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ARTICLE

Deputization and Privileged White Violence

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Abstract. A number of high-profile and racially charged killings, such as Trayvon Martin's, Kenneth Herring's, Ahmaud Arbery's, and Jordan Neely's, have been at the hands of civilians declaring themselves the law. These deaths stemmed from a phenomenon best described as "deputization." Deputization describes a latent legal power that has empowered White people throughout American history to claim authority to enforce the law, as they see it, upon racial minorities generally and Black people in particular. This power turned the ancient common law duty to police all felons in England into a specific American common law duty to police Blacks. From the founding clauses of the Constitution to the Fugitive Slave Acts, to the birth of racist citizen's arrest laws, there has always been an implicit understanding that part of Whiteness in America is a privilege to use private force to police Black people.

Deputization adds to the literature by focusing not only on racist state-sponsored violence but the privilege of racist private violence. Indeed, "deputization" is a more potent danger for Black Americans than racist policing. First, as a matter of magnitude, White Americans' inherited assumption that they are authorized to violently enforce the law

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upon Black people dwarfs the reach of the police. Second, deputization is clothed in claims of legal authority; its power is amplified because those who act upon it feel they are in the right. Lastly, deputization shapes the way in which Black Americans so often move through the world: cautious, alert, or angry; their lives truncated, metaphorically and literally, by the awareness that White people around them claim a power to police them at any time.

Importantly, deputization presents a unique legal challenge because those who impose racial violence in its name do not fear the law; they are confident that they are both authorized by and reinforcing the law. This Article further places deputization in the context of two important areas of criminal theory. It shows how deputization presents another front in understanding critical race theories of criminal law. Simultaneously, it shows why civic, equality-based political theories are particularly insightful in identifying the harms deputization does to our civic bonds. Lastly, this Article shows the lessons of deputization can draw from criminal law abolitionism about the need to change deeper structures than policing while simultaneously cautioning of the dangers of private violence rushing to fill the void.

Table of Contents

Introduction 706

I. Defining Deputization 715

II. Race, American Law, and Deputization 718
 A. History and Prelude 718
  1. The precursor: "Hue and cry" in the common law 718
  2. Of private violence and fugitive slaves 721
  3. Race and citizen's arrest 725
  4. Beyond citizen's arrest 727
 B. Modern Deputization 730
  1. Deputization today 730
  2. Beyond death 738
  3. The scaffolding of everyday deputization 742
  4. Deputization and truncated Black lives 744

III. Isolating Deputization: "Rogue Cops" and Vigilantes 746
 A. Rogue Cops 746
 B. Vigilantes 749

IV. Deputization and Domination 754
 A. The Inherent Racism of Deputization 754
 B. Deputization, Gender, and Machismo 757
 C. Deputization for All: Towards Racially Neutral Deputization? 758

V. Deputization and the Legitimacy of Criminal Law 760
 A. Deputization and Critical Race Theory 760
 B. Deputization and Political Legitimacy 762
 C. Deputization Beyond Black and White 769
 D. Deputization and Gender 771

Conclusion: Deputization, Abolitionism, and Criminal Law Reform 773

Introduction

It is commonplace to refer to the last few years of American life as a "racial reckoning": a falling of the scales from the eyes of White Americans about the racial violence too often visited on Black and Brown people.[1] In the face of searing videos, the brutality reported by Black Americans for generations could no longer be brushed away as exaggerations. So, the last few years (decades, if one cares to learn) have produced numerous tragedies reclaimed as martyrdoms. Eric Garner.[2] Trayvon.[3] Tamir.[4] Walter Scott.[5] Rayshard Brooks.[6] Breonna Taylor.[7] Philando Castile.[8] Ahmaud Arbery.[9] George

1. Some news outlets have used the moniker of "racial reckoning" as an umbrella term for all that occurred after the killing of George Floyd. *America's Racial Reckoning*, NBC NEWS, https://perma.cc/QXG6-K9BT (archived Jan. 2, 2025). Many have explored its failed promise. Gene Demby, Shereen Marisol Meraji, Leah Donnella, Steve Drummond, Brianna Scott & Alyssa Jeong Perry, *The Racial Reckoning that Wasn't*, NPR (June 9, 2021, 1:16 AM ET), https://perma.cc/Q9UF-SJ7N; Perry Bacon Jr., *The Racial Reckoning Led to Lots of Talk but Little Real Change*, WASH. POST (Jan. 15, 2023), https://perma.cc/6UXZ-C5YT.
2. Nadine DeNinno, *Eric Garner Died After NYPD Put Him in a Chokehold, Slammed His Head on Ground During Arrest*, INT'L BUS. TIMES (July 18, 2014, 3:36 PM EDT), https://perma.cc/HF8S-7A95; Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), https://perma.cc/QU65-Q64E.
3. *Trayvon Martin Shooting Fast Facts*, CNN (updated Feb. 14, 2024, 3:03 PM ET), https://perma.cc/67CN-CJ6U; *see* Linton Weeks, *Tragedy Gives the Hoodie a Whole New Meaning*, NPR (Mar. 24, 2012, 5:44 AM ET), https://perma.cc/8K4Q-DR6L.
4. Tom McCarthy, *Tamir Rice: Video Shows Boy, 12, Shot 'Seconds' After Police Confronted Child*, GUARDIAN (Nov. 26, 2014, 2:55 PM EST), https://perma.cc/472Z-8J87.
5. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), https://perma.cc/9S87-29GV; Colin Daileda, *Walter Scott Loved Dancing, Dominos and the Dallas Cowboys*, MASHABLE (Apr. 9, 2015), https://perma.cc/Q4RT-95JL; Michael Gartland, *Slain Walter Scott Struggled to Be a Better Dad*, N.Y. POST (Apr. 13, 2015, 4:34 AM ET), https://perma.cc/MYS3-ALFJ; Corky Siemaszko, Ginger Adams Otis & Sasha Goldstein, *Accused Killer Cop Michael Slager Fired by North Charleston PD, as Walter Scott's Brother Says Officer Used Victim "For Target Practice"*, N.Y. DAILY NEWS (updated Apr. 9, 2018, 4:27 PM EST), https://perma.cc/2558-G5W8.
6. Zachary Hansen & Christian Boone, *Former Atlanta Cop Charged with Felony Murder in Rayshard Brooks' Death*, ATLANTA J.-CONST. (June 17, 2020), https://perma.cc/5BUA-RYNA; Nicole Chavez, *What We Know About the Charges Against the Officers Involved in Rayshard Brooks' Death*, CNN (June 17, 2020, 9:20 PM EDT), https://perma.cc/GE2P-Z6VB.
7. Darcy Costello & Tessa Duvall, *Minute by Minute: What Happened the Night Louisville Police Fatally Shot Breonna Taylor*, COURIER J. (updated Sept. 15, 2020, 3:05 PM ET), https://perma.cc/XC7H-2GHV; Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Aug. 23, 2024), https://perma.cc/88W5-RAFD; Rukmini Callimachi, *Breonna Taylor's Life Was Changing. Then the Police Came to Her Door*, N.Y. TIMES (Aug. 30, 2020), https://perma.cc/8EVN-DAHE.

Floyd.[10] That many of these deaths were at the hands of the police focused the public imagination. Their deaths were understood as unified by the undercurrents of racism that threaten Black lives in the most mundane of moments.[11]

As important as it is to understand what unifies these moments, I worry that it can obscure important distinctions in the way racism imposes violence on people of color. These distinctions are important not for fine philosophical sorting but because understanding different facets of racist violence clarifies the different social and legal tools that must be deployed to overcome them.

Take three prominent examples of racist violence. The most recognizable death of our era is George Floyd's.[12] The reasons hardly need recounting. The video of officer Derek Chauvin callously kneeling on Floyd's neck, Floyd begging for his life, while bystanders pleaded for Chauvin to relent, rocketed around the world.[13] Through twisting turns, Chauvin was eventually convicted of murder.[14] Floyd's murder became instantly iconic, another example in a continuous American history of racist police violence.[15]

A second example. On June 17, 2015, twenty-one-year-old Dylann Roof entered the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, then sat and prayed with nine congregants before pulling out a handgun and killing Cynthia Hurd, Susan Jackson, Ethel Lance, DePayne Middleton-Doctor, Reverend and State Senator Clementa Pinckney, Tywanza Sanders, Reverend Daniel Simmons, Sharonda Singleton, and Myra

8. Jay Croft, *Philando Castile Shooting: Dashcam Video Shows Rapid Event*, CNN (updated June 21, 2017, 10:14 AM EDT), https://perma.cc/LUP2-XYDQ.

9. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Aug. 8, 2022), https://perma.cc/YEV7-G45N.

10. *How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022), https://perma.cc/S4HR-E4QC.

11. Jelani Jefferson Exum, *Presumed Punishable: Sentencing on the Streets and the Need to Protect Black Lives Through a Reinvigoration of the Presumption of Innocence*, 64 HOW. L.J. 301, 302-11 (2021); Juan R. Thomas, *Reimagining Policing*, HUM. RTS., 2021, at 12-13; *cf.* Tasnim Motala, *"Foreseeable Violence" & Black Lives Matter: How* Mckesson *Can Stifle a Movement*, 73 STAN. L. REV. ONLINE 61, 62-64 (2020) (describing how nationwide protests seized on instances of police violence visited on racial minorities).

12. *See* Zamira Rahim & Rob Picheta, *Thousands Around the World Protest George Floyd's Death in Global Display of Solidarity*, CNN (updated June 1, 2020, 6:31 PM EDT), https://perma.cc/6Z4F-XMNZ.

13. *How George Floyd Died, and What Happened Next*, *supra* note 10.

14. Chauvin's sentence was enhanced because he abused his position of public trust as a police officer. *See* Guyora Binder & Ekow N. Yankah, *Police Killings as Felony Murder*, 17 HARV. L. & POL'Y REV. 157, 180-81 (2022); State v. Chauvin, No. 27-CR-20-12646, 2021 WL 2621001, at *3 (Minn. Dist. Ct. June 25, 2021).

15. *See* ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S, at 21-45 (2021).

Thompson.[16] Roof did so for his own demented reasons. He twisted the killing of Trayvon Martin into a symbol of "Black on White" crime and hoped to begin a race war.[17] Thus, Roof is an exemplar of racist, vigilante justice, poisonously convinced that because the world failed to uphold his perverse moral order, he could defy the law.

Both cases have left scars on our collective psyche. But neither quite captures another, arguably broader, set of racist violence. Recall Ahmaud Arbery, who, on February 23, 2020, went jogging near Brunswick, Georgia. Arbery was chased by a group of armed White men in trucks.[18] Arbery was trapped, shot, and killed.[19] His killers pursued Arbery because they suspected—with no evidence whatsoever—he was behind a string of (unreported) neighborhood robberies.[20] Arbery was blocked by a large white truck and threatened by shotgun-wielding Travis McMichael.[21] When Arbery struggled to take the gun away, McMichael shot him, perhaps multiple times.[22] As McMichael stood over Arbery's dying body, he spat out the words, "fucking nigger."[23]

Arbery's death cannot be properly described as police brutality. Though two of his murderers had either served previously as a police officer or had some law enforcement or military training, neither were police officers.[24] Nor can Arbery's murder be described as vigilante violence. His murderers did not see themselves as vigilantes, operating outside of a legal regime.[25] They saw themselves as *supporting* the legal system and *enforcing* the law. They imagined they were authorized to do so; their legal defense centered around the idea that

16. Yamiche Alcindor & Doug Stanglin, *Affidavits Spell Out Chilling Case Against Dylann Roof*, USA TODAY (updated June 19, 2015, 10:43 PM ET), https://perma.cc/5QQQ-UATU; *Charleston Church Shooting: The Victims Remembered*, BBC NEWS (June 18, 2015), https://perma.cc/BHB6-V2AZ.
17. Rachel Kaadzi Ghansah, *A Most American Terrorist: The Making of Dylann Roof*, GQ (Aug. 21, 2017), https://perma.cc/6UFR-4M8N; *Dylann Roof Said He Wanted To Start A Race War, Friends Say*, NPR (June 19, 2015, 5:36 PM ET), https://perma.cc/V6FP-4SYU.
18. Fausset, *supra* note 9.
19. *Id.*
20. Nelson Oliveira, *No Burglaries Were Reported in Neighborhood Where Ahmaud Arbery Was Killed, Contradicting Suspects' Claim: Report*, N.Y. DAILY NEWS (updated May 10, 2020, 5:52 PM EST), https://perma.cc/E2WT-F4QR.
21. Fausset, *supra* note 9.
22. *Id.*
23. Russ Bynum, *Testimony: Shooter Used Racist Slur as Arbery Lay Dying*, ASSOCIATED PRESS (June 4, 2020, 5:33 PM PST), https://perma.cc/9U55-R3WN.
24. Sophie Kasakove, *Who Are the Defendants in the Murder of Ahmaud Arbery?*, N.Y. TIMES (updated Nov. 24, 2021), https://perma.cc/CF53-VFT4.
25. Pre-Hearing Memorandum of Law—Citizens Arrest at 1, State v. Bryan, No. 2020-CR-2000433, 2020 WL 3512759 (Ga. Super. Ct. June 18, 2020).

Arbery was killed during a valid citizen's arrest.[26] Moreover, multiple legal officials confirmed their claim.[27] Despite the stunning video of the three men hunting down and shooting Arbery, a state prosecutor declined to charge the men, concluding their actions were legal under Georgia's citizen's arrest statute.[28] It was not until a third prosecutor saw the video that they were charged.[29]

This third type of racial violence is distinct from state and vigilante violence. Arbery's death arose from deputized White violence: violence aimed at racial minorities, particularly Black people, by White people who, as private citizens, take themselves to be innately authorized to police racial minorities.[30]

Even if it is less recognizable than state or vigilante violence, I want to suggest that "deputization" is actually a more potent danger for Black Americans. First, as a matter of magnitude, an inherited assumption among White Americans that they are authorized to enforce the law upon Black people dwarfs the reach of the police. This sense of deputization is both subtle and ubiquitous; it can be understood only by recognizing it as greater than the sum of its parts: assumptions of Black criminality, racial profiling, expansion of self-defense, citizen's arrest statutes, and so on.

The other reason deputization is more potent than illegal vigilante violence is that it is clothed in justified authority. Without discounting the breadth of lawbreaking behavior, it is too little noticed how often law works merely through its normative pull.[31] Similarly, powerful social norms

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26. *Id.*; Ekow N. Yankah, *Ahmaud Arbery, Reckless Racism and Hate Crimes: Recklessness as Hate Crime Enhancement*, 53 ARIZ. STATE L.J. 681, 681-83 (2021).
27. *Ex-Prosecutor Accused of Interfering with Investigation into Ahmaud Arbery's Killing*, ASSOCIATED PRESS (Sept. 2, 2021), https://perma.cc/2TCQ-9MX8.
28. *Id.*; Tariro Mzezewa, *The Arbery Murder Defendants Say They Were Attempting to Make a Citizen's Arrest. Is That Legal?*, N.Y. TIMES (Nov. 22, 2021), https://perma.cc/QX6R-WGUA; *cf.* Sean A. Hill II, *The Right to Violence*, 2024 UTAH L. REV. 609, 672-73 (2024) (explaining that the state deploys legal rhetoric to authorize and legitimate not just violence of state authorities but also private violence).
29. *Ex-Prosecutor Accused of Interfering with Investigation into Ahmaud Arbery's Killing*, *supra* note 27. To be sure, the second prosecutor, District Attorney Johnson, recused herself, citing a prior employment relationship with one of the killers. *Id.*
30. Hill II, *supra* note 28, at 645-48, 655-56.
31. Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651, 655-57 (2008); Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 392, 398-402 (2000); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3-4 (1990). On normative compliance more generally, see Robert B. Cialdini, Raymond R. Reno & Carl A. Kallgren, *A Focus Theory of Normative Conduct: Recycling the Concept of Norms to Reduce Littering in Public Places*, 58 J. PERSONALITY & SOC. PSYCH. 1015, 1019-20, 1024 (1990) (observing the impact of norms on human behavior, though cautioning that norms can be context-sensitive); H. Wesley Perkins & Alan D. Berkowitz, *Perceiving the Community Norms of Alcohol Use Among Students: Some Research Implications for Campus Alcohol Education Programming*, 21 INT'L J. ADDICTIONS 961, 970-72 (1986)

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condemning racism make people loathe to incur social censure for explicitly racist behavior.[32] Thus, most citizens feel the pull to avoid engaging in what they perceive to be racist vigilante behavior. But deputization encourages similar behavior without social stigma—indeed, with a sense of righteousness. Deputization is devilishly tricky, because it is driven by the conviction that one is obeying and even reinforcing legal norms.

As Black Americans have long understood, White people confident that they are behaving justifiably can be more dangerous than those slinking about in the shadows, knowing that they are in the wrong.[33] Spectacular cases often involve White people reading innocuous Black behavior as a deadly threat, causing them to unleash bullets in the name of self-defense.[34] But cases can range from menacingly following Black pedestrians,[35] to waving guns at protestors,[36] to demanding obsequiousness from those who barbeque[37] or sell water[38] against one's displeasure. Even as I began writing this Article, another

(exploring how increased knowledge of salient norms further strengthens compliance with those norms); Steve Martin, *98% of HBR Readers Love This Article*, HARV. BUS. REV., Oct. 2012, at 23 (exploring how increased knowledge of tax compliance in turn increases willingness to pay taxes); and Ekow N. Yankah, *The Sovereign and the Republic: A Republican View of Political Obligation*, 61 NOMOS 102, 109 (2019). *Cf.* Robert B. Cialdini, Carl A. Kallgren & Raymond R. Reno, *A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior*, 24 ADVANCES EXPERIMENTAL SOC. PSYCH. 201, 203-05 (1991) (highlighting the role of norms in shaping behavior).

32. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946, 954-55 (2006); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 746-47 (2005); *see* John F. Dovidio & Samuel L. Gaertner, *Prejudice, Discrimination, and Racism: Historical Trends and Contemporary Approaches*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 2-5 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

33. Farah Peterson has written elegantly about the power of believing violence is justified and how that power is often extended along racial grounds. Farah Peterson, *Our Constitutionalism of Force*, 122 COLUM. L. REV. 1539, 1580-82 (2022); *accord* Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 942-43 (2019). For public testimony viewing lynching as a law enforcement response to threats of rape, see 62 CONG. REC. 451, 459-460 (1921) (statement of Rep. James Paul Buchanan); and 62 CONG. REC. 1696, 1721 (1922) (statement of Rep. Thomas Upton Sisson).

34. A classic exploration is found in Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 781-86 (1994).

35. *Trayvon Martin Shooting Fast Facts*, *supra* note 3.

36. Crystal Bonvillian, *White St. Louis Lawyers Pull Weapons on Peaceful Protestors Marching Through Neighborhood*, FOX 23 NEWS (June 29, 2020), https://perma.cc/6F6H-PKB7.

37. Haaziq Madyun, *Family Wants to Create Awareness After BBQ Confrontation at Lake Merritt*, KRON 4 (updated May 10, 2018, 1:24 AM PDT), https://perma.cc/BR6L-DJAZ.

38. Sam Levin, *California Woman Threatens to Call Police on Eight-Year-Old Black Girl for Selling Water*, GUARDIAN (June 25, 2018, 3:56 PM EDT), https://perma.cc/83EF-TAGN.

video of a Black man being choked to death in public has ricocheted across the nation.[39] The death of Jordan Neely, a Black homeless man with mental health issues, choked for several minutes by former Marine Daniel Penny,[40] reminds us that in a range of cases, from the complex to the outrageous, there is mortal danger in White people claiming the power to arrest Black people.

Deputization is a way of understanding the presumed normative power that ties these seemingly disparate examples together. Highlighting deputization is important for more than just understanding dangerous confrontations. Deputization helps us understand the way in which Black Americans so often move through the world cautious, alert, or angry—their lives truncated, metaphorically and literally, by the awareness that White people around them claim a power to police them at any time. Such a power undermines the kind of cheerful, racial optimism to which some aspire.[41] An instilled power to police me warps our relationship in ways that do not turn on whether you are "nice."[42] It is a ubiquitous current that charges everyday situations in ways that cannot be fully captured by singular dramatic events. It is why Black fathers fear letting their sons touch other people's cars.[43]

39. Brynn Gingras, Laura Ly, Maria Santana & Ray Sanchez, *Man Dies After Being Put in a Chokehold by Another Rider on New York City Subway, Officials Say. The DA is Investigating*, CNN (updated May 4, 2023, 9:32 PM EDT), https://perma.cc/2NZQ-GRSX.

40. Alex Woodward, *Daniel Penny Charged with Manslaughter for the Death of Jordan Neely in a Case That Has Shaken New York*, INDEPENDENT (May 12, 2023, 11:04 PM BST), https://perma.cc/Z3H2-TPTJ.

41. Scholar Michael Eric Dyson once powerfully described American racial history as "a pantomime of social civility through comfortable gestures" that could only exist based on a studied "willed forgetfulness." Michael Eric Dyson, *Introduction* to WILLIAM A. OWENS, BLACK MUTINY: THE REVOLT ON THE SCHOONER AMISTAD (1997). James Baldwin wrote more searingly, "[t]o accept one's past—one's history—is not the same thing as drowning in it; it is learning how to use it. An invented past can never be used; it cracks and crumbles under the pressures of life like clay in a season of drought." JAMES BALDWIN, THE FIRE NEXT TIME 89-90 (Michael Joseph 5th ed. 1968) (1962).

42. Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 876-77 (2004) (noting that the association between Black men and crime is unconscious and automatic).

43. Public intellectual Ta-Nehisi Coates captures the sentiment in explaining Black parents beat their children because they are terrified that if they don't someone else will beat them harder:

> My father was so very afraid. I felt it in the sting of his black leather belt, which he applied with more anxiety than anger, my father who beat me as if someone might steal me away, because that is exactly what was happening all around us. Everyone had lost a child, somehow, to the streets, to jail, to drugs, to guns. It was said that these lost girls were sweet as honey and would not hurt a fly. It was said that these lost boys had just received a GED and had begun to turn their lives around. And now they were gone, and their legacy was a great fear.

TA-NEHISI COATES, BETWEEN THE WORLD AND ME 15-16 (2015); *see also* Jacob D. Charles & Darrell A.H. Miller, *The New Outlawry*, 124 COLUM. L. REV. 1195, 1215 (2024).

This Article fills a critical, unnoticed gap in the literature considering state-sponsored racial violence. A prominent generation of scholars, led by Ibram X. Kendi,[44] Elizabeth Hinton,[45] and Khalil Gibran Muhammad,[46] have urgently pointed out how structural racism has always been interwoven into American thinking of criminality. The presumption of Black criminality formed the foundation for generations of violent White oppression and, after slavery, was used to justify countless instances of terrorism.[47] White people often internalized the idea that vigilante violence outside the law was necessary to keep Black people in their place.[48] An important cadre of legal scholars such as Tracey Meares, Devon Carbado, and Anthony Thompson, among many others, have, in turn, shown how racism has been historically embedded in American policing and how constitutional protections have been

44. IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 1-2 (2017).

45. HINTON, *supra* note 15.

46. KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 3-4 (2017).

47. *See* Ida B. Wells-Barnett, *Lynch Law in America*, 23 ARENA 15, 15-21 (1900); IDA B. WELLS-BARNETT, LYNCH LAW IN GEORGIA 11, 14, 17 (1899) [hereinafter WELLS-BARNETT, LYNCH LAW IN GEORGIA] (detailing a string of lynchings of Black men from Georgia to Chicago in 1899).

48. WELLS-BARNETT, LYNCH LAW IN GEORGIA, *supra* note 47, at 11, 14, 17.

systematically stripped away, leaving racism in policing legally invisible.[49] I have contributed to this literature myself.[50]

Of course, discriminatory policing undermines the view of Black Americans as full American citizens.[51] Scholars such as Paul Butler, Brian Stevenson, and Jennifer Eberhardt have illustrated how once the Black suspect is collected by the police, his race further dooms him before prosecutors, judges, and juries.[52] This generation of scholarship has shown how state actors

49. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 952-60 (2002) [hereinafter Carbado, *(E)racing the Fourth Amendment*]; Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 129 (2017); CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 6-7 (2014); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 362-72 (1974); Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1277 (1998); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 354-62 (1998); Tracey Maclin, *"Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250-79 (1991); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 312-15 (1997); David A. Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1754-55, 1805 (2005); Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 854-59 (2011); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 957-59 (1999); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1043-44, 1046 (1995). Devon Carbado has recently turned his attention to the way in which private scrutiny serves as a social policing mechanism for Black people, though he does not focus on the specific means of deputization and private violence that I take up here. *See* Devon W. Carbado, *Strict Scrutiny & the Black Body*, 69 UCLA L. REV. 2, 45-49 (2022) [hereinafter Carbado, *Strict Scrutiny & the Black Body*].

50. Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1573-97 (2019) (exploring how the Supreme Court's Fourth Amendment jurisprudence is purposefully blind to issues of race and recommending changes in policing centered on equal citizenship as opposed to individual rights).

51. EPP ET AL., *supra* note 49, at 134; I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. REV. 1, 19-48 (2011); HINTON, *supra* note 15, at 5-7.

52. *See, e.g.*, PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 17-18, 25-28 (2017) [hereinafter BUTLER, CHOKEHOLD: POLICING BLACK MEN]; Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEORGETOWN L.J. 1419, 1434-38, 1442-57, 1469-78 (2016) [hereinafter Butler, *The System Is Working the Way It Is Supposed to*]; Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 3, 4-5 (Angela J. Davis ed., 2017); Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383, 383-85 (2006); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 145-47 (2017).

combine to render the criminal justice system a tool of racial injustice, captured in Michelle Alexander's term, "the New Jim Crow."[53]

This important scholarship naturally focuses on how law empowers *state* actors to disproportionately police Black people. But the scholarship has left untouched the way criminal law implicitly authorizes a much larger army—White *private* citizens—to police Black people at their discretion.[54] While some scholarship has touched on racial bias in self-defense,[55] as well as in stand your ground laws,[56] this Article shows how racial power is woven into a much broader legal and political project of privileging private violence in order to "police" Black people.

The claim is that there is a profound, ubiquitous, yet subtle form of White violence best described as deputization. Deputization describes a latent legal power throughout American history that has licensed White people to claim authority to enforce the law, as they see it, upon racial minorities generally and Black people in particular. And though it is an ephemeral social power, I will make the bold claim that it is an illegitimately inherited legal power, hidden and structured by our criminal law throughout American history. Indeed, I will make the bolder, if somewhat uncomfortable, claim that deputization is innate to Whiteness in America. This power turned the ancient common law duty to police all felons in England to a specific American common law duty to police Blacks.[57] From the founding clauses of the Constitution to the Fugitive Slave Acts, to the racist births of citizen's arrest laws, there has always been an

53. Butler, *The System Is Working the Way It Is Supposed to*, *supra* note 52, at 1442-57; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2-8 (2010) (describing the use of the criminal justice system, generally, and the war on drugs, specifically, to replace formal legal subordination on racial grounds).

54. For a rare inspection in the sociology of state authorized private violence generally, see Wilbur R. Miller, *A State Within 'The States': Private Policing and Delegation of Power in America*, 17 CRIME, HIST. & SOC'YS 125, 127 (2017).

55. Armour, *supra* note 34, at 782-86, 793-96, 799-803, 805-07, 809-16; Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1753 (1993); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 404-06 (1996); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 301-07 (2012); Eberhardt et al., *supra* note 42, at 876-77, 889-91.

56. Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961, 962 (2014); AM. BAR ASS'N, NATIONAL TASK FORCE ON STAND YOUR GROUND LAWS: FINAL REPORT AND RECOMMENDATIONS 10-12 (2015) (citing data from four nationwide surveys); John K. Roman, *Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data*, URB. INST. 1, 9-10 (2013); Nicole Hamsher, *Failed Promises: Stand Your Ground's Removal of Imminence Leads to Inconsistent Application and Decreased Safety*, 55 AKRON L. REV. 251, 259-62 (2022).

57. *See infra* text accompanying notes 74-91.

implicit understanding that part of Whiteness in America is a privilege to use private force to police Black people.[58]

Such claims are uncomfortable because they are not easily amenable to empirical verification. Asking White survey takers "do you feel you have a special right to police Black people?" is unlikely to reveal particularly informative answers. This phenomenon is best illuminated through theoretical exploration; to properly see White deputization as a deep feature in American criminal law is to engage in a project of philosophical reconstitution.

Highlighting examples of deputization, both famous and lesser known, illustrates the ubiquitous power it casts over Black life. Part I lays out the distinct features of deputization. It explores how deputization has been embedded in American criminal law doctrine, shielding a certain kind of White violence against racial minorities within the law itself. Part II distinguishes deputization from other forms of racist violence. First, it illustrates why deputization is categorically different from oft-noticed examples of racist police brutality. More subtly, deputization is distinguished from classically vigilante or outlaw racist violence. Part III then describes the features of deputization as a socio-legal phenomenon. Only after the core work of this piece, isolating and describing deputization, is done does Part IV inspect how deputization undermines the legitimacy of criminal law and offer some ideas about how to address this dangerous ethos. In exploring how to combat deputization, this Article looks to important lessons from the prison abolition literature on the necessity of reforming underlying social and political structures to ultimately achieving legal reform.

I. Defining Deputization

A historical review illustrates how White deputization is buried within our legal history; subterranean enough to hide out of view but ever-present enough that it structures daily life.[59] Though deputization can visit the same violence on racial minorities as "rogue cops" and outlaw vigilantes, it is all too easy to assume these forms of violence should be treated identically. But careful inspection reveals why, even as it morphs and hides, deputization is an importantly different phenomenon. Because of its slippery nature, it is helpful to clearly state what the history and the examples illustrate and to define deputization as clearly as possible.[60]

The term "policing" can describe a wide array of both social and norm policing. A law professor might be said to "police their classroom in a heavy-

58. *See infra* text accompanying notes 92-276.

59. Hill II, *supra* note 28, at 623-26.

60. *See* Charles & Miller, *supra* note 43, at 1200-08.

handed way." This casual use of the word policing often reflects assumptions of legitimate authority to guard the bounds of norms and sanction their violation.

Deputization is a more narrowly defined ancillary phenomenon of criminal law. It is a creation of a socio-legal history that permitted White governance of Black people that continues today. It is also parasitic on social presumptions that Black people generally, and Black men particularly, are criminal.[61] Together, these presumptions lead to an idea that violence visited upon Black men, whether by public or private individuals, is appropriately described as policing. Thus, deputization defines an internalized (innate) right of White private citizens to forcibly impose the law on Black people. The grip of this idea even leads to prosecutors dismissing stark evidence of violence on Black men as citizen's arrests.[62] So deputization, of the sort I care about, has at least three important features: an assumed legal privilege by a private actor, forcible imposition, and racial (or perhaps other political) dominance.

First, at its core, this "right" fixes a supposed privilege to impose violence on Black people to enforce what one takes to be the law. Thus, second, forcible imposition means that the deputy believes they have the right to do more than persuade or even command others to do their bidding. The deputy believes they can use physical violence to force others to obey. Importantly, such violence is viewed by the person imposing it as privileged by the law itself. Adjacent cases of deputization may include threatening to have another—a dangerous, armed spouse or even a police officer—use violence in one's name, but the core case is one where the privilege permits the imposition of violence by the private citizen themself.

Turning to the third criterion, deputization is characterized by this assumed power tracking our long history of racial dominance. To what extent deputization can be disentangled from race or is reflected in other power relationships—gender, ethnicity and the like—is a question to which we will return later.

Lastly, a particular feature of deputization requires clarification. What kind of legal authority is required for someone to assume they are a deputized authority rather than an outlaw? Deputization requires that the person plausibly believes they are acting under the color of law; in most cases, the self-deputized will describe themselves as legally authorized. This belief takes such

61. Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1772-73 (1992); BUTLER, CHOKEHOLD: POLICING BLACK MEN, *supra* note 52, at 17-18, 25-28; Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 799-800, 805-10 (1999); Carbado, *(E)racing The Fourth Amendment*, *supra* note 49, at 950-51; Stevenson, *supra* note 52, at 3, 11; MUHAMMAD, *supra* note 46, at 1-2, 33-34.

62. *See* sources cited *supra* note 28.

acts to be authorized by the law as it roughly exists, not the law as one thinks it should be or wishes it was.

Thus, the hooded KKK member who wants to rescue "The Lost Cause" and restore chattel slavery,[63] or Dylann Roof's grotesque hopes of starting a race war,[64] do not qualify them as deputies. The postbellum KKK member, however, who truly believed themselves to be enforcing the law, often buoyed by supportive, White supremacist law enforcement, does fit into the role of the deputized.[65] The presumption that racist violence is in service of the law is the crux of deputization.

At the same time, it is unrealistic to believe deputization only exists when the offender acts with an explicit, detailed reference to an authorizing legal proposition. Very few people relate to legal norms through statutory precision.[66] Ahmaud Arbery's killers took themselves to be legally authorized to arrest a jogging Black man though they may not have been able to recite Georgia's citizen's arrest statute.[67] When Alison Ettel ("Permit Patty") insisted that an eight-year-old Black girl was not allowed to sell water on the street, she was invoking a vague sense of legal permission, though it is doubtful she had ever consulted local zoning laws. The felt power of legal authority is more central to deputization than the precision or correctness of often-vague underlying legal analysis.[68]

That deputization need not take any particular legal statute as fixed authorization to enforce the law should not be surprising. Indeed, that simple picture of law enforcement does not map onto how even police officers enforce the law either. Much of what police do is "order-maintenance policing," using broad and ill-defined statutory power to keep peace and

63. B.R. TILLMAN, THE STRUGGLES OF 1876: HOW SOUTH CAROLINA WAS DELIVERED FROM CARPET-BAG AND NEGRO RULE 17 (1909) (describing the activities of the KKK in Edgefield).

64. *See* sources cited *supra* note 17.

65. Robbins, *infra* note 96, at 149-50 (describing citizen's arrest statutes put in place to support KKK violence in Georgia).

66. Dan M. Kahan, *Ignorance of Law* Is *an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127, 136-47 (1997).

67. Or at least that is how they and the initial prosecutors conceptualized their claim. *See* Joel Anderson, *The District Attorney Who Saw "No Grounds for Arrest" in the Killing of Ahmaud Arbery Has a History*, SLATE (May 9, 2020, 11:32 AM), https://perma.cc/HG29-DVAY; Richard Fausset & Tariro Mzezewa, *Defense Lawyers Portray the Fatal Shooting of Ahmaud Arbery as Self-Defense*, N.Y. TIMES (Nov. 5, 2021), https://perma.cc/QL6S-CAYY.

68. *Cf.* Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 574-75 (2011) (exploring the uncertain borders of what constitutes serious, violent crime).

maintain their view of public order.[69] Consciously or unconsciously, most people share this picture of the police as broadly empowered to impose order. Thus, broad authority premised on hazily defined "law" fits the conception of justified policing for many White people assuming the private power to police someone Black.[70] Further, this hazily understood power allows for a more expansive view of the power one holds.

Of course, a claim of legal authorization may be so distant from recognizable law as to raise doubts that it is little more than ex-post-facto rationalization. A concept that turns in part on mental states always admits fuzziness around its borders. Such cases may be borderline cases or fail entirely to be deputization. If a legal analogy is of help, consider recklessness, defined in criminal law and torts as conscious disregard of a substantial and unjustified risk.[71] Notoriously, scholars, judges, and juries alike wrestle with whether a defendant was conscious of a risk, so as to distinguish between recklessness and negligence.[72] Some scholars and tribunals further believe the defendant must have, in some sense, been aware the risk was substantial.[73] Despite the existence of borderline cases, we can often clearly delineate between negligence and recklessness. Similarly, uncertainty in some cases where people claim they believed their acts were authorized by law does not mean we cannot recognize clear cases of deputization.

II. Race, American Law, and Deputization

A. History and Prelude

1. The precursor: "Hue and cry" in the common law

It is now a common observation that American policing was birthed by slave patrols.[74] To be sure, the historical story is a good deal more complex.[75] Modern, professionalized policing was emerging simultaneously elsewhere,

69. Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 540 (2015); Charlie Gerstein & J.J. Prescott, *Process Costs and Police Discretion*, 128 HARV. L. REV. F. 268, 268-79 (2015).

70. *See* Carbado, *Strict Scrutiny & the Black Body*, *supra* note 49, at 45-48.

71. Yankah, *supra* note 26, at 689-93.

72. *See id.*

73. *See id.*

74. *See, e.g.*, Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 832 (1994); Sidney Harring, *The Development of the Police Institution in the United States*, 5 CRIME & SOC. JUST. 54, 54-58 (1976); Roger M. Stevens, *A Legacy of Slavery: The Citizen's Arrest Laws of Georgia and South Carolina*, 72 S.C. L. REV. 1005, 1010-20 (2021).

75. *See* Aya Gruber, *Policing and "Bluelining"*, 58 HOUS. L. REV. 867, 877-86 (2021).

not only in northern urban centers but as far-flung as in London.[76] Such policing was often in service of both racial and class domination as much as public safety.[77] Yet, as different vines grow different fruit in foreign soil, the American form of policing has always been shaped by our national obsession with the control of Black slaves and then Black persons.[78] Thus, critical race scholars have illuminated how every facet of our official criminal justice system is riddled with racism.[79]

But casting the story of how official state policing was borne of slavery is to measure the branches while ignoring the trunk and roots below. It is not just that anti-Blackness was built into police and other structures of state violence. Rather, racist state violence has been overlayed on a structure of permitted *private* violence to control Black people that continues to exert powerful gravitational force today.[80]

It is initially jarring to think of private violence being widely authorized by the state. Indeed, it is intuitive to think that the first objects of the state are control and suppression of private violence. Philosophy 101 classes often describe the monopolization of violence as a criterial element of statehood.[81] But it is only our modern view that equates monopolization of violence with the appointment of authorized force in official agents—the police.[82]

Stretching back at least to the twelfth century in the common law, it could be said that the opposite was true.[83] State power consisted in commandeering

76. Famously, Sir Robert Peel's principles to guide the newly established Metropolitan Police Force of London were published in 1829. Keith L. Williams, *Peel's Principles and Their Acceptance by American Police: Ending 175 Years of Reinvention*, 76 POLICE J. 97, 97-98, 100 (2003).

77. Gruber, *supra* note 75, at 874-86; Harring, *supra* note 74, at 54-58; SIDNEY L. HARRING, POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865-1915, at 20-21 (1983) (applying a Marxist interpretation to argue the growth of policing must be essentially seen as a capitalist effort in class control).

78. Harring, *supra* note 74, at 57 (describing how American policing institutions originated from Southern slave patrols).

79. *See supra* text accompanying notes 44-56.

80. *See infra* text accompanying notes 173-289.

81. *See* Max Weber, *The Profession and Vocation of Politics*, *in* WEBER: POLITICAL WRITINGS 309, 310-11 (Peter Lassman & Ronald Speirs eds., 1994); HANS KELSEN, GENERAL THEORY OF LAW AND STATE 21 (Anders Wedberg trans., 1945); Malcolm Thorburn, *Criminal Punishment and the Right to Rule*, 70 U. TORONTO L.J. 44, 46-47 (2020).

82. Nicola Lacey reminds us how many features of the world, even concepts as primitive as moral responsibility, that we take as philosophically given, are merely historically contingent. *See* Nicola Lacey, *Responsibility and Modernity in Criminal Law*, 9 J. POL. PHIL. 249, 250-56 (2001).

83. *See* Stevens, *supra* note 74, at 1021-22. *A Treatise of the Pleas of the Crown: Or, a System of the Principal Matters Relating to that Subject, Digested Under Proper Heads* states "private per[s]ons are bound to apprehend all tho[s]e who shall be guilty of any of the crimes

footnote continued on next page

and channeling private citizens, aiming their violence at the appropriate object of state condemnation: the felon.[84] Indeed, throughout common law history, private citizens were not just authorized to assume the role of police, they were under a positive legal duty to do so.[85] In his Assize of Arms, King Henry II in 1181 codified the common law requirement that all free citizens were to keep and raise arms to pursue lawbreakers when "hue and cry" was raised.[86] Just over a century later, the law was expanded, putting private persons under a duty to "keep the watch continually all night" and arrest all strangers.[87] If a stranger did not submit to arrest, the watch was to invoke "hue and cry" and forcibly deliver the stranger to authorities.[88]

Thus, the duty to anoint oneself as law enforcement and the power to use weapons to arrest suspicious strangers were embedded in the common law for centuries when the American legal system was born. Plausibly, in medieval England, where ordinary persons did not travel far from their homes and there were no professional police, such power in the hands of private citizens did not translate to oppressive threatened violence.

Nor would such a power in England, where slavery died out in the twelfth century, necessarily translate to a racialized power of arrest.[89] An important example is the famous James Somerset case, where Somerset, a slave who was brought to England and escaped, was recaptured and held aboard a Jamaica-bound ship. His case was brought to Lord Chief Mansfield who, after much delay and perhaps reversing his reasoning in earlier cases, held that in English law, no master had the right to take back a slave by force.[90] Though Mansfield

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above-mentioned in their view, [s]o al[s]o are they with the utmo[s]t diligence to pur[s]ue, and endeavor to take all tho[s]e who [s]hall be guilty thereof out of their view, upon a *hue and cry* levied against them." *Id.* at 1022 n.117 (quoting WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS 157 (Thomas Leach ed., 7th ed. 1795)).

84. *See id.* at 1021-23.

85. *Id.* at 1021-22.

86. "Hue and cry" in common law was a legal invocation by which bystanders were summoned to assist in the capture of someone who had committed a crime. *Id.*

87. *Id.* at 1022 (quoting The Statute of Winchester (1285), *reprinted in* SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 78 (George Burton Adams & H. Morse Stephens eds., 1901)).

88. *Id.*; Nic Butler, *The Medieval Roots of the Charleston Night Watch*, CHARLESTON CNTY. PUB. LIBR. (May 18, 2018), https://perma.cc/B8B5-AB82.

89. *Slavery in History*, HIST. PRESS (Nov. 28, 2018), https://perma.cc/KRC3-EZV6.

90. *See* George Van Cleve, Somerset's Case *and its Antecedents in Imperial Perspective*, 24 L. & HIST. REV. 601, 621-40 (2006); T.K. Hunter, *Transatlantic Negotiations: Lord Mansfield, Liberty and* Somerset, 13 TEX. WESLEYAN L. REV. 711, 720-22 (2007).

avoided a dispositive ruling on the legality of slavery in England, he made clear that the power of arrest did not extend along racial or slaveholding lines.[91]

2. Of private violence and fugitive slaves

The same vine—the private power to use violence—planted in the American soil, poisoned by racialized slavery, would ferment into something different.[92] Legal scholar Farah Peterson has illustrated the long-held American tradition of treating private violence as a legitimate way to enforce rights against government overreach and shape the constitutional order.[93] Violence used to rebut unpopular government acts, such as new taxes, were viewed as virtuous defenses of individual rights that could be "ratified" ex post by government recognition of their righteousness.[94] So private violence could be legitimate in protecting both individual rights as against the government and peace as between persons.

But righteous anger always remained the providence of the White man, in service of the domination of Black slaves and the killing of Native Americans.[95] The common law duty designed to reinforce law enforcement was, from the nation's beginning, intertwined with the American project of enslavement. Indeed, a common law duty, which initially could have plausibly been described as a universal civic duty, warped to enshrine White power over Black persons.[96] Thus, the first statute in Virginia obligating household heads to keep weapons at home explicitly excluded Black persons.[97] This power was

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91. *See* Cleve, *supra* note 90, at 634-42.

92. The original American colonies very much inherited the common law duty to arrest felons under the "hue and cry." For example, in *Phillips v. Trull*, a New York case from 1814, the New York Superior Court referenced British common law to conclude that "[a]ll persons whatever, who are present when a felony is committed, or a dangerous wound is given, are bound to apprehend the offenders." 11 Johns. 486, 487 (N.Y. Sup. Ct. 1814).

93. *See generally* Peterson, *supra* note 33, at 1540-50 (2022) (exploring how citizens in the colonial and post-revolutionary America viewed forms of public violence as legitimate political petition).

94. *See id.* at 1552-59, 1579.

95. *Id.* at 1580-87, 1621.

96. Ira P. Robbins, *Citizen's Arrest and Race*, 20 OHIO ST. J. CRIM. L. 133, 140-42 (2022).

97. Christopher Tomlins, *Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery*, 10 THEORETICAL INQUIRIES L. 389, 405-09, 405 n.47 (2009). For the connection with Caribbean laws controlling slaves and access to weapons, see ALEJANDRO DE LA FUENTE & ARIELA J. GROSS, BECOMING FREE, BECOMING BLACK: RACE, FREEDOM, AND LAW IN CUBA, VIRGINIA, AND LOUISIANA 23-25, 36, 185-86 (2020); and Edward B. Rugemer, *The Development of Mastery and Race in the Comprehensive Slave Codes of the Greater Caribbean during the Seventeenth Century*, 70 WM. & MARY Q. 429, 430-32, 440 (2013).

further reflected in key mainland North American statutes such as Virginia's 1705 slave code incorporating Barbadian and Jamaican slave codes.[98]

In America, the private power to police and arrest criminals was fused with White domination of Black persons.[99] One might think Article IV, Section 2, Clause 3 of the Constitution, authorizing owners to recover fugitive slaves, serves as bedrock evidence.[100] Controversy over the meaning of this constitutional clause existed from the beginning and seems to have hardly subsided since. There can be little doubt that the clause was motivated by the Southern focus on securing slavery and controlling Black bodies.[101] Yet many Southerners were sure that despite the clause in Article IV, the Constitution did not sufficiently protect slavery. Passage of the Constitution was seen as a first step in destroying their vast "property" rights in their slaves.[102] To be sure, various politicians and activists forwarded their own interpretations of the Constitution as either securing the South's "peculiar institution" or as implicitly condemning it. In the famous case of Frederick Douglass, his interpretations changed throughout the years as he crafted the arguments best suited to shape public sentiment.[103]

This debate, cast in modern terms as whether the Constitution is a pro-slavery or anti-slavery document, continues to this day.[104] Still, the

98. Rugemer, *supra* note 97, at 432 n.6.

99. Robbins, *supra* note 96, at 137-50; Stevens, *supra* note 74, at 1021-26.

100. U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

101. *See* Robbins, *supra* note 96, at 141-42; Stevens, *supra* note 74, at 1024.

102. Robin L. Einhorn, *Patrick Henry's Case Against the Constitution: The Structural Problem with Slavery*, 22 J. EARLY REPUBLIC 549, 550-60 (2002).

103. *See, e.g.*, Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation*, 114 NW. U. L. REV. 335, 375-86 (2019); Philip Yaure, Seizing Citizenship: Frederick Douglass's Abolitionist Republicanism 71-98 (unpublished manuscript) (Mar. 2023) (on file with author); Robert Bernasconi, *The Constitution of the People: Frederick Douglass and the* Dred Scott *Decision*, 13 CARDOZO L. REV. 1281, 1288-96 (1991). On the "expediency" of Douglass's political thought more generally, see especially WALDO E. MARTIN, JR., THE MIND OF FREDERICK DOUGLASS 33-54 (1984).

104. *See, e.g.*, Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 174-76 (2011); Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 103-06 (2022); JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 329 (2018); MICHAEL F. CONLIN, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN CIVIL WAR 88-89 (2019) (highlighting the Founders' disagreements over the Three-Fifths Compromise). This debate has continued with the publication of the *New York Times*' sweeping "1619 Project." *See* Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES MAG. (Aug. 14, 2019), https://perma.cc/3UQY-VFNE.

Constitutional Clause was clearly a compromise that would allow the document to be ratified, signaling all states would recognize the property rights of slave owners and could not provide safe haven to escaped slaves.[105] And there can be no doubt that it laid a foundation upon which the private power of Whites over Blacks would be further enshrined in our legal culture.

Obviously, there was little need to legally strong-arm southern states into policing Black persons. Both the everyday "problem" of runaway slaves and the ever-present White fear of slave revolt, both as a real matter and mythically large in the Southern imagination, meant that controlling slaves was built into Southern life.[106] So, for example, Carolina initially used state militias, comprised of private persons, to control the growing slave population.[107] When the colony split into two, South Carolina authorized the formation of local slave patrols to arrest slaves found outside of their plantation without their owners' permission.[108] White power over Blacks was near total. After the large Stono slave revolt, the legislature authorized all acts necessary to quell the rebellion, including the killing of "rebellious negroes" without further intervention "as if [they] had undergone a formal trial."[109]

To state the obvious, such a duty was not a race-neutral recognition of a universal civic duty as its English predecessor might have claimed.[110] Even against the common law duty to arrest felons, Georgia made it a crime to falsely imprison a White person without a warrant or appropriate legal authority.[111] Non-Whites were given no such legal protection.[112] Later laws would permit any White person to arrest runaway slaves who had been on the run for over a year by killing them if needed.[113] Similar laws were found throughout the South.[114]

105. JAMES OAKES, THE CROOKED PATH TO ABOLITION: ABRAHAM LINCOLN AND THE ANTISLAVERY CONSTITUTION, at xx-xxiii (2021). On the abolition of slavery in the North, see MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 261 (2016); PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 41-44 (1981); and Edward L. Fiandach, *The Constitutional Status of Slavery: A Lawyer's Interpretation*, 84 ALBANY L. REV. 1, 16-19 (2020).

106. Stevens, *supra* note 74, at 1017-19; *see* Mark M. Smith, *Stono Rebellion*, S.C. ENCYC., https://perma.cc/3FH9-CNX8 (last updated Aug. 25, 2022).

107. Stevens, *supra* note 74, at 1018*; see* Smith, *supra* note 106.

108. Stevens, *supra* note 74, at 1018.

109. *Id.* at 1019 (quoting Act No. 670, para. LVI, *in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 416 (David J. McCord ed., 7th ed. 1840)).

110. Robbins, *supra* note 96, at 139 ("[I]t is clear that the codification of these statutes was inextricably intertwined with slavery and eventual emancipation.").

111. Stevens, *supra* note 74, at 1021, 1025-26.

112. *Id.* at 1025-26.

113. *Id.* at 1019.

114. *See, e.g.*, *id.* (describing Georgia's and South Carolina's patrol laws).

But it would be a mistake to think the power of White citizens to arrest Black people was a peculiarity limited to southern states. When southern states found anti-slavery sentiment still too high, they reinforced the Constitutional provision with the infamous Fugitive Slave Act of 1793.[115] The Fugitive Slave Act permitted owners and their agents to search for and capture escaped slaves in free states and imposed a $500 penalty on anyone who concealed or assisted runaway slaves.[116]

The Fugitive Slave Act was immediately controversial, garnering social, political and legal resistance.[117] Some Northern states passed "Personal Liberty Laws" providing accused runaways with richer due process rights, including access to juries to hear their claims of freedom.[118] Eventually, such laws would be challenged in *Prigg v. The Commonwealth of Pennsylvania*, where the United States Supreme Court upheld the Fugitive Slave Act as constitutional and ruled that states could not infringe on the rights of slave owners to recover their slaves.[119] This ruling was followed by the Fugitive Slave Act of 1850,[120] passed in hopes of quieting Southern calls for secession by further reinforcing the rights of slave owners.[121] Importantly, the 1850 Act compelled citizens to assist in the capture of runaway slaves, turning all White citizens into deputies over Black persons.[122] The 1850 act also imposed a $1000 fine and up to six months of jail time for interfering with the capture of fugitive slaves.[123]

Moreover, creating a legal culture of private bounty hunting of fugitive slaves meant all Black people were in danger of being swept up in the enthusiasm or profit motive driving arrest.[124] If not as horrific as actually

115. *See id.* at 1024.

116. Robbins, *supra* note 96, at 143.

117. *See id.* at 143-45; Stevens, *supra* note 74, at 1024.

118. Robbins, *supra* note 96, at 143.

119. 41 U.S. 539, 542-43 (1842) (striking down a Pennsylvania state law that prohibited Blacks from being taken out of state and being placed back in slavery, thus upholding the fugitive slave laws).

120. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

121. *See* Robbins, *supra* note 96, at 144-45.

122. *See* CONSTITUTIONAL RIGHTS FOUNDATION, THE FUGITIVE SLAVE LAW OF 1850, at 6 (2019). To be sure, the 1850 Fugitive Slave Act also placed control of cases in the hands of federal commissioners, who were paid more to return fugitive slaves than to free them. *Id.*

123. *Id.*

124. A famous example is that of Solomon Northrup. *See* NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 140-42 (2008); *cf.* Charles & Miller, *supra* note 43, at 1210-12 (exploring how private bounty law attempted to recreate the racial domination of slavery even after the Civil War). *See generally* SOLOMON NORTHRUP, TWELVE YEARS A SLAVE (1853) (detailing Solomon Northrup's birth as a free Black man, kidnapping, and sale into slavery).

being a slave, the Fugitive Slave Acts were evidence that to be Black was to be the kind of person who could be arrested at any time.[125]

3. Race and citizen's arrest

The Fugitive Slave Acts were swept away in the blood and smoke of the Civil War. With the Thirteenth Amendment striking down the formal legal institution of slavery,[126] a new project of legal control over Black bodies began. At the eve of the Civil War, southern states, led by Georgia, began to codify public common law.[127] These codifications were interrupted in the aftermath of the War when the seceding states were stripped of their legislative powers.[128] When legislative power was returned to the states, the drafters found themselves tasked with writing laws for a different and devastated world. In South Carolina, for example, over 60% of the White men had been killed or wounded fighting for the Confederacy.[129] Columbia, the capital, had been burned to the ground, and the Union Army occupied the state.[130] Across the South, legislatures were tasked with writing laws for a world they wished to wrench backwards.

Not surprisingly, southern states tried to reimpose the former Black codes, reinstating the slave patrols in everything but name.[131] The South Carolina 1865 bill to amend the patrol laws, for example, purported to provide "an adequate force for the general police of the State" by requiring every owner or lessee of a plantation with fifteen or more colored workers to employ private

125. One way to capture this is to recognize that a separate harm from being enslaved is to be thought of as the kind of person whom it would be appropriate to enslave; in American history, that is to note that Black skin signaled lacking full humanity. *See* Carbado, *Strict Scrutiny & the Black Body*, *supra* note 49, at 65; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1717 (1993). Not surprisingly, the 1850 Act was also met with fierce political resistance. In one famous case in 1851, anti-slavery activists rushed a Boston courthouse, freeing an escaped slave named Shadrach Minkins from federal custody. GARY COLLISON, SHADRACH MINKINS: FROM FUGITIVE SLAVE TO CITIZEN 3 (1998). Similarly, the Underground Railroad famously became a collective response of resistance. But despite the notes of resistance, the position of the law was clear. In America, a citizen's common law duty to police unlawful behavior was interwoven with the duty to police Black slaves in particular and Black people generally.

126. U.S. CONST. amend. XIII.

127. Stevens, *supra* note 74, at 1024-25.

128. *See, e.g.*, *id.* at 1026, 1029-33.

129. *Id.* at 1026-27.

130. *Id.* at 1027.

131. Robbins, *supra* note 96, at 148-49; *see* Gruber, *supra* note 75, at 874-86.

patrol.[132] It took no subtle reading to understand the purpose of the law was to reinstate private policing of the newly freed slaves.[133]

Against this backdrop, Georgia and South Carolina began codifying the nation's earliest citizen's arrest law. In Georgia, the task of drafting the Georgia Code of Laws, including citizen's arrest laws, was given to Thomas R.R. Cobb,[134] a former slave owner who authored the key southern tract defending slavery, *An Inquiry into the Law of Negro Slavery in the United States of America.*[135] Cobb's racist commitments could not be doubted. He asserted the importance of the superior White race controlling inferior Blacks through policing and believed that fugitive slaves could be arrested by anyone, anywhere in the country regardless of local law.[136] Cobb led the legislature's work in 1860 to memorialize the right of any private person to arrest anyone reasonably thought to be a runaway slave, and he simultaneously codified, probably for the first time in America, the common law duty to arrest a person for committing a felony.[137] In a cruel historical irony, Georgia's citizen's arrest statute was codified on January 1, 1863, the same day as the Emancipation Proclamation.[138] Alabama, Louisiana, and South Carolina quickly followed suit, codifying citizen's arrest statutes that entrenched White power to deputize oneself to control Black people.[139]

Likewise, South Carolina's citizen's arrest statute allowed anyone to arrest a Black person for the commission of a misdemeanor.[140] The same law only permitted complaining to a magistrate if a White person committed the same

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132. Stevens, *supra* note 74, at 1030 (quoting An Act to Amend the Patrol Laws (Dec. 20, 1865) (on file with the State of South Carolina Department of Archives and History as Series S165001, Item 00201)).

133. Then-Governor James Lawrence Orr vetoed the bill, lest it antagonize Federal forces. *See id.* at 1030, 1034. Undaunted, the legislature largely ignored Orr's veto and passed legislation authorizing him to continue using the pre-War slave patrol laws, merely removing references to race by substituting the phrase "changed condition of society." *Id.* at 1030 (quoting H.R. Res., 1865 Leg., 47th Reg. Sess. (S.C. 1865), *reprinted in* REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA, PASSED AT THE ANNUAL SESSION OF 1865, at 195-96 (1866)).

134. Stevens, *supra* note 74, at 1023.

135. *See generally* THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 46 (1858) (arguing that "negros" were uniquely suited for slavery and unable to exercise self-development).

136. Stevens, *supra* note 74, at 1023 (citing Cobb, *supra* note 135, at 17, 34, 106, 110).

137. *Id.* at 1024-26.

138. Jefferson James Davis, *The Georgia Code of 1863: America's First Comprehensive Code*, 4 J. S. LEGAL HIST. 1, 1 (1995) ("In 1860 Georgia enacted the first comprehensive code in the United States. That code went into effect January 1, 1863.").

139. *See* Robbins, *supra* note 96, at 138-39.

140. Stevens, *supra* note 74, at 1031-33 (citing An Act to Amend the Criminal Law, *in* 13 THE STATUTES AT LARGE OF SOUTH CAROLINA 253-54 (1875)).

crime, affording Whites more legal protection.[141] In the case of a more serious felony, a citizen could effectuate an arrest on any offender, but White offenders were to be taken to a magistrate and Black offenders to a District Judge.[142] Analogously, early citizen's arrest laws allowed Blacks to be arrested by use of deadly force and even permitted the killing of Blacks at night if they fled when "hailed."[143] Much as Ahmaud Arbery's killing centuries later,[144] a Black person's refusal to submit to dangerous, armed White men was a sign that they were sufficiently dangerous to kill. By contrast, the law did not address felony crimes at night by Whites.[145] It should be noted that such laws were often repealed and scrubbed of their explicitly racial rhetoric in light of the Thirteenth Amendment.[146] Yet their racial intent, carried from the eve of the war to the attempt to maintain racial hierarchy, remained widely understood.[147]

4. Beyond citizen's arrest

Citizen's arrests laws were only one facet of how private citizens could exert power over Blacks after the formal end of slavery. The combination of vague laws prohibiting vagrancy and countless other violations resulting in massive fines allowed the legal institutionalization of a system of involuntary labor as "punishment" for crime.[148] Importantly, such power over Black bodies was often funneled into private hands, for example, in chain gangs, the precursor of modern private labor in prisons.[149]

This subterranean legal power to arrest Black persons (alongside other minorities) has remained a part of the American legal legacy from Reconstruction until today. In some ways, it is hard to historically isolate. After all, the Thirteenth Amendment required during Reconstruction that southern states scrub their laws of explicitly racist language, even while the legal culture obviously sought to preserve control over former slaves.[150] So, too, Jim Crow laws were rarely explicit in spelling out a private power to

141. *Id.* at 1032 (citing An Act to Amend the Criminal Law, *supra* note 140, at 253).

142. *Id.*

143. *See, e.g, id.* at 1032-33.

144. *See supra* text accompanying notes 18-23.

145. Stevens, *supra* note 74, at 1031-33.

146. *See, e.g, id.* at 1033.

147. *See id.*; Robbins, *supra* note 96, at 139, 149.

148. Carrie Leonetti, *Pinkerton Guards and Debtors' Prisons: The Historical Precursors to the Modern Practice of Restitution Exploitation*, 58 HARV. C.R.-C.L. L. REV. 273, 282-84 (2023).

149. *See id.* at 283.

150. Stevens, *supra* note 74 at 1026, 1031-37; Robbins, *supra* note 96, at 139, 149.

arrest someone because they were Black. But of course, the law hardly needed to do so.[151] Given the intricate web of laws tightly proscribing the acts of Black people, from what schools they could attend to what seats they could take on public transportation and countless others, officials and private citizens alike always had legal authorization at hand to police Black behavior.[152]

It is all too natural to focus on the Southern Jim Crow regime to highlight the legal empowerment of Whites to enforce law or arrest Black citizens. While the intensity of Jim Crow was at its highest in the South, the racial empowerment of any White citizen to suddenly enforce the law on Black people could occur anywhere. To take merely one example, countless jurisdictions, concentrated in but not limited to the American South, passed "sundown" laws, which made it unlawful for Black people to be in the town or county after sunset.[153] Such laws were often enforced by police, but their effectiveness turned on the ominous threat of enforcement by the harassment and violence of private individuals as well.[154] Harkening back to the days when slaves could not be off the plantation without their master's leave, the power of sundown towns lay in the threat that anyone might decide to visit violence on a Black person found out after dark.[155] Indeed, a Black person violating these laws could invite the wrath of mobs of White private citizens, inflicting violence, death, and destruction on entire communities.[156] This deputization—the violence taken up by White private citizens—was integral to policing Black Americans by terror, ensuring Blacks knew they were not safe even if they could avoid police harassment.[157] It is worth noting that sundown towns were not merely a Southern phenomenon, but stretched across much of the country.[158] To be clear, sundown laws were distinct from ordinary criminal law. By making a Black person's mere presence in a place illegal, they charged the night air with danger and deputized every set of White eyes.

151. *See* Charles & Miller, *supra* note 43, at 1212-13.

152. I set aside, for the moment, the obvious point that social norms reinforced and amplified this imagined power over and demand for obsequiousness in countless ways.

153. Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1694-96 (2019).

154. *Id.* at 1695-96.

155. *See id.*

156. *See id.;* JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 269-71 (2005).

157. Rolnick, *supra* note 153, 1695-96.

158. *Id.*; *see, e.g.*, LOEWEN, *supra* note 156, at 59-60, 67-69; Jeannine Bell, *Can't We Be Your Neighbor? Trayvon Martin, George Zimmerman, and the Resistance to Blacks as Neighbors*, 95 B.U. L. REV. 851, 857 (2015) (describing private, racial, and anti-integrationist violence directed at Black families who moved into new neighborhoods across the country). On the extent to which racist violence was experienced across the nation, see Hill II, *supra* note 28, at 611.

Looming dangerously over Black life was the ultimate specter of White policing power: the threat of lynching.[159] The extraordinary violence and death that stretched from the birth of the KKK, the White League, and other White supremacist groups is ironically at once well-documented and yet impossible to truly know. It is disturbingly antiseptic to note that more than 2,500 Black people were lynched between 1889 and 1918.[160] As we will explore shortly, the horror of lynching was often grounded in vigilante justice, perpetrated by those who took themselves to be breaking the law for some greater good.[161] After all, the iconic image of the vigilante is the hooded member of the KKK, hiding his face to escape detection and punishment.[162]

But this icon should not obscure how often lynching was not imagined as breaking the law for the greater good, but in the name of private (White) citizens enforcing the law itself.[163] Foremost in the American imagination generally and the Southern imagination in particular, was the mythic epidemic of Black men raping White women.[164] Lynchings were often recast as private enforcement of the law, whether it was a suspected killing of a White person

159. Obviously, in many cases, lynching made no pretense to be anything other than extralegal terror. 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, 183-84 (2020); *see* WILBUR R. MILLER, A HISTORY OF PRIVATE POLICING IN THE UNITED STATES 31-49 (2018); Miller, *supra* note 54, at 128.

160. NAACP, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918, at 7 (1919).

161. *See* Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 942 (2019). For public testimony describing lynchings as law enforcement responses to imagined threats of rape, see 62 CONG. REC. 451, 458 (1921) (statement of Rep. James Paul Buchanan); and 62 CONG. REC. 1669, 1721 (1922) (statement of Rep. Thomas Upton Sisson).

162. Gautham Rao, Slavery's Leviathan: Fugitive Slaves and the Making of America's Police State 18, 31-32 (Feb. 8, 2023) (unpublished manuscript) (on file with author); *see* J.C. LESTER & D.L. WILSON, KU KLUX KLAN: ITS ORIGIN, GROWTH AND DISBANDMENT 59 (1884).

163. *See* Alan J. Singer, *Citizen's Arrest: Racist at its Roots*, HIST. NEWS NETWORK (May 24, 2020), https://perma.cc/A723-5CRT; Rao, *supra* note 162, at 15-18.

164. As Shawn E. Fields stated:

> One of the great victories of white supremacy in this era was the propagation of the false claim that whites faced an "epidemic of black men raping white women." Despite overwhelming evidence that no such threat existed, the fantasy that predatory black men routinely victimized white women became the justification for lynching. During a 1921 debate over a federal anti-lynching bill on the floor of the United States House of Representatives, Representative James Buchanan of Texas denounced "the damnable doctrine of social equality which excites the criminal sensualities of the criminal element of the Negro race and directly incites the diabolical crime of rape upon white women. Lynching follows as swift as lightning, and all the statutes of State and Nation can not stop it." Representative Thomas Upton Sisson of Mississippi agreed, asserting that white southern men "are going to protect our girls and womenfolk from these black brutes. When these black fiends keep their hands off the throats of the women of the South then lynching will stop."

Fields, *supra* note 161, at 942 (citations omitted).

or fabricated rape of a White woman.[165] Indeed, one way of illuminating how lynchings were viewed as in service of the law is to notice their frequent and public nature.[166] American history is replete with public lynchings, instigated by private citizens but attended by the town sheriff, mayor, or priests.[167] The presence of officials reinforces the idea that rather than acting outside the law, lynchings were often seen as deputized by legal officials.[168] In the South, even when perpetrators were prosecuted, the infamous southern all-White jury could be relied upon to acquit them, reinforcing that these were deputized "arrests."[169]

The constitutional duty to capture Black slaves, internalized as justification for deputized (White) citizens to police, arrest and even kill Black persons in the name of enforcing the law, has been passed down through our legal firmament. This deeply felt power to police Black people continued through the defeat of Reconstruction and the Jim Crow era until today.

B. Modern Deputization

1. Deputization today

It is no surprise that throughout American history, White people inherited and internalized this assumed legal power to police Black persons. This right had been enshrined in the law since before the country's founding, whether in the pre-constitutional duty to enforce the law by bearing arms,

165. *See, e.g.*, Singer, *supra* note 163; Robbins, *supra* note 96, at 149-50. As Alan J. Singer describes:

> Lynchings of African American men and women in Georgia by white mobs making "citizen's arrests" have a particularly gruesome history. On January 22, 1912, four Black Americans in Hamilton—three men and a woman—were citizen's arrested and lynched, accused of killing a white planter who was sexually abusing Black girls and women. On July 25, 1946, two African American couples were dragged from their car at Moore's Ford in Walton County and shot about sixty times by a mob of white men making a "citizen's arrest." No one was ever charged with their murders.

Singer, *supra* note 163.

166. For an evocative telling of the often-public nature of lynching, see EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 33-35 (2017).

167. *Id.* Sometimes crowds were present, but oftentimes the crowd consisted of the Klansmen or other perpetrators. *Id.* at 35. Sometimes the perpetrators or observers left the scene with gruesome keepsakes from the victim, or the rope and tree used in the hanging. *Id.* at 33, 35, 44-45, 72; Rao, *supra* note 162, at 15-18.

168. Hill II, *supra* note 28, at 651, 676-77.

169. *Id.* at 615-16; Kindaka Sanders, *The Watchman's Time To Kill: The Right to Vigilante Justice in the Jim Crow South*, 25 J. GENDER RACE & JUST. 355, 388-93 (2022).

pointedly excluding Blacks, the constitutional clause to return fugitive slaves, wherever found, the fugitive slave laws, or racist citizen's arrest laws.[170]

I am a firm believer in Faulkner's observation: "The past is never dead. It's not even past."[171] Some may dismiss these observations as (much too much) legal history with no concrete influence on today's troubling legal questions. But as we are constantly reminded, whether in a passing meme or deeply scarring video,[172] the presumed authority of White private citizens to deputize power (and force) over racial minorities is hardly confined to history.

In the wave of contemporary, racist violence, it is easy to mix up police killings, crass outlaw behavior, and self-proclaimed deputies into one indistinguishable and depressing amalgam. But it is worth focusing on how some of the most visible racist contemporary killings have been modern-day instantiations of deputization.

Take the 2012 killing of seventeen-year-old Trayvon Martin.[173] As is well known, Martin was visiting his father and father's fiancé in Sanford, Florida, when he went out for a fateful late-night snack of Skittles and iced tea.[174] On his way home, he attracted the attention of George Zimmerman.[175] In some ways, Zimmerman is an archetype of deputization: a self-appointed leader of a neighborhood watch in their mutual gated community.[176] In other ways, there is at least racial complexity. Zimmerman is of Peruvian descent, (potentially) bracketing him from an uncomplicated story of White domination.[177] In any

170. *See supra* text accompanying notes 92-169.

171. WILLIAM FAULKNER, REQUIEM FOR A NUN 73 (2011).

172. *See, e.g.*, USA Today, *Ahmaud Arbery Murder Trial: Legal Analysis of Shooting Video* | USA TODAY, YOUTUBE (Oct. 15, 2021), https://perma.cc/WU6L-BDGK.

173. Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN (updated May 23, 2012, 10:48 AM EDT), https://perma.cc/CYT6-CZFW.

174. *Id.*

175. *Id.*

176. Richard Luscombe, *Zimmerman Trial: Prosecutors Portray Defendant as Neighbourhood Busybody*, GUARDIAN (June 25, 2013, 1:34 PM EDT), https://perma.cc/QW3C-U8RB.

177. Mark S. Brodin, *The Legacy of Trayvon Martin—Neighborhood Watches, Vigilantes, Race, and Our Law of Self-Defense*, 106 MARQ. L. REV. 593, 599 (2023); Opinion, *Zimmerman, Whiteness and Latinos*, ABC NEWS (July 18, 2013, 9:55 AM), https://perma.cc/G5D6-S98F. Much needs to be addressed in this wrinkle, particularly about the long American history of other racial minorities making a bid for Whiteness specifically by tapping into the denigration of Black Americans.

One example that sounds strange to modern ears is the path of Italian Americans from racial outsiders to White Americans, in part premised on a collective willingness to express solidarity in despising Black Americans. *See* Brent Staples, Opinion, *How Italians Became "White"*, N.Y. TIMES (Oct. 12, 2019), https://perma.cc/6W7M-QSLA. For an exploration of how anti-Black racism was a pathway to claiming Whiteness, see

footnote continued on next page

case, it is clear Zimmerman focused his "policing" disproportionately on men of color, whose mere presence he often found suspicious.[178] In over a hundred phone calls to the police over the years, Zimmerman had (nearly) universally located his suspicion on the racially marginalized.[179] In reporting everything from loud music and unknown persons to open garage doors, Zimmerman very rarely reported potentially suspicious activity by a White person.[180] Zimmerman clearly claimed the mantle of citizen law enforcement, turning it repeatedly and nearly exclusively on racial minorities, particularly Black men.[181] And despite being explicitly told by a police dispatcher not to pursue Trayvon Martin, he brushed off the direction with a string of expletives and chased down Martin, eventually killing him.[182]

Trayvon Martin's death took its place in a long and sorrowful line of Black children killed by arbitrary ire, stretching back to Emmett Till and so many before.[183] But much of White America was jolted into a conversation about the racial profiling and lethal danger Black people face when anyone can decide they are suspicious.[184] Zimmerman's power to deputize himself, clothed in racial dominance, was ultimately ratified when he was acquitted of any criminal wrongdoing, becoming a conservative celebrity in the process.[185] Perhaps, had a video of Zimmerman's pursuit been available, the controversy

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NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE 104-31, 201-11 (2011). *See also* Ignatiev, *supra* note 124, at 120-30. On the use of private, racist, mob violence as a form of consolidating racial privilege, see Ignatiev, note 124 above, at 136-40.

178. *See* Mother Jones, *George Zimmerman's Police Call History*, CITY OF SANFORD, https://perma.cc/5LCM-H67A (archived Jan. 11, 2025); Brodin, *supra* note 177, at 600-01.

179. *See id.*

180. *See id.*

181. *See id.*

182. Upon being told by the police dispatcher not to follow an unknown person Zimmerman had unilaterally decided was suspicious, Zimmerman can be heard saying, "[f]ucking punks. These assholes, they always get away," before beginning his pursuit. *Trayvon Martin Shooting Fast Facts*, *supra* note 3; Tom Brown & Barbara Liston, *Trayvon Martin Murder Case: Opening Clash on Shooter's Motive*, REUTERS (updated June 24, 2013, 6:32 PM PDT), https://perma.cc/9P7H-W2HD.

183. *See* Brodin, *supra* note 177, at 596-97.

184. *See* Deepti Hajela, *10 Years After Killing of Trayvon Martin, Nation Continues Its Reckoning on Racial Justice*, PBS (Feb. 24, 2022, 12:00 PM EST), https://perma.cc/3UNZ-DKHV.

185. Brodin, *supra* note 177, at 607. Zimmerman reportedly sold the gun he used to kill Trayvon Martin for $250,000. Karen Brooks, *Gun Used to Kill Trayvon Martin Sold for $250,000: TV Reports*, REUTERS (updated May 20, 2016, 5:51 PM PDT), https://perma.cc/R6W2-93EJ; Courtney McKinney, *George Zimmerman and a Terrible New Low for 'Celebrity'*, HUFFPOST (updated Apr. 7, 2014), https://perma.cc/VK67-MMT9; Timothy Bella, *How George Zimmerman Stretched 15 Minutes of Infamy into a Decade of Disgust*, WASH. POST (updated Feb. 22, 2022), https://perma.cc/AV96-58A9.

(and support from some) surrounding Zimmerman's self-appointment as law enforcement would have been clearer.

Or perhaps not.[186] Almost exactly eight years later, Ahmaud Arbery went for a jog in his southern Georgia neighborhood.[187] Arbery was spotted by three White men, who similarly decided he was suspicious, chased him down, and killed him.[188] In Arbery's case, it was not until the searing video recorded by the men chasing him was publicly leaked that Arbery's killers were charged.[189] Most painful was that a prosecutor could watch the video and decline to indict.[190] The prosecutor concluded this modern-day lynching was authorized under Georgia's citizen's arrest law.[191] Little wonder. As noted, that law was crafted explicitly to deputize White people to police Black people, whether runaway slave or free and jogging.[192]

The well-known case of Kyle Rittenhouse illustrates an explicit invocation of illicit deputization through a modern-day "hue and cry." It also demonstrates that even where deputization is aimed at controlling Black protest, it can visit lethal collateral damage to anyone in the vicinity. Rittenhouse was seventeen years old, living in Antioch, Illinois, when Jacob Blake, a Black man, was shot several times and seriously injured by a White police officer in nearby Kenosha, Wisconsin.[193] Kenosha was engulfed in civic unrest, as Black Lives Matter protests against police violence often tipped over into anger-fueled destruction of property.[194] As Kenosha braced for its third day of civil unrest, a former city alderman, known for bringing a handgun to

186. *See* Charles & Miller, *supra* note 43, at 1221-22.

187. Fausset, *supra* note 9.

188. *Id.*

189. *Id.*

190. *See id.*

191. *Id.*; *Ex-Prosecutor Accused of Interfering with Investigation into Ahmaud Arbery's Killing*, *supra* note 27.

192. *See supra* text accompanying notes 126-47.

193. Paige Williams, *Kyle Rittenhouse: American Vigilante*, NEW YORKER (June 28, 2021), https://perma.cc/X4WC-9UCR.

194. *Id.* Thus, Kenosha joined the long, sorrowful American history of cities where police actions and Black outrage foment violent protest, too often resulting in even more police violence. Historian Elizabeth Hinton has illustrated the oft-repeated tragic cycle of police brutality leading to protest leading to police asserting that disproportionate violence is required to quell a "riot." HINTON, *supra* note 15, at 15. Politicians in Kenosha and elsewhere were keenly aware that public conversation was focused on this history as they negotiated the police response at the height of 2020's Black Lives Matter protests. Heather Ann Thompson, *Reflections of the 60th Anniversary of Urban Uprisings in America*, BLACK PERSPECTIVES (Oct. 17, 2024), https://perma.cc/MXF7-RA3P; *cf.* Williams, *supra* note 193 (illustrating former Kenosha officials invoking past urban rioting as justifying militia response).

city council meetings and branding himself the leader of the "Kenosha Guard," posted a social media call for armed "patriots" to defend Kenosha from "evil thugs."[195] His call reflected much more than harmless rhetoric. With a former city official echoing the hue and cry, a mixture of former military, untrained civilians, and law enforcement wannabes, armed with military-style assault rifles, entered Kenosha, declared themselves deputized by local business owners, and took up positions on rooftops, training their scopes on marching protestors.[196]

Into this combustible mix, Rittenhouse, who had long idealized the police and imagined himself (with no training) as an EMT, collected an AR-15 and an assorted bag of medical supplies and raced across state lines to Kenosha.[197] Joseph Rosenbaum, a thirty-six-year-old unarmed local ended up chasing Rittenhouse and grabbed his rifle.[198] Rittenhouse shot him four times at close range, killing him.[199] Rittenhouse then ran as a crowd pursued him.[200] Twenty-six-year-old Anthony Huber struck Rittenhouse with a skateboard; Rittenhouse subsequently shot him fatally in the chest.[201] Twenty-six-year-old Gaige Grosskreutz pursued Rittenhouse and pointed a handgun at him.[202] Rittenhouse shot him in the right arm; luckily, Grosskreutz survived.[203] Rittenhouse was captured on film racing from the shootings, with others chasing him, yelling that he had shot and killed people, while the police stood aside to allow him to flee the scene.[204]

One must note that the unrest that had gripped Kenosha was real and, in some places, destructive.[205] And, in a bit of racial irony, it bears noting that each of Rittenhouse's victims were White men.[206] Still, there can be little doubt that the overarching set piece that put the tragedy in motion was the

195. Williams, *supra* note 193. For the implicit association of black men as "criminal thugs," see Richardson & Goff, note 55 above, at 317; and Calvin John Smiley & David Fakunle, *From "Brute" to "Thug:" The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV'T 350, 350-66 (2016).

196. Williams, *supra* note 193.

197. *Id.*; Cynthia Lee, *Firearms and Initial Aggressors*, 101 N.C. L. REV. 1, 40 (2022); Williams, *supra* note 193.

198. Vanessa Romo & Sharon Pruitt-Young, *What We Know About The 3 Men Who Were Shot by Kyle Rittenhouse*, NPR (Nov. 20, 2021, 8:56 PM ET), https://perma.cc/X933-5UG8.

199. Williams, *supra* note 193.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

long-standing and explicitly invoked power of the self-declared White militia to deputize themselves to police Black protestors.[207] The association was further fixed by a subsequent video of Rittenhouse, standing alongside White supremacists, flashing "White Power" hand signs.[208] As other scholars have noted, it is impossible to imagine a Black Rittenhouse racing from shooting White bystanders while the police casually part way.[209]

Even as I write this Article, new examples have been seared into our minds. On May 1, 2023, thirty-year-old Jordan Neely, a Black homeless man in New York City known for street performances impersonating Michael Jackson, entered a subway car, behaving erratically.[210] Neely began shouting about being hungry and that he was ready to go to jail or die to get food.[211] By most accounts, although his behavior was disturbing, Neely did not directly threaten anyone.[212] It was then that Daniel Penny, a White, twenty-four-year-old former Marine, grabbed Neely, wrestled him to the ground, and placed him in a chokehold.[213] Approximately three minutes of Penny choking Neely was recorded by a freelance journalist; one can hear onlookers warning Penny that he might kill Neely.[214] Neely did in fact die; indeed, he may have died on the subway floor.[215] Daniel Penny was subsequently indicted for manslaughter.[216] Jordan Neely's death—the prolonged stranglehold, onlookers warning Penny that he might kill the Black man—is a deputized analog echoing the police violence in deaths like Eric Garner's and George Floyd's.[217]

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207. *Id.*; JENNIFER CARLSON, CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE 19-24 (2015).

208. Wilson Wong, *Kyle Rittenhouse, Out on Bail, Flashed White Power Signs at Bar, Prosecutors Say*, NBC NEWS (updated Jan. 14, 2021, 7:45 AM PST), https://perma.cc/3MX9-X73H. Rittenhouse later denied he understood the meaning of the signs. Williams, *supra* note 193.

209. Lee, *supra* note 197, at 61-62.

210. Maria Cramer, Hurubie Meko & Amelia Nierenberg, *What We Know About Jordan Neely's Killing*, N.Y. TIMES (updated May 13, 2023), https://perma.cc/SKF3-DNKF; Andy Newman, *Jordan Neely Was on New York's 'Top 50' List of Homeless People at Risk*, N.Y. TIMES (updated May 15, 2023), https://perma.cc/SZ2X-7X77; David Brand, *Who Was Jordan Neely? Friends Recall 'Sweet Kid,' Talented Performer Killed in Subway Chokehold*, GOTHAMIST (May 4, 2023), https://perma.cc/H2ET-LV6S.

211. Cramer et al., *supra* note 210.

212. *Id.*

213. *Id.*; Maria Cramer & Anusha Bayya, *Trial Begins in Fatal Choking of Homeless Man on Subway*, N.Y. TIMES (Oct. 21, 2024), https://perma.cc/X6DG-L99X.

214. Cramer et al., *supra* note 210.

215. *Id.*

216. *Id.*

217. *Id.*

If the videoed deaths of Arbery and Neely are the most visible, they are not singular. Less famous lethal incidents illustrate that moments of White deputization can escape national attention because we do not have disturbing video evidence. Nor are these solely stories of aggressive White men exercising some toxic machismo. Take twenty-one-year-old Hannah Payne, a White woman, who in May 2019 witnessed a minor car accident involving Black sixty-two-year-old Kenneth Herring.[218] Herring stayed at the scene of the accident for approximately twenty minutes before leaving, apparently in distress.[219] Subsequent reports indicated that Herring began experiencing a diabetic medical emergency, prompting him to leave the scene of the accident.[220] Much as in the death of Trayvon Martin, Payne decided to take the law into her own hands despite repeated phone directions by the 911 dispatcher to desist.[221] Echoing the murder of Arbery, Payne followed Herring a substantial distance from the accident and swerved her vehicle around to block his car.[222] She then armed herself, confronted Herring, yelled at him to get out of his car, and ultimately shot him several times.[223] She later claimed, unbelievably, that he shot himself.[224] As with Arbery's death, Payne's legal defense claimed self-defense while executing a citizen's arrest, despite Georgia's citizen's arrest law having been repealed in the wake of the Arbery killing.[225] After numerous delays, it was over four years later that Payne was finally found guilty of felony murder, malice murder, and aggravated assault and sentenced to life in prison.[226]

In this way, deputization ties together many of the separate strands of critical race criminal theory stretching from the last generation until today. To take merely a handful of examples, race scholars have long pointed out the way

218. Donesha Aldridge, *Trial Postponed Again for Woman Accused of Witnessing Hit-and-Run and then Allegedly Killing Driver*, 11ALIVE (Nov. 14, 2022), https://perma.cc/QCL3-QC7A; Megan Carpentier, *New Delays in Trial of Georgia Woman Who Shot Black Driver in Diabetic Shock*, YAHOO! ENT. (Nov. 14, 2022, 8:44 PM UTC), https://perma.cc/ZA3D-XYK9.

219. Akilah Winters, *Jury Trial Set for Woman Who Allegedly Shot and Killed Man When He Left the Scene of a Hit-and-Run*, 11ALIVE (updated Nov. 14, 2022, 12:12 AM EST), https://perma.cc/PQ7E-TDUX.

220. Carpentier, *supra* note 218.

221. *Id.*; Tresia Bowles, *Hannah Payne Testimony: She Never Intended To Shoot, She Says*, 11ALIVE (updated Dec. 12, 2023, 9:17 AM EST), https://perma.cc/4769-2SJC.

222. Carpentier, *supra* note 218.

223. *Id.*

224. *Id.*

225. *See id.*; Jeff Amy, *Georgia Gov. Kemp Signs Repeal of 1863 Citizen's Arrest Law*, ASSOCIATED PRESS (May 10, 2021, 1:44 PM PST), https://perma.cc/QYT7-ZKGF.

226. *Hannah Payne Sentenced to Life for Murder of Man During Citizen's Arrest*, FOX 5 ATLANTA (updated Dec. 15, 2023, 1:13 PM EST), https://perma.cc/4NP3-UCLK.

perceptions of criminality and dangerousness affect the safety of Black men in cases of self-defense.[227] Relatedly, the expansion of self-defense justifications through stand-your-ground statutes has led to higher rates of violence toward people of color.[228] A world where White people feel empowered to enforce the law through private violence illuminates the depth of Black Americans' anxiety about expanding legal justifications for self-defense. After all, the reach of even racially hostile police may be dwarfed by the threat that any White person, as a private citizen, may don the authority to police Black people as they go about their daily lives.[229]

These killers did not assume their legal immunity in a cultural vacuum. If anything, any legal accountability was more serendipitous than a sign of the law taking their killing of unarmed Black Americans seriously. George Zimmerman, who killed Trayvon Martin, was released from police custody without being arrested.[230] Only after weeks of intense media coverage and the appointment of a special prosecutor was he eventually charged.[231] And, of course, he was eventually acquitted.[232] Similarly, three prosecutors failed to charge Travis McMichael, Gregory McMichael, and William "Roddie" Bryan, even after watching a video of them chasing down and killing Ahmaud Arbery.[233] Prosecutors brought charges only after persistent media coverage and community advocacy.[234] Indeed, local prosecutors may have acted illegally to shield Arbery's murderers.[235] It took four years for Hannah Payne to stand trial for killing Kenneth Herring.[236] Likewise, Kyle Rittenhouse, who armed

227. Lee, *supra* note 55, at 404-06; Richardson & Goff, *supra* note 55, at 301-07, 318.

228. Gruber, *supra* note 56, at 962-80 (explaining how George Zimmerman and his supporters mobilized the logic of stand your ground laws); AM. BAR ASS'N, *supra* note 56 (citing data from four nationwide surveys); Roman, *supra* note 56, at 9-10; Hamsher, *supra* note 56, at 259-62.

229. *See* Charles & Miller, *supra* note 43, at 1200.

230. *See* Bill Chappell, *Zimmerman Arrested on Murder Charges in Martin Case; Will Plead Not Guilty*, NPR (Apr. 11, 2012, 6:06 PM ET), https://perma.cc/DPY2-EYH2.

231. *See id.*

232. Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), https://perma.cc/Q477-U42G; Lee, *supra* note 197, at 44.

233. Russ Bynum, *Ex-Prosecutor Indicted for Misconduct in Ahmaud Arbery Death*, ASSOCIATED PRESS (Sept. 2, 2021, 3:34 PM PST), https://perma.cc/NBJ5-M9WW.

234. *Id.*

235. *Id.* (explaining the indictment of District Attorney Jackie Johnson on a felony count of violating her oath of office and a misdemeanor count of hindering a law enforcement officer by shielding Arbery's murderers, one of whom had worked in her office, from arrest).

236. FOX 5 ATLANTA, *supra* note 226; Tyler Fingert & Rob DiRienzo, *Hannah Payne Murder Trial: Guilty on All Counts*, FOX 5 (updated Dec. 12, 2023, 11:40 PM EST), https://perma.cc/AEC5-J9VV.

himself to police Black protestors, only to ultimately kill White bystanders, was also acquitted.[237] The innate immunity of White deputization is seen when prosecutors learn of, or even watch, White citizens kill Black people under outrageous circumstances and shrug it off as legally authorized.[238]

The serendipity of both the Arbery and Martin cases reveals another important insight into the scale of deputization. We noted the deep-rootedness of deputization when prosecutors can watch Black people hunted down and not even see a crime.[239] But the initial dismissals also indicate deputization is much broader than we can easily measure. Without relentless public pressure, both cases would have disappeared as little-noticed local stories.[240] We have no way of knowing the countless other cases of fatal (or non-fatal) deputization with no champions dismissed as self-defense or citizen's arrests. Much as racist police violence was so long dismissed as exaggerated,[241] so too an unknown number of Black lives are cut short by White violence subsequently sanctioned by state officials.

2. Beyond death

Black Lives Matter protests present only the latest contemporary examples. The implicit claim of White people to self-deputize and use armed resistance to stymie Black political movements is as old as Black political movements in America. The most obvious examples come from the long-standing, violent contestation of Black voting rights.[242] From the moment Black Freedmen were granted the right to vote, White resisters armed

237. Lee, *supra* note 197, at 39-40.

238. It is worth noting that these cases did not reach the same legal conclusion. Most strikingly, Rittenhouse and Zimmerman were acquitted. For the sake of our analysis, however, the striking thing is how hesitant prosecutors were to bring charges at all. As noted, it is difficult to imagine prosecutors being so reluctant if one reverses the racial valences of these cases. *Id.* at 61-62; Brodin, *supra* note 177, at 629-31.

239. *See supra* text accompanying notes 233-34.

240. *See, e.g.*, Cleve R. Wootson Jr. & Michael Brice-Saddler, *It Took 74 Days for Suspects to Be Charged in the Death of a Black Jogger. Many People Are Asking Why It Took So Long*, WASH. POST (May 8, 2020), https://perma.cc/B4VB-P5JY; Brodin, *supra* note 177, at 598-99.

241. Conservative commentators such as Heather Mac Donald have long argued that racial bias in policing is exaggerated. *See* Heather Mac Donald, *The Myth of Systemic Police Racism*, WALL ST. J., (June 2, 2020, 1:44 PM ET), https://perma.cc/9PBK-TKYQ. Her arguments stand against an overwhelming body of literature. *See infra* text accompanying notes 290-304; Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOUS. L. REV. 817, 819-27, 831-42 (2021).

242. *See* Ekow N. Yankah, *Compulsory Voting and Black Citizenship*, 90 FORDHAM L. REV. 639, 639-52 (2021).

themselves with voting regulations and weapons to insist they were legally entitled to prevent Blacks from voting.[243] Nor is such brazen deputization to rob Black voters of their voice confined to the past; recall the harrowing scenes of armed White protestors outside voting centers in Black cities, insisting that officials cease counting Black votes.[244] Illustrating the deeply internalized power norm of racial deputization, it is telling that those who threatened election workers were convinced, without evidence or expertise, that they were the ones enforcing the law.[245] In one startling example, then-President Donald Trump and Rudy Giuliani concocted a myth of voter fraud in the Georgia election by targeting two Black, women election workers.[246] This tale prompted a group of Trump supporters to find the home of the elderly Black grandmother and try to break in to commit a "citizen's arrest."[247]

Nor is deputization otherwise limited to spectacular moments of televised death. Deputization can be recognized in volatile moments of racial hubris short of death. Take Mark and Patricia McCloskey, the St. Louis couple who gained notoriety during the height of the Black Lives Matter protests.[248] In June of 2020, social justice protestors marched on their well-to-do private street, past their grand Italianate mansion, in order to protest at the nearby home of St. Louis mayor Lyda Krewson.[249] The protestors included members of the clergy and politicians such as then-candidate and future U.S. Representative Cori Bush.[250] Without more, the scene itself could have been an eyebrow raising study of American contrasts. Social justice protesters, many Black, marching past enclosed streets of wealth and privilege, with White homeowners, attired in almost cinematically preppy summer strips and polos, watching warily.[251]

The scene that unfolded was decidedly less contemplative. Though there is no evidence that the mob made any threatening motion towards their home, the McCloskeys, armed with an AR-15 type assault rifle and a handgun, stood

243. *See* REBECCA J. SCOTT, DEGREES OF FREEDOM: LOUISIANA AND CUBA AFTER SLAVERY 67-70, 85-88 (2008).

244. Yankah, *supra* note 242, at 639-41.

245. *Id.*

246. Azmi Haroun, *Black Election Worker Testifies in January 6 Committee Hearing that Election Conspiracy Theorists Tried to Citizen's Arrest Her Grandmother After Campaign of Lies from Trump, Giuliani*, BUS. INSIDER (June 21, 2022, 5:26 PM EDT), https://perma.cc/B7A3-6Y8X.

247. *Id.*

248. Bonvillian, *supra* note 36.

249. *Id.*; Lee, *supra* note 197, at 3-4.

250. Jessica Lussenhop, *Mark and Patricia McCloskey: What Really Went on in St. Louis That Day?*, BBC NEWS (Aug. 24, 2020), https://perma.cc/PGC4-VU24.

251. *Id.*

menacingly, waving their guns.[252] At times, Patricia McCloskey approached and yelled at marchers while pointing her gun at them.[253] While there is some evidence that the McCloskeys were broadly aggressive,[254] the same racial context we noted with Rittenhouse—the imputed permission to police Black protestors—cannot be ignored.[255] Without this permission, one suspects, it is doubtful that the McCloskeys would have become darlings of conservative media and politics, including President Trump's wildly fabricated stories of their being in danger.[256] But notice that the "danger" narrative is only plausible when one assumes that Black protestors walking by were a danger that the McCloskeys had to meet as law enforcers; two dubious and racialized narrative leaps. The eventual pardon of their assault charges by the Missouri governor,[257] Mark McCloskey subsequently running for Senate,[258] and both being invited to speak at the Republican Presidential convention,[259] were intertwined with the racial subtext that any Black Lives Matter protests were a danger that needed to be checked by "patriotic" and "law abiding" White people.

The implicit power to "police" Black social protests was harrowingly distilled in a scene in Crown Point, Indiana, in June 2020, when a small and peaceful Black Lives Matter protest, which included prayer with the town mayor, was met with White, armed civilians, dressed in faux military armor, brandishing military-style rifles.[260] As a small group of the peaceful protestors walked along the police-appointed path, the large band of armed, White people lined the fence, watching menacingly and occasionally taunting them.[261]

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252. *Id.*

253. *Id.*

254. Jeremy Kohler, *The St. Louis Couple Charged with Waving Guns at Protestors Have a Long History of Not Backing Down*, ST. LOUIS POST-DISPATCH (Aug. 19, 2020), https://perma.cc/5Q7F-H6ER; *McCloskey Mansion*, AM. ARISTOCRACY, https://perma.cc/K9H8-6EVE (archived Jan. 11, 2025).

255. Charles & Miller, *supra* note 43, at 1228.

256. Lussenhop, *supra* note 250.

257. Ivan Pereira, *Governor Pardons St. Louis Couple Who Pointed Gun at Black Lives Matter Protestors*, ABC NEWS (Aug. 3, 2021, 4:08 PM), https://perma.cc/RH4C-UW5Z.

258. Raja Razek & Caroline Kelly, *Mark McCloskey Announces Run for US Senate in Missouri*, CNN (updated May 18, 2021, 11:05 PM EDT), https://perma.cc/8RPG-JDXQ.

259. *Id.*; Caitlin Oprysko, *In Grievance-Filled Speech, St. Louis Couple Warn of Chaos in the Suburbs if Democrats Elected*, POLITICO (updated Aug. 24, 2020, 11:41 PM EDT), https://perma.cc/2VLR-6KT2.

260. Andy Koval, *Protesters Met with Armed Onlookers Following Demonstration in Crown Point*, WGN-TV (updated June 5, 2020, 5:52 AM CDT), https://perma.cc/QL4U-QJSG.

261. Mary Freda, *Crown Point Officials Address Armed Bystanders Amid Peaceful Gathering*, NWI TIMES (June 2, 2020), https://perma.cc/5M6Q-Q4FR.

Deputization does not only occur in moments of sweeping social movements and presidential contestation. Many cases of deputization concern perfectly ordinary moments of Black people going about their lives. Some examples are charged moments of grave tension; armed interventions by White citizens demanding Black people cease their ordinary recreation, show racial deference and prove they are authorized to . . . just be.[262] Others are adjacent to the core phenomenon of deputization in that a White person may not forcibly enforce their demands but reinforce them with explicit threats to call on police force. Others would border on the laughable—overly entitled demands to control public space—if not for the demands being laced with legal presumption and threat.[263] These moments have become so ubiquitously visible as to have spawned its own social language; social media is awash in moments of self-aggrandizing "Karens,"[264] insisting on getting their way or demanding justification of Black people in their daily lives.

Serious examples include the experience of Franklin and Jessica Richardson, a Black couple who decided to spend part of a Memorial Day weekend picnicking lakeside in Mississippi, only to have a camp employee insist they leave at gunpoint for not having an allegedly required reservation.[265] Likewise, the impulse to police Black protest was reflected in the story of an unidentified, wheelchair-using, elderly Minneapolis woman who made national news when videoed being attacked by protestors in a Target.[266] It was later revealed that she had decided to go to the Target to police it from protestors, riding in her wheelchair and stabbing Black people with a sharp tool.[267]

More marginal examples go viral precisely because of the trivial nature of the imagined legal violation. Thus, we have monikers like "Key Fob Kelly" or "Permit Patty" (Hilary Brooke Mueller), who blocked a Black man from entering his own apartment building without showing her his key fob.[268]

262. *See infra* text accompanying notes 265-72.

263. Carbado, *Strict Scrutiny & the Black Body*, *supra* note 49, at 46-49.

264. *See* Ashitha Nagesh, *What Exactly Is a "Karen" and Where Did the Meme Come from?*, BBC (July 30, 2020), https://perma.cc/325U-FPPG.

265. Antonia Noori Farzan, *A Black Couple Were Having a Picnic. Then a White Campground Manager Pulled Out Her Gun*, WASH. POST (May 29, 2019), https://perma.cc/PKZ9-6H6P. The area where they were picnicking was sufficiently ambiguous that another campground manager, the assailant's own husband, later told them that no reservation was required. *Id.*

266. Kat Tenbarge, *A Woman in a Wheelchair Accused of Trying to Stab Minneapolis Target Looters Was Recorded Being Sprayed with a Fire Extinguisher. Now She's Become an Internet Flash Point*, BUS. INSIDER (May 28, 2020, 9:32 AM PDT), https://perma.cc/6YUR-8QRP.

267. *Id.*

268. Mina Kaji, *Woman Defends Herself After Video Shows Her Refusing to Let Black Man Into His Own Apartment Building*, ABC NEWS (Oct. 17, 2018, 8:03 AM), https://perma.cc/

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"Permit Patty" (Alison Ettel) called the police to allege that an eight-year-old Black girl was selling water without a permit.[269] "BBQ Beckie" (Jennifer Schulte) called the police on two Black people barbequing, feigning terror in her voice.[270] The introduction of constant access to video has forced the country to face the indignities of the ever-present impulse of Whites to police Blacks, whether it is police being called on a group of Black people staying at an AirBnB,[271] or a Black Yale graduate student,[272] and so on and so on.

3. The scaffolding of everyday deputization

Even were one to meticulously gather each of these stories and the countless others never captured on video, deputization cannot be reduced to isolated instances that flair up to threaten Black Americans with violence. It is also the scaffolding around which we build social institutions that parallel state law enforcement. Take the persistent racial prejudice and anxiety embedded in non-formal, private policing networks in America. By private police, I refer to the private security industry, which already employs more guards, patrol personnel, and detectives than the federal, state, and local governments combined and remains unchecked by even the anemic Constitutional protections against racial profiling.[273] Many states have promulgated shopkeeper statutes, permitting storeowners to detain persons suspected of stealing, with predictably prejudiced results.[274] Though the killing of Trayvon

3T6X-M2Q7; Melissa Gomez, *White Woman Who Blocked Black Neighbor From Building Is Fired*, N.Y. TIMES (Oct. 15, 2018), https://perma.cc/L6UU-SZ2G.

269. Sam Levin, *"Permit Patty": Woman Who Threatened Black Girl with Police Resigns From Cannabis Firm*, GUARDIAN (June 27, 2018, 2:18 AM EDT), https://perma.cc/TA5R-JUD3.

270. *See* Tom Cleary, *Jennifer Schulte, "BBQ Becky": Five Fast Facts You Need to Know*, HEAVY (updated June 23, 2018, 5:54 PM), https://perma.cc/8S2P-RQWX. Schulte may have been at least formally correct on the law. Oakland Parks and Recreation map shows that the area is not a designated charcoal area but is an area where portable non-charcoal grills can be used. *Id.* Lake Merritt has three areas with stationary charcoal grills for public use, according to the map. *Id.* But residents and officials told the news station that the rule is not typically followed or enforced. *Id.* That noted, there is also evidence that Schulte made extravagant claims that she owned the park and reportedly used racial epitaphs in the encounter. *Id.* Thus, the encounter strikes me as an exemplar of internalized racial domination through the law.

271. Dakin Andone, *Woman Says She Called Police When Black AirBnB Guests Didn't Wave at Her*, CNN (updated May 11, 2018, 2:32 AM EDT), https://perma.cc/9HGA-KRA6.

272. Brandon Griggs, *A Black Yale Graduate Student Took a Nap in Her Dorm's Common Room. So a White Student Called Police*, CNN (May 12, 2018, 12:32 AM ET), https://perma.cc/TJ3F-QABX.

273. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1168-69, 1171-83 (1999).

274. *See* Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1, 3-10 (2003); Hampton v. Dillard

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Martin was at the hands of the self-proclaimed neighborhood watchman, George Zimmerman, there is persuasive evidence of endemic racist discrimination in the countless neighborhood watches that do exist.[275] The results have been no different where the neighborhood watch has entered the Internet age. The Internet neighborhood forum "NextDoor," designed to help neighbors share "local tips" including neighborhood affairs, babysitting, and shared security concerns, for example, has wrestled with persistent racism by users.[276]

At times, these cases straddle the use of private violence that characterizes deputization or the more conventional calling of the police. To be sure, in some cases, there was civic unrest or other potential explanations for some of the behavior. But then, there always is. The point is not that deputization appears out of nowhere, but rather that it is omnipresent.[277] These visible instances of private racial policing are not new. They are now part of the public conversation because modern cellphone videos make it impossible to deny that they have always been woven into the Black experience. While it would be obtuse to pretend that Black experience today is identical to existence under the Fugitive Slave Acts or the era of sundown towns, the point remains

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Dep't Stores, Inc., 18 F. Supp. 2d 1256, 1262 (D. Kan. 1998); Regina Austin, *"A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147, 147-56 (1994); Seth W. Stoughton, *The Blurred Blue Line: Reform in an Era of Public and Private Policing*, 44 AM. J. CRIM. L. 117, 131 (2017); Amanda G. Main, Note, *Racial Profiling in Public Spaces of Accommodation: Theories of Recovery and Relief*, 39 BRANDEIS L.J. 289, 302-07 (2000).

For a case exploring the connection between shopkeepers' use of police and state action, see *Willitis v. Walmart Stores, Inc.*, 2001 U.S. Dist. LEXIS 25778 (S.D. Ind. July 30, 2001). A line of cases has ruled that unless the plaintiff can prove "joint action," they have no claim against public authorities; the actions, though state authorized, should be viewed as private. *See* Dennis v. Sparks, 449 U.S. 24, 24-25 (1980); Cruz v. Donnelly, 727 F.2d 79, 80 (3d Cir. 1984) (suspected shoplifter who was strip searched by police on orders of the store managers failed to state a Section 1983 claim); Allen v. Columbia Mall, Inc., 47 F. Supp. 2d 605, 609 (D. Md. 1999). On the historical connection between the right to exclude from public accommodations and post-Civil War racism, see Joseph William Singer, *No Right to Exclude, Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1293 (1996).

275. Brodin, *supra* note 177, at 613-15; Bell, *supra* note 158, at 855-56; Adeoye Johnson, *Neighborhood Watch: Invading the Community, Evading Constitutional Limits*, 18 U. PA. J.L. & SOC. CHANGE 459, 464-67, 473 (2016); Carbado, *Strict Scrutiny & the Black Body*, *supra* note 49, at 44-49.

276. Jessi Hempel, *For Nextdoor, Eliminating Racism Is No Quick Fix*, WIRED (Feb. 16, 2017, 12:00 AM), https://perma.cc/84DJ-UJWP; *see* Makena Kelly, *Inside Nextdoor's 'Karen Problem'*, VERGE (June 8, 2020, 10:44 AM PDT), https://perma.cc/AYQ9-8MRU; Allyson Waller, *Nextdoor Removes App's 'Forward to Police' Feature*, N.Y. TIMES (June 23, 2020), https://perma.cc/7QZK-L32T.

277. The psychological tax of omnipresent racially based threat is addressed in the following Subpart. *See supra* Part II.B.4.

that our legal culture still imbues White people with the power to police Black people, to demand they show authorization to be in public space.

4. Deputization and truncated Black lives

It is only natural that the outrageous capture our attention. The deaths of Trayvon Martin, Ahmaud Arbery, and Jordan Neely understandably garnered national news coverage.[278] Likewise, aggressive assaults and racial tension caught on video combine ingredients for viral outrage. But much as sensational moments of racist police violence can obscure the daily petty indignities of racist policing, so too the effects of deputization are not to be found only in the spectacular. As White people grow up internalizing a latent authorization to police Black people—by force if need be—so too Black Americans grow up understanding that many White people take themselves to have this power.

White deputization looms over Black Americans' lives even when ostensibly nothing is happening. Take the preoccupation in the Black community and academy with the politics of respectability.[279] The need for Black people to constantly signal their upstandingness touches on all aspects of life, from employment to housing.[280] But it is of little surprise how much of the social, political, and personal conversation about respectability centers on the need for Black men to ward off presumptions of criminality.[281] Too many Black people, particularly Black men, have their lives shaped by, even truncated by, the realization that any White person may perceive innocuous action as hostile and take it upon themselves to intervene.[282] Additionally, even if any initial intervention is not itself outrageous, Black irritation or

278. *See* sources cited *supra* notes 3, 9, 40.

279. Scholars trace the term "respectability politics" to Evelyn Brooks Higginbotham, who described it as an attempt to counter insidious stereotypes about the immoral nature of Black women. EVELYN BROOKS HIGGINBOTHAM, RIGHTEOUS DISCONTENT: THE WOMEN'S MOVEMENT IN THE BLACK BAPTIST CHURCH 1880-1920, at 186, 195 (1993). Legal scholar Randall Kennedy famously applied and advocated for the politics of respectability as a way of addressing discrimination against Blacks generally and stereotypes about Black criminality in particular. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 17-21 (1997).

280. Carbado, *Strict Scrutiny & the Black Body*, *supra* note 49, at 51-54, 61-64.

281. Frederick C. Harris, *The Rise of Respectability Politics,* DISSENT (2014), https://perma.cc/SP6V-R84D; *see, e.g.,* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification,* 65 S. CAL. L. REV. 1769, 1772-73, 1793-96 (1992); Paul Butler, *(Color) Blind Faith: The Tragedy of* Race, Crime, and the Law, 111 HARV. L. REV. 1270, 1273-88 (1998) (book review); Carbado, *(E)racing The Fourth Amendment, supra* note 49, at 950-51. For a historical account of the battle to rebut stereotypes of Black delinquency, see Cheryl Nelson Butler, *Blackness as Delinquency,* 90 WASH. U. L. REV. 1335, 1363-76 (2013).

282. Carbado, *Strict Scrutiny & the Black Body*, *supra* note 49, at 45-49.

anger at being accused or ordered about may lead to escalation of tensions and violence, all too often falling on Black participants.[283] Thus, the White man who intones, "[w]hat are you doing here?" or "[s]top, stop, we want to talk to you," the last phrase Ahmaud Arbery heard,[284] may interpret irritation as a threat which justifies subsequent use of violence.

Even the absence of fatal violence should not lead to underestimating the tax deputization exerts on Black lives. To say deputization truncates Black lives is not to speak in mere metaphor. Recent sociological and medical literature has focused on the cost of "weathering" in sapping years from the lives of Black Americans.[285] The vigilance Black Americans internalize, the endless signaling of respectability to the world, and the navigation and avoidance of hostile spaces all exert real health costs, stealing days, months, and years of Black lives.[286] Deputization illustrates a ubiquitous latent form of policing—of private eyes that threaten to always spring to action—that contributes to weathering of Black lives.

Thus, the innate power of White deputization truncates Black lives in a million invisible ways. For some, it is trying to signal upstandingness when entering a store to ensure that security guards, shopkeepers, and even other shoppers do not act on their racialized suspicions.[287] Others understandably grow angry at the feeling of constantly being watched.[288] Still for others, it is a keen awareness of the danger that threatens our children if they are misinterpreted as out of place or suspicious. It is teaching our boys not to walk across other people's property, touch other people's cars, and a million other rules, knowing that anyone may jump to the conclusion that they are breaking the law and decide to do something about it. The analogy here is to the robust scholarship on how the "male gaze" and the underlying threat of male violence deforms the lives of women in ways so deeply internalized that it can be

283. *See, e.g.*, Lee, *supra* note 197, at 9-10.

284. Fausset, *supra* note 9.

285. Hedwig Lee & Margaret Takako Hicken, *Death by a Thousand Cuts: The Health Implications of Black Respectability Politics*, 18 SOULS 421, 426-28 (2016); Allana T. Forde, Danielle M. Crookes, Shakari F. Suglia & Ryan T. Demmer, *The Weathering Hypothesis as an Explanation for Racial Disparities in Health: A Systematic Review*, 33 ANNALS EPIDEMIOLOGY 1, 1 (2019).

286. *Supra* note 285, at 426-28.

287. *See id.* at 424-25 (employing the term "vigilance" to capture behaviors that reflect attempts to navigate racialized social spaces on a daily basis); Austin, *supra* note 274, at 147-56.

288. The classic invocation is found in W.E.B. Du Bois's distillation of the idea that Black Americans often live with a "double consciousness" in which they must always be aware of how they are viewed by White society. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 5 (Brent Hayes Edwards ed., Oxford Univ. Press 2007) (1903).

mistaken as natural.[289] So too, the "White gaze," and the power of deputization behind it, stunts Black behavior, movement, and lives even before any viral or explosive incident.

III. Isolating Deputization: "Rogue Cops" and Vigilantes

A. Rogue Cops

Because deputization is about the way any White person can assume policing powers, it highlights the ever-present threat of privileged violence from private individuals to racial minorities. Thus, it can be investigated separately from the well-known threat of racist police violence in America. Yet briefly canvassing the academic conversation around illegitimate policing serves two purposes. First, it draws a contrast between the more explored problems of racist police violence and the distinct phenomenon of deputization. Second, it reminds us that even if we had solutions to the problems of racist policing, we cannot blithely assume those solutions would solve the dangers of deputization.

Perhaps the most politically and socially visible examples of racial violence have been killings of unarmed Black men by police officers. George Floyd's death has become a symbol of police violence and dehumanization of men of color. Floyd's slow-motion murder, a distilled version of so many prior wrenching videos, encapsulated the fraught historical relationship between Black Americans and police violence.[290] The video of him being crushed beneath the boot of a callous officer unleashed a national conversation about police reform.[291] Congress searched for ways of influencing local policing; cities and municipalities reorganized, even disbanded, departments;[292] legal scholars examined ways to control police violence;[293] and citizens and scholars called for abolition and defunding the police.[294]

289. Carbado, *Strict Scrutiny & the Black Body*, *supra* note 49, at 25, 53-55, 73; Laura Mulvey, *Visual Pleasure and Narrative Cinema*, SCREEN, Autumn 1975, at 11-12.

290. Muhammad, *supra* note 46, at 1-2, 33-34.

291. Steve Crabtree, *Most Americans Say Policing Needs 'Major Changes'*, GALLUP (July 22, 2020), https://perma.cc/LD9J-X4RA; Press Release, Senators Booker and Harris, CBC Chair Bass, House Judiciary Chair Nadler Introduce Sweeping Policing Bill (June 9, 2020), https://perma.cc/SBG8-9AN3. Disappointingly, if predictably, the negotiations between the two parties collapsed and the bill died. Felicia Sonmez & Mike DeBonis, *No Deal on Bill to Overhaul Policing in Aftermath of Protests Over Killing of Black Americans*, WASH. POST (Sept. 22, 2021), https://perma.cc/V49U-BH2H.

292. Tim Dickinson, *What Happened to Promises to Disband the Minneapolis Police?*, ROLLING STONE (Dec. 14, 2020), https://perma.cc/K2CK-378B.

293. Kami Chavis Simmons, *The Coming Crisis in Law Enforcement and How Federal Intervention Could Promote Police Accountability in a Post-Ferguson United States*, 2014

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Within this political maelstrom, some reactionary voices predictably decried the national focus on policing as misguided or counterproductive. Even before the murder of George Floyd, noted economist Roland Fryer touched off a media storm when he authored a study that found increased police violence against Black Americans but no disproportionate use of fatal violence.[295] Others pointed out that whatever the disparity, police violence is a vanishingly small subset of the violence that befalls racial minorities.[296] And, of course, some almost reflexively trotted out arguments about "Black on Black"

WAKE FOREST L. REV. ONLINE 31, 37-42 (2014); Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 882-905 (2016); Sunita Patel, *Toward Democratic Policing Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 794-800 (2016); Miller, *supra* note 69, at 526-55; Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1328-36 (2021). For arguments that a fundamental philosophical change in policing is needed, see Yankah, *supra* note 50, at 1602-37. For more recent arguments on the shape of democratic policing, see BRANDON DEL POZO, THE POLICE AND THE STATE: SECURITY, SOCIAL COOPERATION, AND THE PUBLIC GOOD 61 (2022).

For skepticism that more criminal law or fewer legal protections for police can meaningfully reform police practice, see Gruber, *supra* note 75, at 919-35; Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225, 1234-37 (2022); Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1002-08 (2021); and Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 843-58 (2019).

294. Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://perma.cc/E9P5-4Q9Q [hereinafter Kaba, *Yes, We Mean Literally Abolish the Police*]; Mariame Kaba, "*The System Isn't Broken*" *in* WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 21, 23 (2021) [hereinafter Kaba, *The System Isn't Broken*]; Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1814-45 (2020); Derecka Purnell, *How I Became a Police Abolitionist*, ATLANTIC (July 6, 2020), https://perma.cc/4TT5-VAWB; Rick Su, Anthony O'Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. 1197, 1205-61 (2022).

295. Roland G. Fryer Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210, 1212-16 (2019) (finding disproportionate use of violence by police against Black Americans but no disproportionality in fatal shootings); *cf.* Cody T. Ross, Bruce Winterhalder & Richard McElreath, *Resolution of Apparent Paradoxes in the Race-Specific Frequency of Use-of-Force by Police*, PALGRAVE COMMC'NS, 2018, at 2 (disputing Fryer's findings and concluding racial bias exists in police use of deadly force); Dean Knox, Will Lowe & Jonathan Mummolo, *Administrative Records Mask Racially Biased Policing*, 114 AM. POL. SCI. REV. 619, 619-20 (2020) (disputing Fryer's methods and concluding that racial discrimination is pervasive in policing contact).

296. Famously, then-Mayor Michael Bloomberg, with police commissioner Raymond Kelly, expanded "stop and frisk" policing in New York City despite persistent protest that it was unjustified and racist. Bloomberg defended the program, at some points arguing that, if anything, his administration should have instituted more stop and frisk stops. His argument turned on the idea that discriminatory police violence was of much less importance than potential Black on Black criminal violence. Bloomberg reversed his position only when it became clear it was a political liability in his presidential ambitions. Ashley Southall & Michael Gold, *Why 'Stop and Frisk' Inflamed Black and Hispanic Neighborhoods*, N.Y TIMES (updated Feb. 19, 2020), https://perma.cc/X49D-XEYW.

crime.[297] These arguments (sometimes willfully) miss the obvious salience of racist police violence: that the police are the embodiment of state force. As such, violence done at their hands is violence done in all our names. Policing rife with structural racism that over-polices and under-protects Black communities leaves little mystery in why even "rare" instances of such spectacular violence grips the Black imagination. Thus, illustrating deputization does not deny the importance of police reform. Still, there are reasons to recognize the unique challenges brought by deputization.

Policing scholars often point out that there are some 18,000 individual police forces across the country, affording no easy solution for police reform.[298] Still, the methods of democratic accountability, if uneven and diffuse, can be brought to bear on policing. Precisely because the benefits, quotidian harms, and spectacular violence of policing emerge out of systems for which we are all accountable, many reformers reject stories of rogue cops and "bad apples" in favor of widespread reform (or even abolition).[299] It is this aspect of more direct democratic accountability that makes "official policing" distinct from private White violence.[300] Put plainly, with uniformed police, there is the possibility of changing hiring practices, training, financial accountability, and punishment.[301] The legal tools are not magic solutions, but they are more or less recognizable.

Much less so with deputization. Because deputization describes the moment when a White private citizen assumes the mantle of state authority, it

297. ELLIOTT CURRIE, A PECULIAR INDIFFERENCE: THE NEGLECTED TOLL OF VIOLENCE ON BLACK AMERICA 8 (2020); Samara Lynn, *Black-on-Black Crime: A Loaded and Controversial Phrase Often Heard Amid Calls for Police Reform*, ABC NEWS (Aug. 1, 2020, 11:14 AM), https://perma.cc/K8CK-RX8D.

298. U.S. DEPT. OF JUST., COMMUNITY RELATIONS SERVICES TOOLKIT FOR POLICING: POLICING 101, at 1 (2023).

299. *See* Yankah, *supra* note 50, at 1573-1631; Kaba, *The System Isn't Broken*, *supra* note 294; Akbar, *supra* note 294, at 1795-1802; Purnell, *supra* note 294.

300. *See* Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612 (2017); Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 UTAH L. REV. 543, 550 (2014); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1599 (2017); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1453 (2005); Daniel Viehoff, *Legitimate Injustice and Acting for Others*, 50 PHIL. & PUB. AFFAIRS 301, 365 (2022).

301. Brodin, *supra* note 177, at 615; *see* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 ILL. L. REV. 629, 661-90 (2018); Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing an Officer's Use of Deadly Force*, GEO. WASH. L. REV. 1362, 1380-447 (2021); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 292-93 (2017); *cf.* Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521, 557 (2021) (detailing some court cases that upheld the constitutionality of a police officer's use of excessive force).

requires different social and legal tools. And given the impossibility of "training" each ordinary citizen to professional standards of investigation and use of force (and given how disappointing even trained professionals can be), the possibilities of private policing going awry are vastly greater.

B. Vigilantes

The "deputy" also poses a distinct form of racial violence compared to the vigilante or the outlaw. To be sure, it is tricky to determine the necessary and sufficient criteria for vigilante violence.[302] Some definitions will come into contact and occasionally overlap with my idea of deputization. But the broad strokes will hopefully be clear enough to recognize the vigilante and the deputy as different threats of racial violence.

As described, the vigilante differs from the deputy because the vigilante is aware that their actions are not authorized by the law.[303] To be sure, the vigilante is not a pure outlaw. Most street muggers do not even pretend their actions are justifiable. Indeed, a mugger often violates moral and legal norms that they would generally affirm as valid. The vigilante, by contrast, understands his acts are illegal but believes they are justified by something more important or more noble. It is the Robin Hood or the Proudhonian anarchist, believing the legal system unjust, whose robberies count as vigilante justice.[304]

To ground our description of the vigilante, let us return to our opening example: Dylann Roof's murders at Emanuel African Methodist Episcopal Church.[305] These murders are an example of this type of vigilante violence. Obviously, Roof knew his killings were a violation of the criminal law. That is why he fled the scene, evading police.[306] Yet Roof was convinced that his actions were justified by a superior normative order, a perverted world view in

302. For example, Cornell Law School's Legal Information Institute defines vigilante justice as the actions of a single person or group of people who claim to enforce the law but lack the legal authority to do so. *Vigilante Justice*, LEGAL INFO. INST., https://perma.cc/LSL5-Y3A5 (archived Jan. 8, 2025).

303. *Id.*

304. Elsewhere, I have explored how normative claims can transform brute force to a claim of legal enforcement. *See* Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1196-97, 1207-09 (2008); *see also* TOMMIE SHELBY, THE IDEA OF PRISON ABOLITION 61, 70-74 (2022) (surveying how various normative claims may affect the perception of confinement as legal and justified incarceration). Thus, one can imagine the line between an outlaw, an anarchist, or a revolutionary turning, in part, on their normative claims about their deployed violence.

305. Alcindor & Stanglin, *supra* note 16.

306. *Id.*

which Black people were a threat and he was heroically acting above the law to begin a race war.[307]

Relatedly, many vigilantes will believe themselves to be violating the law as it is but think that they are justified by the law as it *should be*. In the most extreme cases, they may think themselves justified by a former, fallen legal or moral order—perhaps the Confederate past or a monarchical order that has collapsed. In more subtle cases, the vigilante may take the law into their own hands because they believe state officials have failed to uphold their current legal rights.[308]

At the other end of vigilante justice are those who knowingly act without legal authority but do not consider themselves to be in opposition to the law's normative commitments. Here, vigilantes may have taken the law into their own hands because they widely perceive the law as failing to uphold its own prohibitions.[309] Take, for example, the Deacons for Defense and Justice, a southern Black, armed paramilitary group composed largely of war veterans who guarded Black activists, patrolled neighborhoods, and protected civil rights demonstrations from the KKK or the police.[310] Similarly, the Lavender Panthers were a vigilante, armed self-defense group formed in the early 1970s to protect LGBTQ people from anti-gay violence in San Francisco's Castro and Tenderloin neighborhoods.[311] Frustrated with police refusal to address homophobic violence, the group began to patrol neighborhood streets using a mix of violent and non-violent tactics.[312] Examples of groups taking it upon themselves to enforce the rights they are nominally provided by law could be endlessly multiplied.[313]

The feature that ties these wide-ranging examples together, and distinguishes vigilantism from "deputization," is that while vigilantes take it upon themselves to enforce some legal or social order by force, they are also aware they lack the authority to do so.[314] Indeed, the vigilante is often keenly

307. Ghansah, *supra* note 17.

308. *See* Sanders, *supra* note 169, at 370.

309. *See* Paul H. Robinson, *The Moral Vigilante and Her Cousin in the Shadows*, 2015 U. ILL. L. REV. 401, 409-15 (2015).

310. *Id.* at 410-11; LANCE HILL, THE DEACONS FOR DEFENSE: ARMED RESISTANCE AND THE CIVIL RIGHTS MOVEMENT 37-38 (2004); Ben Garrett, *Profile: Deacons for Defense and Justice: The Use of Guns in the Civil Rights Movement*, ABOUT.COM, https://perma.cc/X86E-C5YN (archived Jan. 8, 2025).

311. Robinson, *supra* note 309, at 409-10.

312. Kirstin S. Dodge, *"Bashing Back": Gay and Lesbian Street Patrols and the Criminal Justice System*, 11 L. & INEQ. 295, 314-30 (1993).

313. *See, e.g.*, Robinson, *supra* note 309, at 414-16.

314. Flanders et al., *supra* note 159, at 164-66 (describing vigilante justice as justice that sees itself "outside the law").

aware that they are acting in explicit contravention to the formal law. The idiom of "taking the law into your own hands" denotes awareness that they have decided to enforce the law despite lacking authorization to do so. Thus, though the Deacons for Defense and Justice, the Lavender Panthers, and others sought to provide their communities the protection of the laws the police refused to enforce, tellingly, the members of these groups did not publicly identify themselves for fear of sanctions by authorities.[315]

Thus, because vigilantes understand themselves to be lawbreakers, we once again have traditional tools to address vigilante violence. Though the reach of the law is never perfect, traditional methods of increasing punishment and enforcement can signal to the vigilante both our collective condemnation and the costs of their actions.

Deputies, by contrast, do not think the law prohibits their behavior; rather, they take themselves as legally authorized to enforce the law. In the cinematic case, the sheriff hands out badges to signify that one is a temporary police officer.[316] In the historic case, the constable would raise hue and cry.[317] But too often in our American social context, the deputies are anyone who simply decides that their White racial identity allows them to forcibly impose their view of the law on racial minorities.

Though a clear conceptual distinction exists, vigilantism and deputization cannot be so neatly kept apart in the messy actual world. If vigilantes on the one hand believe they should take the law into their own hands and deputies believe they are legally authorized to impose violence, some groups stand squarely in the middle.

The most salient example may be the Ku Klux Klan. Though the white robe and hood was the symbol of the Klan's vigilante terror, the need to disguise their identity is an indicator that Klansmen were aware that under the new laws of Reconstruction and with the Northern Federal Army enforcing the law, their terrorist acts were unlawful.[318]

But the Klan's racist terror was not always shy. Countless lynchings were committed without shame and treated as carnivals rather than brutal killings.[319] Judges, legislatures, and other purported pillars of the community

315. *See, e.g.*, Garrett, *supra* note 310 (discussing the secretive nature of the Deacons for Defense and Justice membership).

316. RIO BRAVO (Howard Hawks dir., 1959); TOMBSTONE (George P. Cosmatos dir., 1993).

317. *See supra* text accompanying notes 82-89.

318. The "permission" the Klan and other White terror groups felt would wax and wane depending on the political situation at the time. *See supra* text accompanying notes 163-70.

319. *See* Rao, *supra* note 162, at 15-18; EQUAL JUSTICE INITIATIVE, *supra* note 166, at 33. For more discussion on the spectacularization of these killings, see text accompanying notes 22-30, 164.

would gather with other witnesses to have commemorative photos taken.[320] The heart recoils at stories of children encouraged to soak in the atmosphere and harvest the strange fruit: body parts taken as tokens of the rightful White order.[321] And, of course, central to the story was the often explicit or tacit police acceptance, encouragement, or aid in doing violence to both Black persons and the laws on the books.[322] Thus, in many instances, the Klan very much saw itself as deputized—an extension of the (proper) White police state enforcing the (real) legal norms.[323]

A more admirably complicated case is the Black Panther Party for Self Defense, active in Oakland, California in the mid-sixties to early seventies.[324] The Black Panthers were a community-formed, revolutionary group committed to a stew of Black nationalist, socialist, and armed self-defense ideologies.[325] The Panthers were chic and menacing, a symbol of Black Pride and thus, as has always been in the American imagination, a national threat.[326]

The Black Panthers clothed themselves not just in noir but (at least at times) in claims of rigorous respect for the law, which, after all, permitted them to carry weapons while observing police behavior in Black neighborhoods.[327] But given the central focus of the Black Panthers on fighting police brutality, even their claims of staying within the law did not dispel doubts about the stances legal authorities took regarding the Party's work.[328]

320. EQUAL JUSTICE INITIATIVE, *supra* note 166, at 46-47, 63.

321. *Id.* at 33-35.

322. Letter from W. Bosson, to Major General G.H. Thomas (Mar. 10, 1868) (on file with the Division of Manuscripts, Library of Congress); Thomas B. Alexander, *Kukluxism in Tennessee, 1865-1869*, 8 TENN. HIST. Q. 195, 204 n.32, 207 (1949); Flanders et al., *supra* note 159, at 171-72.

323. *See* JOINT SELECT COMMITTEE TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, 42D CONG., TESTIMONY TAKEN BY THE JOINT SELECT COMMITTEE TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, S. REP. NO. 42-41, at 7, 12, 15 (1872) (testimony of Nathan Bedford Forrest); Robbins, *supra* note 96, at 149-50.

324. Sanders, *supra* note 169, at 359-60.

325. JOSHUA BLOOM & WALDO E. MARTIN JR., BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY 45-62 (2016); Chao Ren, *"Concrete Analysis of Concrete Conditions": A Study of the Relationship between the Black Panther Party and Maoism*, 10 CONSTRUCTING PAST 28, 28-34 (2009).

326. For a retrospective on how the Black Panthers were covered by major media in their heyday, see Giovanni Russonello, *Fascination and Fear: Covering the Black Panthers*, N.Y. TIMES (Oct. 15, 2016), https://perma.cc/H77T-UWH8.

327. BLOOM & MARTIN, *supra* note 325, at 45-62; Cynthia Deitle Leonardatos, *California's Attempts to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947, 962 (1999).

328. Leonardatos, *supra* note 327, at 962; Navid Farnia, *State Repression and the Black Panther Party: Analyzing Joshua Bloom and Waldo E. Martin's* Black Against the Empire, 21 J. AFR. AM. ST. 172, 173-76 (2017).

Nor could it disguise the obvious tension-filled standoffs with police in Black neighborhoods, even before the open warfare erupted with Huey Newton's famous shooting of Officer John Frey (which he claimed was both in self-defense and while unconscious) and Eldridge Cleaver's attack against the Oakland police.[329] And this is to say nothing of the sustained covert state and federal programs that undermined, criminalized, and fomented clashes, killings and, in some cases, simply assassinations of Black Panther leaders.[330] In short, despite intermittent claims of legal authorization, the Panthers understood themselves to be revolutionary vigilantes protecting the Black community from police abuse where the law would not. Indeed, given that the power to deputize has historically tracked White racial power, the Panthers could not have understood otherwise.[331]

It is a chameleon matter to realize that today's vigilante may be tomorrow's deputy or vice versa.[332] A midnight ride by the Klan could be sufficiently authorized in a particular time and place; indeed, in many places across a long stretch of time, the Klan was all but an officially deputized arm of the local State.[333] But at other times, confronted by other authorities, masks were not just symbols of terror but concealment from prosecution that acknowledged that their vigilante acts would be punished. And of course, maddeningly, there will at times be no clear answer. Local officials accepted or supported Klan terror while federal forces sought to suppress it: a picture of legal systems at war.[334] These competing concepts can slide in and out of each other, overlapping in ways that befuddle easy distinction. In more contemporary times, Guardian Angels, an unarmed citizens' crime prevention

329. Leonardatos, *supra* note 327, at 965-66; BLOOM & MARTIN, *supra* note 325, at 30-39.

330. Leonardatos, *supra* note 327, at 965-68; ANNA STUBBLEFIELD, ETHICS ALONG THE COLOR LINE 60-61 (2005); JAKOBI WILLIAMS, FROM THE BULLET TO THE BALLOT: THE ILLINOIS CHAPTER OF THE BLACK PANTHER PARTY AND RACIAL COALITION POLITICS IN CHICAGO 167 (2013).

331. Another interesting attempt of a Black political actor to deputize themselves would be Reverend Oberia Dempsey, pastor of Upper Park Avenue Baptist in Harlem. Dempsey formed the Anti-Crime and Anti-Drug Committee of Harlem to combat rising drug use, violence and the police indifference he saw blighting the jewel of the Black American renaissance. Dempsey's organization, which started with a campaign of public awareness and shaming, grew more confrontational, arming themselves, confronting drug dealers, attempting citizens arrests and earning him the nickname the "pistol packin[g] pastor." Robinson, *supra* note 309, at 412-14. Dempsey's efforts were at different times discouraged and grudgingly accepted by the police. *Id.*

332. *See* Peterson, *supra* note 93, at 1618-19.

333. Hill II, *supra* note 28, at 611-12; Rao, *supra* note 162, at 11-19.

334. The clearest example of this legal conflict was the series of federal Enforcement Acts passed during reconstruction to secure the suffrage rights of Black Americans. These culminated in the Enforcement Act of 1871, known as The Klu Klux Klan Act. 42 U.S.C. § 1985(3).

group, has patrolled the New York City subways with the declared mission of suppressing crime through citizen's arrests.[335] Since their formation in the late seventies, the group has had an uneven relationship with city authorities, who have undulated from condemnation to grudging acceptance to, at times, support and police partnership.[336]

No simple stipulation can impose more order on these overlapping phenomena in the real world. But overlapping does not mean indistinct. Though vigilantes and deputies may occasionally shape-shift, the idea of the deputy is distinct enough to deserve its own attention. Unlike when donning the mantle of the vigilante, the deputy is convinced they are both authorized by and reinforcing the law's authority. They are convinced they are right in doing so, not only in some grand moral sense, but precisely in the way the law has already declared. The deputy views themselves as legally empowered to police Black people, to keep them in their (lawful) place, and, if needed, to dispense violence to do so. It is the assurance that they are already legally empowered to monitor, regulate, and punish Black people that presents a distinct problem and an even more dangerous threat to Black people than those who already know they are acting against the law.

IV. Deputization and Domination

A. The Inherent Racism of Deputization

Is deputization inherently racist? After all, citizen's arrest laws are no longer premised explicitly on race. Perhaps deputization has more to do with gender and machismo or some other set of traits. If deputization were reconceptualized as race-neutral, could it be an attractive form of citizen empowerment? Taken together, these questions consider whether deputization is a desirable but corrupted institution we should reform or an irredeemable blemish we should abolish.

The disaster of deputization in our history, contemporary life, and as a matter of a criminal law legitimacy all lie in its inherent racism. This evil turns on how intractably racism is woven into deputization.

I began this Article by making the bold but uncomfortable claim that being White in America is partly defined by the power of deputization.[337] One way to read this claim is that every White American consciously feels themselves to

335. Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest*, 25 CORNELL J. L. & PUB. POL'Y 557, 580-81 (2016).

336. *Id.*; *The City; Guardian Angels Get City Recognition*, N.Y. TIMES (May 30, 1981), https://perma.cc/J56E-KHMW.

337. *See supra* text accompanying notes 59-73.

be in charge of policing Black people at all times, both throughout our history and throughout their own lives. Alternatively, I could incautiously claim that one is not "properly" White unless aware of this power. Lastly, one could layer on the claim that only someone racialized as "White" could feel empowered to forcibly police others. In philosophical terms, this would amount to a claim that the power of deputization is a necessary feature of and exclusive to Whiteness.[338]

Though there is a seductive rigor in casting claims into necessary and sufficient features, that does not capture deputization as I see it. Deputization, as I am describing it, is a sociological and historically embedded power, shaped in America by our unique racial history. I need not go so far as to imagine that deputization, as a conceptual matter, is defined by race in all places with any history. As noted, premodern deputization arguably lacked inherent racial meaning.[339] In differing cultures, assuming the power to impose the law on others may look very different; perhaps still problematic, but different. What is clear is that American deputization has, from the beginning, been a power of Whites over racial minorities generally and Black Americans in particular.[340]

American deputization can be understood as inherently White because it is a latent social power that has a unidirectional racial valence. It is embedded in our culture as (nearly) exclusively available to White people. Recall that even a Constitutional Amendment heralding the birth of national Black political rights could not overcome the latent power of deputization in the Reconstruction South.[341] When newly made Freedmen attempted to exercise their right to vote, they encountered widespread legal obstacles and trickery, to say nothing of vigilante violence.[342] But just as interesting was the White reaction when Black militants sought legal authorization to protect Black people.[343] One could say that Reconstruction-era Freedmen attempted to (counter) deputize themselves. Despite having the winds of history at their back and the law on their side, Black attempts to enforce the law were dismissed as illegitimate and the Black federal and militia agents were described by White Southerners as "vandals."[344] Moreover, when Black

338. For a primer on "necessary and sufficient" conditions, see ALBERT E. BLUMBERG, *LOGIC: A FIRST COURSE* 133-34 (1976). Other influential works include, for example, J.L. Mackie, *Causes and Conditions*, 2 *AM. PHIL. Q.* 245, 245-64 (1965).

339. *See supra* text accompanying notes 74-91.

340. *See supra* text accompanying notes 92-289. Put another way, if American deputization is its own instantiation, Deputization^{A}, it is that phenomenon which is the focus of this Article.

341. *See supra* text accompanying notes 319-23.

342. *See* Rao, *supra* note 162, at 3-8.

343. SCOTT, *supra* note 243, at 67-70; *see* Rao, *supra* note 162, at 11-13.

344. SCOTT, *supra* note 243, at 67-70; Charles & Miller, *supra* note 43, at 1231.

protection groups banded together not only to enforce civil rights but to enforce basic criminal law protections against assault and murder, they obscured their identities behind masks because they understood that if identified, they would forfeit their safety.[345] Unlike the KKK, who sometimes obscured themselves under dreadful masks but just as often boldly asserted their face publicly, Black enforcers of the law could not cloak themselves with the innate certainty that their actions were supported by surrounding legal and political institutions.[346]

Deputization's privileged racial valence continues to this day. One well-known example illustrates the racially recalcitrant power of deputization. In May 2020, Amy Cooper was walking her dog in New York's Central Park.[347] In the same area, Christian Cooper (no relation) was bird watching when he noticed that Amy's dog was unleashed, a violation of park rules because it disturbed nearby birds.[348] Christian asked Amy to restrain her dog. Amy refused. Scolding, Christian warned he would tempt the dog out of the area and pulled out a dog treat. When Christian began filming Amy's violation, she resorted to calling the police, feigned a scared and tearful voice, and reported that an "African-American" man was threatening her.[349] Her act was as instinctual as it was chilling; the pretense of being afraid for her safety because she was scolded by a Black man. Because the incident occurred on the same day as the murder of George Floyd, the underlying racial threat of police violence was unmistakable, and the video went viral. Amy Cooper was reviled as an example of casual, feminine, White "victimhood" that endangered Black men.

But for our purposes, the important thing to note is how Amy Cooper's invocation of race made even the most trivial form of a Black man's insistence on law-following impossible. White people are empowered to arrest or kill someone on the mere suspicion of burglary, follow someone they don't recognize on a public street, chase after someone involved in a minor car accident, or use military rifles to patrol Black social justice marchers. In contrast, Black citizens enforcing dog-walking regulations—never mind their Constitutional right to vote—threatens the racial script and is rejected as illegitimate.[350]

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345. Robinson, *supra* note 309, at 410-11; Garrett, *supra* note 310; Rao, *supra* note 162, at 18, 41-42.
346. *See* Garrett, *supra* note 310.
347. Carbado, *Strict Scrutiny & the Black Body*, *supra* note 49, at 4-11.
348. *Id.*; Sarah Maslin Nir, *White Woman Is Fired After Calling Police on Black Man in Central Park*, N.Y. TIMES (updated Feb. 16, 2021), https://perma.cc/WYC6-FGTG.
349. Nir, *supra* note 348.
350. *See* Peterson, *supra* note 93, at 1621.

B. Deputization, Gender, and Machismo

Another way to interrogate how Whiteness and deputization are intertwined is to inquire whether the assumption that one may impose the law on others tracks other traits. Perhaps high testosterone and racism mix to produce the permission to enforce the law. As one White male colleague put it to me, "I would never assume I could enforce the law on someone else. I'm small."[351]

I suspect there is some truth to this observation. As already noted, it is too much to reduce something as sweeping as deputization to a set of necessary and sufficient conditions. Despite collectively being steeped in our racist history, the latent power of deputization will pull more strongly on some than on others. Analogously, though there is robust evidence that unconscious anti-Black racism is latent in us all, White, Hispanic, Asian, and even Black, there are people on every point of the spectrum.[352]

Still, it is clear that the racial power of deputization is much deeper than practical considerations of physical domination. True, Jordan Neely died at the hands of a young, male former Marine.[353] Ahmaud Arbery was similarly murdered by a group including a former police officer.[354] But besides the self-deputized White men who meet the archetype, it is not difficult to find someone who is not simply acting on natural physical dominance. Recall the armed twenty-one year old Hannah Payne chasing down sixty-two year old Kenneth Herring after witnessing a minor accident.[355] Or Franklin and Jessica Richardson, the Black couple confronted by an armed female camp employee on a Memorial weekend picnic.[356] Or the unidentified, elderly woman in a wheelchair, armed with a sharp object to confront any potential lawbreakers at Target.[357] Whatever inspired these various people to impose their version of law and order, it is not reducible to simple masculine physical dominance. Their shared trait is a legacy of violent racial privilege.

But these examples reveal a more important truth. The latent power of deputization is so widely spread that Black Americans must always be aware of its danger. Yet that is compatible with deputization not being universally internalized by all White people. The analogy is simple; most men, one hopes, do not think of sexual violence or rape as morally permissible options. But

351. Nope. I'm not telling who . . . .

352. EBERHARDT, *supra* note 32, at 11-13, 19, 61, 68.

353. Cramer et al., *supra* note 210.

354. Kasakove, *supra* note 24.

355. Aldridge, *supra* note 218.

356. *See supra* note 265 and accompanying text.

357. Tenbarge, *supra* note 266.

sexual violence is such a ubiquitous latent threat that women generally live their lives guarding against the possibility that any particular man might be dangerous.[358] Further, women are well aware that there are no simple criteria, be it size or any other, that assure safety.[359] Against the background of ubiquitous sexual violence, it is no answer for any particular man to note that he is too small or would never think to assault anyone.[360] Likewise, it is no answer to worries of private violence in the name of the law that any particular White person does not imagine deputizing themselves.

C. Deputization for All: Towards Racially Neutral Deputization?

We have traced our long American history and surveyed racially charged killings of our present to understand why deputization is so stubbornly fixed as White power over Black people (and other racial minorities). It is this racial valence that makes deputization an everyday latent danger, particularly for men of color—like a low-level current that may electrocute you if you touch the wrong thing. Likewise, deputization expands the Critical Race Theory critique of criminal law as a tool of racial dominance. Deputization does not only misshape state power but implicitly sanctions private violence aimed at Black people. To the extent the law implicitly allows White people to arbitrarily deputize themselves to police Black people, the criminal law cannot be seen as protecting our equal standing in a joint civic project and therefore is illegitimate.

This naturally invites the question of whether deputization commits us to a reform or abolition project. Is there a non-racist version of deputization worth saving? Is deputization racially intractable? Could a democratized sense held by all citizens that they ought to enforce the law by personal use of force be a form of extraordinary civil virtue?

Admittedly, some small part of me is torn over the question. Despite its racist history in America, the idea of citizens dedicating themselves to enforcing the law has some appeal. The threat that deputization is dangerous because any citizen can decree themselves an enforcer comes with the inverse observation. The police cannot be everywhere at once, and there is something disempowering and insulting about the idea that citizens are helpless to

358. *See* CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 143 (1989) (noting that systemic gendered violence implies legal permission for gendered domination); ELIZABETH A. STANKO, INTIMATE INTRUSIONS: WOMEN'S EXPERIENCE OF MALE VIOLENCE 18 (1985); Mary Anne Franks, *Men, Women, and Optimal Violence*, 2016 U. ILL. L. REV. 929, 940-44, 946-54 (2016).

359. Lynne N. Henderson, *What Makes Rape a Crime*, 3 BERKELEY WOMEN'S L.J. 193, 219, 224 (1988); Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 158, 175 (1992).

360. I am again grateful to Maureen Carroll for pressing this line of thinking.

enforce their legal rights without state agents. That someone would have to stand by helplessly while a car is being stolen, for example, seems degrading to law-abiding citizenry in general.[361] One could imagine a healthy, just society in which the willingness of all to enforce the law as a form of public accountability is a sign of robust civic virtue.[362] Moreover, instances of ordinary citizens intervening to rescue endangered children from kidnapping seem the quintessential examples of commendable moral and civic virtue.[363]

Further, if the racial valence of deputization is clear, it seems too simplistic to treat deputization as a never-changing social phenomenon. Even near the zenith of racist domination, newly made Freedmen tried to deputize themselves and enforce the laws that protected their lives, property, and political powers.[364] Their efforts insisted that the country live up to its avowed postbellum values. It would be pessimism, bordering on nihilism, to count their efforts as totally in vain. Lastly, it is possible to imagine Black citizens, who are victims of higher levels of crime, equally bidding for the right to enforce the law against anyone, White or Black, who violates their legal rights.[365]

Despite robust findings of endemic racism at every point of the criminal justice system, it would be myopic to forget that the racism in past generations

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361. I set aside the case of immediate defense of one's own property to focus on the question of deputization. I treat defense of property, similarly as to self-defense, as deputization-adjacent but not as an instance of one imposing the law on others. For an inspection of these borderline cases, see Flanders et al., note 159 above, at 166-69.

362. Willingness to uphold the law, both as it applies to others and even when it imposes serious costs on oneself, has been idealized as a civic virtue since Socrates. For a contemporary exploration, see R.A. Duff & S.E. Marshall, *Civic Punishment*, *in* DEMOCRATIC THEORY AND MASS INCARCERATION 33, 33, 45 (Albert Dzur, Ian Loader & Richard Sparks eds., 2016).

363. *See* Flanders et al., *supra* note 159, at 169. One powerful example can be recalled in the arrest of Brock Turner, a Stanford student, who was sexually assaulting an unconscious Chanel Miller when he was interrupted and detained by two Swedish graduate students, Peter Lars Jonsson and Carl-Fredrik Arndt. The two held Turner, who attempted to flee, until the police could arrest him. Michael E. Miller, *All-American Swimmer Found Guilty of Sexually Assaulting Unconscious Woman on Stanford Campus*, WASH. POST (Mar. 31, 2016), https://perma.cc/QBF4-FU4A.

364. *See* SCOTT, *supra* note 243, at 69, 84.

365. For a thoughtful discussion of the possible tension between Black American community interests in racially just policing, security, and democratic control, see Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699, 1728-57 (2023).

For an example of a Black American man in a position of relative power taking the law into his own hands to recover his stolen car from a Black American youth, consider Ron Brewer, the City Council President of Gary, Indiana. *See* Flanders et al., *supra* note 159, at 167.

was more brazen still.[366] While there remains a distressing gap in the health of Black and White America, it is also remarkable to note the Black generational strides.[367] Explicit White domination over Black lives is vastly diminished by every metric than in generations past.[368] Though hard to measure, the power of a private citizen to deploy the criminal law to exert racist control over a Black citizen is surely weaker now than in Reconstruction or the Jim Crow era.[369] In the same way explicitly racist intent in citizen's arrest laws has been submerged, so too other explicitly racist legal and social norms have become unpalatable. Thus, the felt power of deputization has certainly weakened with the country's racial progress.

V. Deputization and the Legitimacy of Criminal Law

A. Deputization and Critical Race Theory

Critical race scholars have spent generations excavating the ways American law has systematically oppressed people of color, openly or while pretending to be neutral. Whether in family law,[370] housing and property,[371] banking,[372] or bankruptcy,[373] racial prejudice has been woven into all aspects

366. *See* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 36, 53 (2012).

367. *Id.* at 55-56.

368. *Id.* at 62.

369. That is not to say that Black advancement is anything like a smooth or linear process. *See* Elijah Anderson, *The White Space*, 1 SOCIO. RACE & ETHNICITY 10, 15 (2015); Elijah Anderson, *Black Americans Are Asserting Their Rights in "White Spaces." That's When Whites Call 911*, VOX (Aug. 10, 2018, 6:00 AM PDT), https://perma.cc/TLQ5-Y2RW.

370. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 99 (2002); ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY 18-19 (2013); Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 FAM. CT. REV. 213, 215-16, 226-27 (2017).

371. Here, the most famous piece is by public intellectual Ta Nehisi Coates. Ta Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://perma.cc/Y55J-9CWE. Other prominent examples in the legal academy include Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1717-45 (1993); Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. REV. 1, 4-5 (2023); Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 LAW & SOC. INQUIRY 796, 817-18 (2016); Bernadette Atuahene, *"Our Taxes Are Too Damn High": Institutional Racism, Property Tax Assessments, and the Fair Housing Act*, 112 NW. U. L. REV. 1501, 1552-53 (2018); MECHELE DICKERSON, HOMEOWNERSHIP AND AMERICA'S FINANCIAL UNDERCLASS: FLAWED PREMISES, BROKEN PROMISES, NEW PRESCRIPTIONS 145-50 (2014).

372. MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY 8, 184-85 (2015) (highlighting the role of credit and banking disparities in perpetuating the racial wealth gap); MEHRSA BARADARAN, THE

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of the law. But no field has been subject to more concentrated and withering attacks than criminal law. Race has been shown to illegitimately impact the fate of criminal defendants at every point of the criminal law system, from initial police contact to charging decisions and plea bargaining.[374] It affects every level of punishment, whether misdemeanors,[375] felony sentencing,[376] or even the death penalty.[377] The point of Critical Race Theory has been to disabuse us of the notion that the racially oppressive aspects of American law are merely incidental. In the scathing words of criminal law scholar Paul Butler, "[t]he system is now working the way it is supposed to."[378]

Yet despite its searching gaze, critical scholarship has overwhelmingly focused on the role of state actors in racial oppression.[379] To the extent racist private violence has attracted attention, scholarship has fixated on hate crimes and, to a lesser degree, self-defense.[380] The related academic exploration of citizen's arrest laws is comparatively scant.[381] Understanding White

COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 10-13 (2017) (exploring how the history of slavery and broader societal racism left Black banks unable to fulfill a critical role in addressing the racial wealth gap).

373. Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1130-38, 1148-49 (2019); Abbye Atkinson, *Race, Educational Loans, & Bankruptcy*, 16 MICH. J. RACE & L. 1, 3-6, 12-13, 26-33 (2010); Pamela Foohey, Robert M. Lawless & Deborah Thorne, *Driven to Bankruptcy*, 55 WAKE FOREST L. REV. 287, 297, 322-23 (2020); Pamela Foohey, *Lender Discrimination, Black Churches, and Bankruptcy*, 54 HOUS. L. REV. 1079, 1096-98 (2017); Nicole Langston, *Discharge Discrimination*, 111 CAL. L. REV. 1131, 1157-61 (2023).

374. *See* Butler, *The System Is Working the Way It Is Supposed to*, *supra* note 52, at 1446-57; JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 145-47 (2017).

375. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 633-35 (2014); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1075-76 (2015); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1368-72 (2012).

376. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272, 1275 (2004). After decades of vastly racially disproportionate sentencing, racial disparities in sentencing have started to decrease, though not disappear. Ryan D. King & Michael T. Light, *Have Racial and Ethnic Disparities in Sentencing Declined?*, 48 CRIME & JUST. 365, 377-78 (2019); Ekow Yankah & Keith Humphreys, Opinion, *The Unheard-of Decline in Black Incarceration*, CHICAGO TRIB. (updated July 25, 2022, 10:00 AM CST), https://perma.cc/QQ2D-95TL.

377. Eberhardt et al., *supra* note 52, at 383-85.

378. Butler, *The System Is Working the Way It Is Supposed to*, *supra* note 52, at 1478.

379. Fields outside of criminal law, such as housing law, have been more sensitive to the way the law has authorized racist harm through individual preferences. *See* RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 1-18 (2013).

380. My own work reveals this reflex. *See* Yankah, *supra* note 26, at 681-86.

381. Much of the available work has been surveyed in this piece. *See* Robbins, *supra* note 96; Robbins, *supra* note 335; Stevens, *supra* note 74; Flanders et al., *supra* note 159; *see also*

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deputization as an immanent legal power supplements Critical Race Theory's inspection of criminal law, highlighting not only official channels of state power to undermine Black Americans but the illicit power of private citizens to use violence at their own discretion to police Black people.[382]

B. Deputization and Political Legitimacy

It does not take a nuanced theory to see why the historically latent power of private White people to police Black people, premised on Black people's innate inferiority and dangerousness, delegitimizes our criminal law system. On any plausible theory of justice, racial discrimination, particularly as deeply embedded and disfiguring as in the American context, seriously undermines the law's justificatory claim.[383] Indeed, part of the power of Critical Race Theory lies in the fixed intuition that merely exposing the depth of racial discrimination in criminal law delegitimizes it without much further explanation.

On a philosophical level, it is easy to see why this instinct is so deeply embedded. Take the most widely known theory of justification for criminal law: the deontological, or rights-based, theory with which law students and laypeople are most likely familiar. On this view, each person possesses individual rights of autonomy that neither the state nor others may violate without justification.[384] If someone does violate another's individual rights, the state may punish them, either to reaffirm the victim's claim to that right,[385] negate the wrongdoing,[386] express solidarity with the victim,[387] or express our

Note, *The Law of Citizen's Arrest*, 65 COLUM. L. REV. 502 (1965) (exploring the early limitations of common law citizen's arrest doctrine).

382. *See* Charles & Miller, *supra* note 43, at 1213-16, 1261-62.

383. *See* Melvin L. Rogers, *Race, Domination, and Republicanism*, *in* DIFFERENCE WITHOUT DOMINATION: PURSUING JUSTICE IN DIVERSE DEMOCRACIES 59, 62-69, 82-83 (Danielle Allen & Rohini Somanathan eds., 2020) (describing Black intellectuals' republican critiques of American racial domination).

384. For a canvas of the theoretical landscape, see Yankah, note 50 above, at 1606-11.

385. Jean Hampton, *The Retributivist Idea*, *in* FORGIVENESS AND MERCY 111, 128 (Jeffrie G. Murphy & Jean Hampton eds., 1998); *see* JEAN HAMPTON, THE INTRINSIC WORTH OF PERSONS: CONTRACTARIANISM IN MORAL AND POLITICAL PHILOSOPHY 141 (2007); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1663 (1992).

For the view that the state's punishment also recognizes the offender's autonomy, see Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1029, 1060-61 (2004).

386. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 123-30 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991).

collective condemnation.[388] Whichever flavor of retributivist justification is most appealing, it is clearly unconscionable that the state would implicitly designate one group as racially superior, authorizing them to police others based on race.

Rights-based views, like any plausible political theory, can make sense of the illegitimacy of the racial power in White deputization. But it is worth noting that republican political theories of criminal punishment, perhaps somewhat less well-known, are particularly powerful in highlighting the precise nature of the political wrongs we have cataloged in deputization and, in turn, highlighting why deputization is a unique threat to the legitimacy of American criminal law.

Like rights-based or deontological views, philosophical republican theories of political legitimacy and criminal law describe a family of thoughts rather than a single view.[389] What connects these views at their core is their commitment to the idea that political legitimacy is based, first and foremost, on the state's role in securing forms of civic flourishing for members of the polity.[390] Thus, this ancient tradition focuses not on the modern reflexive fixation of the rights each individual holds against each other and the state. Rather, the republican view focuses on how citizens are necessarily bonded in a common civic enterprise, with the duties they have to each other standing in equal importance as the rights they hold against each other.[391] As philosopher Margaret Gilbert describes in related work, such views conceive of political obligation as stemming from our joint commitment to live in an interwoven political community.[392]

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387. Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1486, 1493-94, 1529 (2016). For an inspection of how criminal punishment has been dangerously exaggerated in the search for solidarity, see Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 829-34 (2000).

388. Jean Hampton, *Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of Law*, 11 CAN. J.L. & JURIS. 23, 36-45 (1998); Hampton, *Correcting Harms Versus Righting Wrongs*, *supra* note 385, at 1681-82, 1685-98.

389. Richard Dagger, *Republicanism and the Foundations of Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 44, 45-49 (R.A. Duff & Stuart P. Green eds., 2011); R.A. Duff, *Towards a Theory of Criminal Law?*, 84 PROC. ARISTOTELIAN SOC'Y SUPP. VOL. 1, 5-7 (2010) [hereinafter Duff, *Toward a Theory of Criminal Law?*]; R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 49-53 (2007) [hereinafter DUFF, ANSWERING FOR CRIME].

390. DUFF, ANSWERING FOR CRIME, *supra* note 389, at 49-50.

391. *See* Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 463-66 (2015); Yankah, *supra* note 31, at 105-18, 126-28.

392. *See* MARGARET GILBERT, A THEORY OF POLITICAL OBLIGATION: MEMBERSHIP, COMMITMENT, AND THE BONDS OF SOCIETY 124-27, 134-38, 161-64 (2006); Margaret

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Republican justification does not assume an atomistic individual, solely concerned with protecting her rights against those who would crash into her. Instead, it views law as playing an essential role in how we structure our ability to live together, not merely alongside each other.[393] Republican justifications, then, are distinguished by the elevation of active citizenship and pursuit of a common civic good.[394] This view further insists that law is not primarily cabined by abstract notions of pre-political autonomy.[395] As legal philosopher Nicola Lacey explains:

> [T]he conception of an a- or pre-social human being makes no sense. What individual human beings perceive as the proper bounds of autonomy around themselves, what they regard as just distributions, how they regard their relations with each other and a thousand other questions central to political philosophy, are ones which we simply cannot imagine being answered outside some specific social and institutional context.[396]

Thus, it is critical to keep in mind that the law is constantly creating and defining the terms on which we can meet each other as equals. Republicanism, then, reminds us of the role of law in making our joint lives as equals possible. In one memorable line, it is the law of the city, not of the heath.[397]

On the formulation of Philip Pettit, the core republican justification is to secure citizens from the threat of arbitrary interference from either the state—that is, *imperium*—or from private individuals—that is, *dominium*.[398] After all, one citizen having the power to arbitrarily interfere with another naturally creates a world of oppression by the strong. Equally, it results in a world of cunning or servility, where the weaker must plot, flatter, or simply slink about to avoid the wrath of the powerful.[399] A healthy republican polity, by contrast, is one where everyone can look each other in the eye.[400] As I have described in

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Gilbert, *Obligation and Joint Commitment*, 11 UTILITAS 143, 143-63 (1999); TIMOTHY MACKLEM, LAW AND LIFE IN COMMON 175-95 (2015).

393. *See* Yankah, *supra* note 391, at 463-66; JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 57-59 (1990).

394. *See* Dagger, *supra* note 389, at 46-49.

395. NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 171 (1988).

396. *Id.*

397. Philip Pettit, *The Freedom of the City: A Republican Ideal*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 141, 159 (Alan Hamlin & Philip Pettit eds., 1989).

398. PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 112, 130 (1999).

399. *See* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 47, 82-87 (2012).

400. *Id.*

other work, republicanism is fundamentally premised on the idea of each citizen having an equal voice in the pursuit of the common civic good.[401]

Republican political justification casts the role of criminal law in a particular light. Criminal law does not simply protect autonomy or vindicate pre-existing individualistic rights (though criminal law will also do that). Rather, criminal law is centrally justified by its role in reinforcing the boundaries necessary to make living together as a polity possible.[402] Different republican theories capture this sentiment in different ways.[403] For Pettit and Braithwaite, criminal law must foster a greater sense of "dominion," that is, the freedom of full citizenship.[404] Ripstein's Kant-inflected republicanism highlights that when a democratic legislature makes laws, we ensure that no one is master of another.[405] Duff highlights the way criminal law holds the offender accountable to the polity, requiring punishment and atonement for public wrongs and thus reincorporating the wrongdoer.[406] Dagger uses the metaphor of punishment as "fair play" to highlight the role of punishment in securing our overarching cooperative political enterprise.[407] Dyzenhaus locates republicanism in a Hobbesian framework.[408]

I have offered my own neo-Aristotelian variant, describing a republican theory of criminal law justified by preventing attacks that make living as civic

401. *See* Yankah, *supra* note 31, at 129-30. It is important to note that republicanism both focuses on and limits government power to the pursuit of the common civic good. Thus, there is an important restraint from government power in pursuit of purely religious or moral conceptions of the good as found in virtue theories of punishment, what is sometimes described as "common good constitutionalism" or perhaps reconstructivist theories. For a classic illustration of an Aristotelian virtue theory of punishment, see Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1425-27, 1437-38 (1995); and Kyron Huigens, *Homicide in Aretaic Terms,* 6 BUFF. CRIM. L. REV. 97, 98, 101-05, 115-16 (2002).

402. *See* Yankah, *supra* note 31, at 129-30.

403. For an early version of this concern, see George P. Fletcher, *Domination in Wrongdoing*, 76 B.U. L. REV. 347, 354-55 (1996). Fletcher's work ultimately pursued Kantian-based retributivist themes rather than consciously republican themes. *See generally* George P. Fletcher, *Law and Morality: A Kantian Perspective,* 87 COLUM. L. REV. 533, 535-537 (1987) (exploring the relationship between Law and Morality in Kant's philosophy).

404. BRAITHWAITE & PETTIT, *supra* note 393, at 60, 64-65.

405. *See* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 256-58 (2009).

406. Duff, *Towards a Theory of Criminal Law?*, *supra* note 389, at 4-11; DUFF, ANSWERING FOR CRIME, *supra* note 389, at 51-53, 140-46.

407. *See* RICHARD DAGGER, PLAYING FAIR: POLITICAL OBLIGATION AND THE PROBLEMS OF PUNISHMENT 176-203 (2018).

408. David Dyzenhaus, *Freedom Under an Order of Public Law: From Hobbes Through Hayek to Republicanism, in* FREEDOM AND ITS ENEMIES: THE TRAGEDY OF LIBERTY 79, 85-93 (Renáta Uitz ed., 2015).

equals impossible.[409] My particular arguments claim that neo-Aristotelian republicanism does a better job of describing our criminal law and provides a more attractive political theory of how our criminal law should be reformed.[410] But more important than refereeing between competing republican incantations is to notice what unifies them. In broad strokes, republican theories highlight our role as members of an interwoven political community.[411] Law is not merely an ominous threat to limit our freedom. Instead, the law is a critical way in which we structure our interactions and thus secure freedom; the law is legitimate when it secures the conditions that allow us to live together as civic equals.[412]

In this case, the sometimes-oblique language of political philosophy highlights why deputization is a unique wrong. Recall Pettit's formulation that republican freedom is freedom from arbitrary interference, either by the state—*imperium*—or other private citizens—*dominium*.[413] This piece has focused on how deputization is an ever-present threat for Black Americans because any White private citizen may claim domination presuming the authority to police Black people by force. These moments of "policing" can result in threat, harm, or death to Black people by others based on the morally arbitrary fact of race. Deputization is a stark case of racial domination.

But as noticed before, the harm of deputization is not only its privatized violence. The unique danger of deputization lies precisely in the felt legal authorization, reinforced by history and contemporary implicit legal

409. Yankah, *supra* note 391, at 469-73; Yankah, *supra* note 31, at 128-29; Ekow N. Yankah, *Punishing Them All: How Criminal Justice Should Account for Mass Incarceration*, 97 RES PHILOSOPHICA 185, 197, 202, 206-08 (2020); Ekow N. Yankah, *The Right to Reintegration*, 23 NEW CRIM. L. REV. 74, 75-85, 94-111 (2020).

410. *See* Yankah, *supra* note 391, at 467-69. It explains, for example, the "recidivist premium"—the biggest factor in how much an offender is punished, besides the nature of the crime itself, is whether the offender has a prior record. This is hard to understand if the only thing we care about is what right is being violated. A person who robs a bank a decade after his first robbery does not recognizably violate any rights to a different degree, leaving retributivist theories at a loss to explain this basic feature of our criminal law. But increased punishment makes perfect sense if we center the offender's perseverance on attacking our protected civic bonds. A second obvious example can be found in hate crime legislation. Every jurisdiction in the United States increases punishment for offenders who attack others motivated by their race, religion, or other prohibited factors. Perhaps it is not obvious that to be attacked because of one's racial identity, for example, violates a different set of rights than to be attacked because one is a redhead. But it is clear that attacks on particularly fragile or historically charged traits pose a different kind of danger than those focused on idiosyncratic features; it is precisely that these are longstanding fault lines in our history that make them critical to protect.

411. *See id.* at 467-69.

412. *See id.*

413. PETTIT, *supra* note 397, at 112, 130.

permission, such as a prosecutor's refusal to press charges or a governor's pardoning of armed assault.[414] Deputization not only allows illegitimate private violence but casts the state's power behind it. Thus, in Petitt's language, deputization also represents a derivative form of imperium over Black people.

But we need not rely on the technical language of any particular theory to absorb the core insight. Republicanism understands law to be justified by its role in securing our interactions as equal democratic citizens.[415] Deputization shows how our criminal law has historically allowed Whites to claim the right to use violence to keep racial minorities in their place. In short, deputization is the power of a White to declare that he is not a Black person's equal but rather his master. The greater the extent of deputization, the clearer it is that we are not in a political project together but rather at low-level war.[416]

This understanding of criminal law is one that naturally brings the illegitimacy of White deputization into stark relief. To know that American law implicitly authorizes one racial group to arrest another at their will is the antithesis of a criminal law that secures our place as civic equals.[417] It is a criminal law that enshrines racial domination and thus forfeits its claim to be fully legitimate to Black Americans.[418] By viewing White deputization through the lens of political theory, we deepen our already pressing critique, realizing that the killings of Trayvon Martin, Ahmaud Arbery, and Jordan Neely are neither isolated tragedies nor racist blemishes on the criminal law system. These deaths, and every instance of deputization for which they stand, reveal a rooted history that shakes the fundamental justification of the criminal law system, trunk and branch.

Excavating the history of deputization explicitly intertwines two of the most important contemporary strands of political theory: Critical Race Theory and republican theories of political justification. Perhaps this republican justification has always been innate in critical theories, which take the unequal treatment of racial minorities (along with women, sexual and gender minorities, and others) as a fatal blow to the law's claims of

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414. *See* Mzezewa, *supra* note 28; Bynum, *supra* note 235.

415. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 304-06, 308-26 (1999). Anderson's egalitarianism is, in my eyes, best understood as placed in a republican political tradition.

416. *See* Yankah, *supra* note 31, at 135-36.

417. *See* Rogers, *supra* note 383; Yankah, *supra* note 391, at 471-72; Ekow N. Yankah, *Legal Hypocrisy*, 32 RATIO JURIS 2, 14-18 (2019).

418. To paraphrase Duff, it is a law that cannot claim to speak in the name of all. R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 185-88 (2001); DUFF, ANSWERING FOR CRIME, *supra* note 389, at 53; R.A. Duff, *Responsibility, Citizenship, and Criminal Law, in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 125, 136-41 (R.A. Duff & Stuart Green eds., 2011); Duff, *Towards a Theory of Criminal Law?*, *supra* note 389, at 11.

legitimacy.[419] Certainly, critical theory views have questioned the sufficiency of a certain kind of political liberalism, most famously captured by Rawls's thought experiment in which rights are accorded by imagining bargainers in the original position, denuded of their race, gender, and any other identities.[420] Charles Mills's seminal *The Racial Contract*, now a generation old, was perhaps the first to launch a wholesale attack on how little modern philosophical liberal commitments had to say about race.[421] In criminal law, that work has been carried on by philosopher Tommie Shelby and myself, among others.[422] Indeed, as Shelby makes clear, the failure of the state to cure persistent racial injustice negates the state's right to insist on an obligation to obey the law.[423] Noticing how republican theories pinpoint the wrong of deputization is yet one more piece in outlining a republican critical race theory of law.[424]

Ultimately, I do not wish to argue that other theories of criminal law cannot recognize why the marriage of private violence and racial domination undermines criminal law. One could recast many instances of deputization as gross rights violations. Latent White deputization puts Black people on notice that their rights are always insecure. For the consequentialist, the damaging consequences of racial authoritarianism and broad mistrust of our criminal justice institutions by minorities are obvious.[425] Instead, I wanted to highlight

419. *See* I. Bennett Capers, *Critical Race Theory and Criminal Justice*, 12 OHIO STATE J. CRIM. L. 1, 2 (2014); Butler, *The System Is Working the Way It Is Supposed to*, *supra* note 52, at 1442; Stevenson, *supra* note 52, at 4-5, 11-13; ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 24-35 (2003); Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 20-29 (2019).

420. JOHN RAWLS, A THEORY OF JUSTICE 118-29 (1971).

421. CHARLES W. MILLS, THE RACIAL CONTRACT 1-7 (1997).

422. TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM 204, 209-12, 214-19 (2016).

423. *Id.* at 204-19, 231.

424. *See* Ekow N. Yankah, *Whose Burden to Bear? Privilege, Lawbreaking and Race*, 16 CRIM. L. & PHIL. 13, 14-21 (2022) (exploring how illegitimate racial privilege inverts demands of compliance on the disadvantaged to demands of reform on the privileged).

425. The storied tradition of Black American intellectuals exploring mistrust of our political system generally and criminal punishment system in particular is voluminous. Generational examples include Frederick Douglass's *The Meaning of July Fourth for the Negro* (July 5, 1852); W.E.B. Du Bois's preface to *Some Notes On Negro Crime Particularly in Georgia* (1904); James Baldwin's *The Fire Next Time* (1963); and the modern torchbearer Ta-Nehisi Coates's *Between the World and Me* (2015). *See also* Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO STATE J. CRIM. L. 173, 214-22 (2008); YUEN J. HUO & TOM R. TYLER, HOW DIFFERENT ETHNIC GROUPS REACT TO LEGAL AUTHORITY 21-26 (2000); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 108-11 (2002); Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC'Y REV. 777, 793 (1998); Tom R. Tyler &

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how a political theory that centers criminal law's role in ensuring a polity of equals is particularly sensitive to the evils of deputization and the racial violence it implicitly authorizes. That such a theory brings this underexplored yet omnipresent form of racial domination into sharp relief is another facet in its favor.

C. Deputization Beyond Black and White

Though not deaf to such arguments, I am ultimately skeptical of the aim to racially equalize deputization for at least three reasons. The first, the anti-Black robustness of deputization, has already been explored in depth. History cautions that, for the foreseeable future, self-authorized private violence in the name of the law is likely to mix with the deeply embedded image of Black criminality to endanger Black Americans.[426]

Second, even if one sets aside specifically anti-Black animus, deputization is likely to be consistently used to police the already politically vulnerable. Though Black Americans have been the primary focus of deputization, other racial minorities, be it Asians or Hispanics, have been historically victimized as well. Over a century ago, the arrest and deportation of Chinese citizens under the Geary Act led to White farmers in Los Angeles going on a binge of citizen's arrests of Chinese people, which continued until a U.S. Attorney General sapped the financial incentive by refusing to reimburse deportations.[427] As in contemporary examples, an internalized legal power of racial domination does not respect fine lines.

Take two currently salient forms of deputization that stretch beyond Black and White racial lines. First, America has a long adjacent history of policing Hispanic Americans, whether premised on their "otherness," presumed criminality, or "hot-bloodedness."[428] One obvious example has been the growth of self-appointed and self-armed citizen border patrols, forcibly holding undocumented immigrants or asylum seekers at gunpoint,

Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO STATE J. CRIM. L. 231, 270-71 (2008); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057-58, 2068-72 (2017); Rogers, *supra* note 383, at 62-69; Bernard Boxill, *Two Traditions in African American Political Philosophy*, 24 PHIL. F. Q. 119, 119 (1992).

426. KENDI, *supra* note 44, at 410-11, 433-37; MUHAMMAD, *supra* note 46, at 1-2, 33-34; Stevenson, *supra* note 52, at 4-5, 11-13.

427. KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771-1965, at 82-86 (2017).

428. Karen S. Kopitsky, Note, *How the Scope of States' Citizen's Arrest Statutes Affects the Activity Level of Vigilante Groups on the U.S.-Mexico Border*, 11 J. GENDER, RACE & JUST. 307, 315 (2008); Lee, *supra* note 55, at 443.

interrogating and, at times, beating and terrorizing them.[429] Obviously, that the victims are often not formally citizens adds a layer of complexity. But the same characteristics of self-appointed law enforcement overlapping with ethnic domination, done without regard to the actual legal rights of asylum seekers and their obvious right to be free of life-threatening assault, illustrate the extension of deputization. Thus, deputization is distilled into the literal right to patrol the borders of the country and polity.

This history of policing Latinos provides fertile ground for public actors to extend private power along racial and ethnic lines. In 2010, Arizona passed SB 1070, the controversial anti-immigration statute that requires migrants fourteen years or older who are in the country for over thirty days to carry government-issued registration documents at all times.[430] It further authorized local police to determine a person's immigration status if they had "reasonable suspicion" that person was an undocumented alien.[431] It also criminalized hiring workers from vehicles by the road or transporting, concealing, harboring, or shielding an "illegal immigrant" in "furtherance" of the immigrants' unauthorized presence in the country.[432] Critics contended that the ability of local police to demand to see the papers of anyone who looked ethnically Hispanic and the legal liability for anyone transporting an "illegal alien"—say, by taking your child's teammates to a soccer game—recalled liability under fugitive slave laws.[433]

These undercurrents establish a social world in which the way Latinos are policed by private violence is starkly different from the way Whites can be targeted by even public sanction. Take the 1995 shooting of eighteen-year-old Cesar Arce by William McMasters.[434] McMasters encountered Arce and his friend spray painting under a Los Angeles overpass and, fulfilling his hero fantasies, shot them both, killing Arce.[435] He was widely hailed as a hero.[436] As legal scholar Cynthia Lee points out, McMasters's private decision to shoot two Mexican boys for spraying graffiti was in stark contrast to the national outrage less than a year earlier when a White American was sentenced to a

429. Kopitsky, *supra* note 428, at 317; Lee, *supra* note 55, at 443-51.

430. Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of the ARIZ. REV. STAT. ANN.).

431. *Id.*

432. *Id.*

433. *See Frequently Asked Question About the Arizona Racial Profiling Law*, ACLU (May 17, 2010), https://perma.cc/Z9WV-JPJA.

434. Seth Mydans, *A Shooter as Vigilante, and Avenging Angel*, N.Y. TIMES (Feb. 12, 1995), https://perma.cc/WE9B-SM8P.

435. *Id.*

436. *Id.*

legally authorized lashing in Singapore for the same juvenile misbehavior.[437] Analogously, public safety campaigns exhorting, "if you see something, say something," were experienced by many Middle-Eastern and Muslim-Americans as training the eyes of the public to surveil them.[438] In short, to the extent private citizens were broadly being deputized, it was in hunt of the racialized immigrant. Thus, deputization reform may simply seek out new victims.

D. Deputization and Gender

Perhaps an even more startling extension has been deputization in the service of gender domination. There is surely an analogous article to be written tracing the long history of legal permission for men to impose the rule of law and norms to discipline women.[439] Indeed, the right of a husband to beat his wife (much like his slave) was considered an ancient privilege of the head of household.[440] This analogous form of deputization invites feminist scholarship to excavate gendered forms of deputization. The intersection of deputization as the domination of minorities and control of women is a poignant reminder of how vulnerabilities combine to disempower the most vulnerable and to be particularly sensitive to how some may deputize themselves to dominate Black women.[441]

An obvious contemporary example of sexist deputization was the passage of Texas's 2021 law, SB 8, which sought to ban abortions in Texas,[442] prior to the repeal of *Roe v. Wade*.[443] The law banned abortions after the detection of fetal cardiac activity, which is normally after six weeks of pregnancy and often before women are aware that they are pregnant.[444] In an effort to avoid constitutional review, Texas's law relied solely on enforcement by private individuals through civil lawsuits, authorizing private citizens to sue anyone

437. Lee, *supra* note 55, at 450-51.

438. Carlos Torres, Azadeh Shahshahani & Tye Tavaras, *Indiscriminate Power: Racial Profiling and Surveillance Since 9/11*, 18 U. PA. J.L. & SOC. CHANGE 283, 285-86 (2015). I am grateful to Cyra Choudhury for pressing this point.

439. I am grateful to Maureen Carroll for pressing this line of thinking.

440. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2121-22 (1996); Franks, *supra* note 358, at 940-41.

441. The classic description is found in Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 150-52 (1989).

442. Texas Heartbeat Act, 2021 Tex. Gen. Laws 125 (codified as amended at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-212 (West 2024)).

443. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

444. Ariane de Vogue, *Texas 6-Week Abortion Ban Takes Effect After Supreme Court Inaction*, CNN (updated Sept. 1, 2021, 12:20 PM EDT), https://perma.cc/5RFQ-TEMJ.

who facilitates an illegal abortion for a minimum of $10,000 in damages per abortion plus costs and attorneys' fees.[445] SB 8 was subjected to numerous lawsuits in state and federal court and its fate has been rerouted by the Supreme Court striking down the Constitutional right to an abortion.[446] But even when the law's constitutionality was in doubt, abortion providers remained cowed into compliance because of the private enforcement "bounty" within the law.[447]

Though the very point of SB 8 was to avoid the state's involvement through criminal law, the bounty system empowered private citizens to police the lives of both medical professionals and women who could become pregnant. This deputization fits into a long and analogous history of legal subordination of women.[448] Ultimately, these examples show that even when removed from sites of anti-Black racial oppression, deputization is likely to be aimed at controlling women and the racially vulnerable.

Even were all racial and gendered oppressive uses of deputization cured, it is unclear if overreliance on private citizens to enforce criminal law is an attractive civic good. We have obvious practical concerns surrounding untrained people, hotheaded assertions of authority, and escalating tempers when one citizen demands acquiescence from another.[449] And even putting aside practical concerns, an excessive role by ordinary citizens in enforcing legal norms can quickly lead to a civic culture of oppressive suspicion.[450] My wife grew up in Saudi Arabia and recalls the way voices of ordinary citizens would drop to hushed tones in describing the Royal family or politically powerful.[451] Other scholars and friends recollect growing up in Soviet states where "law abidingness" was secured through paralyzing fear of eavesdropping and being reported to authorities.[452] These dangers stemmed in part from the

445. TEX. HEALTH & SAFETY CODE ANN. §§ 171.207-208 (West 2024).

446. *See, e.g.*, Devlin Barrett & Ann E. Marimow, *Justice Department Sues Texas to Block Six-Week Abortion Ban*, WASH. POST (Sept. 10, 2021), https://perma.cc/X7FN-7XY7.

447. Caroline Kitchener, Emily Wax-Thibodeaux, Ann E. Marimow & Casey Parks, *Despite Latest Court Ruling Blocking Texas Abortion Law, Most Providers Are Still Reluctant to Defy Ban*, WASH. POST (Oct. 7, 2021), https://perma.cc/RJ8E-ANY3; Reese Oxner & Eleanor Klibanoff, *State Judge Declares Texas Abortion Law Unconstitutional—But Does Not Stop It from Being Enforced,* TEX. TRIB. (updated Dec. 9, 2021, 6:00 PM CT), https://perma.cc/3UH7-XPDU*; see* TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(3).

448. *See* Siegel, *supra* note 440, at 2121-22.

449. *Cf.* Lee, *supra* note 197, at 21-31 (discussing self-defense laws).

450. I am grateful to Leo Zaibert and Anna Schur for pressing this line of thinking.

451. *Cf.* U.S. DEP'T STATE, SAUDI ARABIA 2018 HUMAN RIGHTS REPORT 2-4 (2018) (discussing politically motivated killings in Saudi Arabia).

452. *Cf.* James W. Heinzen, *Informers and the State Under Late Stalinism: Informant Networks and Crimes Against "Socialist Property," 1940–53*, 8 KRITIKA: EXPLS. RUSSIAN & EURASIAN

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nature of the underlying political system. Perhaps in a roughly just society, the corrosiveness would be abated. But examples from the Gestapo to the Stasi to the KGB to FBI informants undermining Civil Rights groups should sensitize us to the dangers of excessive reliance on fellow citizens adopting the role of enforcers.[453]

Conclusion: Deputization, Abolitionism, and Criminal Law Reform

It is customary for law review articles to isolate vexing legal problems and then propose a legal solution that neatly slashes the Gordian knot. The nature of deputization, however, resists this kind of singular legalistic solution. That is because deputization is distinct from people merely disobeying the law or insufficient enforcement of criminal law. Rather, deputization stems from people's belief that they are enforcing the law.

A dark irony lies at the heart of suppressing deputization. Faced with undesirable violent behavior, our all-too-natural instinct is to resort to criminal prohibitions.[454] Thoughtfully deployed, such prohibitions do not work merely through organized force but rely on the normative and expressive values of the criminal law to effect widespread changes in society.[455] This reflexive instinct can border on the pathological, leading to the contemporary crisis of overcriminalization.[456] But neither the normative force of criminal prohibition nor the threat of policing is likely to significantly dampen the racist violence posed by deputization. Deputization, after all, occurs when White people take themselves to be authorized enforcers of the law against Blacks. The aggressor is convinced that they are acting rightfully and reinforcing legal norms. Further, because deputization occurs precisely because the police cannot be everywhere, deterrence by force is absent.

More precisely, deputization results from a stew of legal norms and latent social power that one group is permitted to impose their (sometimes quite hazily understood) version of the law on a subordinate and allegedly criminal racial class. This makes deputization nearly impervious to our reflexive instinct to combat criminal violence by passing yet another statute. Indeed, the prevailing sensibility that all social problems, particularly in Black communities, should be handled by criminal law further feeds deputization,

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HIST. 789, 789 (2007) (discussing the "recruitment and deployment of average Soviet people as informants").

453. *See, e.g.*, Leonardatos, *supra* note 327, at 967.

454. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF CRIMINAL LAW 3-32 (2007).

455. Yankah, *supra* note 31, at 109.

456. HUSAK, *supra* note 454, at 3-32; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512-19 (2001).

increasing the danger that more people will appoint themselves the enforcers of Black bodies. Simply put, deputization is, by its nature, difficult to legislate out of existence.

That is not to say there are no legal levers to curtail racist invocations of legal power over racial minorities.[457] Important restrictions on citizen's arrest laws are an apt starting point. Citizen's arrest laws vary widely nationwide but the most palatable ones are the narrowest in scope: those that restrict citizen's arrest powers to only serious felonies that threaten physical safety or very significant loss of property, committed in one's presence or for which one has proof beyond the ever-nebulous standard of probable cause.[458] Further, pairing such citizen's arrest laws with strict liability if one is mistaken, as some statutory regimes impose if one mistakenly uses violence in defense of others, would communicate that while one may take it upon themselves to enforce the law, doing so without certainty means entering into treacherous waters.[459] This standard does not undermine a person's ability to stand on the law any more than imposing strict liability in cases of defense of others denigrates another person's right to bodily integrity. It simply recognizes that when one wades into situations, swinging their fists or waving their guns, they better damn well be sure they know what's going on. After all, as significant as one's interest is in not standing by helpless while your legal rights are being violated, so is another's interest in not having you falsely impose yourself as their legal authority, particularly on racial grounds.

Curbing deputization means amplifying other legal reforms that communicate unwillingness to tolerate racial violence. Robust expansion of hate crime legislation, for example, may afford greater ability for prosecutors to punish those who deputize themselves to intimidate Black protestors or threaten or arrest Black people picnicking or jogging.[460] Additionally, deputization gives powerful reason to curtail the spread of "stand your ground" laws, which too easily mean that assertions of power turn into armed stand-offs, all shielded from legal accountability.[461] As recent studies have revealed, stand your ground laws have not shown any deterrent effect on crime and, in a

457. *See* Charles & Miller, *supra* note 43, at 1264.

458. *See* Robbins, *supra* note 335, at 584-96 (pointing out the high-stakes decisions that citizens need to make to carry out a citizen's arrest).

459. Flanders et al., *supra* note 159, at 171.

460. Yankah, *supra* note 26, at 684-85.

461. Roman, *supra* note 56, at 11 (noting racial disparities in armed stand offs that may be shielded from legal accountability); Fields, *supra* note 156, at 984-86; *see* Gruber, *supra* note 56, at 962-65. *See generally* AM. BAR ASS'N, *supra* note 56, at 13-18 (citing data from four nationwide surveys).

world of assumed Black criminality and White deputization, have led to increased violence towards racial minorities.[462]

But while there are several legal reforms that can blunt the dangers of deputization, a phenomenon that parasitically lives on legal norms themselves invites us to consider the limits of solely focusing on legal reform. Thus, questions about deputization invite comparison to the burgeoning related literature on the gap between reformation and the abolition of the criminal justice system itself.[463]

By way of too brief a summary, radical Black intellectuals for at least a generation have argued that American criminal law is so thoroughly racist that efforts to merely reform it—to scrub it of its racism—are doomed to fail.[464] At its most extreme, the criminal law system is recast as merely another oppressive wing of a racist, capitalist machinery of oppression.[465] The only proper goal, in this view, is not to reshape police and prisons but to abolish them entirely.[466] This strain of thought has recently gained new currency, with a new generation of intellectuals and advocates flying the banner of "Defund the Police."[467]

Despite the provocative headline, criminal law abolitionists have long insisted that over-focusing on "defunding" fundamentally misunderstands the gravamen of the project.[468] The goal of criminal law abolition is not a naïve view that all police should be ushered from city streets tomorrow. The aim is not simply stripping away the police but rather investing in and building the thick and healthy social infrastructure that keeps communities healthy and crime-free, making policing ever less relevant as a social need.[469] The very point of criminal law abolitionism is not to conceive of how legal reform can obscure criminal law to make it more palatable, but to thoroughly remake social, legal, and political relationships so as to render the omnipresence of potential state violence unnecessary.[470]

On the one hand, recognizing deputization highlights a too-little-explored concern with the abolition project. Many people find the idea of eliminating

462. Fields, *supra* note 161, at 984-86; *see* Roman, *supra* note 56, at 11.

463. Kaba, *Yes, We Mean Literally Abolish the Police*, *supra* note 294; Kaba, *The System Isn't Broken*, *supra* note 294; Akbar, *supra* note 294, at 1785-88; Purnell, *supra* note 294.

464. Capers, *supra* note 419, at 2; DAVIS, *supra* note 419, at 24-35.

465. DAVIS, *supra* note 419, at 24-35.

466. Kaba, *Yes, We Mean Literally Abolish the Police*, *supra* note 294; Kaba, *The System Isn't Broken*, *supra* note 294; Akbar, *supra* note 294, at 1802-26; Purnell, *supra* note 294.

467. Kaba, *Yes, We Mean Literally Abolish the Police*, *supra* note 294.

468. *Id.*

469. *Id.*

470. *Id.*

police implausible because they imagine that ordinary, lawbreaking predators will have free hand to terrorize communities.[471] On this picture, police are the only plausible comprehensive solution to violent norm breaking in the pursuit of selfish or destructive desires.[472] Such imagined lawlessness would be particularly devastating for already vulnerable communities of color.[473] But understanding the history of deputization in our country reminds us that the absence of police does not only threaten people generally and communities of color specifically with those who believe themselves above the law.[474] It also means that many will appoint themselves the law; that private persons and companies will rush in to fill the gap.[475] In a world where Blackness is read as criminality, a world without police is one that invites private citizens to be unrestrained in exerting violent control over Black men.[476]

On the other hand, highlighting deputization offers us a surprising way to join the abolitionist project. We started this piece with the claim that despite the vast academic literature focusing on the way racism is embedded in the decisions of police and officials within the criminal justice system, something critical is missed when we ignore how the law empowers White private

471. *Id.*; MARIAME KABA & ANDREA J. RITCHIE, NO MORE POLICE. A CASE FOR ABOLITION 41-70 (2022); Darrell A.H. Miller, *A Simplistic Interpretation of "Defund the Police" May Embolden Vigilantes*, NEWSDAY (June 20, 2020), https://perma.cc/5SSF-U3YD.

472. SHELBY, *supra* note 304, at 162-63, 178-82.

473. JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 124-42 (2017). As Forman points out, when the cries of Black American communities for prosocial responses to rising drug addiction and crime rates went ignored, beleaguered communities eventually sought relief in aggressive policing. *Id.*; *see also* Carol S. Steiker, *More Wrong than Rights*, *in* URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 49, 50-51 (Joshua Cohen & Joel Rogers eds., 1999) (criticizing the view that Black American calls for more policing can be understood without attending to background conditions of injustice).

474. 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, 51-52 (2017).

475. Hans-Bernd Schäfer & Michael Fehling, *Privatization of the Police*, *in* THE CAMBRIDGE HANDBOOK OF PRIVATIZATION 206, 206-07 (Avihay Dorfman & Alon Harel eds., 2021); *see also* Sklansky, *supra* note 273, at 1194 (describing the rise in private policing); WILBUR R. MILLER, A HISTORY OF PRIVATE POLICING IN THE UNITED STATES 1 (2020) (describing private policing); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 55 (2004) (same).

476. Eberhardt et al., *supra* note 42, at 876-77; Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1189 (2017); 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); Michael C. Gearhart, Kristen A. Berg, Courtney Jones & Sharon D. Johnson, *Fear of Crime, Racial Bias, and Gun Ownership*, 44 HEALTH & SOC. WORK 241, 246 (2019); 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).

violence over Black people. But ironically, some of the lessons abolitionists have pressed in examining illegitimate *state* violence apply with equal force in addressing state sanctioned *private* violence.

Legal reform is difficult because forms of deputization, like other forms of racism, often find new avenues and can be imposed on different marginalized groups. Further, even if successful, legal reform is insufficient for the full task of ending the harms from deputization. One must look to the deeper underlying social structures that cast Black people as inherently criminal and appropriate for anyone to police. So even those of us who may not fully count ourselves as criminal abolitionists—I consider myself a criminal law minimalist—deputization brings fully home the lesson that underlying political and economic structures, along with the ideology they spawn, are the most important site to address our deeply embedded history of White private violence in the name of the law.