

Spring 2017

The Blurred Blue Line: Reform in an Era of Public & Private Policing

Seth W. Stoughton

University of South Carolina - Columbia, swstough@law.sc.edu

Follow this and additional works at: https://scholarcommons.sc.edu/law_facpub



Part of the [Law Commons](#)

Recommended Citation

Seth Stoughton, *The Blurred Blue Line: Reform in an Era of Public & Private Policing*, 44 AM.J. CRIM. L. 117 (2017).

This Article is brought to you by the Law School at Scholar Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

Article

THE BLURRED BLUE LINE: REFORM IN AN ERA OF PUBLIC & PRIVATE POLICING

Seth W. Stoughton*

I. Introduction	117
II. The Evolution of Public and Private Policing	119
III. The Blurring of the Blue Line	127
IV. Police Reform & the Blurred Blue Line.....	146
V. Conclusion.....	154

I. INTRODUCTION

In April 2017, the Alabama Senate voted to authorize the formation of a new police department. Like other officers in the state, officers at the new agency would have to be certified by the Alabama Peace Officers Standards and Training Commission. These new officers would be “charged with all of the duties and invested with all of the powers of law enforcement officers.”¹ Unlike most officers in Alabama, though, the officers at the new agency would not be city, county, or state employees. Instead, they would be working for the Briarwood Presbyterian Church, which would be authorized under

* Assistant Professor of Law, University of South Carolina School of Law. I am grateful to Geoff Alpert, Colin Miller, and Nick Selby for their helpful comments and suggestions. I am thankful for the research assistance of Emily Bogart, Ashlea Carver, Courtney Huether, and Colton Driver, and for the editorial assistance provided by the American Journal of Criminal Law. As always, I am deeply grateful for the support of Alisa Stoughton.

¹ S.B. 193 (Ala. 2017), <https://legiscan.com/AL/text/SB193/id/1522071>.

Senate Bill 193, to “appoint and employ one or more persons to act as police officers to protect the safety and integrity of the church and its ministries.”²

The prospect of a private church with its own police department seems like a radical departure from modern practices. The contemporary conception of policing, after all, views it as a primarily and foundationally governmental activity.³ That observation is easy to take for granted. After all, “maintaining order and controlling crime are paradigmatic governmental functions.”⁴ That is certainly the role that most police agencies see themselves as fulfilling,⁵ and, by and large, that is also how the public sees policing. The uniformed police officers that we see driving around; that we read about in the news; and that we watch in reality shows like *COPS*, crime dramas like *Law & Order*, and comedies like *The Other Guys* are, without exception, government employees.⁶ This will strike most people as entirely unremarkable, and for good reason. By any common conception, “the police are government incarnate.”⁷ There is, and we expect there to be, law enforcement even when the government does not provide or contract for basic services like water, sanitation services, or roads.⁸ Indeed, policing is symbolized by the evocative image of the Thin Blue Line, which represents the bulwark that defends civilized society from criminal anarchy. Yet the perception of law enforcement and crime-fighting as exclusively governmental activities is inaccurate as both a historical matter and a modern description. Given the historical, operational, and legal overlap between public and private policing, the Thin Blue Line is neither particularly thin nor exclusively blue. This is not a revelatory observation. Elizabeth Joh and David Sklansky, among others, have written about private policing,⁹ and there is a substantial body of literature about what is variously called “plural policing,” “joint policing,” or “third-party policing.”¹⁰ Prior efforts, however, do not fully illustrate the

² S.B. 193 (Ala. 2017), <https://legiscan.com/AL/text/SB193/id/1522071>.

³ U.S. PRIVATE SECURITY COUNCIL, LAW ENFORCEMENT AND PRIVATE SECURITY: SOURCES AND AREAS OF CONFLICT AND STRATEGIES FOR CONFLICT RESOLUTION 1 (1977) (“The prevention and control of crime has traditionally be viewed by many citizens as a function of government provided by public law enforcement agencies.”).

⁴ David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1168 (1999).

⁵ See Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611 (2016) (discussing the law enforcement’s self-image as the “Thin Blue Line” that separates society from chaos).

⁶ The equation of law enforcement with government is pervasive, so much so that fictional depictions often use the police as a foil for private investigators who have a characteristically tense relationship with law enforcement. Sherlock Holmes, Jack Reacher, Harry Dresden, and Paul Blart are defined in large part by their engagement in law enforcement activities despite not being government agents.

⁷ David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89, 89 (2006).

⁸ This is not to suggest that every governmental entity and subdivision provides independent policing services; that is certainly not the case. Many towns and cities contract with other jurisdictions, such as neighboring cities or the surrounding county, to provide police services. In very remote areas, state police or federal agents may be the only law enforcement officers operating in the jurisdiction.

⁹ Sklansky, *supra* note 7, at 89; Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 596 (2005) [hereinafter Joh, *Conceptualizing*]; Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 55 (2004) [hereinafter Joh, *Paradox*]; Sklansky, *supra* note 4, at 1168.

¹⁰ See generally Hayden P. Smith & Geoffrey Alpert, *Joint Policing: Third Parties and the Use of Force*, 12 POLICE PRAC. & RES. 136 (2011); MAZEROLLE & RANSLEY, *THIRD PARTY POLICING* (2006); PLURAL POLICING: A COMPARATIVE PERSPECTIVE (Trevor Jones & Tim Newburn eds., 2006); ADAM CRAWFORD, *PLURAL POLICING: THE MIXED ECONOMY OF VISIBLE PATROLS IN ENGLAND AND WALES*

distortions in the line that separates public and private policing. This Article contributes to an on-going conversation about modern conceptions of policing. Perhaps more importantly given the broad consensus that policing is in need of reform, this article explores some of the ways in which the blurred blue line should affect the way we think about police reform.¹¹

Part I describes the evolution of modern policing, tracing the emergence of the now-familiar police department from a mixed heritage of public and private efforts. That evolution is not clearly linear; instead, American policing grew out of the domestic adoption of English institutions such as shire-reeves, constables, night watches, and thief-takers, as well as the creation of domestic institutions like rural slave patrols and city guards organized to prevent slave rebellions. These early institutions, a mix of private and public entities, shared responsibility for a variety of different tasks that today we categorize as central to law enforcement efforts.

Part II explores the modern practice of policing, illustrating the operational overlap between public and private policing. Building on Elizabeth Joh's and David Sklansky's work on private policing, and on my own work on police moonlighting,¹² it describes four different phenomena that can blur the blue line: private policing, semi-public private policing, semi-private public policing, and public policing.

Part III identifies how a broader appreciation of the blurred line of public and private policing might affect police reform efforts. I first refute the argument that the blurred blue line has no role in the reform debate. I then identify three categories where the concept may prove relevant: information gathering, the distribution of police resources, and the regulation of policing itself. Within each category, I suggest how a broader conception of policing—one that incorporates the spectrum of public and private behaviors—could inform a range of important conversations. I offer no specific prescriptions; my goal with this piece is not to provide a set of solutions, but rather a set of possibilities.

II. THE EVOLUTION OF PUBLIC AND PRIVATE POLICING

Just as the need for security and safety is nothing new, the police function—detering, identifying, and apprehending criminals—is hardly innovative. The methods in which those functions are fulfilled, though, have changed significantly over time. In the colonial era and the early days of the United States, what we would today identify as the police function was not fulfilled by governmental agencies. “[M]ost of the institutions historically

(2005); MARK BUTTON, PRIVATE POLICING (2002); Rick Sarre & Tim Prenzler, *The Relationship Between Police & Private Security: Models and Future Directions*, 24 INT'L J. COMP. & APPLIED CRIM. JUST. 91 (2000) (providing examples from Australia); Michael E. Buerger, *The Politics of Third-Party Policing*, 9 CRIME PREVENTION STUD. 89 (1998) (discussing “the forced recruitment of agents . . . to act on behalf and direction of the police to control human behavior”).

¹¹ U.S. PRIVATE SECURITY COUNCIL, *supra* note 3, at 1 (“The prevention and control of crime has traditionally be viewed by many citizens as a function of government provided by public law enforcement agencies.”).

¹² Seth W. Stoughton, *Moonlighting: The Private Employment of Off-Duty Officers*, (forthcoming 2017) (on file with University of Illinois Law Review).

responsible for law enforcement would not be recognizable to us as police.”¹³ Indeed, “[t]he concept of a publicly funded entity designed to serve and protect society is a relatively recent historical development.”¹⁴ In this Part, I trace the predecessors of that development.

First, a clarification. Elizabeth Joh defines modern private policing as “the various lawful forms of organized, for-profit personnel services whose primary objectives include the control of crime, the protection of property and life, and the maintenance of order.”¹⁵ She correctly observes early law enforcement efforts, such as I will describe in this Part, “are not analogous to the private, commercial companies offering policing services today, but are better classified as examples of community obligations, volunteer efforts, and vigilantism.”¹⁶ As a result, she warns, “one should be cautious in tracing a continuous development of private policing from the earliest forms of community self-protection to the present day.”¹⁷ I happily concede her point, and I echo her warning. This article, though, is focused on the blurred line between public and private policing. To that end, it is worthwhile to trace the evolution of policing from earlier efforts, both public and private. As this Part will demonstrate, public and private policing did not evolve separately. To the contrary, from the earliest inception of modern policing it has been all but impossible to draw clear distinctions between public and private—which is to say, governmental and non-governmental—policing.

A. *The Complicated Origins of Modern Policing*

The government’s role in law enforcement is perhaps most identifiable in the form of the early English shire-reeve, a title that gives us the modern word “sheriff.” The shire-reeve was a monarchical officer, selected by and answerable to the monarch.¹⁸ Shire-reeves were principally tax-collectors,¹⁹ although they had the authority to assemble a group of men known as a *posse comitatus*—literally “the power of the county”²⁰—when needed to keep the peace or apprehend a felon. The shire-reeves received a portion of the taxes they collected as pay, creating a perverse incentive. As a result, “many [reeves] exploited the power their position gave them for their own financial gain.”²¹ The existing legal system “predictably “led to abuses and made [reeves] rather unpopular figures.”²² The low regard in which they were held is observable at least as early as the 1400s in the form of Robin Hood’s nemesis, the corrupt and oppressive Sheriff of Nottingham (or, differently titled, the Reeve of Nottinghamshire).

¹³ KRISTIAN WILLIAMS, *OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA* 27 (2007).

¹⁴ JAMES F. PASTOR, *THE PRIVATIZATION OF POLICE IN AMERICA* 33 (2003).

¹⁵ Joh, *Paradox*, *supra* note 9, at 55.

¹⁶ Joh, *Conceptualizing*, *supra* note 9, at 579–80.

¹⁷ *Id.* at 585.

¹⁸ PASTOR, *supra* note 14, at 35.

¹⁹ WILLIAMS, *supra* note 13, at 31.

²⁰ *Id.*; ARNOLD S. TREBACH, *THE GREAT DRUG WAR: AND RATIONAL PROPOSALS TO TURN THE TIDE* 163 (2005).

²¹ See generally ELIZABETH M. HALLAM, *THE PLANTAGENET CHRONICLES* (1995).

²² WILLIAMS, *supra* note 13, at 31.

Although the shire-reeve was the clearest example of a governmental agent, perhaps the most recognizable precursor of the modern law enforcement agency was the night watch system that originated in cities and larger towns in the mid-1200s.²³ Every able-bodied, adult male was required to participate in the watch, charged with taking the occasional shift patrolling the town or city at night and sounding an alarm when necessary.²⁴ There was no compensation, direct supervisor, or clearly identified duties. Though initially a symbol of distinction, working as a watchman eventually became something of “a public joke”; participation may have been a public duty, but it was one that was often fulfilled through private transactions as citizens hired substitutes if they had the financial means to do so.²⁵ “By the seventeenth century only those who could not hire a substitute actually assumed [the] onerous duties. Once started, this practice introduced to police work those who were less and less qualified to do the work.”²⁶ As a result, night watchmen were “unarmed, untrained, under-supervised, often unwilling, and frequently drunk.”²⁷

In England, local jurisdictions in and around London began paying watchmen in 1735, and most were doing so by 1785.²⁸ At the same time, the watch system became more formalized, developing minimum qualifications, a command structure, and record-keeping requirements.²⁹ Even then, “although [the watch] function was certainly specialized, it is not always clear that it was policing. Very often, [watchmen] acted only as sentinels, responsible for summoning others to apprehend criminals, repel attack, or put out fires.”³⁰

The watch system may be the clearest predecessor to modern policing, but even in its time it did not operate alone. In 1797, thefts of cargo from boats on the Thames led a small group of distinguished citizens, including celebrated jurist Jeremy Bentham, to approach the West India Planters Committee and the West India Merchants Committees associations with a proposal to create a private police force.³¹ With the permission of the government, the Thames Police—officially the West India Merchants Company Marine Police Institute—began operations the next year.³² Parliament passed the appropriately titled *Act for the More Effectual Prevention of Depredations on the River Thames* to support England’s first

²³ *Id.*

²⁴ *Id.*

²⁵ DAVID R. JOHNSON, *AMERICAN LAW ENFORCEMENT: A HISTORY* 3 (1981).

²⁶ *Id.*

²⁷ *Id.* at 31–32; see also PASTOR, *supra* note 14, at 36 (describing watchmen as “ill-trained, ill-equipped groups of men [who] often lost control and violated laws and created violence in the quest to institute ‘law and order’”).

²⁸ WILLIAMS, *supra* note 13, at 32.

²⁹ *Id.*

³⁰ *Id.* at 27 (quoting David H. Bayley, *The Development of Modern Policing*, in *POLICING PERSPECTIVES, AN ANTHOLOGY* 67 (Larry K. Gaines & Gary W. Cordner eds., 199[8])).

³¹ 19 *THE WORKS OF JEREMY BENTHAM: NOW FIRST COLLECTED* 330–34 (John Bowring ed., Simpkin, Marshall, & Co., London; John Cumming, Dublin, 1843).

³² Dick Paterson, *Origins of Thames Police*, THAMES POLICE MUSEUM, http://www.thamespolicemuseum.org.uk/h_police_1.html (last visited June 27, 2017).

preventative police force.³³ The Thames Police did not last long, but it sparked a broader interest in private efforts to supplement the watch system. “By 1829[,] London had become a patchwork of public and private police forces.”³⁴ A contemporary record reflects private police units operating in forty-five different parishes within ten miles of London.³⁵

It could be difficult to distinguish the public police from private watchmen, a confusion engendered by the widespread practice of fee-based policing. According to one scholar, a police officer’s public salary could be more properly described as “a retaining fee”; officers’ primary income was claiming or sharing “any rewards for the detection and conviction of offenders, [whether] offered by statute, proclamation or by a private party.”³⁶ Supplementing into that patchwork were thief-takers—individuals who would, for a fee, recover stolen property, which they often obtained by buying it from the thief with a portion of the recovery fee³⁷—and “felons associations” that raised money to fund prosecutions related to crimes committed within the association’s purview and which occasionally hired private patrols.³⁸

B. Policing in Colonial America

As in England, a complicated patchwork dominated colonial America. Elected sheriffs and constables were the face of public law enforcement, but neither was particularly attractive. “Corruption . . . was quite common, with sheriffs accepting bribes from suspects and prisoners, neglecting their civil duties, tampering with elections, and embezzling public funds.”³⁹ Constables “were paid by a system of fees, and [they] tended to concentrate on the better-paying tasks.”⁴⁰ As a result, neither position was viewed as particularly respectable. “[M]any people refused to serve when elected, and the authority of each office was commonly challenged, sometimes by violence.”⁴¹ According to one text, “By the 1650s[,] Bostonians had become so adept at avoiding service that the colony’s government had to threaten citizens with huge fines to make them assume their obligations.”⁴² Citizens’ adeptness in dodging their obligations proved persistent. Almost a century later, in 1743, seventeen Bostonians were selected to serve as constables, but only five entered service; ten men refused and paid a fine, while two others were

³³ 39 & 40 Geo 3 c 87.

³⁴ WILLIAMS, *supra* note 13, at 32 (quoting Bayley, *supra* note 30, at 63).

³⁵ Joh, *Conceptualizing*, *supra* note 9, at 584.

³⁶ Sir Leon Radzinowicz, *Trading in Police Services: An Aspect of the Early 19th Century Police in England*, 102 U. PENN. L. REV. 1, 5 (1953). The author goes on to describe how officers’ remuneration included “ordinary fees” and “fees for special services, zeal and exertion.” *Id.* at 8, 11. Additionally, officers sought gratuities and took private assignments from individual civilians or companies. *Id.* at 18, 20, 22.

³⁷ WILLIAMS, *supra* note 13, at 32.

³⁸ Joh, *Conceptualizing*, *supra* note 9, at 582.

³⁹ WILLIAMS, *supra* note 13, at 33.

⁴⁰ *Id.* at 33–34.

⁴¹ *Id.* at 34.

⁴² JOHNSON, *supra* note 25, at 5. By the mid-1700s, “many of those chosen [to serve as a watchman or constable] preferred to pay fines rather than suffer the duties of the office.” *Id.* at 7.

excused from service.⁴³ Even the most conscientious sheriffs and constables were not engaged in what modern viewers would consider to be primarily law enforcement activity; their duties included serving warrants that had been issued by a court, but also tax collection, supervising elections, organizing road repair crews, and other civil functions.⁴⁴

Like their English counterparts, many large towns and cities in the colonial era and early United States, particularly in the northern colonies and states, adopted a night watch system that conscripted able-bodied, adult men to keep order, watch out for fires, light street lamps, and, in Boston at least, “cry the time of night and state of the weather.”⁴⁵ And as had been the case in England, the watchmen were typically not paid and had no training, no set procedure, little to no equipment, and no real command structure.⁴⁶ Citizens who could afford it hired substitutes to serve on the watch for them, ensuring that the watch was dominated by those who had no way to avoid it or no better opportunities elsewhere. These semi-privatized public officials—working class citizens who were hired to satisfy the public service obligations of the more affluent—did not burnish the image of the watch; a contemporary New York City newspaper described them as “a parcel of idle, drinking, vigilant Snorers, who never quelled any nocturnal Tumult in their Lives.”⁴⁷ If anything, this poor public perception only further ensured that those who had the opportunity to avoid watch service did exactly that.

Although their duties overlapped to some extent, and although those duties included some aspects of modern policing, neither sheriffs, constables, nor the early American watch system could be clearly identified as the primary provider of law enforcement services.⁴⁸ A description of policing in New York City in the mid-1780s identifies a small host of different public officials who all shared some law enforcement responsibilities: the mayor and his chief assistant, the high constable; constables and marshals who worked primarily on commission; and watchmen who were paid (at the time) per night of work.⁴⁹

In the American South, an economy heavily dependent on slavery gave rise to a different set of institutions that shared some of the responsibility for policing functions. In the early colonial period, overseers were responsible for controlling the slave populations on their plantations.⁵⁰ Off the plantations, private slave catchers and *ad hoc* militias hunted down runaway

⁴³ JAMES F. RICHARDSON, *URBAN POLICE IN THE UNITED STATES* 5 (1974).

⁴⁴ WILLIAMS, *supra* note 13, at 33–34.

⁴⁵ *Id.* at 34–35; WILLIAM J. BOPP & DONALD O. SCHULTZ, *A SHORT HISTORY OF AMERICAN LAW ENFORCEMENT* 18 (1972).

⁴⁶ WILLIAMS, *supra* note 13, at 35. There were limited exceptions; for example, the Boston night watch began paying night watchmen in the early 1700s, although there is some dispute as to exactly when. BOPP & SCHULTZ, *supra* note 45, at 18 (reporting that Boston’s night watchmen first received compensation in 1712); *A Brief History of the Boston, MA Police Department*, BOSTON POLICE MUSEUM, <http://bostonpolicemuseum.com/history.html> (last visited June 27, 2017) [hereinafter *BPD Museum*] (putting the date at 1707).

⁴⁷ ROBERT C. WADMAN & WILLIAM THOMAS ALLISON, *TO PROTECT AND TO SERVE: A HISTORY OF POLICE IN AMERICA* 11 (2003).

⁴⁸ WILLIAMS, *supra* note 13, at 35.

⁴⁹ BOPP & SCHULTZ, *supra* note 45, at 26–27.

⁵⁰ WILLIAMS, *supra* note 13, at 36.

slaves, returning them for a fee.⁵¹ In 1661, the first slave code shifted responsibility from private slave owners to the public—meaning the white population—leading to the creation of more formalized militias. These militias “began making regular patrols to catch runaways, prevent slave gatherings, search slave quarters, keep order at markets, funerals, and festivals, and generally intimidate the black population.”⁵² As with the sheriffs, constables, and watch, the militias were assisted by private individuals. In the late 1600s, whites were first authorized and then legally required to assist in the recovery of runaway slaves, with the captors entitled to a reward.⁵³ In the early 1700s, under the threat of a Spanish invasion, South Carolina bifurcated the duties of the militias and patrols: militias were responsible for dealing with external threats, while patrols focused on preventing slave revolts and dealing with runaways.⁵⁴ Other southern governments followed suit, and slave patrols became common.⁵⁵

Although the slave patrols appear to be public entities, the reality is more complex. Slave owners were averse to outside intervention, including government intervention intended to reinforce owners’ control over their slaves. Such intervention “represented not only a usurpation of [a slave owner’s] authority but also a personal slight, implying that the master was not up to the task of controlling his slaves.”⁵⁶ Different jurisdictions sought to address this aversion in different ways. Some rural slave patrols were paid from public coffers, others were made up of volunteers, while others consisted of unpaid conscripts.⁵⁷ Regardless of their exact organization, their duties were largely similar—prevent insurrection by intimidating the black population—and they were given wide discretion to determine whether and how to carry out those duties in any given situation.⁵⁸

Southern anxieties about slave revolt were not limited to rural plantations. Early on, cities and towns’ “enforcement [was] entrusted to private individuals and the existing watch,” but soon the model of the rural slave patrol was adopted in the form of city guards.⁵⁹ Unlike the night watches that they supplanted, the city guards were armed and uniformed from early on, with Charleston, South Carolina establishing what may be the nation’s first uniformed patrol in 1783.⁶⁰ Such efforts took considerable public resources. By the early 1800s, the single largest item in Charleston’s city budget was funding for the slave patrol.⁶¹ These organized, uniformed, patrol-based entities came into existence more than thirty years before anything we would recognize today as modern police agencies.

⁵¹ *Id.*

⁵² *Id.* at 37.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 37–39.

⁵⁶ *Id.* at 38.

⁵⁷ *Id.* at 40–41.

⁵⁸ *Id.* at 40–41.

⁵⁹ *Id.* at 41–42.

⁶⁰ Savannah, Georgia, followed suit in 1796, with Richmond, Virginia, adopting uniforms in 1800. *Id.* at 42.

⁶¹ RICHARDSON, *supra* note 43, at 19.

C. *The Emergence of Modern Policing*

The first “modern” municipal police departments began to appear in the 1830s,⁶² largely in response to rioting and civil unrest.⁶³ One of the first metropolitan police departments in the country was funded not from the public coffers but by the bequest of a wealthy philanthropist who wanted “Philadelphia to provide more effectually than they do now for the security and property of the persons . . . by a competent police.”⁶⁴ As that phrasing suggests, the police forces of the time were not universally admired. Indeed, the concept of a public police force was attacked on both fiscal and philosophical grounds. Fiscally, a publically funded police force would be more expensive than a sheriff, who worked on commission, or night watchmen, who were still often conscripted. Philosophically, the creation of a full-time, paid police force would give a substantial amount of authority to the government, raising concerns about excessive power and the invasion of personal liberties.⁶⁵ Despite these concerns, early police forces began to supplement, then supplant, the watch systems.⁶⁶

As American policing became more formalized, police agencies somewhat reluctantly added detective bureaus. The reluctance stemmed from the fact that the detectives’ “specialized function carried with it the imperative to become involved with criminals,” and that involvement threatened to undermine the legitimacy of the agency’s primary duty: patrol.⁶⁷ Such concern was well-founded. Ostensibly charged with solving crimes, particularly property crimes, in practice “[t]he primary goal of the detective was to recover stolen property and share in the reward, not to arrest the thief.”⁶⁸ In this way, detectives in early American policing were similar to their English counterparts, the thief-takers; through a system for the recovery of stolen property known as “compromises,” detectives “negotiated with thieves and offered immunity for the return of property. The victim would pay the detective a ‘reward,’ which the detective would share with the thief.”⁶⁹ Many detectives worked on their own behalf or for a private security company in addition to their work for their public employer.⁷⁰ Even when they were

⁶² Exactly which city first created a municipal police department remains contested. Many police agencies date their origins on the development of a day-time watch service. For example, Philadelphia is often cited as the first police agency in the United States because it created a paid, day-time watch in 1833, despite abandoning the effort three years later. CHARLES R. SWANSON ET AL., *CRIMINAL INVESTIGATION* 3 (2003). Similarly, the Boston Police Department is typically dated to 1838, when the city organized its day watch even though it had started paying night watchmen more than a century before. *BPD Museum*, *supra* note 46. New York City, for its part, began paying watchmen in 1658, shortly before the British took it, under the name of Nieu Amsterdam, from the Dutch. BOPP & SCHULTZ, *supra* note 45, at 18–19.

⁶³ RICHARDSON, *supra* note 43, at 21.

⁶⁴ BOPP & SCHULTZ, *supra* note 45, at 35.

⁶⁵ PASTOR, *supra* note 14, at 36.

⁶⁶ In many cases, police forces proved to be significantly more effective than night watch systems. In the 1840s, for example, the twenty-two person Boston police force “captured more criminals than the entire rival body of over two hundred night watchmen.” BOPP & SCHULTZ, *supra* note 45, at 37.

⁶⁷ GARY T. MARX, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA* 24 (1988).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 28 (describing how the “line between the public and private sectors was blurred as detectives went back and forth, sometimes working for both [private and public employers] simultaneously”).

working under the auspices of a public police agency, “much of policing took on the character of a contractual relationship negotiated between clients (or victims). The clients sought protective, investigative or enforcement services, while the agents (i.e., police) supplied such services in return for a fee, reward or share of recovered goods.”⁷¹

By the 1850s, police agencies were a common fixture of large cities, although the officers themselves were not readily identifiable: they did not typically wear uniforms.⁷² But despite the rise of the police department in its modern incarnation, it would be a mistake to think that law enforcement was exclusively or even primarily a governmental responsibility. Municipal police agencies with limited jurisdiction were simply unable to accommodate large-scale commercial entities operating on an interstate or national scale, such as railroads, banks, and mining companies.⁷³ This was particularly true in the West and Midwest, which had relatively few public police officers.⁷⁴ Without a strong federal police presence, private organizations stepped in to fill the gap. In 1850, as localities across the country continued to establish their own police agencies, Allan Pinkerton formed the Pinkerton National Detective Agency.⁷⁵ Pinkerton agents engaged in sting operations, solved crimes, and hunted down criminals,⁷⁶ all of which are likely to strike the modern reader as more within the purview of public police than private security.⁷⁷

By the 1880s, all of the major cities in the United States had created municipal police agencies, and states soon followed suit. Following Texas’s early 1870 example, other southwestern states began creating state police agencies at the turn of the century.⁷⁸ State police continued to expand over the next few decades, with the momentum eventually shifting from general service police agencies to dedicated highway patrols during the Great Depression.⁷⁹ Throughout this period, private security was in decline as states and local governments increased their expenditures on law enforcement,

⁷¹ PASTOR, *supra* note 14, at 37.

⁷² BOPP & SCHULTZ, *supra* note 45, at 39. There was both public and internal controversy about police uniforms. Public critics condemned uniforms as imitative of royal livery, while many officers feared that wearing a uniform would only invite attack. *Id.* at 39–40 (describing the sentiment among officers “that the job was dangerous enough without advertising that one was an officer”); *see also* JOHNSON, *supra* note 25, at 25. The officers may have had a point. In in 1700s, watchmen in Charleston, South Carolina, had become so reviled that sailors “began to purposefully target the watchmen on their rounds, sometimes beating them severely.” WADMAN & ALLISON, *supra* note 47, at 12. As a result, it took decades before uniforms were accepted. Three of the largest police agencies—Boston, New York, and Chicago—adopted uniforms in 1858, 1860, and 1861, respectively. JOHNSON, *supra* note 25, at 29.

Notably, officers began carrying firearms as a matter of course at about the same time, although many police agencies still prohibited them as a matter of official policy. *Id.* at 30. When cities began to authorize officers to carry firearms, it “only recognized what was becoming standard.” *Id.*

⁷³ PASTOR, *supra* note 14, at 38.

⁷⁴ *Id.*

⁷⁵ *Id.* Although the Pinkerton National Detective Agency was not the first private security company in the United States, it was by far the largest and most successful. SWANSON ET AL., *supra* note 62, at 4.

⁷⁶ MARX, *supra* note 67, at 28–29.

⁷⁷ Then, as now, the proper balance of public and private policing was a matter of debate, with private security forces criticized as tools of the wealthy. PASTOR, *supra* note 14, at 38–39.

⁷⁸ H. KENNETH BECHTEL, STATE POLICE IN THE UNITED STATES: A SOCIO-HISTORICAL ANALYSIS 35–39 (1995).

⁷⁹ *Id.* at 42–44.

encouraged by private industry and large companies that preferred to shift the costs of security from their account books to the public coffers.⁸⁰ The decline of private policing, however, was temporary. The next Part addresses the contemporary practices that continue to blur the line between public and private policing.

III. THE BLURRING OF THE BLUE LINE

The prior Part described the complicated and inconsistent evolution of public and private efforts that gave rise to modern policing, demonstrating both the muddled heritage and the fact that there has likely never been a point in time at which public and private policing could be clearly distinguished. As leading scholars have pointed out, private policing efforts are difficult to casually conceptualize. David Sklansky, for example, has argued that private policing is functionally indistinguishable from both the public police and from the public more generally.⁸¹ Elizabeth Joh has argued that “traditional legal scholarship has demonstrated too shallow an understanding of private policing in action,” which she attributes to the assumption “that private policing is a monolithic entity.”⁸² Building on Elizabeth Joh’s and David Sklansky’s work on private policing, this Part turns to the modern era by describing four different phenomena: private policing, semi-public private policing, semi-private public policing, and public policing.⁸³ Each, it seems, has the potential, if not the tendency, to blur the line that separates—or doesn’t—public and private policing.

My objective in this Part is to demonstrate the substantial overlap that exists in private and public policing as they are currently practiced. In so doing, I do not mean to suggest that any interstices between the two are inconsequential, nor do I intend to argue that the points of comparison are universally applicable. Indeed, my goal is to offer some support for Sklansky’s argument: as it is practiced, public and private policing can come close to being functionally indistinguishable.⁸⁴ Indeed, the line is blurred in both directions to an extent that has not been fully appreciated. In the next Part, I address the potential implications of that observation on police reform efforts.

A. *Private Policing*

Today, the vast majority of police officers are employed at the state and local level. According to the most recent data available, more than 15,000 state and local general-purpose law enforcement agencies employ almost

⁸⁰ PASTOR, *supra* note 14, at 39.

⁸¹ Sklansky, *supra* note 4, at 1270–75.

⁸² Joh, *Conceptualizing*, *supra* note 9, at 596.

⁸³ Elizabeth Joh has persuasively argued that it is a mistake to view private policing as monolithic, as there are at least five dimensions of variation in (goals, resources, legal powers, jurisdiction, and organizational location) and four distinct types of private policing (protective policing, intelligence policing, publically contracted policing, and corporate policing). Joh, *Conceptualizing*, *supra* note 9, at 596. This valuable taxonomy informs, but cannot structure, my analysis here.

⁸⁴ Sklansky, *supra* note 4, at 1270–75.

725,000 full-time officers.⁸⁵ Additionally, more than 1,700 special jurisdiction agencies—agencies with either a special geographic jurisdiction, such as a university or public transportation system, or with limited enforcement responsibilities such as alcohol control agencies—employ an additional 57,000 full-time officers.⁸⁶ The 638 constables and marshals’ agencies left in the country employ a total of about 3,500 full-time officers.⁸⁷ In total, there are approximately 780,000 full-time, sworn law enforcement officers working for state or local governments in the United States. The ratio of 252 officers per 100,000 people means that there is one state or local officer for roughly every 400 people (one officer for every 300 adults) in the population.⁸⁸

What about the private security industry? Although precise numbers are difficult to come by,⁸⁹ one thing is certain: there are more—probably *many* more—individuals working in private security than in public policing.⁹⁰ As of 2015, the Bureau of Labor Statistics estimated that there were almost 1.1 million private security guards responsible for “guard[ing], patrol[ing] or monitor[ing] premises.”⁹¹ The National Association of Security Companies agrees, estimating that, in 2006, “between 11,000 and 15,000 private security companies employ[ed] more than 1 million guards.”⁹² The broader private security industry, which includes individuals who conduct background investigations, provide armored transport services, offer personal protection, manage correctional facilities, and perform security-related tasks other than those that fall under the general classification of “patrol,” is even larger.⁹³

⁸⁵ BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATS., NCJ 233982, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), <http://www.bjs.gov/content/pub/pdf/cslea08.pdf>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ LINDSAY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, AGE & SEX COMPOSITION: 2010, at 2 tbl.1 (May 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>. (There are an additional 120,000 full-time law enforcement officers employed by the federal government, spread over 73 different law enforcement agencies. Of that number, over a third (37.3%) engage in “criminal investigation and enforcement duties,” while almost a quarter (23.4%) perform police response and patrol. The remainder works in immigration or customs inspection (15.3%), corrections (14.2%), security and protection (5.1%), and court operations (4.7%).) REAVES, *supra* note 85, at 1. (Including federal officers, there are 900,000 full-time, sworn officers in the United States, or one officer for about every 300 adults in the population.)

⁸⁹ This is true in part because there is no uniform definition about what constitutes “private security.” For a useful discussion of the conceptual difficulties that complicate attempts to define that term, see Clifford D. Shearing & Philip C. Stenning, *Modern Private Security: Its Growth and Implications*, 3 CRIME & JUST. 193, 195–98 (1981).

⁹⁰ Joh, *supra* note 9, at 1; Sklansky, *supra* note 4, at 1175.

⁹¹ BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL EMPLOYMENT AND WAGES: 33-9032 SECURITY GUARDS (May 2015), <http://www.bls.gov/oes/current/oes339032.htm>; BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: SECURITY GUARDS AND GAMING SURVEILLANCE OFFICERS (2016–17 ed.), <http://www.bls.gov/ooh/protective-service/security-guards.htm>.

⁹² KEVIN STROM ET AL., DOCUMENT NO. 232781, THE PRIVATE SECURITY INDUSTRY: A REVIEW OF THE DEFINITIONS, AVAILABLE DATA SOURCES, AND PATHS MOVING FORWARD 4-8 (Dec. 2010), <https://www.ncjrs.gov/pdffiles1/bjs/grants/232781.pdf>.

⁹³ STROM ET AL., *supra* note 92, at 4-6. One study estimates the number of “full-time security workers to be between 1.9 and 2.1 million.” Press Release, ASIS Int’l, Groundbreaking Study Finds U.S. Security Industry to be \$350 Billion Market (Aug. 12, 2013), [https://www.asisonline.org/News/Press-Room/Press-Releases/2013/Pages/Groundbreaking-Study-Finds-U.S.-Security-Industry-to-be-\\$350-Billion-](https://www.asisonline.org/News/Press-Room/Press-Releases/2013/Pages/Groundbreaking-Study-Finds-U.S.-Security-Industry-to-be-$350-Billion-)

Further, private security as an industry is growing faster than public policing. The Bureau of Labor Statistics predicts that the ten-year period from 2014 to 2024 will see 4% growth in public policing, but 7% growth in the private security industry.⁹⁴ This follows ten-year predictions from 2012 to 2022 of 5% and 12%, respectively.⁹⁵ Historically, the thirty-year period from 1980 to 2010 saw an 80% growth in contract security firms.⁹⁶ Local police departments, on the other hand, saw only a 34% increase in officers in the twenty-six years between 1987 and 2013.⁹⁷ Further, the total number and rate of growth does not include individuals who work in a primarily security capacity for non-security businesses, such as loss prevention employees working for retail stores, or the wide range of employees who have *some* security-related responsibilities, even if their primary duties are unrelated to security.⁹⁸

Regardless of whether they are employed by a traditional security company or some other enterprise, private employees conduct a range of what we would otherwise identify as law enforcement activities. The comparison can be a point of pride for security personnel and a selling point for their employers. Elizabeth Joh's seminal article on the private security industry opens with a quote from a security guard describing his agency as "very policelike."⁹⁹ That description captures the broad involvement of private security personnel in patrol, investigations, and surveillance, as well as their authority to stop, search, and arrest. Uniformed security guards engage in patrol on behalf of private businesses, community centers, and neighborhoods. In many gated communities, security guards physically control space¹⁰⁰ by screening vehicles and pedestrians at entry checkpoints

Market.aspx [hereinafter *Groundbreaking Study*]. I have intentionally left unmentioned the private security industry's "hardware security" component, which manufactures, installs, and monitors alarm systems. Although closely related to law enforcement, this function may be seen as distinct from the modern conception of policing. There are some potential parallels, though: law enforcement agencies have been instrumental in installing and monitoring emergency call boxes in some public spaces; these alarms are a familiar sight on many university campuses.

⁹⁴ Compare BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, POLICE AND DETECTIVES (2016–17 ed.), <http://www.bls.gov/ooh/protective-service/police-and-detectives.htm#tab-6> (visited Feb. 21, 2017), with *id.*, SECURITY GUARDS & GAMING SURVEILLANCE OFFICERS, <http://www.bls.gov/ooh/protective-service/security-guards.htm#tab-6> (last visited June 27, 2017). Different facets of the private security industry may grow even faster. A study by ASIS Int'l, a professional organization for the security industry, and the Institute of Finance and Management, a professional organization for financial controllers, estimated that private investigations would see 21% growth and information technology security would see 22% through 2020. *Groundbreaking Study*, *supra* note 93.

⁹⁵ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, POLICE AND DETECTIVES (2014–15 ed.), <http://www.bls.gov/ooh/protective-service/police-and-detectives.htm> (Dec. 19, 2013); *id.*, SECURITY GUARDS & GAMING SURVEILLANCE OFFICERS, BUREAU OF LABOR STATISTICS (Dec. 19, 2013), <http://www.bls.gov/ooh/protective-service/security-guards.htm>.

⁹⁶ STROM ET AL., *supra* note 92, at 4–3.

⁹⁷ REAVES, *supra* note 85, at 1.

⁹⁸ Sklansky, *supra* note 4, at 1175 (listing "store clerks, insurance adjustors, and amusement park attendants" as non-security employees who nevertheless have some security-related responsibilities).

⁹⁹ Joh, *Paradox*, *supra* note 9, at 49 (quoting Bud Hazelkorn, *Making Crime Pay*, S.F. CHRON. MAG., Aug. 17, 2003, at 14, 17).

¹⁰⁰ Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2199 (2014) ("Policing is, to a significant extent, the exercise of control over space."); see also STEVE HERBERT, POLICING SPACE: TERRITORIALITY AND THE LOS ANGELES POLICE DEPARTMENT 9–11, 21–23 (1997).

that only residents and duly designated guests are permitted to pass.¹⁰¹ They respond to complaints and alarms, from the mall security officers called to deal with an obnoxious patron in the food court to mobile security officers who respond to residential burglar alarms. With both a preventative and responsive aspect, private security patrol closely parallels the public police patrol function.

Patrol is the “mainstay of police work,”¹⁰² but policing also includes an investigative component; police agencies are expected to investigate and solve crimes so they can apprehend offenders and support successful prosecutions.¹⁰³ Those investigations may include surveillance, either targeted surveillance that tracks a subject suspected of wrong-doing¹⁰⁴ or drag-net surveillance that captures a range of individuals in an attempt to ferret out wrong-doing that has not yet been identified.¹⁰⁵ Just as private parties parallel the public police’s patrol function, so too do they engage in similar investigative behaviors. “Private detectives increasingly are hired not only to watch for shoplifters, but also to investigate and not infrequently to spy on, everyone from insurance claimants and litigation opponents to employees, business partners, and even prospective neighbors.”¹⁰⁶

In addition to targeted surveillance, private security efforts include pervasive surveillance of public or private space. Such surveillance is not intended to gather information about a particular person, but rather to observe the behaviors of a group of people (whoever happens to be in camera range) so that wrongdoers can be identified in real time or after the fact. Casino surveillance is perhaps the most obvious example of privately administered pervasive surveillance. In Nevada, for example, the Gaming Commission requires licensed casinos that operate at least three gaming tables to have the capacity to “monitor and record: (a) each table game area with sufficient clarity to identify patrons and dealers; and (b) each table game surface, with sufficient coverage and clarity to simultaneously view the table bank and determine the configuration of wagers, card values, and game outcomes.”¹⁰⁷ According to a long-time casino security engineer, a large casino like the

¹⁰¹ EDWARD JAMES BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 2–3 (1997) (estimating that over 20,000 gated communities existed in the United States as of 1997).

¹⁰² ERIC J. FRITSCH ET AL., *POLICE PATROL ALLOCATION AND DEPLOYMENT* 17 (2008); see also Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 879–80 (2014).

¹⁰³ Indeed, this expectation is so persistent that the failure to do so is considered newsworthy. Martin Kaste, *Open Cases: Why One-Third of Murders In America Go Unresolved*, NPR (Mar. 30, 2015, 5:04 AM), <http://www.npr.org/2015/03/30/395069137/open-cases-why-one-third-of-murders-in-america-go-unresolved>; Jace Larson, *New Harris County Numbers Show Many Unsolved Crimes*, CLICK2HOUSTON (May 18, 2015), <http://www.click2houston.com/news/investigates/new-harris-county-numbers-show-many-unsolved-crimes/33082726>; Lyndsay Winkley, *Murders Mostly Solved, Not Minor Crimes*, SAN DIEGO UNION TRIB., Apr. 11, 2015, <http://www.utsandiego.com/news/2015/apr/11/police-clearance-rates-murders-fbi-stats/>.

¹⁰⁴ See, e.g., *United States v. Jones*, 565 U.S. 400 (2012).

¹⁰⁵ For example, the New York Police Department’s surreptitious surveillance of Muslim communities in New Jersey. Adam Goldman, *Tape Surfaces of Caller Outing NYPD Spying in NJ*, ABC EYEWITNESS NEWS 11 (July 25, 2012), <http://abc11.com/archive/8748471/>.

¹⁰⁶ Sklansky, *supra* note 4, at 1176.

¹⁰⁷ NEVADA GAMING COMM’N, *SURVEILLANCE STANDARDS FOR NONRESTRICTED LICENSES, SURVEILLANCE STANDARD* 2(1) (2005), <http://gaming.nv.gov/modules/showdocument.aspx?documentid=2944>.

Bellagio may have more than 2,000 active cameras.¹⁰⁸ While this is a rather extreme example, and one largely directed at private space, private surveillance in more public areas is a fact of modern life: outward facing security cameras are a common feature of parking lots, gas pumps, ATMs, apartment building entrances, urban storefronts, and so on.

Not only do private actors share many of the duties of their public counterparts, they often share some of the same legal powers. At common law, private citizens had the power to arrest—the proverbial “citizen’s arrest”—but it was limited. Like public officials, private citizens could arrest for felonies committed outside of their presence, but could only arrest for misdemeanors and breaches of the peace committed in their presence.¹⁰⁹ If the person arrested for the misdemeanor was not the perpetrator of the crime, or if no felony had actually been committed, a public officer was immune from civil and criminal liability so long as they had a good faith belief amounting to probable cause at the time of the arrest. But a private citizen had no such protection; even with a good-faith, probable cause belief that the perpetrator committed a crime, civilians remained potentially liable for a range of intentional torts and their criminal analogues.¹¹⁰ Private security guards, on the other hand, have less to worry about.

The law in many jurisdictions gives more flexibility to private businesses and their employees than it does to citizens. Statutes that codify the common-law doctrine known as “shopkeeper’s privilege” or “merchant’s privilege,” for example, provide a probable cause defense for business owners and employees who arrest someone for larceny.¹¹¹ Further, merchants may be explicitly authorized to use force to effectuate the arrest or protect their property in a way that private citizens are not.¹¹² Such statutes may provide “absolute immunity from civil liability for intentional torts . . . which may occur during the apprehension and detention of a customer suspected for shoplifting.”¹¹³ And while a merchant and the merchant’s agents face *less* civil or criminal liability than a private individual would, the perpetrator of the crime may face *more*; in some states, resisting a merchant or private security guard’s attempt to arrest carries a separate criminal penalty in much the same way that it is a crime to resist a police officer’s attempt to arrest.¹¹⁴

¹⁰⁸ Jon Brodtkin, *Casino Insider Tells (Almost) all About Security*, NETWORKWORLD (Mar. 7, 2008, 12:00 AM), <http://www.networkworld.com/article/2284208/software/casino-insider-tells--almost--all-about-security.html>.

¹⁰⁹ Note, *The Law of Citizen’s Arrest*, 65 COLUM. L. REV. 502, 504–05 (1965) [hereinafter *Citizen’s Arrest*]; see also *Carroll v. United States*, 267 U.S. 132, 157 (1924).

¹¹⁰ *Citizen’s Arrest*, *supra* note 109, at 511. Some states have provided substantive protections by immunizing private citizens who have some quantum of proof—probable cause or reasonable cause are the two most common—supporting their actions. U.S. DEP’T OF JUSTICE, NAT’L CRIM. JUST. REFERENCE SERV. (NCJRS), NCJRS 146908, SCOPE OF LEGAL AUTHORITY OF PRIVATE SECURITY PERSONNEL apps. C1 & C2 (1976) [hereinafter NCJRS, SCOPE OF LEGAL AUTHORITY], https://www.ncjrs.gov/pdffiles1/Digitization/146908NCJR_S.pdf.

¹¹¹ Amanda G. Main, Note, *Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief*, 39 BRANDEIS L.J. 289, 293–94 (2000).

¹¹² *Id.* at 295.

¹¹³ ALAN KAMINSKY, A COMPLETE GUIDE TO PREMISES SECURITY LITIGATION 82 (2008).

¹¹⁴ See, e.g., FLA. STAT. ANN. § 812.015(6) (“An individual who . . . resists the reasonable effort of a . . . merchant [or] merchant’s employee . . . commits a misdemeanor of the first degree.”).

Private security guards acting on behalf of their employers are not just given more protection than private citizens, they may also be given more authority. In some states, private security guards are explicitly equated to public police. In South Carolina, for example, an individual “hired or employed to provide security services on a specific property is granted the authority and arrest power given to sheriff’s deputies” while on that property, so long as the security guard is “registered or licensed.”¹¹⁵ Further blurring the line between public and private policing, it is the South Carolina State Law Enforcement Division that does the registering and licensing for security guards in the state, as well as playing a central role in the regulation of private security and investigations businesses and employees.¹¹⁶

The equation of private actors with public officials also plays prominently in the history of bounty hunting. The authority for bounty hunting dates from 1873, when the Supreme Court held that, under the common law, a bondsman has “dominion” over a defendant whose bond he had paid.¹¹⁷ That control, the Court held, “is a continuance of the original imprisonment.”¹¹⁸ By virtue of the private contract, the private bondsman, in essence, stands in the shoes of the public law enforcement official who had originally imprisoned the defendant:

Whenever [the bondsmen] choose to do so, they may seize [the defendant] and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. *It is likened to the rearrest by the sheriff of an escaping prisoner.*¹¹⁹

Given that authority, it should be no surprise that private parties engage in the rather specialized function of fugitive apprehension. According to one source, private “[b]ounty hunters claim to catch 31,500 bail jumpers per year, about 90 percent of people who jump bail in the United States.”¹²⁰

¹¹⁵ S.C. CODE ANN. § 40-18-110 (2000). For a more thorough, if slightly outdated, discussion of statutes and common law governing private security, see NCJRS, SCOPE OF LEGAL AUTHORITY, *supra* note 110.

¹¹⁶ S.C. CODE ANN. §§ 40-18-30 to -100 (2000).

¹¹⁷ Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1873).

¹¹⁸ *Id.*

¹¹⁹ *Id.* (emphasis added). A few states explicitly prohibit bounty hunting, while most states impose a variety of regulations that limit the common law rules. See Brian R. Johnson & Ruth S. Stevens, *The Regulation and Control of Bail Recovery Agents: An Exploratory Study*, 38 CRIM. JUST. REV. 190, 194–200 (2013); see also Collins v. Commonwealth of Va., 720 S.E.2d 530, 532–33 (Va. 2012) (holding that state law requiring bounty hunter licensure abrogated their common law rights to enter the state to seize individuals). The common law rules presumably remain in effect in the 18 states that do not have statutes regulating bounty hunting. Johnson & Stevens, *supra* note 119, at 200.

¹²⁰ Robert J. Meadows, *Bounty Hunters*, 1 THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA 155 (Wilbur R. Miller ed., 2012).

Indeed, private actors may well have *more* authority than public officers.¹²¹ They are not regulated by the Fourth, Fifth, or Sixth Amendments or the state analogues that restrict police actions, nor are they subject to federal statutes like 42 U.S.C. § 1983 and 18 U.S.C. § 242 or judicial remedies like the exclusionary rule. Because they are private actors, “[p]rivate police have been held exempt from the Fourth Amendment and the *Miranda* rules—as well as from restrictions on entrapment and statutory disclosure requirements.”¹²² As a result, private actors can act when public officers cannot, without the quanta of proof that would be required to support police action and without fear of the same remedial mechanisms. In 2013, for example, an appellate court in North Carolina held that a private security guard hired by a Homeowners’ Association to patrol a private neighborhood was not a state actor and thus was permitted to conduct a traffic stop without reasonable suspicion or probable cause.¹²³

Though the authority wielded by public police officers and private security actors can differ in meaningful ways, it is not always easy for the casual observer to determine who is whom. Private security guards often wear uniforms reminiscent of police uniforms, and their marked patrol vehicles may be emblazoned with phrases indicative of governmental service, such as “Metro Public Safety.”¹²⁴ They may be permitted or required to wear or carry badges and credentials that only a close read will identify as

¹²¹ See, e.g., MALCOLM K. SPARROW, *NEW PERSPECTIVES OF POLICING, MANAGING THE BOUNDARY BETWEEN PUBLIC AND PRIVATE POLICING* 6 (Sept. 2014) (“[P]rivate police agents, being constitutionally classed as citizens . . . , can legally do things that public police cannot.”); Johnson & Stevens, *supra* note 199, at 192 (stating, in the context of bounty hunters, that private actors “have unique powers that far surpass those of the police in America.”).

¹²² Sklansky, *supra* note 4, at 1240.

¹²³ *State v. Weaver*, 752 S.E.2d 240 (N.C. Ct. App. 2013). The court went on to hold that if such a quantum of proof *was* required, it existed in this case based on the security officer’s estimate of the vehicle’s speed. *Id.* The basis for that estimate was not provided, *id.*, although a public police officer would almost certainly have testified about specialized training and experience in visually estimating vehicle speeds. See generally Seth W. Stoughton, *Evidentiary Rulings as Police Reform*, 69 *MIAMI L. REV.* 429, 445–54 (2015). For example, the Ohio Supreme Court ruled in 2010 that “an officer’s unaided visual estimation of a vehicle’s speed is sufficient evidence to support a conviction for speeding . . . without independent verification [i.e., without the use of mechanical identification through radar or LIDAR] if the officer is trained . . . and is experienced in visually estimating vehicle speed.” *Barberton v. Jenney*, 929 N.E.2d 1047, 1049 (Ohio 2010). The Fourth Circuit has adopted a more nuanced approach, holding that an officer’s visual estimate “that a vehicle is traveling in significant excess of the legal speed limit” may not need independent corroboration to establish a quantum of proof, but, “where an officer estimates that a vehicle is traveling in only slight excess of the legal speed limit, and particularly where the alleged violation is at a speed differential difficult for the naked eye to discern, an officer’s visual speed estimate requires additional indicia of reliability to support probable cause.” *United States v. Sowards*, 690 F.3d 583, 592 (4th Cir. 2012). It is worth noting, in that case, the Fourth Circuit held that the trial court clearly erred by finding the officer was trained to estimate speeds: “[T]here was not testimony or evidence that [the officer] received any specialized training in the estimation of vehicle speeds.” *Id.* at 589. The court stated that visual estimates can be supported by “radar, pacing methods, or other indicia of reliability,” and although the court’s discussion is not an endorsement of visual estimates, it may be that specialized training can be an indication of reliability. See *id.* at 592–93.

Although the court divorces the two points in its discussion, it may be that specialized training is an “additional indicia of reliability” that, like radar and pacing methods, can support probable cause. Regardless, it appears that the private security officer in *Weaver* was not expected to provide the same justification for a visual speed estimate that likely would have been required of a public police officer.

¹²⁴ *Weaver*, 752 S.E.2d 240.

belonging to a private actor.¹²⁵ And sometimes even knowing that a uniformed officer is paid by a private security agency, rather than a public police department, won't sufficiently distinguish between private and public policing efforts.

B. Semi-Public Private Policing

Complicating the task of cleanly distinguishing between public and private security is the close working relationship that can exist between the two. This is a relatively recent phenomenon in the United States. "Historically, a patronizing, if not suspicious and antagonistic, attitude on the part of public police toward their private counterparts seem[s] to have been the dominant theme."¹²⁶ As of 1972, "no city . . . contracted directly with a private firm for all police services, and less than 1 percent of the cities surveyed dealt with private firms for subservice functions like crime labs."¹²⁷ In 1977, the United States Private Security Advisory Council, which advised the Law Enforcement Assistance Administration at the Department of Justice, identified several major barriers between private and public policing, which they "ranked [in] order of pervasiveness and intensity[:]"

- lack of mutual respect[:]
- lack of communication[:]
- lack of cooperation[:]
- lack of law enforcement knowledge of private security[:]
- perceived competition[:]
- lack of standards [for cooperation; and]
- perceived corruption."¹²⁸

Perhaps the most significant barrier, however, was the belief that public policing was about protecting public concerns, while private security efforts were directed exclusively at private concerns.¹²⁹ "[P]rivate security," it was thought, "ought to stay well away from the realm of investigation and public service, and to take a purely passive and preventative role."¹³⁰

Times have changed. Although the status differential and other factors undoubtedly remain an area of conflict between public police and private security agencies, there appears to be a higher degree of cooperation than in earlier eras. In 2004, the International Association of Chiefs of Police issued

¹²⁵ See, e.g., 14B N.C. ADMIN. CODE § 16.0405 ("While engaged in their official duties, a private investigator shall be allowed to carry, possess, and display a badge . . . The badge shall be gold with dark blue lettering. . . . The badge shall be displayed in a folding pocket case with the badge displayed on one side of the case and the Private Investigator's pocket credential . . . displayed on the opposite side of the case.").

¹²⁶ Sarre & Prenzler, *supra* note 10.

¹²⁷ BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE 18 (1998).

¹²⁸ U.S. PRIVATE SECURITY COUNCIL, *supra* note 3, at 2–3.

¹²⁹ *Id.* at 5–10.

¹³⁰ Sarre & Prenzler, *supra* note 10, at 93.

a summit report urging laws of “the major law enforcement and private security organizations [to] make a formal commitment to cooperation.”¹³¹ Public-private partnerships were to be viewed as “a preferred tool to address terrorism, public disorder, and crime.”¹³² Further, public entities were more willing to make use of private security agencies. By the late 1990s, it was estimated that about 45% of local government entities were hiring private companies to provide at least some security services.¹³³ In all likelihood, that number has only increased. Government agencies employ the third largest number of private security employees, after only manufacturing firms and retail businesses, “and the expenditures for such services run in the multibillion dollar range.”¹³⁴

What exactly are those private security agencies doing for their public employers for that multibillion dollar payoff? The short answer is, “Just about everything.” Private security guards have been used to supplement traditional public policing by, for example, providing static, preventative security. Today, thousands of federal buildings around the country are protected by some 15,000 private security guards contracted by the Department of Homeland Security’s Federal Protective Service.¹³⁵ Local governments, meanwhile, contract with private security agencies to guard “public buildings, sports arenas, schools, public housing projects, convention centers, courts, airports, and other public facilities.”¹³⁶ Local governments also fund private security efforts. In Washington, D.C., the Private Security Camera Incentive Program provides “a rebate for residents, businesses, nonprofits, and religious institutions to purchase and install security camera systems on [the exterior of] their property and register them with the Metropolitan Police Department.”¹³⁷ The stated purpose of the program is “to help deter crime and assist law enforcement with investigations.”¹³⁸ As of October 2016, the program has issued more than 900 rebates, funding the installation of more than 2500 private security cameras.¹³⁹

¹³¹ PRIVATE SECURITY/PUBLIC POLICING: VITAL ISSUES AND POLICY RECOMMENDATIONS 19 (2004).

¹³² *Id.*

¹³³ Sklansky, *supra* note 7, at 92. Note that this does not include local government agencies that contract for “police support services, such as accounting, maintenance, communications and dispatch, data processing, towing illegally parked cars, fingerprinting prisoners, crime laboratory investigations, performing background checks on job applicants, guarding school crossings, directing traffic, transporting prisoners, and guarding prisoners in hospitals.” BENSON, *supra* note 127, at 18. That type of administrative and subservice support for policing efforts is admittedly important, but outside my narrow focus on the direct provision of policing services.

¹³⁴ BENSON, *supra* note 127, at 18.

¹³⁵ STROM ET AL., *supra* note 92, at 4-15.

¹³⁶ BENSON, *supra* note 127, at 18; *see also* Sklansky, *supra* note 4, at 1177.

¹³⁷ Office of Victim Servs. & Just. Grants, *Private Security Camera Incentive Program*, MAYOR MURIEL BOWSER, DC.GOV, <http://ovsjg.dc.gov/service/private-security-camera-system-incentive-program> (last visited June 27, 2017).

¹³⁸ *Id.*

¹³⁹ OFFICE OF VICTIM SERVS. & JUST. GRANTS, PRIVATE SECURITY CAMERA INCENTIVE PROGRAM REPORT, DATA AS OF OCTOBER 4, 2016, http://ovsjg.dc.gov/sites/default/files/dc/sites/ovsjg/service_content/attachments/Private%20Security%20Camera%20Program%20Report%20to%20Council%20-%20October%202016.pdf.

Security personnel and private security efforts are not purely passive; private policing can also be responsive.¹⁴⁰ For example, local governments contract with private security agencies to provide many different aspects of the patrol function previously fulfilled by public police, including directing traffic when necessary.¹⁴¹ Government entities might also use private contractors to respond to some calls for service. Burglar alarms are a perfect example: when an alarm accurately identifies a burglary in progress, it may be vastly preferable to have a police officer—with a potentially faster response time and the benefit of more training, better equipment, and the availability of backup—respond to the scene. Unfortunately, alarms are rarely accurate; various studies have found that false positives account for up to 95% of all alarms.¹⁴² And there can be *lots* of alarms; “alarm responses account for 10 percent to 30 percent of all calls for police service.”¹⁴³ A Department of Justice report estimated in 1998 that responding to alarms cost public law enforcement agencies \$1.5 billion¹⁴⁴ (more than \$2.2 billion in 2016 terms¹⁴⁵). To preserve scarce resources, many police agencies have stopped responding to non-verified alarms, meaning alarms that are triggered but have not been verified by a video or auditory feed or a live complainant such as a resident or security guard.¹⁴⁶ And when public police pull out, “private police can contribute . . . by patrolling and by handling certain service functions, such as alarm response.”¹⁴⁷

Beyond the relatively limited context of burglary alarms, private security personnel also engage in proactive policing by patrolling assigned beats.¹⁴⁸ Although the paradigmatic deployment of private security patrols involves personnel reporting incidents to sworn, public officers,¹⁴⁹ private security employees engage in what many modern viewers would consider to be more invasive law enforcement activities. Parking enforcement is perhaps the least objectionable aspect of proactive, invasive policing,¹⁵⁰ but it may also be true

¹⁴⁰ PASTOR, *supra* note 14, at 49 (stating that “the Toronto Police Department reports that more than 60 percent of all calls to the police are handled by ‘alternative response’ units, which could include private policing acting as a supplement to public police departments”).

¹⁴¹ Sklansky, *supra* note 4, at 1177.

¹⁴² PASTOR, *supra* note 14, at 50.

¹⁴³ *Id.*

¹⁴⁴ RANA SAMPSON, U.S. DEP’T OF JUSTICE, FALSE BURGLAR ALARMS, PROBLEM-ORIENTED GUIDES FOR POLICE NO. 5, at 1 (2002), <http://www.cops.usdoj.gov/pdf/e05021556.pdf>. Adjusted for inflation to represent 2015 dollars, the total estimate is almost \$2.1 billion. See CONSUMER PRICE INDEX INFLATION CALCULATOR, BUREAU OF LABOR STATISTICS, <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=15&year1=1998&year2=2015>, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited June 27, 2017).

¹⁴⁵ CONSUMER PRICE INDEX INFLATION CALCULATOR, BUREAU OF LABOR STATISTICS, <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1500&year1=1998&year2=2016> (last visited June 27, 2017).

¹⁴⁶ Francie Grace, *Burglar Alarms Cops Won’t Answer*, CBS NEWS (Apr. 14, 2003), <http://www.cbsnews.com/news/burglar-alarms-cops-wont-answer/>.

¹⁴⁷ PASTOR, *supra* note 14, at 50.

¹⁴⁸ *Id.*

¹⁴⁹ BENSON, *supra* note 127, at 18 (“East Hills, Long Island, employs thirty security officers to patrol the town on a twenty-four-hour basis. . . he officers are uniformed but unarmed, and they call the local police when they observe a problem.”).

¹⁵⁰ Sklansky, *supra* note 4, at 1177.

that private police perform “more stops, searches, and interrogations than is often imagined.”¹⁵¹

On some occasions, semi-public private policing blurs the line even further, as when political subdivisions hire private security companies to be the *primary* provider of policing services.¹⁵² Kalamazoo, Michigan, for example, contracted with the private security company Charles Services “for street patrol and traffic control.”¹⁵³ Under that arrangement, “private personnel were sworn in as deputy sheriffs in order to ensure compliance to the law, but the personnel were paid by the hour so that they could be released during slow periods and provided in larger force during peak periods.”¹⁵⁴ Hiring a private firm as the primary provider of policing services isn’t common, but Kalamazoo isn’t unique. At least seven other jurisdictions have contracted with private security agencies to provide policing services, including two—Indian Springs, Florida, and Buffalo Creek, West Virginia—that did so for over five years.¹⁵⁵

C. *Semi-Private Public Policing*

Just as private security employees can operate as semi-public entities, public police can be semi-privatized. Examples can be found in special jurisdiction agencies, special appointments, and the widespread practice of private employers hiring off-duty officers to engage in law enforcement or security services.

Special jurisdiction agencies are police organizations that serve either a special geographic jurisdiction that does not align with political subdivisions—university or transit police, for example—or engage in specialized enforcement activities, such as the Enforcement Division of Nevada’s Gaming Control Board.¹⁵⁶ As of 2008, the last year for which data were available, there were more 1,700 special jurisdiction agencies that employed just under 57,000 full-time, sworn officers.¹⁵⁷ Many of these, perhaps most, do little to blur the line between public and private policing.¹⁵⁸ But some do. The Federal Reserve System, a somewhat unique public/private entity, has its own law enforcement agency, the United States Federal Reserve Police.¹⁵⁹ Officers may be “designated or authorized by the [Federal Reserve

¹⁵¹ *Id.* at 1179.

¹⁵² Joh, *Conceptualizing*, *supra* note 9, at 614–15 (discussing Kalamazoo, Michigan); Joseph Lyons, *Privatization of Police Services*, FLA. DEP’T OF LAW ENFORCEMENT 5 (Sussex, New Jersey); Amy Goldstein, *The Private Arm of the Law*, WASH. POST, Jan. 2, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/01/AR2007010100665.html> (North Carolina); MARX, *supra* note 67, at n.4 (Florida).

¹⁵³ BENSON, *supra* note 127, at 20.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ ENFORCEMENT DIVISION, NEV. GAMING CONTROL BD., GAMING COMM’N, <http://gaming.nv.gov/index.aspx?page=46>.

¹⁵⁷ REAVES, *supra* note 85, at 8.

¹⁵⁸ Of the more-than 1,700 special jurisdiction police agencies, most serve public school districts (250), higher education facilities (779), transportation systems (167), parks and recreational areas (124), and hospitals or other health care facilities (48).

¹⁵⁹ 12 U.S.C. § 248(q).

Board] or a reserve bank,” and are authorized to carry firearms, make arrests, and access law enforcement information.¹⁶⁰ Another example, and one less connected to government entities, can be found in private universities’ police departments. Campus police officers at Yale, for example, “wear New Haven Police Department badges and are invested with their powers of arrest through the City of New Haven,” even though “the Yale Police Department and New Haven Police Department are in fact two separate entities.”¹⁶¹ The blurring of public and private policing can be even more dramatic. Headquartered in Memphis, Tennessee, the FedEx Corporation is a publicly traded multinational business organization with annual revenue of more than \$50 billion in 2016.¹⁶² It doesn’t just maintain a massive fleet of air carriers that service more than 350 airports, it also maintains a private police force. Because Tennessee law allows for the creation of “transportation security officers”¹⁶³ who have “all of the powers of a peace officer,”¹⁶⁴ FedEx employs a (relatively small) number of officers who can make arrests, apply for warrants, initiate pursuits, carry weapons, and participate in a Regional Joint Terrorism Task Force.¹⁶⁵

Tennessee is not the only state that allows private entities to establish police forces. In Arizona, a private railroad company can, on its own, designate “railroad police,” who “aid and supplement . . . law enforcement agencies . . . in the protection of railroad property and the protection of the persons and property of railroad passengers and employees.”¹⁶⁶ Other states blur the line between public and private policing even more. In Virginia, a private corporation or the private owner of “any place within the Commonwealth” can ask a circuit court judge to appoint a “special conservator of the peace.”¹⁶⁷ A special conservator can be designated a “law-enforcement officer” and may identify themselves as “police” on uniform or badge, including a badge that bears the state seal.¹⁶⁸ Special conservators can serve up to a four-year term, and in that time “have all the powers, functions, duties, responsibilities and authority” of a police officer, at least within “such geographical confines as the court may deem appropriate . . . within the confines of the county, city or town where the corporate applicant is located.”¹⁶⁹ Courts may, but need not, “limit the use of flashing lights and sirens on personal vehicles used by the conservator in the performance of his

¹⁶⁰ 12 U.S.C. § 248(q)(3).

¹⁶¹ Leigh J. Jahnig, Note, *Under School Colors: Private University Police as State Actors Under § 1983*, 110 NORTHWESTERN U. L. REV. 249, 264 n.96 (2015) (quoting Bharat Ayyar, *City, Campus Jurisdictions Overlap for Police Depts.*, YALE DAILY NEWS (Nov. 5, 2007), <http://yaledailynews.com/blog/2007/11/05/city-campus-jurisdictions-overlap-for-police-depts/> [<http://perma.cc/7MQQ-HXHW>]).

¹⁶² FEDEX ANNUAL REPORT 2016, <http://annualreport.van.fedex.com/2016/>.

¹⁶³ TENN. CODE ANN. § 38-3-120(j)(2017).

¹⁶⁴ *Id.* § 38-3-120(j)(3).

¹⁶⁵ Gary Fields, *FedEx Takes Direct Approach To Battling Terrorism, Crimes*, WALL STREET J., Oct. 9, 2003, <http://www.wsj.com/articles/SB106564839659803900>.

¹⁶⁶ ARIZ. REV. STAT. ANN. § 40-856 (2015).

¹⁶⁷ VA. CODE ANN. § 19.2-13A (2017).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

duties.”¹⁷⁰ A special conservator must register with the Department of Criminal Justice Services and may have to go through basic police training, although exemptions are permissible.¹⁷¹ There are, however, benefits to going through a police academy. A special conservator “who has completed the minimum training standards established by the Department of Criminal Justice Services . . . has the authority to [e]ffect arrests, using up to the same amount of force as would be allowed to a law-enforcement officer employed by the Commonwealth or any of its political subdivisions when making a lawful arrest.”¹⁷² Special conservators of the peace are public officers who may be requested by a private corporation or property owner, but the special conservator is a public officer and not (necessarily) an employee of the requesting party. Special Conservators are, in essence, privately requested police officers without an agency; they work outside both the normal market controls of a private security company and the normal political controls of a local police officer.

Not every private entity can create their own police force, nor do most of them need to do so. Private interests can leverage public policing by shifting the costs of security from their own expenditure to the public coffers. According to a review of Walmart stores in the Tampa area, for example, local police agencies “logged nearly 16,800 calls” over the course of a year, or “two calls an hour, every hour, every day.”¹⁷³ One officer described the situation this way: “We are, as a department, at the mercy of what they [Walmart] want to do.”¹⁷⁴ According to retail analyst Burt Flickinger, “Law enforcement becomes in effect a taxpayer-paid private security source for Walmart.”¹⁷⁵

Private industry does not always rely on the largess of public police; various investigative efforts may be privately funded. In the early 1980s, the National Automobile Theft Bureau, a not-for-profit organization “dedicated exclusively to fighting insurance fraud and crime,”¹⁷⁶ provided personnel and funding for a joint operation with the Tennessee Department of Revenue and the Metropolitan Nashville Police Department that, under the supervision of a prosecutor, used extensive undercover investigations to target vehicle theft in eastern Tennessee.¹⁷⁷ More recently, licensed taxis in Los Angeles pay a \$30 monthly fee to fund police sting operations directed at ferreting out unlicensed taxis since 2006.¹⁷⁸ In the modern era of ride-sharing apps like Uber and Lyft, this funding has been used to identify drivers who illegally

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Zachary T. Sampson et al., *Walmart, Thousands of Police Calls. You Paid the Bill.*, TAMPA BAY TIMES (May 11, 2016), <http://www.tampabay.com/projects/2016/public-safety/walmart-police/>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ NAT'L INS. CRIME BUREAU, OUR STORY, https://www.nicb.org/about-nicb/our_story (last visited June 21, 2017).

¹⁷⁷ DAVID H. MCELREATH, ET AL., INTRODUCTION TO LAW ENFORCEMENT 168 (2013).

¹⁷⁸ OFFICE OF THE CITY CLERK, CITY OF LOS ANGELES, COUNCIL FILE NUMBER 06-0142, IMPROVED BANDIT TAXI ENFORCEMENT PROGRAM (Feb. 21, 2017), https://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=vcfi.dsp_C FMS_Report&rptid=99&cfnumber=06-0142.

accept cash payment (instead of demanding payment through the app, as required).¹⁷⁹

Businesses can acquire police services even more directly by hiring uniformed officers to provide law enforcement services while they're off-duty, a practice known as "moonlighting."¹⁸⁰ According to a recent survey of more than 160 police agencies that collectively employ over 143,000 full-time, sworn officers—almost a fifth of all non-federal officers in the country—the vast majority of police agencies permit officers to engage in moonlighting.¹⁸¹ And officers take advantage of that opportunity more frequently than one might expect: the agencies that track the relevant data reported that 42.63% of their full-time, sworn employees worked in a law enforcement capacity for a private employer.¹⁸² To the casual observer, it can be difficult or impossible to distinguish between moonlighting and public policing, as off-duty officers typically wear the same uniform and provide the same wide range of services that on-duty officers might otherwise provide. The single most important difference—how an officer is being compensated—is something that observers simply are not privy to.

[U]niformed officers may be paid for providing security at a night club or bar or for directing traffic outside of a church or synagogue. Officers may also receive free or discounted rent at an apartment complex (so-called "courtesy officers") in exchange for parking their marked police vehicle in a visible spot or for responding, when off-duty, to non-emergency calls like noise complaints. Officers may be compensated directly by the private entity that hires them, or the employer may pay the city or agency so the officer's compensation is channeled through the public payroll system. Officers may also receive collateral benefits from private employers, such as employee discounts and earlier-than-public access to information and products.¹⁸³

The manner in which officers engage in moonlighting can further blur the line. Some agencies employ in-house coordinators to facilitate officers' off-duty employment; private employers who want to hire off-duty officers approach the agency itself, which then makes the job available to officers. Other agencies take a more hands-off approach, leaving it to private employers and individual officers to find each other and work out the details of a moonlighting job, subject only to agency approval. This has created something of a private market for off-duty officers. Phoenix-based security

¹⁷⁹ Nick Sibilla, Opinion, *LAPD Should Stop Stings Against Uber*, ORANGE CNTY. REGISTER (Cal.) (Dec. 9, 2016), <http://www.ocregister.com/articles/hundreds-737920-arresting-taxi.html>

¹⁸⁰ See Stoughton, *supra* note 12. There is no uniform terminology within law enforcement

¹⁸¹ See Stoughton, *supra* note 12; see also Albert J. Reiss, Jr., *Private Employment of Public Police*, in *PRIVATIZATION AND ITS ALTERNATIVES* 226 (William T. Gormley ed., 1991); WILLIAM C. CUNNINGHAM ET AL., *THE HALLCREST REPORT II: PRIVATE SECURITY TRENDS, 1970 TO 2000*, at 286–90 (1990); ALBERT J. REISS, JR., *PRIVATE EMPLOYMENT OF PUBLIC POLICE* (1989).

¹⁸² Stoughton, *supra* note 12.

¹⁸³ See Stoughton, *supra* note 12.

firm Law Enforcement Specialists, for example, takes a traditional approach to providing security personnel, but offers off-duty officers instead of regular security guards.¹⁸⁴ The technology start-up CopsForHire takes a different tack, having established a “platform for the on-demand marketplace of cops working off-duty.”¹⁸⁵ Their online marketplace follows the example of Uber, the popular ride-sharing app, by connecting private employers with local officers who would be interested in working off-duty. The appeal of this approach isn’t limited to officers who independently seek their own moonlighting opportunities; police agencies can also adopt the CopsForHire platform for internal use, essentially hiring CopsForHire to play a coordinating role.¹⁸⁶

The existence of special jurisdiction police agencies, the special appointment of officers, and the widespread practice of moonlighting all have the potential to partially privatize public policing.

D. Public Policing

In contrast with the specialized agencies, officers, and duties discussed in the previous section, one might think that an on-duty officer at a municipal public agency is a clear and definitive example of purely public policing. Sometimes that may be the case. But certain investigative techniques, funding and equipment, and the reliance on private parties to assist with police investigations can all blur the line between public and private policing.

On at least some occasions, officers act in an official capacity outside of the jurisdiction in which they have lawful authority. The International Liaison Program implemented by the New York Police Department, for example, has stationed Intelligence Officers in 13 cities far outside of the geographic boundaries of New York. “The world-wide presence allows NYPD officers at the scene of a terrorist attack to provide information to the NYPD’s counterterrorism command structure.”¹⁸⁷ When that is the case, officers may be effectively limited to doing no more than what any “ordinary” individual might do. In essence, officers may fulfill their public position even without the mantle of state authority.

Outside the relatively confined context of extrajudicial action, several common investigative tactics depend on obscuring the line separating public and private action, and for good reason; officers simply would not be effective if they operated in a way that continually advertised their official affiliation. But the very reason that these tactics are effective also creates the potential for them to blur the line between public and private action. In plainclothes operations, for example, officers engage in surveillance or proactive patrol

¹⁸⁴ *Do the Comparison: Off-Duty Police Officers vs. Security Guards*, LAW ENFORCEMENT SPECIALISTS, <http://offdutyofficers.com/>.

¹⁸⁵ COPSFORHIRE.COM, <https://www.copsforhire.com/> (last visited June 27, 2017); Email correspondence with Rob McDermott, Sept. 1, 2016 (email on file with author).

¹⁸⁶ Taylor Soper, *Seattle Police Department Picks CopsForHire as Platform to Handle Off-Duty Assignments*, GEEKWIRE (Oct. 10, 2016, 3:49 pm), <http://www.geekwire.com/2016/seattle-police-department-picks-copsforhire-platform-handle-off-duty-assignments/>.

¹⁸⁷ N.Y.C. POLICE FOUND., INTERNATIONAL LIAISON PROGRAM, <http://www.nycpolicefoundation.org/programs/international-liaison-program/> (last visited Feb. 21, 2017).

while wearing civilian attire rather than police uniforms. The objective is to observe people without advertising officers' official identities until it becomes advantageous to do so; e.g., when initiating an investigative detention. The difficulty of identifying officers in these circumstances has become an issue in several high profile incidents, including the shootings of Amadou Diallo and Sean Bell.¹⁸⁸ Undercover operations blur the line of public and private policing even more, as officers assume the role of a civilian. There are different degrees of "cover" under which an officer can operate. At one end of the spectrum is superficial cover, as with officers engaged in prostitution stings or reverse-stings.¹⁸⁹ Other operations require modest preparation, as with officers who create misleading personal accounts to investigate child pornography.¹⁹⁰ At the far end of the spectrum is sophisticated cover identities that require what is known as "backstopping," the creation of fictitious information to support a cover identity.¹⁹¹ The paradigmatic example of a sophisticated undercover operation involves an officer using a cover identity to infiltrate a criminal network,¹⁹² but that is hardly the only example. In "stash-house stings," undercover officers recruit suspects to help them rob non-existent drug dealers, which requires them to create a fake stash house (where the arrest will ultimately take place).¹⁹³ Some undercover operations can be even more sophisticated. In late 2013, for example, the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives was rocked by the public disclosure of a series of sting operations in which ATF agents operated fake pawn shops or other private businesses that

¹⁸⁸ Cara Buckley & William K. Rashbaum, *A Day After a Fatal Shooting, Questions, Mourning, and Protest*, N.Y. TIMES, Nov. 27, 2006, at B1, <http://www.nytimes.com/2006/11/27/nyregion/27shot.html>; Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, <http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html>.

¹⁸⁹ In a prostitution sting, officers pretend to be clients, or "johns," who solicit sex from suspected prostitutes, who they later arrest. *See, e.g.*, *Commonwealth v. Fisher*, 627 A.2d 732 (Pa. Super. 1993) (describing a prior case involving "a sting operation wherein police officers acted as "johns" and were solicited by prostitutes who offered to perform various sexual acts for specific sums of money"). In a reverse sting, officers pretend to be prostitutes and arrest the would-be johns. *See, e.g.*, *Connecticut v. One 1985 Gray Buick Automobile*, 1998 WL 518610 (Conn. Sup. Ct. Aug. 11, 1998) ("The operation was a reverse prostitution detail intended to target "johns," the prostitutes' customers, by arresting them, seizing their vehicles, and seeking their forfeiture. As part of the sting, officer Patricia Beaudin, a police decoy, or undercover female police officer, posed as a prostitute, stood on the corner of Broad Street and Allen Place and waited to be approached by a prospective customer.").

¹⁹⁰ According to the testimony of an FBI Deputy Assistant Director, "FBI Agents and task force officers go online undercover into predicated locations utilizing fictitious screen names and engaging in real-time chat or E-mail conversations with subjects to obtain evidence of criminal activity." Testimony of Keith Lourdeau Before the House Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection, May 6, 2004, <https://archives.fbi.gov/archives/news/testimony/combating-the-exploitation-of-children-through-peer-to-peer-network>.

¹⁹¹ *See, e.g.*, JOHN M. MACDONALD & JERRY KENNEDY, CRIMINAL INVESTIGATION OF DRUG OFFENSES: THE NARCS' MANUAL 121-35 (1983).

¹⁹² ATF Agent William Queen's infiltration of the Mongols motorcycle gang, for example. *See WILLIAM QUEEN, UNDER AND ALONE: THE TRUE STORY OF THE UNDERCOVER AGENT WHO INFILTRATED AMERICA'S MOST VIOLENT OUTLAW MOTORCYCLE GANG* (2005).

¹⁹³ Brad Heath, *ATF Uses Fake Drugs, Big Bucks to Snare Suspects*, USA TODAY, June 28, 2013, <http://www.usatoday.com/story/news/nation/2013/06/27/atf-stash-houses-sting-usa-today-investigation/2457109>.

conducted illegal transactions (such as purchasing illegal firearms and stolen goods) so as to eventually arrest their “customers.”¹⁹⁴

Beyond plainclothes and undercover operations, the use of informants is another common investigative practice that can blur the line between public and private policing.¹⁹⁵ Informants can be passive, in the sense that they pass along information to the police but play no other role in the investigation, but it is active informants, who engage in information gathering or participate in operations at the explicit direction of officers, who raise the specter of private policing. Informants can set law enforcement priorities,¹⁹⁶ work to attract would-be wrong-doers,¹⁹⁷ and facilitate prolonged investigations.¹⁹⁸

Like certain investigative techniques, the way in which police acquire and deploy surveillance or investigative equipment can blur the blue line, particularly in the modern era of stretched public budgets. As part of its 2006 downtown, urban revitalization efforts, for example, the Minneapolis Police Department partnered with the Target Corporation to install security cameras.¹⁹⁹ The number grew from the original 30 to over 100 cameras deployed in the 40-block area, monitored by both private security personnel and the city police department.²⁰⁰ In 2012, Target Corporation’s Vice President of Assets Protection estimated that Target has partnered with about two dozen cities to provide similar access to security cameras. Target is far from alone. A range of private businesses in metropolitan Grand Rapids, for example, allow public police agencies to access and monitor their security video feeds in real time.²⁰¹ In Minneapolis, the SafeZone Collaborative formed a 501(c)(3) organization, then successfully lobbied for the metropolitan area to be zoned as a Downtown Improvement District (a type

¹⁹⁴ John Diedrich & Ruel Rutledge, *ATF Uses Rogue Tactics in Storefront Stings Across Nation*, MILWAUKEE WIS. J. SENTINEL, Dec. 7, 2013, <http://archive.jsonline.com/watchdog/watchdogreports/atf-uses-rogue-tactics-in-storefront-stings-across-the-nation-b99146765z1-234916641.html>; Conor Friedersdorf, *Feds Paid a Teen to Get a Neck Tattoo of a Giant Squid Smoking a Joint*, ATLANTIC, Dec. 12, 2013, <http://www.theatlantic.com/politics/archive/2013/12/feds-paid-a-teen-to-get-a-neck-tattoo-of-a-giant-squid-smoking-a-joint/282279/>.

¹⁹⁵ ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 25–27 (2011) (describing how “snitching is sprinkled throughout the system like salt, flavoring every kind of case from burglary to corporate fraud and political corruption” and noting that “federal defendants have been rewarded for cooperation in connection with every single type of federal crime, including murder, sexual abuse, and child pornography”).

¹⁹⁶ NATAPOFF, *supra* note 195, at 35–36.

¹⁹⁷ Perhaps the most famous example was the Abscam investigation, in which Melvin Weinberg, working under the direction of the FBI, created a fictitious company, approached state and federal officials, and paid bribes in exchange for political favors. See, e.g., *The Two Faces of Abscam*, THE NEW YORK TIMES, May 5, 1981, <http://www.nytimes.com/1981/05/05/opinion/the-two-faces-of-abscam.html> (describing Weinberg as “the convicted confidence man who helped identify the investigation’s targets and stage its bribery transactions”).

¹⁹⁸ See NATAPOFF, *supra* note 195; Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155 (2009); Andrea L. Dennis, *Collateral Damage? Juvenile Snitches in America’s “Wars” on Drugs, Crime, and Gangs*, 46 AM. CRIM. L. REV. 1145 (2009).

¹⁹⁹ Bob Giles, *Minneapolis Public-Private Surveillance Effort with Target Corp.*, SECURITY INFO WATCH (Apr. 18, 2012), <http://www.securityinfo-watch.com/article/10702225/minneapolis-safezone>.

²⁰⁰ *Id.*

²⁰¹ Garret Ellison, *Police Getting Real-Time Access to Private Security Cameras in Downtown Grand Rapids*, MLIVE (June 29, 2014), http://www.mlive.com/news/grand-rapids/index.ssf/2014/06/police_getting_real-time_access.html.

of Business Improvement District²⁰²), where a special tax on property owners funds continued security efforts.²⁰³

Public officers have come to rely on private actors for everyday police operations. Private police support services—such as private companies that provide call-taking and dispatch services²⁰⁴ or private forensic laboratories that contract with police agencies²⁰⁵—are common, but so, too, is private entanglement in what would otherwise appear to be public police investigations. Before it merged with the Insurance Crime Prevention Institute, for example, the National Automobile Theft Bureau—a private, not-for-profit organization supported by the private insurance industry—managed databases that collected information about stolen vehicles.²⁰⁶ In many states, law enforcement officers were required to report information about motor vehicle thefts to the Bureau, including details about the vehicle and the theft itself.²⁰⁷ A more contemporary and mundane example of officer reliance on private actors may be found in the context of DUI enforcement. According to the most recent Uniform Crime Reporting data, more than 1 million persons were arrested for driving under the influence in 2015.²⁰⁸ Some number of those arrestees were subjected to a blood draw, initiated by officers to obtain the suspects' blood-alcohol levels. In 2016, the Supreme Court held that warrantless blood-testing for DUI purposes violated the Fourth Amendment's prohibition on unreasonable searches absent exigent circumstances or, presumably, the suspect's consent.²⁰⁹ Regardless of whether a blood sample is taken pursuant to a warrant, exigency, or consent, it is typically not an officer who draws blood. Although precise data are unavailable, it seems safe to say that task is typically left to a medical professional;²¹⁰ indeed, state law

²⁰² For more on Business Improvement Districts, see generally Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999).

²⁰³ Giles, *supra* note 199.

²⁰⁴ Michelle Perin, *Private 911 Police Telecommunications: Same Job, Different Boss*, OFFICER.COM (July 16, 2013), <http://www.officer.com/article/10959085/private-9-1-1-police-telecommunications-same-job-different-boss>.

²⁰⁵ JJ Velasquez, *Austin Contracts Dallas Forensic Lab To Address Rape Kit Backlog*, COMMUNITY IMPACT NEWSPAPER (Texas) (Nov. 3, 2016, 2:02 pm) <https://communityimpact.com/austin/central-austin/city-county/2016/11/03/aust>

in-contracts-dallas-forensic-lab-address-rape-kit-backlog/; *Police Eye Partnership with Portland Crime Lab*, TOWN OF CAPE ELIZABETH NEWS (Mar. 31, 2008), <https://www.capeelizabeth.com/news/2008/crimelab.html>; *Palm Bay Partners with Cellmark Forensics*, SPACE COAST DAILY (Feb. 8, 2014), <http://spacecoastdaily.com/2014/02/palm-bay-partners-with-cellmark-forensics/>.

²⁰⁶ Gary T. Marx, *The Interweaving of Public & Private Police Undercover Work*, in PRIVATE POLICING (Clifford D. Shearing & Phillip C. Stenning eds., 1987).

²⁰⁷ *Id.*

²⁰⁸ FBI, 2015 Crime in the United States tbl.29, <https://web.archive.org/web/20170216005201/https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29> (last visited June 21, 2017).

²⁰⁹ *Birchfield v. North Dakota*, 136 S. Ct. 2160, 579 U.S. ____ (2016).

²¹⁰ The Supreme Court, at least, has assumed that it will be medical professionals, not officers, conducting blood draws. See *Birchfield*, 136 S. Ct. at 2167, 579 U.S. at ____ (“A technician with medical training uses a syringe to draw a blood sample from the veins of the subject, who must remain still during the procedure, and then the sample is shipped to a separate laboratory for measurement of its alcohol concentration.”); *Missouri v. McNeely*, 133 S. Ct. 1552, 1561 (2013) (“[A] police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test.”). This is not to suggest that we should take the Court's unsupported empirical assertions at face value. For a discussion of the Court's reliance on

may impose such a limitation.²¹¹ In short, in the context of blood samples, officers' investigative efforts are heavily dependent on the cooperation of private actors.²¹² In some jurisdictions, "cooperation" is misleading; the assistance of medical professionals is so essential that state law may require medical authorities to assist police investigations by performing blood draws upon an officer's request when the suspect consents or when the state's implied-consent rule is implicated.²¹³

IV. POLICE REFORM & THE BLURRED BLUE LINE

The prior two Parts illustrate how the popular conception of policing as an exclusively or primarily governmental activity is wrong as both a historical and contemporary matter, demonstrating that the Thin Blue Line is neither as thin nor as blue as it first appears. This Part explores the implications of that observation in the context of police reform. Calls for police reform are nothing new; indeed, criticism of modern policing predates policing itself.²¹⁴ Over at least the last 85 years, a legion of public commissions have studied policing at either a national or local level and used their findings to make reform recommendations, from the Wickersham Commission's 1931 *Report on Lawlessness in Law Enforcement*, which addressed issues with Prohibition enforcement, to President Obama's Task Force on 21st Century Policing, which released its final report in 2015.²¹⁵ Private organizations and nonprofits

questionable facts and the problems that can arise, see Stoughton, *supra* note 102; Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59 (2013); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012).

²¹¹ See, e.g., N.Y. STATE VEH. & TRAF. LAW § 1194(4)(a)(1) (West, Westlaw through 2017 legislation) ("At the request of a police officer, the following persons may withdraw blood for the purpose of determining the alcoholic or drug content therein: a physician, a registered professional nurse, a registered physician assistant, a certified nurse practitioner, or an advanced emergency medical technician as certified by the department of health.")

Officers are not entirely dependent on private actors. Arizona law allows blood to be drawn for investigative purposes by "a physician, a registered nurse, or another qualified person," ARIZ. REV. STAT. ANN. § 28-1388 (2017), and state courts have read "another qualified person" to include officers who receive specialized specific training in blood draws. *Arizona v. May*, 112 P.3d 39, 42 (Ariz. Ct. App. 2005). The Arizona Governor's Office of Highway Safety provides the principal funding for the state's Law Enforcement Phlebotomist Program, which certifies officers after a one-week training course is funded by the state. Ariz. Governor's Office of Highway Safety, Phlebotomy Program, <https://www.azgohs.gov/programs/default.asp?ID=48>. It is not yet clear how this program will adapt to the restrictions on warrantless blood testing. See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 579 U.S. ____ (2016).

²¹² I recognize, of course, that there are a number of public medical institutions, including university hospitals that do not fit into a strict definition of "private actors."

²¹³ Ordinarily, a search warrant can compel a suspect to furnish a blood sample, *Schmerber v. California*, 384 U.S. 757, 765 (1966), but a writ of assistance would be needed to compel a third-party to facilitate the search. State law typically permits medical providers to assist law enforcement upon request. See, e.g., ARIZ. REV. STAT. ANN. § 28-1388 (stating that a medical professional "may withdraw blood"); N.Y. STATE VEH. & TRAF. LAW § 1194(4)(a)(1) (similar). Some states, however, go further by requiring assistance as a matter of statutory law. See, e.g., N.C. GEN. STAT. § 20-139.1(c) ("[W]hen a blood . . . test is specified as the type of chemical analysis by a law enforcement officer, a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood sample . . . and no further authorization or approval is required"). It is not yet clear how mandatory cooperation statutes will be applied now that involuntary blood draws request a warrant or exigent circumstances.

²¹⁴ See *supra* notes 65–66 and accompanying text.

²¹⁵ NAT'L COMM'N ON LAW OBSERVANCE & ENF'T, NO. 11 REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 3–6 (1931); PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF

have done the same,²¹⁶ as have academics and other commentators²¹⁷ Since the shooting death of Michael Brown by Ferguson, Missouri, Police Officer Darren Wilson in the summer of 2014 and the national emergence of the #BlackLivesMatter movement,²¹⁸ there has been an unprecedented consensus among community members, commentators, politicians, and police executives that reform of some type is necessary.²¹⁹

The relevance of the blurred blue line to police reform efforts depends on one's perspective on reform and the emphasis one puts on different types of reform.²²⁰ One plausible position, for example, is that the conflation of public and private policing as it is described in this Article has no conceptual or practical implications for police reform. Such conflation lacks conceptual salience to the extent that one's interest in reform is limited to a particular category of actions—the infringement of individual privacy, liberty, and autonomy—only when those actions are performed by a particular entity—government agents. In that case, it may be argued, the dual observations that both governmental and non-governmental actors perform the same invasive actions and that they both also engage in behaviors that are not invasive may be irrelevant. And even if there were conceptual implications, one might reject the implications of the blurred blue line on practical grounds. Police reform, the argument goes, can be a distressingly slow and uneven process when it is limited to public police agencies; attempts to broaden the way we look at policing could further limit both the scope and pace of reform.

Those positions, and others of the same vein, are not without some merit, but they miss the point. My argument is neither that the distinctions between public and private policing should be ignored for purposes of reform nor that

THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 33 (May 2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf; *Corruption in Uniform; Excerpts of What the Commission Found: Loyalty Over Integrity*, N.Y. TIMES (July 7, 1994), <http://www.nytimes.com/1994/07/07/nyregion/corruption-uniform-excerpts-what-commission-found-loyalty-over-integrity.html?pagewanted=all> (discussing the Knapp and Mollen Commissions); JAMES G. KOLTS, SPECIAL COUNSEL, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT (July 1992), <http://www.clearinghouse.net/chDocs/public/PN-CA-0001-0023.pdf>; EISENHOWER FOUND., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, <http://www.eisenhowerfoundation.org/docs/kerner.pdf> (last visited June 27, 2017) (discussing the Kerner Commission); HUM. RTS. WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES, THE CHRISTOPHER COMMISSION REPORT [hereinafter SHIELDED FROM JUSTICE], <https://www.hrw.org/legacy/reports98/police/uspo73.htm> (last visited June 27, 2017).

²¹⁶ See, e.g., SHIELDED FROM JUSTICE, *supra* note 215 (detailing reports of incidents in various cities to demonstrate barriers to police accountability).

²¹⁷ No single footnote, nor even an entire article, is sufficient to list the range of scholars who have studied policing and offered suggestions for improvement on everything from agency culture to the use of force.

²¹⁸ The #BlackLiveMatter hashtag first appeared on social media after neighborhood watch volunteer George Zimmerman shot and killed Trayvon Martin. *About the Black Lives Matter Network*, BLACKLIVESMATTER, <http://blacklivesmatter.com/about/> (last visited June 27, 2017). It grew into an organized movement after the events in Ferguson. *A HerStory of the #BlackLivesMatter Movement*, BLACKLIVESMATTER, <http://blacklivesmatter.com/herstory/> (last visited June 27, 2017).

²¹⁹ This is not to suggest that all parties agree on what police reform should look like; that is certainly not the case.

²²⁰ See, e.g., Stoughton, *supra* note 5, at 611–12 (identifying calls for reforms to training, equipment, policies and procedures, and law).

both should be targeted for reform. Instead, my point is that a more holistic understanding of what policing *is* can better inform conversations about what policing *should be*. Even divorced from any particular policy preference, the blurred blue line is a relevant consideration for anyone interested in police reform. In every incarnation, reform efforts are directed at changing the nature of the police community/relationship, using a combination of incentives and disincentives to change officer behavior. A broader recognition of public and private policing, after all, can inform both the goals and mechanisms, the ends and the means, of police reform. In the following sections, I explain how a broader conception of policing, one that appreciates the blurred blue line, may affect the way reformers approach information gathering, the distribution of police resources, and the regulation of policing.

A. *Information Gathering*

Expanding the conventional understanding of policing to include at least some aspects of both public and private policing offers a potentially rich source of new information. There are, of course, meaningful differences that should lead us to be wary of casual comparisons. In the context of private security, Elizabeth Joh has persuasively argued that there are at least five dimensions of variation (goals, resources, legal powers, jurisdiction, and organizational location) and four distinct types of private policing (protective policing, intelligence policing, publicly contracted policing, and corporate policing) that make it a mistake to view private policing as a monolithic entity.²²¹ In the same vein, it would be a mistake to conflate public and private policing by citing to similarities without appreciating the dimensions of variation and distinct types of policing being performed. Accounting for those distinctions, however, may provide valuable information about how the various types of policing are performed differently given not just the variations that Joh identified, but also sharp distinctions in training, equipment, staffing, and agency principles. Those differences, once identified, can be scoured for lessons that may be applicable across the blurred blue line.

Recall, for example, that registered or licensed security guards in South Carolina who are “hired or employed to provide security services on a specific property [are] granted the authority and arrest power given to sheriff’s deputies” while on that property.²²² Whether and how those private security services differ in practice from geographic security services provided by government entities, such as court security officers and county sheriff’s deputies, can inform a range of policy decisions about who should secure government properties and, by going beyond the limited consideration of cost, how they should do so. The same thing is true with the private security patrol function; a superficial acknowledgement that it exists could be deepened to a

²²¹ Joh, *Conceptualizing*, *supra* note 9, at 596.

²²² S.C. CODE ANN. § 40-18-110 (2000). For a more thorough, if slightly outdated, discussion of statutes and common law governing private security, see NCJRS, SCOPE OF LEGAL AUTHORITY, *supra* note 110.

more robust understanding about how it compares to public police patrol not just in terms of cost, which is the most common consideration,²²³ but also in terms of legitimacy and effectiveness given the different aspects of the police function: law enforcement, order maintenance, and service provision. That, in turn, could lead to a more informed policy decision to discourage or promote greater integration of public and private policing.²²⁴ These issues have been formally addressed internationally, but have received scant attention in the United States.

There is, perhaps, little public interest in the static security or private patrol function themselves, but it is also true that the blurred blue line can be a source of information about the more controversial issues of police practices, including the use of force. It is often said that the state holds a monopoly on violence. It would be more accurate to say that the state holds a monopoly on legitimizing violence; government determines whether the use of force is permissible *ex ante*, primarily through the legislative process, and *ex post*, primarily through the executive (law enforcement) and judicial (adjudication) processes. Although a number of studies have sought to identify factors that correlate with police violence,²²⁵ it remains true that there is a startling lack of reliable national or regional data about police uses of force.²²⁶ A number of voices have called for more robust data-gathering efforts, including some voices within the federal government itself,²²⁷ and it may well be that case that expanding the dataset by including the use of force by private police may provide valuable insights. If a comparative review finds that there is a discrepancy in public and private police use force, which seems likely, thorough analysis can determine whether that discrepancy is solely attributable to the different functions that public and private officers fulfill, whether other factors—training, equipment, culture, organizational structure, the distinct legal standards that apply, and so on—affect how force is used. Further, analysis may help identify the role of force in advancing a

²²³ See, e.g., John Kiedrowski et al., *Police Civilianisation in Canada: A Mixed Methods Investigation*, 27 POLICING & SOC'Y 1 (Feb. 6, 2017).

²²⁴ See, e.g., PLURAL POLICING, *supra* note 10, at 12–23, 34–54 (discussing the integration of formal police bodies with private policing efforts in Netherlands and the funds allocated by the United Kingdom's Crime and Disorder Act of 1998 toward developing auxiliary patrol regimes).

²²⁵ There are far too many sources to cite in a single footnote, but they include Christopher J. Harris, *Police Use of Improper Force: A Systemic Review of the Evidence*, 4 VICTIMS & OFFENDERS 25 (2009); GEOFFREY P. ALPERT & ROGER G. DUNHAM, UNDERSTANDING POLICE USE OF FORCE (2004); William Terrill & Michael D. Resig, *Neighborhood Context and Police Use of Force*, 40 J. RESEARCH IN CRIM. & DELINQUENCY 291 (2003); Geoffrey P. Alpert & John M. MacDonald, *Police Use of Force: An Analysis of Organizational Characteristics*, 18 JUST. Q. 393 (2001); GEOFFREY P. ALPERT & ROGER G. DUNHAM, U.S. DEP'T OF JUSTICE, NAT'L CRIM. JUST. REFERENCE SERV. (NCJRS), NCJRS 183648, AN ANALYSIS OF POLICE USE-OF-FORCE DATA (2000); Charles Crawford & Ronald Burns, *Predictors of the Police Use of Force*, 1 POLICE Q. 41 (1998); Robert Worden, *The "Causes" of Police Brutality: Theory and Evidence on Police Use of Force*, in AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE (William A. Geller & Hans Toch eds., 1995); James J. Fyfe, *Police Use of Deadly Force: Research & Reform*, 5 JUST. Q. 165 (1988); Richard E. Kania & Wade C. Mackey, *Police Violence as a Function of Community Characteristics* 15 CRIM. 27 (1977).

²²⁶ GEOFFREY ALPERT ET AL., *Untitled Book*, Chapter 3 ("While individual police agencies collect information about their officers, providing a 'worm's eye view' of specific incidents, there is an almost complete lack of national data, effectively precluding a broader 'bird's eye view.'").

²²⁷ See, e.g., FBI, UNIFORM CRIME REPORTING, NATIONAL USE-OF-FORCE DATA COLLECTION, <https://ucr.fbi.gov/use-of-force> (last visited June 27, 2017).

particular function. To the extent that the public and private policing share the same goals, for example, one might study how the different rates of force relate to relative effectiveness in deterring crime or building public trust.

B. The Distribution of Police Resources

In addition to providing information about practices that may translate between private and public policing, the blurred blue line can be a source of information about the distribution of police resources and the nature of policing in different contexts. Policing is widely viewed as redistributive; the communities that provide the lion's share of the tax revenue that funds public policing efforts are typically not where the majority of policing takes place. Or, to provide a more nuanced view, those communities may receive a different mix of policing services than poorer communities; more community policing and problem-oriented policing, for example, and less enforcement oriented or zero-tolerance policing. Expanding the conception of policing to include private policing efforts, however, may change our understanding: the distribution of police resources may be less uneven while, at the same time, the nature of police activities may be even more lopsided. Returning to the debate about police uses of force, for example, the fact that black people are affected disproportionately is often explained, at least in part, by the fact that officers have more of a presence in the lower-income, higher-crime minority communities. This may well be the case if we define "officers" as public officers working their regular duty assignments. But if we take into account private policing efforts, the picture may change – defining police more broadly, we may find that there is a heavier police presence in high-income communities than was previously appreciated. If that's true, a racial discrepancy in the use of force may have less to do with police presence and officer-civilian interactions and more to do with the *nature* of policing and the quality of those interactions. So much seems intuitive—officers are, after all, far more likely to use force when making an arrest than during the course of a interaction unrelated to an enforcement action—but accounting for the full scope of policing activities will provide substantially more precision than current data permits.

Even outside the use-of-force context, efforts to accurately chart the distribution of police resources may fall short if they do not take the blurred blue line into account. These accounts are important, and not just for traditional crime control reasons. Economic modeling suggests that the allocation of police resources can influence crime, of course, but it can also affect housing prices, aggregate welfare, income inequality, and integration.²²⁸ If correct, those observations have important policy implications. "[S]ocieties with high levels of income inequality may face a complicated dilemma. Concentrated [police] protection may maximize aggregate welfare but exacerbate social disparities. In contrast, in more egalitarian societies, dispersed protection simultaneously maximizes

²²⁸ Sebastian Galiani et al., *Stirring Up a Hornets' Nest: Geographic Distribution of Crime* (Nat'l Bureau of Econ. Res. Working Paper No. 22166, Apr. 2016), <http://www.nber.org/papers/w22166.pdf>.

aggregate welfare and reduces social disparities.”²²⁹ But exploring the relationship between current practice and its policy implications assumes that current practice—the allocation of protective services—is easy identifiable. David Thacher, for example, has compared geographic measurements of income inequality against the number of publicly employed police employees per crime committed in that geographic area to find that “[p]olice protection has become more concentrated in the most advantaged communities—those with the highest per-capita incomes and the largest share of white residents.”²³⁰ Even relatively sophisticated measures may provide a misleading picture if they fail to account for the blurred blue line. Contemporary accounts may be under-inclusive if they omit private policing efforts, and they may be over-inclusive if they assume that public policing efforts have a consistently public orientation.

In a less academic vein, the allocation of police resources has traditionally been primarily concerned with police patrol.²³¹ That is, there has historically been a heavy emphasis on making sure that there was sufficient coverage, which is often defined by referring to the number of officers that cover a geographic area given the number and nature of calls for service.²³² Agencies make allocations based on the estimated number of on-duty officers, but while traditional methods account for factors like officers who are out sick or on vacation, they do not directly take into account factors like private policing efforts or officer moonlighting (that is, off-duty officers who are working in a police capacity for private employers). Incongruously, agencies that justify moonlighting policies by referring to the ameliorative effect of having off-duty officers handle calls for service may not take those effects into account when designing their patrol systems. A more comprehensive understanding of policing resources may provide benefits to the allocation of on-duty resources.

C. *The Regulation of Policing*

Understanding the blurred blue line may also prove to be an important consideration in how society regulates the practice of policing. Effective regulation requires an accurate understanding of the regulated activity. As I have written elsewhere in the context of constitutional regulation,²³³ factual misunderstandings about the police environment, police practices, and officer motivations can result in a misalignment between the legal or administrative regulation and the world that regulation was intended to effect. That misalignment, in turn, can result in the over- or under-regulation of policing, which is to say the over- or under-protection of rights. A similar observation may apply in the context of public and private policing: an incomplete understanding of policing can lead to regulation that is focused exclusively

²²⁹ *Id.* at 4.

²³⁰ David Thacher, *The Distribution of Police Protection*, 27 J. QUANTITATIVE CRIMINOLOGY 275 (2011).

²³¹ See, e.g., FRITSCH ET AL., *supra* note 102.

²³² *Id.*

²³³ Stoughton, *supra* note 102.

on policing as it is conducted by public officials *not* because the regulatory decision was driven by informed consideration of the options but instead because the blurred blue line was not considered at all. In this section, I discuss two possible ways that a broader conception of policing might affect constitutional and sub-constitutional regulation.

The Fourth Amendment limits the government's ability to infringe on civilians by requiring that such invasions be "reasonable."²³⁴ This restriction has given rise to what has been described as a "mess"²³⁵ of "embarrass[ing]"²³⁶ rules that seek to guide courts as they answer two interrelated questions: whether the government engaged in a search at all and, if so, whether that search was reasonable. With regard to the first part of that inquiry, the Supreme Court has developed the third-party doctrine, which obviates Fourth Amendment protections for information that has been knowingly revealed to a third party. The doctrine flows from the propositions that the Fourth Amendment protects reasonable expectations of privacy and that an individual does not have a reasonable expectation of privacy in information that they share.²³⁷ The third-party doctrine is deeply controversial among legal scholars and civil rights advocates. It is "the Fourth Amendment rule scholars love to hate[,] the *Lochner* of search and seizure law, widely criticized as profoundly misguided."²³⁸ Many, though not all, of the criticisms arise from the observation that an individual can share something and still expect it to be private and the intuition that such an expectation ought to be honored. Consider, for example, the criticism of the Court's decision in *United States v. Miller*, which held that bank records—checks, deposit slips, and the like—were not protected by the Fourth Amendment in part because the information was "voluntarily conveyed to the banks and exposed to their employees."²³⁹ In his highly influential search & seizure treatise, Wayne LaFare criticized that decision, quoting a California state court opinion that read, "It cannot be gainsaid that the customer of a bank expects that the documents, such as checks, which he transmits to the bank in the course of his business operations will remain private."²⁴⁰ As Criminal Procedure students know, criticisms of that nature are grounded in the observation that, in many contexts, our social norms rely on other people *not* looking at, not remembering, or not analyzing information that we display to them. We expect that, in most cases, people will use any information we give them for the limited purpose that we gave it to them. But not the police. Officers look at us *differently*. A number of objections to the third-party doctrine reflect discomfort with the idea of ignoring broad social norms about the communication of information.

²³⁴ U.S. CONST. amend. IV.

²³⁵ Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973).

²³⁶ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

²³⁷ *Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.")

²³⁸ Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009).

²³⁹ 425 U.S. 435, 435 (1976).

²⁴⁰ I WAYNE R. LAFARE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(c), at 975 (5th ed. 2012) (quoting *Burrows v. Superior Court*, 13 Cal. 3d 238 (1974)).

The blurred blue line both complicates the picture and offers a principled way to think about the third-party doctrine in non-absolute terms. Critics who advocate for the eradication of the third-party doctrine because it does not incorporate our behavioral norms and supporters who advocate for its continued application because it has some value even though it cuts against social expectations may both have an incomplete picture in mind. In some contexts, we casually expose information with the expectation that it will remain private. But in other contexts a reasonable person should know that the information they disclose is likely to be subjected to more than casual review, even if such review *isn't* by the police. The blurred blue line can help draw that line; sometimes it's reasonable to expect that a private party will look at information in the same way that a public police officer would. A more holistic view of policing might lead one to the position that the knowing exposure of information that a reasonable person could expect to be subjected to police-like scrutiny obviates the expectation of privacy, but a knowing exposure of information to a private party who is not reasonably expected to analyze that information in a police-like way does not. Applying the third-party doctrine through the filter of the blurred blue line might lead to a rule that bank records lack Fourth Amendment protection (to the extent they may be subject to internal audit by bank personnel) but call records remain protected because no one at the phone company is likely to subject them to critical analysis. There are, no doubt, a host of considerations that my hastily sketched out approach fails to take into account. My point here is not that limiting the third-party doctrine is normatively better than leaving it unchanged, eliminating it, or modifying it in some other way. Instead, my point is only that the blurred blue line offers a perspective that is largely missing from existing conversations about the constitutional regulation of policing.

A full appreciation for the blurred blue line may also provoke new conversations about the sub-constitutional regulation of policing, including what I describe here as semi-public private policing and semi-private public policing. As discussed above, I surveyed several hundred police agencies that collectively employ almost 20% of the non-federal officers in the country about moonlighting, the practice of permitting off-duty officers to work in a police capacity for private employers.²⁴¹ I found substantial variety in the way the practice is regulated by state law and administrative policies.²⁴² For example, under California law, the public agency that employs the officer bears “any and all civil and criminal liability” arising from an off-duty officer’s actions, even those taken on behalf of a private employer.”²⁴³ Mississippi, in contrast, makes the private employer liable for an off-duty officer’s actions and omissions; the state and state subdivisions are explicitly exempted.²⁴⁴ Given the frequency and importance of police moonlighting, this area is overdue for serious policy discussions.

²⁴¹ Stoughton, *supra* note 12.

²⁴² Stoughton, *supra* note 12, at pts. II & III.

²⁴³ Stoughton, *supra* note 12, at pts. II & III (citing CAL. PENAL CODE § 70(d)(2) (2016)).

²⁴⁴ Stoughton, *supra* note 12, at pts. II & III (citing MISS. CODE ANN. § 17-25-11(3) (2016)).

The same may be said for private efforts that support public policing. Increasingly, traditional police agencies are relying on private entities to not only gather massive quantities of information, but also to *analyze* that information. For police agencies, the goal is actionable intelligence; private vendors can provide information that agencies can readily act upon. Summaries of Federal Bureau of Investigation memoranda filed in *United States v. Rettenmaier*, for example, reflected that the FBI used the Geek Squad, Best Buy's computer repair service, as a "tripwire" to detect child pornography on customers' computers.²⁴⁵ The Bureau maintained what was described as a "close liaison with the Geek Squad management in an effort to glean case initiations and to support the division's Computer Intrusion and Cyber Crime programs." Geek Squad technicians were reportedly paid as confidential informants, receiving a bounty each time they found incriminating evidence.

Private actors do more than gather and sift through data; governmental agencies also rely on them to provide insight into how to *use* the information that has been collected and assessed. Police agencies and political subdivisions rely on private analysis to identify a range of problems and to develop operational solutions. For example, Palantir Law Enforcement, a division of a California-based company named for the magical seeing stones in the *Lord of the Rings*, advertises in its marketing materials that it "provides the LAPD with a full suite of analytical capabilities, including geospatial search, trend analysis, link charts, timelines, and histograms."²⁴⁶ It does so by reviewing data from multiple databases and making connections that might otherwise elude investigators. As a result, the investigative response is predicated on the results of third-party analysis: it is the private entity that identifies whom investigators should speak to, how to infiltrate criminal organizations, and so on.²⁴⁷ Further, police agencies, like law schools or other institutions of higher education, may hire strategic consultants to review practices or other data and made a range of recommendations about training, operations, community engagement, and so on. The Baltimore Police Department, for example, spent more than a quarter million dollars on a "police department consulting service contract" to develop "a strategic plan with goals and objectives for three and five years."²⁴⁸

Adopting a broad conception of policing may mean more robust regulation at three different points: the collection of data, the analysis of that data, and the response to that analysis. It does not appear, however, that the Constitution has sufficient regulatory reach. The constitution regulates

²⁴⁵Scott Moxley, FBI Used Best Buy's Geek Squad to Increase Secret Public Surveillance, OC WEEKLY, Mar. 8, 2017, <http://www.ocweekly.com/news/fbi-used-best-buys-geek-squad-to-increase-secret-public-surveillance-7950030>.

²⁴⁶ Responding to Crime in Real Time, PALANTIR, <http://www.palantir.com/wp-assets/wp-content/uploads/2014/03/Impact-Study-LAPD.pdf>.

²⁴⁷Shane Harris, Palantir Technologies Spots Patterns to Solve Crimes and Track Terrorists, WIRED, July 31, 2012, <http://www.wired.co.uk/article/joining-the-dots>.

²⁴⁸ Mark Reutter, Meet Baltimore's \$560-an-hour Cop Consultant, BALT. BREW, Apr. 24, 2013, <https://baltimorebrew.com/2013/04/24/meet-baltimores-560-an-hour-cop-consultant/>.

private actors who engage in state action,²⁴⁹ but that happens most clearly when a governmental agent explicitly directs the private actor's course of action. Sub-constitutional regulation may be necessary when the private actor is simply selling information—which was *not* gathered explicitly or exclusively for government purposes—to a public police agency. In the world of meta-data and large-scale analytics of consumer information, the blurred blue line serves as a reminder of the potential need to regulate information and information services that are sold or provided to the police, especially when the police are one of several potential buyers.

V. CONCLUSION

Modern policing is conceived of as the Thin Blue Line, a wall of police officers who are all that stands between ordered, civilized society and the anarchic, criminal element that constantly threatens it. But as evocative as that dramatic imagery is, it inaccurately suggests that public officers are the exclusive provider of policing services. That has never been the case. Building on existing literature, this article explored the historical and contemporary overlaps between public and private policing, demonstrating that the Thin Blue Line is neither as thin nor as blue as it first appears. To identify the nature of those overlaps, this article described four different phenomena: private policing; semi-public private policing; semi-private, public policing; and public policing. Each category abounds with everyday behaviors that blur the line between public and private policing. From private security guards initiating traffic stops in gated neighborhoods and patrolling government buildings to privately created police forces, from off-duty police officers working in uniform for private employers to the use of plainclothes officers and police informants, modern policing efforts are best described as “the blurred blue line.” The fact that such efforts are utterly ordinary only strengthens the argument that the popular conception of policing requires revision: the blurred blue line is not some exceptional aspect of contemporary policing, it *is* contemporary policing.

This article explored some of the ways in which a broader conception of policing, one that takes into account the blurred blue line, might affect the process of police reform. A more holistic understanding of what policing *is* can better inform conversations about what policing *should be*. In every incarnation, reform efforts are directed at changing the nature of the police community/relationship through a combination of incentives and disincentives to change officer behavior and police culture. A broader recognition of public and private policing can inform both the goals and mechanisms, the ends and the means, of police reform. It can do so in at least three ways. First, expanding the conventional understanding of policing to include at least some aspects of both public and private policing offers a potentially rich source of new information about how policing is performed and the extent to which policing efforts may be considered successful.

²⁴⁹ See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

Second, a greater appreciation for the blurred blue line may lead us to rethink the distribution of police resources in society. Consider that racially disparate aspects of policing—including stops, arrests, and uses of force—are often related to the relatively heavy police presence in poor, minority communities. In short, the story goes, police just go where the crime is. That may be true of *public* officers, but if we take into account private policing efforts, the picture may change – defining police more broadly, we find that there is a far heavier police presence in high-income communities than was previously appreciated. That suggests that the racial discrepancy in police activities may have less to do with police presence and the number of officer-civilian interactions and more to do with the *nature* of policing and the quality of those interactions. Taken seriously, the blurred line between public and private policing may lead us to reconsider systemic problems, their underlying causes, and promising solutions.

Third and finally, understanding the blurred blue line may also prove to be an important consideration in how society regulates the practice of policing. Effective regulation requires an accurate understanding of the regulated activity; an incomplete understanding of policing can lead to regulation that is focused exclusively on policing as it is conducted by public officials *not* because the regulatory decision was driven by informed consideration of how policing should be defined but instead because the blurred blue line was not considered at all. From constitutional conundrums such as the third-party doctrine to state workers compensation liability, the blurred blue line brings into sharp focus a range of regulatory considerations that are customarily overlooked.

This Article intentionally does not provide a normative determination about the blurred blue line. My goal was not to establish that it is good or bad; my goal was instead to establish that it *is*. Going beyond the conventional understanding of policing will not simplify the process of police reform. If anything, a more robust appreciation of the blurred blue line will complicate something that is already complex. Yet this additional complexity is necessary to fully understand policing so that lasting reform becomes possible.