. In addition, if the illegally obtained evidence results in a criminal conviction, the defendant's success in a civil action against the private actor will not overturn the conviction. Exclusion of evidence—a remedy available to defendants in criminal prosecutions where the police acted illegally—is not a remedy available to

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241 Fairfax, *supra* note 3, at 274; *see also* Burdeau v. McDowell, 256 U.S. 465, 476 (1921).

242 *See, e.g.,* United States v. Powell, No. 2:10-cr-36-FtM-36DNF, 2010 WL 3156559, at *5 (M.D. Fla. July 9, 2010) (demonstrating that neighborhood watch programs can provide information to police that enables them to obtain search warrants); State v. Smith, 663 So. 2d 845, 847 (La. Ct. App. 1995) (same).

243 *See* Sklansky, *supra* note 1, at 1183.

244 42 U.S.C. § 1983 (1996).

245 Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 872 (1996) (citing Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284 (1988)).

246 Sklansky, *supra* note 1, at 1185–86 (noting that the low recovery "may explain why such cases appear to be rare").

defendants who claim evidence was illegally seized by a private actor.[247]

V. IMPOSING LEGAL RESTRICTIONS ON NEIGHBORHOOD WATCH ACTIVITIES

As noted above, current legal restrictions on private citizens engaged in law enforcement duties are not effective to address the potential problems posed by such activities. The powers available to private citizens engaged in law enforcement functions are in many ways as great as those available to public law enforcement officers. Yet, constitutional safeguards that restrict the behavior of government actors engaged in law enforcement activities do not limit the conduct of private citizens. As neighborhood watch programs continue to grow in popularity, and laws governing the ownership of guns and acceptable conduct to defend one's self grow more permissive, it is easy to see potential problems that could arise.

Indeed, in February 2012, the shooting death of an African-American teenager by a neighborhood watch member in Florida sparked a national debate over neighborhood watch programs as well as the legitimacy of stand your ground laws.[248] This incident is an extreme example of what can happen when private citizens are engaged in law enforcement activities without the restrictions and training of police officers. But even the less extreme results present significant concerns about fairness in the criminal justice process. Unreasonable detentions, illegal searches, and coerced confessions all can result from a neighborhood watch member acting to detect and prevent crime in their community. All of these circumstances lead to concerns about the erosion of due process protections and the violation of civil rights. Limitations need to be put in place to restrict the ability

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247 Sklansky, *supra* note 1, at 1186 ("[E]vidence 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.").

248 *See* Patrik Jonsson, *Trayvon Martin Case Reveals Confusion Over How Stand Your Ground Works*, CHRISTIAN SCI. MONITOR (Apr. 11, 2012), http ://www.csmonitor. com/USA/Justice/2012/0411/Trayvon-Martin-case-reveals-confusion-over-how-Stand-Your-Ground-works; *Florida's Stand Your Ground Law: Investigation*, TAMPA BAY TIMES, http://www.tampabay.com/stand-your-ground-law/ (last updated Dec. 19, 2012); Eyder Peralta, *Trayvon Martin Killing Puts 'Stand Your Ground' Law In Spotlight*, NPR.ORG (Mar. 19, 2012 5:15 PM), http://www.npr.org/blogs/thetwo-way/2012/03/19/ 148937626/trayvon-martin-killing-puts-stand-your-ground-law-in-spotlight.

of neighborhood watch members to wield these powers and ensure a fairer system of law enforcement.

The most drastic solution to the problem presented is the abandonment of the state action doctrine. By limiting constitutional safeguards to conduct of government actors, the state action doctrine fails entirely to address private actors engaged in law enforcement activities.[249] This failure becomes all the more egregious when examined in light of the growing privatization of law enforcement functions.[250] While more and more private actors are performing the tasks previously associated with police officers, constitutional safeguards have not been extended to the conduct of private actors.

Abandonment of the state action doctrine, or a significant curtailment of the principles behind it, would allow the procedural rules derived from the Fourth, Fifth, and Sixth Amendments to extend to conduct engaged in by private law enforcement personnel. This would ensure that due process rights were protected, regardless of whether a person acting as a law enforcer is doing do publicly or privately. Rejection of the state action doctrine would more adequately ensure the overall fairness of criminal investigations and prosecutions. The rights of criminal suspects would be better protected by limiting the use of illegally obtained evidence and by providing a more meaningful remedy to those suspects whose rights have been violated by private law enforcement.

However, abandonment of a doctrine so entrenched in American constitutional law is unlikely. A far more practical solution to the problems presented by neighborhood watch associations would be state legislation the addresses and properly limits the powers and abilities of neighborhood watch associations and their members.

Currently, there are few, if any, laws governing the activities of neighborhood watch associations. This absence has allowed private actors to act as law enforcers without oversight, training, or governing rules. Legislation that limits the ability of a private citizen acting as a member of a group tasked with detecting and preventing crime and engaged in law enforcement activities would better ensure that due process guarantees are met even though the actor is not a public officer.

Any number of statutory provisions could help to restrict the activities of neighborhood watch members and therefore better protect

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249 *See* discussion *supra,* Part IV.B.

250 *See* Sklansky, *supra* note 1, at 1229–30.

the rights of individual suspects. For example, statutory law could limit the ability of neighborhood watch groups to carry weapons while on patrol. This would lessen the coercive power of neighborhood watch members and might reduce the number of illegal detentions, searches, and interrogations. Such legislation might also diminish the likelihood of deadly interactions between neighborhood watch members and suspected wrongdoers.

Further, statutes could limit the ability of neighborhood watch members to confront suspects in the course of their duties. While some neighborhood watches instruct members to avoid confrontation and limit actions to observation and reporting,[251] no statutes mandate this. By preventing members from engaging with suspects while on patrol, such statutes would limit the opportunity for neighborhood watch organizations to impinge upon the due process rights of individuals.

Further still, statutes could encourage criminal prosecution of neighborhood watch members who engage in illegal activities by mandating arrest under certain prescribed circumstances. This would discourage members from taking the law into their own hands or engaging in criminal activity to find evidence of a crime or prevent a suspect from leaving the scene of the crime. Statutes could also reduce the burdens on those seeking to file a civil suit for the tortious actions of a neighborhood watch member.

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

Finally, perhaps the most effective statutory remedy would be to extend the exclusionary rule to cover evidence illegally seized by anyone, not just State actors. Indeed, one State, Texas, currently has such a law in place.[252] Texas extended the exclusionary rule to apply

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[251] Nat'l Sheriff's Ass'n., USA on Watch—National Neighborhood Watch Program, *Neighborhood Watch Manual*, at 22 (2010), https://www.bja.gov/Publications/NSA_NW_Manual.pdf ("Community members only serve as the extra 'eyes and ears' of law enforcement. They should report their observations of suspicious activities to law enforcement; however, citizens should never try to take action on those observations. Trained law enforcement should be the only ones ever to take action based on observations of suspicious activities.").

[252] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 38.23 (West 1987). While the legislature has since considered eliminating this expansion of the exclusionary rule, it has never acted to change the rule, and thus it remains a part of the Texas Code of Criminal Procedure. *See* Robert O. Dawson, *State-Created*

to evidence illegally seized by private citizens as a direct response to concerns about vigilantism and the lack of constitutional restrictions on private individuals engaged in law enforcement activities.[253]

While the exclusionary rule typically only leads to the exclusion of evidence illegally seized by government actors, or those acting at the direction of government officials, an expansion of the rule to generally cover those engaged in law enforcement duties would better protect due process guarantees.[254] While this rule, by itself, might not deter private individuals from engaging in illegal conduct to obtain evidence, it would prevent the police and prosecutors from benefitting from illegally seized evidence obtained through these means. Thus, the use of illegally obtained evidence to convict an individual would be prohibited, regardless of its source, thereby protecting due process guarantees and ensuring a fairer criminal justice process. Further, expansion of the exclusionary rule would provide defendants with a meaningful remedy to violations of their civil rights. While damages resulting from a civil action or prosecution of the neighborhood watch member might provide some relief to a defendant whose rights have been violated, a more important remedy would be to prevent the fruits of such illegal conduct from supporting a conviction in the first place.

Because of the lack of statutes governing private criminal justice actors, neighborhood watch members act outside of the constraints of most criminal justice principles. Without guidance or restrictions, these citizens are able to exercise great powers without the constitutional restrictions imposed upon those who are employed by the state. Yet neighborhood watch members perform many of the same functions as public law enforcement personnel. For these reasons, restrictions on their activities are necessary to ensure that they do not

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Exclusionary Rules in Search and Seizure: A Study of the Texas Experience, 59 TEX. L. REV. 191, 195–96 (1981).

253 Adam M. Gershowitz, *Is Texas Tough on Crime but Soft on Criminal Procedure?*, 49 AM. CRIM. L. REV. 31 (2012). As Professor Gershowitz notes, in 1925, the Texas legislature enacted an exclusionary rule in response to concerns about vigilantism. *Id.* at 47. These concerns specifically dealt with private citizens engaging in law enforcement activities and turning over illegally seized evidence to the police for use at trial. *Id.* To discourage such vigilantism and prevent police from benefitting from illegal behavior, the Texas exclusionary rule bars the use of evidence illegally seized by private citizens, in addition to barring evidence illegally seized by police. *Id.*

254 Nat'l Sheriff's Ass'n., USA on Watch—National Neighborhood Watch Program, *Neighborhood Watch Manual,* at 17 (2010), https://www.bja.gov/Publications/NSA_NW_Manual.pdf.

violate the law. By enacting legislation that guides and governs the activities of neighborhood watch associations, state legislatures would not only recognize their growing importance in the prevention and detection of crime, but also limit the powers they wield within communities.

VI. CONCLUSION

The powers that the State grants to police are significant. To balance these powers with individual liberties and to ensure that these liberties are not unnecessarily intruded upon, federal and state law provide rigorous procedural protections to individuals who are the subject of police action.[255] Yet when private organizations take on the role of law enforcement, these procedural safeguards are often abandoned or ignored. At the same time, laws permitting the ownership of weapons and extending the right to use deadly force in self-defense have empowered private individuals engaged in quasi-law enforcement functions.[256]

Perhaps nowhere is this more concerning than in the realm of neighborhood watch associations. Without the training and oversight that private security guards often receive, or the training and oversight that police officers receive, the individual participants in neighborhood watch programs are given many of the powers of public law enforcement with little guidance or limitation. These neighborhood watch members can patrol the streets of their community and engage in illegal detentions, searches, seizures, and interrogations, without affecting the ability of the State to obtain a conviction based upon illegally obtained evidence. Indeed, police and prosecutors alike can benefit from the illegal activities of neighborhood watch participants by utilizing evidence that would be inadmissible if obtained by a public law enforcement officer. Thus, neighborhood watch associations wield significant enforcement power without any meaningful statutory restrictions. This can and has led to civil rights violations, in addition to far more tragic consequences.[257]

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255 *See* discussion *supra*, Part IV.A.

256 *See* discussion *supra*, Part IV.C.

257 *See, e.g.*, Brian Stelter, *In Florida Shooting Case, A Circuitous Route to National Attention*, N.Y. TIMES, Mar. 26, 2012, at B1; Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN.COM (May 23, 2012) http://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/index.html; Susan Jacobson, *Trayvon Martin case: Panel Reviews Media Coverage*,

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

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

ORLANDO SENTINEL (Aug. 11, 2012), http://articles.orlandosentinel.com/2012-08-11/news/os-trayvon-martin-black-journalists-20120811_1_trayvon-martin-case-retreat-at-twin-lakes-george-zimmerman.