

ESSAY

THE NEW OUTLAWRY

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From subtle shifts in the procedural mechanics of self-defense doctrine to substantive expansions of justified lethal force, legislatures are delegating larger amounts of “violence work” to the private sphere. These regulatory innovations layer on top of existing rules that broadly authorize private violence—both defensive and offensive—for self-protection and the ostensible maintenance of law and order. Yet such significant authority for private violence, and the values it projects, can have tragic real-world consequences, especially for marginalized communities and people of color.

We argue that these expansions of private violence tap into an ancient form of social control—outlawry: the removal of the sovereign’s protection from a person and the empowerment of private violence in service of law enforcement and punishment. Indeed, we argue that regulatory innovations in the law of self-defense, defense of property, and citizen’s arrest form a species of “New Outlawry” that test constitutional boundaries and raise profound questions about law and violence, private and public action.

Simultaneously, we use the New Outlawry as a frame to explore connections between several constitutional doctrines heretofore considered distinct. Whether limits on authorized private violence fall under the state action doctrine, the private nondelegation doctrine, due process or equal protection, or the republican form of government guarantee, experimentation with the New Outlawry provides an opportunity to explore how these different doctrinal categories share common jurisprudential and normative roots in the state’s monopoly over legitimate violence.

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INTRODUCTION

From subtle shifts in the procedural mechanics of self-defense doctrine¹ to substantive expansions of justified lethal force,² many red-state legislatures across the country are delegating larger amounts of “violence work”³ to the private sphere. In the wake of antiracism protests in summer 2020, Republican-dominated legislatures proposed a slew of such measures.⁴ The measures provide private citizens greater license to

1. See Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, 96 S. Cal. L. Rev. 509, 523–528 (2023) [hereinafter Ruben, *Self-Defense Exceptionalism*] (exploring the shifts in self-defense doctrine).

2. See *infra* Part II.

3. Micol Seigel, *Violence Work: State Power and the Limits of Police* 12 (2018) (discussing the range of public and private actors who act as “channels for violence condoned by the state”).

4. See, e.g., Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)*, N.Y. Times (Apr. 21, 2021), <https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html> (on file with the *Columbia Law*

engage in violence to protect themselves from perceived threats and, supposedly, to contribute to the public maintenance of law and order.⁵

Some proposals have been drastic, potentially upsetting what previously had been thought settled practice and doctrine. New Hampshire lawmakers proposed authorizing deadly force against someone who is “likely to use *any* unlawful force in the commission of riot.”⁶ Arizona legislators wanted to authorize deadly force whenever a property owner reasonably believed it necessary “to prevent the other’s commission of criminal damage” to the property.⁷ Missouri lawmakers sought to create a statutory presumption that any interpersonal violence was justified by self-defense, entitling an actor to presumptive immunity from arrest, prosecution, and conviction.⁸ Florida Governor Ron DeSantis proposed a measure that would permit private deadly force to prevent looting, criminal mischief, or arson that disrupts a business operation.⁹

Review) (last updated June 23, 2023) (describing measures that were “part of a wave of new anti-protest legislation, sponsored and supported by Republicans, in the 11 months since Black Lives Matter protests swept the country following the death of George Floyd”); see also Jon Michaels & David Noll, *Vigilante Democracy* (forthcoming 2024) (manuscript at 10–12) (on file with the *Columbia Law Review*) (arguing that the Charlottesville protests leading to the death of Heather Heyer demonstrated a power to silence political speech through political violence “that could be wielded by a highly motivated and weaponized group of true believers, willing to do what was necessary to Make America Great Again”).

5. See *infra* Part II (explaining both kinds of greater liberalization); see also Rafi Reznik, *Taking a Break from Self-Defense*, 32 *S. Cal. Interdisc. L.J.* 19, 22 (2022) (“[F]ollowing their historical precursors who used private violence to conserve a political and economic order that put them atop the social hierarchy, contemporary vigilantes can claim both self-defense and ‘law and order’ on their side.”).

6. HB 197 (2021): Allow Deadly Force Defending a Person in a Vehicle, Citizens Count, <https://www.citizenscount.org/bills/hb-197-2021/> [<https://perma.cc/9FV6-KLZS>] (last visited Jan. 29, 2024) (emphasis added); see also US Protest Law Tracker, Int’l Ctr. for Not-For-Profit L., <https://www.icnl.org/usprotestlawtracker/> [<https://perma.cc/NML5-RLHA>] (last visited Jan. 29, 2024).

7. S. 1650, 55th Leg., 2d Reg. Sess. (Ariz. 2022) (emphasis omitted). The proposed bill referred to “criminal damage under section 13-1602, subsection A, paragraph 7,” but the relevant section of the Arizona Code appears to only have six paragraphs in subsection A. See *Ariz. Rev. Stat. Ann.* § 13-1602(a) (2024). In a similar vein, one Arizona legislator was reported to have introduced a bill loosening the ability to use lethal force against suspected undocumented immigrants who trespass on private property. See Leah Britton, *GOP Bill Would Make It Easier for AZ Ranchers to Shoot and Kill Border-Crossers on Their Property*, *AZ Mirror* (Feb. 23, 2024), <https://azmirror.com/2024/02/23/republican-bill-would-let-az-ranchers-shoot-and-kill-border-crossers-on-their-property/> [<https://perma.cc/CZX2-GHG6>]. A legislative supporter of the bill called it “a great Second Amendment bill.” *Id.* (internal quotation marks omitted).

8. See *infra* section II.B. The law was referred to as the “Make Murder Legal Act” by law enforcement groups and was narrowly defeated in committee. See Gregg Palermo, *Missouri Bill Dubbed ‘Make Murder Legal Act’ Dies in Senate Committee*, *Fox2now* (Feb. 10, 2022), <https://fox2now.com/news/missouri-bill-dubbed-make-murder-legal-act-dies-in-senate-committee> [<https://perma.cc/8N6B-NPVD>]. For more on the operation of this law, see *infra* text accompanying notes 232–243.

9. Erik Ortiz, “Stand Your Ground” in Florida Could Be Expanded Under DeSantis’ “Anti-Mob” Proposal, *NBC News* (Nov. 12, 2020), <https://www.nbcnews.com/news/us->

These proposals capture a cultural zeitgeist that increasingly condones violence, especially directed at those perceived as outsiders or political antagonists.¹⁰ Some measures have gone beyond mere proposals. Numerous states have relaxed their rules for civilian use of force, authorizing private citizens to mete out violence in a greater number of situations.¹¹ In 2018, for example, Idaho passed a law expanding its justifiable homicide statute to permit deadly force in defense of “a place of business or employment” against anyone who “manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the . . . place of business or employment.”¹² Professor Cynthia Lee documents how states have expanded the defense of habitation—the traditional right to use deadly force to defend one’s home—to many more places than the dwelling.¹³ As Professor Mary Anne Franks writes, laws like these are “a significant departure from the long-held belief that the use of deadly force should not be used to protect mere property.”¹⁴

news/stand-your-ground-florida-could-be-expanded-under-desantis-anti-n1247555/
[<https://perma.cc/45QH-JCN3>].

10. See Anthony Michael Kreis, *The New Redeemers*, 55 *Ga. L. Rev.* 1483, 1488–89 (2021) (“After four years, the American right’s full-throated embrace of grievance politics at the behest of Donald Trump created a tinderbox. This period was nothing short of a slow burning Second Redemption.” (footnote omitted)); see also Nicole Hemmer, *Opinion, Jason Aldean Can’t Rewrite the History His Song Depends on*, CNN, <https://www.cnn.com/2023/07/20/opinions/opinion-jason-aldean-video-cmt-vigilantism-hemmer/index.html> [<https://perma.cc/A396-HWVE>] (last updated July 20, 2023) (describing the “toxic message” behind Jason Aldean’s song “Try That in a Small Town” in which he threatens that “those who step out of line . . . —whether they ‘cuss out a cop’ or ‘stomp on a flag’—will find themselves facing down ‘the gun that my granddad gave me’” (quoting Jason Aldean, *Try That in a Small Town* (BBR Music Grp. 2023))).

11. See *infra* Part II.

12. Act of Mar. 21, 2018, ch. 222, § 1, 2018 Idaho Sess. Laws 500–501 (codified at Idaho Code § 18-4009 (2024)). The statute says such force is only justified if the intruder entered for the purpose of “offering violence,” but the new amendment provides that “a person who unlawfully and by force or by stealth enters or attempts to enter a . . . place of business or employment . . . is presumed to be doing so with the intent to commit a felony.” *Id.* The year prior, Iowa also created a presumption that a person reasonably believed deadly force was necessary when they used that force against one who was “[u]nlawfully entering the . . . place of business or employment . . . of the person using force by force or stealth, or has unlawfully entered by force or stealth and remains within the . . . place of business or employment.” Act of Apr. 13, 2017, ch. 69, § 39, 2017 Iowa Acts 177 (codified at Iowa Code § 704.2A (2024)).

13. See Cynthia Lee, *Firearms and the Homeowner: Defending the Castle, the Curtilage, and Beyond*, 108 *Minn. L. Rev.* (forthcoming 2024) (manuscript at 4–5) (on file with the *Columbia Law Review*).

14. See Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women’s Syndrome, and Violence as Male Privilege*, 68 *U. Mia. L. Rev.* 1099, 1106 (2014).

Journalist Alex Pareene also chronicles an uptick in legislation immunizing drivers who run over protesters.¹⁵ Iowa, for instance, provides civil immunity to drivers who, while “exercising due care,” run over protesters blocking public highways.¹⁶ And Oklahoma provides civil and criminal immunity for persons who unintentionally injure another if they reasonably believe they must flee a riot in their vehicle and exercise due care.¹⁷ Not coincidentally, legislative interest in these laws picked up after the protests arising from George Floyd’s 2020 murder.¹⁸

These regulatory innovations layer on top of existing rules that broadly authorize private violence, like expansive stand-your-ground and citizen’s arrest laws. Stand-your-ground laws give citizens the right to use deadly force even when they could safely leave an encounter.¹⁹ In doing so, they provide private actors the prerogative of police, who also owe no duty to retreat from a potentially deadly scenario.²⁰ Yet “this transformation of citizen into cop,” argues Professor Kimberly Ferzan, “is practically redundant because little-known citizen’s arrest laws already do just that.”²¹ Citizen’s arrest laws grant private citizens the right to

15. See Alex Pareene, *The Right to Crash Cars Into People*, *New Repub.* (Apr. 24, 2021), <https://newrepublic.com/article/162163/republicans-anti-riot-laws-cars/> [<https://perma.cc/N2BW-667T>].

16. See Iowa Code § 321.366A (conferring immunity from civil liability for “[t]he driver of a vehicle who is exercising due care and who injures another person who is participating in a protest, demonstration, riot, or unlawful assembly or who is engaging in disorderly conduct and is blocking traffic in a public street”).

17. Okla. Stat. tit. 21, § 1320.11 (2024).

18. See U.S. Current Trend: Bills Provide Immunity to Drivers Who Hit Protesters, *Int’l Ctr. for Not-For-Profit L.* (Sept. 2021), <https://www.icnl.org/post/analysis/bills-provide-immunity-to-drivers-who-hit-protesters/> [<https://perma.cc/AZ53-2H8D>]; see also Nancy C. Marcus, *When “Riot” Is in the Eye of the Beholder: The Critical Need for Constitutional Clarity in Riot Laws*, 60 *Am. Crim. L. Rev.* 281, 300–01 (2023) (discussing how “riot” designation can be pivotal in these driver immunity statutes); Epstein & Mazzei, *supra* note 4. The timing of these laws, in response to heightened attention about inequality, should come as no surprise. See Seigel, *supra* note 3, at 182 (arguing that “the more unequal are social relations, the more violence is required to preserve social hierarchies, and a cycle of exacerbated inequality and correspondingly greater violence can ensue as elites attempt to keep other people from leaving or revolting”).

19. See, e.g., Wyatt Holliday, Comment, “The Answer to Criminal Aggression is Retaliation”: Stand-Your-Ground Laws and the Liberalization of Self-Defense, 43 *U. Tol. L. Rev.* 407, 418–20 (2012) (explaining Florida’s permissive self-defense laws, which largely eliminate any duty to retreat if attacked); see also Ann Marie Cavazos, *Unintended Lawlessness of Stand Your Ground: Justitia Fiat Coelum Ruat*, 61 *Wayne L. Rev.* 221, 222 (2016) (describing the “castle law,” which is the “general idea that a man will be excused for using force to defend his home”).

20. Kimberly Kessler Ferzan, Response, *Stand Your Ground*, in *The Palgrave Handbook of Applied Ethics and the Criminal Law* 731, 742 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019).

21. Kimberly Kessler Ferzan, Response, *Taking Aim at Pointing Guns? Start with Citizen’s Arrest, Not Stand Your Ground*, 100 *Tex. L. Rev. Online* 1, 8 (2021), <https://texaslawreview.org/wp-content/uploads/2021/09/Ferzan.Publication.pdf> [<https://perma.cc/L4HA-JU4F>] [hereinafter Ferzan, *Taking Aim*].

coercively capture and detain suspected wrongdoers, often with little to no training and few to none of the constitutional protections that circumscribe police-initiated arrests.²² When these citizen's arrest privileges are coupled with expansive stand-your-ground immunities, private citizens obtain powers to use violence that equal—and sometimes exceed—the powers of professional law enforcement.²³

Such broad authority for private violence workers—and its expressive effects—can have disastrous real-world consequences. The stories are familiar and harrowing. Ahmaud Arbery, a twenty-five-year-old African American man, was simply out for a jog when three men chased him down in a vehicle and shot him. The killers claimed to be engaging in armed civilian policing in response to a series of recent break-ins in the neighborhood.²⁴ But for the fact that one individual recorded the homicide, a criminal case against the three men may never have been brought. At trial, the defendants claimed both a right to engage in citizen's arrest and a right to self-defense.²⁵ On his own initiative, Kyle Rittenhouse traveled interstate to Kenosha, Wisconsin, to provide volunteer security services amid racial justice protests in the city and ended up killing two men.²⁶ Daniel Perry ran a red light, drove into protesters at a racial justice rally, and then shot and killed a legally armed protester who approached his vehicle.²⁷ Perry had previously texted a friend that he “might go to

22. See *infra* section II.A.

23. They may even exceed the power available to members of the military. See ABA, National Task Force on Stand Your Ground Laws: Final Report and Recommendations 5–6 (2015) (“Texas law provides a more lenient rule for a civilian’s use of a firearm than is available to a police officer or even a [soldier] at war, notwithstanding the fact that police officers and military officers receive extensive firearms and defensive training.”); *id.* at 22 (quoting Christopher Jenks, a Texas law professor and former U.S. military member, as saying that it’s “troubling that under Stand Your Ground, there are less restrictions imposed on U.S. service members using deadly force when they return to the United States than when they are deployed in a combat environment”).

24. Joseph Margulies, *How the Law Killed Ahmaud Arbery*, *Bos. Rev.* (July 7, 2020), <https://www.bostonreview.net/articles/joseph-margulies-arbery-shooting/> [<https://perma.cc/FA75-QK3C>].

25. Clare Hymes, *Closing Arguments in Trial for Ahmaud Arbery’s Killing Focus on Citizens’ Arrest Law and Claim of Self-Defense*, CBS News, <https://www.cbsnews.com/live-updates/ahmaud-arbery-murder-trial-closing-arguments-day-1/> [<https://perma.cc/YXK8-7RG3>] (last updated Nov. 23, 2021).

26. See Ruben, *Self-Defense Exceptionalism*, *supra* note 1, at 510–12 (discussing Rittenhouse’s case from a self-defense perspective); Paige Williams, *Kyle Rittenhouse, American Vigilante*, *New Yorker* (June 28, 2021), <https://www.newyorker.com/magazine/2021/07/05/kyle-rittenhouse-american-vigilante/> (on file with the *Columbia Law Review*) (“[T]hanks to the opportunists who have seized on the Rittenhouse drama, the case has been framed as the broadest possible referendum on the Second Amendment. No other legal case presents such a vivid metaphor for the country’s polarization.”).

27. Eric Levenson, *Lucy Kafanov & Nouran Salahieh, Daniel Perry, Army Sergeant Convicted of Murder for Shooting Black Lives Matter Protester, Asks for 10 Years in Prison*, CNN, <https://www.cnn.com/2023/05/09/us/daniel-perry-texas-sentencing/index.html> [<https://perma.cc/S8ZQ-6RCP>] (last updated May 10, 2023).

Dallas to shoot looters.”²⁸ Some of these men were convicted of crimes. Others were not.²⁹

These permissive laws and the constitutional and policy questions they raise are not entirely novel. After all, as Professor Farah Peterson reminds, “There are more than enough signs, for those looking to find them, that violence has been an integral part of the American system of government from the Founding era.”³⁰ Indeed, “[v]iolence is the double-edged sword of democracy.”³¹ It has been used to secure safety and freedom since the beginning but also used to undermine democratic institutions and to subordinate people. Recent events, legislative experimentation with ever-expansive spheres of private authority,³² and a growing public distrust of governing institutions and fellow citizens make questions about authorized private violence newly urgent.³³

28. Jim Vertuno, *Man Guilty in Texas Protest Killing Posted ‘I Am a Racist’*, Associated Press (May 9, 2023), <https://apnews.com/article/black-lives-matter-protest-shooting-texas-sentence-04abb51c52d41fa259b2f2ed8ee72f37/> [<https://perma.cc/2RFQ-KV2V>] (internal quotation marks omitted).

29. See, e.g., Andrea A. Amoa, *Comment, Texas Issues a Formidable License to Kill: A Critical Analysis of the Joe Horn Shootings and the Castle Doctrine*, 33 *T. Marshall L. Rev.* 293, 296–97, 313 (2008) (describing the case of Joe Horn, who was not indicted after shooting and killing two men who had burglarized his neighbor’s home, despite the 911 operator telling him that property is not worth killing over).

30. Farah Peterson, *Our Constitutionalism of Force*, 122 *Colum. L. Rev.* 1539, 1548 (2022); see also Jared A. Goldstein, *Real Americans: National Identity, Violence, and the Constitution* 184 (2022) (describing what he calls the “Violent Constitution” and tracing “recent movements that rely on the Constitution as justification for antigovernment violence”); Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1610 n.22 (explaining the centrality of violence to “the practice of law and government”). As Robert Cover says, “[R]ead the Constitution. Nowhere does it state, as a general principle, the obvious—that the government thereby ordained and established has the power to practice violence over its people. That, as a general proposition, need not be stated, for it is understood in the very idea of government.” *Id.*

31. Kellie Carter Jackson, *Force and Freedom: Black Abolitionists and the Politics of Violence* 4 (2019).

32. See Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 107 *Cornell L. Rev.* 1187, 1191 (2023) [hereinafter Michaels & Noll, *Vigilante Federalism*] (exploring “the nascent surge in private subordination regimes and understand[ing] it as both a symptom and an accelerant of today’s dominant legal, cultural, and political movements”).

33. See *id.* at 1190–91 (studying a related “broader trend among state legislatures to use private rights of action to penalize and suppress highly personal and often constitutionally protected activities”); Peterson, *supra* note 30, at 1548 (discussing how the post–January 6, 2021, era should affect the analysis of violence and governance). We recognize that the effect of these kinds of laws raise empirical questions. This project, however, should be conceived of as one of spotting a trend and surfacing the issues that arise from them, perhaps before any demonstrable impact on homicides, racial violence, or other metrics can be assessed. We are also cognizant that even small but salient effects of privatized violence can have important behavioral impacts on other margins. For example, unpunished—and often approved—white supremacist terror in the South had a century-long impact on the political composition of the national government. See Richard White, *The Republic for Which It Stands* 622 (2017) (finding that by 1888, “[s]outhern fraud and violence ensured that every white vote in the South was worth two Northern votes in presidential elections”).

This Essay builds on our prior work outlining the limits of the state's authority to delegate violence³⁴ and makes two primary contributions to debates about delegation,³⁵ privatization,³⁶ and violence.³⁷

34. See Jacob D. Charles & Darrell A.H. Miller, *Violence and Nondelegation*, 135 *Harv. L. Rev. Forum* 463, 472 (2022), <https://harvardlawreview.org/wp-content/uploads/2022/06/135-Harv.-L.-Rev.-F.-463.pdf> [<https://perma.cc/V5ZT-QV9J>]; see also David M. Lawrence, *Private Exercise of Governmental Power*, 61 *Ind. L.J.* 647, 647 (1986) [hereinafter Lawrence, *Private Exercise*] (recognizing that “[t]he transfer of governmental powers raises the issue of to what extent it is constitutionally permissible to delegate those powers to private actors”).

35. Many of these debates are about intergovernmental power. See generally F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 *Va. L. Rev.* 281 (2021) (adding to the debate concerning the level of delegation that should be permitted in criminal law and arguing criminal courts should permit less delegation than in other areas of law); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 *Colum. L. Rev.* 277 (2021) (making an originalist argument against constitutional nondelegation); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence From the Federal Tax on Private Real Estate in the 1790s*, 130 *Yale L.J.* 1288 (2021) (arguing in favor of the permissibility of congressional delegation by looking to acts of Congress from 1789–1800); Ilan Wurman, *Nondelegation at the Founding*, 130 *Yale L.J.* 1490 (2021) (arguing that, during the Founding Era, a nondelegation doctrine existed that did not permit delegation of important issues from Congress to the Executive).

But there is also a rich and burgeoning literature about private delegation and even delegations in the context of coercive government powers. See, e.g., Robert Craig & André Douglas Cummings, *Abolishing Private Prisons: A Constitutional and Moral Imperative*, 49 *U. Balt. L. Rev.* 261, 282–83 (2020) (discussing private nondelegation in the context of for-profit incarceration); Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 *Fla. L. Rev.* 31, 50 (2021) (discussing the history of private nondelegation doctrine); Richard Primus & Roderick M. Hills, Jr., *Suspect Spheres, Not Enumerated Powers: A Guide for Leaving the Lamppost*, 119 *Mich. L. Rev.* 1431, 1470 (2021) (articulating a “corporate nondelegation doctrine” limiting government delegation to private corporations); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 *Conn. L. Rev.* 879, 969–70 (2004) (discussing and critiquing force privatization as a form of delegation); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 *Harv. J.L. & Pub. Pol’y* 931, 955 (2014) (discussing both federal and state nondelegation doctrine and distinguishing them from due process concerns).

36. See, e.g., Chiara Cordelli, *The Privatized State* 9 (2020) (arguing that the most significant wrong of privatization is that it “consists in the creation of an institutional arrangement—the privatized state—that denies, to those subject to it, equal freedom, understood not as mere noninterference but rather as a relationship of reciprocal independence”) [hereinafter Cordelli, *The Privatized State*]; Catherine M. Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* 1 (2007) (“In the complex and managerial context of modern government, private non-governmental actors exercise delegated legislative and executive powers as a matter of regularity, and not uncommonly, they exercise judicial power too.”); Jon D. Michaels, *Constitutional Coup: Privatization’s Threat to the American Republic* 4 (2017) [hereinafter Michaels, *Constitutional Coup*] (discussing the constitutional dimensions of broad privatization of government functions in a number of spheres); Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It* 1 (2007) (“The government exercises sovereign powers. When those powers are delegated to outsiders, the capacity to govern is

First, this Essay reframes the authorization and toleration of private violence from a libertarian model to one that better reflects Anglo-American political and legal traditions. This reframing exposes these efforts as less about expanding negative liberty and more about implementing an affirmative program of social control, especially targeting marginalized communities.³⁸ The Essay then affixes a label to this phenomenon, calling it the “New Outlawry.” The New Outlawry shares features with the ancient practice of outlawry, in which the sovereign removed the protection of the law from designated individuals and left them vulnerable to the plenary use of private violence by any other person.³⁹ Like traditional outlawry, the state leverages its monopoly on legitimate violence by dispersing it, empowering and immunizing private violence for public ends. Unlike traditional outlawry, however, the New Outlawry minimizes or abandons the *ex ante* procedural controls on who is exiled from the protection of the law; and it operates in ways that are (1) both more and less particularized, and (2) both more and less temporally contingent. The New Outlawry also operates in ways in which racialized preconceptions and biases are covert but no less fatal.

Second, this Essay uses the New Outlawry as a vehicle to explore constitutional limitations on empowerment of private force wielders. Many discrete constitutional domains—state action doctrine, the private nondelegation doctrine, due process and equal protection, and the republican form of government guarantee—rely on an intuition that there are constitutional boundaries to delegation to private parties, especially

undermined”); Chiara Cordelli, *The Wrong of Privatization: A Kantian Account*, in *The Cambridge Handbook of Privatization* 21, 21 (Avihay Dorfman & Alon Harel eds., 2021) (“[E]ven if privatization could facilitate the achievement of socially desirable goals, there would still be non-instrumental reasons to object to it (or, at least, to many of its instances).”); Gillian E. Metzger, *Privatization as Delegation*, 103 *Colum. L. Rev.* 1367, 1501–02 (2003) (exploring accountability mechanisms for private delegation).

37. See *supra* notes 19–23. There have been some scholarly explorations of the limits of violence delegation, but these generally cover only one aspect of the problem and were written before the current environment and escalating legal permissions called for new attention. See, e.g., F. Patrick Hubbard, *The Value of Life: Constitutional Limits on Citizens’ Use of Deadly Force*, 21 *Geo. Mason L. Rev.* 623, 623–24 (2014) (proposing a strict-scrutiny-like tailoring regime for private uses of deadly force); Rosky, *supra* note 35, at 966–70 (discussing privatized force in the context of political liberalism); John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 *Notre Dame L. Rev.* 1237, 1242 (2014) (outlining deadly force as a nondelegable government function).

38. See Sean A. Hill II, *The Right to Violence* 6–8 (Ohio State Legal Stud. Rsch. Paper No. 811, 2023), <https://ssrn.com/abstract=4634278> [<https://perma.cc/US7Z-T5AR>] (drawing attention to the way that a *de facto* right to engage in violence accrues to white people and stands at its apex when used to subordinate racial minorities); see also Shawn E. Fields, *Neighborhood Watch: Policing White Spaces in America* 5 (2022) (exploring how racial fear drives private policing of Black people, including “by exacting vigilante justice through extrajudicial killing under the guise of self-defense and standing one’s ground”).

39. It should not come as a surprise that many of these laws are enacted in jurisdictions sympathetic to an ideology that Professor Anthony Michael Kreis calls the “Second Redemption.” See Kreis, *supra* note 10, at 1488–89.

with respect to violence. But as of yet, few scholars have discussed how these doctrinal areas are linked. State experimentation with the New Outlawry provides an opportunity to explore how these different doctrinal categories share common jurisprudential and normative roots.

The following analysis builds on open questions in this debate. As one scholar recently underscored, “[L]ittle contemporary work has been done examining when governments may permissibly authorize deadly force apart from self-defense”⁴⁰—or, one should add, on the limits of that authorization even when characterized as self-defense. Many scholars who have written about private policing focus on the professional, institutional, paid private security guards patrolling malls, gated communities, retail stores, and similar venues.⁴¹ Other studies of privatized violence focus on the outsourcing of national security efforts to private military contractors.⁴²

This Essay focuses on the unpaid, “volunteer,” noninstitutionalized, domestic private policers who do not wear uniforms (at least not the retail kind) or answer to corporate decisionmakers. Despite differences with their formalized and professional peers—both public and corporate

40. Robert Leider, *Taming Self-Defense: Using Deadly Force to Prevent Escapes*, 70 Fla. L. Rev. 971, 1008 (2018) [hereinafter *Leider, Taming Self-Defense*].

41. See, e.g., Wilbur R. Miller, *A History of Private Policing in the United States 1* (2020) [hereinafter *Miller, A History of Private Policing*] (exploring the provision of “order maintenance, detection and prevention of crime” by private companies in the commercial, residence, and leisure sectors); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. Crim. L. & Criminology 49, 55 (2004) [hereinafter *Joh, Paradox of Private Policing*] (defining “private policing” for her purposes 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” (emphasis omitted)); Hans-Bernd Schäfer & Michael Fehling, *Privatization of the Police*, in *The Cambridge Handbook of Privatization* 206, 206–07 (Avihay Dorfman & Alon Harel eds., 2021) (examining “civilian private security in relation to public police”); David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1166–68 (1999) (discussing private police “to demonstrate why private policing deserves more attention from legal scholars, to suggest what forms that attention should take, and to draw some tentative lessons from the little we already know”); Comment, *Private Police Forces: Legal Powers and Limitations*, 38 U. Chi. L. Rev. 555, 556 (1971) [hereinafter *Private Police Forces*] (“Although private police perform numerous functions, including the provision of armored car, patrol, and investigation services, they are used most extensively as uniformed guards in industrial and retail settings.”); see also Ric Simmons, *Private Criminal Justice*, 42 Wake Forest L. Rev. 911, 919 (2007) (noting that “[t]he degree to which private entities have taken over law enforcement functions in this country is extraordinary” and describing the ubiquity of private police).

42. See, e.g., Maryam Jamshidi, *The Private Enforcement of National Security*, 108 Cornell L. Rev. 739, 741–42 (2023) (seeking to “analyze national security’s private enforcement for the first time”); Herbert Wulf, *The Privatization of Violence: A Challenge to State-Building and the Monopoly on Force*, 18 Brown J. World Affs. 137, 137–38 (2011) (examining the “privatization of traditionally military and police functions” as one “strateg[y] . . . to tackle the security dilemma”); see also Jon D. Michaels, *Deputizing Homeland Security*, 88 Tex. L. Rev. 1435, 1437 (2010) (discussing the “deputization” of a “new cadre of private snoops, data crunchers, and . . . vigilantes” that purport to assist in homeland security).

ones⁴³—these private actors are also imbued with significant authority.⁴⁴ And this Essay argues that, at least in some circumstances, the state should be responsible when it delegates power to private parties to deal out violence, especially violence that the state itself could not lawfully engage in.⁴⁵ The object in this Essay is to surface and scrutinize the deep legal and theoretical issues that arise when the state decides to delegate violence work to private parties—whether by express authorization, tacit permission, post-hoc immunization, or other means.

The topic is pressing. Lawmakers are actively proposing and passing legislation. Experiments in one sector of a state’s “ecology of violence”⁴⁶ are wreaking unintended consequences in another. Forces of both the left and the right are questioning foundational notions of the state as legitimate violence monopolist and the constitutional doctrines that reflect that role, whether those challenges arise in the form of police abolition or expanded rights to carry and use firearms.⁴⁷

The Essay proceeds in four Parts. Part I describes the traditional forms of outlawry and highlights its features as a form of social control. From even before the Norman Conquest, Anglo-Saxon law recognized a form of legal action in which a person could be declared an outlaw—placed outside the protection of the law and subject to the lethal violence of any

43. See Joh, Paradox of Private Policing, *supra* note 41, at 112 (explaining the ways in which professional private police are different from ordinary citizens who perform policing tasks).

44. Michaels & Noll, Vigilante Federalism, *supra* note 32, at 1193 (discussing the increasing ways that legislatures are authorizing private subordination, in what the authors term “legal vigilantism”).

45. See Private Police Forces, *supra* note 41, at 581 (“The routine participation of private police in certain areas of law enforcement may sometimes supplant the public police, and to this extent private police are performing a public function.” (footnote omitted)).

46. Cf. Eric C. Schneider, *The Ecology of Homicide: Race, Place, and Space in Postwar Philadelphia* 7 (2020) (using this term to describe how individuals both influence and are shaped by their environments with respect to the relationship between systemic inequality and murder cases in Philadelphia). This Essay conceives of this ecology as having a number of features. For example, distrust in the state’s official violence workers may give rise to other non-state-authorized violence work. A state experiment with loosened stand-your-ground laws may occur at the same time a city therein undertakes significant policing reform.

47. See, e.g., Robert J. Cottrol & Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 *Geo. L.J.* 309, 314 (1991) (identifying an individual rights theory of the Second Amendment as ensuring “an armed citizenry in order to prevent potential tyranny by a government empowered and perhaps emboldened by a monopoly of force”); Benjamin Levin, What’s Wrong with Police Unions?, 120 *Colum. L. Rev.* 1333, 1339 (2020) (“Adopting this understanding of the critiques would speak to a radical vision of police reform—the problem is not that police are unionized but that they have so much power by virtue of constitutional doctrine, their monopoly on state violence, and so forth.”); Karl T. Muth, The Panther Declawed: How Blue Mayors Disarmed Black Men, 37 *Harv. BlackLetter L.J.* 7, 11 (2021) (“Without the Second Amendment, the tyrannical state enjoys a total monopoly on violence; the downtrodden populace serves at such a government’s heel and bends to its whim.” (footnotes omitted)).

other citizen.⁴⁸ Over time, this severe judgment grew less harsh and submitted to greater exceptions and qualifications.⁴⁹ After briefly remaining in the states after independence, it was abolished for most people in U.S. jurisdictions in the nineteenth century.⁵⁰ Nevertheless, vestiges of outlawry remained in America, especially as applied to African Americans (both enslaved and free), and formed the basis for a type of racialized social control that relied on the authorization and immunization of private violence.

Building on this groundwork, Part II describes what this Essay refers to as the New Outlawry. Although the New Outlawry differs in context, operation, and effect, this web of proposed and enacted laws nevertheless serves a function similar to traditional outlawry.⁵¹ First, the New Outlawry designates certain persons, under certain conditions, as having forfeited their right to protection of the state (or as lacking any legitimate claim to protection at all); second, it authorizes private actors to judge the violence necessary to incapacitate or punish these persons; third, the express or implicit purpose of these laws is to enlist, empower, deputize, and immunize private parties to deploy violence in service of social control, often in ways the state itself legally cannot.⁵²

Next, Part III explores how the New Outlawry represents a departure from basic assumptions of the state that form the best account of Anglo-American political and legal traditions. It then describes how these assumptions undergird a set of seemingly disparate constitutional doctrines: those dealing with state action, private delegation, due process, equal protection, and guarantees of republican government.

Part IV discusses the implications of the New Outlawry with respect to these doctrines and theories, exploring how courts and policymakers may respond to accelerated experimentation with violence delegations.

I. TRADITIONAL OUTLAWRY: A BRIEF HISTORY

This Part sketches the traditional forms of outlawry in medieval England as well as its migration and alteration in the United States. Section

48. See Ralph B. Pugh, *Early Registers of English Outlaws*, 27 *Am. J. Legal Hist.* 319, 319 (1983) (noting that outlawry had been imported from Scandinavia the century before and “was a flourishing concept at the Norman Conquest”); H. Erle Richards, *Is Outlawry Obsolete?*, 18 *Law Q. Rev.* 297, 298 (1902) (noting that outlawry is “one of the oldest weapons” of the English common law, predating even the Norman Conquest).

49. See G.S. Rowe, *Outlawry in Pennsylvania, 1782–1788 and the Achievement of an Independent State Judiciary*, 20 *Am. J. Legal Hist.* 227, 229 (1976) (describing the increasing ways that outlawry was made less harsh).

50. See, e.g., Mark DeWolfe Howe, *The Process of Outlawry in New York: A Study of the Selective Reception of English Law*, 23 *Cornell L.Q.* 559, 572 (1938) (discussing New York’s repeal of its outlawry statutes in 1828).

51. See Rowe, *supra* note 49, at 228 (describing how outlawry in medieval England functioned “as a declaration of war by the state against an offending member”).

52. See *infra* Part II.

I.A describes the English roots of outlawry, its basic structural features, and its eventual decline. Section I.B describes how outlawry migrated to the colonies and transmuted into a form of racialized social control from the antebellum period through Jim Crow. This history supplies context for what Part II describes as the New Outlawry: a form of privatized violence for ostensibly public ends that shares the basic function, but not the procedural particulars, of the old outlawry.

A. *English Practice*

In its earliest iterations, outlawry was akin to a default judgment against an accused offender who failed to appear to answer the charges made against them.⁵³ The accused's flight from justice was taken as admission of guilt, and, since the crime for which they were accused was frequently punishable by death, a judgment of outlawry permitted other citizens to lawfully kill them.⁵⁴ At common law, an outlaw was described as one with a wolf's head—*caput lupinum*: “a hateful beast which it was the duty of every man to exterminate.”⁵⁵ As with a wolf, there was no prohibition against killing an outlaw.⁵⁶ Quite the contrary, “in the strictest sense of the law, it appears rather to have been the duty of every man to do so.”⁵⁷ Outlawry, in effect, put the accused back into the state of nature, in a war against all and an enemy of all.⁵⁸

The outlaw was deemed “friendless,”⁵⁹ and those who harbored an outlaw were subject to the same punishment as the outlaw.⁶⁰ Those who excluded, captured, or killed an outlaw were performing a public service and contributing to the overall maintenance of law and order. During a period in which long terms of imprisonment were impracticable, the

53. See Richards, *supra* note 48, at 298 (“It was in substance a process by which punishment could be inflicted on criminals who fled from justice: their flight was regarded as an admission of guilt, and they were outlawed in their absence without trial.”).

54. *Id.*; Jane Y. Chong, Note, Targeting the Twenty-First Century Outlaw, 122 *Yale L.J.* 724, 744 (2012) (“Their flight amounted to a confession of guilt for the crime charged, and in their absence they were outlawed and subject to execution without trial.”).

55. Richards, *supra* note 48, at 298.

56. *Id.*

57. *Id.*

58. See Deborah A. Rosen, Slavery, Race, and Outlawry: The Concept of the Outlaw in Nineteenth-Century Abolitionist Rhetoric, 58 *Am. J. Legal Hist.* 126, 127 (2018) (“[B]ecause the outlaw had absconded in order to evade the criminal justice system, he was seen as having ‘broken his part of the original contract between king and people’” (quoting 4 William Blackstone, *Commentaries* *375)); 2 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 471 (Liberty Fund 2010) (1895) (“He who breaks the law has gone to war with the community; the community goes to war with him.”).

59. 2 Henry of Bratton, *On the Laws and Customs of England* 361 (George Woodbine ed., Samuel E. Thorne trans., President & Fellows of Harvard Coll. 2003) (n.d.).

60. *Id.* (“Hence if anyone wittingly feeds [an outlaw] after his outlawry and expulsion, or harbours him or communicates with him in some way or hides or keeps him, he ought to receive the same punishment as the outlaw” (footnotes omitted)).

penalties associated with outlawry were thought a mechanism to incapacitate criminals and to prevent crime.⁶¹

The practice changed significantly over time.⁶² In 1215, Magna Carta established that outlawry could only be imposed consistent with a proceeding that afforded some minimum level of process, prescribing that it be done according to the “law of the land.”⁶³ Later, there developed a fairly laborious practice of serial demands for the miscreant’s appearance before he could be formally outlawed.⁶⁴ The penalties also gradually grew less severe. English law eventually prohibited private citizens from killing an outlaw at will, although private summary executions of outlaws still occurred.⁶⁵ Because of the harshness of the punishment, formal outlawry judgments began to be overturned routinely based on even the smallest technical errors, like spelling mistakes.⁶⁶ And the form, nature, and consequences of an outlawry declaration varied widely depending on factors like the type of proceeding and underlying offense.⁶⁷ By the

61. See Susan Stewart, *Outlawry as an Instrument of Justice in the Thirteenth Century*, in *Outlaws in Medieval and Early Modern England: Crime, Government and Society, c.1066–c.1600*, at 37, 52–53 (John C. Appleby & Paul Dalton eds., 2009); see also J.E.A. Jolliffe, *The Constitutional History of Medieval England From the English Settlement to 1485*, at 107–08 (1961) (noting that the king began to extend his special peace over the realm and used outlawry as a “common process of coercive procedure, and a penalty for many offences of violence”); Anthony Musson, *Social Exclusivity or Justice for All? Access to Justice in Fourteenth-Century England*, in *Pragmatic Utopias: Ideals and Communities, 1200–1630*, at 136, 150 (Rosemary Horrox & Sarah Rees Jones eds., 2001) (“[Outlawry’s] effectiveness derived from its use of the sanction of exclusion as a means of preventing crime.”).

62. John Bellamy, *Crime and Public Order in England in the Later Middle Ages 105* (1973) (“By the later fifteenth century to be outlawed was much less of a calamity than it had been even a century before.”); Chong, *supra* note 54, at 746–47 (detailing changes over the centuries).

63. Nat’l Archives & Recs. Admin., *Magna Carta Translation 4* (Nicholas Vincent trans., Sotheby’s Inc. 1985) (1215), <https://www.archives.gov/files/press/press-kits/magna-carta/magna-carta-translation.pdf> [<https://perma.cc/768C-KLEA>].

64. Bellamy, *supra* note 62, at 105.

65. *Id.* (discussing the exoneration of a Lincolnshire man and his associates for the arrest and execution of a man suspected of being an outlaw); Chong, *supra* note 54, at 746.

66. Chong, *supra* note 54, at 747 & n.105; see also Theodore F.T. Plucknett, *A Concise History of the Common Law 397* (1956) (“[Outlawry’s] traditional machinery was slow, but crushing. When it was felt that it was too severe, reform took the shape . . . insisting upon extraordinary accuracy in every detail of the outlawry procedure.”); Howe, *supra* note 50, at 565 (describing how the unfairness of outlaw proceedings led judges to “protect the rights of outlawed defendants by means of artificial technicalities”).

67. Chong, *supra* note 54, at 746 (“Changes to outlawry proceedings over time suggest some sensitivity to outlawry’s fairness as a legal judgment. For example, murder, arson, rape, maiming, and larceny were among the thirteenth-century felonies that warranted outlawry and execution.”).

nineteenth century, England had abolished outlawry in civil proceedings, and the practice became moribund in criminal actions.⁶⁸

B. *American Practice*

Despite claims that “[t]here is no such thing as legal outlawry in our American jurisprudence,”⁶⁹ the practice was in fact transplanted to America.⁷⁰ Pennsylvania and North Carolina, for example, adopted forms of outlawry—and were among the last states to abandon the practice.⁷¹ In Pennsylvania, if a defendant failed to appear in court before trial, the state supreme court could declare the person an outlaw, rendering a conviction and sentence itself.⁷² If the person was outlawed for treason or other serious crimes, the President of the Pennsylvania Executive Council was in charge of ensuring that an execution was carried out.⁷³

North Carolina adopted the English tradition of outlawry for felonies.⁷⁴ While Pennsylvania charged a specified government official with carrying out executions based on outlawry, North Carolina’s statute retained a greater role for private citizens.⁷⁵ It provided that “any citizen of the State may capture, arrest, and bring [an outlaw] to justice, and in case of flight or resistance by him after being called on and warned to surrender, may slay him without accusation of any crime.”⁷⁶ In that respect, “North Carolina was the last state to declare a fugitive from justice an outlaw executable upon sight.”⁷⁷

North Carolina’s outlawry statute endured until modern times. In 1974, a man who had been declared an outlaw pursuant to the statute surrendered to authorities and brought suit in federal court to invalidate

68. Bobby G. Deaver, Note, Outlawry: Another “Gothic Column” in North Carolina, 41 N.C. L. Rev. 634, 639 (1963). The last writ of outlawry was issued by an English court in 1855. *Id.* at 640.

69. Harlow v. Carroll, 6 App. D.C. 128, 133 (D.C. Cir. 1895); see also Howe, *supra* note 50, at 566 (collecting these common but incorrect statements).

70. See United States v. Hall, 198 F.2d 726, 727–28 (2d Cir. 1952) (“Apparently outlawry was imported into our criminal law with some early vigor, but during the nineteenth century was either abolished or fell into disuse.” (footnote omitted)); see also Green v. United States, 356 U.S. 165, 171 (1958), overruled on other grounds by Bloom v. Illinois, 391 U.S. 194 (1968) (stating that “the severe remedy of outlawry . . . fell into early disuse in the state courts”).

71. Rosen, *supra* note 58, at 127.

72. Chong, *supra* note 54, at 748.

73. *Id.* The Executive Council was colonial Pennsylvania’s executive branch of government from 1777–1790. Supreme Executive Council of Pennsylvania, Hist. Soc’y of Penn., <http://digitalhistory.hsp.org/pafirm/org/supreme-executive-council-pennsylvania/> (on file with the *Columbia Law Review*) (last visited Feb. 26, 2024).

74. See Chong, *supra* note 54, at 749–50; Deaver, *supra* note 68, at 642.

75. Chong, *supra* note 54, at 750.

76. N.C. Gen. Stat. § 15-48 (repealed 1997), reprinted in Autry v. Mitchell, 420 F.Supp. 967, 968 n.1 (E.D.N.C. 1976).

77. Chong, *supra* note 54, at 749–50.

the law.⁷⁸ As discussed in more detail in section II.A below, a three-judge district court struck down the statute.⁷⁹ “The effect of the proclamation” of outlawry, said the court, “is to license the public to kill the accused felon if he runs after being called on to surrender.”⁸⁰ The court concluded that the statute violated both the Due Process and the Equal Protection Clauses.⁸¹ It also stated, without deciding, that if the statute were construed as imposing a penalty, it would violate the Eighth Amendment’s bar on cruel and unusual punishment:

If the statute is viewed as a penal one, we would have little difficulty in concluding that authorizing citizens to slay an outlawed person with impunity is so disproportionate to the underlying status of accused felon as to be cruel in its excessiveness and unusual in its character and inconsistent with evolving standards of decency that mark the progress of a maturing society.⁸²

Unlike limitations in the state’s then-existing citizen’s arrest statute or the restrictions on law enforcement’s use of deadly force, the outlawry statute empowered “armed citizens—not in uniform” to kill an accused felon fleeing out of fright.⁸³ “The extreme remedy granted the citizenry infringes, we think, a fundamental right: that one not be denied life, or be wounded, except by due process of law.”⁸⁴

While outlawry gradually ebbed for the majority of the populace in America, it remained a potent legal and political fixture as applied to enslaved and free Black people.⁸⁵ Colonial slave codes in function, purpose, and occasionally even terminology maintained a system of outlawry, placing Black people outside the law’s protection and subject to the private judgment and violence of any citizen they encountered. A South Carolina colonial regulation “effectively turned the entire white population into a community police force” authorized to capture fugitives “dead or alive.”⁸⁶ Virginia, like South Carolina, immunized the murder of

78. See *Autry v. Mitchell*, 420 F. Supp. 967, 968 (E.D.N.C. 1976).

79. See *Id.* at 969.

80. See *id.* at 970.

81. See *id.* at 969.

82. See *id.* at 969 n.2 (citing *Trop v. Dulles*, 356 U.S. 86, 101, 102 (1958)).

83. *Id.* at 971.

84. *Id.* at 971. The state did not officially repeal the statute until 1997. See Act of May 22, 1997, ch. 80, § 10, 1997 N.C. Sess. Laws 158, 162.

85. For a discussion of the racialized nature of the authority to use violence, see generally Hill, *supra* note 38 (“Not only did legal institutions generate and enforce a right to violence against enslaved people; the state also took affirmative steps—whether conditioning enslavement on the status of the mother or prohibiting the testimony of enslaved victims—in order to shield white perpetrators from prosecution and punishment.”).

86. Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* 17–18 (2001); see also *An Act for the Better Ordering of Slaves*, No. 57, § 1 (1690), reprinted in *7 The Statutes at Large of South Carolina* 343, 347 (David J. McCord ed., 1840)

escaped slaves who resisted re-enslavement.⁸⁷ North Carolina authorized parties to kill fugitives from slavery who had been declared fugitives by proclamation of a justice of the peace.⁸⁸

After independence, some states maintained their colonial customs, rendering fugitive slaves unprotected and subject to private violence.⁸⁹ North Carolina's statute allowed citizens to "kill and destroy such slave or slaves, by such ways and means as he shall think fit."⁹⁰ Outlawry declarations against fugitives appeared in North Carolina newspapers well into 1856.⁹¹ Tennessee had a similar law.⁹² Even in states with statutes less express than in North Carolina or Tennessee, enslaved people were still treated as outside of the law's protection, absent extraordinary situations.⁹³ As one court put it, "The power of the master must be absolute, to render the submission of the slave perfect."⁹⁴ Said another southern court, the enslaved person "is subject to despotism" and the untrammelled will of the master.⁹⁵

(immunizing private individuals who killed a slave attempting to escape capture "any law, custom or usage to the contrary notwithstanding").

87. An Act Concerning Servants and Slaves § 34 (1705), reprinted in 2 *Slavery in the United States: A Social, Political, and Historical Encyclopedia* 535, 540 (Junius Rodriguez ed., 2007) (providing that owners who killed a person for resisting his enslavement should be acquitted "as if such accident had never happened").

88. Rosen, *supra* note 58, at 128 n.5; see also Act of Apr. 4, 1741, ch. 24, 1741 N.C. Acts § 45, reprinted in 23 *The State Records of North Carolina* 191, 201–02 (Walter Clark ed., 1905) ("And if any Slave . . . against whom Proclamation hath been . . . issued . . . do not immediately return home, it shall be lawful for any Person . . . whatsoever to kill and destroy such Slave . . . by such Ways and Means as [they] shall think fit, without Accusation or Impeachment of any Crime for the same."); Act of 1715, ch. 46, 1715 N.C. Acts § 9, reprinted in 23 *The State Records of North Carolina* 62, 63–64 (Walter Clark ed., 1905) ("And if any person or persons shall kill any Runaway Slave that hath lye[n] out two months such person or persons shall not be called to answer for the same if he give Oath that he could not apprehend such Slave but was constrained to kill him.").

89. Rosen, *supra* note 58, at 128–30.

90. *Id.* at 129 (quoting Act of 1831, ch. 111, 1831 N.C. Acts § 22, reprinted in 1 *The Revised Statutes of the State of North Carolina, Passed by the General Assembly at the Session of 1836–7*, at 571, 577–78 (James Iredell & William H. Battle eds., 1837)).

91. Rosen, *supra* note 58, at 128.

92. Act of Oct. 23, 1799, ch. 9, 1799 N.C. Acts § 2, reprinted in *Public Acts of the General Assembly of North-Carolina and Tennessee, Enacted From 1715 to 1813, in Force in Tennessee* 300, 300–01 (3d ed. 1815) (excepting from the crime of murder the "killing [of] any slave outlawed by virtue of an act of general assembly[,] or the killing of a slave attempting to resist an owner or after "moderate correction").

93. Rosen, *supra* note 58, at 136–37. Professor Sean Hill distinguishes between the protection from private violence afforded to Black people when they were understood to be chattel or labor as opposed to protection from private violence on the basis of being a member of the political community or an agent deserving protection in their own right. See Hill, *supra* note 38, at 18–36.

94. See *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829).

95. See *Ex parte Boylston*, 33 S.C.L. (2 Strob.) 41, 43 (Ct. App. L. 1847); see also Darren Lenard Hutchinson, "Continually Reminded of Their Inferior Position": Social

Abolitionists of the time often seized on this arbitrariness to explain how slavery had reduced Black people to the status of outlaws, even without the formal procedural mechanisms of outlawry. They quoted from contemporary advertisements offering bounties to anyone “who would ‘kill and destroy’” outlawed runaways.⁹⁶ As historian Deborah Rosen notes, lawyers sympathetic to the abolitionist movement “observed that in practice no official declaration was necessary” to make runaways outlaws, because southerners would treat any act of violence against a fugitive as justified.⁹⁷

Even after universal emancipation with the Thirteenth Amendment, outlawry retained a vestigial presence when it came to the social control of freedmen and free African Americans. In the immediate post-Civil War South, Carl Schurz, a German immigrant, Union soldier, journalist, and eventual U.S. Senator, conducted a tour of the southern states. He remarked how southern society attempted to reconstruct the slave system through the empowerment of private law.⁹⁸ Describing one set of laws, he observed that the state had essentially “place[d] the freedmen under a sort of permanent martial law” because it had “invest[ed] every white man with the power and authority of a police officer as against every black man.”⁹⁹ The legislation, to Schurz, was “a striking embodiment of the idea that although the former owner has lost his individual right of property in the former slave, ‘the blacks at large belong to the whites at large.’”¹⁰⁰

The long period of Jim Crow relied upon the basic structure of outlawry to enforce racial subordination and white supremacy. Ida B. Wells, for example, argued that the widespread tolerance of lynching of Black people in the post-Civil War era continued this tradition.¹⁰¹ And the practice of rendition in the Jim Crow era, which historian Margaret Burnham skillfully describes, similarly left many Black people subject to wanton violence.¹⁰² The “quotidian violence that shaped routine

Dominance, Implicit Bias, Criminality, and Race, 46 Wash. U. J.L. & Pol’y 23, 74–75 (2014) (describing other similar examples).

96. Rosen, *supra* note 58, at 132.

97. *Id.* at 134.

98. Report on the Condition of the South (1865), reprinted in 1 Carl Schurz, *Speeches, Correspondence and Political Papers of Carl Schurz* 279, 326 (Frederic Bancroft ed., 1913). For more on this phenomenon, see Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, 101 Tex. L. Rev. 1259, 1270–1288 (2023).

99. Schurz, *supra* note 98, at 326 (Frederic Bancroft ed., 1913).

100. See *id.*

101. David Squires, *Outlawry: Ida B. Wells and Lynch Law*, 67 Am. Q. 141, 142 (2015); see also Hill, *supra* note 38, at 36 (explaining how unpunished white violence against African Americans in the form of massacres and lynching assured a racialized right to commit violence based on the racial identity of the perpetrator and the victim).

102. See Margaret Burnham, *By Hands Now Known: Jim Crow’s Legal Executioners* 3 (2022) (“Though the rendition cases read as a twentieth-century archive about states’ rights and Black citizenship, the roots of these laws and legal practices lie in antebellum fugitive slave laws.”).

experiences” in the Jim Crow South, she argues, kept Black Americans from the promise of full citizenship.¹⁰³ Private actors were key to maintaining this system. “Conflating private and public authority, and immunizing whites who served as unofficial policemen . . . Jim Crow blurred the lines between formal law and informal enforcement.”¹⁰⁴

* * *

Outlawry’s procedural components as a legal practice may have changed over time, but at its root, outlawry retained essential features from the medieval period to the early twentieth century. First, the designation formally or functionally rendered a subject outside the law’s protection. Second, it empowered private parties to engage in violence against these outlaws. Third, private violence directed against the outlaw was understood as performing a public function, whether that be prevention or punishment of crime, reclamation of private property rights in human beings, or enforcement of racialized social norms.

II. THE NEW OUTLAWRY

The state has long legitimated private violence.¹⁰⁵ Yet, this legitimation warrants examination, given how governments are attempting to exploit criminal law and private violence to obtain the purported benefits of physical coercion without the corresponding limitations, a phenomenon we call the New Outlawry.

This New Outlawry performs functions similar to the traditional form of outlawry: It leverages the power of the state as the legitimate violence monopolist and sets the outlaw outside the state’s protection; it empowers and immunizes private violence against that outlaw; and it does so for the express or tacit purpose of social control and crime prevention.¹⁰⁶

103. See *id.* at xii.

104. *Id.* at xiii; see also Peterson, *supra* note 30, at 1619 (criticizing the notion that “there will be clear lines between constitutional violence and private crime” and noting that this “naiveté . . . has never really been available to the Black citizen, for whom, in many places and across generations, the police force has blended imperceptibly into the vigilante posse comitatus”); Hill, *supra* note 38, at 46–47 (observing how both violence by both private and public actors maintained a system of white supremacy).

105. See Daniel D. Polsby, *Reflections on Violence, Guns, and the Defensive Use of Lethal Force*, 49 *Law & Contemp. Probs.* 89, 89 (1986) (“That individuals may legally employ lethal force under certain circumstances seems so intuitively obvious that it is seldom questioned.”); Lance K. Stell, *Close Encounters of the Lethal Kind: The Use of Deadly Force in Self-Defense*, 49 *Law & Contemp. Probs.* 113, 113 (1986) (noting the view that “it would be inconsistent, if not perverse, to affirm the right to life but refuse to permit the use of means reasonably thought necessary to repel aggressive threats to self-preservation”).

106. This is not, of course, to say all legal permissions for violence are problematic. A state should no more prohibit self-defense than allow it on the merest pretext of insult. It is only to highlight that there are limits to how permissive those laws can rightly be, and to surface the sources of public legitimacy that make such acts of violence something more than the imposition of despotic dominion over another. See *infra* Parts III–IV.

Where the New Outlawry diverges from its common law roots is in context, operation, and effect. In context, the New Outlawry arose after the rights revolution of the latter half of the twentieth century.¹⁰⁷ Compared to medieval England, or even the early twentieth century, modern constitutional restraints on public action and public agents are much thicker and more legally cognizable.¹⁰⁸ Further, the distinction in legal doctrine between private and public action is far more rigid in the twenty-first century than it was historically.¹⁰⁹ This new context provides temptations for governments to legislate in ways that seek to obtain all the social effects of law enforcement and crime control, including reinforcement of status hierarchies, without any of the constitutional or regulatory costs associated with public action.

In operation, the New Outlawry uses few procedural controls to determine who is exiled from the protection of the law and under what circumstances. Instead, decisions about who has put themselves “at war” with the community—and, hence, at risk of lethal violence—are entrusted to the discernment and armament of individual violence workers, often unaided by any training or process.¹¹⁰ No public official makes the specific determination to make someone an outlaw; private individuals are allocated that power. The result is a system that diverges from the old outlawry in its generality and temporality. An entire group may become presumptive outlaws by implicit bias and threat perception, although no overt legal designation of that group has occurred. At other times, a single person may become an outlaw when engaging in certain conduct; but such outlawry does not extend beyond the temporal limits of the conduct. The consequence is a form of outlawry whose boundaries and subjects are difficult to identify in advance but whose consequences are no less lethal.

107. See Jack M. Balkin, *The Roots of the Living Constitution*, 92 *B.U. L. Rev.* 1129, 1152 (2012) (describing this phenomenon). But see Eric J. Miller, *The Warren Court’s Regulatory Revolution in Criminal Procedure*, 43 *Conn. L. Rev.* 1, 5–6 (2010) (critiquing this account because it “turned progressive attention away from the vital and difficult task of generating a positive doctrinal and political account of policing: its justification, intrinsic limits, and proper means of regulation”).

108. See *infra* Part III.

109. There are some signs, however, of that beginning to relax. Cf. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022) (“Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say.”). And there is, to be sure, still “fuzziness at the edges” in the current dichotomy. Lawrence, *Private Exercise*, *supra* note 34, at 648.

110. Like old outlawry, the New Outlawry places some people outside the law’s protective force and subject to the “inconveniences” reminiscent of a Lockean state of nature, in which each person served as “both judge and executioner of the law of nature.” John Locke, *Two Treatises of Government* 127, 184 (Thomas I. Cook ed., Hafner Publishing 1947) (1690) [hereinafter *Locke, Two Treatises*]; see also V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 *U. Pa. L. Rev.* 1691, 1705 (2003) (“If we allow any defendant to exempt himself from the rules and challenge the state’s monopoly on violence, we fear that he will enforce the law in ways that are excessive or partial.”).

In effect, the New Outlawry reinforces social domination. But it does so through indifference to—or acquiescence in—the private biases and motivations of potential violence workers. African Americans in particular already have to account for the potential for police-empowered violence. In those states experimenting with the New Outlawry, the potential sources of authorized threat increase.¹¹¹ Those who are the objects of the New Outlawry must price the additional risk into their daily lives. What are the chances of immunized private violence associated with my attending this political march? Where shall I run the last quarter mile of my jog, given the scope of citizen’s arrest, public carry, and stand-your-ground laws in this state? Will I have to negotiate a phalanx of privately armed individuals, empowered by state law, who have decided to patrol my voting precinct this November? What is the likelihood that any private violence used against me will be presumed to be a crime rather than a justified use of force?

Racial minorities have long been subject to the law’s restraints but enjoyed little of its protections, and the New Outlawry widens rather than narrows this gap. In none of the modern laws we discuss are race or ethnicity explicit, but the New Outlawry operates—perhaps even assumes—a *de facto* world in which private judgments about the necessity, justification, and use of private violence will track racialized assumptions about who gets to use violence and when, which injuries are condemned and which are tolerated. In fact, the very lack of the old outlawry’s particularized designation is what makes the New Outlawry so insidious: Marginalized groups must navigate a world in which they are subject to a kind of stochastic outlawry that is arbitrary, status reinforcing, and (at least ostensibly) constitutionally invisible.¹¹²

This Part focuses on a few exemplary categories of legally sanctioned private violence: (1) violence to advance the state’s ends, like *anticipatory violence* to prevent or deter crime and *reactive violence* to apprehend or detain lawbreakers;¹¹³ and (2) violence for putatively private ends, like *defensive violence* used in self-defense, defense of others, and defense of

111. Ekow N. Yankah, *Deputization and Privileged White Violence*, 77 *Stan. L. Rev.* (forthcoming 2025) (manuscript at 4–5) (on file with the *Columbia Law Review*) (highlighting the increased risk from broadly privileging private violence, especially the increased risks to Black people).

112. We’re grateful to Professor Susanna Siegel for the term “stochastic outlawry.” We discuss the potential constitutional implications in Part III. And, as Professor Nadia Banteka uncovers, even public police officers can sometimes escape accountability for constitutional violations by “identity shopping” and successfully arguing their violence occurred in their private capacity. Nadia Banteka, *Police Vigilantism*, 110 *Va. L. Rev.* (forthcoming 2024) (manuscript at 4), <https://ssrn.com/abstract=4723241> [<https://perma.cc/4LXY-MTX6>].

113. Defensive violence can also be anticipatory or reactive in nature, but these shorthand descriptions seem to us to express a distinction between violence used offensively for crime-control purposes and to defend private interests; but the lines are not bright and, as we discuss, defensive rhetoric increasingly dominates as justification for all kinds of violence.

property.¹¹⁴ This Part traces how existing and expanding authorizations for private violence recreate and transform the basic features of outlawry, forming what this Essay calls the New Outlawry.

Part III then explains why this New Outlawry should be of constitutional concern, discusses how it reveals fundamental assumptions about the state, and outlines the potential doctrinal responses to jurisdictions that continue to test the limits of private delegations of violence.¹¹⁵

A. *Violence for the State: Anticipatory and Reactive Violence*

Although the expansion of self-defense law receives the lion's share of scholarly and public commentary, what is in fact "percolating to the top of the cultural conversation is not the language of defense—it is the language of aggression."¹¹⁶ As Professor Kimberly Ferzan underscores, stand-your-ground laws attract the most attention, but "[c]itizens' arrests, and more generally the idea of using violence *in the name of the state*, is where the action is."¹¹⁷ This section explores how the state categorizes and

114. See Darrell A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 *Law & Contemp. Probs.* 85, 90 (2017) [hereinafter Miller, *Self-Defense*] ("The legal distinction between homicide on behalf of the sovereign and homicide as a private act of self-preservation persisted even as theories of natural law came to influence English treatise writers in the seventeenth and eighteenth centuries."); *id.* at 91 ("[T]he distinction between justified self-defense and excusable self-defense at common law only makes conceptual sense if one understands that the homicide is justified when the slayer acts in some sense on behalf of the state. It is merely excused when the slayer acts solely on his own behalf."). The lines between these kinds of violence can be thin and will often blur in reality (is shooting a carjacker self-defense/defense of property, or is it lethal force to prevent a crime, or both?), but the conceptual categories can help clarify the scope and limits of private force. At common law, the carjacker-type example would likely have been treated as violence for the state's purposes, not self-defense. See Michael Foster, *Crown Cases* 270 (3d ed. 1792) (describing it as coincidental that self-defense and duty to apprehend a felon occur simultaneously when one uses lethal force to repel a robber or assailant).

115. See Malcolm Thorburn, *Reinventing the Night-Watchman State?*, 60 *U. Toronto L.J.* 425, 426 (2010) (arguing that state functions like "the use of force in preventing the commission of an offence or in making an arrest, or the invasion of privacy when performing a search and seizure[,] . . . may not be privatized without undermining . . . the most basic assumptions of the modern liberal political order") [hereinafter Thorburn, *Reinventing*]. In the United States, these practices have long been used along axes of race. See Burnham, *supra* note 102, at xxi ("Lawless police acting on behalf of the state has defined how Black people experienced American law for two centuries, and concomitantly, Black struggles for citizenship and meaningful democratic participation have always included radical demands for relief from such state violence.").

116. Ferzan, *Taking Aim*, *supra* note 21, at 8. It is also, we contend, the language of domination.

117. See *id.*

defines legal rules and then licenses private actors to enforce those rules.¹¹⁸

Crime is a socially constructed category of conduct that a community deems harmful or abnormal, for which it will deploy coercive force to condemn and punish.¹¹⁹ Crime and punishment establish society's rules. Professor Malcolm Thorburn argues that all modern states claim a "right to rule"—the exclusive authority to create legal rules for a given jurisdiction.¹²⁰ Breaches of the right to rule, he argues, demand a remedy, which, in the modern state, takes the form of criminal punishment.¹²¹ In this model, serious criminal activity is an attempt by offenders to impose a law different than that established by the sovereign. Therefore, offenders must be punished to reassert the state's exclusive right to rule.¹²² Enforcing the law and punishing infractions are thus fundamental to what it means to be a modern state.¹²³

The project of law enforcement was long a cooperative endeavor, with a permeable division between public and private action.¹²⁴ Prior to the rise

118. See Michaels, *Constitutional Coup*, supra note 36, at 24 (noting how "the history of the United States is itself replete with private actors tasked with carrying out sundry State functions").

119. See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 5 (2001) ("Th[e] crime control field is characterized by two interlocking and mutually conditioning patterns of action: the formal controls exercised by the state's criminal justice agencies and the informal social controls that are embedded in the everyday activities and interactions of civil society."); Seigel, supra note 3, at 6–7 (deconstructing the notion of crime); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs.* 401, 405 (1958) (describing the distinctions between criminal and civil wrongs and describing a "crime" as "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community").

120. See Malcolm Thorburn, *Criminal Punishment and the Right to Rule*, 70 *U. Toronto L.J.* 44, 46 (2020).

121. See *id.* at 46–47.

122. *Id.* at 48; see also Leider, *Taming Self-Defense*, supra note 40, at 1003 (arguing that the corollary to the state's monopoly on violence is that "the government can use deadly force against those who stubbornly resist the most basic legal institutions"); Wulf, supra note 42, at 140 ("A modern state functions in its ideal form when governmental institutions rule over a given territory, a legal system exists, and the state has the capacity to implement its policies.").

123. See Seigel, supra note 3, at 10 (arguing that violence is essential to the notion of the state). Part of the reason to resist this private violence is also that, as Thorburn argues and Peterson shows, society can be reshaped if unlawful force is unchecked. See Peterson, supra note 30, at 1625 ("The danger of violent movements like the one the rioters brought to the Capitol on January 6 is not simply that they threaten to destabilize our treasured institutions; it is that they have the potential to remake them, to create a new order that conforms to their demands.").

124. Jonathan Obert, *The Six-Shooter State: Public and Private Violence in American Politics* 5 (2018) (discussing the "early American tradition of citizenship in which private actors self-consciously supported the state in law enforcement activities"); Seigel, supra note 3, at 53 (highlighting the overlap between civilian, policing, and military roles); Sklansky, supra note 41, at 1205 ("Colonial towns, like their English counterparts, relied on the

of organized police departments and professional law enforcement, private individuals and communities were tasked with policing obligations.¹²⁵ Many of the enforcement practices in the early United States were inherited from England's practices—the hue and cry, posse comitatus, watch and ward.¹²⁶ “[F]or much of early common law history,” notes Thorburn, “policing was almost entirely provided by ordinary (private) citizens.”¹²⁷ Yet these citizens were exercising legal duties, not personal initiatives, and the tasks individuals undertook in their policing roles were public responsibilities. Citizens enforced the state's code, not their own. Failure to fulfill law-enforcing duties in fact exposed citizens to their own criminal liability.¹²⁸ From the very earliest times of medieval state building, these methods “brought crime more firmly under the state's control.”¹²⁹ Crucially, in doing so, they “removed communities' ability to decide both what was a crime and who would be punished.”¹³⁰ Those decisions would be the state's to make.¹³¹

In early England, for example, community members were obligated to raise the hue and cry—literally make an announcement (such as “Out! Out!”)—when happening upon a felony.¹³² Blackstone described it as “the

medieval institutions of the constable, the night watch, and the hue and cry—institutions that ‘drew no clear lines between public and private.’” (footnote omitted) (quoting Lawrence M. Friedman, *Crime and Punishment in American History* 28–29 (1993)).

125. Obert, *supra* note 124, at 5.

126. Erik H. Monkkenon, *History of Urban Police*, 15 *Crime & Just.* 547, 549 (1992) (noting that “[t]he night watch and the day constable” dated “from the Middle Ages”); Thorburn, *Reinventing*, *supra* note 115, at 434 (“[T]he colonial United States relied on the same medieval law-enforcement institutions as England – the constable, the night watch, and the hue and cry” (citing Lawrence M. Friedman, *Crime and Punishment in American History* 29 (1993))); see also Kenneth F. Duggan, *The Hue and Cry in Thirteenth-Century England*, in *Thirteenth Century England XVI: Proceedings of the Cambridge Conference*, 2015, at 153, 159 (Andrew M. Spencer & Carl Watkins eds., 2017) (“Localities had a duty to protect themselves through the watch and ward, which by royal command required every village to keep watch throughout the night by at least four men who would try to arrest – or at least raise the hue and cry on – any stranger they saw.”).

127. See Thorburn, *Reinventing*, *supra* note 115, at 427; see also Peterson, *supra* note 30, at 1578 (“In eighteenth-century colonies, law and policing were managed by communities through posse comitatus, the militia, and eventually, the summoning of the local grand jury to indict offenders.”).

128. Obert, *supra* note 124, at 26 (“Refusing to cooperate with a *posse* was itself a crime, and the institution was, like the militia or town watch, considered a civic duty for all able-bodied male citizens.”).

129. Duggan, *supra* note 126, at 171.

130. *Id.*

131. The transition was not always easy to demarcate. See Sir Frederick Pollock, *The King's Peace in the Middle Ages*, 13 *Harv. L. Rev.* 177, 177 (1899) (“All existing civilized communities appear to have gone through a stage in which it was impossible to say where private vengeance for injuries ended and public retribution for offences began, or rather the two notions were hardly distinguished.”).

132. 2 Pollock & Maitland, *supra* note 58, at 607. Or individuals may have yelled other things, like “Thieves! Thieves!” or “Strike! Strike!,” as English law appears to have required no precise wording. Duggan, *supra* note 126 at 156.

old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another.”¹³³ By law, neighbors had to turn out to pursue the suspect.¹³⁴ Early on, if the wrongdoer was caught in the act (or with the goods), he would be brought before a hastily convened court, “and without being allowed to say one word in self-defence, he [would] be promptly hanged, beheaded or precipitated from a cliff, and the owner of the stolen goods [would] perhaps act as an amateur executioner.”¹³⁵ This summary justice, as Professors Frederick Pollock and Frederic Maitland wrote, developed from the practice of outlawry—from a notion that one found red-handed was not entitled to the law’s protection.¹³⁶

English law, then, imposed a duty on private citizens to participate in pursuing serious lawbreakers and assisting in their arrest. Certainly, when the hue and cry was raised, “every Man may and must arrest the Offender upon whom it [was] levied,” and failing to pursue the offender subjected a person to punishment.¹³⁷ According to Sir Matthew Hale, “Persons [who were] present at the committing of a Felony [had to] use their endeavours to apprehend the Offender.”¹³⁸ If they failed to make this attempt, “they [were] to be fined and imprisoned.”¹³⁹ Anyone who killed a person “upon Hue-and-Cry, or otherwise, to arrest a Felon that flies” committed no felony.¹⁴⁰ Importantly, these kinds of community law enforcement actions were not conceived of as personal acts of self-defense; they were actions taken by privately constituted public authority for the benefit of the public.¹⁴¹

Slave patrols in antebellum America built on these English common law institutions.¹⁴² “Slave patrols had significant and unfettered power

133. See 2 William Blackstone, Commentaries *293.

134. 2 Pollock & Maitland, *supra* note 58, at 607.

135. *Id.* at 608.

136. See *id.* at 609 (“There is hardly room for doubt that this process [of killing a criminal in the act of committing a crime] had its origin in days when the criminal taken in the act was *ipso facto* an outlaw.”).

137. 1 Matthew Hale, Pleas of the Crown 90 (London, J.N. Assignee of Edw. Sayer, 5th ed. 1716).

138. See *id.* at 89.

139. *Id.*

140. *Id.* at 36.

141. See Michael Foster, A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry 270 (London, 3d ed. 1792) (describing “[h]omicide in advancement of justice” as justified because “the ends of government will be totally defeated” unless a person can be made “[amenable] to justice”).

142. Hadden, *supra* note 86, at 3 (citing the hue and cry and posse comitatus and writing that “[p]atrols were not created in a vacuum, but owed much to European institutions that served as the slave patrol’s institutional forebears”). As the Civil War Amendments formally ended facially racist law enforcement, the slave patrol’s functions did not cease but instead splintered among a mix of public and private actors. *Id.* at 4 (“[Slave patrols’] law-enforcing aspects—checking suspicious persons, limiting nighttime

within their communities” and were deputized “to terrorize enslaved Blacks to deter revolts, capture and return enslaved Blacks trying to escape, and discipline those who violated any plantation rules.”¹⁴³

More contemporary citizen’s arrest laws also grew out of these earlier English practices.¹⁴⁴ For felony offenses, the law authorized (and in most states still authorizes) a private person to arrest anyone who committed the offense in the arrester’s presence or anyone whom the arrester had probable cause to believe had committed the offense.¹⁴⁵ For lesser offenses, private persons could only effect an arrest if the crime were committed in their presence.¹⁴⁶

Just as external security in America transitioned from a citizen militia to professional soldiery over the course of the nineteenth century,¹⁴⁷ internal security gradually transitioned from citizen-enforcers to professional law enforcement in roughly the same period.¹⁴⁸ As professional, full-time, state-employed law enforcement institutions arrived and spread in the late nineteenth century,¹⁴⁹ the responsibilities of private citizens turned from duties to permissions. No longer would citizens be legally mandated to hazard their safety by pursuing wrongdoers upon a cry for help.¹⁵⁰

movement—became the duties of Southern police forces, while their lawless, violent aspects were taken up by vigilante groups like the Ku Klux Klan.”).

143. Brandon Hasbrouck, *Abolishing Racist Policing With the Thirteenth Amendment*, 67 *UCLA L. Rev.* 1108, 1114 (2020).

144. Note, *The Law of Citizen’s Arrest*, 65 *Colum. L. Rev.* 502, 502 & n.3 (1965) (“The role of the private person in the apprehension of criminals is defined by the law of citizen’s arrest—an outgrowth of stagnated common-law rules that were derived from English practices of the Middle Ages.”); cf. *Private Police Forces*, *supra* note 41, at 557 (“Every citizen possesses certain common law and statutory powers of arrest, search and seizure, and self-defense. The private policeman enjoys these powers no less than any other individual.” (footnotes omitted)).

145. Alvin Stauber, *Citizen’s Arrest: Rights and Responsibilities*, 18 *Midwest L. Rev.* 31, 31 (2002) (noting that private citizens could arrest wrongdoers who committed a “breach of the peace” in their presence); see also *Colby v. Jackson*, 12 N.H. 526, 530 (Super. Ct. 1842) (“[I]t is well settled at common law, that a private person, without warrant, may lawfully seize and detain another, in certain cases.”).

146. Stauber, *supra* note 145, at 31; Note, *The Law of Citizen’s Arrest*, *supra* note 144, at 504.

147. On the Founding generation’s general distrust of professionalized military forces and standing armies, see Noah Shusterman, *Armed Citizens: The Road From Ancient Rome to the Second Amendment* 6–11 (2020).

148. See Obert, *supra* note 124, at 4–5 (describing the evolution); Seigel, *supra* note 3, at 74 (noting that “private policing preceded the public version, founded to support colonial ventures”). To be sure, in the Founding Era, citizen militias also provided internal protection. See Shusterman, *supra* note 147, at 8 (stating that militias in eighteenth century America “were best at being repressive domestic forces”).

149. See Cynthia A. Brown, *Utah v. Strieff*: Sound the Hue and Cry, 45 *S.U. L. Rev.* 1, 8–10 (2017) (discussing the shift to professional forces).

150. See Chad Flanders, Raina Brooks, Jack Compton & Lyz Riley, *The Puzzling Persistence of Citizen’s Arrest Laws and the Need to Revisit Them*, 64 *How. L.J.* 161, 175

But, as legal command turned to legal assent, a growing fissure in the rules of justification emerged. As the next Part discusses, constitutional prohibitions restrict public law enforcement's use of force to capture fleeing felons but typically not private citizens.¹⁵¹ Therefore, formal state actors can be held responsible for violating constitutional rights by using force, but nonstate actors have historically not been so accountable.¹⁵² This creates a troubling "arbitraging opportunity" for government to outsource its functions to private parties who "act relatively unencumbered by the laws that more stringently regulate government agents."¹⁵³ Despite these fissures, citizen's arrest laws have puzzlingly persisted for decades, little changed from their common law roots.¹⁵⁴ In some ways, in fact, there has been a recent "expansion of the right of private citizens to detain offenders who are suspected of violating the law."¹⁵⁵

The continued authorization for private policing in these laws makes them a dangerous weapon in the modern era. That hazard is all the more true given the absence of the very constitutional¹⁵⁶ (or even in some cases

(2020) (stating that after the rise of professional police forces, "[i]t could no longer be plausibly maintained that citizens had the *duty* to arrest").

151. See *State v. Cooney*, 463 S.E.2d 597, 599 (S.C. 1995) (stating that the Supreme Court's limitation on the use of deadly force to capture fleeing felons "does not apply to seizures by private persons and does not change the State's criminal law with respect to citizens using force in apprehending a fleeing felon" (citing *People v. Couch*, 461 N.W.2d 683 (Mich. 1990))); Sharon Finegan, *Watching the Watchers: The Growing Privatization of Criminal Law Enforcement and the Need for Limits on Neighborhood Watch Associations*, 8 *U. Mass. L. Rev.* 88, 106–07 (2013) (discussing how private actors can be authorized to engage in policing without the restrictions of public actors); Nicholas A. Serrano, *Vigilante Justice at the Home Depot: The Civilian Use of Deadly Force Under Michigan's Common Law Fleeing-Felon Rule*, 11 *Charleston L. Rev.* 159, 161 (2017) (describing Michigan's authorization to use deadly force to stop a fleeing felon, even when the underlying offense is not dangerous or violent); *Private Police Forces*, *supra* note 41, at 567 (arguing in the Fourth Amendment context that, "since the public police are intended to be society's primary law enforcers, the limitations on public police search should set the upper boundaries of allowable search by private police").

152. See *United States v. Cruikshank*, 92 U.S. 542, 553 (1876) (dismissing an indictment against individuals for violating constitutional rights on the grounds that the Constitution does not govern the conduct of private parties).

153. Michaels, *Constitutional Coup*, *supra* note 37, at 108.

154. Flanders, et al., *supra* note 150, at 163; *Private Police Forces*, *supra* note 41, at 561 ("Although many states have expanded the arrest powers of public police officers, the scope of permissible citizen's arrest, and the attendant powers of force and detention, have remained relatively constant [since the common law days]." (footnote omitted)).

155. Stauber, *supra* note 145, at 38.

156. See *infra* Part III.

statutory¹⁵⁷) limitations that constrain public officials.¹⁵⁸ The risk of experiments with the New Outlawry is that vigilantism and private violence (ostensibly for public ends) become normalized but without any of the ex ante or ex post controls on public forms of violence. As one of us has written, the threat from private policing in this fashion (especially under the banner of constitutional or statutory rights) is that you end up with

individuals [who] don't have to abide by constitutional limitations on deadly force. They can't be made to wear body cameras, don't have to learn de-escalation techniques or undergo de-bias training, and don't file reports when they use their weapons. They aren't subject to investigation for engaging in an unconstitutional pattern or practice and they can't be forced to enter into a consent decree when they abuse their power. They aren't beholden to any politically responsive institution and they can't be fired.¹⁵⁹

In other words, this kind of “[s]tate power passed through private conduits becomes much harder for the rest of civil society to monitor and challenge.”¹⁶⁰ Relying on after-the-fact criminal punishment to prevent excesses is already a risky proposition. That behavioral check deteriorates all the more rapidly once legislatures experimenting with the New Outlawry begin expanding immunities for violence.

Ahmaud Arbery's 2020 murder in Georgia is a case in point. Arbery, an innocent jogger, was chased by private citizens who suspected him in a series of break-ins. They stopped him and ultimately shot him dead. Law enforcement officials initially refused to arrest the killers, chalking up their actions to a legally sanctioned citizen's arrest and lawful self-

157. Flanders et al., *supra* note 150, at 172 (“[I]n some states, because of reforms to law enforcement officer’s use of force laws, citizens sometimes have a *greater* ability to use force than police officers do in certain circumstances.”). In other ways, private citizens may have more restrictive statutory authority. See *People v. Page*, 149 N.E.3d 905, 914 (N.Y. 2020) (Fahey, J., dissenting) (collecting sources limiting private actors and noting that “[a]s the English common law developed in tandem with greater urbanization and the expansion of police forces, distinctions arose between arrests performed by a private citizen and those performed by a police or peace officer”).

158. It is true that, in some ways, “private citizens are more accountable under law for improper uses of force.” Robert Leider, *The State’s Monopoly of Force and the Right to Bear Arms*, 116 *Nw. U. L. Rev.* 35, 76 (2021) [hereinafter *Leider, State’s Monopoly*]. After all, as Robert Leider writes, “Police officers are clothed with many civil and criminal immunities, including broader arrest authority based on probable cause alone, more power to use force, and qualified immunity for mistaken judgments.” *Id.* This all assumes that the existing role of torts, criminal law, and immunity remain unchanged—changes the New Outlawry specifically contemplates.

159. Darrell A.H. Miller, *Opinion, A Simplistic Interpretation of “Defund the Police”* May Embolden Vigilantes, *Newsday* (June 20, 2020), <https://www.newsday.com/opinion/commentary/defund-the-police-protests-george-floyd-police-brutality-a93508/> (on file with the *Columbia Law Review*) [hereinafter *Miller, Simplistic Interpretation*].

160. Michaels, *Constitutional Coup*, *supra* note 37, at 131; see also Joh, *Paradox of Private Policing*, *supra* note 41, at 60 (noting the “high degree of legal regulation,” including numerous constitutional limitations, on the actions of public police).

defense.¹⁶¹ One of the prosecutors initially on the case said, “[The men appeared to be] following, in ‘hot pursuit’, a burglary suspect, with solid first hand probable cause, in their neighborhood, and asking/ telling him to stop. It appears their intent was to stop and hold this criminal suspect until law enforcement arrived.”¹⁶² And that, he underscored, “is perfectly legal” under Georgia law.¹⁶³

That same year, a self-styled militia in Michigan hatched a plan to kidnap the state’s governor, Gretchen Whitmer.¹⁶⁴ Perhaps emboldened by an armed gun-rights rally and chafing at what they considered pandemic-related overreach by Michigan officials, some of those charged for the kidnapping claimed a citizen’s arrest authority to detain the governor and hand her over to sympathetic local sheriffs.¹⁶⁵ Legal scholars have charted many similar stories of the harmful effects of privatized policing that citizen’s arrest laws authorize.¹⁶⁶

As these recent episodes show, growing polarization, political extremism, distrust of institutions, and social fragmentation are normalizing resorting to violence.¹⁶⁷ Gun rights advocates and

161. Letter from George E. Barnhill, Dist. Att’y, Waycross Jud. Cir., to Tom Jump, Captain, Glynn Cnty. Police Dep’t (Feb. 23, 2020), <https://int.nyt.com/data/documenthelper/6916-george-barnhill-letter-to-glyn/b52fa09cdc974b970b79/optimized/full.pdf> [perma.cc/39QP-KTUN].

162. See id. at 2.

163. See id. Georgia has since repealed its citizen’s arrest law. See Act of May 10, 2021, § 2, 2021 Ga. Laws 625, 626.

164. The Co-Leader of a Plot to Kidnap Michigan’s Governor Gets 16 Years in Prison, NPR (Dec. 27, 2022), <https://www.npr.org/2022/12/27/1145632535/michigan-governor-kidnap-plot-adam-fox-sentencing/> [https://perma.cc/E9HP-FGFN]; see also Joseph Blocher & Reva B. Siegel, When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under *Heller*, 116 Nw. U. L. Rev. 139, 153 (2021).

165. Darcie Moran & Joe Guillen, Whitmer Kidnap Plot: Possible Citizen’s Arrest Mentioned in March, Prosecutor Says, Det. Free Press (Oct. 23, 2020), <https://www.freep.com/story/news/local/michigan/2020/10/23/whitmer-kidnap-plot-suspect-citizens-arrest/6010264002/> [https://perma.cc/UV8B-9V4G]. Others charged in the plot seemed to have more anarchic and murderous plans. See Dustin Dwyer, Federal Trial to Begin Against Men Accused of Plotting to Kidnap Whitmer. Here’s What to Know, Mich. Pub. Radio (Mar. 7, 2022), <https://www.michiganradio.org/criminal-justice-legal-system/2022-03-07/federal-trial-to-begin-against-men-accused-of-plotting-to-kidnap-whitmer-heres-what-to-know/> [https://perma.cc/CP6V-APDC] (noting that one person charged in the plot was recorded stating, “I’m going to do some of the most nasty, disgusting things that you have ever read about in the history of your life” (internal quotation marks omitted) (quoting Barry Croft)).

166. See Flanders et al., *supra* note 150, at 166–69 (describing recent incidents in California, Georgia, Indiana, Missouri, and Montana); Serrano, *supra* note 151, at 161 (describing a Michigan incident).

167. See Rachel Kleinfeld, The Rise of Political Violence in the United States, 32 J. Democracy 160, 160 (2021) (“From death threats against previously anonymous bureaucrats and public-health officials to a plot to kidnap Michigan’s governor and the 6 January 2021 attack on the U.S. Capitol, acts of political violence in the United States have skyrocketed in the last five years.”); Nelson Lund, The Future of the Second Amendment in a Time of Lawless Violence, 116 Nw. U. L. Rev. 81, 99 (2021) (arguing that in today’s environment the

organizations have helped propel the New Outlawry's official sanction of private violence for public ends. They have been instrumental in inculcating a mindset that not only sanctions violent conduct but also valorizes it. Heroic gun owners are envisioned as the sheepdogs who police the community to protect the sheep from wolves.¹⁶⁸ They are, in the words of sociologist Jennifer Carlson, the "citizen-protectors" who enforce law and order in a world perceived as increasingly dangerous.¹⁶⁹ Political scientists have traced the ascent of an intentionally incubated gun-rights ideology and gun-owner identity over the last several decades.¹⁷⁰ These developments coincide with a turn in gun ownership that focuses less on hunting and recreation and more on protection against perceived individual and societal threats.¹⁷¹

Law enforcement has grown more tolerant of this trend. Some law enforcement officers even see guns in the hands of the "right" kinds of people as a cooperative benefit, aiding police in maintaining order.¹⁷² As

right to bear arms "has more importance in protecting us from criminal violence because government has become more aggressive in restricting our freedom to arm ourselves against this threat"); cf. Mugambi Jouet, *Guns, Identity, and Nationhood*, *Palgrave Commc'ns*, Nov. 5, 2019, at 1, 3 ("The radicalization of the gun rights movement parallels a paradigm shift in American conservatism.").

168. Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 *Mich. L. Rev.* 581, 641 (2022) [hereinafter Charles, *Securing Gun Rights*] ("In the language of the gun-rights movement, everyone is either a wolf, a sheepdog, or a sheep—a threat, a protector, or someone who needs protecting."); see also Hayley N. Lawrence, *Toxic Masculinity and Gender-Based Gun Violence in America: A Way Forward*, 26 *J. Gender, Race & Just.* 33, 54 (2023) ("Gun owners, the majority of whom are men, tend to view their social role as that of the sheepdog: bound by duty to protect the defenseless herd of sheep against menacing wolves. Many . . . view themselves as fulfilling some sort of civic duty by carrying a firearm in public spaces." (footnotes omitted)); Susanna Siegel & Caroline Light, *Opinion, 'Warrior Mindset' Can Get People Killed*, *Tampa Bay Times* (Dec. 18, 2020), <https://www.tampabay.com/opinion/2020/12/18/warrior-mindset-can-get-people-killed-column/> [<https://perma.cc/74KH-GG6X>] (arguing that this sorting problematically "replaces care and discernment with baseless fear and misdirected aggression").

169. See Jennifer Carlson, *Citizen-Protectors: The Everyday Politics of Guns in an Age of Decline* 19–24 (2015); see also Trent Steidley, *Sharing the Monopoly on Violence? Shall-Issue Concealed Handgun License Laws and Responsibilization*, 62 *Socio. Persps.* 929, 930 (2019) ("Doubts about the efficacy of the state to provide collective security may motivate many to seek crime protection on their own.").

170. See Matthew J. Lacombe, *Firepower: How the NRA Turned Gun Owners Into a Political Force* 6, 9–14 (2021) (arguing that the NRA has used "ideational resources" to cultivate an "engaged[] and powerful constituency").

171. See David Yamane, *Gun Culture 2.0: The Evolution and Contours of Defensive Gun Ownership in America*, 704 *Annals Am. Acad. Pol. & Soc. Sci.* 20, 21 (2022) (noting that "by 2010, armed self-defense had clearly become the core of American gun culture").

172. See Jennifer Carlson, *Policing the Second Amendment: Guns, Law Enforcement, and the Politics of Race* 107 (2020) ("[P]olice are not as invested in a strict monopoly on legitimate violence as accounts of gun militarism might suggest. Instead, they tend to accommodate the reality [of and benefit from] widely armed populace[s], sympathizing with legal gun carriers and even understanding them as productive of social order.").

a result, “as citizen’s arrest cases are percolating to the surface of our public consciousness, we need to stop worrying about the people who only use guns on the defense and start thinking about how the law is authorizing civilian gun usage to go on the offense.”¹⁷³

Both during and in the aftermath of the racial justice protests in 2020, some commentators praised gun-toting private citizens and their superior ability to fight back against “rioting and looting” when formal law enforcement stood down.¹⁷⁴ Individuals like Kyle Rittenhouse viewed their task as supplementing formal law enforcement in upholding the law, sometimes to tragic effect.¹⁷⁵ And while progressive jurisdictions (mostly municipal) propose substantial police reform, up to and including abolition,¹⁷⁶ conservative policymakers (mostly at the state level) propose

173. Ferzan, *Taking Aim*, supra note 21, at 5.

174. See, e.g., David E. Bernstein, *The Right to Armed Self-Defense in Light of Law Enforcement Abdication*, 19 *Geo. J.L. & Pub. Pol’y* 177, 180 (2021) (claiming that, in light of orders for the police to “stand down” in response to protests in 2020, “[t]he argument against the individual right to bear arms for self-defense purposes significantly weakens when, for political reasons, police are prohibited from enforcing any semblance of law and order”); Leider, *State’s Monopoly*, supra note 158, at 42 (“[T]he American system of decentralized violence remains preferable to the government having a complete monopoly of force, particularly in times of emergency and civil unrest.”); Lund, supra note 167, at 84 (arguing, in the context of “sustained and repeated riots[,]” that “[a]rmed citizens take responsibility for their own safety, thereby exhibiting and cultivating the self-reliance and vigorous spirit that are ultimately indispensable for genuine self-government”).

175. See, e.g., Michael Tarm, Scott Bauer & Kathleen Foody, *Rittenhouse: ‘I Didn’t Do Anything Wrong. I Defended Myself’*, Associated Press (Nov. 10, 2021), <https://apnews.com/article/kyle-rittenhouse-george-floyd-racial-injustice-kenosha-shootings-f92074af4f2668313e258aa2faf74b1c/> [<https://perma.cc/QE3E-77Y9>] (noting Kyle Rittenhouse’s testimony that he had armed himself to attend the Kenosha, Wisconsin, police brutality protests in an effort to protect local businesses and property after seeing violence there on previous nights).

176. See, e.g., Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 *Harv. L. Rev.* 1613, 1635 (2019) (“BYP100 Chicago is spearheading an organizing campaign for a participatory city-budgeting process in which the public is empowered to defund police and reinvest resources by ‘setting a living wage and by fully funding healthcare, social services, public schools, and sustainable economic development projects.’” (quoting Ctr. for Popular Democracy, L. for Black Lives & Black Youth Project 100, *Freedom to Thrive: Reimagining Safety & Security in Our Communities* 20 (2017), <https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf> [<https://perma.cc/36T3-LM7X>])); Solomon Gustavo, *What We Know (and Don’t Know) So Far About the Effort to Dismantle the Minneapolis Police Department*, *Minn. Post* (July 9, 2020), <https://www.minnpost.com/metro/2020/07/what-we-know-and-dont-know-so-far-about-the-effort-to-dismantle-the-minneapolis-police-department/> [<https://perma.cc/799B-X3XM>] (“The new proposal would amend the charter to allow the city to disband the police department, do away with other charter mandates regarding city policing . . . , and put a new public safety department under the supervision of the city council.”). Some of the disbanding of police appears financial as opposed to ideological. See Trisha Ahmed & Jim Salter, *America’s Small Towns are Disbanding Police Forces, Citing Hiring Woes*, *L.A. Times* (Sept. 5, 2023), <https://www.latimes.com/world-nation/story/2023-09-05/americas-small-towns-are-disbanding-police-forces-citing-hiring-woes/> [<https://perma.cc/5FD7-TKAH>].

and enact policies that would expand private prerogatives to exercise violence in ways prohibited to the state.¹⁷⁷

For example, Florida responded to the 2020 antiracism protests with an “anti-riot” law—the Combating Public Disorder Act¹⁷⁸—that Governor Ron DeSantis called “the strongest anti-rioting, pro-law enforcement piece of legislation in the country.”¹⁷⁹ That law broadened what constituted an unlawful “riot” under Florida law, prompting a federal judge to enjoin enforcement of this part of the statute as unconstitutionally vague and overbroad.¹⁸⁰ Among its other provisions, the law provided civil immunity in some situations when Floridians used vehicles to ram protesters.¹⁸¹ “The bill doesn’t exactly make it legal to run someone over,” wrote one reporter, “but it does shield drivers from civil liability if they injure or kill protesters on Florida roads.”¹⁸²

And Florida was not alone in creating what Pareene called “the right to crash cars into people.”¹⁸³ Over the last few years, legislators in other states too “have been trying to make it easier for certain people to run over certain other people.”¹⁸⁴ These laws are both responding to and feeding violent vigilantism.¹⁸⁵ The legislation “comes after an alarming surge of vehicle-ramming attacks against protesters across the country.”¹⁸⁶ In just a

177. See John Dehn, *The U.S. Constitution and Limits on Detention and Use of Force in Handling Civil Unrest*, Just Sec. (June 3, 2020), <https://www.justsecurity.org/70535/the-u-s-constitution-and-limits-on-detention-and-use-of-force-in-handling-civil-unrest/> [<https://perma.cc/NQ9J-B4EZ>] (discussing limits on state actors’ use of force during civil unrest).

178. Combating Public Disorder Act, ch. 2021-6, 2021 Fla. Laws 60 (codified in scattered sections of Fla. Stat. Ann. (West 2024)).

179. Gray Rohrer & Steven Lemongello, *DeSantis Signs ‘Anti-Riot’ Bill Into Law, Sparking Outcry From Democrats, Civil Rights Groups*, Orlando Sentinel (Apr. 19, 2021), <https://www.orlandosentinel.com/2021/04/19/desantis-signs-anti-riot-bill-into-law-sparking-outcry-from-democrats-civil-rights-groups/> (on file with the *Columbia Law Review*) (last updated Apr. 21, 2021).

180. See *Dream Defs. v. DeSantis*, 559 F. Supp. 3d 1238, 1281–83 (N.D. Fla. 2021).

181. See Pareene, *supra* note 15 (“The car . . . is now just openly also a literal weapon used by the state to prevent people from protest and dissent.”).

182. See *id.* (cleaned up).

183. See *id.*

184. *Id.*

185. See Ari Weil, *Opinion, Protesters Hit by Cars Recently Highlight a Dangerous Far-Right Trend in America*, NBC News (July 12, 2020), <https://www.nbcnews.com/think/opinion/seattle-protester-hit-car-latest-casualty-dangerous-far-right-trend-ncna1233525/> [<https://perma.cc/BBH4-DLRT>] (“GOP state legislators also attempted to make it harder to punish drivers. In 2017, bills were proposed in six states that would shield drivers who hit protesters. None became law, but they made an impression on the right.”); cf. Michaels & Noll, *Vigilante Federalism*, *supra* note 32, at 1228 (describing how corrosive private enforcement schemes “are both the *product* of anti-democratic, White Christian nationalist politics and an effort to affirmatively *create* and *amplify* it”).

186. Tess Owen, *Florida ‘Anti-Rioting’ Law Will Make It Much Easier to Run Over Protesters With Cars*, Vice News (Apr. 19, 2021), <https://www.vice.com/en/article/>

six-month period starting in the summer of 2020, researchers documented more than one hundred episodes in which vehicles were driven into crowds, “about half of which were confirmed to be intentional.”¹⁸⁷

Notably, these are not instances of mere defensive violence. They are not about people defending themselves from unlawful aggression. Instead, the laws are designed to allow private citizens to enforce law and order and uphold existing social structures. And they are not unrelated to broader efforts to enlist citizens in the law-enforcing business, the way Rittenhouse viewed himself.¹⁸⁸ As Pareene writes,

There’s something very telling about how the car (or police cruiser, or truck, or SUV) has been enshrined into law as an instrument of state-sanctioned violence. American conservatives are creating, really, a sort of Second Amendment for cars. Not the Second Amendment in terms of the literal text in the Constitution, but the Second Amendment as existing doctrine. The legal framework conservative politicians and jurists spent years crafting and refining to facilitate politicized and racialized gun violence in this country is now expanding to another of America’s omnipresent and deadly institutions.¹⁸⁹

In other words, just as the citizen-protectors wielding guns to deter and prevent crime had the blessing of the law, so too are drivers permitted by these authorizations to inflict violence on those they perceive as responsible for disorder.¹⁹⁰

In myriad other ways, some subtle and others less so, recent proposals have devolved the violence prerogative to private citizens to maintain social order. Legislators have extended the right to use deadly force to protect one’s business property.¹⁹¹ They have authorized deadly force to prevent looting or damage to commercial enterprises.¹⁹² For the past several years, a Mississippi legislator has introduced “The Combating Violence, Disorder and Looting and Law Enforcement Protection Act of Mississippi.”¹⁹³ Among other things, the Act would modify the state’s

88n95a/florida-anti-rioting-law-will-make-it-much-easier-to-run-over-protesters-with-cars/
[<https://perma.cc/5CCW-EUQH>].

187. *Id.*

188. Pareene, *supra* note 15.

189. *Id.*

190. See *id.* (“Just as the heavily armed patriot is encouraged to consider himself deputized to carry out violence on behalf of the police (the only legitimate arm of the state in his eyes anyway), now certain drivers are permitted to harm certain people in defense of the social order.”).

191. See *supra* notes 11–14 and accompanying text; see also Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 *J.L. & Econ.* 201, 202 (1971) (noting that a privilege to use deadly force to protect property “presents interesting questions concerning the allocation of law enforcement authority between the public and private sectors”).

192. See *supra* notes 11–14 and accompanying text.

193. See H.R. 34, 2023 Leg., Reg. Sess. (Miss. 2023); H.R. 613, 2022 Leg., Reg. Sess. (Miss. 2022); H.R. 83, 2021 Leg., Reg. Sess. (Miss. 2021).

homicide statute to justify a killing “[w]hen necessarily committed in lawful defense of one’s own business, where there is rioting, looting or other activity” defined in the statute.¹⁹⁴

Though many of these proposals have failed (for now), they capture the cultural shift in many places where lethal force, administered on the ground, in real time, by private citizens, is seen as a legitimate response to disorder.¹⁹⁵ Moreover, these proposals are articulated as a reaction to actual or perceived deficiencies in official law enforcement. The result is a violence ecology in which private parties are empowered to exercise lethal force in many of the circumstances that official law enforcement could not.¹⁹⁶ When that kind of conduct obtains legal license, it predictably places some people outside the law’s protective force, creating a new and insidious form of outlawry.¹⁹⁷ Though it doesn’t mirror old outlawry in all its particularities, and certainly not in its procedural protections, the New Outlawry shares the basic features of authorizing, encouraging, and immunizing private violence against others for purposes of social control.

B. *Violence for the Self: Defensive Violence*

Just as legal rules have increasingly placed power in the hands of private actors to affirmatively seek out lawbreakers and mete out punishment, legislation has increasingly expanded an individual’s right to use defensive force. That kind of modern shift marks an even bigger break from how self-defense was treated in Anglo-American history.

The common law was notoriously jealous of the right to use violence.¹⁹⁸ As the prior section discussed, the state compelled community members to engage in policing for its own purposes but strictly limited

194. See H.R. 34, 2023 Leg., Reg. Sess. § 6(j) (Miss. 2023).

195. A recent stir over a country song about how small towns enforce social norms epitomizes the shift. Emily Olson, How Jason Aldean’s ‘Try That in a Small Town’ Became a Political Controversy, NPR, <https://www.npr.org/2023/07/20/1188966935/jason-aldean-try-that-in-a-small-town-song-video/> [<https://perma.cc/4QXH-6Q4G>] (last updated July 20, 2023) (describing how the song’s lyrics include “a list of crimes that might happen in urban settings” and suggest how small towns handle those outsiders, with a bonus ode to gun rights). As one commentator wrote, “[A]n explicit message of this song is that if you light a flag on fire or cuss at a cop, it’s okay and actually good for people to shoot you.” Jay Willis (@jaywillis), Twitter (July 17, 2023), <https://twitter.com/jaywillis/status/1681009802535907328/> [<https://perma.cc/8MPL-78YA>].

196. Even if one disagrees with this as a descriptive matter, given the difficulties of punishing or deterring police violence through criminal law or civil liability, it still stands that the radically decentralized immunization of violence makes political accountability for misuse of violence substantially more difficult to achieve. See Miller, *Simplistic Interpretation*, *supra* 159.

197. See Peterson, *supra* note 30, at 1586–87 (noting how a right to violence has long been a tool in the hands white people, often to enforce racial hierarchies).

198. See Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 *Calif. L. Rev.* 63, 83 (2020) [hereinafter Ruben, *Unstable Core*] (detailing authorities for this notion).

violence to defend private interests.¹⁹⁹ The forms of offensive violence—to prevent crime and catch lawbreakers—were done on behalf of the state. Individuals were pressed into the service of the sovereign.²⁰⁰ They were not engaged in self-help to vindicate private rights.²⁰¹

As Pollock and Maitland explain, “at a fairly early stage in its history” English law severely restricted the use of self-help remedies.²⁰² Justifiable homicides at common law were extremely limited, and the circumstances in which they occurred—for example, apprehending a manifest thief or an outlaw—“would have been regarded less as cases of legitimate self-defence than as executions.”²⁰³ “So fierce is” early English law “against self-help,” they note, “that it can hardly be induced to find a place even for self-defence.”²⁰⁴ For centuries, the rules for self-defense were much more restrictive than those for violence used in policing functions.²⁰⁵

199. Benjamin Levin, Note, A Defensible Defense?: Reexamining Castle Doctrine Statutes, 47 *Harv. J. on Legis.* 523, 528 (2010) (noting that at common law, self-defense was less protected and “[t]he only justifiable homicide . . . was one committed under the auspices of the state, or at least in clear furtherance of the state’s interests”).

200. See Miller, *Self-Defense*, supra note 114, at 86 (“Early self-defense law in the Anglo-American tradition presumed that homicide—even in self-defense—required the pardon of the sovereign. Only those slayers who killed as an actual or constructive agent of the state were completely innocent.”); Stell, supra note 105, at 115 (“Commentators were careful to distinguish between a person who killed merely for the sake of his own skin, and a person who, in killing a felon, was performing a public benefit.”).

201. See Stell, supra note 105, at 115 (noting that, with respect to violence for crime prevention and apprehension, “[n]ot only was there no duty to retreat, there was an affirmative obligation to use deadly force if the alternative were leaving a murderous felon at liberty”).

202. 2 Pollock & Maitland, supra note 58, at 602.

203. See *id.* at 502 (“The man who commits homicide by misadventure or in self-defence deserves but needs a pardon.”); see also Joseph H. Beale Jr., *Retreat From a Murderous Assault*, 16 *Harv. L. Rev.* 567, 568 (1903) (“The line between homicide in execution of the law and homicide by misadventure or *se defendendo* was not yet clearly defined; but the distinction was well established.”); Rollin M. Perkins, *Self-Defense Re-Examined*, 1 *UCLA L. Rev.* 133, 142 (1954) (“Homicide was not justifiable unless it was commanded or authorized by law.”).

204. 2 Pollock & Maitland, supra note 58, at 602. See also 4 Albert H. Putney, *Torts, Damages, Domestic Relations* 46 n.50 (1908) (“[I]n case of homicide the ancient doctrine was that self-defense was not a good plea. The man who was so unfortunate as to have to slay another to save himself was required to surrender and was remitted to jail, where he might hope to receive royal clemency.” (quoting 1 Thomas Atkins Street, *The Foundations of Legal Liability* 7 (1906))).

205. See Richard Maxwell Brown, *No Duty To Retreat: Violence and Values in American History and Society* 4 (1991) [hereinafter Brown, *No Duty*] (contrasting justifiable homicide from excusable homicide in English common law); Ruben, *Unstable Core*, supra note 198, at 83 (“[H]istorically, homicide was justified only under limited circumstances, such as the prevention of a small number of specified felonies, in which a person ‘acted as an actual or implicit agent of the sovereign.’ Killing purely in private self-defense . . . was only excusable, requiring a sovereign pardon after trial and conviction.” (footnote omitted) (quoting Miller, *Self-Defense*, supra note 114, at 89)). Of course, these neat theoretical lines are often not so tidy in practice. See Miller, *Self-Defense*, supra note 114, at 89 (“In practice, the facts

Famously, English law at the time of the American Founding, which transferred to these shores, required retreat before resorting to deadly force in self-defense.²⁰⁶ The castle doctrine provided a limited exception to the retreat rule, excusing people from retreating from their own homes before using deadly force.²⁰⁷ The logic behind the retreat rule, writes historian Richard Maxwell Brown, “was that the state—the Crown—wished to retain a monopoly of the resolution of conflict at the level of dispute between individuals.”²⁰⁸

Many jurisdictions in the United States eroded—and then eventually eliminated—the retreat requirement during the course of the nineteenth century.²⁰⁹ Of course, there was much more variation by jurisdiction here than in England: Individual states could make their own decisions about the exact parameters of self-defense law. Still, on the whole, “[t]he centuries-long English legal severity against homicide was replaced in our country by a proud new tolerance for killing in situations where it might have been avoided by obeying a legal duty to retreat.”²¹⁰ As with the rules for violence on behalf of the state, the “metaphorical and symbolic impact” of the expanding rules for private self-defense—how they affect culture and understandings of permissible violence—can also be immense.²¹¹ In some ways those broader effects blur the distinction between offensive and defensive violence; as legal theorist Rafi Reznik writes, in the modern United States “self-defense has become a tool of aggression.”²¹²

that distinguished private vengeance, excusable self-defense, and justifiable killing remained, as they are today, notoriously fuzzy and contingent.”).

206. Brown, *No Duty*, supra note 205, at 3; Miller, *A History of Private Policing*, supra note 41, at 11; Miller, *Self-Defense*, supra note 114, at 92–93.

207. Brown, *No Duty*, supra note 205, at 3. There was also certainly a desire to minimize violence, which American self-defense law no longer appears to maintain. See Polsby, supra note 105, at 93 (“[T]he law of lethal self-help . . . bears no regular symmetry with the law of punishment or with the presumptions of innocence that the law of punishment provides. It grants a surprisingly broad right, but does not rigidly circumscribe that right with incentives to keep conduct as harmless as possible.”).

208. Brown, *No Duty*, supra note 205, at 4.

209. *Id.* at 5 (“[O]ne of the most important transformations in American legal and social history occurred in the nineteenth century when the nation . . . repudiated the English common-law tradition in favor of the American theme of no duty to retreat: that one was legally justified in standing one’s ground to kill in self-defense.”); Cynthia V. Ward, “Stand Your Ground” and Self-Defense, 42 *Am. J. Crim. L.* 89, 99–100 (2015) (“In the mid-to-late nineteenth century, . . . the American approach [to self-defense doctrine] changed as homegrown legal commentators, influential state supreme courts, and United States Supreme Court opinions developed a more robust Stand Your Ground doctrine . . .” (footnote omitted)).

210. Brown, *No Duty*, supra note 205, at 5.

211. *Id.* at 6; see also Reznik, supra note 5, at 22 (arguing that “self-defense is a public institution that conveys grave social meanings and sets key terms of collective life”).

212. Reznik, supra note 5, at 25.

The story of the modern Stand-Your-Ground movement and its ties to gun-rights associations has been told before.²¹³ But the roots of that movement trace back further still into American history. And at inflection points in the story, often those arising from anxieties over race and crime, self-defense has been used as a justification for anticipatory violence, as well as grounds to broaden protections for individual self-defense against perceived criminal threats.

For example, the arming of African American militia members during Reconstruction sparked a white backlash of terror and violence that perpetrators and enablers specifically defended on grounds of community policing, self-defense, and defense of others.²¹⁴ As one former Confederate put it, the Klan was founded on “[t]he instinct of self-protection . . . ; the sense of insecurity and danger” among whites, especially in areas in which African Americans predominated.²¹⁵ For over a century, white supremacist terrorism by privately armed individuals has routinely been defended by apologists as order-restoring, justified acts of self-defense.²¹⁶

For another particularly striking example, consider Nebraska’s first statutory protection for self-defense, which had previously been governed by common law doctrine. In the late 1960s, the Nebraska legislature codified the state’s self-defense justification for the first time, and in so

213. See, e.g., Caroline Light, *Stand Your Ground 2* (2017) (“[R]oughly coincident with the turn of the millennium, our admiration for defensive militarism has transformed into a pressing call for individual, do-it-yourself (DIY)-security citizenship. The defensively armed citizen has become, in some quarters, the paragon of patriotism.”); Brown, *No Duty*, *supra* note 205, at vi (“[N]o duty to retreat is much more than a legal technicality. It is an expression of a characteristically American approach to life.”).

214. Transcript of Record, *United States v. Mitchell*, 26 F. Cas. 1283 (C.C.D.S.C. 1871), as reprinted in *Proceedings in the Ku Klux Trials at Columbia, S.C. in the United States-Circuit Court, November Term, 1871*, at 150–51, 425–26 (Benn Pitman & Louis Freeland Post eds., Columbia, S.C., Republican Printing 1872) (defending Klan behavior on the grounds that African Americans were better armed than whites); H.R. Rep. No. 42-22, pt. 1, at 452 (1872) (quoting John B. Gordon, a Ku Klux Klan member who called the Klan “nothing more and nothing less . . . [than] an organization . . . [of] the peaceable, law-abiding citizens of the State, for self-protection”).

215. H.R. Rep. No. 42-22, pt. 1, at 452; see also *id.* at 439 (lamenting that while African Americans occupy law enforcement positions “the white men are denied the right to bear arms or to organize, even as militia, for the protection of their homes, their property, or the persons of their wives and their children”).

216. Jared A. Goldstein, *The Klan’s Constitution*, 9 *Ala. C.R. & C.L. L. Rev.* 285, 315 (2018) (“Klan ideology declared that violence against African Americans and Republicans were justifiable acts of self-defense.”). The consistency is remarkable: In the 1870s, Klan terrorists articulated their acts as legitimate self-defense; in the 1960s, they defended their terror as “self-defense for our homes, our families, our nation and Christian Civilization.” *Id.* at 354 (internal quotation marks omitted) (quoting *White Knights KKK Miss., Special Greenwood, LeFlore County Edition, Klan Ledger*, Summer 1966, at 2).

doing eroded the traditional common law limitations.²¹⁷ That law provided in relevant part that “[n]o person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting, *by any means necessary*, himself, his family, or his real or personal property.”²¹⁸ The statute contained no explicit reasonableness, proportionality, or imminence requirements, the traditional foundations of self-defense law.²¹⁹ In fact, the legislature had twice defeated amendments to revise the statute to restrict force to “*reasonable means*.”²²⁰

Among the reasons for legislative support for the bill was the increasing salience of violent crime and racial unrest in the volatile 1960s. As one legislator said of the statute in a hearing two years later, it was “passed in the midst of an almost irrational climate of emotion, passion and fear.”²²¹ He recounted how several of the legislators who voted for the law “admitted to me that they were actually afraid to vote against that bill because they were afraid they would be tagged as being pro-criminal or soft on law and order.”²²²

Some had referred to that bill, another legislator said, as the “Kill Your Neighbor Law.”²²³ In his veto message (a veto the legislature overrode to pass the bill), the Governor had warned that the law troublingly allowed “the unreasonable use of force to repel minimal non-deadly force” and “implement[ed] a system of vigilante law enforcement, a system long ago proved to be destructive of civilized society.”²²⁴

217. See *State v. Ryan*, 543 N.W.2d 128, 146 (Neb. 1996) (Gerrard, J., dissenting) (outlining the statutory changes to Nebraska’s self-defense doctrine), overruled by *State v. Burlison*, 583 N.W.2d 31 (Neb. 1998).

218. See Self Defense Act, ch. 233, 1969 Neb. Laws 862, 862 (emphasis added) (repealed 1971), invalidated by *State v. Goodseal*, 183 N.W.2d 258 (Neb. 1971). It also provided for a defense of others justification, forbidding prosecution for use of force based on a person “coming to the aid of another who is in imminent danger of or the victim of aggravated assault, armed robbery, holdup, rape, murder, or any other heinous crime.” *Id.*

219. See Ruben, *Unstable Core*, *supra* note 198, at 83–84 (“Lawful self-defense still requires a showing of necessity and proportionality.”).

220. *Goodseal*, 183 N.W.2d at 262 (emphasis added) (internal quotation marks omitted).

221. See Minutes of Committee on Judiciary: Hearing on LB 184, LB 149, and LB 187 Before the Comm. on Judiciary, 82d Leg., 1st Sess. 33 (Neb. 1971) (statement of Sen. Luedtke).

222. See *id.* This tough-on-crime approach was not a phenomenon just among rural conservatives. The impulse also had a civil rights and race-pride component to it in places where African Americans controlled the levers of political power, like in Washington D.C., as James Forman Jr. has well documented. See generally James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America* 10–11 (2017) (documenting responses and attitudes by Black officials to problems such as gun violence and drug use in Black communities).

223. 88th Nebraska Legislature, Floor Debate Transcripts 1167 (Mar. 2, 1983), https://nebraskalegislature.gov/transcripts/view_page.php?page=01167&leg=88 [<https://perma.cc/GR57-LLRF>] (statement of Sen. DeCamp).

224. Message From the Governor, 80 Leg. J. 2272–73 (Neb. May 28, 1969).

Legislators soon had to confront what they unleashed. In a notable case—in which the Nebraska Supreme Court ended up declaring the law unconstitutionally broad—a defendant charged with murder argued that the Act did indeed license unbounded force.²²⁵ She argued that the law “provide[d] that a person may use *unlimited force* in repelling an aggressor and that the common law rule that one may use only reasonable force ha[d] been abrogated by the act.”²²⁶ The court agreed that the legislature did expressly decline to include a reasonableness requirement but rejected the defendant’s suggestion that necessary force included unlimited force.²²⁷ Still, the court held, the state had unconstitutionally expanded the right to self-defense.

By making the defendant the sole judge of the force necessary to use in any given situation, “the Legislature has delegated the fixing of the punishment to the person asserting self-defense which it cannot do.”²²⁸ Echoing Thorburn’s right-to-rule concept (and Lockean concerns with private judgment), the court emphasized that defining crimes and setting punishment lie in the exclusive province of the state.²²⁹ “Any attempt to delegate either of such powers to private persons with the excesses that naturally follow when crime or punishment are placed elsewhere than with the state, is violative of the powers placed exclusively with the Legislature by our state Constitution.”²³⁰

Just as the broad Nebraska law had been dubbed the “Kill Your Neighbor Law” for licensing such broad discretion,²³¹ some modern laws have been characterized similarly. In 2022, Missouri legislators proposed an expansion of self-defense law that critics dubbed the “Make Murder Legal Act.”²³² The bill, numbered Senate Bill 666,²³³ would have eliminated the existing requirement that a criminal defendant bear “the

225. See *Goodseal*, 183 N.W.2d at 262. The defendant was a sex worker who killed a man she said forced himself on her; the gender and social dynamics are an inescapable subtext in the opinion. See *id.* at 260–61 (noting that the defendant “did not testify to making an outcry or to any attempt to open the car door or to leave the car” during the alleged sexual assault); *id.* at 263 (“The character of the defendant and the fact of her engaging in prostitution did not deprive her of the right of self-defense, but they were circumstances to be considered by the jury, along with all other facts and circumstances shown by the evidence . . .”).

226. *Id.* at 262 (emphasis added).

227. See *id.*

228. *Id.* at 263.

229. See *id.*; see also Jennifer A. Brobst, *Perilous Private Enforcement Strategies: From Posses and Citizen’s Arrest to Texas Heartbeat Statutes*, 14 *ConLawNOW*, no. 1, 2022, at 11, 14 (“Without enough guidance or accountability, private citizens have a tendency toward excess, especially when they feel they are on a mission.”).

230. *Goodseal*, 183 N.W.2d at 263. This Essay returns to this case when discussing the constitutional avenues for accountability for the New Outlawry.

231. See *supra* note 223 and accompanying text.

232. See Palermo, *supra* note 8.

233. S.B. 666, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

burden of injecting the issue of justification” into a criminal trial.²³⁴ It would have instead created “a presumption of reasonableness under this section that the defendant believed such force was necessary to defend himself or herself or a third person from what he or she believed to be the use or imminent use of unlawful force by another person.”²³⁵

This aspect was particularly concerning to some critics of the proposal: It would, they claimed, “shift[] the burden of injecting the issue of self-defense from the defense to a presumption that every single assault that ever occurs in the entire State of Missouri is a result of self-defense.”²³⁶ The bill also created presumptive immunity from arrest, detention, and trial and introduced a pretrial immunity hearing at which the government would have to convince a judge that the conduct was unlawful by clear and convincing evidence to even get to a jury.²³⁷ Exempting “defendants from the ordinary criminal process is profound” and a rare immunity in the history of criminal law.²³⁸

At a hearing on the bill, witnesses against the legislation outweighed those in favor five to one.²³⁹ Those in favor included former Senate candidate and convicted gun offender Mark McCloskey.²⁴⁰ The opponents were a diverse group of clergy, community organizations, and crime fighters. Law enforcement witnesses argued that “the proposal would allow criminals to cry self-defense, and possibly get away with murder.”²⁴¹ In a letter to the committee, dozens of law enforcement officials entreated the legislators to reject the bill.²⁴² It failed to pass out of committee on a narrow 4-3 vote.²⁴³

234. Mo. Ann. Stat. § 563.031 (West 2023); see also S.B. 666.

235. *Id.*

236. Letter from Law Enforcement Cmty. of Se. Mo. to Hon. Jason Bean 1 (Jan. 28, 2022), <https://s3.documentcloud.org/documents/21195357/senate-bill-666-letter-to-jason-bean-final.pdf> [<https://perma.cc/9ZQT-2N8E>] [hereinafter Law Enforcement Letter].

237. See S.B. 666, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

238. Ruben, *Self-Defense Exceptionalism*, *supra* note 1, at 514. It’s worth pointing out that, as the Court’s attention in constitutional cases has turned to venerate history and tradition, this liberalization is entirely alien to that history and tradition. See *id.* at 520 (“The notion that self-defense could be adjudicated by a judge before trial thus has no basis in the common law tradition imported from England and implemented in America.”).

239. Senate Committee Minutes: Hearing on S.B. 666 Before the Comm. on Transp., Infrastructure & Pub. Safety, 101st Gen. Assemb., 2nd Reg. Sess. (Mo. 2022) [hereinafter Senate Committee Minutes].

240. *Id.*; see also Brad Dress, Mark McCloskey, Who Waved Gun at Protesters, Garners Just 3 Percent of GOP Senate Primary Vote, *The Hill* (Aug. 3, 2022), <https://thehill.com/homenews/campaign/3586336-mark-mccloskey-who-waved-gun-at-protesters-garners-just-3-percent-of-vote-in-gop-senate-primary/> [<https://perma.cc/YXF3-ZCDA>].

241. Marsha Heller, Mo. SB 666, Dubbed ‘Make Murder Legal Act’, Fails to Pass Committee, *KFVS12* (Feb. 10, 2022), <https://www.kfvs12.com/2022/02/10/mo-sb-666-dubbed-make-murder-legal-act-fails-pass-committee/> [<https://perma.cc/FYY7-THRZ>].

242. Law Enforcement Letter, *supra* note 236, at 1.

243. Senate Committee Minutes, *supra* note 239.

The Missouri example is extreme, but that state is not alone among legislators working to license and protect greater amounts of private violence. Professor Eric Ruben has documented how novel procedural changes—in the form of self-defense immunity—have insulated force wielders.²⁴⁴ In more than a quarter of the country, states have granted immunity to proclaimed self-defenders in an attempt to preclude a criminal trial and erase the jury’s historic role in deciding the legality of self-defense in a given situation.²⁴⁵

The development of this procedural protection is just as important as the substantive expansion of the circumstances when deadly force can be used. As Ruben writes, “[W]hile Stand Your Ground has garnered the most attention, advocates—and especially gun rights advocates—have pursued a deeper goal: insulating defensive gun use from legal oversight to the greatest extent possible.”²⁴⁶ And, as with the substantive expansion,²⁴⁷ this procedural innovation has real and symbolic effects.²⁴⁸ “The message that self-defense immunity sends is troubling: that people can engage in defensive violence that *they believe* is lawful with less legal oversight.”²⁴⁹

Studies of expansive substantive permission to use deadly force in stand-your-ground jurisdictions bear out these worries. The RAND Corporation, a nonpartisan research organization, has for years compiled information about the empirical evidence concerning various gun policies. After reviewing the research that met its stringent requirements for showing causal effects, the organization gave stand-your-ground laws its highest rating for increasing firearm homicides.²⁵⁰

And the harms this regime imposes are distributionally stratified. Evidence suggests that the benefits of stand-your-ground laws accrue less to women and nonwhite men, and the harms often flow their way

244. See Ruben, *Self-Defense Exceptionalism*, supra note 1, at 512.

245. *Id.* at 515.

246. See *id.*

247. Mary Anne Franks, *The Cult of the Constitution* 98 (2019) (“It is quite clear that many people *believe* that stand-your-ground laws give them the right to use deadly force in a wide variety of situations and act accordingly.”); Light, supra note 213, at 155 (“In addition to their powerful legal implications, the laws have had a profound effect on the nation’s culture, reinforcing the belief that a good, law-abiding citizen is an armed citizen.”).

248. See Ruben, *Self-Defense Exceptionalism*, supra note 1, at 541 (arguing that “immunizing self-defense can lead to more unlawful violence with less legal oversight; diminish the jury, thereby inviting less accurate and less legitimate outcomes; and introduce inefficiency into the criminal justice process”).

249. *Id.*

250. What Science Tells Us About the Effects of Gun Policies, Rand Corp. (Mar. 2, 2018), <https://www.rand.org/research/gun-policy/key-findings/what-science-tells-us-about-the-effects-of-gun-policies.html> [<https://perma.cc/EV4Y-Q7NZ>] (last updated Jan. 10, 2023).

instead.²⁵¹ There is a vast literature on threat perception and its racially disparate effects.²⁵² Racial minorities, and African Americans in particular, appear more likely to be mistakenly shot based on threat perception.²⁵³ Training in use of deadly force (as is required for professional law enforcement but not for private individuals in most cases) can possibly diminish, but not eliminate, this risk.²⁵⁴ As Professor Alice Ristroph writes, these types of violence-empowering laws “may decrease the risks of violence to some persons but increase the risks that others—persons likely to be perceived as threatening—will suffer harm.”²⁵⁵

251. See Charles, *Securing Gun Rights*, *supra* note 168, at 623–24 (describing and collecting evidence); Miller, *A History of Private Policing*, *supra* note 41, at 20 (documenting data).

252. This is not to say there isn’t controversy over these studies. Compare John Paul Wilson, Kurt Hugenberg & Nicholas O. Rule, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 *J. Personality & Soc. Psych.* 59, 60 (2017) (discussing studies that found people perceive young Black men as larger and more physically threatening than young white men), with Stephen P. Garvey, *Implicit Racial Attitudes and Self-Defense*, 37 *Notre Dame J.L. Ethics & Pub. Pol’y* 201, 246 (2023) (expressing skepticism that studies are conclusive).

253. Isabel Bilotta, Abby Corrington, Saaid A. Mendoza, Ivy Watson & Eden King, *How Subtle Bias Infects the Law*, 15 *Ann. Rev. L. & Soc. Sci.* 227, 230 (2019) (“[P]roviding participants with a 630-ms deadline results in a biased pattern of errors, such that unarmed Blacks are more likely to be incorrectly shot than their White counterparts and armed Whites are less likely to be shot than armed Black targets.” (citations omitted)); Michael C. Gearhart, Kristen A. Berg, Courtney Jones & Sharon D. Johnson, *Fear of Crime, Racial Bias, and Gun Ownership*, 44 *Health & Soc. Work* 246, 246 (2019) (“Our findings indicate that . . . vigilance is more likely to be directed toward racial and ethnic minorities. Shooter bias studies suggest that this hypervigilance toward racial and ethnic minorities is associated with an increased likelihood of shooting at a person who is a racial or ethnic minority.” (citations omitted)); Yara Mekawi & Konrad Bresin, *Is the Evidence From Racial Bias Shooting Task Studies a Smoking Gun? Results From a Meta-Analysis*, 61 *J. Experimental Soc. Psych.* 120, 123 (2015) (conducting a meta-analysis of 43 studies and finding that “[r]elative to White targets, participants were quicker to shoot armed Black targets, slower to not shoot unarmed Black targets, and more likely to have a liberal shooting threshold for Black targets”).

254. Compare Joshua Correll, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 *J. Personality & Soc. Psych.* 1314, 1315 (2002) (finding that forty untrained undergraduate students’ interpretations of a target as dangerous and the associated decision to shoot varied based on a function of the target’s ethnicity), with Joshua Correll, Bernadette Park, Charles M. Judd, Bernd Wittenbrink, Melody S. Sadler & Tracie Keesee, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 *J. Personality & Soc. Psych.* 1006, 1021 (2007) (“We suggest, then, that police training and on-the-job experience in complex encounters may allow officers to more effectively exert executive control in the shoot/don’t-shoot task, essentially overriding response tendencies that stem from racial stereotypes.”).

255. See Alice Ristroph, *The Constitution of Police Violence*, 64 *UCLA L. Rev.* 1182, 1189 (2017). Professor Hill sees this as an instantiation of the critique that “coercion proceeds along two overlapping tracks: wherein the state not only actively targets Black people for coercive measures but also relies upon criminal laws to authorize private activity that aligns with or fortifies their subjugation.” Hill, *supra* note 38, at 62.

The authority of private persons to engage in defensive force has migrated far from the restrictive days of English common law. That authority is expanding around the country today, and much of the rhetoric around self-defense is explicitly tied to guns. According to these narratives, broad authorization for self-defense is needed to protect law-abiding gun owners, and guns are necessary instruments for law-abiding citizens to exercise self-defense.

* * *

In dealing with both types of violence—that which furthers the state’s interests and that which secures private defense (and supposedly greater public safety)—American law has grown alarmingly lax. But recent developments make that liberality even more troubling. Coupled with the deterioration of social and civic ties, and distrust in official forms of law enforcement, states have been gradually entrusting more violence work to private citizens. Laws empower individuals to act aggressively to enforce law and order and react forcefully to any perceived threat.²⁵⁶ The result is an uncoordinated, but unmistakable, lurch toward decentralized violence that purports to inure to the benefits of the society and each individual. Much of this license extends beyond the bounds of what state actors could lawfully do and is articulated in the language of individual right. The next Part breaks down the conceptual and doctrinal limits of this turn.

III. LIMITATIONS ON DELEGATING VIOLENCE

The New Outlawry, in the various forms outlined in Part II, represents a departure from the basic contractarian model of liberal political theory. Briefly put, in the state of nature, everyone is formally equal in their insecurity. In exchange for some measure of protection by all, the executive judgment of each to decide what is just is surrendered to officials that act on behalf of everyone.²⁵⁷ Although greatly simplified, this is the basic reciprocal agreement in the Western political tradition: Each surrenders private vengeance and equal insecurity for the security provided by the state.²⁵⁸ In return, each agrees to submit to the judgment

256. Professor Aziz Huq theorizes that “legal systems of private suppression typically are a dominant group’s response to new, exogenous threats to economic interests and status hierarchies.” See Huq, *supra* note 98, at 1301. Hence, it should come as no surprise that private delegations of violence such as the type described here arise in those jurisdictions and among those groups who feel their economic and political power most threatened by demographic change.

257. Locke, *Two Treatises*, *supra* note 110, at 190 (“[M]en give up all their natural power to the society which they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws . . .”).

258. See Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 113 (2006) (quoting the prosecutors in the 1806 *Selfridge* case concerning self-defense and the duty to retreat as arguing that “[a]ll men are bound to

of the whole. The New Outlawry represents a departure from this basic agreement. In some not insignificant number of applications, it attempts to replace the judgment of the whole with the judgment of the individual.

Of course, to characterize something as a departure depends on what constitutes the baseline. The notion of a “delegation” of violence is unintelligible without a conception of the default distribution of authority to inflict violence.²⁵⁹ Although some criticize the premise that the state possesses a monopoly on legitimate violence both descriptively and normatively,²⁶⁰ we think it represents the best account of Western liberal political theory and Anglo-American legal tradition from the early modern period to the present. And that thesis has implications for the authority of the state to wash its hands of the violence it enlists private actors to perform.

Additionally, as explained below, the monopolization thesis helps rationalize a number of features of American constitutional practice—including some aspects of state action doctrine, the private nondelegation doctrine, the state-created-danger theory of due process liability, the meaning of equal *protection* of the law, and the minimum guarantees of the Republican Form of Government Clause. Jurisdictional experiments with the New Outlawry test the boundaries of these discrete doctrinal concepts and reveal jurisprudential and normative assumptions that connect them.

Section III.A explains and defends the monopoly thesis as the best account of Anglo-American political theory and history. Sections III.B and III.C then explore the constitutional limits on the state’s authority to license violence, given its monopoly.

A. *The State’s Violence Monopoly*

The notion that a state—for that concept to have any meaning—must monopolize all legitimate force is an idea over four hundred years old and

surrender their natural rights upon entering into civil society, and the law become the guardians of the equal rights of all men” (internal quotation marks omitted)).

259. Although this Essay argues that there’s a good descriptive account of the monopoly on legitimate violence as a matter of American political and legal history, we recognize that the selection of this baseline is not free from normative choice. See generally Cordelli, *The Privatized State*, supra note 36, at 24–25 (describing different sorts of baselines in referring to privatization and noting that “the very concept of privatization conceptually presupposes a baseline against which the idea of public functions must be specified”); Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 Ga. L. Rev. 911, 916 (1989) (recognizing that “[b]aselines embody important moral and political choices” but that this normative aspect is often obscured in legal argument).

260. See, e.g., Leider, *State’s Monopoly*, supra note 158, at 41 (“This premise [of the state’s monopoly of force], however, runs counter to a centuries-long tradition of Anglo-American law decentralizing the use of force.” (emphasis omitted)).

shared by theorists across numerous disciplines.²⁶¹ Historians,²⁶² philosophers,²⁶³ peace researchers,²⁶⁴ and other scholars recognize how this concept makes sense of the nature of the modern state. The term “monopoly of legitimate violence” (sometimes translated as “monopoly of legitimate force”) was coined by German sociologist and historian Max Weber in *Politics as a Vocation*,²⁶⁵ but its predicates extend far back into the Early Modern period and continue to the present day.

Philosopher Baruch Spinoza spoke of the impossibility of “preserv[ing] peace unless individuals abdicate their right of acting entirely on their own judgment.”²⁶⁶ German Enlightenment philosopher Immanuel Kant conceived of the state as that entity with the “power to crush all inner resistance.”²⁶⁷ English philosophers Thomas Hobbes and John Locke both recognized that a state must be capable of monopolizing legitimate violence to resolve the paralyzing insecurity (or, in Locke’s term, “inconvenience”) that each will execute his self-interested judgment upon all others.²⁶⁸ As Kant wrote: “[B]efore a public lawful condition is

261. See Rosky, *supra* note 35, at 886 (“For four centuries, [the ‘monopoly thesis’] has been widely accepted and articulated, in one form or another, by philosophers, political scientists, sociologists, historians, and economists—both liberal and non-liberal alike.”); Schäfer & Fehling, *supra* note 41, at 207 (“Nearly all states under the rule of law respect the state monopoly on the legitimate use of violence, although the scope differs.”).

262. See, e.g., Susan Reynolds, *There Were States in Medieval Europe: A Response to Rees Davies*, 16 *J. Hist. Soc.* 550, 551 (2003) (modifying the Weberian definition slightly and defining a state as “an organization of human society within a more or less fixed area in which the ruler or governing body more or less successfully controls the legitimate use of physical force”).

263. See, e.g., Mark Dsouza, *Retreat, Submission, and the Private Use of Force*, 35 *Oxford J. Legal Stud.* 727, 729 n.5 (2015) (observing that the notion of the state’s monopoly on legitimate force is “almost universally accepted as a foundational principle of state amongst modern liberal states”).

264. See, e.g., Wulf, *supra* note 42, at 147–48 (“The key to the modern Westphalian nation-state is a monopoly on legitimate and organized force. This is one of the main achievements of a civilized society.”).

265. Max Weber, *Politics as a Vocation* (Jan. 28, 1919), in *The Vocation Lectures* 32, 33 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004) (emphasis omitted).

266. Baruch Spinoza, *Theologico-Political Treatise* (R.H.M. Elwes trans. 1906) (1670), reprinted in *The European Philosophers from Descartes to Nietzsche* 227, 229 (Monroe C. Beardsley ed., 2002).

267. See Immanuel Kant, *On the Old Saw: That May Be Right in Theory but It Won’t Work in Practice* 67 (E.B. Ashton trans., 1974) (1793).

268. See Thomas Hobbes, *Leviathan* 97 (Oxford Univ. Press 1952) (1651) (arguing that in the state of nature, each is in “continual feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short”); Locke, *Two Treatises*, *supra* note 110, at 127. Professor James Whitman argues that it’s a mistake to conflate the social contract theory of English philosophers and the monopoly of violence thesis of Weber. His argument is that the former is about contracting for self-defense; the latter is about the social management of vengeance. See James Q. Whitman, *Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence*, 39 *Tulsa L. Rev.* 901, 922–23 (2004). For this Essay’s purposes, we can elide the distinction, since both self-defense and vengeance are instantiations of an individual’s decision to execute their own moral judgment through

established individual human beings, peoples, and states can never be secure against violence from one another, since each has its own right to do what seems right and good to it and not to be dependent upon another's opinion about this."²⁶⁹

In the modern era, Professor John Rawls operated from a baseline of violence monopolization, writing that "political power is always coercive—backed by the government's monopoly of legal force."²⁷⁰ So justification through public reason was essential, for coercive power is also public power—"the power of free and equal citizens as a corporate body."²⁷¹

Rawls's philosophical foil, the libertarian scholar Robert Nozick, shared this monopolist premise, noting that the state "claims a monopoly on deciding who may use force when" as well as the sole authority to decide "who may use force and under what conditions."²⁷² The state possesses sole authority "to pass on the legitimacy and permissibility of any use of force within its boundaries" and a corollary right to "to punish all those who violate its claimed monopoly."²⁷³ The ability to monopolize violence and punish those who use violence without its permission is the *sine qua non* of even the minimalist state in Nozick's conception.²⁷⁴ Contemporary philosopher Philip Pettit also assumes the state is that entity with the monopoly on legitimate violence.²⁷⁵ It is for this reason, according to Pettit, that democratization²⁷⁶ and a republican tradition of

violence on another. See Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 *Ohio St. J. Crim. L.* 449, 463 n.80 (2008) ("Because I am considering precisely the argument that the social contract is one that gives the state a monopoly on violence, and without the contract, different types of violence are indistinguishable, I am intentionally conflating these two versions of the social contract."). These same problems of private judgment recur in discussions about corporatized private police. See Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 *Utah L. Rev.* 573, 578 [hereinafter Joh, *Conceptualizing the Private Police*] ("[W]hat counts as deviant or disorderly behavior for private police is defined not in moral terms but instrumentally, by a client's particular aims: a pleasant shopping experience, a safe parking area, or an orderly corporate campus.").

269. Immanuel Kant, *Metaphysical First Principles of the Doctrine of Right* (1797), reprinted in *The Metaphysics of Morals* 98 (Mary J. Gregor ed., Mary Gregor trans., Cambridge Univ. Press 2017) (emphasis omitted).

270. See John Rawls, *Justice as Fairness: A Restatement* 90 (Erin Kelly ed., 2001).

271. *Id.*; see also Matthew A. Shapiro, *Delegating Procedure*, 118 *Colum. L. Rev.* 983, 1044 (2018) (describing Rawls as recognizing the "doubly public" nature of political power: "As coercive power, it's vested with the state, per the monopoly of physical force; and as democratic power, it's collectively authorized by the political community, per the social contract").

272. See Robert Nozick, *Anarchy, State and Utopia* 23 (1974).

273. *Id.*

274. *Id.* at 24.

275. See Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* 155 (2001) ("Assuming a monopoly of legitimate force in its territory, the state has a coercive power of charging members a fee And not only is the state coercive . . . ; it is also inescapable.").

276. See *id.* at 156.

nonsubjugation²⁷⁷ must operate when evaluating the exercise of force by this collective.

The “monopoly thesis” is borne out in Anglo-American history too.²⁷⁸ As Sir Frederick Pollock, the grandee of English legal history, has written, after a period of fluidity between private and public violence, almost all communities converge on a system which “stay[s] . . . the private avenger’s hand” and in which “the repression of crime [is] by direct application of the power at the disposal of the State.”²⁷⁹ So, as the common law historians chronicle, what began as a system of dispute resolution through feuding, blood money, and localized custom was gradually replaced by a comprehensive “king’s peace” that covered “all times, the whole realm, [and] all men.”²⁸⁰

Of particular seriousness were those acts that flouted the sovereign’s monopoly on violence, such as the unauthorized use of public arms, which “could be taken as a claim to governing authority and a challenge to the crown.”²⁸¹ So, for instance, dueling—perhaps the most structured form of interpersonal violence—was castigated by Blackstone’s contemporaries as an affront to the sovereign. “He who takes upon him to decide his private quarrels by private Force,” wrote one commentator, “puts himself in the place of an independent Sovereign.”²⁸² Another spoke of the “depraved custom” of dueling as “an insult against the King’s power and

277. See Philip Pettit, *Freedom as Antipower*, 106 *Ethics* 576, 577 (1996) [hereinafter Pettit, *Freedom as Antipower*] (“[Under] the republican tradition . . . the antonym of freedom [is] . . . subjugation, defenseless susceptibility to interference, rather than actual interference.” (footnote omitted)). Thank you to Aziz Huq for directing us to this work.

278. See Rosky, *supra* note 35, at 886.

279. See Frederick Pollock, *The King’s Peace in the Middle Ages*, 13 *Harv. L. Rev.* 177, 177 (1899); see also Jolliffe, *supra* note 61, at 107 (observing that between 900 and 1066, “the king, once no more than the avenger of the law in the last recourse, was becoming its arbiter” by granting his “personally given peace” and “by taking over . . . the coercive force of outlawry”).

280. F. W. Maitland, *The Forms of Action at Common Law* 10 (A.H. Chaytor & W.J. Whittaker eds., 1979); see also Pollock, *supra* note 279, at 178 (noting that eventually, “pursuit of serious crime was taken away from the old local courts and came under the control of the king’s judges and officers”). Something similar happened on the continent as well when the Holy Roman Emperor used the concept of *Landfrieden* as a way to limit private enforcement of property rights and eliminate feuds. Some of these laws included weapon regulation. See Kristoffel Grechenig & Martin Kolmar, *The State’s Enforcement Monopoly and the Private Protection of Property*, 170 *J. Institutional & Theoretical Econ.* 5, 6 (2014).

281. Guyora Binder & Robert Weisberg, *What Is Criminal Law About?*, 114 *Mich. L. Rev.* 1173, 1183 (2016).

282. See Richard Hay, *A Dissertation on Duelling* 50 (London, William Smith 2d ed. 1801) (1784). The writer remarked on the absurdity of each asserting “the privilege of settling disputes by the Sword or Pistol,” in which case there would be a crowd of “independ[e]nt Sovereigns, without Subjects.” See *id.* at 51. Having “given up all claim to Protection from the civil power,” these independent sovereigns were fit only to live in the woods “till they should die a natural death, by Famine, by wild Beasts, or by the hands of each other.” *Id.* at 51 (emphasis omitted).

authority.”²⁸³ As Professor Don Herzog summarizes, “Private violence becomes intolerable when the sovereign is supposed to have exclusive power to rule.”²⁸⁴

Because the peace of the sovereign supplanted all other forms of individual judgment and self-help, offenses against others were not merely private wrongs; they were offenses to the sovereign as the violence monopolist.²⁸⁵ So, pleas in criminal cases are styled as on behalf of the sovereign because the sovereign is the figure, as Blackstone wrote, “in whom centers the majesty of the whole community, [and who] is supposed by the law to be the person injured by every infraction of the public rights belonging to that community.”²⁸⁶

This notion of the king’s peace did not expire with the American Revolution. Instead, the caption in criminal proceedings simply republicanized, substituting the sovereign state, commonwealth, or people for the monarch.²⁸⁷ As historian Laura Edwards has extensively documented, a gradual and un-self-reflective process in America followed the “logic of Revolutionary ideology: once free people replaced the Crown as sovereign members of the polity,” crimes against Americans “became, in theory, ‘public wrongs.’”²⁸⁸

The development of the Anglo-American common law of self-defense is consonant with this violence monopolist model. As the prior Part outlined, at common law in England, there was no such thing as justifiable killing in pure self-defense; the deliberate killing of another human being was the sole province of the sovereign. Homicides could be justified if they were done pursuant to the sovereign’s writ, in apprehending a “manifest felon[]” or when visiting a judgment on those deemed outlaws.²⁸⁹ What made these kinds of killings justifiable was that they were “committed in execution of the law.”²⁹⁰ They were more akin to a state-sanctioned execution than anything one would recognize as an act of personal self-defense.²⁹¹ All other forms of homicide, including homicide in self-

283. See Don Herzog, *Sovereignty*, RIP 44 (2020) (internal quotation marks omitted) (quoting Sir Francis Bacon).

284. See *id.* at 43.

285. Binder & Weisberg, *supra* note 281, at 1183 (“In medieval and early-modern law, crimes were not conceived as injuries to interests of individuals. Instead, they were breaches of a duty of political loyalty to a lord.”).

286. See 4 William Blackstone, *Commentaries* *2.

287. Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 *Law & Contemp. Probs.* 11, 14 (2017) (“The American Revolution republicanized the concept of the King’s Peace by transmuting it into the people’s peace . . .”).

288. See Laura Edwards, *The People and Their Peace* 98 (2009).

289. Beale, *supra* note 203, at 567–68.

290. *Id.* at 568.

291. See 2 Pollock & Maitland, *supra* note 58, at 479; see also Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 *Yale L.J.* 537, 539 (1934) [hereinafter Perkins,

defense,²⁹² were understood as committed in derogation of the sovereign's sole authority to dispense death and judgment and consequently required royal pardon.²⁹³ Matthew Hale confirmed the monopoly thesis, writing that "private persons are not trusted to take capital revenge [on each other]."²⁹⁴

Although the sovereign's pardon—essentially a ratification of a killing in self-defense—became routine early in English history,²⁹⁵ the imposition of the state's special permission persisted well into the nineteenth century. This is why the lawbooks of the sixteenth, seventeenth, and eighteenth centuries insist on a distinction between justifiable and excusable homicide.²⁹⁶ Justifiable homicides are killings performed on behalf of the sovereign; excusable homicides (including self-defense) are killings which the sovereign will tolerate on the basis of necessity—but in either case, the sovereign, not the killer, decides the propriety of the killing.²⁹⁷

Whether viewed from Western philosophy or Anglo-American law, the monopoly thesis prevails. As Professor Clifford Rosky aptly stated, "[N]o matter who tells the tale, or how it is told, the state-of-nature story always ends with the same basic punchline: The state has, must have, or should have a monopoly of force."²⁹⁸

The monopoly thesis has three interrelated concepts that are worth unpacking: violence, monopoly, and legitimacy.

1. *Violence*. — When we use the term violence, we mean the threat or application of unconsented-to physical force.²⁹⁹ There are more

Malice Aforethought] ("According to the ancient common law of England, only those homicides were innocent which were caused in the enforcement of justice . . .").

292. Perkins, *Malice Aforethought*, supra note 291, at 540 ("He who had caused the death of another . . . in the necessary defense of his own life . . . had no legal defense." (footnotes omitted)).

293. 2 Henry of Bratton, supra note 59, at 732–73; 2 Pollock & Maitland, supra note 58, at 502 ("The man who commits homicide by misadventure or in self-defense deserves but needs a pardon."); cf. Binder & Weisberg, supra note 281, at 1183 (noting that excuse defenses for criminal charges at common law "included infancy, insanity, and duress—but also self-defense, seen as a justification today").

294. See 1 Hale, supra note 137, at 481.

295. See *Killing a Thief Act of 1532*, 24 Hen. 8, c. 5 (Eng.).

296. See Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. Pitt. L. Rev. 621, 637 (1996) ("Exoneration for killings committed *se defendendo* and *per infortunium* remained a matter of pardon until relatively late in the history of Anglo-American law.").

297. Beale, supra note 203, at 572 ("Self-defense merely was no excuse, but ground for pardon; but it was an excuse in equity, and the equitable defense was at last accepted at law. Killing in due execution of law was justifiable." (footnote omitted)).

298. Rosky, supra note 35, at 885.

299. See Robert Paul Wolff, *On Violence*, 66 J. Phil. 601, 606 (1969) ("Strictly speaking, violence is the illegitimate or unauthorized use of force to effect decisions against the will or desire of others." (emphasis omitted)). We disagree with Wolff that the definition of violence includes illegitimacy. For our purposes, we separate out the descriptive from the normative when we speak of violence, recognizing as Professor Alice Ristroph does, that separating the two may obscure some important features. See Alice Ristroph, *Criminal Law*

comprehensive definitions of violence, of course.³⁰⁰ But the unmediated threat or application of physical force by another individual is exceptional and deserving of exceptional treatment when it is deployed. It is exceptional because to be threatened with or suffer physical harm by another goes to the very heart of human dignity. A person who is subject to the threat or reality of physical coercion by another private party is no longer being treated as a being with agency but as an object or instrument of another's will.³⁰¹ *State v. Mann* is rightfully reviled because it states with absolute candor that it is the unappealable, despotic fact of *physical* coercion by one private party over another that separates freedom from slavery.³⁰²

2. *Monopoly*. — As Professor Ralf Poscher has written, the idea of the state possessing a “monopoly” on violence is a bit misleading. Murder, terrorism, theft, and other forms of violence do occur as a matter of social reality. Hence, “even the modern state has no *factual* monopoly on the use of force.”³⁰³ Instead, what the state asserts is to have a monopoly on *superior* force.³⁰⁴ Because only with the capacity to overpower any other force can

in the Shadow of Violence, 62 Ala. L. Rev. 571, 574–75 (2011) (noting that scholars often focus solely on the descriptive, material aspect of violence and argue its legitimacy should be a separate inquiry but that “the dual dimensions of violence sometimes run seamlessly into one another”).

300. See James P. Lynch & Lynn A. Addington, Crime Trends and the Elasticity of Evil: Has a Broadening View of Violence Affected Our Statistical Indicators?, 44 Crime & Just. 297, 298 (2015) (“As civility increases, the cultural and legal definitions of criminal violence expand. Relatively minor incivilities not previously defined as violent are considered so, and violence that did not rise to illegal behavior becomes classified as criminal.”).

301. See Julian A. Sempill, Ruler's Sword, Citizen's Shield: The Rule of Law & the Constitution of Power, 31 J.L. & Pol. 333, 365 (2016) (“If people are simply coerced, or tricked, rather than being offered genuinely good reasons to give their allegiance to a constitutional order, then they are reduced to the status of objects of manipulation, mere means or instruments, to be used according to the convenience of those wielding power.”); see also Pettit, Freedom as Antipower, *supra* note 277, at 595 (observing that the principle of antipower, as opposed to subjugation, is that “[y]ou do not have to live either in fear of that other . . . or in deference to the other . . . [:] You are a somebody in relation to them, not a nobody”).

302. *State v. Mann*, 13 N.C. (2 Dev.) 263, 267 (1829) (“The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God.”); see also Eric L. Muller, Judging Thomas Ruffin and the Hindsight Defense, 87 N.C. L. Rev. 757, 761–62 (2009) (describing *Mann* as “perhaps the coldest and starkest defense of the physical violence inherent in slavery that ever appeared in an American judicial opinion”); Pettit, Freedom as Antipower, *supra* note 277, at 576–77 (explaining how American republican tradition saw slavery as subjugation, the “defenseless susceptibility to interference”).

303. Ralf Poscher, The Ultimate Force of the Law: On the Essence and Precariousness of the Monopoly on Legitimate Force, 29 Ratio Juris 311, 312 (2016); see also Robert C. Ellickson, Forceful Self-Help and Private Voice: How Schauer and McAdams Exaggerate a State's Ability to Monopolize Violence and Expression, 42 Law & Soc. Inquiry 49, 51 (2017) (“[M]onopoly implies a degree of control over the use of force that a state in practice can never attain.” (emphasis omitted)).

304. Poscher, *supra* note 303, at 314.

the law transform “potentially violent social conflicts” into legal ones.³⁰⁵ Without the capacity to overawe all other force, the “juridification” of violence through a sovereign-empowered dispute resolution system becomes advisory, a “next-to-last strategy” for resolving conflict.³⁰⁶ No reasonable recourse to private violence can remain for a state to function according to law: “The law must be capable of overpowering every other force that might potentially resist it.”³⁰⁷ Poscher’s formulation is consonant with Professor Robert Ellickson’s refinement of the monopolist thesis. Because actual monopolization is impossible, Ellickson proposes that a better restatement would be something along the following: First, every society contains individuals who will use violence to “prey on others’ persons and property;” second, those attacked, and perhaps witnesses, are “inherently prone to use self-help measures” including violence “to ward off or punish these acts of predation;” third, because the state is “unable wholly to prevent the two forms of private violence,” it “invariably attempts to regulate both forms.”³⁰⁸

What these formulations share is the notion that the state’s monopoly is over legitimate violence, or over what one might call the *legitimation* of violence. The state sets itself up, not as the only entity that ever uses violence, but as the entity with the ultimate power to sanction violence. “The state,” in other words, “has the prerogative to distinguish between legitimate and illegitimate violence.”³⁰⁹ For our purposes, the upshot is that the state’s monopoly is over the power to pass on the propriety of every act of violence in its jurisdiction.³¹⁰

3. *Legitimacy*. — The final feature of the monopoly on violence thesis is that the state monopolizes *legitimate* or *lawful* violence. As acknowledged above, as a matter of social reality, violence occurs without the state’s permission. And the monopoly thesis does not mean that any actual violence that goes undetected or unpunished is implicitly sanctioned by the state. Instead, legitimacy presupposes a demarcation between that violence that the state inflicts or sanctions; that violence that the state does not inflict or sanction, but for other reasons does not detect or punish;

305. Id.

306. Id.

307. Id.

308. See Ellickson, *supra* note 303, at 52. Ellickson contemplates that the state often regulates violence *ex post*, but that does not necessarily imply the inability to regulate *ex ante*. Cf. Poscher, *supra* note 303, at 314 (discussing the role that the state’s monopoly on superior force plays in legitimating violence regulation through sovereign-empowered dispute resolution).

309. Jennifer Carlson, *Revisiting the Weberian Presumption: Gun Militarism, Gun Populism, and the Racial Politics of Legitimate Violence in Policing*, 125 *Am. J. Socio.* 633, 633 (2019).

310. See Nozick, *supra* note 272, at 23 (“A state claims a monopoly on deciding who may use force when; . . . it reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries; furthermore it claims the right to punish all those who violate its claimed monopoly.”).

and that violence that the state will inflict and sanction and will use its superior power to detect and punish.

Of course, it is possible that the state can “subcontract” violence to other parties and allow them to utilize violence.³¹¹ But this subcontracting isn’t the same as surrendering the monopoly. The violence subcontracted to others must be understood as ultimately advancing the goals and purposes of the violence monopolist. Much of the delegation of private policing discussed in the prior Part is in this vein. Violence permitted for the state’s end in preventing and deterring crime, as well as apprehending offenders, is consistent with the state’s monopoly.³¹² Self-defense doctrine, too, is entirely consistent with the state’s monopoly, as the state sets the parameters around when violence to protect private interests is justified.³¹³ So, for example, in Professor Malcolm Thorburn’s assessment, the legitimacy of policing and punishment comes not from individualistic rights to self-help and self-preservation but derives from the legitimacy of the whole.³¹⁴

We think that the monopolization thesis provides the best account of Western political theory and Anglo-American common law traditions. There are, of course, profound disagreements about whether this baseline is normatively desirable; but we are confident that this is the best descriptive account of American social and political practice and the common assumptions that undergird a number of seemingly disparate features of American jurisprudence.³¹⁵ Assuming this account of the monopolization thesis is descriptively true, it provides the baseline that explains the *ex ante* distribution of authority in American jurisprudence:

311. Alice Ristroph, *The Second Amendment in a Carceral State*, 116 *Nw. U. L. Rev.* 203, 213 (2021) (“Weber apparently contemplated that a monopolist could subcontract some of the work of violence; he allowed that the state may designate as legitimate some uses of force by private citizens.” (citing Max Weber, *The Theory of Social and Economic Organization* 156 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1947))).

312. Indeed, such a mechanism of accountability may be required by the state as a principle of antipower. See Pettit, *Freedom as Antipower*, *supra* note 277, at 590. To surrender one person to the unchecked, arbitrary coercive power of another is to facilitate domination, not to expand freedom. See *id.* at 599 (arguing that for the Framers, “freedom require[d] an absence of exposure to the arbitrary interference of others, in particular, the absence of exposure guaranteed under a proper rule of law”).

313. T. Markus Funk, *Rethinking Self-Defence: The ‘Ancient Right’s’ Rationale Disentangled 19–25* (2021) (explaining how self-defense law can serve monopolist values); Miller, *Self-Defense*, *supra* note 114, at 86 (noting that self-defense law has always been “heavily conditioned and constructed by the state”); see also Whitman, *supra* note 268, at 913 (“[O]ur right of self-defense has not typically been understood to license any violence beyond what is strictly necessary to preserve our physical well-being.”).

314. See Thorburn, *Reinventing*, *supra* note 115, at 426 (arguing that policing conduct “is legitimate only insofar as it is performed by someone who can plausibly be said to be acting in the name of the polity as a whole, and not in some narrower private interest”).

315. Cf. Metzger, *supra* note 36, at 1375 (exploring how privatization and delegation should be understood and noting that the Supreme Court has failed “to link the private delegation and state action analyses”).

a fixed position to judge whether powers have been retained or delegated, when a party has acted or refrained from acting, and other basic features of constitutional jurisprudence, as explained more fully below.³¹⁶

B. *State Action and Delegation*

Courts recognize the sovereign's monopolization of legitimate violence in a number of discrete areas, but one of the most emblematic is in the state action context. State action remains a "conceptual disaster area,"³¹⁷ but the doctrine sets the outer boundaries of what kind of activity can be ascribed to the state as a legal matter.³¹⁸ This activity falls into roughly four categories: those actions that have been traditionally and exclusively public functions,³¹⁹ those circumstances "when the government has outsourced one of its constitutional obligations to a private entity,"³²⁰ those situations in which government and private parties act jointly, and those acts a government compels a private actor to perform.³²¹ This section focuses on the first two as most relevant.

1. *Traditional and Exclusive Public Functions.* — Traditional and exclusive public functions are few³²² and largely undefined by the Supreme Court.³²³ But the ones that the Court cites as paradigmatic are illuminating. Many of these cases involve functions and activities deeply enmeshed in notions of democratic legitimacy and accountability. As the Court described them, they are functions "traditionally associated with

316. Some commentators reject the notion that the right to engage in self-defense is delegated or granted by the state and instead insist that it is an inherent or natural right that individuals never give up when entering civil society. See Funk, *supra* note 313, at 22 (discussing this view). Whatever its precise source or nature, we agree with the widespread view that once there is a state, "there must be *some* limits on self-defence." See *id.* at 24; see also *id.* at 24–25 ("[T]here is general agreement that some boundaries on defensive force are both appropriate and required.").

317. Charles L. Black, Jr., The Supreme Court, 1966 Term: Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 95 (1967).

318. Cf. Joh, Paradox of Private Policing, *supra* note 41, at 93 (noting that "the Supreme Court and the lower courts have repeatedly rejected claims that the federal constitutional constraints placed on public police should also apply to the private police").

319. See Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928–29 (2019) ("[T]o qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally and exclusively performed the function.").

320. *Id.* at 1928–29, 1929 n.1. The *Halleck* Court characterized this scenario as related to the "traditional and exclusive" public function test, see *id.*, but it strikes us as being conceptually distinct.

321. *Id.* (describing government compulsion as a ground for finding state action).

322. See *id.* at 1928–29 ("The Court has stressed that 'very few' functions fall into that category." (quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978))).

323. See Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 578 (2000) ("The Court has never identified those functions it considers 'associated with sovereignty.'" (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974))).

sovereignty.”³²⁴ Actors that purport to be private become agents of the state when they engage in these kinds of activities.³²⁵

Take *Marsh v. Alabama*.³²⁶ In *Marsh*, the Gulf Shipbuilding Corporation owned and operated a town called Chickasaw, Alabama, in the suburbs of Mobile. Except for its ownership, “it ha[d] all the characteristics of any other American town.”³²⁷ It had sewers, a business district, public streets, and a Mobile deputy sheriff, who “serve[d] as the town’s policeman.”³²⁸ Grace Marsh, a Jehovah’s Witness, was arrested for trespassing after being asked to stop distributing religious tracts on the streets of Chickasaw. Citing its free speech precedent, it was clear to the Court that “had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks,”³²⁹ any government they formed to manage their disparate ownership could not have prevented a person from passing out religious literature. That ownership of Chickasaw’s property was concentrated in one private corporate entity was irrelevant for purposes of constitutional analysis. “Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.”³³⁰ Speech was of such importance to the foundations of free government that its severe constraint—even by an ostensible private property owner—could not be tolerated.³³¹ Crucially, the Court characterized this as a form of delegation, remarking that the fact the corporation is a private property owner “is not sufficient to justify the State’s *permitting a corporation to govern a community of citizens* so as to restrict their fundamental liberties.”³³²

Or consider the administration of elections. In a series of cases having to do with the right to vote in party primaries, the Court repeatedly said the activities related to administering an election are traditionally and exclusively governmental. In *Smith v. Allwright*, the Texas Democratic Party, at the time held in thrall to white supremacists, refused an African American voter access to a ballot. Texas law treated the party as a private,

324. *Jackson*, 419 U.S. at 353.

325. *Smith v. Allwright*, 321 U.S. 649, 660 (1944) (“[S]tate delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party’s action the action of the state.”).

326. 326 U.S. 501 (1946).

327. *Id.* at 502.

328. *Id.*

329. *See id.* at 505.

330. *Id.* at 507.

331. *See id.* at 509 (“When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.”).

332. *Id.* (emphasis added); see also *Private Police Forces*, *supra* note 41, at 581 (arguing that “although private police perform only limited public functions, the rationale of *Marsh* suggests that when the state permits private police activities, it may endow these activities with state action”).

voluntary association.³³³ The Court rejected this characterization of the party: “The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.”³³⁴ A constitutional democracy like the United States could not tolerate the capacity for free choice to be “nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.”³³⁵

Courts repeatedly refer to the power to condemn property by eminent domain as a feature of sovereign authority.³³⁶ In a related context, the power of eminent domain tends to be one factor that tips an ostensibly special-purpose governmental entity—for which there is no equal protection one-person, one-vote rule—into a “general government” for which the one-person, one-vote rule applies.³³⁷ In sum, the ability to dispossess a person of property—especially for ostensibly public purposes—is an aspect of coercion that courts routinely treat as uniquely governmental and accordingly subject to political and constitutional accountability.

Incarceration and criminal punishment are also functions courts have insisted are traditionally and exclusively public.³³⁸ Although the Supreme Court has yet to directly rule on the issue, the idea that there is an irreducible public aspect to punishment is borne out by judicial enforcement of constitutional claims in the private prison context.³³⁹ As

333. 321 U.S. 649, 654 (1944).

334. *Id.* at 663.

335. *Id.* at 664.

336. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352–53 (1974) (“If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one.”); *Cox v. Ohio*, No. 3:16CV1826, 2016 WL 4507779, at *7 (N.D. Ohio Aug. 29, 2016) (“Because Kinder Morgan[,] [a private pipeline construction company,] is exercising the State of Ohio’s eminent-domain powers, it is a state actor under the ‘public functions’ test.”).

337. See, e.g., *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 53–54 (1970) (explaining that the ability to condemn property, along with other exercises of power, was sufficiently general and significant to trigger constitutional protections).

338. See *Horvath v. Westport Libr. Ass’n*, 362 F.3d 147, 151 (2d Cir. 2004) (“[O]nly the State may legitimately imprison individuals as punishment for the commission of crimes.”); *Giron v. Corr. Corp. of Am.*, 14 F. Supp. 2d 1245, 1249 (D.N.M. 1998) (“The function of incarcerating people, whether done publicly or privately, is the exclusive prerogative of the state.”).

339. 1 Steven H. Steinglass, *Section 1983 Litigation in State and Federal Courts* § 2:15 (2023–2024 ed. 2023) (“[Lower courts] typically treat the confinement of wrongdoers to be a function that is traditionally the exclusive prerogative of the state, thus subjecting state-contracting private prison management companies and their employees as subject to suit under § 1983.”); see also *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991) (*per curiam*) (“As a [private] detention center, Pri-Cor is no doubt performing a public function traditionally reserved to the state.”); *Gabriel v. Corr. Corp. of Am.*, 211 F. Supp. 2d 132, 137 (D.D.C. 2002) (holding that “[a] private corporation that provides services normally

one Fifth Circuit case declared: “Clearly, confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function.”³⁴⁰

Policing too, has been described by the Supreme Court as “one of the basic functions of government,”³⁴¹ although it has expressly declined to detail under what circumstances the state may “delegate to private parties the performance of such functions” to avoid constitutional strictures.³⁴² The picture in the lower courts is mixed, with some courts finding that private parties delegated with broad law enforcement capabilities are exercising an exclusive public function³⁴³ and others rejecting the proposition.³⁴⁴ The Sixth Circuit encapsulated the principle on the side of an exclusive government function when it said, “[W]hen the state delegates a power traditionally reserved to it alone—the police power—to private actors in order that they may provide police services to institutions

provided by municipalities” is a state actor). But see *Holly v. Scott*, 434 F.3d 287, 292 n.3 (4th Cir. 2006) (“It is an open question in this circuit whether § 1983 imposes liability upon employees of a private prison facility under contract with a state.”).

340. See *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (per curiam); see also 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 16.2 (5th ed. 2012) (arguing that modern state action analysis indicates that “any private corporation or private individual who supervised prisoners pursuant to a contract with a local state or federal government agency should be found to be performing a public function, and subject to constitutional limitations concerning the treatment of government prisoners”).

341. *Foley v. Connelie*, 435 U.S. 291, 297 (1978).

342. *Flagg Bros. v. Brooks*, 436 U.S. 149, 163–64 (1978).

343. See, e.g., *Romanski v. Detroit Ent., L.L.C.*, 428 F.3d 629, 637 (6th Cir. 2005) (“Where private security guards are endowed by law with plenary police powers such that they are *de facto* police officers, they may qualify as state actors under the public function test.”); *Rodriguez v. Smithfield Packing Co.*, 338 F.3d 348, 354–55 (4th Cir. 2003) (holding that an auxiliary deputy sheriff working as head of security at a meat-packing plant was a state actor because by arresting plaintiffs, he was exercising a “core, sovereign power” (quoting *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 342 (4th Cir. 2000))); *Payton v. Rush–Presbyterian–St. Luke’s Med. Ctr.*, 184 F.3d 623, 629 (7th Cir. 1999) (“[I]f the state cloaks private individuals with virtually the same power as public police officers, and the private actors allegedly abuse that power to violate a plaintiff’s civil rights, that plaintiff’s ability to claim relief under § 1983 should be unaffected.”); *Henderson v. Fisher*, 631 F.2d 1115, 1118 (3d Cir. 1980) (“[T]he delegation of police powers, a government function, to the campus police buttresses the conclusion that the campus police act under color of state authority.”); *Janusaitis v. Middlebury Volunteer Fire Dep’t*, 607 F.2d 17, 24 (2d Cir. 1979) (holding that a volunteer fire team that had the authority to “direct any person to leave any building or place in the vicinity of a fire on penalty of fine or imprisonment” had taken on some of the trappings of sovereignty because fire protection constitutes a public function).

344. See, e.g., *United States v. Day*, 591 F.3d 679, 689 (4th Cir. 2010) (holding that defendant security guards were not engaged in a public function because they “were not endowed with plenary arrest authority, but rather were ‘permitted to exercise only what were in effect citizens’ arrests.’” (quoting *Romanski*, 428 F.3d at 639)).

that need it, a ‘plaintiff’s ability to claim relief under § 1983 [for abuses of that power] should be unaffected.’”³⁴⁵

Although the doctrinal picture is hazy, the functions that are most often described as traditionally and exclusively governmental also tend to be those most closely associated with the basic functions of a self-governing representative democracy: maintenance of order, punishment of crime, and the selection of governing elites.³⁴⁶

2. *Outsourcing Constitutional Duties.* — The state is also responsible for nominally private actors when it engages in an enterprise that triggers constitutional obligations but attempts to evade those obligations by enlisting private agents to perform the tasks. This outsourcing doctrine shares features with the traditional and exclusive public function test. The two are often conflated in the case law, but they are conceptually distinct.

The exclusive public function test tends to categorize a set of government tasks that no private party can engage in independently—conducting an election for public office or performing an execution, for example. There is no parallel election or execution market that competes with the government. The outsourcing doctrine, by contrast, is subtly different in that there may be private market actors supplying a similar or identical service, but when the government engages in the service, it takes on constitutional obligations that cannot be evaded by off-loading performance onto private parties.

The paradigmatic case is *West v. Atkins*.³⁴⁷ In *West*, an inmate in a correctional facility in North Carolina sued a private physician under contract with the prison system for his deliberate indifference to the inmate’s need for orthopedic surgery.³⁴⁸ The physician defended the case on the grounds that he was not a state actor.³⁴⁹ A unanimous Supreme Court disagreed.³⁵⁰ “Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody,” the Court reasoned.³⁵¹ North Carolina operated a prison and was under a constitutional obligation to provide medical care to its inmates. Contracting out that duty to private physicians “does not

345. See *Romanski*, 428 F.3d at 637 (alteration in original) (quoting *Payton*, 184 F.3d at 629).

346. See Elizabeth E. Joh, *The Forgotten Threat: Private Policing and the State*, 13 Ind. J. Glob. Legal Stud. 357, 359–60 (2006) (“Whether it encourages by inaction, or discourages through legislation and public critique, the state is always implicated in the development of private policing.”).

347. 487 U.S. 42 (1988).

348. See *id.* at 43–45.

349. See *id.*

350. See *id.* at 58.

351. See *id.* at 56.

deprive the State's prisoners of the means to vindicate their Eighth Amendment rights."³⁵²

But it would be wrong to understand *West* as just a "prison" case. As Justice Sotomayor has written recently in dissent, the doctrine does not just concern those kinds of functions that are traditionally and exclusively public; nor does it require a scenario in which the government is the only available provider in the marketplace. "Governments are . . . not constitutionally required to open prisons or public forums, but once they do either of these things, constitutional obligations attach. The rule that a government may not evade the Constitution by substituting a private administrator . . . is not a prison-specific rule."³⁵³

Hence, just as a government could not operate a public park but then delegate all its constitutional obligations to nominally "private" agents,³⁵⁴ so by extension a state could not provide policing or law enforcement services and then populate its entire force with unaccountable private security personnel.³⁵⁵ State action would apply in this circumstance, even if one accepts that provision of security—even armed security—is not a traditional and exclusive government function.³⁵⁶

C. *Independent Constitutional Limits on Delegation*

Even when the actions of private parties cannot be ascribed to the state in the form of state action, there still may be freestanding constitutional limits on the government's act of delegation.³⁵⁷ In this scenario, it is not the case that the state becomes responsible for the acts

352. *Id.*; see also *Lemoine v. New Horizons Ranch & Ctr., Inc.*, 990 F. Supp. 498, 503 (N.D. Tex. 1998) (discussing the state action of a medical provider in a twenty-four-hour juvenile detention center). As Professors Kate Crawford and Jason Schultz note, the fact that there are other private suppliers of medical services is not relevant to whether in the case of operating a prison, the state can outsource its Eighth Amendment obligations. See Kate Crawford & Jason Schultz, *AI Systems as State Actors*, 119 *Colum. L. Rev.* 1941, 1961 (2019).

353. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1940 n.8 (2019) (Sotomayor, J., dissenting).

354. *Cf. Evans v. Newton*, 382 U.S. 296, 302 (1966) (finding that a city that transferred title to a public park to a private entity could not divest itself of the obligation to comply with the Fourteenth Amendment).

355. When a New Jersey borough tried to outsource its policing functions to a private security force, a state court ruled it illegal, writing that "the traditional role of government . . . has always been to provide for the public safety, and that role simply cannot be delegated to a private agency." Joh, *Conceptualizing the Private Police*, *supra* note 268, at 614 n.230 (alteration in original) (quoting Brian T. Murray, *Private Security Force in Sussex Ruled Illegal, "Dangerous"* by Judge, *Star-Ledger* (Newark), July 31, 1993, at 1).

356. *Cf. Peterson*, *supra* note 30, at 1618 (arguing that, in "seeking out our constitutionalism of force in the historical record," it is not "useful to attempt to distinguish private and 'official' conduct" because the lines are often murky).

357. Metzger, *supra* note 36, at 1396 (arguing that "the powers exercised by private entities as a result of privatization often represent forms of government authority, and that a core dynamic of privatization is the way that it can delegate government power to private hands").

of its de facto agents; it is that the state is prohibited from delegating the task in the first instance.³⁵⁸ Alternatively, sometimes when the state decides not to act in a sovereign capacity as a violence monopolist it is penalized for its *inaction* in preventing the harm caused by a third party.³⁵⁹

1. *Private Delegation (or Nondelegation) Doctrine.* — Even without state action, there could be independent constitutional limitations on delegating violence work to private parties. The nondelegation doctrine has been experiencing an uptick in interest in recent years.³⁶⁰ Typically, this involves separation of powers concerns—as when Congress delegates some function to the executive branch.³⁶¹

In a handful of the Supreme Court’s early nondelegation cases, however, the justices have articulated a distinct “private delegation” doctrine that limits the government’s ability to repose certain types of power in private parties.³⁶² This type of impermissible delegation is most pertinent for the kind of violence work the New Outlawry attempts to empower. And, as Professor Gillian Metzger has noted, it represents a sort of “road not taken” in existing efforts to hold the exercise of government power in private hands to constitutional standards.³⁶³ To be sure, much of the case law this Essay discusses concerns the *federal* nondelegation doctrine applicable to branches of the federal government, but some states

358. Kimberly N. Brown, *Government by Contract and the Structural Constitution*, 87 *Notre Dame L. Rev.* 491, 504 (2011) (explaining the differences between state action doctrine and the limits of private delegation); Metzger, *supra* note 36, at 1437 (explaining how a private delegation doctrine can provide accountability that state action doctrine cannot).

359. Pettit’s idea of antipower also contemplates this kind of responsibility for inaction. See Pettit, *Freedom as Antipower*, *supra* note 277, at 579 (suggesting that forms of omission can count as a form of coercion); see also Peterson, *supra* note 30, at 1619 n.493 (“We must see such arenas of conflict, suppression, and violence in which the state regularly withholds its power, surveillance, and protection for what they are: not the absence of law, but rather, consigned to governance by means other than institutions and text.”).

360. See Brandon J. Johnson, *The Accountability-Accessibility Disconnect*, 58 *Wake Forest L. Rev.* 65, 78 (2023) (“With the addition of Justices Gorsuch and Kavanaugh to the Court . . . the number of justices willing to question the status quo of the nondelegation doctrine increased to a majority of the Court.” (footnote omitted)).

361. See *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (plurality opinion) (focusing on the relationship between Congress and the executive branch).

362. Freeman, *supra* note 323, at 583–84. The source of the constitutional barrier to this delegation is important. As Professor Calvin Massey has observed, “A conclusion that the non-delegation doctrine bars delegations of authority to private parties, even pursuant to intelligible standards set by Congress, affects only federal power.” Calvin R. Massey, *The Non-Delegation Doctrine and Private Parties*, 17 *Green Bag 2d* 157, 165 (2014). But “[g]rounding the principle in due process would also bar state legislatures from delegating state power to private entities.” *Id.* For a skeptical view of the private nondelegation doctrine, see Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 *Notre Dame L. Rev.* 203, 229 (2023) (“Nothing in the Article I Nondelegation Doctrine bars private delegations.”).

363. See Metzger, *supra* note 36, at 1411.

share similar or broader nondelegation doctrines, and some principles of federal constitutional law may also constrain state decisionmakers.³⁶⁴

The Supreme Court's early private nondelegation cases tended to involve delegations of public power and their effects on property rights. In 1912, in *Eubank v. City of Richmond*, the Court considered a challenge to a Richmond ordinance that delegated zoning authority to private parties.³⁶⁵ By ordinance, the City of Richmond authorized those who owned two-thirds of the property on a street to impose a housing moratorium past a certain line and to require modification of existing homes to conform to the line.³⁶⁶ A homeowner challenged the law, saying it deprived him of due process and equal protection.³⁶⁷ The Court struck down the ordinance as surrendering a police power to the caprice and potential self-interest of the private property owners.³⁶⁸

Sixteen years later, in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, the Court considered a similar delegation: This time, a trustee wanted to build an elderly home for the poor but was stymied by neighbors empowered by Seattle's law that required two-thirds agreement of all landowners within four hundred feet of the proposed home.³⁶⁹ The Court, citing *Eubank*, held that the regulation violated due process.³⁷⁰ The private property owners "are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice."³⁷¹

Then again, in 1933, during the height of the Court's skepticism of delegation, it reiterated that governmental power could not be delegated to private parties. The Bituminous Coal Conservation Act of 1935 empowered district boards in coal producing areas to fix minimum and maximum prices;³⁷² in another section, private producers and mine workers could set wage and hour agreements that would bind all producers covered by the act.³⁷³ The Court rejected the structure as

364. See Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 *Duke L.J.* 545, 629 n.457 (2023) ("State courts have a long tradition of more rigorously scrutinizing delegations of public power to private entities because of concerns regarding democratic accountability."); Benjamin Silver, *Nondelegation in the States*, 75 *Vand. L. Rev.* 1211, 1242 (2022) (stating that "state supreme courts have routinely held delegations to private entities to be invalid").

365. 226 U.S. 137, 140 (1912).

366. *Id.* at 141–42.

367. *Id.* at 140.

368. See *id.* at 143–44 ("The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised . . .").

369. 278 U.S. 116, 117–19 (1928).

370. *Id.* at 122 (citing *Eubank*, 226 U.S. at 143).

371. *Id.*

372. Bituminous Coal Conservation Act of 1935, ch. 824 § 4 pt. II, 49 Stat. 991, 995–1001 (repealed 1937).

373. *Id.* § 4 pt. III(g), at 1002.

unconstitutional: “This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”³⁷⁴ Production of coal may be private, but regulation of its production was “necessarily a governmental function, since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor.”³⁷⁵

The Court has never expressly overruled its private delegation cases, although it has certainly become more forgiving of such delegations in a post-*Lochner* world.³⁷⁶ However, the present Justices have taken an increased interest in Article I nondelegation; in one such case, Justice Samuel Alito, in a concurring opinion, appeared to endorse the continued soundness of the private nondelegation principle.³⁷⁷

As attorney Paul Larkin observes, one reason the private delegation doctrine is not completely repudiated is a concern that government will “turn[] over to private parties a decision that the government could not make free from legal restraints.”³⁷⁸ He describes this risk as the “mirror image . . . of declaring someone an ‘outlaw’ at common law”: The government delegates an unconstitutional act to a private party and can disclaim any responsibility for it.³⁷⁹

Thinking about power to inflict violence for public ends as nondelegable reinforces two intuitions that animate the due process aspects of the private delegation doctrine. First, there’s the concern that delegations to private entities always risk arbitrary or self-interested decisionmaking.³⁸⁰ The Court’s concern with biased or arbitrary decisionmaking runs through the private nondelegation doctrine cases of

374. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). In coming to this conclusion, the Court cited its prior private delegation decisions: “The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.” *Id.* (citing, *inter alia*, *Eubank v. City of Richmond*, 226 U.S. at 143, and *Roberge*, 278 U.S. at 121–22).

375. *Id.* at 311.

376. Larkin, *supra* note 35, at 52–53 (speculating that the “private delegation doctrine” has not seen much activity because “the Court has decided to group *Eubank*, *Roberge*, and *Carter Coal* into other pre-New Deal Era decisions . . . that unlawfully intruded on a legislature’s power to define what is in the public interest”).

377. See *Dep’t of Transp. v. Ass’n of Am. Railroads*, 575 U.S. 43, 57 (2015) (Alito, J., concurring) (“One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern.”).

378. See Larkin, *supra* note 35, at 74.

379. See *id.*

380. Lawrence, *Private Exercise*, *supra* note 34, at 659 (remarking that the core concern with private delegation “is that governmental power—power coercive in nature—will be used to further the private interests of the private actor, as opposed to some different public interest”).

Eubank, *Roberge*, and *Carter*. Those cases had to do with delegations of decisionmaking over property. They seem just as applicable—perhaps even more so—when dealing with matters of violence, liberty, and life. Delegating violence in this way tests any person’s mettle, because “self-interested individuals are incapable of exercising the objectivity, restraint, and discretion” necessary to make just decisions.³⁸¹ Private parties are apt to use violence in ways that are mistaken or biased as to the justification for the violence, the degree of violence necessary, and the circumstances that give rise to the violence.³⁸²

Second, the private delegation doctrine also taps into the intuition that underpins the traditional and exclusive government function test for state action—that there is a set of government functions that can *only* be performed by government officials subject to legal restraints.³⁸³ Attempts to delegate these functions to private entities must be scrutinized to ensure they are not an attempt at constitutional evasion.³⁸⁴ This intuition is different from the concern about bias or self-interest. No matter how efficiently private actors may perform such functions, no matter how neutral or disinterested the private party may claim to be, this strand of the nondelegation doctrine corresponds to the strong intuition that there are a set of tasks that must be performed by agents of representative government and not private parties.³⁸⁵

2. *Due Process and the “State-Created Danger” Doctrine.* — Due process can also act as an independent restriction on private delegation. Although *DeShaney v. Winnebago County* stands for the broad proposition that there is no due process violation for government’s failure to protect a person from private violence, there are limits to *DeShaney*.³⁸⁶ The most relevant to

381. Watts, *supra* note 37, at 1270 (citing John Locke, *The Second Treatise of Civil Government*, reprinted in *The Second Treatise of Civil Government and a Letter Concerning Tolerance* 3, 63 (J.W. Gough ed., 1948) (1690)); see also Nourse, *supra* note 110, at 1705 (“If we allow any defendant to exempt himself from the rules and challenge the state’s monopoly on violence, we fear that he will enforce the law in ways that are excessive or partial.”).

382. See Watts, *supra* note 37, at 1270.

383. This is akin to what Benjamin Silver calls the “Sovereignty theory” of nondelegation. See Silver, *supra* note 364, at 1241 (“The Sovereignty theory can succinctly be summarized as the view that certain governmental functions must be exercised by public officials acting in their official capacities.”).

384. See Larkin, *supra* note 35, at 59–60 (arguing that the privatization of government functions could “weaken public norms such as the commitment to equality”).

385. Although space does not permit further discussion here, the widespread resistance to private militias during the late 1800s and early 1900s exhibits this same instinct. See Darrell A.H. Miller, *Prohibitions on Private Armies in Seven State Constitutions*, in *New Histories of Gun Rights and Regulation: Essays on the Place of Guns in American Law and Society* 263, 268–73 (Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller eds., 2023) (describing resistance to Pinkertons and private armed groups as rooted in concerns over the dangers of arming individual actors).

386. See *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989) (“[N]othing in the language of the Due Process Clause itself requires the State to protect

the New Outlawry is the “state-created danger” theory of liability, which is “a means by which state actors may be held constitutionally liable for acts of *private violence* under prescribed circumstances.”³⁸⁷

Government actors can be liable for a due process violation when their action or lack of action leaves a person more vulnerable to harms caused by third parties. The state-created danger doctrine has various formulations but usually requires (1) foreseeable harm, (2) a mens rea beyond simple negligence (sometimes expressed as “conscience-shocking”), (3) some foreseeability that the plaintiff would be a victim of the state actor’s acts or failure to act, or (4) the state actor to have aggravated the risk of harm to the victim.³⁸⁸

There are a number of cases in which the government’s shocking lack of attention to the risk posed by others generates government liability. In one case, a woman experiencing a psychotic episode at Midway Airport in Chicago was eventually released by the officers into a particularly dangerous part of the city.³⁸⁹ Despite efforts by some good Samaritans in the neighborhood to assist her, she was nonetheless sexually assaulted in an apartment and suffered traumatic head injuries in her effort to escape out of a seventh floor window.³⁹⁰ In another case, a state trooper arrested a drunk driver and impounded the car, abandoning the passenger on the side of the road in a high-crime area in the early morning.³⁹¹ The passenger was subsequently raped by a person who offered to give her a ride.³⁹²

In some cases, it is not the executive actions (or inactions) of a government official but the official policy or informal custom of the municipal government that creates the danger. The litigation surrounding Seattle’s “Capitol Hill Autonomous Zone” is a pertinent example. Following racial justice protests in Seattle in 2020, staff at the East Precinct

the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation . . . , not as a guarantee of certain minimal levels of safety and security.”).

387. Gray v. Univ. of Colo. Hosp. Auth., 672 F.3d 909, 917 (10th Cir. 2012).

388. See, e.g., Lipman v. Budish, 974 F.3d 726, 744 (6th Cir. 2020) (“[The] plaintiff must show: 1) an affirmative act by the state . . . ; 2) a . . . danger . . . wherein the state’s actions placed the plaintiff . . . at risk . . . ; and 3) the state knew . . . that its actions specifically endangered the plaintiff.” (internal quotation marks omitted) (quoting Cartwright v. City of Marine City, 336 F.3d 487, 493 (6th Cir. 2003)); Waugh v. Dow, 617 F. App’x 867, 871 (10th Cir. 2015) (“(1) [T]he charged state . . . actor[] created the danger . . . ; (2) plaintiff was a member of a limited and specifically identifiable group; (3) defendant’s conduct put plaintiff at substantial risk . . . ; (4) the risk was obvious or known; (5) defendant[] acted recklessly . . . ; and (6) such conduct . . . is conscience shocking.” (second, third, and sixth alterations in original) (internal quotation marks omitted) (quoting Estate of B.I.C. v. Gillen, 761 F.3d 1099, 1105 (10th Cir. 2014)); Bright v. Westmoreland County, 443 F.3d 276, 281 (3d Cir. 2006) (outlining similar elements).

389. See Paine v. Cason, 678 F.3d 500, 504 (7th Cir. 2012).

390. Id. at 506.

391. Wood v. Ostrander, 879 F.2d 583, 586 (9th Cir. 1989).

392. Id.

of the Seattle Police Department “abruptly deserted” their posts.³⁹³ Almost immediately thereafter, private parties set up barricades, blocked off access, and formed their own patrols and security apparatus. Eventually, approximately sixteen blocks of Seattle became the “Capitol Hill Autonomous Zone,” a “no-cop” area where private parties performed security within the zone.³⁹⁴

Plaintiffs alleged that the resulting property and violent crime, and the City’s policy of permitting private security rather than official government-provided policing, amounted to the City’s creation of a “state-created danger” sufficient to rise to the level of a due process violation.³⁹⁵ Although the plaintiffs eventually lost at summary judgment, had they been able to produce facts that the harm was particularized to them and the City had shown deliberate indifference to their risk of injury, they may have prevailed at least in sending the case to a jury.³⁹⁶

It is true that existing case law in the lower courts generally fails to find statutes or general policies to be a permissible basis for invoking the state-created danger doctrine, even when they might make identifiable groups less safe.³⁹⁷ A Pennsylvania appellate court, for example, rejected use of the state-created danger theory in a challenge to the state’s firearms preemption law and the additional danger it allegedly created for residents most at risk for gun violence in Philadelphia and Pittsburgh.³⁹⁸ We think the experiments with the New Outlawry may generate reconsideration of a bright-line rule that exempts statutes and requires plaintiffs to show individualized danger.

3. *Equal Protection of the Law.* — The Fourteenth Amendment forbids states from denying “any person within its jurisdiction the equal protection of the laws.”³⁹⁹ The equal protection doctrine has developed over many

393. *Hunters Cap. LLC v. City of Seattle*, 499 F. Supp. 3d 888, 893 (W.D. Wash. 2020).

394. *Id.* (internal quotation marks omitted). The area was also known as the “Capitol Hill Organized Protest,” “Capitol Hill Occupying Protest,” or “CHOP.” *Id.*

395. The plaintiffs in *Hunters Capital LLC* eventually lost on a motion for summary judgment. See *Hunters Cap., LLC v. City of Seattle*, 650 F. Supp. 3d 1187, 1205–08 (W.D. Wash. 2023). While the plaintiffs had produced sufficient evidence that “the City’s actions in response to [the formation of the Autonomous Zone] increased criminal activity in the . . . area,” they failed to provide sufficient evidence on the other elements, including that they had suffered a “an actual, particularized danger that they would not otherwise have faced” or that the city had “acted with deliberate indifference to expose Plaintiffs to certain unreasonable risks.” *Id.* at 1200–02.

396. See *id.* at 1201–02.

397. See, e.g., *Gray v. Univ. of Colo. Hosp. Auth.*, 672 F.3d 909, 926 (10th Cir. 2012) (describing why general policies and customs typically do not satisfy the state-created danger exception); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998) (noting that a city policy of releasing the personnel files of undercover agents in response to public records requests “placed the officers and their family members in ‘special danger’ by substantially increasing the likelihood that a private actor would deprive them of their liberty interest in personal security”).

398. See *Crawford v. Commonwealth*, 277 A.3d 649, 668–69 (Pa. Commw. Ct. 2022).

399. U.S. Const. amend. XIV, § 1.

generations, but one aspect of the Clause is worth recovering: It is about *protection*.

The authors of the Fourteenth Amendment operated upon a backdrop of American contractarian political theory that began a century earlier. The Framers of the 1787 Constitution were steeped in a contractarian tradition that, in exchange for obedience, the state must protect one's life, liberty, and property from the violence of others.⁴⁰⁰ Liberty and order were not antonyms to them; order was what was *required* for liberty. Liberty, wrote John Locke, "is to be free from restraint and violence from others, which cannot be where there is not law . . . [F]or who could be free, when every other man's humour might domineer over him?"⁴⁰¹ Law must not only provide remedies and punish wrongs, but also prevent wrongs (i.e., protect) for liberty to flourish.⁴⁰²

This right to protection extended into the nineteenth century, influencing antebellum and Reconstruction thought.⁴⁰³ Abolitionists railed at a system of slavery that they understood to allow unfettered discretion to harm others with legal impunity.⁴⁰⁴ As early as 1835, attendees at the National Negro Convention were urged to petition for protection as one of the basic rights of national citizenship as well as being a basic obligation of government.⁴⁰⁵ Twenty years later, a participant at a convention of African Americans in Sacramento, California, exclaimed that "[a]s it is, the law is to us a dead letter, a broken staff to lean upon. The oath that should protect life, liberty, and property . . . is denied us. Now we have no protection, and stand as nothing."⁴⁰⁶

After the abolition of slavery in 1865, members of the Joint Committee on Reconstruction became keenly aware that the problem was not only, or even primarily, that freedmen were not getting *equal* protection from private violence; they were receiving *no* protection from

400. For extended discussions, see generally Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 *Geo L.J.* 1 (2021) (arguing that the Fourteenth Amendment secures positive rights, guaranteeing both nondiscriminatory laws and their nondiscriminatory enforcement); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 *Duke L. J.* 507 (1991) ("[T]he Fourteenth Amendment was understood to incorporate the right to protection, as that right was understood in the classical tradition, into the Federal Constitution.").

401. Locke, *Two Treatises*, *supra* note 110, at 148.

402. See Heyman, *supra* note 400, at 529 ("[I]n contrast to a negative conception of liberty, which perceives law solely as a limitation on individual freedom, classical liberalism regarded law as essential to liberty.").

403. Bernick, *supra* note 400, at 25.

404. *Id.* at 25–26.

405. James W. Fox, *The Constitution of Black Abolitionism: Reframing the Second Founding*, 23 *U. Pa. J. Const. L.* 267, 287 (2021).

406. *Proceedings of the First State Convention of the Colored Citizens of the State of California* 13 (Adam S. Eterovich ed., Saratoga, R & E Rsch. Assocs., 1969) (1855) (quoting the remarks of David Lewis).

private violence.⁴⁰⁷ A Freedman's Bureau official in North Carolina testified,

Of the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me, and of the very many cases of similar treatment of Union citizens in North Carolina, I have never yet known a single case in which the local authorities or police or citizens made any attempt . . . to redress any of these wrongs or to protect such persons.⁴⁰⁸

Debates on the Ku Klux Klan Act—which should be remembered is officially titled “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes”⁴⁰⁹—confirm this purpose of the Fourteenth Amendment as guaranteeing through equal protection some minimum protection from private violence.

Representative William Stoughton declared, “It is a fundamental principle of law that while the citizen owes allegiance to the Government he has a right to expect and demand protection for life, person, and property.”⁴¹⁰ Senator John Pool echoed this sentiment: “The right to personal liberty or personal security can be protected only by the execution of the laws upon those who violate such rights. A failure to punish the offender is not only to deny to the person injured the protection of the laws, but to deprive him, in effect, of the rights themselves.”⁴¹¹

These conceptions of equal protection manifest themselves in those parts of the Ku Klux Klan Act directed at the *failure* of government officials to keep the peace or prevent private violence. In large part, these approaches were modeled on much older riot laws, going back to the Statute of Winchester in England that imposed collective liability for unchecked private violence.⁴¹² Although the most muscular form of this kind of liability—municipal liability under federal law for harm caused by private groups “riotously and tumultuously assembled”—failed to pass in Congress, a different version did provide some remedy for failure to

407. Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1847 (2010) (“The majority of the injustices reported were examples of private violence and the failure of states to protect blacks and white unionists from this violence.”); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1354 (1964) (discussing how the legislative record shows “a pervasive pattern of private wrongs, motivated by popular prejudice and hostility” aimed at African Americans, and to some degree Northern whites and Southern Unionists).

408. S. Rep. No. 39-30, pt. 2, at 209 (1866).

409. Enforcement Act of 1871, ch. 22, 17 Stat. 13 (codified as amended in scattered sections of 42 U.S.C. (2018)).

410. See Cong. Globe, 42d Cong., 1st Sess. 322 (1871) (statement of Rep. Stoughton).

411. See *id.* at 608 (statement of Sen. Pool).

412. See Heyman, *supra* note 400, at 542 (noting the Statute of Winchester and the 1714 Riot Act imposed liability on communities for failing to apprehend thieves or for tolerating riots within their jurisdictions).

protect.⁴¹³ Section 2 of the Act, now codified at 42 U.S.C. § 1985, spells out a long list of conspiracies to engage in politically motivated terrorism.⁴¹⁴ Section 6, now codified at 42 U.S.C. § 1986, imposes liability on those who know, and are empowered to stop, such conspiracies but fail to do so:

That any person or persons, having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse to do so, and such wrongful act shall be committed, such person or persons shall be liable to the person injured . . . for all damages caused by any such wrongful act which such first-named person or persons by reasonable diligence, could have prevented⁴¹⁵

Lower court cases construing § 1986 are limited but, as Professor William Carter has explained, can be reduced to the following propositions: (1) “any person” means both state actors and nonstate actors; (2) bystanders to private violence of which the bystander has knowledge and the power to prevent can be liable for injuries; (3) those with knowledge and power to prevent a conspiracy can be liable for negligently failing to prevent the harm; (4) one need not share or be sympathetic to the conspirator’s goals to be liable; (5) those who have knowledge of a conspiracy must take some affirmative steps to prevent it, whether that is by intervening, alerting law enforcement, or other lawful means.⁴¹⁶ Therefore, there could be avenues under existing civil rights statutes to hold government officials accountable when they are aware of conspiracies to use private violence to thwart constitutional guarantees protectable from private threats and fail to prevent them.⁴¹⁷

413. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 664 (1978) (internal quotation marks omitted) (quoting Cong. Globe, 42d Cong., 1st Sess. 749 (1871) (statement of Rep. Shellabarger)) (discussing failures of the “Sherman Amendment”); see also Susan S. Kuo, *Bringing in the State: Toward A Constitutional Duty to Protect From Mob Violence*, 79 Ind. L.J. 177, 202 (2004) (“Although Congress eventually passed a second substitute to the Sherman Amendment, the alternate bill restricted liability to individuals who had knowledge of the impending crime and the ability to prevent it, and who had neglected or refused to aid or intervene.”).

414. 42 U.S.C. § 1985.

415. Enforcement Act of 1871, ch. 22, § 6, 17 Stat. 13, 15 (codified as amended at 42 U.S.C. § 1986).

416. See William M. Carter, Jr., *The Anti-Klan Act in the Twenty-First Century*, 136 Harv. L. Rev. Forum 251, 276–77 (2023), <https://harvardlawreview.org/wp-content/uploads/2023/02/136-Harv.-L.-Rev.-F.-251.pdf> [<https://perma.cc/DGJ4-CVJW>]; see also *Park v. City of Atlanta*, 120 F.3d 1157, 1160 (11th Cir. 1997); *Clark v. Clabaugh*, 20 F.3d 1290, 1298 (3d Cir. 1994); *Vietnamese Fishermen’s Ass’n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1007–08 (S.D. Tex. 1981).

417. We acknowledge that the existing law would require that the underlying private conspiracy to which the government has knowledge, but does not act, be class based and targeted at some kind of right protected from private interference, like the right to travel or the right to vote. See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 267–68 (1993) (explaining that to prove a private conspiracy under § 1985(3) a plaintiff must show

More broadly, perhaps, the New Outlawry could force courts to better develop a theory of equal protection of the law, one more consonant with constitutional history.⁴¹⁸ This newer thinking about the Fourteenth Amendment could push the doctrine in a more positive direction, one that may require some minimum, equitable, and enforceable right to the affirmative protection of the people.⁴¹⁹

4. *Republican Form of Government.* — Finally, Article IV, Section 4 of the Constitution guarantees all states a republican form of government.⁴²⁰ Generally, the clause is thought to be a nonjusticiable political question.⁴²¹ Indeed, the first case to so hold involved violence as between two factions fighting over which was the legitimate government of the state of Rhode Island.⁴²² But that does not mean that it has no constitutional content that can give context to the acts (or failure to act) of other government entities, including Congress, the President, and state and local officials.⁴²³

At the Founding Era, Madison and many of his contemporaries were particularly concerned with the threat that armed and militaristic minorities posed to republican forms of government. “[F]act and experience,” wrote Madison, had proven that “a minority may in an appeal to force, be an overmatch for the majority,” especially in the circumstances when “the minority happen[s] to . . . possess the skill and habits of military

(1) discriminatory animus and (2) that the conspiracy aimed at rights protected against private and official encroachment); *League of United Latin Am. Citizens–Richmond Region Council 4614 v. Pub. Int. Legal Found.*, No. 1:18-CV-00423, 2018 WL 3848404, at *6 (E.D. Va. Aug. 13, 2018) (finding that “Plaintiffs have stated a claim under the ‘support and advocacy’ clause of Section 1985(3), which unlike the equal protection part of Section 1985(3) does not require allegations of a race or class-based, invidiously discriminatory animus or violation of a separate substantive right”).

418. See Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit* 20 (2021) (“Restoring the original meaning of the [Fourteenth Amendment] would require] . . . judicial recognition of an affirmative duty on the part of states to provide protection against violence by ‘private’ actors.”). The New Outlawry could also force courts to devise a doctrine more consonant with the theory of the state. Professor Brandon del Pozo, for instance, argues that the monopoly thesis is best fleshed out as the government’s monopoly on the *duty* to provide protection. Brandon del Pozo, *The Police and the State: Security, Social Cooperation, and the Public Good* 32 (2022).

419. Hill, *supra* note 38, at 56; see also Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 *Vand. L. Rev.* 409, 429 (1990) (“A less restrictive reading of the fourteenth amendment by the Court would have imposed an affirmative duty on the states to develop common law, construct statutes, or tailor services that protect fundamental rights against encroachment from the states themselves or from private action.”).

420. U.S. Const. art. IV, § 4.

421. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849).

422. See *id.* at 2.

423. Some states have analogs or references to the republican form of government guarantee in their state constitutions. See *Idaho Const. art. IX, § 1*; *Tex. Const. art. I, § 2*.

life.”⁴²⁴ Guarantees of republican forms of government and suppression of lawless violence were intertwined in these Founders’ minds.⁴²⁵

These concerns about violence and preservation of republican guarantees of protection returned during Reconstruction. Again, the debates over the Ku Klux Klan Act are illuminating. Representative Austin Blair tethered his argument for the Act to the national government’s Article IV duties: “The object of the Constitution was to protect the people of the States from lawless violence, and to that end it provided in article four, section four, that—‘The United States shall guarant[ee] to every State in this Union a republican form of Government’”⁴²⁶

Occasionally, the Reconstruction congressmembers bolstered their positions with basic theories of constitutional government and contractarian political theory, animated more by the Constitution’s spirit than the letter of any particular provision. As Representative George McKee argued, “*Salus populi suprema est lex*—the safety of the people should be the supreme law”⁴²⁷ Representative John Bingham, considered the James Madison of the Fourteenth Amendment, argued that “[t]he Government owes high and solemn duties to every citizen of the country. It is bound to protect him in his most important rights.”⁴²⁸ Representative Robert Elliot thought it “the great paramount duty of the Republic to protect its citizens[,]” and that “when you abolish or weaken the right to protection you destroy or diminish the duty of allegiance. I am bound to obey my country and her laws because I am by them protected. When they cease to protect me I can rightly cease to obey them.”⁴²⁹

Put simply, mob rule is not republican rule.⁴³⁰ A government that radically decentralizes violence in the hope that the invisible hand in this “marketplace of violence” will lead to desirable ends or that attempts to enlist private parties, animated by private biases and vengeance, with the end of allowing private parties to pursue violence for public ends, is not complying with its obligations of the social compact.

424. See James Madison, *Vices of the Political System of the United States* (1787), reprinted in 9 *The Papers of James Madison* 345, 350–51 (J.C.A. Stagg ed., 2010).

425. Ryan C. Williams, *The “Guarantee” Clause*, 132 *Harv. L. Rev.* 602, 648 (2018) (explaining the “perceived connection between violence and the threat to republicanism” in the Founders’ thinking).

426. *Cong. Globe*, 42d Cong., 1st Sess. app. at 72 (1871) (statement of Rep. Blair) (quoting U.S. Const. art. IV, § 4).

427. *Id.* at 427 (statement of Rep. McKee).

428. *Id.* at app. 85 (statement of Rep. Bingham) (internal quotation marks omitted) (quoting Daniel Webster, *The Constitution Not a Compact Between Sovereign States* 17 (New York, Bergen & Tripp 1861) (1833)).

429. *Id.* at 390 (statement of Rep. Elliot).

430. *Cf. Hoxie Sch. Dist. No. 46 v. Brewer*, 137 F. Supp. 364, 366–67 (E.D. Ark. 1956), *aff’d*, 238 F.2d 91 (8th Cir. 1956) (finding that the Republican Form of Government Clause was implicated when defendants sought to “compel a rescission of the order of desegregation by intimidation and force”).

IV. IMPLICATIONS

The New Outlawry tests, and in some cases seems to exceed, the limits on the government's delegation of violence to private parties. Although the existing legal boundaries that constrain government delegations of violence are fuzzy and take many doctrinal forms, they exist. As Part III illustrated, case law governing several discrete areas of law reveals strong intuitions that governments do not have unchecked discretion to permit private violence, even if they believe such violence will redound to the public benefit. There's definitely a line, although its contours remain indistinct. The upshot is that, even here, the state can become responsible for what it allows people to do. It can expand self-defense too far, and it can license too much private violence in citizen policing.

This Essay does not attempt to lay out the precise line, but only endeavors to show that the concern is one of constitutional import. And the way states are legislating makes deciphering the limits all the more important. To the extent that jurisdictions continue on the path of experimentation with new forms of outlawry and press the envelope of what kinds of private violence they will sanction or enable, these lines may become sharper and their doctrinal aspects more concrete. But this Essay can offer some thoughts now, based on the observed trends.

On the judicial level, it is possible, for example, that courts will evaluate excessive delegations of violence to private parties under a state action rubric and begin to subject "de facto" private policers to the same constraints that federal and state constitutions place upon official state employees empowered to use threats and use of force in service of crime control. An approach like this would repudiate the path taken by courts like the South Carolina Supreme Court in *State v. Cooney*⁴³¹ and instead create commensurate constitutional restrictions on public and private arresters.

In *Cooney*, two men whose business had been repeatedly burgled hid out to find the thief.⁴³² Armed with pistols, they confronted a man returning to the scene and, after he reportedly confessed to the crime, told him they were going to take him to the police.⁴³³ He tried to run away.⁴³⁴ They shot and killed the man.⁴³⁵ One of the business owners raised citizen's arrest as a defense to the subsequent murder charge.⁴³⁶ The trial court understood the United States Supreme Court's decision in *Tennessee v. Garner*⁴³⁷ to restrict the use of force because the Court had held that the Fourth Amendment does not permit the use of deadly force to catch a

431. 463 S.E.2d 597 (S.C. 1995).

432. *Id.* at 598.

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. 471 U.S. 1 (1985).

fleeing felon who poses no immediate risk.⁴³⁸ The South Carolina Supreme Court, however, disagreed, stating that the owner “was acting free of State influence when he attempted to arrest” the suspect.⁴³⁹ Thus, it said, “[T]he holding in *Garner* does not apply to seizures by private persons and does not change the State’s criminal law with respect to citizens using force in apprehending a fleeing felon.”⁴⁴⁰

Alternatively, or additionally, a court may consider an excessive delegation under a due process lens. The district court’s ruling in *Autry v. Mitchell*,⁴⁴¹ discussed in section I.B above, is an example of how this approach might work. There, the court addressed a broad delegation of private violence: North Carolina’s outlawry statute, which permitted private citizens to capture and kill anyone declared an outlaw in the state because they fled from criminal charges.⁴⁴² The court contrasted the limited right of public law enforcement’s authority to use deadly force with “the danger put upon the outlawed accused felon: [I]f he should become fearful of armed citizens—not in uniform—and should run, he may be slain ‘without accusation of any crime.’”⁴⁴³ “The extreme remedy granted [to] the citizenry,” said the court, “infringes, we think, a fundamental right: that one not be denied life, or be wounded, except by due process of law.”⁴⁴⁴ In other words, the law delegated too great an unchecked authority to private citizens to violate the right to life.

Alternatively, a court could use a due process lens and hold that removing the legal strictures against private violence is a form of “state-created danger” that forms the outer boundary of the *DeShaney* case.⁴⁴⁵ As with the Capitol Hill Autonomous Zone case,⁴⁴⁶ surrendering an entire area, or a select group of people, to the private security—or private vengeance—of a self-appointed security detail may run afoul of the state-created danger theory for people within that area.

A court could similarly invalidate a broad delegation under a private nondelegation rubric. The Nebraska Supreme Court’s approach to the broad self-defense statute enacted in the 1960s is a prime example of how this approach would work. As discussed in Part II, the court ruled it unconstitutional for the legislature to authorize private citizens to decide for themselves when force is necessary.⁴⁴⁷ Despite not grounding the ruling in the federal Due Process Clause or formal private nondelegation doctrine, the court was clear that “the Legislature has delegated the fixing

438. See *Cooney*, 463 S.E.2d at 598.

439. *Id.* at 599.

440. *Id.*

441. 420 F. Supp. 967 (E.D.N.C. 1976).

442. *Id.* at 970.

443. See *id.* at 971 (quoting N.C. Gen. Stat. § 15-48 (repealed 1997)).

444. See *id.*

445. See *supra* section III.C.2.

446. See *supra* notes 393–396 and accompanying text.

447. See *State v. Goodseal*, 183 N.W.2d 258, 263 (Neb. 1971).

of the punishment to the person asserting self-defense which it cannot do.”⁴⁴⁸ Delegating that power “to private persons . . . is violative of the powers placed exclusively with the Legislature by our state Constitution.”⁴⁴⁹

Some of these experiments in violence delegation may expose officials to liability under provisions of the Ku Klux Klan Act, especially in contexts in which private parties conspire to violate constitutional privileges that public actors would have to respect. Nonenforcement against conspiracies to engage in private racialized violence, voter intimidation, or retaliation against grand or petit jurors may generate this kind of liability.

And these types of remedies are based only on federal law. There could be state constitutional remedies under equivalent state constitutional provisions, which need not be read in lockstep with federal constitutional guarantees.⁴⁵⁰ There could also be other constitutional remedies. Professor Metzger, for example, argues that instead of imposing the same obligations on private parties who exercise government powers as those that apply to public officials, courts should insist on adequate accountability mechanisms to ensure compliance with constitutional limits.⁴⁵¹ So, instead of making private parties liable for constitutional violations, courts could “requir[e] that the government create such [accountability] mechanisms as the constitutionally-imposed price of delegating government power to private hands.”⁴⁵²

Outside the courts, further experiments with the New Outlawry may stimulate federal executive or legislative action. Currently, the national government spends billions of dollars to support state and local law enforcement.⁴⁵³ These expenditures may come under more scrutiny to the extent that state and local governments begin to delegate the basic tasks of law enforcement to private, less politically accountable people within the jurisdiction.

448. See *id.*

449. *Id.*

450. See, e.g., *State v. Schmid*, 423 A.2d 615, 628 (N.J. 1980) (“[T]he rights of speech and assembly guaranteed by the State Constitution are protectable not only against governmental or public bodies, but under some circumstances against private persons as well.”); see also Jeffrey S. Sutton, 51 *Imperfect Solutions: States and the Making of American Constitutional Law* 174 (2018) (expressing skepticism that state constitutional doctrine on individual rights should follow the federal constitution in all respects).

451. Metzger, *supra* note 36, at 1374.

452. *Id.*

453. Brian Naylor, *How Federal Dollars Fund Local Police*, NPR (June 9, 2020), <https://www.npr.org/2020/06/09/872387351/how-federal-dollars-fund-local-police/> [<https://perma.cc/S7EX-VQ92>].

CONCLUSION

In recent years, states have accelerated an alarming trend of devolving greater amounts of authority for private parties to engage in lawful violence. In fact, despite concerns about criminal violence, many recent episodes of socially harmful and communally destructive violence have been state-sanctioned or at least found legal under expansive state laws. Collectively, these moves form a New Outlawry that enlists private citizens to inflict state-sanctioned private violence on those the law deems outside the state's protection.

And yet, because of the state's monopoly on violence, this Essay argues that there are limits on how far a state can go in licensing private violence. Whether those limits are enforced by state action rules, private delegation, due process and equal protection doctrines, or the Republican Form of Government Clause, the Constitution is not silent when states attempt to skirt limitations on the use of force by their own employees. To the extent that policymakers, often in response to their most shrill and uncompromising constituencies, continue to push the envelope on empowerment of private violence for public ends, the constitutional implications of these delegations will become clearer, as will their consequences.

