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Regulation Without Agency: A Practical Response to Private Policing in *United States v. Day**

INTRODUCTION

The popular image of the “mall cop” has created a comical caricature of private police, or security officers, for many individuals.¹ In the movie *Paul Blart: Mall Cop*, actor Kevin James exemplifies this image with his portrayal of a mall security guard whose self-doubt marginalizes his profession when he responds to his own question of “[w]hat are you trained to do?” with a deflated “[n]othing.”² The reality is that private police personnel are frequently trained, licensed, and regulated and serve a variety of roles, ranging from property protection to preserving public order.³

Beyond the caricature lies a rich history of policing, both public and private, which has been extensively explored within the literature addressing private policing.⁴ For the purposes of this Recent Development, this history provides one fundamental takeaway: the policing function has never been controlled exclusively by the government, nor have its functional components been rigidly defined.⁵ As a result, “perceived gaps in the policing services provided by government” have determined the responsibilities of private police.⁶ If a government does not provide adequate preventive, protective, or investigatory services, then the general public will frequently demand a private alternative.⁷

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1. See, e.g., *Mall Cops: Mall of America* (The Learning Channel 2010); OBSERVE AND REPORT (Warner Bros. Pictures 2009); PAUL BLART: MALL COP (Sony Pictures 2009).

2. PAUL BLART: MALL COP, *supra* note 1.

3. See generally CHARLES NEMETH, PRIVATE SECURITY AND THE LAW 22–59, 70 (3d ed. 2005) (describing the current regulatory requirements applicable to the private policing industry and the types of duties performed by private police).

4. See David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1193–1229 (1999); Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 579–85; Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 921–24 (2007); M. Rhead Enion, Note, *Constitutional Limits on Private Policing and the State's Allocation of Force*, 59 DUKE L.J. 519, 529–41 (2009).

5. See Sklansky, *supra* note 4, at 1194.

6. *Id.*

7. See, e.g., Simmons, *supra* note 4, at 924–27. *But cf.* Sklansky, *supra* note 4, at 1168 (“[I]t is far from clear to what extent the growing numbers of private security employees

As the private policing industry continues to grow⁸ and the variety of services provided by private police expands,⁹ many questions remain regarding the legal framework within which this industry must function.¹⁰ Of particular concern is the risk of violating constitutional protections through the exercise of the police function,¹¹ including the use of private police to collect evidence by methods not legally available to public police officers.¹²

are actually performing functions previously carried out by public officers.”). For example, private police actively fill a perceived gap in the availability of patrol services. See Sklansky, *supra* note 4, at 1180. Notably, the armed security officers in *United States v. Day*, 591 F.3d 679 (4th Cir. 2010), were providing patrol services at the time of their encounter with the appellee, Mario Day. See *infra* note 30 and accompanying text.

8. See Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 54 (2004). By one account, there are “nearly three private guards for every public police officer.” *Id.* at 55. “In the 1970s . . . there were approximately 1.4 public police officers for every private guard.” *Id.* at 54–55; see also Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 191 (2005) (“[P]rivate security companies employ approximately two million guards, compared to public law enforcement’s 725,000.”).

9. In the area of property protection alone, “[u]niformed private officers guard and patrol office buildings, factories, warehouses, schools, sports facilities, concert halls, train stations, airports, shipyards, shopping centers, parks, government facilities—and, increasingly, residential neighborhoods.” Sklansky, *supra* note 4, at 1175. The scope of private policing is far broader, including intelligence gathering and monitoring, privatization of policing services by government entities, and corporate policing. See Joh, *supra* note 4, at 609–15 (describing the specific roles currently being filled by private police).

10. See NEMETH, *supra* note 3, at 68–69. A significant factor behind the questions in this area is that many private police exercise controversial powers, including “detaining individuals, conducting searches, investigating crimes, and maintaining order.” See Joh, *supra* note 8, at 50.

11. See Boghosian, *supra* note 8, at 177–78. Violations of constitutional protections were a significant concern of the *Day* dissent. See *Day*, 591 F.3d at 690 (Davis, J., dissenting in part); see also Brief of Amicus Curiae ACLU of Virginia, Inc. in Support of Petition for Rehearing at 1–6, *Day*, 591 F.3d 679 (No. 08-5231), 2010 WL 374017.

12. Joh, *supra* note 8, at 114–16. The risks are particularly acute given the significant problems that frequently exist within the industry, including “[h]igh attrition rates, inadequate personnel screening and selection, substandard training and supervision of personnel, low pay, and conflicts of interest.” Boghosian, *supra* note 8, at 179. According to one source, in the area of preassignment training, uniformed security guards receive an average of four to six hours of training. *Id.* at 182. Virginia requires unarmed security officers to receive a minimum of eighteen hours of entry-level training, whereas armed security officers, like those in *Day*, receive forty hours of entry-level training. 6 VA. ADMIN. CODE § 20-171-350 (2010) (including eight hours of arrest authority training for armed security officers); see also 26 Va. Reg. Regs. 1482, 1519–20 (proposed Feb. 1, 2010) (proposing an increase in armed security officer training to fifty hours). In contrast, Virginia requires public law enforcement officers to have a minimum of 580 training hours. 6 VA. ADMIN. CODE § 20-20-21 (2010).

Training and supervision aside, because private police frequently wear police-style uniforms and have the opportunity to carry weapons, see Boghosian, *supra* note 8, at 181 (noting that ten percent of private security employees carry firearms), and execute

This Recent Development examines these issues by considering *United States v. Day*,¹³ a Fourth Circuit Court of Appeals decision that addresses state action—or government agency¹⁴—within the context of the private policing industry. Legal certainty within this context is elusive, however, because no uniform definition of private policing exists,¹⁵ and the United States Supreme Court has not determined whether a delegation of police powers to a private party results in state action.¹⁶ The uncertain legal status of private policing has left open many significant issues for lower courts to resolve, including policy issues associated with the applicability of the Fourth and Fifth Amendments to private policing conduct.¹⁷

Day addresses whether the constitutional constraints placed on state actors by the Fourth and Fifth Amendments apply to private armed security officers.¹⁸ Extending Fourth and Fifth Amendment constitutional restraints to private police would potentially exert some control over their behavior.¹⁹ As noted by Professor Elizabeth

arrests—even if only citizen arrests—private police often communicate a powerful and easily misunderstood message to the general public. *See id.* at 204–06. Specifically, “most individuals stopped by a uniformed security guard assume that the guard possesses legal authority to search and seize.” *Id.* at 204–05.

13. 591 F.3d 679 (4th Cir. 2010).

14. In *Day*, the distinction between state action and agency is not always clearly drawn. Though primarily concerned about whether private actors were agents of the state, the *Day* majority also defines its analysis in terms of state action. *Compare Day*, 591 F.3d at 687 (describing the public function test as the “theory of agency relied on by the district court”), *with id.* at 689 (rejecting the argument that the private actors were in fact “state actors”). In this Recent Development, the distinction between state action and agency is important, *see infra* Parts II, III, but any distinctions should not overshadow the underlying search for state responsibility.

15. *See Joh, supra* note 8, at 55. Professor Joh defines “private policing” as “the various lawful forms of organized, for-profit personnel services whose primary objectives include the control of crime, the protection of property and life, and the maintenance of order.” *Id.* (emphasis omitted). Generally, “private policing” will be used in this Recent Development as opposed to a narrower term like “private security.” *Cf. id.* at 67 (describing the difference between “private policing” and the “private security industry”).

16. *See, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 163 n.14 (1978) (stating that the Court had never determined “the constitutional status of private police forces” and asserting “no opinion” in this case).

17. *See NEMETH, supra* note 3, at 68–69. *See generally* U.S. CONST. amends. IV, V (sources for search and custodial questioning restrictions). The Fourth Amendment does not forbid all searches and seizures, but does bar those considered unreasonable. *See Terry v. Ohio*, 392 U.S. 1, 8 (1968). The Fifth Amendment prohibits the use of individual statements arising out of custodial interrogation unless procedural safeguards are taken to preserve the individual’s freedom from self-incrimination. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

18. *See infra* Parts II, III.

19. *See generally* Enion, *supra* note 4 (arguing for the extension of constitutional limitations to private police). *But see Joh, supra* note 8, at 118 (arguing that the transfer of

E. Joh, however, “the Supreme Court and the lower courts have repeatedly rejected claims that the federal constitutional constraints placed on public police should also apply to the private police.”²⁰

Contributing to this trend and in spite of the arrest, search, and questioning of Day by privately employed armed security officers and the criminal charges their efforts helped support,²¹ the Fourth Circuit Court of Appeals concluded that Virginia’s regulation of private security services did not create an agency relationship between the government and the armed security officers in *Day*.²² Consequently, the procedural constraints of the Fourth and Fifth Amendments did not apply to the armed security officers’ conduct.²³

Though the armed security officers’ freedom from constitutional criminal procedure in *Day* generates legitimate concern about the powers of private police and their potential abuse,²⁴ the Fourth Circuit’s holding is a proper application of current case law.²⁵ More importantly, application of the public function test²⁶ and any subsequent finding of state action based upon Virginia’s regulation of private security service providers is both unwarranted under the facts in *Day* and unwise as a matter of public policy.²⁷ Indeed, a more promising approach for influencing the behavior of private police is through robust legislative and administrative oversight of the private policing industry.²⁸

criminal procedure may not control the behavior of private police).

20. Joh, *supra* note 8, at 93. Exceptions exist, including instances where private police were deputized and acquired the characteristics of public police officers, *see id.* at 101–02, or in situations where the private actor is an off-duty police officer, *see id.* at 104. For cases involving deputized individuals, *see Pratt v. State*, 263 A.2d 247, 247 (Md. 1970) (reversing conviction because evidence was obtained by private employee commissioned to act as a police officer); *Commonwealth v. Leone*, 435 N.E.2d 1036, 1040 (Mass. 1982) (concluding that a “special or deputy police officer” is a state agent subject to the limitations imposed by the Fourth Amendment). For cases involving off-duty police officers, *see State v. Betsell*, 240 S.E.2d 781, 782 (Ga. Ct. App. 1977) (upholding suppression of evidence seized by off-duty police officer acting as a motel security guard); *State v. Wilkerson*, 367 So. 2d 319, 321–22 (La. 1979) (vacating guilty plea resulting from off-duty police officer’s search of personal property located within the apartment complex where he worked as a security guard). For further discussion of the case law associated with these various distinctions, *see Sklansky, supra* note 4, at 1244 n.444.

21. *See United States v. Day*, 591 F.3d 679, 681 (4th Cir. 2010).

22. *See id.* at 685–86, 688–89.

23. *See id.* at 689.

24. *See, e.g.*, Brief of Amicus Curiae ACLU of Virginia, Inc. in Support of Petition for Rehearing, *supra* note 11, at 5–6.

25. *See infra* Part II.

26. *See infra* note 110 and accompanying text (defining the public function test).

27. *See infra* Part III.

28. *See infra* Part IV. In general, the private policing industry is subject to minimal

Part I of this Recent Development explores the essential facts presented in *Day*. Part II then examines the “two primary factors” test used by the *Day* majority in determining that an agency relationship did not exist between the government and the armed security officers. Of particular concern to the *Day* majority was whether Virginia “‘knew of and acquiesced’” to the armed security officers’ conduct.²⁹ Part III considers the *Day* dissent’s application of the public function test and its argument that state action does exist within this context, a standard the *Day* majority considered and rejected. Finally, Part IV argues that the *Day* holding provides an opportunity for governments to exercise meaningful control over private police through legislative and administrative regulation, including increased information disclosure to regulatory authorities and the promotion of civil actions and criminal liability for unlawful behavior attributable to private police personnel.

I. UNITED STATES V. DAY

On July 5, 2008, shortly after midnight, two on-duty armed security officers patrolling the Regency Lake apartment complex³⁰ in

statutory regulation. See Boghosian, *supra* note 8, at 178; Joh, *supra* note 8, at 50; Simmons, *supra* note 4, at 927–28. Often, what regulation does exist is associated with licensing, candidate screening, and mandatory training standards. Simmons, *supra* note 4, at 978–79 (noting that there are “no federal guidelines and states enforce[e] widely varying (but mostly minimal) standards as to licensing, screening, and training”). In some states, regulation is even nonexistent. Joh, *supra* note 8, at 50. In the absence of a statutory framework that is capable of adequately overseeing the behavior of private police, various civil and criminal remedies serve as backstops for addressing wrongful conduct. See *id.* at 107–09. For example, if private police personnel wrongfully detain individuals, then tort and criminal law may provide remedies for false arrest, trespass, or assault. *Id.* at 109; Sklansky, *supra* note 4, at 1166–67. Interestingly, “[t]he legal regime governing private security . . . is strikingly similar to the legal regime that many reformers have advocated for public law enforcement: deconstitutionalized, defederalized, tort based, and heavily reliant both on legislatures and on juries.” Sklansky, *supra* note 4, at 1168; see also Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 758 (2004) (noting that occasional arguments are made for the regulation of police misconduct through tort actions, but they are often prematurely dismissed as unworkable). At one time, tort and criminal doctrines “defined the principal boundaries of permissible public policing.” Sklansky, *supra* note 4, at 1183. As a practical matter, however, it is difficult to determine how well this system deters private police abuses. *Id.* at 1272 (stating further that no one has even tried to determine whether “the tort system has worked to deter abuses by private security personnel”).

29. *United States v. Day*, 591 F.3d 679, 683 (4th Cir. 2010) (quoting *United States v. Jarrett*, 338 F.3d 339, 344 (4th Cir. 2003)).

30. See *United States v. Day*, 590 F. Supp. 2d 796, 799 (E.D. Va. 2008), *rev’d*, 591 F.3d 679 (4th Cir. 2010). The armed security officers’ employer, American Security Group, see *id.*, provides comprehensive security services to its clients. See *Protective Services*, AM. SEC. GRP., <http://www.teamasg.com/protective.shtml> (last visited Apr. 14, 2011).

Chesterfield County, Virginia witnessed a gathering outside an apartment.³¹ The armed security officers witnessed two individuals—one of whom was the appellee, Mario Day—arguing with persons inside one of the apartments.³² After Day retrieved a gun from a nearby vehicle, he held the weapon “in a low and ready position”³³ and proceeded toward the apartment.³⁴ At that time, the armed security officers exited their patrol vehicle, drew their weapons, and ordered Day to freeze.³⁵

Upon reaching Day and placing him in handcuffs,³⁶ the armed security officers conducted a *Terry* search and questioned Day without giving him a *Miranda* warning.³⁷ The *Terry* search produced “no suspicious bulges or hard objects.”³⁸ However, after one of the armed security officers “asked Day if he had ‘anything illegal’ on him,”³⁹ Day admitted possession of marijuana.⁴⁰ The security officers removed the marijuana from Day’s pocket and questioned him about the firearm in his possession, which he claimed was for self-defense.⁴¹ After contacting their superior officer and the local authorities, the armed security officers turned custody of Day over to a Chesterfield police officer.⁴² A grand jury subsequently indicted Day for possession of marijuana and possession of a firearm by a drug user.⁴³

Interestingly, “American Security Group instructs its guards that they ‘are there as a deterrent. [They] are not local police, and [they] cannot conduct [them]selves as such.’” Brief of the United States at 8, *Day*, 591 F.3d 679 (No. 08-5231), 2010 WL 832926 (quoting Joint Appendix at 15).

31. *Day*, 590 F. Supp. 2d at 799.

32. *Id.*; see also Brief of the United States, *supra* note 30, at 10 (describing the event as “‘some type of verbal altercation’ with people inside the apartment” (quoting Joint Appendix at 21)).

33. Brief of the United States, *supra* note 30, at 2.

34. *Day*, 590 F. Supp. 2d at 799.

35. *Id.*

36. Brief of the United States, *supra* note 30, at 14.

37. *Day*, 590 F. Supp. 2d at 799. A *Terry* search is a protective measure that may be taken in order to search for weapons regardless of whether probable cause exists for arrest. See *Terry v. Ohio*, 392 U.S. 1, 27 (1968). *Miranda* warnings require that at the time of custodial interrogation an individual must be informed of her right to remain silent and the consequences of waiving that right. See *Miranda v. Arizona*, 384 U.S. 436, 467–69 (1966).

38. *Day*, 590 F. Supp. 2d at 799.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* The district court proceedings made clear that the decision to “arrest” Day was made by the Chesterfield police officer who responded to the scene. Brief of the United States, *supra* note 30, at 13, 15.

43. *United States v. Day*, 591 F.3d 679, 681 (4th Cir. 2010).

Prior to trial, Day sought to suppress the evidence obtained by the armed security officers—the drugs, gun, and his statements⁴⁴—by alleging violations of his Fourth and Fifth Amendment rights.⁴⁵ The district court granted Day’s motion to suppress the drugs and his statements regarding the drugs and firearm, but denied the motion as to the firearm itself.⁴⁶ The district court concluded that the *Terry* search of Day and the seizure of the gun were justified because the pat-down was a necessary protective measure and the firearm was in plain view.⁴⁷ The court also concluded, however, that the armed security officers’ subsequent actions, including custodial interrogation without a *Miranda* warning and the retrieval of the marijuana following an unproductive *Terry* search, warranted suppression.⁴⁸ On appeal, the Fourth Circuit reviewed Day’s motion to suppress and reversed the district court’s finding that the armed security officers were acting as government agents.⁴⁹

II. THE “TWO PRIMARY FACTORS” TEST: THE *DAY* MAJORITY

The personal protections provided by the Fourth and Fifth Amendments generally apply only to government conduct.⁵⁰ One way this generalization fails is if a private party, “in light of all the circumstances of the case, must be regarded as having acted as an ‘instrument’ or agent of the state.”⁵¹ Therefore, if the armed security officers in *Day* were acting as government agents, they would be subject to the procedural requirements of the Fourth and Fifth Amendments.⁵² Violation of these constitutional requirements could

44. *Id.* at 681–82.

45. See Brief of the Appellee at 2–3, *Day*, 591 F.3d 679 (No. 08-5231), 2009 WL 1390727.

46. *Day*, 590 F. Supp. 2d at 804.

47. *Id.* at 802–03.

48. *Id.* at 803–04.

49. *Day*, 591 F.3d at 681. On remand, Day pled guilty to unlawful possession of a firearm by a controlled substance user. *United States v. Day*, No. 3:08CR403, 2010 U.S. Dist. LEXIS 53216, at *1 (E.D. Va. May 27, 2010) (finding Day “guilty of Count One of the Indictment”); Indictment at 1, *United States v. Day*, 590 F. Supp. 2d 796 (E.D. Va. 2008) (No. 3:08CR403), 2008 WL 6564484 (describing count one as unlawfully possessing a firearm “while being an unlawful user of a controlled substance”).

50. See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *United States v. Garlock*, 19 F.3d 441, 442 (8th Cir. 1994) (“[T]he constraints of the Fourth and Fifth Amendments do not apply to purely private activity.”) (citations omitted); *United States v. Abney*, No. 03CR60(JGK), 2003 WL 22047842, at *3 (S.D.N.Y. Aug. 29, 2003).

51. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (citations omitted), *overruled on other grounds by Horton v. California*, 496 U.S. 128 (1990).

52. Cf. Steven Euler, *Private Security and the Exclusionary Rule*, 15 HARV. C.R.-C.L. L. REV. 649, 649–51 (1980) (arguing for application of the exclusionary rule when private

result in suppression of the evidence they obtained.⁵³ If suppressed, the government would effectively be held accountable for the conduct of the armed security officers, given the impact suppression would have on the prosecution.⁵⁴

To determine whether the armed security officers in *Day* were acting as government agents,⁵⁵ triggering the possibility of suppression, the *Day* majority first identified two primary factors necessary for establishing an agency relationship in this context: “(1) ‘whether the Government knew of and acquiesced in the private’ individual’s challenged conduct; and (2) ‘whether the private individual intended to assist law enforcement or had some other independent motivation.’”⁵⁶ The *Day* majority focused primarily on the first factor and analyzed whether Virginia’s regulation of armed security officers satisfied this component of the test.⁵⁷

In identifying agency, other courts have also applied the two-factor test within a variety of situations, including private policing contexts.⁵⁸ For example, in *State v. Santiago*,⁵⁹ a case factually similar to *Day*,⁶⁰ the Supreme Court of New Mexico confirmed that the first

security officers violate the Constitution when investigating crimes and gathering evidence for criminal prosecutions).

53. *See id.*

54. *See* Brief of the United States, *supra* note 30, at 43–44. Governmental accountability would be justified if the government actually influenced the conduct of the armed security officers because suppression would likely deter future violations. *Cf.* Joh, *supra* note 8, at 118 & n.325 (describing deterrence as the primary rationale for the exclusionary rule). If the State exerts influence over the armed security officers, then the threat of evidence exclusion would arguably trigger the State to modify its influence and the resulting conduct of the armed security officers. *Cf. Coolidge*, 403 U.S. at 488 (stating that exclusion is designed “‘to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.’” (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960))).

55. *See supra* note 14.

56. *United States v. Day*, 591 F.3d 679, 683 (4th Cir. 2010) (quoting *United States v. Jarrett*, 338 F.3d 339, 344 (4th Cir. 2003)).

57. This Recent Development does not thoroughly examine the second element of the two-factor test—the individual motivations of the armed security officers. The *Day* majority recognized the crime-deterrence objective of the armed security officers, but also noted that satisfaction of the second element of the test alone would not establish agency. *See id.* at 686–87; *see also State v. Santiago*, 2009-NMSC-45, ¶¶ 26–27, 217 P.3d 89, 97 (requiring satisfaction of both prongs of the test).

58. *See Santiago*, 2009-NMSC-45, ¶¶ 17–18, 217 P.3d at 95; *see also United States v. Alexander*, 447 F.3d 1290, 1295 (10th Cir. 2006) (“While [the two-factor test] has not been explicitly adopted in the Fifth Amendment context, it is nonetheless instructive.”).

59. 2009-NMSC-45, 217 P.3d 89.

60. In *Santiago*, private security guards at a shopping mall responded to a fight, at which time they arrested and searched the defendant and discovered drugs that were later turned over to the public police. *Id.* ¶¶ 2–3, 217 P.3d at 91–92. Furthermore, the *Santiago* court concluded that the private security guards had not been delegated broad police

factor of the two-factor agency test “requires that the state exercise a degree of control over the private actors.”⁶¹ Focusing on the Fourth Amendment, the *Santiago* court stated that “[f]ederal courts consider whether the private actor performed the search at the request of the government, or whether the government otherwise initiated, instigated, orchestrated, encouraged, or participated in the search.”⁶²

The *Santiago* court, in short, required more than mere “awareness” of the security guards’ actions.⁶³ *Santiago* sought some form of “active participation” by the government in the activities of the private security guards.⁶⁴ The presence of a police substation on the same commercial property, a shared radio frequency between the police and the security guards, and knowledge that the security guards routinely performed pat-down searches after detaining suspects was insufficient evidence to satisfy the first factor.⁶⁵ The *Santiago* court acknowledged, however, that if the public police encouraged the security guards to perform evidentiary searches for the State, or if the guards “routinely exceeded the permissible scope of protective searches” that the public police condoned, participated in, or did not discourage, then agency may result.⁶⁶

If measured by direct contact between armed security officers and the State, *Day* provides less of a measurable relationship than *Santiago*. *Day* contains no evidence of prior direct contact between the armed security officers and the local public police authority,⁶⁷ nor is there any reference to a police substation at the Regency Lake apartment complex, a shared radio frequency, or government awareness of the armed security officers’ routine practices.

The first factor of the agency test, however, may be established in more ways than direct contact alone. Rejecting a simplistic “knowledge plus acquiescence equals agency” standard in *United States v. Koenig*,⁶⁸ the Seventh Circuit specifically looked to the common law of agency in analyzing the two-factor test: “An agency relationship ‘results from the manifestation of consent by one person

powers. See *id.* ¶ 35, 217 P.3d at 99. Instead, the “security guards [we]re limited to the lawful exercise of a common-law citizen’s arrest.” *Id.*

61. *Id.* ¶ 19, 217 P.3d at 95 (citing *United States v. Shahid*, 117 F.3d 322, 325 (7th Cir. 1997)).

62. *Id.* (citing *United States v. Smythe*, 84 F.3d 1240, 1243 (10th Cir. 1996)).

63. *Id.* ¶ 22, 217 P.3d at 96.

64. *Id.* ¶ 23, 217 P.3d at 96.

65. *Id.* ¶ 21, 217 P.3d at 96.

66. *Id.* ¶ 23, 217 P.3d at 96.

67. *United States v. Day*, 591 F.3d 679, 686 (4th Cir. 2010).

68. 856 F.2d 843 (7th Cir. 1988).

to another that the other shall act on his [or her] behalf and subject to his [or her] control, and consent by the other so to act.’”⁶⁹ Though *Koenig* cited this principle in determining that a formulaic inquiry is inappropriate when applying the two-factor test,⁷⁰ the opinion made clear that control is a critical issue in identifying agency within this context.⁷¹

Though focused primarily on the private parties’ motivation for searching, *Koenig* required evidence that government action induced the private party’s conduct.⁷² Particularly relevant to *Day*, given that there appears to be no direct contact between state authorities and the armed security officers,⁷³ *Koenig* held “that legal compulsion by statute, regulation, or executive order may provide the control over private entities necessary to treat them as governmental agents.”⁷⁴

Under some circumstances a regulatory system may result in governmental accountability for private-party conduct.⁷⁵ In examining *Skinner v. Railway Labor Executives’ Ass’n*,⁷⁶ the *Day* majority acknowledged that the United States Supreme Court held the Fourth Amendment applicable when a private railroad complied with voluntary drug testing standards regulated by federal law.⁷⁷ The Supreme Court concluded that specific regulatory features indicated that the government adopted more than “‘a passive position’” regarding the drug testing performed by the private party.⁷⁸ Specifically, the regulatory system “‘removed all legal barriers to the testing authorized by’ the regulations, ‘made plain [the Government’s] strong preference for testing,’ and expressed the Government’s ‘desire to share the fruits of such intrusions.’”⁷⁹ *Skinner* demonstrates that the existence of agency is dependent on

69. *Id.* at 847 n.1 (quoting RESTATEMENT (SECOND) OF AGENCY § 1 (1958)); *see also Day*, 591 F.3d at 683 (stating that identifying an agency relationship “‘is a fact-intensive inquiry that is guided by common law agency principles.’” (quoting *United States v. Ellyson*, 326 F.3d 522, 527 (4th Cir. 2003))).

70. *See Koenig*, 856 F.2d at 847 n.1.

71. *See id.* at 849–50.

72. *Id.* at 850 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 488–89 (1971)).

73. *See Day*, 591 F.3d at 686.

74. *Koenig*, 856 F.2d at 850.

75. *See Day*, 591 F.3d at 685 n.6.

76. 489 U.S. 602 (1989); *see also Day*, 591 F.3d at 685 n.6 (discussing *Skinner*).

77. *Day*, 591 F.3d at 685 n.6 (citing *Skinner*, 489 U.S. at 614–15); *see also United States v. Jarrett*, 338 F.3d 339, 344 (4th Cir. 2003) (discussing *Skinner*).

78. *Day*, 591 F.3d at 685 n.6 (quoting *Skinner*, 489 U.S. at 615).

79. *Id.* at 686 n.6 (quoting *Skinner*, 489 U.S. at 615).

the scope of governmental involvement in the private party's actions.⁸⁰

In *Day* it is not apparent that Virginia's regulatory system goes beyond a "passive position" regarding the armed security officers' conduct, particularly with regard to their arrest of *Day*. For example, title 9.1 of the Code of Virginia⁸¹ regulates private security services businesses,⁸² including armed security officers.⁸³ Fundamental provisions of the private security regulations subject security providers to licensing and registration,⁸⁴ mandatory training standards;⁸⁵ oversight by the Criminal Justice Services Board and the Department of Criminal Justice Services;⁸⁶ limitations on the power of arrest;⁸⁷ and disciplinary action.⁸⁸ Of critical importance to the *Day* majority, the statute merely empowers armed security officers to make "an arrest for an offense occurring . . . in [their] presence."⁸⁹ Though both the district court and the *Day* dissent found sufficient regulatory intrusions to satisfy the first element of the two-factor test,

80. See *Skinner*, 489 U.S. at 614.

81. VA. CODE ANN. §§ 9.1-138 to -150 (2006). As noted in *Day*, armed security officers are registered, trained, and subject to disciplinary action as a result of Virginia's regulatory system. See *Day*, 591 F.3d at 684.

82. § 9.1-138 (defining "private security services businesses" to include security officers, private investigators, alarm respondents, locksmiths, and other security service providers).

83. *Id.* (" 'Armed security officer' means a natural person employed to (i) safeguard and protect persons and property or (ii) deter theft, loss, or concealment of any tangible or intangible personal property on the premises he is contracted to protect, and who carries or has access to a firearm in the performance of his duties.").

84. § 9.1-139(A), (C), (E).

85. See § 9.1-139(F) (requiring minimum training standards and background checks); see also *supra* note 12 (describing requirements under administrative regulations).

86. § 9.1-141 (defining the powers of the Criminal Justice Services Board, including responsibility for establishing training requirements, qualifications, and examinations; fee collection; and receipt of complaints, investigations, and disciplinary action); § 9.1-142 (defining the powers of the Department of Criminal Justice Services, including the ability to issue subpoenas for the investigation of complaints, "[i]nstitute proceedings to enjoin any person from engaging in any lawful act," and establishing a duty to turn over evidence of criminal acts to law enforcement officers).

87. § 9.1-146 ("A registered armed security officer . . . while at a location which the business is contracted to protect shall have the power to effect an arrest for an offense occurring (i) in his presence on such premises or (ii) in the presence of a merchant, agent, or employee of the merchant the private security business has contracted to protect, if the merchant, agent, or employee had probable cause to believe that the person arrested had shoplifted or committed willful concealment of goods For the purposes of [issuance and service of summons in place of a warrant in a misdemeanor case], a registered armed security officer . . . shall be considered an arresting officer.").

88. See §§ 9.1-147 to -150.

89. § 9.1-146; see *United States v. Day*, 591 F.3d 679, 688–89 (4th Cir. 2010).

regarding knowledge and acquiescence,⁹⁰ the *Day* majority rejected this conclusion.⁹¹

Day requires something more than government regulation in order to establish an agency relationship.⁹² In short, the *Day* majority requires evidence that the government participated in or affirmatively encouraged the private parties' conduct.⁹³ In citing *United States v. Shahid*,⁹⁴ a Seventh Circuit case, the *Day* majority acknowledged that when the government knows of and acquiesces in a private party's conduct, "the private party would expect some benefit (*e.g.*, receiving a reward from the government) from taking the action, or expect some detriment (*e.g.*, getting in trouble with government authorities) from not acting."⁹⁵ There was no evidence that the armed security officers in *Day* were to receive a reward or compensation for their actions, nor were they subject to regulatory discipline for failing to act.⁹⁶ In short, the *Day* majority required some evidence of control—proof of the government's intent to either directly or indirectly influence the conduct of the armed security officers.⁹⁷ In *Day*, control,

90. See *Day*, 591 F.3d at 694 n.5 (Davis, J., dissenting in part) (arguing that Virginia's regulatory framework "cloaks these guards with a comprehensive imprimatur of state authority," including licensing standards, arrest and search powers, and status as "arresting officers"); *United States v. Day*, 590 F. Supp. 2d 796, 801–02 (E.D. Va. 2008) ("[Virginia] affirmatively encouraged and enabled these officers to engage in the complained of conduct."), *rev'd*, 591 F.3d 679 (4th Cir. 2010). The *Day* dissent also argues that "[a]lthough the Commonwealth [of Virginia] may not have advance knowledge of every individual arrest and search undertaken by a private security guard, the same is true of its sworn law enforcement officers." *Day*, 591 F.3d at 694 n.5 (Davis, J., dissenting in part). However, the *Day* dissent does not account for a public officer's legal duty to arrest in appropriate circumstances. See *Yeatts v. Minton*, 177 S.E.2d 646, 648 (Va. 1970) (citing *Norfolk & W. Ry. Co. v. Haun*, 187 S.E. 481, 484 (Va. 1936)); see also *United States v. Lima*, 424 A.2d 113, 120 (D.C. Cir. 1980) (distinguishing a citizen's lack of duty to arrest relative to a public police officer who would be subject to criminal liability or a fine for failing to arrest for an offense committed in his presence).

91. See *Day*, 591 F.3d at 685–86.

92. See *id.* at 685.

93. See *id.*

94. 117 F.3d 322 (7th Cir. 1997).

95. *Id.* at 327 (citing *United States v. Feffer*, 831 F.2d 734, 738 (7th Cir. 1987)); see, *e.g.*, *United States v. Gingen*, 467 F.3d 1071, 1075 (7th Cir. 2006) (stating that the private parties "did not act to obtain a reward" in searching their father's home and notifying police).

96. See *Day*, 591 F.3d at 685–86.

97. *State v. Madsen*, 2009 SD 5, 760 N.W.2d 370, represents an interesting example of a case where sufficient governmental involvement existed to support a finding of agency within the private policing context. In *Madsen*, the defendant was convicted for various drug-related crimes based on evidence obtained by security guards at the Royal River Casino Hotel in Flandreau, South Dakota. *Id.* ¶¶ 1–3, 760 N.W.2d at 371–72. The hotel was owned by the Flandreau Santee Sioux Tribe. *Id.* ¶ 3, 760 N.W.2d at 372. It is important to note that the trial record did not clearly define "whether the Tribe itself

or even compulsion, is not present under Virginia's regulatory scheme given that the Fourth Circuit correctly characterized the armed security officers' actions as regulated, but permissive, conduct.⁹⁸ In comparison to the regulatory scheme applicable in *Skinner*, it is not clear that Virginia's regulatory framework has removed all barriers to an armed security officer's action⁹⁹ or created any preference for armed security officer action or inaction.

Moreover, within the *Day* context, the case-by-case, fact-intensive inquiry required by the two-factor test is a practical approach when considering suppression for at least two reasons: (1) suppression, through the use of the exclusionary rule, should be applied cautiously,¹⁰⁰ and (2) it is not clear that the suppression of evidence would deter all private police.¹⁰¹ At a minimum, the

operate[d] the casino and hotel, or whether it maintain[ed] an operating contract with a third party." *Id.* ¶ 3 n.1, 760 N.W.2d at 372 n.1. In overturning the lower court's denial of the defendant's motion to suppress, the *Madsen* court relied heavily on a Ninth Circuit agency test analogous to the two-factor test applied in *Day*. *See id.* ¶ 29, 760 N.W.2d at 380. Important factors in establishing control for the *Madsen* court—despite the failure to clearly show direct management of the facility—were the tribal government's hiring of tribal members for security positions in both the casino and hotel, *id.* ¶¶ 3, 24, 760 N.W.2d at 372, 378, and the tribe's designation of policies and procedures governing the security guards' behavior associated with the lawful operation of the facility under the Indian Gaming Regulations, *id.* ¶ 24, 760 N.W.2d at 378. In sum, the *Madsen* court held that the security guards were "government actors" whose activities were subject to the exclusionary rule. *See id.* ¶ 31, 760 N.W.2d at 381.

98. *See Day*, 591 F.3d at 685–86. Even in Virginia, however, instances will occur when government control does exist, requiring case-by-case consideration of the facts and potential suppression of evidence. *See generally* Amy Goldstein, *The Private Arm of the Law*, WASH. POST, Jan. 2, 2007, at A4 (describing the Virginia Department of Criminal Justice Services' development of closer ties between security companies and public police).

99. For example, in the case of arrest, an armed security officer's authority is limited by statute, *see supra* note 87, thus placing a fundamental restriction on the power of an armed security officer to act in many situations. *See infra* notes 124–25 and accompanying text.

100. *See United States v. Janis*, 428 U.S. 433, 459 (1976) (stating that when applying the exclusionary rule "[t]here comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches"). In *Janis*, the Supreme Court "conclude[d] that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." *Id.* at 454; *see also* Sklansky, *supra* note 4, at 1267–68 ("The Supreme Court has instructed that the exclusionary rule should apply only when its incremental value in deterring constitutional violations outweighs its cost for 'truth-finding' and law enforcement.").

101. *Compare United States v. Francouer*, 547 F.2d 891, 894 (5th Cir. 1977) (arguing against the extension of the exclusionary rule to Disney World security officers), *and Joh*, *supra* note 8, at 118–20 (describing the ineffectiveness of suppression in a hypothetical

effectiveness of suppression as a motivator may be limited;¹⁰² consequently, its extension has been restricted in various contexts, including situations where direct government violation of constitutional rights did not result in the application of the exclusionary rule.¹⁰³ The apparent diminished deterrent effect of suppression in many private policing contexts is not a component of

private policing example), and *Simmons*, *supra* note 4, at 931 (arguing that the incentive system upon which the Fourth and Fifth Amendments are based (i.e., exclusion of evidence) is ineffective within the private policing context), with *State v. Keyser*, 369 A.2d 224, 225 (N.H. 1977) (arguing that the exclusionary rule may be effective in certain private policing contexts), and *Sklansky*, *supra* note 4, at 1268–69 (arguing that it is unclear what impact the exclusionary rule has on private police), and Sean James Beaton, Comment, *Counterparts in Modern Policing: The Influence of Corporate Investigators on the Public Police and a Call for the Broadening of the State Action Doctrine*, 26 *TOURO L. REV.* 593, 599–603 (2010) (describing specific instances where private police have a significant interest in criminal prosecution).

102. See 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 1.8(a), at 258 (4th ed. 2004) (describing the ineffectiveness of exclusion on a private searcher); see also *Janis*, 428 U.S. at 459 (“In the past this Court has opted for exclusion in the anticipation that law enforcement officers would be deterred from violating Fourth Amendment rights. Then, as now, the Court acted in the absence of convincing empirical evidence and relied, instead, on its own assumptions of human nature and the interrelationship of the various components of the law enforcement system.”). For further consideration of LaFave’s arguments and the complications associated with the often mixed motivations of private police, see *Sklansky*, *supra* note 4, at 1268–69.

103. See *Janis*, 428 U.S. at 434, 454 (holding that the exclusionary rule does not apply to unconstitutionally seized evidence by a state law enforcement officer, making it admissible in a civil proceeding by the United States); LAFAVE, *supra* note 102, § 1.8(d), at 295–98; *Euller*, *supra* note 52, at 672 n.83. Generally speaking, “exclusion can be an effective deterrent only if two conditions are met: (i) ‘the searcher must have a strong interest in obtaining convictions’; and (ii) ‘the searcher must commit searches and seizures regularly in order to be familiar enough with the rules to adapt his methods to conform to them.’” LAFAVE, *supra* note 102, § 1.8(d), at 291 (footnote omitted). Regarding the former requirement, a strong argument can be made that many private police, including the armed security officers in *Day*, are primarily motivated to prevent or detect crime, not investigate it for potential prosecution. See, e.g., Brief of the United States, *supra* note 30, at 8–9 (describing policies of the armed security officers’ employer, American Security Group). Regarding the latter requirement, however, private police in many instances are “‘repeat players’ who possess incentives to use legal rules strategically.” *Joh*, *supra* note 8, at 112. In contrast, it has also been argued that “[g]uards seldom investigate, interrogate, make investigative searches, or arrest suspects.” *Euller*, *supra* note 52, at 682. *But see Sklansky*, *supra* note 4, at 1179 (“[T]he security industry as a whole probably carries out significantly more stops, searches, and interrogations than is often imagined.”). Ultimately, the frequency of searches and interrogations likely relates to the individual private police officer’s duties and job responsibilities. See *Sklansky*, *supra* note 4, at 1179; see also *supra* note 20 (describing instances in which private police are off-duty police officers or have been deputized). Nevertheless, it is possible that any increased interest in prosecution would result in agency and the increased effectiveness of suppression as a deterrent. Cf. *Boghossian*, *supra* note 8, at 202–03 (describing an increasing interest in criminal prosecution in the private policing sector and the cooperative relationships that are developing with public policing entities).

the two-factor test analysis, yet it does provide invaluable context for understanding the practical effectiveness of any sanction resulting from a finding of agency or state action within a criminal proceeding.¹⁰⁴ This is particularly true in *Day*, where it is not clear that a desire to achieve a successful prosecution motivated the armed security officers.¹⁰⁵

III. THE PUBLIC FUNCTION TEST: THE *DAY* DISSENT

The Supreme Court considers the suppression of evidence an effective sanction in deterring public police from violating constitutional protections.¹⁰⁶ As a result, evidence improperly acquired by public police may be subject to suppression.¹⁰⁷ Similarly, if the armed security officers in *Day* were shown to be “*de facto* police,” the evidence they obtained would also be subject to suppression.¹⁰⁸ The *Day* majority, therefore, considered whether the armed security officers acted as *de facto* police under the public function test, which would potentially qualify them as state agents or actors.¹⁰⁹

Under the public function test, “[a] private entity may be deemed a state actor . . . if it performs functions that are ‘traditionally the exclusive prerogative of the State.’”¹¹⁰ The police function and the

104. *Cf. Joh, supra* note 4, at 616 (arguing that the expansion of the state action doctrine may be appropriate when private police place more emphasis on pursuing prosecution; however, when this is not the case, any subsequent expansion may have no effect).

105. *Cf. United States v. Day*, 591 F.3d 679, 686 (4th Cir. 2010) (arguing that the private officers’ “objective of ‘deterring crime’ is entirely consistent with [their] responsibility to protect the tenants and property of the Regency Lake apartment complex, irrespective of any simultaneous goal of assisting law enforcement”).

106. *See Terry v. Ohio*, 392 U.S. 1, 12–13 (1968).

107. *See id.*

108. *See United States v. Day*, 590 F. Supp. 2d 796, 800–04 (E.D. Va. 2008) (“ ‘Where private security guards are endowed by law with plenary police powers such that they are *de facto* police officers, they may qualify as state actors under the public function test.’ ” (quoting *Romanski v. Detroit Entm’t, L.L.C.*, 428 F.3d 629, 637 (2005))), *rev’d*, 591 F.3d 679 (4th Cir. 2010).

109. *See Day*, 591 F.3d at 687–89.

110. *Wade v. Byles*, 83 F.3d 902, 905 (7th Cir. 1996) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)). The *Day* majority makes clear that “the ‘public function’ test [is] typically utilized for assessing a private party’s susceptibility to a civil rights suit under 42 U.S.C. § 1983.” *Day*, 591 F.3d at 687; *see also State v. Santiago*, 2009-NMSC-045, ¶ 31, 217 P.3d 89, 98 (finding that the public function test has only been applied in a limited number of jurisdictions in the context of the Fourth Amendment). Interestingly, the primary cases examined by the *Day* dissent were civil actions under 42 U.S.C. § 1983. *See Day*, 591 F.3d at 689–92 (Davis, J., dissenting in part). Given that the ultimate sanction in *Day* is suppression, a cost imposed on the government, *see Brief of the United States*,

associated authority to arrest have been identified by courts as “‘basic functions of government.’”¹¹¹ Unfortunately, a significant challenge exists when applying the public function test within this context because even though policing may be identified as a basic function of government, this designation appears to have little bearing on its status as a power reserved “traditionally” and “exclusively” for government.¹¹²

The *Day* majority assumed that even if “plenary arrest authority alone could transform a private individual into a state actor, [the armed security officers] did not possess the same power to make warrantless arrests afforded to Virginia police officers.”¹¹³ A public police officer’s broad authority “to ‘arrest, without a warrant, any person who commits any crime in the presence of the officer and *any* person whom he has reasonable grounds or probable cause to suspect

supra note 30, at 43–44, not the armed security officers, it is necessary to consider the fundamental distinction between the two-factor test and the public function test. As stated by the *Santiago* court:

Whereas the agency test looks at the relationship between the private actor and the government, “[t]he public function strand of state action theory states that when a private citizen performs tasks and exercises powers that are traditionally governmental in nature, he will be treated as a government actor. He will be subject to the same restrictions as the government, even in the absence of direct contact between him and a government official or agency.”

Santiago, 2009-NMSC-045, ¶ 29, 217 P.3d at 98 (quoting Euler, *supra* note 52, at 657). This distinction highlights an underlying discomfort some courts may have in effectively punishing the government through the suppression of evidence as a result of a private individual’s actions without clear government involvement. *See id.* ¶¶ 36–37, 217 P.3d at 100. This is particularly true when the sanction itself may have no impact on the future conduct of the private actor, *see supra* notes 100–03 and accompanying text, or when the government has not delegated plenary police powers to the private actor, *see Santiago*, 2009-NMSC-045, ¶¶ 33–37, 217 P.3d at 99–100.

111. *Rodriguez v. Smithfield Packing Co.*, 338 F.3d 348, 355 (4th Cir. 2003) (quoting *Foley v. Connelie*, 435 U.S. 291, 297–98 (1978)); *see also* *Flagg Bros. v. Brooks*, 436 U.S. 149, 163 (1978) (describing “police protection” as an activity that has “been administered with a greater degree of exclusivity by States and municipalities” relative to other activities); *Day*, 591 F.3d at 688 (discussing *Rodriguez*).

112. *See* Sklansky, *supra* note 4, at 1253–62 (discussing, among other things, the uncertainty created by the United States Supreme Court’s statements regarding the status of “police protection” as a public function in *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978)); *see also* *Beaton*, *supra* note 101, at 607–08 (discussing the issues associated with applying the public function test within the private policing context). For an extensive discussion of the more recent complexities associated with the United States Supreme Court’s public function doctrine, *see* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 379–90 (1997).

113. *Day*, 591 F.3d at 688–89.

of having committed a felony not in his presence’ ”¹¹⁴ is not an “insignificant” detail when determining whether a government has delegated plenary arrest power to a private party.¹¹⁵ A public police officer’s comprehensive arrest power represents a true plenary police power, while armed security officers are “ ‘permitted to exercise only what [a]re in effect citizens’ arrests.’ ”¹¹⁶ The *Day* dissent, however, disagreed with this conclusion.¹¹⁷

Applying the public function test, the *Day* dissent concluded that the armed security officers possessed extensive police powers, most notably “generous arrest authority,” were subject to extensive regulation, and were therefore state actors.¹¹⁸ Consequently, the *Day* dissent would have required the armed security officers to comply with the same constitutional standards as public police.¹¹⁹

Interestingly, the degree of arrest authority exercised by or granted to private police plays a crucial role in state action analysis.¹²⁰ In *Lindsey v. Detroit Entertainment, LLC*,¹²¹ for example, casino security guards that detained suspected slot machine thieves did not exercise an identifiable police power, like misdemeanor arrest authority,¹²² but rather a power possessed by ordinary citizens

114. *Id.* at 688 (quoting VA. CODE ANN. § 19.2-81 (2008)).

115. *Compare id.* at 693 (Davis, J., dissenting in part) (describing the difference in scope of arrest as “sufficiently insignificant to declare that Virginia guards possess authority akin to plenary authority” (citing *Romanski v. Detroit Entm’t, L.L.C.*, 428 F.3d 629, 638 n.3 (6th Cir. 2005)), *with id.* at 688–89 (majority opinion) (arguing that the scope of arrest is more limited).

116. *Id.* at 689 (majority opinion) (quoting *Romanski v. Detroit Entm’t, L.L.C.*, 428 F.3d 629, 639 (6th Cir. 2005)).

117. *See id.* at 692–93 (Davis, J., dissenting in part).

118. *See id.* at 690–93. The focus in this section will be based primarily on the scope of arrest power given that the general regulatory framework has already been explored in detail. *See supra* Part II.

119. *See Day*, 591 F.3d at 693 (Davis, J., dissenting in part).

120. *See Joh, supra* note 8, at 92. In general, the doctrine of state action and its application to private police have challenged the courts. *Id.* at 95 (noting, however, that “[m]uch . . . scholarship takes the view that the state action doctrine, if carefully applied, would qualify private police as state actors”). Challenges persist because state action doctrine, as it applies to the police function, is rarely litigated, resulting in very little case law available for distinguishing private from public within the policing context. *See id.* at 94. As a result, courts generally rely on the presence or absence of official title, *see Sklansky, supra* note 4, at 1246, like deputization, *see supra* note 20. Accordingly, “courts have been more concerned with the line distinguishing public police from *all* other people, rather than with private police as a separate category warranting distinct legal status.” *Joh, supra* note 8, at 95. Unfortunately, the risk of broadly applied state action is a loss of meaning for this doctrine, creating an environment in which almost all private activity results in state action. *See Sklansky, supra* note 4, at 1250, 1261–62.

121. 484 F.3d 824 (6th Cir. 2007).

122. *See id.* at 829. In *Lindsey*, the security personnel were not licensed under Michigan

comparable to the common law shopkeeper's privilege.¹²³ This distinction is crucial—although Virginia defines an armed security officer's arrest authority, this does not independently create a grant of plenary police powers.¹²⁴ Virginia has instead instituted a narrow regulatory system that allows an armed security officer to exercise the equivalent of a citizen's privilege of arrest.¹²⁵

In contrast, in both *Romanski v. Detroit Entertainment, L.L.C.*¹²⁶ and *Payton v. Rush-Presbyterian-St. Luke's Medical Center*,¹²⁷ on which the *Day* dissent relied,¹²⁸ states delegated plenary police powers comparable to public police officers to the security guards in question.¹²⁹ In *Romanski*, the State delegated “ ‘the authority to arrest a person without a warrant as set forth for public peace officers.’ ”¹³⁰ In *Payton*, in which the security personnel were licensed as “special Chicago police officers,”¹³¹ the Seventh Circuit concluded that “no legal difference exist[ed] between a privately employed special officer with full police powers and a regular Chicago police officer.”¹³²

In *Day*, however, the armed security officers were subject to more extensive limitations on their ability to execute an arrest. Though they were capable of making “an arrest for *any* offense occurring in their presence while on the premises they guard, and even for some (primarily shop-lifting-related) offenses not occurring

law; therefore, they did not have misdemeanor arrest authority. *Id.* The importance of licensure and the arrest authority it granted were critical issues in the court's holding. *Id.* at 829–31.

123. *See id.* at 831 (citing *Chapman v. Higbee Co.*, 319 F.3d 825, 834 (6th Cir. 2003)). The common law shopkeeper's privilege allows a merchant to detain a suspected shoplifter if the merchant believes that the individual did in fact steal store property. PROSSER AND KEETON ON THE LAW OF TORTS § 22, at 141–42 (W. Page Keeton et al. eds., 5th ed. 1984). In Virginia, this privilege is codified in VA. CODE ANN. § 8.01-226.9 (2007).

124. *See Day*, 591 F.3d at 688–89.

125. *See id.* A citizen may arrest for an offense of the peace committed in his presence, including misdemeanors and felonies. *See Hudson v. Commonwealth*, 585 S.E.2d 583, 588 (Va. 2003). For a more detailed discussion of citizen's arrest at common law generally, see M. CHERIF BASSIOUNI, *CITIZEN'S ARREST: THE LAW OF ARREST, SEARCH, AND SEIZURE FOR PRIVATE CITIZENS AND PRIVATE POLICE* 9–13 (1977).

126. 428 F.3d 629 (6th Cir. 2005).

127. 184 F.3d 623 (7th Cir. 1999).

128. *See Day*, 591 F.3d at 691–92 (Davis, J., dissenting in part).

129. *See Romanski*, 428 F.3d at 637–38; *Payton*, 184 F.3d at 630. In both cases, the private actors were licensed. *Romanski*, 428 F.3d at 638; *Payton*, 184 F.3d at 624–25.

130. *Romanski*, 428 F.3d at 638 (quoting MICH. COMP. LAWS ANN. § 338.1080 (West 2004)).

131. *Payton*, 184 F.3d at 624.

132. *Id.* at 630.

in their presence,”¹³³ this power is not substantially different from the general public’s power of arrest.¹³⁴ The latter grant is arguably the most significant extension of power, yet it only applies to shoplifting offenses or the willful concealment of goods committed “in the presence of a merchant, agent, or employee of the merchant the private security business has contracted to protect.”¹³⁵ In effect, the Virginia statute allows the transfer of the shopkeeper’s privilege from business owners to their armed security officers, which may be a pragmatic safety consideration given the inherent risks associated with confronting a suspected thief.¹³⁶

133. *Day*, 591 F.3d at 692 (Davis, J., dissenting in part) (citing VA. CODE ANN. § 9.1-146 (2006)).

134. *See Day*, 591 F.3d at 688–89; *see also* NEMETH, *supra* note 3, at 70–79 (describing citizen’s arrest and the reality that private police generally possess “no more formal authority than an average citizen”); *supra* note 125 and accompanying text (describing citizen’s arrest). In contrast, it may be argued that little difference exists between the arrest authority of private individuals and public police officers, *see* Sklansky, *supra* note 4, at 1184–87; however, this conclusion would seemingly result in government acquiescence amounting to state action within the context of citizen’s arrest, *see id.* at 1250. This type of conclusion would stretch the boundaries of state action doctrine. *See id.* at 1250; *supra* note 120.

135. VA. CODE ANN. § 9.1-146 (2006). The dissent does point out that “there are . . . circumstances when the law requires that private security guards be deemed ‘arresting officers.’” *Day*, 591 F.3d at 692 (Davis, J., dissenting in part) (citing VA. CODE ANN. § 9.1-146 (2006)). The dissent also notes that private individuals conducting citizen’s arrests are not considered “arresting officers.” *Id.* at 693 n.3. This grant to armed security officers exists so that a summons may be issued, *see* VA. CODE ANN. § 19.2-74 (2008), which is arguably a practical policy decision that allows an armed security officer to avoid the need to arrest and detain an individual, *see supra* note 42 (stating that the decision to arrest *Day* as opposed to issuing him a summons was made by a public police officer). This judgment is practical in the sense that it acknowledges an armed security officer’s greater likelihood of executing an arrest relative to an ordinary citizen and the need for an efficient mechanism to process the individuals she encounters. *Cf. Joh*, *supra* note 8, at 64 (“[P]rivate police are occupationally disposed to use powers that a citizen may rarely, if ever, invoke.”). The dissent’s citation of *Coston v. Commonwealth*, 512 S.E.2d 158 (Va. Ct. App. 1999), in which the Court of Appeals of Virginia recognized a registered security officer issuing a summons as a “‘public officer or public employee,’” *see Day*, 591 F.3d at 695 n.6 (Davis, J., dissenting in part) (quoting *Coston*, 512 S.E.2d at 159–60), is distinguishable. The *Coston* court limited its holding to the issue of whether the defendant could be convicted for the forgery of a public document—the summons. *Coston*, 512 S.E.2d at 159–60. *Coston* made clear that this decision had no application within the Fourth or Fifth Amendment context. *Id.* at 160 (citations omitted). The *Day* majority even noted that the *Coston* court recognized “‘[t]he general rule’ that ‘a private security officer’ is not ‘a public officer or public employee.’” *Day*, 591 F.3d at 689 n.10 (quoting *Coston*, 512 S.E.2d at 160).

136. It could also be argued that this is merely a recognition of an “entity’s basic right to protect persons and property” through a conscious delegation to private police personnel. *See* NEMETH, *supra* note 3, at 70.

The *Day* dissent largely equated the scope of arrest delineated in Virginia's regulatory scheme to a public police officer's authority;¹³⁷ however, if Virginia had delegated a public function to armed security officers sufficient to constitute state action, the State would effectively be left with two options. In short, the State could "(1) withdraw the delegation, or (2) compel the private actor to conform its actions to the requirements of the Constitution as they apply to governmental action."¹³⁸ Unfortunately, neither option would likely produce a favorable outcome within this context.¹³⁹

IV. REGULATING PRIVATE POLICE AFTER *DAY*

After *Day*, many observers may feel that there is little hope of regulating the behavior of private police.¹⁴⁰ First, statutory regulation is minimal in many jurisdictions¹⁴¹ and the effectiveness of civil and/or

137. See *Day*, 591 F.3d at 692–93 (Davis, J., dissenting in part).

138. Buchanan, *supra* note 112, at 345.

139. Withdrawing the delegation, specifically arrest as it is defined in section 9.1-146, would not likely resolve the concerns of the *Day* dissent because the armed security officers could still exercise citizen's arrest or simply take action without regard to any legal justification. In contrast, the extension of constitutional restrictions to armed security officers would fundamentally redefine the methods by which armed security officers provide security services in Virginia. Interestingly, an armed security officer's employer may only be concerned about providing affordable residential security, see Sklansky, *supra* note 4, at 1223 (describing landowner liability for property security), yet the outcome advocated by the *Day* dissent would require the employer to ensure that those services were provided in a constitutionally legitimate manner subject to the constraints of the Fourth and Fifth Amendments. See *Day*, 591 F.3d at 693 (Davis, J., dissenting in part). Presumably, this result would impact the economic viability of the private security option. Brief of the United States, *supra* note 30, at 46; see Sklansky, *supra* note 4, at 1222–23 (describing patrols as labor-intensive activities requiring low-wage employees). For example, armed security guards would not benefit from a qualified immunity defense for civil rights suits under 42 U.S.C. § 1983, potentially subjecting them to greater liability than similarly situated public police officers. Brief of the United States, *supra* note 30, at 43. The end result would be to impact the individual liberty of the employer and create government responsibility where it may not be warranted. Cf. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–37 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.").

140. In the short-term, the recommendations outlined in this section will not address the dilemma faced by *Day*—his apparent belief that the armed security officers who confronted him did in fact have authority to search and interrogate him following their initial confrontation. There seems to be no viable means for addressing this specific situation given that it warranted the officers' initial intervention. In fact, the armed security officers may have done *Day* a great service by intervening. The escalation of events that evening could have easily resulted in two more unfortunate outcomes: *Day* committing murder or being killed himself. Cf. Brief of the United States, *supra* note 30, at 13, 53 (noting that the armed security officers' "presence calmed the situation").

141. See *supra* note 28.

criminal liability is uncertain.¹⁴² Second, the constitutional constraints associated with the Fourth and Fifth Amendments are generally inapplicable to the private police sector.¹⁴³ Unlike a finding of state action under the public function test, which would have likely required a revocation of the delegation or compliance with criminal procedure,¹⁴⁴ the two-factor test employed by the *Day* majority preserves the existing regulatory framework instituted by the State of Virginia. As a result, Virginia may adapt its current regulatory framework to address some of the more fundamental concerns associated with the private policing industry.¹⁴⁵

The following are recommendations that recognize the strengths of Virginia's current security industry regulations and areas where modifications could be made.¹⁴⁶ These recommendations encourage increased information collection regarding the activities of the private police industry and the viability of civil actions and criminal sanctions as regulating forces. While these recommendations focus on Virginia's regulatory framework, they are generally applicable to any jurisdiction interested in reconsidering its own regulatory approach.

142. See *supra* note 28.

143. See *supra* notes 20, 50 and accompanying text.

144. See *supra* note 138 and accompanying text.

145. See Simmons, *supra* note 4, at 931–32; see also NEMETH, *supra* note 3, at 22–23 (describing heightened interest in private police regulation by “state legislatures, federal authorities, and even local governing bodies”). But see Simmons, *supra* note 4, at 931 n.86 (stating that “very little political pressure” exists to expand “state regulation of private security guards”); Sklansky, *supra* note 4, at 1272 (“Legislators have shown little interest in reforming the rules governing the private police, or even in collecting basic information about their operations.”). General change could result, however, if private police misconduct resulted in public outrage or heightened visibility. See NEMETH, *supra* note 3, at 24, 32. The events of *Day*, or analogous situations, may not trigger new regulation, but other bad activity may make change more viable. See generally Lourdes Medrano Leslie & Curt Brown, *Guard Could Face Criminal Charges in Teen’s Shooting*, STAR TRIB. (Minneapolis), Nov. 4, 2003, at 1B (describing the shooting of a sixteen-year-old boy who was suspected of stealing a car radio by a residential security guard); Rene Stutzman, *Guard to Plead in Teen’s Death*, ORLANDO SENTINEL, Jan. 17, 2006, at B3 (describing the shooting of a sixteen-year-old by two apartment complex security guards); Mike Tolson & Mike Glenn, *Security Guard Who Shot Man Jailed, Charged with Murder*, HOUS. CHRON., May 28, 2010, at A1 (describing the shooting of a twenty-year-old by a security guard employed by Top Gun Security & Investigations, a company that had been in business for only four months); *Hooters Sued Over Alleged Attack on Grandmother*, CBS NEWS.COM (Nov. 19, 2010), <http://www.cbsnews.com/stories/2010/11/19/national/main7070904.shtml> (describing a security guard who headlocked a grandmother as a result of a confrontation over a disputed bill).

146. For a somewhat comparable, but dated, approach to private police regulation, see Mark L. Webb et al., *Private Police in California: A Legislative Proposal*, 5 GOLDEN GATE U. L. REV. 115, 137–40 (1974) (arguing for comprehensive legislation of the private police industry in California through adaptation of existing regulatory tools).

A. Information Collection

Governments should commission empirical studies describing the activities and behaviors of private police in order to better understand and effectively regulate the private police industry.¹⁴⁷ Particular focus should be placed on accurately comparing and contrasting the similarities and differences between private and public police.¹⁴⁸ Obtaining the data needed to perform these studies, however, can be difficult given the secrecy associated with this industry.¹⁴⁹

In order to obtain this data, Professor David A. Sklansky recommends that states should require private police entities to “file regular, public reports on their activities, with due regard for legitimate privacy interests.”¹⁵⁰ States could require private police entities to provide information regarding “the number of people they accost and detain, when and how those individuals are questioned, how many suspects are turned over to the police, the number and type of searches conducted by private security personnel, or the circumstances and results of those searches.”¹⁵¹

Virginia’s current regulatory framework provides a foundation for pursuing this objective. First, Virginia requires each licensed private security services business to designate a compliance agent¹⁵² for the organization.¹⁵³ State regulations require compliance agents to possess a minimum of three years of experience in the private security services business (or a related field) and ensure an entity’s compliance with the private security services businesses legislation.¹⁵⁴

The private security regulations assign compliance agents a variety of responsibilities, including “[e]nsur[ing] that the licensee and all employees regulated . . . conform to all application requirements, administrative requirements and standards of conduct.”¹⁵⁵ Furthermore, administrative regulations require

147. See Sklansky, *supra* note 4, at 1278.

148. See *id.* (describing the need to know “more about how the day-to-day activities of private guards differ from those of the public police” in order to better assess potential reforms).

149. *Id.*

150. *Id.*; cf. Enion, *supra* note 4, at 520 (“[P]ublic disclosure requirements do not apply to ‘private’ entities.”).

151. Sklansky, *supra* note 4, at 1279.

152. VA. CODE ANN. § 9.1-138 (2006) (defining “compliance agent” as “an individual who owns or is employed by a licensed private security services business to ensure the compliance of the private security services business with this title”).

153. *Id.* § 9.1-139(A).

154. *Id.*

155. 6 VA. ADMIN. CODE § 20-171-240(10)(a) (2010).

compliance agents to “[m]aintain documentation for all employees . . . that verifies compliance with requirements pursuant to the Code of Virginia.”¹⁵⁶ State law requires the maintenance of these records in part to ensure their availability for inspection by Virginia’s administrative oversight body.¹⁵⁷

Second, the private security services businesses administrative regulations currently require a licensee to report “any incident in which any registrant has discharged a firearm while on duty.”¹⁵⁸ Taken together, Virginia’s relevant statutes and regulations provide the basic elements needed to effectively gather empirical evidence regarding the behavior of private police: (1) an oversight body, (2) an organizational compliance agent, and (3) a model notification requirement. Compliance agents could be used to periodically report specific data regarding the number of times security personnel place individuals in constraints, perform searches, remove individuals to private interrogation rooms, or turn over evidence to public law enforcement entities.¹⁵⁹ Collection of this data would provide a better understanding of the private police industry in Virginia and could be used to develop more targeted legislation in the future.¹⁶⁰

B. Encourage Civil Action and Increase Criminal Punishments

The suppression of evidence in criminal prosecutions may not encourage a significant number of private police to comply with the privacy and personal autonomy objectives of the Fourth and Fifth Amendments.¹⁶¹ In many situations, including the circumstances in *Day*, suppression will not incentivize private police to the same extent as their public police counterparts given that successful criminal prosecutions may not be their primary objective.¹⁶² In fact, private police may wish to avoid prosecutions and the organizational costs associated with participating in criminal proceedings altogether.¹⁶³

156. § 20-171-240(10)(b).

157. 6 VA. ADMIN. CODE § 20-171-220(1) (2010).

158. § 20-171-220(15).

159. See Sklansky, *supra* note 4, at 1279.

160. See, e.g., Simmons, *supra* note 4, at 981 (describing the need for empirical study regarding how adequately tort actions deter private police misconduct). Professor Ric Simmons argues that empirical evidence could provide a basis for modifying the tort system to adequately deter misconduct, including “lower[ing] the barriers to bringing suit, or increas[ing] the punitive damages available once mistreatment has been proven.” *Id.*

161. See *supra* notes 101–03 and accompanying text.

162. See *supra* notes 103–05 and accompanying text.

163. See Joh, *supra* note 8, at 122; Simmons, *supra* note 4, at 938, 961.

Individual private police misconduct, in contrast, may be directly subject to civil and criminal liability.¹⁶⁴ Specifically, misconduct may result in liability for trespass, false imprisonment, and assault.¹⁶⁵ A theory supporting the effectiveness of tort liability, for example, is that successful claims will encourage more desirable behavior given the associated costs of misconduct.¹⁶⁶ One may argue that violations of constitutional protections will not frequently produce viable tort liability claims; however, even limited success may have a positive incremental effect on private police behavior.¹⁶⁷

Though the effectiveness of civil and criminal liability in this context may be minimal, or at least uncertain,¹⁶⁸ it does allow for a private police officer to be held personally liable for certain forms of misconduct.¹⁶⁹ Subjecting an armed security officer to civil and criminal liability links the misconduct and accountability more closely than the suppression of evidence.¹⁷⁰ A robust tort and criminal liability system represents a more viable incentive mechanism for encouraging private police to respect personal privacy and individual autonomy.¹⁷¹

Virginia has already instituted a number of regulatory provisions that provide a foundation for achieving and maintaining a dynamic tort and criminal liability system. First, Virginia law establishes an oversight body that is responsible for receiving complaints and conducting investigations regarding violations committed by private

164. See, e.g., Sklansky, *supra* note 4, at 1183. In Virginia, registered or licensed security entities or personnel are subject to administrative discipline, including loss of registration or licensure, probation, fines, and remedial training. See 6 VA. ADMIN. CODE § 20-171-500 (2010).

165. See Sklansky, *supra* note 4, at 1183 (“Unless the owner has given consent, a security guard’s search of private property will generally constitute a trespass. And arrests or detentions not authorized by state law generally will expose a security guard to civil and criminal liability for false imprisonment and, if force is involved, for assault.”).

166. Cf. Miller & Wright, *supra* note 28, at 781 (discussing tort judgments and their impact on public police behavior). Interestingly, it is at least arguable that civil liability may have even greater impact on private conduct relative to government activity. See *id.*

167. See *id.* at 772–73 (referencing Fourth Amendment tort liability claims).

168. See Sklansky, *supra* note 4, at 1185–86. But see Simmons, *supra* note 4, at 979–81 (arguing that the tort system is an effective regulatory device for private police).

169. Cf. Simmons, *supra* note 4, at 980 (stating that private police do not benefit from qualified or sovereign immunity); Sklansky, *supra* note 4, at 1186 (stating that public police, acting in good faith, “generally are immunized from tort or criminal liability”). It should be noted that civil action against public police officers may be more attractive given that “suits alleging constitutional violations by officers acting ‘under color of state law’ can proceed under 42 U.S.C. § 1983, which entitles victorious plaintiffs to recover not only damages but attorneys’ fees as well.” Sklansky, *supra* note 4, at 1186–87.

170. See Simmons, *supra* note 4, at 980–81.

171. See *id.* at 981.

police.¹⁷² More importantly, the private security services businesses regulations require that any “[i]nformation concerning alleged criminal violations shall be turned over to law-enforcement officers in appropriate jurisdictions.”¹⁷³ Second, it is “unlawful for any person to . . . [v]iolate any statute or regulation governing the practice of the private security services businesses.”¹⁷⁴ Conviction for a willful violation of this provision constitutes a class 1 misdemeanor.¹⁷⁵ As a result, an armed security officer could face a maximum twelve-month prison sentence and/or a \$2,500 fine for willful violation of the private security services businesses legislation.¹⁷⁶ Third, Virginia requires private security services businesses to maintain a surety bond or liability insurance as a requirement of licensing.¹⁷⁷ The bond and liability insurance exist for individuals injured by the misconduct of licensed private police who win a judgment that remains unsatisfied.¹⁷⁸

In sum, increased information collection and the encouragement of a robust civil and criminal liability system would address some of the concerns associated with private policing. Based on the *Day* majority’s two-factor analysis, it is unlikely that the suggestions outlined above would create an agency relationship because they would not result in governmental control of an armed security officer’s individual behavior.¹⁷⁹ Increased regulation could be achieved without also triggering governmental accountability for an armed security officer’s misconduct. It is possible that increased disclosure could produce a factual record revealing significant cooperation between private police and government actors and result

172. See VA. CODE ANN. § 9.1-142(B) (2006).

173. *Id.*

174. *Id.* § 9.1-147(A)(4).

175. § 9.1-147(B). Presumably, a licensee would have lost their license at this point, *see, e.g., id.* § 9.1-145(C), but any third or subsequent conviction under this provision would result in a class 6 felony, § 9.1-147(B); *see also* VA. CODE ANN. § 18.2-10(f) (2009) (“For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.”).

176. VA. CODE ANN. § 18.2-11(a) (2009) (“For Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both.”).

177. See VA. CODE ANN. § 9.1-144(A) (2006); *see also* 6 VA. ADMIN. CODE §§ 20-171-50(B)(2), -60(C)(2) (2010) (setting the minimum liability coverage for licensing and renewal at \$100,000).

178. See § 9.1-144(B).

179. See *supra* Part II.

in a court finding agency.¹⁸⁰ Nevertheless, any such finding would likely be legally justified and desirable.¹⁸¹

CONCLUSION

The Fourth Circuit's decision in *United States v. Day* is an appropriate application of government agency case law. Without direct guidance from the United States Supreme Court regarding the status of private police, courts are left with difficult questions and unclear solutions; however, courts should only find state action or agency when the actions of private policing personnel can rightly be attributed to the government.

Virginia's regulation of private security services businesses did not create an agency relationship between the government and the armed security officers who arrested, searched, and questioned Day. Though Virginia's regulation was not entirely passive, in that it defined the limits of the armed security officers' authority, the government did not participate in or encourage the activities of those officers. Furthermore, without a delegation of plenary police powers, it is unreasonable to designate their activities as an exclusively public function or the exercise of a sovereign power.

Concerns about the abuse of authority and the violation of constitutional rights by armed security officers are legitimate. The facts presented in *Day*, however, do not require compliance with the procedural safeguards of the Fourth and Fifth Amendments. Ultimately, the benefits of comprehensive government regulation may be the most viable mechanism for holding private police accountable in this context.

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180. See *supra* Part II.

181. Cf. Sklansky, *supra* note 4, at 1268–69 (arguing that as the distinction or separation between private and public police diminishes, the extension of constitutional limitations to private police activities may be warranted).

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