POLICE VIGILANTISM

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This Article uncovers a critical yet unexplored dimension of policing: the strategic oscillation of police officers between their roles as state actors and private individuals, and its significant implications for police accountability frameworks. As officers toggle between these two roles to their legal advantage, they exploit a deep, systemic flaw in the structural design of policing. Tracing the trajectory of policing from its vigilante origins to its institutionalized form today, this Article argues that contemporary policing merges state-sanctioned power with vestiges of vigilantism to blur the public-private divide. This duality enables a form of state-sanctioned vigilantism through which officers exploit legal gray areas. Police wield the state's coercive power under the color of law, enjoying immunities and legal protections unavailable to private individuals. Yet, simultaneously, they can invoke their identity as private individuals to circumvent constitutional constraints on their conduct.

The resulting rupture of accountability frameworks is a significant design flaw that harms policed individuals and communities while undermining the institution of policing from within. Where these frameworks presume a clear divide between state and private action, officers instead navigate a liminal space, leveraging state-sanctioned power while exploiting doctrinal ambiguities to subvert legal constraints. The Article critically evaluates how the state action doctrine, designed to delineate state and private conduct, fails to account for this reality. So, too, does the qualified immunity doctrine, which often shields vigilante conduct that exceeds constitutional

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bounds. To address this pressing problem, the Article advocates for a radical reconceptualization of police authority and accountability. It proposes reinterpreting the state action doctrine to break down the dichotomy between state and private action. It suggests implementing comprehensive statutory regulations to constrain police identity shopping. Ultimately, it challenges us to consider whether the entrenched vigilante origins of policing may necessitate a fundamental reevaluation, or even abolition, of the institution of policing itself.

INTRODUCTION

In the law of policing, where the expansive authority of the state often intersects and clashes with the boundaries of individual liberty, the dual role of a police officer as both state actor and private citizen presents a unique and currently unidentified legal challenge. Consider this scenario: a police officer, driving home from his night shift, crosses from the city where he works into the township where he lives. Moments later, he observes a young man with a backpack jumping a fence between two residential properties. Acting with probable cause under the citizen's

arrest statute,[1] but not the Fourth Amendment,[2] the officer pursues the young man, unholsters his department-issued gun, pins him to the ground, and forcibly opens the backpack.[3] His use of force breaks three of the young man's ribs. When the young man files a civil rights lawsuit, the officer contends he was acting as a private individual, not a state officer.[4] The court agrees, dismissing the civil rights claims.[5]

[1] These statutes, often codifications of common law, are abundant across jurisdictions. See infra Section II.B. For the concept and history of these statutes and consequent arrests, see generally Ashish Valentine, What Is the Citizen's Arrest Law at the Heart of the Trial over Ahmaud Arbery's Death?, NPR (Oct. 26, 2021, 10:39 AM), https://www.npr.org/2021/10/26/1048398618/what-is-the-citizens-arrest-law-in-the-trial-over-ahmaud-arberys-death [https://perma.cc/5L5V-SXAK]; Chad Flanders, Raina Brooks, Jack Compton & Lyz Riley, The Puzzling Persistence of Citizen's Arrest Laws and the Need to Revisit Them, 64 How. L.J. 161 (2020); Ira P. Robbins, Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest, 25 Cornell J.L. & Pub. Pol'y 557 (2016); Kimberly Kessler Ferzan, Response, Taking Aim at Pointing Guns? Start with Citizen's Arrest, Not Stand Your Ground: A Reply to Joseph Blocher, Samuel W. Buell, Jacob D. Charles and Darrell A. H. Miller, *Pointing Guns*, 99 Texas L. Rev. 1172 (2021), 100 Tex. L. Rev. Online 1 (2021) (surveying citizen's arrest laws around the country).

[2] U.S. Const. amend. IV.

[3] This fictional example is not so fictional, as variations of it have come up in countless cases across jurisdictions. See, e.g., State v. Phoenix, 428 So. 2d 262, 265 (Fla. Dist. Ct. App. 1982) ("In addition to any official power to arrest, police officers also have a common law right as citizens to make so-called citizen's arrests."); State v. Slawek, 338 N.W.2d 120, 121 (Wis. Ct. App. 1983) ("An extensive line of cases from other states, however, upholds the validity of an extraterritorial arrest made by a police officer who lacked the official authority to arrest when the place of arrest authorizes a private person to make a citizen's arrest under the same circumstances."); State ex rel. State v. Gustke, 516 S.E.2d 283, 290 (W. Va. 1999) ("Even if the officers were without statutory arrest powers as policemen, they retained power as citizens to make an arrest . . . ." (quoting Dodson v. State, 381 N.E.2d 90, 92 (Ind. 1978))); Commonwealth v. Harris, 415 N.E.2d 216, 220 (Mass. App. Ct. 1981) (citing with approval "[a]n extensive line of cases from other states uphold[ing] the validity of an extraterritorial arrest made by a police officer who lacked the official authority to arrest where the place of arrest authorizes a private person to make a 'citizen's arrest' under the same circumstances").

[4] See, e.g., Budnick v. Barnstable Cnty. Bar Advocs., Inc., No. 92-1933, 1993 WL 93133, at *3 (1st Cir. Mar. 30, 1993) ("But, 'a police officer, while unable to act as an officer in an adjoining jurisdiction, does not cease to be a citizen in that jurisdiction . . . .'" (quoting Commonwealth v. Dise, 583 N.E.2d 271, 274 (Mass. App. Ct. 1991))); State v. Miller, 896 P.2d 1069, 1070 (Kan. 1995) ("An officer who makes an arrest without a warrant outside the territorial limits of his or her jurisdiction must be treated as a private person. The officer's actions will be considered lawful if the circumstances attending would authorize a private person to make the arrest.").

[5] See, e.g., United States v. Layne, 6 F.3d 396, 398–99 (6th Cir. 1993) (finding arrest made by sheriff outside his geographical jurisdiction valid under private citizen's arrest statute and thus did not violate Fourth Amendment); State v. Furr, 723 So. 2d 842, 845 (Fla. Dist. Ct. App. 1998) ("[T]he trial court erred by concluding that a citizen's arrest is nullified where the officer, acting outside of his jurisdiction, uses a marked police car, and otherwise announces his official position.").

Another night, another town. Two officers respond to a report of an older man shouting outside a local apartment complex. When they arrive, the man whom they believe to be the subject of the call is waving a medium-sized object in the air. The officers' approach seems to set off the man, and he yells at a higher volume, still waving the object in his hand. At that moment, one of the officers pulls a gun, fires at the man, and kills him. As the man lies dead on the pavement, the officers find headphones still playing music in his ears and an air gun by his arm. When the state attorney brings an indictment for homicide, the officer invokes the state's stand-your-ground law. He argues that, regardless of the laws governing officer use of force, he had rights as a private citizen to shoot in self-defense.[6] The court agrees and quashes the indictment.[7]

Both cases bring to light the ambiguous and often controversial nature of police authority when the roles of state actor and private citizen converge, raising questions of accountability in law enforcement. This Article is the first to systematically identify the existence of these dual identities and the consequent discretionary legal space granted to police officers. I term this phenomenon "identity shopping," denoting a significant problem in current policing law and doctrine which profoundly impacts accountability structures.[8] Identity shopping refers to the strategic maneuvering by police officers between their roles as state agents and private citizens, depending on which identity offers the most advantageous legal position in a given situation.[9] Think of it as a light switch on a dimmer, with "state actor" on one end and "private citizen" on the other. Officers can often slide the switch back and forth, selecting which rules apply to them—the rules governing state actors or those applicable to private individuals.

Identity shopping reflects a deeper systemic issue arising from the inherent structures of policing that allow, and perhaps even encourage, officers to shift between roles to minimize legal repercussions or maximize authority. Drawing from historical insights, this Article traces the evolution of policing from its origins as informal vigilante groups to formally recognized and state-sanctioned law enforcement.[10] The

[6] Unfortunately, this is another not-so-fictional example. For a similar case, see State v. Peraza, 259 So. 3d 728, 729–30 (Fla. 2018).

[7] Id. at 733.

[8] See infra Section II.A.

[9] See infra Section II.B.

[10] See infra Section I.A.

midcentury professionalization movement and subsequent regulation of the police contributed to the reconceptualization of police from vigilantes to formal state actors.[11] This transformation has endowed officers with distinct responsibilities, leading courts to also grant them unique rights, including expanded civil immunities and criminal defenses.[12] However, this transformation of policing has not been linear but rather a tapestry of conflicting identities and roles, an intersection of past and present, informal authority and formal legitimacy.

This Article demonstrates that this transition from vigilantes to state-sanctioned law enforcement has not fully extinguished the initial ethos of vigilantism within policing. Despite their formal designation as state actors, police maintain a bifurcated identity, traversing the line between public servants and private individuals. This duality permits a latent form of vigilante behavior, now cloaked under state authority.[13] Termed as "shadow vigilantism,"[14] this phenomenon might seem paradoxical: How can those entrusted with upholding the law operate in a way that undermines it? Yet police vigilantism thrives in the gray areas between state action and private conduct, where officers morph into citizens still empowered by their official identity, and private citizens assume the mantle of law enforcement, invoking a privilege to use force.

Officers may use public authority symbols like uniforms and badges to make off-duty arrests, employ deadly force on duty while invoking defenses intended for civilians, or engage in extralegal activities adjacent to law enforcement, all while retaining the ability to choose the most favorable legal identity when confronted with legal accountability.[15] This

[11] See Anna Lvovsky, The Judicial Presumption of Police Expertise, 130 Harv. L. Rev. 1995, 2004–05 (2017).

[12] See infra Section II.B.

[13] See id.

[14] See Paul H. Robinson, The Moral Vigilante and Her Cousins in the Shadows, 2015 U. Ill. L. Rev. 401, 453. Robinson juxtaposes "shadow vigilantism" with "classic vigilantism." Id. at 404. Unlike classic vigilantism, which involves explicitly unlawful or unauthorized action, shadow vigilantism refers to the less obvious and potentially more damaging ways individuals may resist and subvert the legal system. Id. at 453. To be sure, for several scholars vigilantism connotes illegality, but the way this paper defines vigilantism through the use of the term "shadow vigilantism" is wider and can include lawfully authorized activity. See Ekow N. Yankah, Deputization and Privileged White Violence, 77 Stan. L. Rev. (forthcoming 2025) (manuscript at 3–5) (on file with author) (distinguishing between vigilantism and deputization); Regina Bateson, The Politics of Vigilantism, 54 Compar. Pol. Stud. 923, 925–27 (2021) (providing various conceptions of vigilantism).

[15] See infra Section II.B; see, e.g., Laughlin v. Olszewski, 102 F.3d 190, 192 & n.1 (5th Cir. 1996); Abraham v. Raso, 183 F.3d 279, 287 (3d Cir. 1999); Swiecicki v. Delgado, 463 F.3d

interplay of identities thus fosters a dynamic where the imprints of vigilante origins intermittently resurface. As a result, contemporary policing operates within a unique nexus, merging state-sanctioned power with discretionary—sometimes unilateral—approaches reminiscent of its vigilante roots.

This Article contends that the dual identity available to police officers is a significant design flaw in the accountability structures of law enforcement.[16] Police accountability frameworks are fundamentally misaligned with the dynamic nature of police identity and are thus inadequate to address the complexities of identity shopping and shadow vigilantism. This systemic oversight creates a gap in police accountability that undermines its efficacy from within.

The existing police accountability system is based on clear demarcations of legal identity and fails to account for entities capable of selecting between private citizenry and state agency. Its basis, the state action doctrine, dictates that only certain actions undertaken by certain actors qualify as state actions and must thus conform to the specific legal constraints but also enjoy the legal immunities of the state.[17] Yet, identity shopping exploits the cracks in this doctrine, leveraging the nebulous space between official authority and private action. The result is a legal Gordian knot, one that strands victims of police vigilantism in a quagmire of uncertainty and often leaves the very concept of police accountability beyond reach.

Correcting this misalignment requires a radical reconceptualization of police authority and existing accountability frameworks to address the phenomenon of identity shopping and end police vigilantism. This Article proposes reinterpreting the state action doctrine to break down the dichotomy between state and non-state action. It also suggests implementing comprehensive statutory regulations to constrain police identity shopping.[18] Ultimately, it challenges us to consider whether the entrenched vigilante origins of policing may necessitate a fundamental reevaluation, or even abolition, of the institution of policing itself.[19]

489, 490–91 (6th Cir. 2006); Morris v. Dillard Dep't Stores, Inc., 277 F.3d 743, 746–47 (5th Cir. 2001); Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1427–28 (10th Cir. 1984).

[16] See infra Part III.

[17] See infra Section III.A.

[18] See infra Section III.B.

[19] For discussions of fundamentally reevaluating or abolishing policing, see, for example, Jessica M. Eaglin, To "Defund" the Police, 73 Stan. L. Rev. Online 120, 125 (2021); Shawn E. Fields, The Fourth Amendment Without Police, 90 U. Chi. L. Rev. 1023, 1052, 1082

In addressing these points and the challenging terrain of the police's dual identity, my argument proceeds in three Parts. Part I traces the historical evolution of policing from its vigilante roots to its status as a formal state apparatus. This Part posits that despite the development of a formalized legal status, police often employ a dual identity, combining public servant duties with private discretion in a way that hearkens back to policing's vigilante origins. Understanding this development is pivotal to identifying how the vestiges of vigilantism continue to influence modern policing practices.

Part II introduces the novel concept of identity shopping. It delves deeper into the practice, arguing that identity shopping results in a form of shadow vigilantism within the modern police force. This Part further demonstrates how our legal system has sanctioned identity shopping across various policing forms, including on-duty and off-duty policing, private policing, and citizen's arrests. This juxtaposition of sanctioned law enforcement with remnants of vigilante conduct presents a distinct challenge to conventional structures of government oversight and legal accountability.

Part III proposes a radical rethinking of the dual identities of police officers in order to address this unique challenge. It argues that this legal characterization of police officers is a significant design flaw in the frameworks of police accountability and proposes strategies to address this issue, including a way to reconceptualize the state action doctrine, qualified immunity, statutory reforms, and police abolition.

Ultimately, scrutinizing the practices of identity shopping and shadow vigilantism reveals a critical gap in our understanding of policing. It raises fundamental questions about the role of police in a democratic society, the nature and limits of state authority, and the responsibilities of those who wield it. It grapples with the complex dynamics between formal

(2023); Sandy Hudson, Building a World Without Police, 69 UCLA L. Rev. 1646, 1649 (2023); Benjamin Levin, Criminal Law Exceptionalism, 108 Va. L. Rev. 1381, 1448 (2022); Jamelia Morgan, Responding to Abolition Anxieties: A Roadmap for Legal Analysis, 120 Mich. L. Rev. 1199, 1203 (2022); V. Noah Gimbel & Craig Muhammad, Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy, 40 Cardozo L. Rev. 1453, 1532–34 (2019); Brandon Hasbrouck, Reimagining Public Safety, 117 Nw. U. L. Rev. 685, 692 (2022); Tiffany Yang, "Send Freedom House!": A Study in Police Abolition, 96 Wash. L. Rev. 1067, 1077–79 (2021); Marbre Stahly-Butts & Amna A. Akbar, Reforms for Radicals? An Abolitionist Framework, 68 UCLA L. Rev. 1544, 1550–51 (2021); Amna A. Akbar, An Abolitionist Horizon for (Police) Reform, 108 Calif. L. Rev. 1781, 1842 (2020) [hereinafter Akbar, An Abolitionist Horizon]; Amna A. Akbar, Toward a Radical Imagination of Law, 93 N.Y.U. L. Rev. 405, 460 (2018) [hereinafter Akbar, Toward a Radical Imagination of Law].

policing roles and individual discretion, revealing the implications for governance and individual rights. And it contributes to the abolitionist discourse by demonstrating that modern policing and the legal frameworks that govern it continue to permit the unchecked use of state-sanctioned violence akin to the vigilantes of the early republic or the street vigilantes of today.

I. POLICE IDENTITY

This Part scrutinizes the evolution of the police's status in the United States, tracing its trajectory from the era of individuals imposing personal definitions of order through violence to contemporary state-sanctioned actors granted legal immunities and other special protections. Through this brief historical analysis, this Section argues that elements of early vigilantism continue to influence modern law enforcement. Although policing has evolved from its roots in informal, community-led vigilantism to more formalized state functions, vestiges of its original vigilantism ethos persist. This creates a dual identity for officers. Despite their official roles, police officers often carry out their public servant duties with the private-individual discretion that hearkens back to their vigilante predecessors. This juxtaposition of sanctioned law enforcement with remnants of vigilante conduct presents a distinct challenge to the conventional structures of government oversight and legal accountability.

A. Vigilantes or State Actors

Anthropological and sociological accounts of modern policing often locate its origins in the shift from kinship-based societies to the organization of the modern state.[20] As these earlier societies became more complex, the concomitant economic and political changes supported the development of a specialized police force.[21] This evolution positioned the police in a peculiar dual role: simultaneously acting as "the agent of both the people they police and the dominant class controlling these same people."[22]

Prior to the emergence of formal policing, individuals in the United Kingdom, where modern policing first took hold, utilized force to protect

[20] Cyril D. Robinson & Richard Scaglion, The Origin and Evolution of the Police Function in Society: Notes Toward a Theory, 21 Law & Soc'y Rev. 109, 123 (1987).

[21] See id. at 118.

[22] Id. at 114.

their communities from external threats and internal social disintegration.[23] As communities grew, implementation of the frankpledge system provided a more organized form of policing.[24] Under that system, constables sorted groups of men in each neighborhood, also known as "tythings," to band together and bring criminals to court.[25] Over time, this system shifted away from individual citizen leaders and toward appointed officers with fixed terms, such as constables, sheriffs, and justices of the peace, who organized groups of watchmen and facilitated legal proceedings.[26]

In the early American colonies, this model flourished. Sheriffs received payment based on their performed duties, often leading them to prioritize tax collection over law enforcement.[27] The constable, initially an elected position, transitioned to a semiprofessional appointment made by local governments.[28] The decentralized nature of municipal governments in the United States meant that police relied on individual rapport with the communities they policed to establish legitimacy, rather than relying on institutional authority from a centralized government.[29] This dynamic resulted in a distinctively unregulated form of policing.[30]

In this context, individual officers employed personal discretion and relied on their own life experiences to dictate their conduct, and any external oversight was subject to the whims of political change.[31] Often, individual officer conduct was influenced by allegiances to political

[23] Id. at 113–15.

[24] See Craig Uchida, The Development of the American Police: An Historical Overview, *in* Critical Issues in Policing: Contemporary Readings 11, 12–13 (7th ed. 1989).

[25] Id.

[26] Id. at 13.

[27] See id. at 14; Rachel Harmon, The Law of the Police 62 (2021) ("Both because there was less law and because early American policing was less controlled by the law that existed, legal norms mattered less in early policing . . . ."); Samuel Walker & Charles M. Katz, The Police in America: An Introduction 32 (9th ed. 2018); Anthony O'Rourke, Rick Su & Guyora Binder, Disbanding Police Agencies, 121 Colum. L. Rev. 1327, 1377 & n.327 (2021) (identifying that many of these duties are still in state constitutions today); see, e.g., Tex. Const. art. VIII, § 14(b) ("[T]he sheriff of the county . . . shall be the assessor-collector of taxes, except that the commissioners court of such a county may submit to the qualified voters of the county at an election the question of electing an assessor-collector of taxes as a county officer separate from the office of sheriff.").

[28] See Walker & Katz, supra note 27, at 32.

[29] See Uchida, supra note 24, at 17.

[30] Id.

[31] See id.

actors or private individuals who compensated them for their services.[32] It was widely accepted that police would receive such compensation from private individuals, such as business owners whose businesses the police protected.[33] This form of policing focused on responding to emergencies and disorder rather than preventing their occurrence and was only incidentally concerned with crime control.[34] It was not until the mid-to-late nineteenth century that states adopted more formalized and centralized police forces to carry out preventive policing, largely in response to industrialization in northern cities and increased hostility toward immigrants.[35]

In the southern states, policing developed as a means of controlling enslaved peoples.[36] States funded slave patrols to enforce slavery laws, including by apprehending escaped enslaved people and deterring others from seeking freedom.[37] These patrols operated within designated geographic areas, wore uniforms, and carried weapons.[38] They enjoyed additional rights not granted to other civilians, such as the authority to

[32] See Nirej Sekhon, Police and the Limit of Law, 119 Colum. L. Rev. 1711, 1732 (2019).

[33] Id. at 1732–33.

[34] Id. at 1733.

[35] Uchida, supra note 24, at 14–17.

[36] Alex S. Vitale, The End of Policing 47 (2017); see Edward L. Ayers, Vengeance and Justice: Crime and Punishment in the 19th-Century American South 173 (1984); Aya Gruber, Policing and "Bluelining," 58 Hous. L. Rev. 867, 876 (2021); Harmon, supra note 27, at 61; Philip L. Reichel, Southern Slave Patrols as a Transitional Police Type, 7 Am. J. Police 51, 68 (1988); K.B. Turner, David Giacopassi & Margaret Vandiver, Ignoring the Past: Coverage of Slavery and Slave Patrols in Criminal Justice Texts, 17 J. Crim. Just. Educ. 181, 185 (2006); Gary Potter, The History of Policing in the United States, Part 1, E. Ky. Univ. Online (June 25, 2013), https://plsonline.eku.edu/insidelook/history-policing-united-states-part-1 [https://perma.cc/4FJX-H3D2]; Olivia B. Waxman, How the U.S. Got Its Police Force, Time (May 18, 2017, 9:45 AM), http://time.com/4779112/police-history-origins/ [https://perma.cc/S86E-87Z4].

[37] See Darryl Pinckney, Black Lives and the Police, N.Y. Rev. Books (Aug. 18, 2016), https://www.nybooks.com/articles/2016/08/18/black-lives-and-the-police/ [https://perma.cc/MR7S-CP44] (describing seventeenth-century slave patrols made up largely of poor whites, and noting that "[t]o stop, harass, whip, injure, or kill black people was both their duty and their reward" and that "their real purpose was to monitor and suppress the capacity for slave rebellion"); Philip L. Reichel, The Misplaced Emphasis on Urbanization in Police Development, 3 Policing & Soc'y 1, 4 (1992); Gruber, supra note 36, at 876; Reichel, supra note 36, at 68.

[38] See Reichel, supra note 36, at 57, 68; Carol S. Steiker, Second Thoughts About First Principles, 107 Harv. L. Rev. 820, 839 (1994).

enter the home of any individual they suspected to be protecting escaping enslaved individuals.[39]

During and after the Reconstruction Era, more modern police departments of southern states largely began to emerge.[40] Their focus shifted to enforcing Black Codes, laws that restricted and controlled the freedom of formerly enslaved people.[41] These police departments also facilitated and even participated in mob lynchings of Black people.[42] Well into the twentieth century, these departments upheld the legal structures of segregation and white supremacy through the enforcement of Jim Crow laws.[43] Throughout the Civil Rights Movement of the 1960s, police frequently deployed force against Black activists[44] and reinforced the narrative that Black people were responsible for crime.[45]

B. The Thickening of the Concept of the Police

Legal procedure initially played little role in regulating police conduct because few laws governed policing, and the law that did exist was not enforced.[46] As police started to retire their vigilante hats (at least formally) for their uniformed, state-sanctioned hats, they began to face more scrutiny. In response to the unregulated, abusive forms of American vigilante-style policing prevalent up to the early twentieth century, reformers, starting in the mid-twentieth century, used internal departmental changes to professionalize and bureaucratize the police.[47]

Police departments developed new principles of department management, including specialized units, as part of a campaign to remove control of policing from the political arena.[48] The professionalization movement emphasized the development of police expertise by identifying

[39] See Andrea J. Ritchie, Invisible No More: Police Violence Against Black Women and Women of Color 28 (2017); Connie Hassett-Walker, How You Start Is How You Finish? The Slave Patrol and Jim Crow Origins of U.S. Policing, 46 Hum. Rts. 6, 7 (2021).

[40] See Hassett-Walker, supra note 39, at 7; Gruber, supra note 36, at 871.

[41] See Anthony Gregory, Policing Jim Crow America: Enforcers' Agency and Structural Transformations, 40 Law & Hist. Rev. 91, 95 (2022); Gruber, supra note 36, at 875.

[42] See Harmon, supra note 27, at 61–62; Ayers, supra note 36, at 163–64.

[43] See Gregory, supra note 41, at 112–17; Gruber, supra note 36, at 875.

[44] See Hassett-Walker, supra note 39, at 8.

[45] See Harmon, supra note 27, at 61; Ayers, supra note 36, at 163.

[46] See Harmon, supra note 27, at 63; Mark H. Haller, Historical Roots of Police Behavior: Chicago, 1890–1925, 10 Law & Soc'y Rev. 303, 303–04 (1976).

[47] See Samuel Walker, Governing the American Police: Wrestling with the Problems of Democracy, 2016 U. Chi. Legal F. 615, 628–29.

[48] See id.

special skills gained from policing experience, and police departments began to emphasize the need for educated personnel.[49] In transforming police departments into law enforcement agencies, reformers prioritized self-regulation and the importance of respecting constitutional rights.[50]

Police had previously gained their legitimacy largely based on their connection to political figures, but reformers wanted to combat the unchecked abuses this structure allowed.[51] As a result, police sought to legitimize their existence through the identity of professional law enforcers. They justified their actions in response to crime or public disorder by invoking their status as enforcers of the law with professional experience that distinguished them from civilians.[52] While policing prior to the professionalization movement relied on an individual officer's personal relationship with the community in which he worked, professionalization reformers trained officers on how to be neutral, impartial, and detached from personal community ties.[53] In some jurisdictions, it became illegal for the police to live in the areas they patrolled.[54]

The thickening of the police through professionalization also changed the public's perception of the police.[55] Through public media outreach and social influence, police styled themselves as professionals to the general public as well as the larger legal community.[56] Courts largely accepted this rebranding, and criminal court decisions progressively reflected a belief that individual officers are professional policing experts and ordered a corresponding deference to police.[57] Despite these changes, many continued to believe that the legal mechanisms governing the police

[49] See Lvovsky, supra note 11, at 2004–05.

[50] Id. at 2005.

[51] See George L. Kelling & Mark H. Moore, Nat'l Inst. of Just., Dep't of Just., The Evolving Strategy of Policing, *in* 4 Perspectives on Policing 1, 5 (1988).

[52] Id.

[53] Id. at 5–6.

[54] Id. at 5 (citing Philadelphia as one example).

[55] See Lvovsky, supra note 11, at 2004–05, 2008–11.

[56] See id. at 2008–11; Kelling & Moore, supra note 51, at 5–6.

[57] See Lvovsky, supra note 11, at 2015–16; Hudson v. Michigan, 547 U.S. 586, 598 (2006) ("Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline.").

were insufficient to motivate necessary changes in police effectiveness, discipline, and community relations.[58]

In the 1970s and 1980s, scholars began to advocate for increased self-regulation by police departments. Some proposed independent police rulemaking with minimal judicial oversight of the process, analogous to the ways administrative agencies issue rules to govern themselves.[59] These scholars justified police rulemaking by invoking the same principles underlying administrative rulemaking in other contexts: flexibility, the application of field-specific expertise, better specification of individuals' rights, improved internal discipline, and increased public visibility of the rulemaking process.[60] They further justified arguments for police self-regulation by positing that police were more likely to follow rules they made themselves because they would understand why such rules were necessary and the intricacies of when they should apply.[61]

This era of police rulemaking was constrained by the U.S. Supreme Court's creation of bright-line rules governing criminal procedure and officer conduct. Although the Court had been slowly expanding civilians' due process protections from the police prior to the 1960s,[62] the Warren Court[63] hastened the development of constitutional criminal procedure doctrines that subjected police conduct to higher legal standards and subsequent scrutiny.[64] Internal police rulemaking was significantly limited, including by the Court's ruling in *Mapp v. Ohio*, which justified the exclusionary rule remedy for Fourth Amendment violations when the

[58] Gerald M. Caplan, The Case for Rulemaking by Law Enforcement Agencies, 36 Law & Contemp. Probs. 500, 500–01 (1971).

[59] See id.; Carl McGowan, Rule-Making and the Police, 70 Mich. L. Rev. 659, 676–81 (1972).

[60] McGowan, supra note 59, at 676–81.

[61] See id. at 672 ("It is a psychological truism that self-regulation tends to command a higher degree of observance by the regulated, if for no other reason than that the reasonableness of the resulting command is more self-evident.").

[62] See, e.g., Brown v. Mississippi, 297 U.S. 278, 278 (1936) (holding that the use of confessions obtained by coercive police violence violates a person's right to due process of law); Harmon, supra note 27, at 63.

[63] See The Warren Court in Historical and Political Perspective 7 (Mark Tushnet ed., 1993).

[64] See, e.g., Stephen J. Schulhofer, The Constitution and the Police: Individual Rights and Law Enforcement, 66 Wash. U. L.Q. 11, 12 (1988) (noting that in criminal procedure the "real Warren Court" emerged with *Mapp v. Ohio*, 367 U.S. 643 (1961)); Francis A. Allen, The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases, 1975 U. Ill. L.F. 518, 519 n.4.

rule would deter police misconduct.[65] Thus, the Court helped outline the general limits of acceptable police behavior, and rulemaking fleshed out the more specific contours.

C. The Blurring of the Concept of the Police

Because of this idiosyncratic development of policing, modern police authority invites normative investigation. At its core lie vexing questions regarding the police's role in a democracy, the source of their legitimacy, and the nature of their interventions. Perhaps the most influential definition of the police comes from Professor Egon Bittner, who frames the police as a "mechanism for the distribution of situationally justified force in society."[66] Bittner's framework suggests that society empowers police to use force in situations requiring immediate intervention.[67] A more conventional view casts the police as the chief enforcers of criminal law,[68] focusing on investigations and arrests, and ultimately facilitating prosecutions and punishment.[69] Finally, a more critical analysis recognizes a universal function of policing across industrialized societies, highlighting its dual capacity for lawful violence and law enforcement.[70]

Professor Eric Miller recently shifted the focus to the normative dimensions of police authority and responsibilities.[71] He views police authority as a status relationship, compelling compliance not only through

[65] Mapp v. Ohio, 367 U.S. 643, 648 (1961); Harmon, supra note 27, at 63; Haller, supra note 46, at 322–23.

[66] Egon Bittner, The Functions of the Police in Modern Society 39 (1970).

[67] Egon Bittner, Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police, *in* Policing: Key Readings 150, 150 (Tim Newburn ed., 2005).

[68] See, e.g., Ronald J. Allen, The Police and Substantive Rulemaking: Reconciling Principle and Expediency, 125 U. Pa. L. Rev. 62, 62 (1976) ("Until recently the police were often regarded as impartial, unbiased, nondiscriminating enforcers of the criminal law, possessing and exercising no discretion in the decision to invoke the criminal process when a violation of the criminal law is brought to their attention."); John Gardner, Criminals in Uniform, *in* The Constitution of the Criminal Law 97, 111 (R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo & Victor Tadros eds., 2013); Elizabeth E. Joh, The Paradox of Private Policing, 95 J. Crim. L. & Criminology 49, 60 (2019) (describing the characterization of police as law enforcers as "popular").

[69] Gardner, supra note 68, at 111.

[70] See, e.g., Alice Ristroph, The Thin Blue Line from Crime to Punishment, 108 J. Crim. L. & Criminology 305, 321–22 (2018).

[71] Eric J. Miller, The Concept of the Police, 17 Crim. L. & Phil. 573, 573–74 (2023).

force but also through a normative transformation within the governed.[72] Miller examines the boundaries of who make up the police, identifying clear cases like sheriffs and patrol officers alongside murkier ones like "citizens in uniform" or paramilitary groups.[73] Professor John Gardner, in a similarly normative vein distinct from Bittner's functional view of the police, has introduced the notion of police in name only. He argues that any officers who fail to uphold their moral duties forfeit their claim to legitimate authority, essentially becoming vigilantes within the state-sanctioned apparatus.[74]

This variability in conceptualizing the police, coupled with the dynamic interplay between formal roles and individual actions, constitutes a defining characteristic of modern policing. This fluidity reflects the complex historical and social forces that have shaped the police in often contradictory and evolving ways. Initially, community-driven vigilante actions governed law enforcement, which eventually evolved into officially recognized state policing.[75] This shift, amplified by the professionalization of police forces and their heightened regulation, transformed informal vigilante practices into structured, state-endorsed roles.[76]

Yet, the next Part of this Article argues that the core vigilante ethos permeates modern policing. Officers often inhabit a dual identity, oscillating between official status and personal capacity. This duality allows vigilante-like behaviors to persist under state authority, sometimes leading to discretionary enforcement or unilateral actions beyond formal mandates, which challenges legal accountability models that turn on state action.[77] Recognizing how this blend of state power and vigilante traits creates accountability gaps in police conduct is paramount to any meaningful analysis of police authority and its implications for governance and individual rights. The following Parts illustrate the shortcomings of our legal system in recognizing and reconciling this phenomenon and the significant gaps in the resulting accountability mechanisms governing police conduct.

[72] See id. at 576–77; Leslie Green, Authority and Convention, 35 Phil. Q. 329, 330 (1985) (describing a normative power as "the ability to change their reasons for action, to alter their permissions, prohibitions, and requirements").

[73] See Miller, supra note 71, at 579.

[74] See Gardner, supra note 68, at 105.

[75] See Robinson & Scaglion, supra note 20, at 117–18.

[76] See Caplan, supra note 58, at 514.

[77] See infra Part II.

II. POLICE VIGILANTISM

The current legal framework for police accountability is marked by a fundamental duality, resting on a Janus-like facade. Police officers frequently navigate between the roles of state actors and private individuals, a practice that is flawed on principle and impedes accountability. This Part demonstrates how this duality enables officers to strategically choose their legal identity to evade accountability. It addresses how this mutable identity obscures the distinction between public duties and private actions, drawing police toward their vigilante roots, where they operate outside the legal constraints on state violence.

This Part unpacks this phenomenon in two Sections. First, it argues that this phenomenon is best captured by the concept of shadow vigilantism, a covert form of vigilantism driven by disillusionment with systemic legal failures that compel individuals to manipulate the system from within. The second Section of this Part illustrates how identity shopping operates as a mechanism of shadow vigilantism across various policing roles and behaviors often sanctioned by our legal system.

A. Police as Vigilantes

The concept of the vigilante, an archetypal figure operating beyond the bounds of the law, occupies a complex position in both legal theory and cultural perception.[78] At its essence, vigilantism embodies the extralegal assumption of law enforcement functions, frequently arising from perceived deficiencies in formal legal structures.[79] Yet, this narrative often overlooks the propensity of formal institutions themselves to engage in extralegal actions.[80] This paradox is particularly manifest in the realm

[78] See, e.g., Allen Rostron, The Law and Order Theme in Political and Popular Culture, 37 Okla. City U. L. Rev. 323, 360 (2012); Itay Ravid, Watch & Learn: Illegal Behavior and Obedience to Legal Norms Through the Eyes of Israeli and American Popular Culture, 4 Berkeley J. Ent. & Sports L. 38, 47–48 (2015).

[79] See Richard Maxwell Brown, Strain of Violence: Historical Studies of American Violence and Vigilantism 95–96 (1975); Rebecca Tapscott, Vigilantes and the State: Understanding Violence Through a Security Assemblages Approach, 21 Persps. on Pol. 209, 212 (2023).

[80] See Bateson, supra note 14, at 927–28; H. Jon Rosenbaum & Peter C. Sederberg, Vigilantism: An Analysis of Establishment Violence, 6 Compar. Pol. 541, 542 (1974); Brown, supra note 79, at 95–96; Eduardo Moncada, Varieties of Vigilantism: Conceptual Discord, Meaning and Strategies, 18 Glob. Crime 403, 403 (2017); Les Johnston, What Is Vigilantism?, 36 Brit. J. Criminology 220, 220 (1996); Ray Abrahams, Vigilant Citizens: Vigilantism and the State 7, 9 (1998).

of policing, where officers, sanctioned enforcers of the law, still embody the ethos of vigilantism—not on the fringes, but within the very institutions entrusted with legal enforcement.[81] This phenomenon, termed "shadow vigilantism," presents significant challenges to the legitimacy and effectiveness of modern law enforcement.[82]

Historically, vigilantism has manifested in various forms, reflecting the sociopolitical landscapes of its times. In the late colonial period, classical vigilantism was primarily focused on law enforcement in frontier territories.[83] With the urbanization of the nineteenth century, a new form of vigilantism emerged, often motivated by prejudice and fear, targeting marginalized groups with impunity.[84] This evolved into a pseudo-vigilantism during the mid-twentieth century's social upheavals,[85] marked by an intertwining of vigilantism with state power, where vigilantes were often implicitly or explicitly supported by the state.[86]

More recently, Professor Paul Robinson has illuminated another variant of vigilantism: shadow vigilantism.[87] This subtle yet insidious form of subversion within the legal system emerges when individuals, disillusioned by perceived systemic legal failures, feel compelled to manipulate the system from within.[88] Shadow vigilantism transcends overt street-level violence, manifesting as a pervasive, often covert, resistance to and undermining of the formal legal system.[89]

Unlike traditional vigilantism's blatant lawbreaking, shadow vigilantism attracts those who typically avoid overt illegalities but engage in subtle acts of systemic undermining.[90] This covert vigilantism often evades the explicit calls for systemic reform, which more frequently focus

[81] See Robinson, supra note 14, at 453; William Ker Muir, Jr., Police: Streetcorner Politicians 26 (1977); Bittner, supra note 66, at 108.

[82] Robinson, supra note 14, at 453.

[83] Kelly D. Hine, Vigilantism Revisited: An Economic Analysis of the Law of Extra-Judicial Self-Help or Why Can't Dick Shoot Henry for Stealing Jane's Truck?, 47 Am. U. L. Rev. 1221, 1225 (1998).

[84] See supra Part I.

[85] Id.

[86] Tapscott, supra note 79, at 211.

[87] See Robinson, supra note 14, at 453.

[88] Id.

[89] Id. at 467.

[90] See id. at 461 (noting these can include acts that undermine the system through noncooperation, lying, or other low-level misconduct); Sarah L. Swan, The Plaintiff Police, 134 Yale L.J. (forthcoming 2024) (manuscript at 3–5) (on file with author) (identifying plaintiff police lawsuits as acts that potentially undermine democracy).

on overt vigilantism.[91] Instead, shadow vigilantism insidiously erodes trust and predictability within the legal system, inserting disparity and arbitrariness into legal outcomes; in turn, these forces strengthen perceptions of a dysfunctional legal system while eluding public and legal scrutiny.[92]

This Article identifies police identity shopping in modern policing as a unique manifestation of shadow vigilantism. Tracing its roots to civilian vigilantes and paramilitary groups, modern policing has undergone an intricate evolution, culminating in its institutionalization as a state function. However, even as courts and legislators have legitimized police as state actors, their failure to address the lingering identities of officers as private actors employing extralegal force has facilitated police engagement in shadow vigilantism. This engagement has allowed police officers to operate outside of the formal accountability measures imposed over the last century of reform.[93]

Consider how this system evolved. Following the institutionalization of police, courts broadened the legal rights available to police, bolstering their authoritative role within the legal system.[94] These expanded legal protections were intended to enable police officers to fulfill their duties without undue fear of personal legal repercussions, effectively cloaking their conduct with governmental authority.[95] This official empowerment effects a dual transformation: it elevates the normative status of police actions when within permissible bounds and grants immunity from criminal and civil liability for actions that would otherwise be unlawful.[96]

[91] Robinson, supra note 14, at 462.

[92] Id.

[93] See Caplan, supra note 58, at 500–01 (noting that our system's delegation of vast amounts of discretion to police is *sui generis*, then describing how existing accountability structures have been dissatisfactory).

[94] See Malcolm Thorburn, Criminal Law as Public Law, *in* Philosophical Foundations of Criminal Law 21, 38 (R.A. Duff & Stuart P. Green eds., 2011) (documenting how justification defenses for the use of force by police were necessary to render police conduct permissible).

[95] See id.

[96] See id. ("[P]olice officers throughout the common law world rely on justification defences in order to render their conduct permissible. Without such justifications, a great deal of police conduct would constitute criminal offences: arrests would be criminal assaults, searches would be trespasses, imprisonment would be unlawful confinement, execution would be murder, and so on."); Miller, supra note 71, at 583–84 (observing that the police can rationalize their deployment of coercive power by claiming legal, justified authority or invoking "public reasons").

Conversely, this grant of authority imposed distinct duties on police officers that are separate from their civilian obligations.[97] Bound by a range of norms, from constitutional mandates to departmental policies, their status as state actors demands a higher standard of conduct and accountability, commensurate with the significant trust and authority society places in them.[98] These duties encompass responsibilities like maintaining public order,[99] enforcing specific laws,[100] protecting the public,[101] ensuring legality,[102] treating all parties equitably,[103] and accepting a risk of harm.[104]

However, police identity shopping in the context of these accountability frameworks has created a dynamic where officers can oscillate between two legal identities and thus two legal frameworks: that of civilians and that of police officers. The ability to alternate between these identities in the same circumstances affords officers considerable discretion in determining their applicable legal status and which rules apply in what context. Shadow vigilantism thus provides a means for police to expand their rights while constricting their duties and accountability, undermining legal frameworks while maintaining elements of their original vigilante identity.

[97] See, e.g., John Kleinig, The Ethics of Policing 23, 26–29 (Douglas MacLean ed., 1996); Gardner, supra note 68, at 104–05, 109; Malcolm Thorburn, Justifications, Powers, and Authority, 117 Yale L.J. 1070, 1121–23 (2008) [hereinafter Thorburn, Justifications, Powers, and Authority] (discussing how the duties owed by the police stem from their fiduciary duties to the public). Whether the police necessarily possess special powers and duties that civilians lack is largely the substance of the Gardner-Thorburn debate, particularly in the context of the use of force. See Gardner, supra note 68, at 103–10 (2013); Thorburn, supra note 94, at 38; John Gardner, Justification Under Authority, 23 Canadian J.L. & Juris. 71, 89–90 (2010); Thorburn, Justifications, Powers, and Authority, supra, at 1121–24. For the abolitionist critique of the police as an institution serving these duties in the name of the state, see, for example, Derecka Purnell, Becoming Abolitionists: Police, Protests, and the Pursuit of Freedom 204–08, 210–12, 215–19 (2021); Paul Butler, Chokehold: Policing Black Men 3, 6, 56–61 (2017).

[98] Cf. Devon W. Carbado, From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence, 105 Calif. L. Rev. 125, 129–30 (2017) (viewing the Fourth Amendment as insulating the police from liability for wrongdoing).

[99] See Miller, supra note 71, at 573–74; Bittner, supra note 67, at 150.

[100] See Gardner, supra note 68, at 109.

[101] Id. at 104.

[102] See id. at 111.

[103] Id.

[104] See Miller, supra note 71, at 588.

B. Police Vigilantism in Practice

This Section delves deeper into the intricate relationship between the different and mutable identities available to police officers within legal accountability frameworks and scrutinizes how strategic choices in identity selection can broaden rights or diminish police accountability. The status of a police officer and the conduct of policing exist on a spectrum. For instance, an officer may hold the status of federal, state, local, or private officer. Additionally, the policing conduct might include on-duty activities, off-duty engagements, and what I classify as de facto policing.[105]

The subsequent Subsections demonstrate how the practice of identity shopping functions as a mechanism of shadow vigilantism within various roles and across different forms of conduct. This exploration reveals the nuanced ways that officers navigate and exploit their dual identities, and how this exploitation impacts both their professional conduct and the broader frameworks of legal accountability. By dissecting the multifaceted nature of policing roles and the conduct associated with these roles, this analysis provides a deeper understanding of the complex dynamics at play in modern law enforcement and how they impact legal frameworks, individual agency, and institutional practices.

1. On-Duty Policing

In analyzing on-duty policing, it is instructive to examine officers at the federal, state, and local levels. These officers, typically employed by government entities, assume the legal identities of their respective employers when acting within the scope of their official capacities.[106] The legal implications of police officers' status as government agents are context-dependent, particularly concerning their vulnerability to civil lawsuits for alleged constitutional violations.

In *Monroe v. Pape*,[107] the Court upheld the right of individuals to sue government officials for damages for constitutional violations under 42

[105] See infra Subsections II.B.1–2, 4.

[106] See Hafer v. Melo, 502 U.S. 21, 27 (1991); see also Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (noting that when a police officer is sued in their official capacity, the suit is against the government for which they work). In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Court also recognized the established legal presumption that the term "person" typically excludes the sovereign. 529 U.S. 765, 780 (2000).

[107] 365 U.S. 167 (1961).

U.S.C. § 1983.[108] When facing such lawsuits under 42 U.S.C. § 1983, police officers frequently invoke state actor immunity.[109] Historically, at common law, certain government officials enjoyed absolute or qualified immunity contingent on the nature of their duties.[110] While high-ranking officials like legislators, judges, and prosecutors receive absolute immunity from these suits when acting in their official capacities, police officers are granted qualified immunity.[111]

This qualified immunity, as interpreted by the Court in the context of 42 U.S.C. § 1983, incorporates certain common law immunities against litigation provided the conduct is state action and does not grossly violate the Constitution.[112] The seminal case of *Harlow v. Fitzgerald*[113] marked a significant shift in these suits, as the Court moved away from the common law requirement of proving an officer's subjective bad faith[114] to requiring proof that a reasonable officer in like circumstances would have known they were violating a clearly established constitutional right.[115] Post-*Harlow*, the Court has consistently held that a right is clearly established only if there is unequivocal existing precedent on the constitutional question.[116] Scholars have argued that this requirement has effectively elevated the defense of qualified immunity for police officers to a level akin to absolute immunity for high-ranking officials.[117]

This doctrine, while intended to protect government officials, including police officers, from frivolous litigation, has faced criticism for excessively insulating them from accountability.[118] This critique is particularly potent considering the Court's tendencies to emphasize the

[108] Id. at 167, 184–87.

[109] Scott A. Keller, Qualified and Absolute Immunity at Common Law, 73 Stan. L. Rev. 1337, 1340, 1345 (2021).

[110] When government officials fulfilled duties toward the public, such acts were called discretionary, and officers had immunity from suit so long as they did not act with a clear absence of discretionary authority. Id. at 1347–50. Duties toward individuals were called ministerial, and officers had immunity from suit so long as they did not perform these duties negligently or exceed their authority in doing so. Id. However, officers were not immunized from suit if plaintiffs could establish that an officer was not acting in good faith because they had an improper motive. Id. at 1346, 1350, 1354.

[111] Pierson v. Ray, 386 U.S. 547, 553–55, 557 (1967); Keller, supra note 109, at 1346.

[112] See Keller, supra note 109, at 1341–42, 1344.

[113] 457 U.S. 800 (1982).

[114] See Keller, supra note 109, at 1388–94.

[115] Id.; *Harlow*, 457 U.S. at 818.

[116] White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam).

[117] Keller, supra note 109, at 1393–94.

[118] Id. at 1393–96 (providing a summary of scholars making this argument).

identity of officers as government agents, which overshadows their concurrent role as private individuals "acting under color of law."[119] As a notable example of this judicial approach, the Court in *Will v. Michigan Department of State Police*[120] ruled that neither a State nor a state official acting in an official capacity is a "person[]" subject to suit under 42 U.S.C. § 1983.[121] The petitioner had sued the Michigan Department of State Police and its director, alleging his denial of promotion within the department violated his constitutional rights.[122] The Court's distinction between personal- and official-capacity suits effectively meant that suits

[119] The question regarding the applicability of qualified immunity to private actors is anything but clear. See Filarsky v. Delia, 566 U.S. 377, 397 (2012) (Sotomayor, J., concurring) (qualifying the Court's holding on the issue of whether a private individual, temporarily retained by the government to carry out its work, is entitled to seek qualified immunity from suit under 42 U.S.C. § 1983). Justice Sotomayor in her concurrence noted that "it does not follow that *every* private individual who works for the government in some capacity necessarily may claim qualified immunity when sued under 42 U.S.C. § 1983." Id. Noting the Court in *Richardson v. McKnight* left open "the question whether immunity would be appropriate for 'a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision.'" Id. (quoting Richardson v. McKnight, 521 U.S. 399, 413 (1997)). On the facts of *Filarsky*, the Court concluded that "[w]hen a private individual works closely with immune government employees, there is a real risk that the individual will be intimidated from performing his duties fully if he, and he alone, may bear the price of liability for collective conduct." Id. at 398. Justice Sotomayor stated:

> This does not mean that a private individual may assert qualified immunity only when working in close coordination with government employees. For example, *Richardson*'s suggestion that immunity is also appropriate for individuals "serving as an adjunct to government in an essential governmental activity," would seem to encompass modern-day special prosecutors and comparable individuals hired for their independence. There may yet be other circumstances in which immunity is warranted for private actors. The point is simply that such cases should be decided as they arise, as is our longstanding practice in the field of immunity law.

Id. (emphasis omitted) (citation omitted) (quoting *Richardson*, 521 U.S. at 413); see also Alex Kozinski & Andrew Bentz, Privatization and Its Discontents, 63 Emory L.J. 263, 272 (2013) ("But what's troubling about *Filarsky* is where it leaves *Richardson* . . . . The tension between *Filarsky* and *Richardson* will likely cause no end of trouble."); Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, Qualified Immunity Developments: Not Much *Hope* Left for Plaintiffs, 29 Touro L. Rev. 633, 640 (2013) ("Thus, since *Filarsky*, it is unclear whether private actors acting under color of state law and vulnerable to suit under Section 1983 are entitled to qualified immunity."); Andrew W. Weis, Note, Qualified Immunity for "Private" § 1983 Defendants After *Filarsky v. Delia*, 30 Ga. St. U. L. Rev. 1037, 1055–56 (2014).

[120] 491 U.S. 58 (1989).

[121] Id. at 58.

[122] Id. at 60.

against state officials in their official capacity are deemed actions against the state and thus impermissible under § 1983.[123]

In *Hafer v. Melo*,[124] the Court addressed a contrasting scenario and clarified that state officials are not immune from personal liability under 42 U.S.C. § 1983 for alleged constitutional violations when acting in their personal capacity.[125] In *Hafer*, the Auditor General of Pennsylvania faced a lawsuit from dismissed employees who claimed their dismissals were politically motivated, violating their First and Fourteenth Amendment rights.[126] The Court reasoned that the language of 42 U.S.C. § 1983, targeting "[e]very person" who violates constitutional rights under color of state law,[127] does not exempt officials from personal capacity suits, even for conduct performed in their official roles.[128]

This interpretation permits the coexistence of an officer's identities as both a civilian and a government actor, suggesting that one identity (that of a state actor) should not inherently shield individuals from personal capacity accountability. This coexistence of the two identities, however, can prove problematic if it permits officers to identity shop.

Moving away from the civil litigation realm, consider how this dual identity affects criminal cases with the example of a recent criminal case involving Deputy Peter Peraza of the Broward County Sheriff's Office. The case exemplifies the ability to privilege one identity over the other—here the officer's identity as a private as opposed to state actor—to mitigate legal accountability. The case arose in response to Officer Peraza fatally shooting Jermaine McBean, a man experiencing a mental health crisis and holding an air gun outside of his apartment complex.[129] Officer Peraza, arriving at the apartment complex and perceiving the gun as a threat, demanded that McBean stop.[130] McBean ignored the command, and Peraza shot and killed him.[131] When indicted for manslaughter,[132] Peraza invoked immunity from prosecution under Florida's "Stand Your

[123] Id. at 71.
[124] 502 U.S. 21 (1991).
[125] Id. at 27.
[126] Id. at 23.
[127] Filarsky v. Delia, 566 U.S. 377, 383 (2012) ("Section 1983 provides a cause of action against any person who deprives an individual of federally guaranteed rights 'under color' of state law.").
[128] *Hafer*, 502 U.S. at 27.
[129] State v. Peraza, 259 So. 3d 728, 729–30 (Fla. 2018).
[130] Id. at 729.
[131] Id. at 729–30.
[132] Id. at 730.

Ground" law.[133] This law, traditionally applicable to individuals, justifies the use or threatened use of deadly force by a "person" in certain circumstances.[134] The trial court accepted Peraza's defense, dismissing the charges.[135]

On appeal, the State argued that police officers are excluded from stand-your-ground immunity due to the existence of other specialized statutory defenses applicable to police conduct during lawful arrests.[136] Nonetheless, both the Florida Fourth District Court of Appeal and the Florida Supreme Court affirmed Peraza's immunity under the stand-your-ground law.[137] The Florida Supreme Court's rationale was grounded in a literal interpretation of the statute, which extends immunity to any "person" acting in self-defense.[138] This reasoning thus characterized Deputy Peraza as a private person despite his on-duty status during the incident,[139] marking a significant moment where the legal system provided immunity from prosecution to an on-duty police officer, categorizing him as an individual rather than a state functionary, thereby shielding his criminal liability.[140] In a related context, the Tallahassee Police Department's response to the shootings of Tony McDade and Wilbon Woodard provides a parallel example of police identity shopping to evade accountability.[141] The officers implicated in these incidents invoked Marsy's Law, a state constitutional amendment intended to protect victims' rights,[142] to prevent the public disclosure of their

[133] Id. At common law, the self-defense justification was available to civilians who reasonably believed it was necessary to use force to defend against imminent harm from another. See Cynthia Lee, Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense, 2018 U. Ill. L. Rev. 629, 658. Under the prevailing "castle doctrine," civilians had no duty to retreat when their home was being invaded but otherwise had to retreat before using deadly force. Id. at 660–61, 661 n.207. The majority of states today have stand-your-ground laws, which do not require civilians to retreat before using deadly force in self-defense. Id. at 660.

[134] *Peraza*, 259 So. 3d at 730–31; Fla. Stat. § 776.012(2) (2023).

[135] *Peraza*, 259 So. 3d at 730.

[136] Id.; Fla. Stat. § 776.05 (2023).

[137] *Peraza*, 259 So. 3d at 730, 733.

[138] Id. at 731.

[139] Id. at 733.

[140] Common Law and Statutory Law Allow Police Officers "Stand Your Ground" Immunity, Harv. C.R.-C.L. L. Rev. Amicus Blog (Mar. 22, 2019), https://journals.law.harvard.edu/crcl/common-law-and-statutory-law-allow-police-officers-stand-your-ground-immunity/ [https://perma.cc/VDB3-STDA].

[141] Nadia Banteka, Unconstitutional Police Pretexts, 2023 Wis. L. Rev. 1871, 1895.

[142] Fla. Const. art. I, § 16(b); Banteka, supra note 141, at 1892–93, 1893 n.142.

identities.[143] Originally designed to protect private individuals victimized by criminal acts, Marsy's Law was thus employed to shield officers from public accountability, despite their professed victimization not resulting in criminal prosecution.[144]

The trial court initially ruled that on-duty police officers do not fall within the "victim" category as envisaged by Marsy's Law.[145] However, the First District Court reversed this decision on appeal, holding that a police officer satisfied the definition of an individual crime victim.[146] The Florida Supreme Court subsequently overturned the appellate decision but did not directly address the applicability of Marsy's Law to on-duty officers.[147] This strategic deployment of a law meant to protect private citizens underscores the increasingly blurred distinctions between police roles as state actors and private individuals.

The phenomenon of identity shopping has profound implications for the legal characterization and treatment of police officers. When perceived as individuals, officers may access broader protections but also face greater personal accountability. Conversely, as state agents, their actions are subject to more stringent governmental scrutiny, yet they enjoy increased immunity from liability. If police officers can selectively adopt the identity that best serves their interests in each legal context, they subvert established systems of police accountability. The complexity of this issue extends to off-duty officers as well, further obscuring the legal landscape surrounding police conduct and accountability.

2. Off-Duty Policing

Police officers frequently engage in moonlighting, working for private employers in a law enforcement capacity while off-duty, unless they are explicitly prohibited by statute or department policy from doing so.[148]

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[143] Fla. Const. art. I, § 16(b)(5).

[144] See Banteka, supra note 141, at 1893–97; id. at 1893 ("In states [like Florida] with a version of Marsy's law, officers who have sustained any form of physical injury, however minor, or who claim to perceive a threat of physical harm, have asserted their status as victims of crime and have received corresponding rights afforded to victims of crime.").

[145] Fla. Police Benevolent Ass'n v. City of Tallahassee, 314 So. 3d 796, 797–98 (Fla. Dist. Ct. App. 2021), *quashed and remanded*, 375 So. 3d 178 (Fla. 2023).

[146] Id. at 801, 804.

[147] City of Tallahassee v. Fla. Police Benevolent Ass'n, 375 So. 3d 178, 181, 189 (Fla. 2023); see Banteka, supra note 141, at 1895.

[148] See Seth W. Stoughton, Moonlighting: The Private Employment of Off-Duty Officers, 2017 U. Ill. L. Rev. 1847, 1853, 1866; Julie Ayling, Peter Grabosky & Clifford Shearing,

This practice includes roles such as providing security at bars or nightclubs, or directing traffic near stadiums or places of worship.[149] Additionally, police departments often deputize their officers to work for private clients providing policing-like services.[150]

Current legal doctrine, while not definitively established by the Court or most federal courts of appeals,[151] suggests that an officer's authority stems from their status as a state agent.[152] This is the case even when they appear to exercise official authority[153] while employed by private entities.[154] This legal framework implies that officers retain their official

Lengthening the Arm of the Law: Enhancing Police Resources in the Twenty-First Century 140–41 (Alfred Blumstein & David Farrington eds., 2009); David A. Sklansky, The Private Police, 46 UCLA L. Rev. 1165, 1176 (1999); Andrew Stark, Arresting Developments: When Police Power Goes Private, Am. Prospect, Jan.–Feb. 1999, at 41, 41–42.

[149] Stoughton, supra note 148, at 1854; see also William C. Cunningham, John J. Strauchs & Clifford W. Van Meter, Hallcrest Systems, Inc., Private Security Trends, 1970–2000: The Hallcrest Report II, at 285 (1990) (estimating that approximately 150,000 public police officers work in private police jobs when off-duty); Gary T. Marx, The Interweaving of Public and Private Police Undercover Work, *in* Private Policing 172, 174 (Clifford D. Shearing & Philip C. Stenning eds., 1987) (describing how private security guards also work for federal, state, and local government).

[150] See Stoughton, supra note 148, at 1894.

[151] See, e.g., Davidson v. AT&T Mobility, LLC, No. 17-cv-00006, 2019 WL 486170, at *11 n.14 (N.D. Tex. Feb. 7, 2019) (noting lack of Fifth Circuit case law addressing the question); Bracken v. Okura, 869 F.3d 771, 777 & n.4 (9th Cir. 2017) (observing lack of Supreme Court or circuit precedent); Saenz v. G4S Secure Sols. (USA), Inc., 224 F. Supp. 3d 477, 481–82 (W.D. Tex. 2016) (noting "nation[wide] uncertainty regarding this issue").

[152] Williams v. United States, 341 U.S. 97, 98–100 (1951) (holding Williams "was asserting the authority granted him and not acting in the role of a private person" where he had taken an oath and was qualified by the city of Miami as a police officer but received no payment from the city); Griffin v. Maryland, 378 U.S. 130, 135 (1964) (noting an officer "wore a sheriff's badge and consistently identified himself as a deputy sheriff rather than as an employee of the park," and therefore qualified as a state actor).

[153] See Barna v. City of Perth Amboy, 42 F.3d 809, 816 (3d Cir. 1994); Parks v. City of Columbus, 395 F.3d 643, 652 (6th Cir. 2005); Latuszkin v. City of Chicago, 250 F.3d 502, 505–06 (7th Cir. 2001); Pickrel v. City of Springfield, 45 F.3d 1115, 1118 (7th Cir. 1995); Martinez v. Colon, 54 F.3d 980, 986 (1st Cir. 1995). But see Roe v. Humke, 128 F.3d 1213, 1216 (8th Cir. 1997).

[154] Morris v. Dillard Dep't Stores, Inc., 277 F.3d 743, 746, 755 (5th Cir. 2001) (holding an off-duty police officer was entitled to qualified immunity after arresting a plaintiff while working as a store security guard); Pourghoraishi v. Flying J, Inc., 449 F.3d 751, 763 n.5 (7th Cir. 2006) (taking a similar approach); Smith v. Norton Hosps., Inc., 488 S.W.3d 23, 29, 32 (Ky. Ct. App. 2016) (granting immunity to an off-duty officer serving as a security guard because the conduct fell within the statutorily defined authority of a peace officer); Sawyer v. Humphries, 570 A.2d 341, 345–48 (Md. Ct. Spec. App. 1990) (summarizing decisions from New York, California, Illinois, Pennsylvania, New Jersey, Georgia, Ohio, and Minnesota discussing whether private employment prevents a peace officer from acting in what otherwise would be official capacity); cf. Stewart v. State, 527 P.2d 22, 24 (Okla. Crim. App. 1974)

state authority even when actively working for private employers.[155] Taking it one step further, some states, localities, and departments have adopted specific regulations requiring all police officers to be "on-duty" even when "off-shift."[156]

For instance, the U.S. Court of Appeals for the Fifth Circuit held in *Laughlin v. Olszewski*[157] that an off-duty Houston police officer hired by a private entity to provide security was acting under the color of law.[158] According to the court's analysis, the officer's off-duty status did not curtail his authority to exercise force in the presence of criminal activity, as his conduct was deemed in the discharge of official police duties.[159] Similarly, the Third Circuit in *Abraham v. Raso*[160] found that an off-duty officer in uniform who attempted to arrest a shoplifter and subsequently shot him was acting under color of law, as her actions were typical of an officer performing official duties.[161] The Sixth Circuit in *Swiecicki v. Delgado*[162] ruled that an off-duty officer in full uniform who arrested an individual after a physical altercation was acting under color of law.[163] In *Morris v. Dillard Department Stores, Inc.*,[164] the Fifth Circuit held that an off-duty police officer was entitled to qualified immunity for arrest while working as a store security guard.[165] The Tenth Circuit in *Lusby v. T.G. & Y. Stores, Inc.*[166] held that an off-duty officer acting as a private security guard at a store, who identified himself as a police officer and completed paperwork at the police station, was also acting under color of law.[167] The court noted that even if he were a private person, the police department's

("We believe that when an off-duty police officer accepts private employment and is receiving compensation from his private employer he changes hats from a police officer to a private citizen when engaged in that employment and he is therefore representing his private employer's interest and not the public's interest.").

[155] See Stoughton, supra note 148, at 1884–85.

[156] See, e.g., Brown v. Gray, 227 F.3d 1278, 1290–91 (10th Cir. 2000).

[157] 102 F.3d 190 (5th Cir. 1996).

[158] Id. at 192 n.1.

[159] Id.

[160] 183 F.3d 279 (3d Cir. 1999).

[161] Id. at 287.

[162] 463 F.3d 489 (6th Cir. 2006), *abrogated on other grounds by* Wallace v. Kato, 549 U.S. 384 (2007).

[163] Id. at 490–91.

[164] 277 F.3d 743 (5th Cir. 2001).

[165] Id. at 746, 755.

[166] 749 F.2d 1423 (10th Cir. 1984), *judgment vacated sub nom.* City of Lawton v. Lusby, 474 U.S. 805 (1985).

[167] Id. at 1428–30.

policy allowed him to substitute his judgment for that of the police, and so his off-duty conduct constituted state action under color of law.[168]

State courts have reached similar conclusions. The Maryland Court of Special Appeals (now called the Appellate Court of Maryland) in *Sawyer v. Humphries*[169] established that state police officers are perpetually on duty in terms of legal protections and responsibilities, regardless of their shift status.[170] Similarly, the Ohio Court of Appeals in *State v. Glover*[171] affirmed that a police officer retains the power to arrest and detain, even when functioning as a private security guard.[172] The Minnesota Supreme Court likewise held in *State v. Childs*[173] that a city police officer, while working off-duty as a private security guard, concurrently assumes the roles of a private employee and a police officer, and thus the officer was entitled to make an arrest while engaged in private employment.[174]

The increasingly indistinct line between civilian private security guards, deriving their authority from their private employment contracts, and off-duty police officers, exercising state power in policing-related conduct, creates unique legal implications. By permitting officers and their counterparts to manipulate this indistinction, courts have extended immunities and defenses typically available to on-duty officers to their off-duty counterparts for comparable conduct.[175]

Consider this identity shopping in the context of civil defenses for individuals acting under color of law. While such individuals may face civil rights lawsuits, the evolution of the doctrine of qualified immunity adopts a notably lenient stance toward them.[176] This leniency is so substantial that off-duty officers working for private employers may prefer being sued as state agents rather than as private individuals due to the protective shield of qualified immunity.[177] This underscores the

[168] Id. at 1430.
[169] 570 A.2d 341 (Md. Ct. Spec. App. 1990).
[170] Id. at 345.
[171] 367 N.E.2d 1202 (Ohio Ct. App. 1976).
[172] Id. at 1204.
[173] State v. Childs, 269 N.W.2d 25 (Minn. 1978).
[174] Id. at 27.
[175] See Stoughton, supra note 148, at 1889; see, e.g., John C. Jeffries, Jr., What's Wrong with Qualified Immunity?, 62 Fla. L. Rev. 851, 860 (2010).
[176] See supra Subsection II.B.1.
[177] Consider, for instance, the defendant in *Bracken v. Okura*, who conceded at oral argument that he "absolutely" acted under color of state law in helping detain Bracken, and argued that because of this, qualified immunity was necessarily available to him. 869 F.3d 771, 776 (9th Cir. 2017).

accountability paradox that police identity shopping has engendered: the original intent of qualified immunity was to protect public employees from frivolous lawsuits and the ensuing distraction and deterrence from public service.[178] The justifications become increasingly tenuous when the doctrine is applied to officers performing off-duty work who may admit to undertaking state action simply to enjoy qualified immunity.[179]

Or consider the context of the criminal law on self-defense, which varies significantly between civilians and police officers. Civilians can generally only invoke self-defense for force used in the face of imminent threats of death or substantial bodily harm, which requires a demonstration of proportionate and necessary action.[180] Conversely, police officers as state actors are subject to less rigorous use of force standards.[181] Various state laws governing police use of force often do not

[178] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); Richardson v. McKnight, 521 U.S. 399, 404 (1997) (citing Wyatt v. Cole, 504 U.S. 158, 167 (1992)).

[179] See Stoughton, supra note 148, at 1890.

[180] Lee, supra note 133, at 654–61.

[181] See id. Consider that, under the common law rules, officers could use deadly force against someone who assaulted and resisted the officer so long as the officer reasonably believed such force was absolutely necessary to arrest the person. Both officers and civilians could apprehend fleeing felons with deadly force. In *Tennessee v. Garner*, the Supreme Court rejected the common law rule that officers could use deadly force to apprehend a felon regardless of the circumstances, holding instead that such force is only justified "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." 471 U.S. 1, 11 (1985). As the *Garner* Court explained, by the time of the decision almost half the states had abandoned the old common-law rule. Id. at 18. Since then, a dozen more states have chosen, by legislation or by court interpretation, to conform their criminal laws more closely to the new standard for "fleeing felon" cases articulated in *Garner*. Chad Flanders & Joseph Welling, Police Use of Deadly Force: State Statutes 30 Years After Garner, 35 St. Louis U. Pub. L. Rev. 109, 120, 124 (2015). But not all states have done so. Within the past decade, another dozen states still adhered to the old common-law rule, while other states that abandoned the common-law approach decided not to go quite as far as *Garner* in restricting police use of deadly force. Id. at 124. Often, states do not clearly distinguish between statutes that authorize police use of force and those that provide a defense against criminal liability for use of force. See Lee, supra note 133, at 656. This has resulted in a convoluted patchwork of differing state laws about police use of deadly force. Some states continue to follow the common law rule that officers can use deadly force against fleeing felons on the grounds that *Garner* only established the definition of excessive force within the civil suit context. See, e.g., People v. Couch, 461 N.W.2d 683, 684 (Mich. 1980). Further, the initial aggressor's duty to retreat is not included in most police use of force laws. See Lee, supra note 133, at 661. While civilian requirements for self-defense have evolved over time and become more demanding, such standards for police officers continue to expand and become less demanding, enabling a broad use of officer discretion. Compare Fritz Allhoff, Self-Defense Without Imminence, 56 Am. Crim. L. Rev. 1527, 1529–30 (2019) (noting that with respect to citizen

mandate proof of proportionate force or the consideration of alternative measures.[182] And some jurisdictions assess the reasonableness of deadly force based on the officer's subjective perspective, thereby deviating from a more objective standard.[183] Being considered a state actor while in private employment allows these officers to invoke the more permissive standards available to state actors while using force.

In all these scenarios, a public police officer might enjoy immunity from liability arising from discretionary decisions like the deployment of deadly force while exercising official power.[184] Conversely, similar actions taken in a private capacity, for instance by a private employee who acts as a security guard, do not benefit from the same level of immunity.[185] But off-duty public officers working for private employers have access to the full array of defenses and immunities and can shop for the most beneficial legal frameworks. This raises critical questions about the scope and application of these doctrines, especially as officers navigate the blurred lines between their roles as state agents and private individuals.

The extension of these defenses and immunities to off-duty activities not only dilutes the intended purpose of these doctrines but also undermines public accountability mechanisms by creating a protective veil for actions that might otherwise be subject to legal scrutiny. This intricate legal landscape, where officers retain authority and immunities as state agents even while engaged in private employment, underscores the imperative for our legal system to recognize the phenomena of identity shopping and shadow vigilantism.

self-defense, several states have shifted from the common law's reasonableness requirement to stricter necessity and imminence requirements), with Kindaka J. Sanders, The New Dread, Part II: The Judicial Overthrow of the Reasonableness Standard in Police Shooting, 71 Clev. St. L. Rev 1029, 1031–32 (2023) (noting that with respect to excessive force claims against officers, the Court's explication of a reasonableness test in *Graham v. Connor*, 490 U.S. 386 (1989), and its progeny have greatly increased officers' discretion over time).

[182] Lee, supra note 133, at 654–61.

[183] See, e.g., id. at 654 n.181 (highlighting Nebraska as one example); People v. Goetz, 497 N.E.2d 41, 48–51 (N.Y. 1986) (addressing subjective and objective common law standards of reasonableness in using deadly force for self-defense); Model Penal Code §§ 3.04(2)(b), 3.09 (Am. L. Inst. 1985).

[184] See Mark C. Niles, "Nothing but Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity, 54 Admin. L. Rev. 1275, 1315 (2002).

[185] Pardon v. Finkel, 540 N.W.2d 774, 776 (Mich. Ct. App. 1995) (holding that officers hired by a private agency for crowd control services were not engaged in a governmental function and therefore were not entitled to governmental immunity).

3. Private Policing

Private policing, a concept without a formal definition, is generally understood as the lawful, organized, and professional provision of services focused on crime control, order maintenance, and property protection for profit.[186] This for-profit characteristic often separates private policing from public law enforcement.[187] Its professional nature sets it apart from ad hoc groups of private individuals enforcing personal interpretations of the law, and its legality distinguishes it from extralegal vigilantism.[188] These distinctions, while not absolute,[189] provide a structural framework for categorizing the various identities and roles of individuals identified as private police officers or those engaged in private policing activities.

Legal scholars have raised concerns over the limited regulation of private police, particularly in relation to the state action doctrine.[190] This doctrine asserts that constitutional criminal procedure rules applicable to law enforcement are relevant only when actions can be attributed to the

[186] Joh, supra note 68, at 55.

[187] However, these lines have been blurred. Consider, for instance, public-private partnerships where public police use private security guards to supplement traditional public policing. See Seth W. Stoughton, The Blurred Blue Line: Reform in an Era of Public & Private Policing, 44 Am. J. Crim. L. 117, 135 (2017).

[188] See Joh, supra note 68, at 56.

[189] See, e.g., David Garland, The Limits of the Sovereign State, 36 Brit. J. Criminology 445, 452 (1996).

[190] See Burdeau v. McDowell, 256 U.S. 465, 475–76 (1921) (holding the Fourth Amendment applies only to law enforcement activity connected with the government); Griffin v. Maryland, 378 U.S. 130, 135 (1964) (holding that a private security guard qualified as a state actor because he had "purported to exercise the authority of a deputy sheriff" when he wore a sheriff's badge and consistently identified himself as a deputy sheriff); Flagg Bros. v. Brooks, 436 U.S. 149, 163 n.14 (1978) ("[T]his Court has never considered the private exercise of traditional police functions. In *Griffin v. Maryland*, the State contended that the deputy sheriff in question had acted only as a private security employee, but this Court specifically found that he 'purported to exercise the authority of a deputy sheriff.' *Griffin* thus sheds no light on the constitutional status of private police forces, and we express no opinion here." (citations omitted) (quoting *Griffin*, 436 U.S. at 135)); Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971) (holding that the Fourth Amendment did not apply to a search or seizure by a private party who was not acting as an " 'instrument' or agent" of the government); Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 614 (1989) ("Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities . . . ."); Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that "coercive [public] police activity" is a "necessary predicate" to finding a confession involuntary under the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment).

government.[191] In distinguishing between private and public police, lower courts have identified four criteria from the Court's state action doctrine[192]: the exercise of powers traditionally exclusive to the government,[193] joint action with public officials,[194] government coercion or inducement of an entity's action,[195] and a sufficiently close nexus between the government and the entity, such that the latter's actions are effectively those of the government.[196]

For instance, in *Gallagher v. Neil Young Freedom Concert*,[197] the Tenth Circuit addressed whether private security guards conducting pat-down searches at a concert held at the University of Utah acted under color of law, concluding they did not.[198] The court considered the relationship between the state (university) and the private entity (concert

[191] See, e.g., Elizabeth E. Joh, Conceptualizing the Private Police, 2005 Utah L. Rev. 573, 595; Sklansky, supra note 148, at 1230–31; David A. Sklansky, Private Policing and Human Rights, 5 Law & Ethics Hum. Rts. 112, 128–29 (2011); Joh, supra note 68, at 91; John M. Burkoff, Not So Private Searches and the Constitution, 66 Cornell L. Rev. 627, 627–28 (1981); Tamar Frankel, The Governor's Private Eyes, 49 B.U. L. Rev. 627, 628 (1969); Marx, supra note 149, at 183; Stephen Rushin, The Regulation of Private Police, 115 W. Va. L. Rev. 159, 185 (2012).

[192] To be sure, in delineating the state action doctrine, the Court has been concerned more with the line distinguishing public police from all other entities, rather than from private police specifically. See Joh, supra note 68, at 95.

[193] See Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) ("We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State.").

[194] See Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) ("Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute." (quoting United States v. Price, 383 U.S. 787, 794 (1966))); Dennis v. Sparks, 449 U.S. 24, 27–28 (1980) ("Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions." (first citing *Adickes*, 398 U.S. at 152; and then citing *Price*, 383 U.S. at 794)); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) ("The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.").

[195] See Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."); Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978) ("[A] State is responsible for the . . . act of a private party when the State, by its law, has compelled the act.").

[196] See *Jackson*, 419 U.S. at 351.

[197] 49 F.3d 1442 (10th Cir. 1995).

[198] Id. at 1444, 1457.

company and security guards) under the criteria for state action.[199] Despite the university officials' awareness of the security guards' employment and the presence of university public safety officers, the court did not find the necessary nexus for state action.[200] The court nevertheless acknowledged the absence of precedent specifically addressing the characterization of security services in a government-owned building leased to a private entity.[201]

In the context of a private university, the Eighth Circuit held in *United States v. Avalos* that private university security officers who searched the defendant on campus were not functioning in tandem with government officials;[202] thus, the search was not subject to the Fourth Amendment.[203]

In *Lindsey v. Detroit Entertainment, LLC*,[204] the Sixth Circuit held that security guards at a private casino who detained plaintiffs for picking up abandoned tokens and credits from the slot machines were not state actors.[205] The court distinguished the circumstances from *Romanski v. Detroit Entertainment, LLC*,[206] where the private casino security officer was licensed under Michigan law and thus given the power to arrest (after being vetted by the state's department of police) beyond that given to ordinary citizens.[207] Unlike *Romanski*, the private guards in *Lindsey* were not licensed under Michigan law and so did not exercise delegated state power.[208]

In *Edwards v. Okie Dokie, Inc.*,[209] the U.S. District Court for the District of Columbia ruled that the actions of nightclub security personnel did not constitute action under color of state law for the purposes of a 42 U.S.C. § 1983 claim.[210] The court found that detaining patrons and restraining them until police arrived did not demonstrate willful

[199] Id. at 1447.

[200] Id. at 1450. Factors like the university's financial gain and the event's location on university property were not sufficient to establish state action. Nor were the security services considered an exclusive state function. Id. at 1452–53, 1457.

[201] Id. at 1457.

[202] 984 F.3d 1306, 1308 (8th Cir. 2021).

[203] Id. at 1307.

[204] 484 F.3d 824 (6th Cir. 2007).

[205] Id. at 825–26, 831.

[206] 428 F.3d 629 (6th Cir. 2005).

[207] Id. at 632–33, 640.

[208] *Lindsey*, 484 F.3d at 829–30.

[209] 473 F. Supp. 2d 31 (D.D.C. 2007).

[210] Id. at 41.

participation with state law enforcement, a close nexus with the state, or a transfer of state authority to the nightclub guards.[211]

But in *People v. Zelinski*,[212] the Supreme Court of California determined that private police are subject to constitutional protections, including the Fourth Amendment, due to the growing dependency of local law enforcement on private security for crime prevention and law enforcement, and the consequent rising risks to individual privacy.[213] And yet, in *In re Deborah C.*,[214] the same court took a different stance. It ruled that standard detentions and interrogations by undercover store detectives do not necessitate *Miranda* warnings.[215] The majority noted "[t]hat private security guards sometimes act under color of law when they conduct illegal searches neither makes them 'law enforcement officials' nor establishes the complicity of those officials for purposes of *Miranda*."[216]

[211] Id.

[212] 594 P.2d 1000 (Cal. 1979).

[213] Id. at 1005–07; see also Cervantez v. J.C. Penney Co., 595 P.2d 975, 980 (Cal. 1979) (discussing merchant's privilege to detain upon probable cause); In re Bryan S., 167 Cal. Rptr. 741, 743–44 (Cal. Ct. App. 1980) (refusing to extend *Zelenski* to ordinary private citizens); People v. Eastway, 241 N.W.2d 249, 250 (Mich. Ct. App. 1976) (concluding the exclusionary rule applies when a search is conducted by private security guards); People v. Jones, 393 N.E.2d 443, 446 (N.Y. 1979) (suppressing evidence obtained by store detectives). But see People v. Leighton, 177 Cal. Rptr. 415, 418–19 (Cal. Ct. App. 1981) (stating the constitutional limitations of the Fourth Amendment will not be applied to actions of private security police protecting store's interests); Commonwealth v. Leone, 435 N.E.2d 1036, 1041 (Mass. 1982) (holding that specially commissioned officers are subject to Fourth Amendment restraints; but when guard takes legitimate and reasonable steps to protect employer's private property, exclusionary rule will not be applied); Stanfield v. State, 657 P.2d 1200, 1201 (Okla. Crim. App.) (finding that store security guard who searched without probable cause was acting as private citizen), *withdrawn on other grounds*, 666 P.2d 1294 (Okla. Crim. App. 1983).

[214] 635 P.2d 446 (Cal. 1981).

[215] Id. at 449.

[216] Id.; see also United States v. Antonelli, 434 F.2d 335, 337–38 (2d Cir. 1970) (declining to extend *Miranda* to statements made in custody of private security because security guards lacked a de facto connection with law enforcement); United States v. Birnstihl, 441 F.2d 368, 370 (9th Cir. 1971) (noting that failure of private security guard to give *Miranda* warning did not render inculpatory statements inadmissible because *Miranda* "applies only to the actions of law enforcement officials" (citation omitted)); United States v. Casteel, 476 F.2d 152, 155 (10th Cir. 1973) (concluding that private employees did not have a de facto connection with law enforcement); People v. Raitano, 401 N.E.2d 278, 281 (Ill. App. Ct. 1980) (finding that security guards' failure to give *Miranda* warning did not render statement inadmissible because they were not state actors); Silks v. State, 545 P.2d 1159, 1161 (Nev. 1976) (noting that statements made to private security guards were admissible because *Miranda* only applies to "custodial interrogation initiated by police officers" (quoting Schaumberg v. State, 432 P.2d

The dichotomy inherent in the role of private police, as they navigate both private and public spheres, presents a notable legal paradox. Private police officers adopt symbols of public authority, such as uniforms and badges, reminiscent of those worn by public law enforcement.[217] Yet, simultaneously, they maintain their status as private entities, effectively sidestepping the constitutional and public law obligations that bind their counterparts in public policing.[218]

This duality, as noted by Professor David Sklansky, embodies a paradox at the core of the state action doctrine when applied to private police and further sheds light on the phenomenon of identity shopping within the realm of private policing.[219] Private police officers demonstrate a proficient ability to maneuver between their dual identities. They leverage their status as private individuals, whose conduct is not constitutionally scrutinized, while often leveraging a perception of police authority typically afforded to state agents.[220] This adept navigation underscores a deliberate and strategic blurring of the lines between public and private policing roles.[221]

In this way, both public and private police engage in a different but nuanced exploitation of police authority within the legal system. This not only complicates the source and nature of police authority but also raises fundamental questions about the scope and limits of constitutional protections in the context of private policing.

4. De Facto Policing

In our contemporary legal system, the doctrine of citizen's arrest stands as a unique form of public participation in law enforcement that traces its origins directly back to medieval England's "hue and cry"[222] and the

500, 501 (Nev. 1967))); People v. Ray, 480 N.E.2d 1065, 1067–68 (N.Y. 1985) (holding *Miranda* warnings were not required when a store detective detains and interrogates an accused shoplifter and then transfers the accused to on-scene special patrolman).

[217] See United States v. Boylan, 898 F.2d 230, 236 (1st Cir. 1990) ("[F]ew symbols are better recognized than the lawman's badge.").

[218] Sklansky, supra note 148, at 1228.

[219] Id. at 1229.

[220] See supra Section I.A.

[221] See Joh, supra note 68, at 115; Sklansky, supra note 148, at 1229.

[222] See Laura K. Donohue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181, 1231 (2016) (defining "hue and cry" as a warning shout that legally obligated everyone between the ages of fifteen and sixty who heard it to assist in the apprehension of a wrongdoer); Robbins, supra note 1, at 562–65.

vigilante groups of the American frontier.[223] This doctrine, which permits ordinary citizens to apprehend suspected offenders, has historically fluctuated between justifications based on civic duty and vigilantism, reflecting the varying societal needs and legal frameworks of different eras.[224]

In early American jurisprudence, states in the North sanctioned citizen enforcement against crimes like horse theft and counterfeiting, particularly in regions where formal law enforcement was nascent or nonexistent.[225] Conversely, in the antebellum South, a more ominous variant of citizen policing emerged, primarily aimed at sustaining the institution of slavery, culminating in the establishment of vigilante slave patrols by the late eighteenth century.[226]

Today, citizen enforcement manifests in three primary forms: legal actions against government entities, organized civilian watch groups, and individual enforcement actions.[227] The latter two forms represent what I term here "de facto policing."

The citizen's arrest doctrine reflects an era of communal responsibility for maintaining public order[228] when all capable citizens had the authority to pursue and detain suspected offenders.[229] At this time, the distinctions between private citizens and law enforcers in executing arrests,[230] as well

[223] See, e.g., Richard Slotkin, Gunfighter Nation: The Myth of the Frontier in American Fiction 156 (1992).

[224] Robert Liebman & Michael Polen, Perspectives on Policing in Nineteenth-Century America, 2 Soc. Sci. Hist. 346, 354 (1978); Robbins, supra note 1, at 562–65.

[225] See Carly Maylath, Utilizing Citizen Enforcement Provisions to Legalize Vigilantism, 75 Rutgers U. L. Rev. 645, 647–48 (2023); Gary T. Marx & Dane Archer, Citizen Involvement in the Law Enforcement Process: The Case of Community Police Patrols, 15 Am. Behav. Scientist 52, 52–53 (1971).

[226] See Maylath, supra note 225, at 647–48; Hassett-Walker, supra note 39, at 6–7.

[227] See Maylath, supra note 225, at 649–50; Barry Boyer & Errol Meidinger, Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws, 34 Buff. L. Rev. 833, 835 (1985).

[228] See Statute of Winchester 1285, 13 Edw. 1, c. 1–6 (Eng.), *reprinted in* 3 English Historical Documents 460, 460–62 (David C. Douglas & Harry Rothwell eds., 1975); M. Cherif Bassiouni, Citizen's Arrest: The Law of Arrest, Search, and Seizure for Private Citizens and Private Police 9 (1977).

[229] See Kristian Williams, Our Enemies in Blue: Police and Power in America 32 (2007) (noting how prior to the eighteenth century, British "watches" did not have minimum qualifications); William J. Bopp & Donald O. Schultz, A Short History of American Law Enforcement 17–18 (1972) (documenting how early American "watches" were staffed by ordinary citizens).

[230] See Jerome Hall, Legal and Social Aspects of Arrest Without a Warrant, 49 Harv. L. Rev. 566, 567 (1936).

as associated liability concerns, were minimal.[231] Over time, this doctrine evolved, particularly in response to the changing societal context increasingly distinguishing the roles and responsibilities of private individuals from those of police officers.[232] This evolution is marked by a transition toward more defined regulations and a growing emphasis on the liability of private individuals for false arrests.[233]

As this common law doctrine has evolved, the right of individuals to effectuate arrests remains in some states as a common law right,[234] while other states have codified and adapted it.[235] The resulting legal landscape is a patchwork, often shrouded in ambiguity and inconsistency.[236] For example, Colorado's statute allows citizen's arrests for *any* crime committed in the presence of the arresting person, while California restricts such actions to felonies or public offenses committed in the individual's presence.[237] California's statute permits arrests based on a

[231] See Statute of Winchester, c. 4, *reprinted in* 3 English Historical Documents, supra note 228, at 461.

[232] See Hall, supra note 230, at 569.

[233] See Carroll v. United States, 267 U.S. 132, 156–57, 161 (1925) (noting private citizens engaging in policing actions face false arrest charges); Brown v. United States, 256 U.S. 335, 343 (1921) (finding that many jurisdictions prescribe a duty to retreat, thus mandating retreat before using force where safely possible); Robbins, supra note 1, at 564, 570.

[234] As of 2016, jurisdictions that rely on the common law of citizen's arrest are Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, Pennsylvania, Vermont, West Virginia, and Wisconsin. Robbins, supra note 1, at 565 n.48.

[235] See, e.g., Cal. Penal Code § 837 (West 2024); Ala. Code § 15-10-7 (2024); Iowa Code § 804.9 (2024).

[236] Robbins, supra note 1, at 569.

[237] Colo. Rev. Stat. § 16-3-201 (2024). But see Cal. Penal Code § 837 (West 2024), which provides:

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

State statutes similar or identical to California's law include Alabama, Alaska, Arizona, Idaho, Indiana, Iowa, Kansas, Minnesota, Mississippi, Nevada, North Dakota, Oklahoma, South Dakota, Tennessee, and Utah. See Ala. Code § 15-10-7 (2024); Alaska Stat. § 12.25.030 (2024); Ariz. Rev. Stat. Ann. § 13-3884 (2024); Idaho Code § 19-604 (2024); Ind. Code § 35-33-1-4 (2023); Iowa Code § 804.9 (2024); Kan. Stat. Ann. § 22-2403 (2024); Minn. Stat. § 629.37 (2023); Miss. Code Ann. § 99-3-7 (2024); Nev. Rev. Stat. Ann. § 171.126 (LexisNexis 2024); N.D. Cent. Code § 29-06-20 (2023); Okla. Stat. tit. 22, § 202 (2024); S.D. Codified Laws § 23A-3-3 (2024); Tenn. Code Ann. § 40-7-109 (2024); Utah Code Ann. § 77-7-3 (LexisNexis 2023).

reasonable belief that the person arrested committed a felony.[238] In contrast, New York and Texas impose stricter requirements: the person arrested must have actually committed an offense,[239] or the arrestor risks liability for a false arrest, regardless of the reasonableness of their belief.

Overall, this legal framework has facilitated the normalization of extralegal practices under the guise of civic duty, blurring the lines between state-sanctioned law enforcement and individual action. But the nature of citizen's arrests also allows officers to operate under a less regulated, more ambiguous set of standards compared to those governing their on-duty responsibilities.[240] This end run around accountability aligns with the phenomenon this Article unearths, as the boundaries between official law enforcement authority and personal discretion become increasingly blurred, raising concerns about accountability and the potential for abuse of power.

Judicial interpretations of the citizen's arrest doctrine have also fueled this phenomenon. Courts have ruled that officers can effectuate valid citizen's arrests outside of their assigned jurisdiction, as they remain citizens in those areas.[241] Even their use of police insignia and assertion

[238] Cal. Penal Code § 837 (West 2024).

[239] N.Y. Crim. Proc. Law § 140.30 (McKinney 2024) (providing a private person is authorized to arrest another "for a felony when the latter has in fact committed such felony"); see also Tex. Code Crim. Proc. Ann. art. 14.01(a) (West 2023) (requiring that a felony be committed in the citizen's presence or view).

[240] See supra notes 180–83 and accompanying text; Jacob D. Charles & Darrell A. H. Miller, Essay, The New Outlawry, 124 Colum. L. Rev. 1195, 1213 (2024) (describing the similar phenomenon of the "New Outlawry").

[241] See, e.g., Budnick v. Barnstable Cnty. Bar Advocs., Inc., No. 92-1993, 1993 WL 93133, at *3 (1st Cir. 1993) ("But, 'a police officer, while unable to act as an officer in an adjoining jurisdiction, does not cease to be a citizen in that jurisdiction . . . and may lawfully conduct a citizen's arrest there if he has probable cause to believe that a felony has been committed and that the person arrested has committed it.'" (quoting Commonwealth v. Dise, 583 N.E.2d 271, 274 (Mass. App. Ct. 1991)); see also State v. Phoenix, 428 So. 2d 262, 265 (Fla. Dist. Ct. App. 1982), *approved and remanded*, 455 So. 2d 1024 (Fla. 1984) ("In addition to any official power to arrest, police officers also have a common law right as citizens to make so-called citizen's arrests."); Hudson v. Commonwealth, 585 S.E.2d 583, 590 (Va. 2003); Phoenix v. State, 455 So. 2d 1024, 1025–26 (Fla. 1984); State v. Slawek, 338 N.W.2d 120, 121 (Wis. Ct. App. 1983) ("An extensive line of cases from other states, however, upholds the validity of an extraterritorial arrest made by a police officer who lacked the official authority to arrest when the place of arrest authorizes a private person to make a citizen's arrest under the same circumstances."); Dodson v. State, 381 N.E.2d 90, 92 (Ind. 1978) ("Even if the officers were without statutory arrest powers as policemen, they retained power as citizens to make an arrest . . . ."); State v. O'Kelly, 211 N.W.2d 589, 595 (Iowa 1973) ("An officer who seeks to make an arrest without warrant outside his territory must be treated as a private person. Of course, his action will be lawful if the circumstances are such as would

of official authority does not negate their ability to perform such arrests as private individuals.[242] However, because arrests made under common law or statutory citizen's arrest provisions often are not deemed actions "under color of office," extraterritorial officers can sidestep their constitutional obligations by claiming to act in their private capacities.[243]

The Sixth Circuit's ruling in *United States v. Layne*[244] illustrates this dynamic. There, the court found that a sheriff's warrantless arrest outside of his geographical jurisdiction was valid under Tennessee's private citizen's arrest statute.[245] Applying the standard for "reasonable cause" required for citizen's arrests under that statute, the court declined to hold the officer to Fourth Amendment standards.[246]

The ability of law enforcement officers to maneuver between their status as officials and private citizens in the context of citizen's arrests embodies a form of identity shopping. By permitting officers to strategically choose their legal identity to suit the circumstances, courts allow officers to circumvent the traditional legal constraints and

authorize a private person to make the arrest." (quoting 5 Am. Jur. 2d Arrest § 50 (1962))); Commonwealth v. Harris, 415 N.E.2d 216, 220 (Mass. App. Ct. 1981) (citing with approval "[a]n extensive line of cases from other states uphold[ing] the validity of an extraterritorial arrest made by a police officer who lacked the official authority to arrest where the place of arrest authorizes a private person to make a 'citizen's arrest' under the same circumstances"); State v. Miller, 896 P.2d 1069, 1073 (Kan. 1995) ("An officer who makes an arrest without a warrant outside the territorial limits of his [or her] jurisdiction must be treated as a private person. [The officer's] actions will be considered lawful if the circumstances attending would authorize a private person to make the arrest." (quoting State v. Shienle, 545 P.2d 1129, 1132 (Kan. 1976))).

[242] See, e.g., State v. Furr, 723 So. 2d 842, 845 (Fla. Dist. Ct. App. 1998) ("[T]he trial court erred by concluding that a citizen[']s arrest is nullified where the officer, acting outside of his jurisdiction, uses a marked police car, and otherwise announces his official position."); Dodson v. State, 381 N.E.2d 90, 92 (Ind. 1978) (noting that "[e]ven if the officers were without statutory arrest powers as policemen, they retained power as citizens to make an arrest" where undercover officers effectuated an arrest). But see People v. Lahr, 589 N.E.2d 539, 540 (Ill. 1992) (rejecting a citizen's arrest argument and noting that "an extraterritorial arrest will not be upheld if in making the arrest the officer uses the powers of his office to obtain evidence not available to private citizens").

[243] See, e.g., Phoenix v. State, 455 So. 2d 1024, 1025 (Fla. 1984) ("[T]he majority of the courts have . . . h[eld] that the 'under color of office' doctrine applies only to prevent law enforcement officials from using the powers of their office to observe unlawful activity or gain access to evidence not available to a private citizen."); United States v. Hernandez, 715 F.2d 548, 551 (11th Cir. 1983).

[244] 6 F.3d 396 (6th Cir. 1993).

[245] Id. at 397–99; Tenn. Code Ann. § 40-7-109 (2024).

[246] *Layne*, 6 F.3d at 399; see also Sisk v. Shelby County, No. 96-5379, 1997 WL 157713, at *2–3 (6th Cir. 1997) (applying the "public offense" portion of Tennessee's citizen's arrest statute to validate an arrest).

accountability mechanisms that would otherwise govern law enforcement activities, including arrests.

Identity shopping in this context also has corollary effects for organized civilian watch groups and private enforcement actions. While identity shopping facilitates fluidity in the roles of police officers, it simultaneously extends this fluidity to civilians, especially those involved in activities traditionally associated with law enforcement, like community patrols or property defense. As a result, these individuals can also oscillate between civilian and law enforcement roles.

Consider, for instance, neighborhood watch initiatives like those of George Zimmerman;[247] militia groups, as discussed in the Kyle Rittenhouse case;[248] and other civilian-led law enforcement efforts. Each instance underscores a dualistic expansion of legal identity that significantly muddles conventional distinctions between police officers and private citizens, injecting further ambiguity into the legal frameworks governing police conduct and citizen's arrests. By calling into question the boundaries of authority, responsibility, and accountability in both formal law enforcement and community-based policing, it further disrupts established legal norms.

The harmful consequences of this phenomenon necessitate a closer examination of the legal frameworks of authority and accountability. They challenge traditional accountability frameworks in law enforcement and raise concerns about the proper scope and limitations of police authority. It is essential to consider how this phenomenon and its practices

[247] See Mark S. Brodin, The Murder of Black Males in a World of Non-Accountability: The Surreal Trial of George Zimmerman for the Killing of Trayvon Martin, 59 How. L.J. 765, 766–67 (2016); Michael Muskal & Tina Susman, Rules for Neighborhood Watch Discussed in George Zimmerman Trial, L.A. Times (June 25, 2013, 12:00 AM), https://www.latimes.com/nation/la-xpm-2013-jun-25-la-na-nn-george-zimmerman-neighborhood-watch-20130625-story.html [https://perma.cc/VK9M-5E8N]; Mark S. Brodin, The Legacy of Trayvon Martin—Neighborhood Watches, Vigilantes, Race, and Our Law of Self-Defense, 106 Marq. L. Rev. 593, 599 n.41 (2023) [hereinafter Brodin, The Legacy of Trayvon Martin].

[248] See Brodin, The Legacy of Trayvon Martin, supra note 246, at 623–25; Paige Williams, Kyle Rittenhouse, American Vigilante, New Yorker (June 28, 2021), https://www.newyorker.com/magazine/2021/07/05/kyle-rittenhouse-american-vigilante [https://perma.cc/XHC3-FJ5H]; Julie Bosman, Rittenhouse Verdict: Kyle Rittenhouse Acquitted on All Counts, N.Y. Times (Jan. 27, 2022), https://www.nytimes.com/live/2021/11/19/us/kyle-rittenhouse-trial#kyle-rittenhouse-verdict [https://perma.cc/GZ6C-TKUV]; Charles Homans, To Paramilitary Groups, Rittenhouse Verdict Means Vindication, N.Y. Times (Nov. 21, 2021), https://www.nytimes.com/2021/11/21/us/rittenhouse-militia-paramilitary.html [https://perma.cc/89VP-LQ59].

affect the rule of law and civil liberties, emphasizing the need for a legal system that scrutinizes the authority of policing across identities.

III. ABOLISHING POLICE VIGILANTISM

The dualistic identity of police officers, straddling the realms of state action and private citizenry, presents a critical conundrum within our contemporary legal frameworks. This Part posits that this duality is not merely an incidental feature of policing but a profound vulnerability in the concept of the police and a consequent design flaw in the frameworks of police accountability. It endows officers with a flexibility that allows them to oscillate along a continuum, ranging from roles as agents of the state to ordinary private individuals. This malleability in identity enables officers to maneuver within the legal landscape in a way that effectively blurs established boundaries on which accountability frameworks are based.

The legal system as it stands is predicated on clear demarcations of legal identity and does not account for entities capable of selecting between private and governmental identities. By ignoring the persistence of dual identities, this system fosters a climate where shadow vigilantism can chip away at the system of police accountability, undermining its efficacy from within. The current system of police accountability is thus fundamentally misaligned with the dynamic nature of police identity. Correcting this misalignment necessitates a thorough reconceptualization of the existing frameworks to address this dynamic nature of police identity more thoroughly. Such a recalibration would enhance the accountability of law enforcement officers and reinforce the integrity of the legal system.

A. The State Action Delusion

The state action doctrine functions as the fulcrum for discerning when private conduct intersects with state authority and warrants constitutional scrutiny.[249] The doctrine's essence lies in delineating when constitutional

[249] Since its inception in 1875, the state action doctrine's application has been inconsistent, leading to criticisms of its functionality and coherence. See, e.g., Charles L. Black, Jr., Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 95 (1967); Martha Minow, Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs, 52 Harv. C.R.-C.L. L. Rev. 145, 145–52 (2017); Gary Peller & Mark Tushnet, State Action and a New Birth of Freedom, 92 Geo. L.J. 779, 789 (2004); Erwin Chemerinsky, Rethinking

safeguards and obligations are triggered.[250] Its core principle posits that only actions taken under constitutional, statutory, or regulatory mandates by government employees or designated entities qualify as state action.[251] This classification of the conduct, in turn, activates the due process constraints against substantive and procedural unfairness afforded by the Fifth and Fourteenth Amendments.[252]

Generally, the doctrine presumes state actions are executed through state agents.[253] The Supreme Court and lower courts have developed several approaches to identify whether entities that are not clearly state agents in particular circumstances are engaged in state action. These approaches hinge on examining the relationship between the state and the entity, the extent of governmental entanglement in the relevant conduct, and the delegation of traditional state functions to the entity.[254] Courts address state action questions through contextual, fact-intensive inquiries, grounding the analysis in the specificities of each case.[255]

The state action doctrine thus relies on the construction of a dichotomy: it characterizes conduct as either state action, subject to constitutional restraints, or non-state action, which lies outside such constraints. This binary framework is crucial in defining the parameters of constitutional rights and the scope of legal accountability. However, as this Article

State Action, 80 Nw. U. L. Rev. 503, 503–05 (1985); Mark Tushnet, State Action in 2020, *in* The Constitution in 2020, at 69, 69–77 (Jack M. Balkin & Reva Siegel eds., 2009); Lillian BeVier & John Harrison, The State Action Principle and Its Critics, 96 Va. L. Rev. 1767, 1770–72 (2010) (summarizing criticisms while defending the state action doctrine); Wilson R. Huhn, The State Action Doctrine and the Principle of Democratic Choice, 34 Hofstra L. Rev. 1379, 1380 (2006) (setting out criticisms before asserting that the state action doctrine's purpose "has been misunderstood"); Emily Chiang, No State Actor Left Behind: Rethinking Section 1983 Liability in the Context of Disciplinary Alternative Schools and Beyond, 60 Buff. L. Rev. 615, 643 (2012); Morton J. Horwitz, The History of the Public/Private Distinction, 130 U. Pa. L. Rev. 1423, 1427–28 (1982) (noting that the private-public distinction has been eroded); Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U. Pa. L. Rev. 1349, 1350–57 (1982).

[250] See Minow, supra note 249, at 147.

[251] Id.

[252] Id.

[253] See Ex parte Virginia, 100 U.S. 339, 346–49 (1879) (holding that the action of a state official who exceeds the limits of his authority constitutes state action contemplated by the Fourteenth Amendment). It is generally accepted that acts of a state officer or agency are considered state actions whether or not they were authorized or even if positively forbidden by state laws. Thomas P. Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083, 1086 (1960).

[254] See supra notes 193–96.

[255] Burton v. Wilmington Parking Auth., 365 U.S. 715, 725–26 (1961).

demonstrates, the binary construct breaks down when police officers straddle the line between state and non-state action. The muddying of their legal status frustrates the application of a doctrine premised on clear lines.

The ambiguity of identities directly impacts liability frameworks that rely on the clear demarcation between state and non-state action. For instance, actions performed under the color of state law that deprive individuals of constitutional rights are subject to legal redress under 42 U.S.C. § 1983.[256] In determining whether an individual alleging such constitutional harms has a viable claim, the key questions revolve around whether the defendant acted "under color of state law" and qualifies for immunities under 42 U.S.C. § 1983.[257] But the doctrine's failure to recognize the intersection of private and public action, as in cases of identity shopping by police, can lead to an exclusion of civil rights remedies for conduct deemed private. On the other hand, officers acting as state agents may face civil lawsuits and invoke qualified immunity or assert officer-specific defenses in criminal prosecutions.[258]

Shadow vigilantism renders this framework's reliance on a clear demarcation between state and private actions at every stage of the analysis problematic. This Article has shown that the assumption of a distinct divide is, in reality, often a misperception. Consequently, this Article posits that current police accountability frameworks are inherently flawed. Acknowledging and addressing these flaws is imperative for reforming police accountability systems.

B. Facing Police Vigilantism

A fundamental issue in our legal frameworks for police accountability is the frameworks' inability to effectively address the blurred line between identities of police officers as state actors and private citizens. This muddled identity engenders legal ambiguity within which officers have discretion to select between identities, posing significant challenges to police accountability.

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[256] See Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982). The Court also made explicit that challenged conduct which constitutes state action is also conduct under color of law for § 1983 purposes. Id.

[257] Minow, supra note 249, at 150.

[258] See id.; *Lugar*, 457 U.S. at 935; Stoughton, supra note 148, at 1889; Thorburn, supra note 94, at 38.

The objective of reimagining this framework is thus twofold: first, to eradicate the vigilante strand that permeates current policing models through identity shopping; and second, to establish a more honest jurisprudence that provides effective and transparent systems of police accountability. This shift would require a more forthright approach in legal doctrines concerning state action and compel an assessment of societal expectations from the state, including which behaviors are intolerable when state actors adopt a guise akin to private vigilantism.

1. Constitutional Remedies

A pressing issue for legal accountability frameworks arises from the judiciary's failure to adequately address the dual identity of police officers as both state actors and private individuals.[259] This shortcoming necessitates a reevaluation of the state action doctrine, particularly in its application to law enforcement officers. Professor Cass Sunstein has identified a critical flaw in the traditional application of this doctrine: the persistent focus on the mere presence of state action often overlooks the pervasive influence of the state within the relevant underlying legal frameworks.[260] Sunstein advocates for an inquiry that extends beyond the existence of state action in a specific circumstance. Instead, he would presume state action to be always present.[261] Operating under this theory, courts would engage in a deeper examination of relevant constitutional guarantees in each contested context, regardless of the formal presence of state action.[262]

Consider the scenario of an off-duty police officer sued by a family for employing lethal force against a deceased relative. The conventional judicial approach might probe whether the officer was involved in state action, considering the specifics of the encounter. However, a more incisive and pertinent line of inquiry would consider whether the Constitution sanctions the relevant law on officer use of force that has allowed the officer to act in this way. This approach requires recognizing that the officer's actions are not random events, but rather direct outcomes of the state's delegation of legal authority to, in this case, off-duty

[259] There is a commonplace understanding that the applicability of the Constitution to decisions made by "quintessentially public actors" is not routinely disputed. See BeVier & Harrison, supra note 249, at 1803 & n.71.

[260] Cass R. Sunstein, State Action Is Always Present, 3 Chi. J. Int'l L. 465, 467–68 (2002).

[261] Id. at 467.

[262] Id. at 467–68.

officers.[263] This allocation of authority warrants a thorough constitutional analysis under which the officer's conduct is examined on its own merits—that is, "[t]he constitutional question, in any system that has a state action requirement, is not whether there is state action, but whether the relevant state action is unconstitutional."[264]

In other words, once we identify an exercise of public power through an event attributable to one actor when a different decision by a different actor would have avoided that event, what matters for the constitutional question are the "purposes and effects" of this exercise of power.[265] This perspective shifts the judicial focus from simply determining the presence of state action to a more substantive consideration of the constitutional implications embedded within the state's legal framework.

In the recent case of *Bracken v. Okura*,[266] the Ninth Circuit followed a similar approach in answering the question of whether qualified immunity extends to an off-duty police officer working as a private security guard, who was alleged to have violated an individual's constitutional rights.[267] In *Bracken*, an off-duty uniformed officer was employed as a "special duty" security guard for a hotel.[268] The officer, along with another private guard, detained the plaintiff at a hotel event.[269] The officer, facing legal action for not intervening in an alleged assault by the other guards,[270] asserted that he was acting under color of state law as an off-duty officer and invoked qualified immunity as a defense to liability.[271] The Ninth Circuit agreed with the plaintiff that the officer's failure to intervene may be a violation of his constitutional rights,[272] and the court held that qualified immunity did not apply in this context.[273]

In disentangling the question of qualified immunity from state action, the court clarified that the presence of state action under 42 U.S.C. § 1983 does not necessarily trigger qualified immunity for such action when a

[263] See id. at 467.

[264] Id. at 466; see also Peller & Tushnet, supra note 249, at 814 ("That is our position too, but we doubt that the move from background rights to the merits is quite as simple as . . . Sunstein suggest[s].").

[265] Cass R. Sunstein, The Partial Constitution 205 (1993).

[266] Bracken v. Okura, 869 F.3d 771 (9th Cir. 2017).

[267] Id. at 775–76.

[268] Id. at 775.

[269] Id.

[270] Id.

[271] Id. at 776.

[272] Id. at 780.

[273] Id. at 777.

government officer uses their state authority for private, nongovernmental purposes.[274] Recognizing the lack of precedent on the availability of qualified immunity to off-duty officers serving as private security guards, the appellate court examined the history and purposes behind government employee immunity.[275] The court concluded that, in this instance, protecting the officer from legal action would not align with the policies underpinning qualified immunity because the officer was not preventing a crime, but rather furthering the hotel's security interests.[276]

In this case, the court looked beyond whether the officer was acting under the color of state law at the moment to also consider the broader context of his actions against the underlying objectives motivating qualified immunity. The court's context-dependent scrutiny provides an example of the kind of nuanced analysis that reconfigures the state action doctrine to account for these dual identities.

Such a reorientation of the state action doctrine compels a shift in focus from a binary assessment of state action versus private action to a broader evaluation of the consequential constitutional ramifications. This shift is essential for a more nuanced and effective application of constitutional principles, particularly in the realm of policing, where the interplay between public duties and private conduct presents unique legal challenges. In the context of police identity shopping, a claim to a non-state identity would not necessarily shield an officer from constitutional scrutiny for using state power. Courts assessing the constitutionality of the use of state power in a specific context would have to grapple with the limitations on state power.

2. Statutory and Common Law Remedies

Outside of the realm of state action, this approach would also impact statutory police accountability frameworks. Consider, for instance, the laws on the use of force by officers. When the Florida Supreme Court affirmed Officer Peraza's entitlement to "Stand Your Ground" immunity

[274] Id. at 776.

[275] Id. at 777; see also Richardson v. McKnight, 521 U.S. 399, 404 (1997) (concluding that the Court's precedent "tell[s] us . . . to look both to history and to the purposes that underlie government employee immunity" to determine whether qualified immunity applies to private employees).

[276] *Bracken*, 869 F.3d at 778. The court, however, left open the possibility of qualified immunity in situations where an off-duty officer reverts to their police role, such as to prevent a crime. Id. at 778 n.6.

from prosecution under statutes that justify the use of deadly force by a "person,"[277] the court's determination positioned Officer Peraza not as an agent of the state but rather as a private individual, irrespective of his on-duty status at the time of the incident.[278]

But interpretations that treat officers as civilians for the purposes of barring criminal prosecution potentially disrupt the criminal statutory scheme regulating officers' excessive use of force.[279] The absence of a fixed line between their conduct as state actors and as private citizens undermines the mechanisms meant to hold them accountable for their actions, effectively displacing criminal laws that would otherwise apply.

As Peraza's case illustrates, allowing shadow vigilantism to creep in leads to a lack of accountability for police misconduct. Redefining the role of delegated state power in conduct like Officer Peraza's would prevent identity shopping from cutting off a more nuanced consideration of the appropriate accountability framework for such conduct.

3. Legislative Reforms

The longstanding legal framework that regulates policing, focused predominantly on constitutional criminal procedure as the primary determinant of police conduct, has been scrutinized for its inability to fully address the complexities of policing.[280] Scholars like Rachel Harmon have highlighted the shortcomings of constitutional law in addressing the distributive impacts of law enforcement.[281] Harmon advocates for a shift in regulatory focus toward local, state, and federal laws and policies to establish a more effective policing regime.[282] Similarly, Professors Barry Friedman and Maria Ponomarenko point to the pivotal role of legislatures in shaping police practices through

[277] State v. Peraza, 259 So. 3d 728, 730–31, 733 (Fla. 2018).
[278] Id. at 731.
[279] See, e.g., Fla. Stat. § 776.05 to -.06 (2023).
[280] See, e.g., Rachel A. Harmon, The Problem of Policing, 110 Mich. L. Rev. 761, 764–68 (2012); Barry Friedman & Maria Ponomarenko, Democratic Policing, 90 N.Y.U. L. Rev. 1827, 1877–79 (2015); McGowan, supra note 59, at 660–62; Christopher Slobogin, Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine, 102 Geo. L.J. 1721, 1725 (2014). Professor John Rappaport argues the Supreme Court has focused too much jurisprudential energy on regulating street police officers directly, leading to results that are "mixed at best." John Rappaport, Second-Order Regulation of Law Enforcement, 103 Calif. L. Rev. 205, 207–10 (2015).
[281] Harmon, supra note 280, at 768–81.
[282] Id. at 764–65.

statutes.[283] They observe that many countries successfully employ comprehensive legal codes that regulate policing in civil law systems, and they propose that the United States could benefit from adopting a similar, structured statutory framework.[284]

The shadow vigilantism phenomenon within police ranks is sometimes traced to a deep-seated disillusionment with the criminal legal system.[285] This disillusionment, arguably fueled by perceived failures within the system, propels officers toward covert practices like identity shopping, which subvert the core principles of police accountability embedded in criminal legal frameworks.[286] Viewing police conduct through this lens opens up the possibility that police officers engage in identity shopping not out of inherent malevolence, but instead to navigate regulatory and constitutional ambiguities. The Court's jurisprudence, despite its attempts to establish bright-line rules for criminal procedure,[287] often does not provide clear answers on what is lawful when applied to the intricate realities of modern policing.[288] The ambiguity that confronts officers

[283] Friedman & Ponomarenko, supra note 280, at 1877, 1889; cf. William J. Stuntz, The Political Constitution of Criminal Justice, 119 Harv. L. Rev. 781, 791–92 (2006) (arguing legislators have been discouraged from regulating policing due to the Court's extension of constitutional principles into the area).

[284] Friedman & Ponomarenko, supra note 280, at 1877, 1889.

[285] See Robinson, supra note 14, at 453. Robinson's analysis of shadow vigilantism suggests that officers undertake actions that, while not overtly illegal, effectively erode the legal framework from within. This shift in policing practices underscores a significant departure from the established norms of the legal system, driven by a perception of systemic indifference to justice. Id.

[286] Id.

[287] See Dunaway v. New York, 442 U.S. 200, 213–14 (1979) (emphasizing the need for "[a] single, familiar standard" which would "guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront"); New York v. Belton, 453 U.S. 454, 458 (1981) (declaring that Fourth Amendment doctrine should "regulate the police in their day-to-day activities" through "a set of rules which, in most instances, makes it possible to reach a correct determination beforehand" as to whether their conduct is constitutional (quoting Wayne R. LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 Sup. Ct. Rev. 127, 141–42)); Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) ("[T]he object . . . is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing . . . ."); Berghuis v. Thompkins, 560 U.S. 370, 381–82 (2010) (asserting that an "unambiguous invocation" requirement to exercise *Miranda* rights provides "an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity" (quoting Davis v. United States, 512 U.S. 452, 458–59 (1994))); Riley v. California, 573 U.S. 373, 398 (2014) (noting the Court's "general preference to provide clear guidance to law enforcement through categorical rules").

[288] See Friedman & Ponomarenko, supra note 280, at 1832 ("[F]ew believe it makes sense for courts to be the primary supervisors of police agencies, particularly because judicial review

navigating these new realities thereby inadvertently hastens the emergence of shadow vigilantism.

Acknowledging the existence of police vigilantism brings into sharp focus the pressing need, expressed by many reformists, for more comprehensive measures to regulate police behavior.[289] These measures should endeavor to establish clearer guidelines delineating the nature of police conduct as state or private action. Fundamental to this endeavor is a direct confrontation with the crucial question concerning the source of police authority across the spectrum of policing roles and activities.[290] This Article demonstrates that conventional heuristics such as uniforms, badges, and oaths to the Constitution are insufficient for distinguishing legitimate police authority from forms of vigilantism. Indeed, it reveals that shadow vigilantism has become embedded within the operational framework of police authority.

A critical reexamination of the source of police authority could mitigate disillusionment among law enforcement officers, curtail tendencies toward shadow-vigilante behaviors, and foster law enforcement operations within a framework characterized by accountability and transparency. Alternatively, this reassessment might compel a deeper, more radical introspection, leading to questions of whether vigilantism is so intrinsically woven into the fabric of policing that reform may be unattainable. This line of inquiry could provoke considerations of whether, in its current form, the institution of policing ought to be fundamentally restructured or even abolished.

is almost exclusively about constitutionality. Governing policing involves a host of prior questions . . . .").

[289] See, e.g., Barry Friedman & Elizabeth G. Jánszky, Policing's Information Problem, 99 Tex. L. Rev. 1, 33 (2020) ("The actual problem here is not that legislators feel displaced by courts, but that far too much of policing lives in a dark hole of ignorance."); Tracey L. Meares, The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—and Why It Matters, 54 Wm. & Mary L. Rev. 1865, 1865–66 (2013) (advancing the paradigm of "rightful policing," not focused on lawfulness or efficacy in crime-fighting, but on the "procedural justice or fairness of police conduct"); Megan Quattlebaum & Tom Tyler, Beyond the Law: An Agenda for Policing Reform, 100 B.U. L. Rev. 1017, 1027 (2020) (proposing that the discussion on police reform should start by deciding what we want police to do, potentially deciding "to reduce police officers' functions down to the smallest, hard core of violent and other serious crime problems . . . for which we see no other possible response").

[290] See Miller, supra note 71, at 589 (discussing various sources of police authority and the requirements for legitimacy).

4. Abolition

The examination of police identity shopping as a form of police shadow vigilantism offers critical insights into the abolitionist critique of policing and bolsters the arguments for dismantling traditional policing structures. Abolition "strives toward a society where racialized punitive systems of legal control and exploitation are no longer a component of the way we deal with criminalized social harms and problems, such as substance use disorders, mental illness, theft, assault, and even murder."[291] It emphasizes the necessity of disentangling "social responses to harm and conflict from the criminal legal system" while fostering "nonpunitive . . . systems of accountability and care."[292]

Contrasting with reformist perspectives, which treat policing as an institution capable of improvement, abolitionist thought argues that we lack a viable foundational baseline for reform.[293] This perspective essentially contends that reform efforts are inherently futile.[294] Instead, "[t]he state must be transformed, the law must be transformed, the police must be eliminated, or at least the[] social and fiscal footprint of police must be considerably diminished, if not eliminated."[295] Thus, abolition is both pragmatic and existential;[296] pragmatically, it suggests that reducing police presence will likely decrease police violence, and existentially, it aspires to replace the traditional policing model with innovative approaches to community safety and well-being.[297]

This Article contributes to the abolitionist discourse by tracing the origins of police vigilantism and its continued salience, thereby

[291] Matthew Clair & Amanda Woog, Courts and the Abolition Movement, 110 Calif. L. Rev. 1, 25 (2022).

[292] Morgan, supra note 19, at 1203; see, e.g., Gimbel & Muhammad, supra note 19, at 1532–33; Barry Friedman, Disaggregating the Policing Function, 169 U. Pa. L. Rev. 925, 926 (2021) (proposing how to remove police from noncriminal public safety functions).

[293] See Akbar, Toward a Radical Imagination of Law, supra note 19.

[294] See Mariame Kaba, Yes, We Mean Literally Abolish the Police, N.Y. Times (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/8D6M-K23U] ("The only way to diminish police violence is to reduce contact between the public and the police.").

[295] Akbar, Toward a Radical Imagination of Law, supra note 19.

[296] See Eaglin, supra note 19.

[297] See id.; Akbar, An Abolitionist Horizon, supra note 19, at 1787; Morgan, supra note 19 ("It is an understatement to say that abolition is an ambitious and long-term project. Leading abolitionist theorist Ruth Wilson Gilmore captures this by saying that to create an abolitionist society, abolitionists have to change one thing: everything." (footnote omitted)).

underscoring the "raced, classed, and gendered" elements of policing.[298] These systemic issues identified by abolitionists appear to be deeply ingrained in the fabric of the institution, which continues to perpetuate vigilante violence under the guise of state authority. This entrenched dynamic, when coupled with the persistence of vigilantism, suggests that policing in its present state cannot be merely reformed into a more effective institution of public safety but may need to be abolished. Attempts to reform the police that do not grapple with these entrenched dynamics might inadvertently reinforce the very problems they aim to resolve, perpetuating cycles of oppression and harm.

In advocating for abolition, proponents call for a transformative approach to addressing the endemic violence inherent in policing.[299] They propose replacing traditional police forces with alternative "first responders, or harm-mitigation workers, and 'non-police health and safety solutions.'"[300] These alternatives range from state-driven welfare initiatives to cooperative state-community endeavors, or purely community-led efforts.[301]

However, the involvement of the state in these alternatives raises critical concerns regarding reliance on these new agents to deliver services without replicating existing structural issues.[302] Notably, "[t]here is a large body of research cataloguing the perils of the welfare state for poor people and communities of color—surveillance, blame and assessments of desert, humiliation and stigmatization, administrative burden, reinforcement of racial hierarchy, and the welfare state's own carceral and neoliberal logics and justifications."[303]

[298] Akbar, Toward a Radical Imagination of Law, supra note 19, at 460.

[299] See id.

[300] See Benjamin Levin, Criminal Law Exceptionalism, 108 Va. L. Rev. 1381, 1413 (2022); Friedman, supra note 292, at 934.

[301] See Levin, supra note 300, at 1413–14.

[302] Id. at 1414.

[303] Monica C. Bell, Katherine Beckett & Forrest Stuart, Investing in Alternatives: Three Logics of Criminal System Replacement, 11 U.C. Irvine L. Rev. 1291, 1301–02 (2021); see Dorothy E. Roberts, Prison, Foster Care, and the Systemic Punishment of Black Mothers, 59 UCLA L. Rev. 1474, 1478 (2012) (arguing that neoliberalism "depends on the brutal containment of the nation's most disenfranchised groups," wherein "welfare, prison, foster care, and deportation systems [are] extremely punitive mechanisms for regulating residents of the very neighborhoods most devastated by the evisceration of public resources"); Lisa Kelly, Abolition or Reform: Confronting the Symbiotic Relationship Between "Child Welfare" and the Carceral State, 17 Stan. J.C.R. & C.L. 255, 261 (2021).

Entirely community-led initiatives have distinct implications that are relevant to this Article. Professor Shawn Fields has noted that replacing police with noncriminal entities might raise the risk of increased intrusions on privacy and liberty due to lack of constitutional oversight comparable to state actors.[304] This Article does not aim to allay these apprehensions entirely but rather posits that the difference between current policing practices and these non-police alternatives may not be as significant as assumed. If policing, characterized by identity shopping and shadow vigilantism, already obscures lines of accountability and state action, then the current system might not offer more constitutional protections than a framework where non-state actors operate without direct constitutional checks.

This analysis does not imply that the development of legal frameworks to protect civil rights and liberties is unnecessary. Rather, the argument here is that the fear of dismantling a supposedly more protective status quo—a status quo that, in theory, offers protections but in practice is operationalized in ways that fail to provide these protections—should not be a deterrent to abolition. The insights presented in this Article challenge the assumption that the existing system, ostensibly underpinned by constitutional safeguards, is inherently more protective of individual rights than potential non-state alternatives, especially considering the systemic issues prevalent in the existing policing and accountability models.

CONCLUSION

In our criminal legal system, the police embody a Janus-faced identity—a duality that introduces profound complications into frameworks of police accountability. Police wield the state's coercive power under the color of law, enjoying immunities and legal protections unavailable to private citizens. Yet, simultaneously, they retain their identity as private individuals with the associated privileges and without constitutional constraints on their conduct. This inherent duality, a complex legacy of policing's historical entanglement with vigilantism, presents a profound challenge to legal frameworks and accountability mechanisms. Where these frameworks presume a clear divide between state and non-state action, officers instead navigate a liminal space in which they can strategically select between one or the other identity in a

[304] Fields, supra note 19, at 1052, 1082.

form of shadow vigilantism, exploit legal ambiguities, and leverage state-sanctioned power to subvert legal constraints.

This Article unearths the phenomenon of police shadow vigilantism, scrutinizing its legal ramifications and advocating for a critical reevaluation of how the law grapples with the duality of police identity. The interplay of police officers' roles as agents of the state and as private individuals exploits critical gaps in our understanding of policing. It enables officers to shop identities, invoking state authority to justify actions while claiming individual protections when challenged, or vice versa.

This identity shopping manifests in various forms, from off-duty interventions blurring the line between official and personal conduct to use of excessive force justified by the looser standards of state-sanctioned authority or excused under personal self-defense law. Doctrines like the state action doctrine, designed to delineate state and private conduct, falter in regulating this fluid and often nebulous domain. So, too, does qualified immunity, which often fails to account for vigilante conduct that exceeds constitutional bounds. The result is a legal framework that is ill-equipped to confront shadow vigilantism, where officers exploit the interstices between state and individual spheres to act with unbridled discretion.

Addressing this challenge requires more than piecemeal reforms. While the reevaluation of doctrines such as the state action doctrine and qualified immunity is essential, a substantive transformation demands a deeper reckoning with the historical and sociological underpinnings of this police duality. The specter of vigilantism, inextricably woven into the historical tapestry of the institution, continues to exert its influence on contemporary policing culture and practices. Any reformative efforts should thus aim to clarify the roles and responsibilities of police officers, aligning legal frameworks with the fluid nature of police identity.

But acknowledging the entrenched vigilante origins of policing and the challenges posed by the dual identity of police officers might also force us to confront the disquieting reality that the very structure of policing may be inherently susceptible to abuse. A transformative response to this reality would necessitate not just reform but also a fundamental reevaluation of the policing institution within the framework of a democratic society. This reevaluation necessitates a holistic approach, coupling legal and structural reforms with a willingness to fundamentally reimagine policing itself.