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THE PARADOX OF PRIVATE POLICING

ELIZABETH E. JOH*

INTRODUCTION

"Most people think of security as some unarmed fat guy that can't speak English at the 7-Eleven. . . . That's not us at all. We're very policelike, even though we are security officers."

—Security guard employed by Intervention Agency, a security firm.[1]

Those who worry about the encroaching powers of the public police in the war against terrorism ignore an equally important group. Increasingly, the *private* police are considered the first line of defense in the post-September 11th world.[2] Hardly anything is known about the private police, yet they are by far the largest provider of policing services in the United States, at least triple the size of the public police. More importantly, the functions, responsibilities, and appearance of the private and public police are increasingly difficult to tell apart. This development has been surprisingly underappreciated. What's more, the law recognizes a nearly absolute distinction between public and private. This means that private police are largely unburdened by the law of constitutional criminal procedure or by state regulation. While the law multiplies distinctions between private and public police, the two groups perform many of the same tasks, and private

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[1] Bud Hazelkorn, *Making Crime Pay*, S.F. CHRON. MAG., Aug. 17, 2003, at 14, 17.

[2] *See, e.g.*, Mimi Hall, *Private Security Guards are Homeland's Weak Link,* USA TODAY, Jan. 23, 2003, at 1A, *available at* 2003 WL 5303940 (noting that private guards are "the first line of defense against terrorism"); *accord* Service Employees International Union, *Safer Buildings For A Safer America, available at* http://www.seiu.org/building/security (last visited Mar. 5, 2004).

police benefit from heavy public involvement. This is the paradox of private policing.

Private police long ago outpaced the public police in terms of persons employed and dollars spent. Today they provide crime control and order maintenance services in many of the places in which we work and live. Uniformed guards patrol shopping malls, "gated communities," and even public streets.[3] Employers routinely hire private investigative agencies to conduct background checks on prospective employees.[4] Many of these privately paid police behave like public law enforcement officers: detaining individuals, conducting searches, investigating crimes, and maintaining order. Because few empirical studies exist, the private police remain largely unknown. Courts have not developed comprehensive rules governing private police, and statutory regulation is minimal, even non-existent in some states.[5] To make matters worse, legal scholars—especially those who study the public police—have paid them hardly any attention.[6]

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[3] *See, e.g.*, Wall Street Garage Parking Corp. v. N.Y. Stock Exch., 2004 WL 727069, at *6 (N.Y. Sup. Ct. Mar. 12, 2004) (granting a preliminary injunction to the owner of a parking garage affected by searches by private police forces on public streets within a security zone established by the N.Y.P.D.).

[4] *See, e.g.*, Karen Dybis, *Firms Go High-Tech to Screen Applicants*, DET. NEWS, June 22, 2004, at 1A (reporting popularity of private screening services used to check prospective employees).

[5] *See, e.g.*, Jeffrey R. Maahs & Craig Hemmens, *Guarding the Public: A Statutory Analysis of State Regulation of Security Guards*, 21 J. CRIME & JUST. 119, 119 (1998) ("What passes for regulation in some states is little more than asking applicants to promise that they are qualified to be a security guard.").

[6] Law school casebooks devote, if at all, only a few pages to private police. For example, see RONALD ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 616-17 (2001), with 1500+ textual pages but only two pages on the private police. The small body of legal scholarship on private policing focuses almost exclusively on the applicability of the state action doctrine of federal constitutional law. Most of this scholarship has been limited to work by law students and recent law school graduates. *See, e.g.*, Heather Barr, *More Like Disneyland: State Action, 42 U.S.C. § 1983, and Business Improvement Districts in New York*, 28 COLUM. HUM. RTS. L. REV. 393 (1997); Steven Euller, *Private Security and the Exclusionary Rule*, 15 HARV. C.R.-C.L. L. REV. 649 (1980); Gloria G. Dralla et al., Comment, *Who's Watching the Watchman? The Regulation, or Non-Regulation of America's Law Enforcement Institution, The Private Police*, 5 GOLDEN GATE U. L. REV. 433 (1975); Lynn M. Gagel, Comment, *Stealthy Encroachments Upon the Fourth Amendment: Constitutional Constraints and Their Applicability to the Long Arm of Ohio's Private Security Forces*, 63 U. CIN. L. REV. 1807 (1995); Note, *Private Assumption of the Police Function Under the Fourth Amendment*, 51 B.U. L. REV. 464 (1971); Note, *Private Police Forces: Legal Powers and Limitations*, 38 U. CHI. L. REV. 555 (1970); Note, *Regulation of Private Police*, 40 S. CAL. L. REV. 540 (1966); Comment, *Shoplifting Law: Constitutional Ramifications of Merchant Detention Statutes*, 1 HOFSTRA L. REV. 295 (1973). David Sklansky's 1999 article, *The Private Police*, is an important exception. Sklansky presents the most comprehensive legal discussion of private policing to date. His article does not discuss many of the issues

This Article begins to remedy that ignorance, by drawing a contrast between the rigid legal conception of the private police, on the one hand, and their increasingly complicated and shifting social role on the other. Drawing upon materials from ethnographic observation, sociology, and law, this Article argues that private police participate in much of the policing work that their public counterparts do. Although every private police agency may not perform all the tasks that a public police department does, many do, and private police in the aggregate unquestionably perform all of these duties. This apparently simple observation warrants reconsideration of the private police by courts and academics. Their common legal characterization as mere "night watchmen," is both dated and inadequate.[7]

Exactly what constitutes "policing" and who may legitimately call themselves "police" are now contested issues. As a consequence, the regulatory framework governing the police, by giving insufficient consideration to these increasingly unsettled questions, creates legal distinctions at odds with actual police work.[8] Furthermore, the contemporary proposition that private police ought to serve as *partners* with public police in a common enterprise of crime prevention must be met with caution, for these partnerships carry unresolved questions as to the proper balance of burdens, benefits, and controls that are distributed between the public and private sectors.[9]

How stark is the contrast that I have drawn? Consider the following example. A store clerk in a Florida town alerted a police officer, named Morgan, that he had seen several counterfeit fifty-dollar bills redeemed that morning. In response, Morgan alerted nearby shopkeepers, and then observed Thomas Francoeur pass one such counterfeit bill. Followed by Morgan, Francoeur completed his transaction and then met with two associates, Jack Pacheco and Robert Pizio. After summoning a fellow officer, Morgan stopped the three men, showed them his badge, and told them to follow him to his office. Once there, another officer, Schmidt, examined a book one of the detained men had turned over, and found inside nine counterfeit fifty-dollar bills. The three men also surrendered plane tickets bearing false names, and a key to a room in a local motel, in which police later found hotel receipts with the same false identities. While in custody,

raised here, however, including situating the analysis within the theoretical literature on policing, and discussing the patterns of cooperation between public and private police organizations. *See generally* David Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999). For further discussion, see *infra* Part III.A.1.

[7] *See infra* notes 10-11 and accompanying text.

[8] *See infra* Part II.

[9] *Id.*

Francoeur, Pacheco, and Pizio stood behind a one-way mirror so that shop employees could identify them. The three men were later convicted of passing counterfeit currency and conspiracy.[10]

Officers Morgan and Schmidt were private police officers; their jurisdiction, Disney World. Though Morgan's behavior differed little from that of a public police officer, the Fifth Circuit Court of Appeals thought otherwise, and in 1977 rejected Francoeur's claims that Morgan and Schmidt had violated his Fourth Amendment rights. In its view, Disney World was "an amusement park to which admission is charged. . . . No one is permitted into the outer gates of Disney World except by consent of its owners."[11] Disney World was not a community, according to the court, and consequently, Morgan was not like a police officer responsible for that community. While the court offered few facts about the Disney police department, today the eight-hundred member security force of Disney World, solely responsible for patrolling the hundreds of acres of Disney property, answers 911 calls, and investigates crimes up until the point of arrest.[12] Officers Morgan and Schmidt looked like police, behaved like police, but in the view of the *Francoeur* court, were not "real" police.

Twenty years later, a Florida state court characterized Disney police just as the *Francoeur* court had. In *Sipkema v. Reedy Creek Improvement District*,[13] the parents of Rob Sipkema, invoking the Florida Public Records Act, sued Reedy Creek, a holding company managed by the Disney Corporation,[14] to obtain copies of the operations manual used by Disney police. A high speed chase conducted by Disney police led to an accident resulting in Sipkema's death. [15] While the appellate court summarily affirmed the trial court's refusal to require Disney to produce the records, Judge Harris, in a concurring opinion, provided a glimpse into one judge's view of the Disney police. These employees issued only "Mickey Mouse . . . citations," and provided "*night watchman*" rather than "*law enforcement*" services.

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[10] United States v. Francoeur, 547 F.2d 891, 892 (5th Cir. 1977).

[11] *Id.* at 894.

[12] *See* CARL HIAASEN, TEAM RODENT: HOW DISNEY DEVOURS THE WORLD 27-37 (1998) (describing private policing of Disney World).

[13] 697 So. 2d 880 (Fla. Dist. Ct. App. 1997).

[14] *See* HIAASEN, *supra* note 12, at 26 ("Everybody in Orlando knows that Reedy Creek is Disney and Disney is Reedy Creek.").

[15] *Id.* at 31-35; *see also* Kent Wetherell, *Florida Law Because of and According to Mickey: The "Top 5" Florida Cases and Statutes involving Walt Disney World*, 4 FLA. COASTAL L.J. 1, 20-22 (2002).

Therefore, they could not be considered government entities for purposes of the state public records law.[16]

More than twenty-five years after *Francoeur* was decided, the Fifth Circuit's view of private policing remains the dominant one in American legal thinking. From this standpoint, only public employees paid by tax dollars, and no one else, are the police.[17] This Article explains how this inaccurate assessment produces a tension between law and police practices, as well as opportunities for exploiting that tension.

Consideration of private policing poses some preliminary questions: defining more precisely the term "private policing," and distinguishing private from public policing. Accordingly, Part I provides a definition and the socio-legal context for the following parts.[18]

Relying principally on a case study, Part II demonstrates three points about the present state of private policing. First, the advocacy of private-public partnerships creates incentives for ever greater involvement between the two policing groups. Second, as that case study shows, meaningful dis-

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[16] *Sipkema*, 697 So. 2d at 882 (emphases added). Judge Harris described in more detail the nature of Disney policing operations:

> Disney issues only Mickey Mouse traffic citations. Such citations are issued only to Disney employees, in order to encourage them to obey the speed limits and to otherwise drive safely on Disney property. The citations have no force of law—no fines are authorized and no points are assessed. The citations are placed in the employee's personnel file for appropriate action based on the number and severity of the violations. Non-employees may be stopped by Disney security employees in order for the employees to caution such persons to slow down or otherwise drive more safely, but citations are not issued to non-employees. The actions of repeat or continuing non-employees offenders are reported to deputies of the Orange County Sheriff's Department. This is no more law enforcement than the action of one asking his teenage neighbor to slow down while driving in the neighborhood because there are small children playing.

Id.

[17] For further discussion of the contrasting legal status of public and private police, see *infra* Part III.

[18] I focus primarily on the structure and behavior of private police as they relate to law, rather than on the culture and institutions within private policing organizations. Accordingly, I do not discuss areas such as individual exercises of authority, the occupational effects on the daily lives of private police employees, or any subcultures of private policing, although these areas, which have been studied extensively with respect to public policing, deserve attention and research. With regard to the public police, there are a number of classic studies in these areas, including: WILLIAM K. MUIR, POLICE: STREETCORNER POLITICIANS (1977) (describing dynamics of individual police behavior); ALBERT REISS, THE POLICE AND THE PUBLIC (1971) (exploring police authority); ELIZABETH REUSS-IANNI, TWO CULTURES OF POLICING: STREET COPS AND MANAGEMENT COPS (1983) (documenting variance in police subcultures); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL (1966) (exploring the tension between ideals of legality and bureaucratic efficiency). For an excellent case study examining the attitudes of "front-line" officers in a Canadian private police company, see GEORGE RIGAKOS, THE NEW PARAPOLICE 119-46 (2002).

tinctions between "private" and "public" in private police organizations are difficult to make. Finally, private police work involves much more than passive protection of private property. More than ever, private police agencies are sophisticated organizations not dependant on public direction or aid.

If private policing is complex and varied, the legal framework governing it is not. Part III examines the law regulating private policing, and draws attention to the rigid legal distinction between public and private.[19] We can attribute this sharp distinction to at least two presumptions in the law of (public) policing that obscure private police activity from otherwise applicable rules. I call one the superficiality of state involvement; the other, the centrality of arrest. In Part IV, I conclude with the proposal that "policing" and "the police" are terms with increasingly contestable meanings, and suggest how private policing forces us to reexamine conventional wisdom on police and the law.

I. PRIVATE POLICING: WHAT IS PRIVATE AND WHAT IS PUBLIC?

If the sheer size of a social phenomenon is a measure of the need for increased legal attention, the private police long ago warranted it. Since the late 1960s, the United States has experienced an explosion in the growth of companies and individuals providing policing services on a for-profit basis.[20] Sociologist Clifford Shearing describes this growth as a "quiet revolution."[21] In the 1970s, for example, a report commissioned by the Department of Justice estimated that there were approximately 1.4 public police

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[19] *See* Sklansky, *supra* note 6, at 1191 (noting that "most persistent complaint" about private policing is that it is "insufficiently regulated"); *see also* Maahs & Hemmens, *supra* note 5, at 131 ("[C]onsidering the enormous size of the security industry and the authority invested in security guards, there is surprisingly little state regulation of security guards."); Phil McCombs, *On His Guard*, WASH. POST, May 14, 2002, at C1 (referring to "America's vast, under-regulated rent-a-cop industry").

[20] Private policing also has a large, and sometimes greater, presence in other countries. A recent survey of thirty-seven countries suggests that other countries in the developed world are experiencing a similar expansion in private police forces that rivals or exceeds the numbers of their public police. *See* PAUL CHEVIGNY, EDGE OF THE KNIFE 157-58, 210, 233 (1995) (describing prevalence and use of private guards in São Paulo, Jamaica, and Mexico City); Jaap De Waard, *The Private Security Industry in International Perspective*, 7 EUR. J. CRIM. POL'Y & RES. 143, 152-60 (1999). The ratio of private to public police in post-apartheid South Africa, for example, is far more dramatic than it is in the United States. *See* Michael Kempa et al., *Reflections on the Evolving Concept of 'Private Policing'*, 7 EUR. J. CRIM. POL'Y & RES. 197, 202 (1999) (noting that private policing growth in South Africa "outstrips even that of the U.S.").

[21] *See* Clifford D. Shearing, *The Unrecognized Origins of the New Policing: Linkages Between Private and Public Policing*, *in* BUSINESS AND CRIME PREVENTION 224 (Marcus Felson & Ronald V. Clarke eds., 1997).

officers for every private guard.[22] Today, that ratio has reversed direction, and there are nearly three private guards for every public police officer.[23] California alone accounts for 185,000 licensed security guards.[24] A number of estimates suggest that nationwide the money spent on private policing is at least twice that spent on public policing.[25]

A. "PRIVATE POLICING": WHAT IS PRIVATE AND WHAT IS PUBLIC?

Much confusion exists regarding what the term "private policing" means. Does it refer only to security guards? How is it different from public policing?

By "private policing" I refer to 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.* In order to evaluate private policing as a discrete subject of study, we need to define it generously enough to include more than a few examples, but not so broadly that we include all forms of social control apart from the public police.[26] As defined here, private policing is distinct from other social

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[22] WILLIAM C. CUNNINGHAM ET AL., PRIVATE SECURITY TRENDS, 1970 TO 2000: THE HALLCREST REPORT 327 (1990) [hereinafter "HALLCREST REPORT"]; *Policing for Profit*, THE ECONOMIST, Apr. 19, 1997, *available at* 1997 WL 8136664. The Hallcrest Report, which contains the most recent and reliable nationwide figures, reported that as of 1990, there were 393,000 proprietary or "in house" guards, and 520,000 "contract" guards. *See id.* at 185, 196. There is no systematic collection of data on private policing by the federal or state governments. *Cf.* SIDRA LEA GIFFORD, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURES AND EMPLOYMENT IN THE UNITED STATES, 1999, at 9 (2002) (explicitly excluding "[p]rivate security police" from calculation of national spending and employment of police).

[23] This ratio, which is cited throughout the literature on private policing, is based upon a 1990 projection on security guards from the Hallcrest Report. *See* HALLCREST REPORT, *supra* note 22, at 229. It does not include others occupations within private policing, such as private investigators.

[24] *See* Hazelkorn, *supra* note 1, at 16.

[25] *See, e.g.*, *Policing for Profit*, THE ECONOMIST, Apr. 19, 1997, *available at* 1997 WL 8136664 (reporting that $90 billion is spent on private policing and $40 billion spent on public police); *see* HALLCREST REPORT, *supra* note 22, at 229 (estimating that in 2000, public and private spending would be $44 and $103 billion). These estimates are at best, however, a very rough approximation, given the lack of consensus about what counts as private policing, and the paucity of systematic data collection. A recurring observation in existing studies of private policing is how little is known of its size and scope. *See, e.g.*, NIGEL SOUTH, POLICING FOR PROFIT 23 (1988) (noting that "[t]he only consistent and reliable statement that is continually made about the size and scope of the private security industry today is that it is hard to obtain consistent and reliable information about it"); Sklansky, *supra* note 6, at 1277 ("[W]e know less today about private policing than we knew in 1930 about public law enforcement.").

[26] *Cf.* TREVOR JONES & TIM NEWBURN, PRIVATE SECURITY AND PUBLIC POLICING 17 (1998) (choosing to focus "on something more specific than policing defined as all 'social

groups and activities, outside of public law enforcement, that also play some role in controlling crime and maintaining order. Throughout American history, groups of private citizens have organized themselves to enforce their own interpretations of law, but vigilantism is distinct from private policing in its extralegal status.[27] Volunteers in neighborhood block-watches and citizen patrols may be more likely to follow the law, but for them policing is not a primary occupation, as it is for private police.[28] Similarly, crime control and safety is only a secondary concern to persons such as insurance adjusters, garage attendants, or janitors, who may be required, as a part of their duties, to engage in some police-like activity.[29] And what of private armies? The provision of private employees in international peacekeeping missions and conflicts is more accurately described as quasi-military work, not the domestic activities with which we associate public policing, my primary point of comparison.[30] Finally, locks and alarms pro-

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control,' or than policing defined as 'governance' or the provision of guarantees of security").

[27] *See, e.g.*, RICHARD MAXWELL BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM 95-96 (1975).

[28] Some researchers on private policing have classified volunteers together with commercial providers of policing. *See, e.g.*, LES JOHNSTON, THE REBIRTH OF PRIVATE POLICING 137-58 (1992) (discussing the concept of "responsible citizenship"). Admittedly, some examples raise the question of whether there is any clear boundary between volunteer and for-profit policing. *See, e.g.*, Vanessa Thomas, *Broader Policing, with Citizen Volunteers*, BUFF. NEWS, Feb. 6, 2004, at A1 (reporting on the patrols of the Buffalo Special Police, who are volunteers wearing blue uniforms and badges, and who carry firearms, batons, and pepper spray); *see also* Williams v. Great S. Lumber Co., 277 U.S. 19, 22 (1928) (describing volunteer group comprised of "business and professional men . . . [organized] for the purpose of assisting the city authorities in maintaining law and order" and sworn in as special police). This expansion of "policing" is not a helpful one, for it blurs any distinction between policing as an occupation and all forms of non-state social control, which can include not just block-watches but also crime precautions taken by teachers and parents, for example. To be sure, volunteer efforts and private policing are both part of a contemporary effort by government to encourage "responsibilization" strategies. For further discussion of this trend, see David Garland, *The Limits of the Sovereign State*, 36 BRIT. J. CRIMINOLOGY 445, 452 (1996).

[29] Bruce George and Mark Button, in their study of private policing in the U.K., refer to such persons as "occupations with significant security activity," including caretakers at universities, parking garage attendants, and receptionists. *See* BRUCE GEORGE & MARK BUTTON, PRIVATE SECURITY 118-19 (2000).

[30] *See, e.g.*, P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2003) (discussing growth of private corporations offering military services); Sam Dagher, *Iraq Turns Into Bonanza for World's Private Security Firms*, AGENCE FRENCE-PRESSE, Dec. 28, 2003 (describing Iraq as a "magnet for veterans of guerrilla wars in Africa, Latin America and Northern Ireland," as well as American public police); Andrew Higgins, *Contract Cops: As It Wields Power Abroad, U.S. Outsources Law and Order Work*, WALL ST. J., Feb. 2, 2004, at A1 (describing federal contract with DynCorp to provide security in

tect property and promise security, but the use of these goods is both too episodic and too widespread throughout society to be contained within a discrete definition of policing, let alone private policing.

We should recognize, however, that the definition of private policing here serves to sharpen the object of analysis, and not to draw absolute boundaries between that which is or is not "private policing" and more generally, "policing." Much social action, broadly interpreted, might be considered policing, so line-drawing exercises are unlikely to be successful here. As the following parts suggest, the story of the private police role in society is also a debate about the boundaries of policing itself, and thus it is my hope to let the problematic character of "policing" permeate the discussion that follows.

B. STUDYING THE PUBLIC POLICE

Who are the public police? For many, the "police" are armed, uniformed public servants charged with enforcing the criminal law. To this we might add that they are members of a "bureaucracy created by political and legislative processes," and are also expected to "maintain public order," or to keep the peace.[31] In democratic societies, police are accountable to the courts, and to elected legislatures and executives.[32] The employment of the term "private police" necessarily implies a definition in contrast to the public police. How is each group distinct from the other?

In order to draw a comparison, the student of private policing must be acquainted with the sociological and legal literature pertaining to the public police. Consider the interplay between the formal rules regulating public police behavior and observations made of public police organizations in action. The public police are formally charged with the enforcement of criminal laws and the prevention and detection of crime.[33] States define by

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Iraq); Eugene B. Smith, *The New Condottieri and U.S. Policy: The Privatization of Conflict and Its Implications*, PARAMETERS, Winter 2002-03, at 104-05 (discussing emergence of the "private military corporation" as a "a legally chartered company or corporation organized along business lines and engaged in military operations across the spectrum of conflict"); *cf.* Kempa, *supra* note 20, at 214 (describing the United States as the "largest exporter" of overseas private security for international peacekeeping functions).

[31] *See* Jerome H. Skolnick, *Policing*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 11535 (2001).

[32] *See id.*

[33] The New York Police Department, for instance, offers the following mission statement: "The Mission of the New York City Police Department is to enhance the quality of life in our City by working in partnership with the community and in accordance with constitutional rights to enforce the laws, preserve the peace, reduce fear, and provide for a safe environment." *See* N.Y. Police Dept., *About NYPD*, *at* http://www.nyc.gov/html/nypd/html/

statute who may be classified as a public police officer, or in the parlance of some statutes, a "peace officer."[34] This designation identifies who may stop, detain, search, and arrest persons under the special legal powers that states confer upon the public police.[35]

The formal obligation to enforce the law fully is not borne out in practice, however.[36] Patrol officers possess considerable discretion, in deciding both when and whether to enforce the law (as well as in the exercise of their peacekeeping function).[37] Because no police department exists with enough time or personnel to meet formal enforcement goals, police officers rely instead upon "priorities of enforcement."[38] As for the goal of *preventing*

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mission.html (last visited Dec. 15, 2003); *see also* MARK S. DAVIS, THE CONCISE DICTIONARY OF CRIME AND JUSTICE 198 (2002) (defining police as "officials whose responsibility is to enforce criminal laws and ensure public safety").

[34] *See* WAYNE LAFAVE ET AL., 1 CRIMINAL PROCEDURE § 1.7(f) (2004).

[35] *See id.*; *see also* Sklansky, *supra* note 6, at 1187 (noting that public police, unlike ordinary private citizens, have special powers to apply for and execute warrants, conduct searches without a warrant in some circumstances, and to command the assistance of bystanders); *see, e.g.*, CAL. PENAL CODE § 833 (2004) (permitting peace officers to search "any person for whom he has legal cause to arrest, whenever he has reasonable cause to believe that the person possesses a dangerous weapon"); CAL. PENAL CODE § 833.5(a) (2004) (permitting detention by peace officer in cases where the officer has reasonable cause to believe that person suspected possesses a "deadly weapon"); CAL. PENAL CODE § 835a (2004) (permitting "reasonable force" by peace officer to effect arrest, or to overcome resistance when reasonable cause exists to believe that a person has committee a "public offense").

[36] *See* THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, THE KERNER REPORT: THE 1968 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 312 (Pantheon Books 1988) (1968) ("Formally, the police officer has no discretion; his task is to enforce the law at all times. . . . Informally—and in reality—the officer faces an entirely different situation.").

[37] *See, e.g.*, Albert Reiss, Jr., *Police Organization in the Twentieth Century*, *in* MODERN POLICING 51, 74 (Michael Tonry & Norval Morris eds., 1992) (noting that "[a]lthough the foundation of policing is the legal order and its rules, police officers, nevertheless, have enormous discretionary powers to apply the law").

[38] *See, e.g.*, Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 561 (1960). By contrast, Goldstein defines "full enforcement" as follows:

> (1) the investigation of every disturbing event which is reported to or observed by them and which they have reason to suspect may be a violation of the criminal law; (2) following a determination that some crime has been committed, and effort to discover its perpetrators; and (3) the presentation of all information collected by them to the prosecutor for his determination of the appropriateness of further invoking the criminal process.

Id. at 559-60; *see also* KENNETH CULP DAVIS, POLICE DISCRETION 166 (1975) (observing that "selective enforcement" results from a conflict between the expectation to enforce the law fully and the lack of resources to do so).

crime, an objective of the very first public police,[39] the police remain largely reactive: attending to crime after the fact, on the basis of citizen complaints.[40]

Although the public, and even officers themselves, perceive crime-fighting as the most important task of the public police,[41] the average patrol officer devotes only a small portion of his or her working day to solving or preventing crime.[42] Instead, patrol officers spend the greatest portion of their time engaged in maintaining order, or peacekeeping; they "interrupt and pacify situations of potential or angry conflict."[43] The order that the police keep, or as Richard Ericson revises, "reproduce,"[44] is the result of various factors: police officer attitudes, public expectations, and the "situational exigencies" of individual encounters between officer and citizen.[45] The public criminal law is *a* but not *the* resource for determining police behavior.[46] This is especially true at the level of the individual officer. Socially and physically isolated in his work, the patrol officer is informed as much by his "working personality"—a combination of danger, authority, and accountability to superiors—as he is by the law.[47] In addition to crime control and order maintenance, the public police also are responsible for regulatory duties such as towing away illegally parked cars and issuing permits for parades.[48]

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[39] *See, e.g.*, T.A. CRITCHLEY, A HISTORY OF POLICE IN ENGLAND AND WALES 900-1966, at 52 (1967).

[40] *See* ALBERT REISS, THE POLICE AND THE PUBLIC 63-120 (1971) (discussing how citizen complaints mobilize police behavior); *see also* Peter W. Greenwood & Joan Petersilia, *The Criminal Investigation Process: Volume I: Summary and Policy Recommendations*, *in* WHAT WORKS IN POLICING 71 (David H. Bayley ed., 1998).

[41] *See* EGON BITTNER, *Urban Police*, *in* ASPECTS OF POLICE WORK 19, 20-21 (1990).

[42] *See* DAVID H. BAYLEY, POLICE FOR THE FUTURE 17 (1994) (arguing that perhaps a quarter of a patrol officer's time is spent on crime fighting).

[43] *See id.* at 19. Additionally, Richard Ericson and Kevin Haggerty argue that today's public police play a significant role in recording and organizing information related to risk assessment, such as car theft data for insurance claims. *See* RICHARD V. ERICSON & KEVIN D. HAGGERTY, POLICING THE RISK SOCIETY 7-9 (1997).

[44] *See* RICHARD ERICSON, REPRODUCING ORDER: A STUDY OF POLICE PATROL WORK 7 (1982).

[45] Egon Bittner provides an often-cited definition of public policing as "a mechanism for the distribution of non-negotiably coercive force employed in accordance with the dictates of an intuitive grasp of situational exigencies." *See* Egon Bittner, *The Functions of the Police in Modern Society*, *in* ASPECTS OF POLICE WORK 89, 131 (1990).

[46] *See, e.g.*, JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR 227-77 (1968) (explaining how "political culture" influences police department behavior and attitudes).

[47] *See* SKOLNICK, *supra* note 18, at 42-70.

[48] *See* BITTNER, *supra* note 41, at 23.

In sum, sociological studies of the public police have shown that their popular characterization as "law enforcers" is only partially correct. Policing, even for the public police, encompasses a much greater variety of action (and inaction) than might be first assumed.

These general observations, however, go only partway towards characterizing the attitudes, functions, and operation of any particular police department. American policing is a highly local and decentralized (or, "balkanized,")[49] institution.[50] There are federal, state, county, and city police,[51] as well as police with special jurisdictions, like the Florida Game and Fresh Water Fish Commission, and the Southeastern Pennsylvania Transit Authority.[52] The priorities and mission of any one police department depend highly on a variety of factors that include its leadership, local politics, the professional culture of the police, and the outlook of the community that the department serves.[53] Historians of American public policing have demonstrated repeatedly that the "[public] police were never fully controlled from the outside or above."[54]

Overlaying the complex world of ordinary police work is a high degree of legal regulation, much of which has been "constitutionalized." Most importantly, limitations set by judicial interpretation of the Fourth, Fifth, and Sixth Amendments of the U.S. Constitution shape the ability of public police to detain, arrest, question, and use force in their interactions with the public.[55] These constraints are enforced indirectly by rules of evidentiary exclusion in the trials of criminal defendants. The exclusion of otherwise relevant evidence from a criminal defendant's trial has a two-fold impact, by undermining the prosecution's case and by implicitly deterring future illegality on the part of the police. More directly, public police officers may themselves be civil or criminal defendants on the basis of alleged misconduct. Most claims of this nature against the public police arise under the

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[49] William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, *in* MODERN POLICING, *supra* note 37, at 231-32.

[50] American policing has been locally controlled since its establishment during the mid-nineteenth century. *See generally* ROBERT M. FOGELSON, BIG CITY POLICE (1977); JAMES RICHARDSON, THE NEW YORK POLICE: COLONIAL TIMES TO 1901 (1970).

[51] The majority of police are provided by local governments. *See* Reiss, *supra* note 37, at 61-62.

[52] Each employs hundreds of police officers. *See* MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2000 (2003).

[53] *See, e.g.*, ERICSON, *supra* note 44, at 30 (noting that police "operate within a framework of rules emanating from the community and legal and police organizations").

[54] *See* Roger Lane, *Urban Police and Crime in Nineteenth-Century America*, *in* MODERN POLICING, *supra* note 37, at 20.

[55] *See, e.g.*, Sklansky, *supra* note 6, at 1183.

federal civil rights laws.[56] But the public police are also subject to suit under state tort laws,[57] as well as to criminal prosecution under federal or state law,[58] although criminal cases are rarely pursued.[59]

As a working definition, then, the term "public police" refers to those bureaucratically organized, professionally trained public employees entrusted with the tasks of enforcing the criminal law and maintaining order, backed by the authority of the state, paid by public funds, and accountable to democratic institutions.

C. REFINING THE PRIVATE POLICE DEFINITION

By contrast, the boundaries of private policing are much less clear, in part because there has been so little scholarly attention, and because there is no equivalent to criminal procedure law governing them.[60] Because "there is a growing lack of consensus as to what exactly the 'private policing' construct entails,"[61] what is and is not defined as "private policing" here is not without contest.[62] We can attribute some of the disagreement to the fact that private police are employed in a variety of different contexts: acting as bodyguards, patrolling property, investigating fraud, and maintaining order. Another source of confusion is the range of organizational forms.[63] Some private police are employees of large, publicly-held multinational corporations, while others are solo practitioners. All, however, share a common purpose: to pursue their clients' objectives.

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[56] *See, e.g.*, 42 U.S.C. §§ 1981-1988 (2004); *see also* MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION 1-1 (3d ed. 2003) (observing that the largest number of public police misconduct cases are brought as § 1983 claims).

[57] *See* Matthew Hess, *Good Cop Bad Cop, Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 188.

[58] *See, e.g.*, 18 U.S.C. §§ 241-242 (2004) (providing for criminal prosecution for both conspiracy to violate and for violations of federal civil rights).

[59] *See* Hess, *supra* note 57, at 177-187.

[60] *See, e.g.*, GEORGE & BUTTON, *supra* note 29, at 3 (noting that there are "only a handful of academics interested in private policing"); RIGAKOS, *supra* note 18, at 5 (observing that although academic interest in private policing dates back to the 1970s, the literature is "sparse" and "relatively few scholars" are involved).

[61] Kempa, *supra* note 20, at 198.

[62] *See, e.g.*, HALLCREST REPORT, *supra* note 22, at 122 ("What is private security? Unfortunately there is no generally accepted definition of private security; in fact there is considerable disagreement.").

[63] *See* Elizabeth E. Joh, *Conceptualizing the Private Police,* UTAH L. REV. (forthcoming 2005) (presenting a typology of private policing).

A client-driven mandate is perhaps the most central characteristic of private policing.[64] Clients' particular substantive needs—the kinds of losses and injuries for which they seek policing services—shape the character of the private policing employed.[65] Thus, what counts as deviant, disorderly, or simply unwanted behavior for private police organizations is defined not in moral terms but instrumentally, by a client's particular aims, such as a pleasant shopping experience or an orderly work environment.[66]

To pursue these substantive ends, private police organizations often turn to four methods of policing, as discussed by Clifford Shearing.[67] First, private police agencies focus on loss instead of crime. Loss is distinctive because it is concerned with a wider scope of activity than crime, such as accidents and errors. The emphasis on loss also means that private police are disengaged from the moral underpinnings of the criminal law; they focus instead on property and asset protection.[68] Second, private police stress preventive means over detection and apprehension to control crime and disorder. Because private police clients are concerned not so much with the punishment of individual wrongdoers but the disruption of routine activity (e.g., a smoothly functioning workplace), policing efforts focus heavily on surveillance.[69]

When prevention fails, however, private police often can turn to a third means: private justice systems.[70] These are functional alternatives to the public police and the criminal justice system. Multiple incentives exist to treat matters privately—banning, firing, and fining—instead of pursuing

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[64] *See* CLIFFORD D. SHEARING & PHILLIP C. STENNING, PRIVATE SECURITY AND PRIVATE JUSTICE: THE CHALLENGE OF THE 80S: A REVIEW OF THE POLICY ISSUES 9 (1982); Clifford D. Shearing, *Private Security: Implications for Social Control*, *in* UNDERSTANDING POLICING 521, 531 (K.R.E. McCormick & L.A. Visano eds., 1992).

[65] *Cf.* Thomas M. Scott & Marlys McPherson, *The Development of the Private Sector of the Criminal Justice System*, 6 LAW & SOC'Y REV. 267, 286 (1971) (observing that a private police officer is "employed, presumably, to investigate and apprehend the wrongdoer because the client has suffered a direct loss by virtue of the acts of the wrongdoer").

[66] *See* Shearing, *supra* note 64, at 531-32.

[67] *See* SHEARING & STENNING, *supra* note 64, at 7.

[68] *See* Shearing, *supra* note 64, at 531-32.

[69] *See* Clifford D. Shearing & Phillip C. Stenning, *Say "Cheese!": The Disney Order That Is Not So Mickey Mouse*, *in* PRIVATE POLICING 317, 323 (Clifford D. Shearing & Phillip C. Stenning eds., 1987).

[70] *See* Stuart Henry, *Private Justice and the Policing of Labor: The Dialectics of Industrial Discipline*, *in* PRIVATE POLICING, *supra* note 69, at 45-46 (defining private justice as "localized nonstate systems of administering and sanctioning individuals accused of rule-breaking or disputing within groups or organizations"). I define private justice to include also formal legal means outside of the criminal law, including civil recovery statutes, which are discussed further *infra* Part III.B.3.

prosecution.[71] In a private justice system, the resolution of problems is left to the control and discretion of private police and their clients, who may see some incidents as unworthy of the lost time and resources necessary to assist in a public prosecution.[72] As a consequence, some private police clients choose to tolerate some kinds and amounts of deviance.[73] In addition, public police organizations may lack the resources to investigate or assign a different priority to some matters, such as shoplifting, that some private police agencies and their clients see as serious problems.

Finally, Shearing identifies a close link between the growth of private police and the emergence of "mass private property."[74] The term refers to large spaces, such as malls and "corporate campuses," that are privately owned but functionally public or quasi-public. They are quasi-public because, while nominally private, people use them as they do more traditional public spaces: the town square, the sidewalk, and the commons. While public police traditionally have assumed responsibility for the policing of public spaces, private police have presumptive control over private property.[75] Thus, the mass private property concept identifies a change in the

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[71] For example, a recent lawsuit against Macy's department stores alleged that the store's private punishment for shoplifting included permanent exclusion from the store for a period of seven years. *See* First Amended Class Action Complaint for Declaratory and Injunctive Relief and Monetary Damages at 28, Simmons-Thomas v. Macy's East, Inc., No. 03-CV-3625 (S.D.N.Y. June 2, 2003) (on file with author).

[72] *See, e.g.*, HALLCREST REPORT, *supra* note 22, at 27, 299-300; JAMES S. KAKALIK & SORREL WILDHORN, PRIVATE POLICE IN THE UNITED STATES: FINDINGS AND RECOMMENDATIONS 60 (1971); Stuart Macaulay, *Private Government*, *in* LAW AND THE SOCIAL SCIENCES 445, 450-51 (Leon Lipson & Stanton Wheeler eds., 1986).

[73] Recently, Greyhound Bus Lines security guards in Tennessee revealed that they routinely release persons who have been found with small amounts of drugs on their persons. One guard stated that they often "flush the drugs down the toilet, and let passengers continue traveling on their route." The public police were notified, according to the Greyhound guards, only when the quantity of drugs found warranted a felony charge. The company initially denied that such discretion was available to its private police officers, and then, shortly after its denial, issued new guidelines stating that Greyhound station managers should seek guidance from local public police departments to develop policies regarding the discovery of illegal drugs. *See* Christian Bottorff, *After Incident Here, Greyhound Changes Policy on Illegal Items*, THE TENNESSEAN, June 16, 2004, at 1; *Greyhound Guards Sometimes Let Drug Offenders Go*, ASSOC. PRESS NEWSWIRES, June 12, 2004.

[74] *See* Shearing, *supra* note 64, at 526.

[75] *See, e.g.*, KAKALIK & WILDHORN, *supra* note 72, at 18 (contrasting responsibilities); INSTITUTE FOR LOCAL SELF GOVERNMENT, PRIVATE SECURITY AND THE PUBLIC INTEREST 85 (1974) (same); Nicholas R. Fyfe, *Policing the City*, 32 URB. STUD. 759, 767 (1995) (same). Even these presumptions, though, are changing as some municipalities in Illinois, California, Maryland, Virginia, and New Jersey have begun to enforce public speeding, parking, and pet litter laws on private roads and spaces. *See* Andrew Stark, *Arresting Developments: When Police Power Goes Private*, AM. PROSPECT, Jan./Feb. 1999, at 41.

structure of modern life—where and how Americans live, work, and spend leisure time—that has led to a more prominent role for private police.

As for their legal status, many private police do not possess the same legal powers as the public police. Many private security guards, for instance, possess no greater legal capabilities than do ordinary citizens to forcibly detain persons who are suspected of or have in fact committed a crime, although there is less distinction between the citizen arrest power and peace officer arrest power than might be expected.[76] For example, in many states, an ordinary citizen may arrest someone for a misdemeanor committed in her presence, and for a felony that she has probable cause to believe that the person has committed (subject to the limitation that a felony has in fact been committed).[77] Even if citizens and private police possess the same formal powers, the more important difference is a practical one; private police are occupationally disposed to use powers that a citizen may rarely, if ever, invoke.

Some private police *do* possess greater legal powers than ordinary private citizens. Deputization confers upon private police the same powers granted to the public police.[78] For example, private police on many college campuses possess "peace officer" powers while on duty and within the confines of the campus.[79] There are also large numbers of public police working as private police in their off-hours.[80] Some of these "moonlighting" police even work in their public uniforms and drive their public squad cars, all while on a private payroll.[81]

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[76] *See* Sklansky, *supra* note 6, at 1183-84.

[77] *See id.* at 1184; Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566 (1935).

[78] The Rand Report define deputization as the "formal method by which federal, state, and city government grant to specific, named individuals the powers or status of public police—usually for a limited time and in a limited geographic area." *See* KAKALIK & WILDHORN, *supra* note 72, at 63 (discussing deputization); *see also* GEORGE O'TOOLE, THE PRIVATE SECTOR: PRIVATE SPIES, RENT-A-COPS, AND THE POLICE-INDUSTRIAL COMPLEX 10 (1978) (O'Toole defines deputization as "a process by which some private citizens can be invested with full or partial police powers (and permitted to) arrest, search, or detain someone in circumstances that would constitute false arrest or some other offense by a regular private guard."); Sklansky, *supra* note 6, at 1183-84.

[79] *See, e.g.*, Valeria L. Brown, *Commentary: The Campus Security Act and Campus Law Enforcement*, 70 EDUC. L. REP. 1055, 1058-1062 (1992) (discussing examples of campus police powers granted by state law).

[80] *See* ALBERT J. REISS, JR., DEP'T OF JUSTICE, PRIVATE EMPLOYMENT OF PUBLIC POLICE 1 (1988) (estimating that approximately 150,000 public police officers work in private police jobs when off-duty).

[81] *See* Stark, *supra* note 75 (describing employment of moonlighting police); *see also infra* Part II.

Consequently, it would be a mistake to think of private police as lacking a legal basis from which to exercise coercive power. The private police also possess some powers that the public police lack.[82] Many are authorized to act as agents of property, and can rely upon the powers of exclusion or ejection for those considered undesirable or unwelcome from the malls, corporate campuses, and other private spaces that are policed privately.[83] Public police may lack these specific powers of exclusion in the places they serve.

Distinctions more fundamental than formal legal powers exist between the two groups. Even if the criminal law does not *determine* their behavior, public police nevertheless must take into account social and democratic values that the law represents.[84] Public police rely on the criminal law—with its neutral, universal, and uniform criteria—as a source of legitimacy.[85] In his discussion of formal organizations, sociologist Philip Selznick draws a contrast between "management" and "governance" that is useful here.[86] A management model stresses efficiency and goal-achievement, whereas a governance model takes into account broader goals of integrity, the accommodation of interests, and morality.[87] Public police do possess "bot-

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[82] *See, e.g.*, Shearing, *supra* note 64, at 521, 528 ("While modern private security guards enjoy few or no exceptional law enforcement powers, their status as agents of property allows them to exercise a degree of legal authority which in practice far exceeds that of their counterparts in the public police.").

[83] *See id.*

[84] Compare, for example, the characterizations of public and private presented by the Advisory Counsel established by the Department of Justice: "Law enforcement agencies provide a general level of protection and security for the public and serve the public interest by regulating behavior considered offensive or contrary to the common good of society. . . . [By contrast,] private security consists of private concerns protecting private property and interests." PRIVATE SECURITY ADVISORY COUNCIL, LAW ENFORCEMENT AND PRIVATE SECURITY SOURCES AND AREAS OF CONFLICT AND STRATEGIES FOR CONFLICT RESOLUTION 5 (1977).

[85] *See* Albert Reiss, Jr. *The Legitimacy of Intrusion into Private Space, in* PRIVATE POLICING 19, 26 (Clifford D. Shearing & Philip C. Stenning eds., 1982).

[86] PHILLIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PURPOSE OF COMMUNITY (1992).

[87] In the 1936, the Senate Committee on Education and Labor convened a subcommittee chaired by Robert La Follette, Jr. to investigate the role of private police in strike breaking. The committee described the public police this way:

> Public police systems . . . are paid from public treasuries and are expected to be responsive to the requirements of entire communities. They must perform their duties impartially, without regard to the economic, racial, or religious status or views of the individual members of the community. The final responsibility for the actions of public police systems rests in electived representatives who are accountable to the electorate.

tom-line" goals, of course; departments focus on their "clearance rates" and police chiefs must answer to increases in the crime rate.[88] Fundamentally, however, the public police are an organization that stresses governance; the private police, management. Legal scholars usually focus most on the powers formally delegated to police, but one of the more significant distinctions lies in these basic organizational stances.

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"Private" and "public" do not represent concrete distinctions. Many forms of policing reside somewhere on a continuum between public and private. Increasingly, it is not obvious whether the police officer walking a "beat" is governed by a public agency or by a private company. As a rough approximation, however, the distinctions made here between public policing and private policing are useful ones.

D. IS THE PRIVATE SECURITY INDUSTRY DIFFERENT?

Private policing must also be distinguished from the private security industry: a term used to describe those private companies that provide the materials necessary for private police work.[89] Confusion often arises because the industry also supplies security personnel, and thus whether these two terms are identical has provoked a range of responses. Some have adopted an additional term that incorporates the sense that private policing is an activity as well as a set of products on the market.[90] Sociologist Nigel South, for example, in his study of British private policing, suggests the use of the "private security sector."[91]

Others have chosen to combine not only private policing and the private security industry, but to include the public police also under the gen-

PRIVATE POLICE SYSTEMS, S. REP NO. 76-6, pt. 2, at 2 (1939). For further discussion, see Elizabeth E. Joh, *The Evolving Status of Private Policing* (in draft) (2004) (discussing the importance of the La Follette investigation).

[88] *See, e.g.*, SKOLNICK, *supra* note 18, at 164-81 (describing how police detectives meet organizational measures of performance by saving and parceling out clearances).

[89] There are few reliable means of measuring the private security industry in the United States. As with private policing, this can be attributed both to disagreement over the definition of the industry, as well as the practical lack of means to collect data on the industry. For a discussion of the American private security industry, see the HALLCREST REPORT, *supra* note 22, at 163-226. For a comparative look at its British counterpart, see JONES & NEWBURN, *supra* note 26, at 54-94.

[90] *See, e.g.*, O'TOOLE *supra* note 78, at xiii ("I mean the term 'Private Sector' to include any individual or group involved with law enforcement or authority, but lacking official police authority.").

[91] *See* NIGEL SOUTH, POLICING FOR PROFIT 23 (1988).

eral term of "policing." Thus, for example, Shearing has chosen this approach to highlight what he sees as the blurred boundary between private and public policing.[92] There remains no consensus on the boundaries of private policing or its relationship to the security industry, and each preference is highly dependent on the researcher's particular perspective.

There is no one right manner in which to describe the phenomenon, and the adoption of a particular term should be judged by its usefulness. My choice here is to use both "private policing" and the "private security industry" because they represent separate but overlapping categories. The private security industry refers to the set of for-profit security products and services, which include three broad categories: the provision of guards, equipment, and investigation or consulting services.[93] Individuals may purchase goods and services from the industry without necessarily being involved in private policing, as when a homeowner purchases an alarm system. Private policing, by contrast, refers to the acquisition and use of these products and services, as well as the application of specialized knowledge in areas like crime control, investigation, and risk management. In these terms, private policing is the set of activities whose needs are partially supplied by the private security industry.[94]

II. PRIVATE AND PUBLIC CONVERGENCE: PARTNERSHIPS

A. THE CONTEMPORARY CONTEXT OF PARTNERSHIP

To observe the numerical rise in private police is to tell only half of the story. Just as importantly, today public agencies are increasingly relying upon private police act as *partners* with the public police. The popularity of these partnerships comes at a time when there are doubts about the capa-

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[92] *See* Shearing, *supra* note 21, at 219-30.

[93] Public police departments may purchase equipment from the very same companies that private security companies do, and perhaps the "policing industry" might be a more accurate term than "private security industry." Prison management presents a similar set of issues. *Cf.* Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY 51, 63 (Dec. 1998) ("The prison-industrial complex now includes some of the nation's largest architecture and construction firms, Wall Street investment banks that handle prison bond issues and invest in private prisons, plumbing-supply companies, food-service companies, health-care companies, companies that sell everything from bullet-resistant security cameras to padded cells available in a 'vast color selection.'"). To avoid confusion about general references to "policing," however, I use the term "private security industry."

[94] As the following Parts demonstrate, it will make more sense to speak of "private policing" as an activity rather than to "the private police," to the extent that the latter term suggests a single, coherent private agency. For the sake of convenience, however, I also use the term "private police."

bility of government to act as the primary provider of security to the public. This waning confidence has roots extending well beyond the September 11th attacks. Private police today find themselves the beneficiaries in the debate over the responsibility and capability of government to control crime: a crisis in what David Garland calls the "myth of sovereign crime control."[95]

In a period beginning in the 1960s, governments of the United States and other western democracies have found themselves in a predicament. Faced with persistently high crime rates, public officials (in the Department of Justice, and in the British Home Office, for example) "see the need to withdraw or at least qualify their claim to be the primary and effective provider of security and crime control."[96] In a 1976 report on private policing commissioned by the Law Enforcement Assistance Administration,[97] for instance, the authors state that "the sheer magnitude of crime in our society prevents the criminal justice system *by itself* from adequately controlling and preventing crime."[98] Similarly, James Stewart, former director of the National Institute of Justice, declared in 1985 that "the responsibility of government to ensure security need not necessarily mean that government must provide *all* the protective services itself."[99] Even voices within the public police community concede that "cops can't do it alone."[100]

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[95] *See* Garland, *supra* note 28, at 448.

[96] *See id.*; Ronald L. Boostrom & Corina Draper, *Community Policing, Problem Oriented Policing, Police-Citizen Coproduction of Public Safety, and the Privatization of Crime Control, in* PRIVATIZING THE UNITED STATES JUSTICE SYSTEM 56, 57 (Gary W. Bowman et al. eds., 1992) (stating that partnership between public and private sectors "was promoted [in 1980s] as an antidote to the failure of state-monopolized criminal justice").

[97] The LEAA was a Federal agency established in 1968 to funnel federal funding to state and local law enforcement agencies. The agency created state planning agencies, funded educational programs, research, and a variety of local crime control initiatives, and was abolished in 1982. *See* Records of the Law Enforcement Assistance Administration, *available at* http://www.archives.gov/research_room/federal_records_guide/law_enforcement_assistance_administration_rg423.html (last visited Feb. 2, 2004).

[98] U.S. NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON PRIVATE SECURITY 18 (1976) (emphasis added).

[99] James Stewart, *Public Safety and Private Police*, 45 PUB. ADMIN. REV. 758, 760 (1985) (emphasis added). Similarly, in a report on private security, the British Home Office stated: "There is no modern society in which the Government can provide total protection against crime. It is clearly desirable for individuals and organizations to take sensible precautions against crime. In our society it is reasonable for them to pay others to provide a system." *See* Home Office, THE PRIVATE SECURITY INDUSTRY: A DISCUSSION PAPER 10 (1979); *cf.* Naoko Yoshida, *The Taming of the Japanese Private Security Industry*, 9 POLICING AND SOCIETY 241, 242 (1999) ("The Japanese public is no longer content to leave security issues to the police.").

[100] *See* Ralph Blumenthal, *And Now a Private Midtown "Police Force,"* N.Y. TIMES, Aug. 22, 1989, at B4 (quoting Richard Dillon, a thirty-two-year veteran of the NYPD and

Official endorsement of private policing as a public resource provided one important solution to the problem. Beginning in the 1970s, reports sponsored by the Department of Justice suggested that private police could provide much-needed aid to the public police, and provided a vocabulary to describe this emerging position. A 1971 report by the Rand Corporation was probably the first major national study of several to suggest that private police could benefit the public generally.[101] Policing, according to the Report, is not necessarily the exclusive dominion of government, but rather was a "service" that could be assumed either by public or private agencies.[102]

Conventional research on the police had incorporated Max Weber's definition of the state in terms of its monopoly over legitimate force.[103] Policing, as a part of that monopoly, could not become private.[104] The reinterpretation of policing in these reports, therefore, was radical. Later studies took the further step that private police could serve as *equal partners* with the public police in the "coproduction of security," rather than simply subordinates providing a complementary service.[105]

The endorsement of these partnerships in policing represents one aspect of the greater reliance today on non-state groups—corporations, houses of worship, non-profit organizations, and communities[106]—to assume in-

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now heading a private security force); *see also* Jack R. Greene et al., *Merging Public and Private Security for Collective Benefit: Philadelphia's Center City District*, 14 AM. J. POLICE 3, 7 (1995) (observing that there is a "greater awareness that the public police cannot stand alone in the crime control arena"); Anthony M. Voelker, *NYPD's APPL Program: A New Partnership*, 1991 FBI LAW ENFORCEMENT BULLETIN 1 (Feb. 1991) ("The police cannot provide all the protection and enforcement necessary to maintain safe and orderly communities.").

[101] *Cf.* Clifford D. Shearing, *The Relation between Public and Private Policing, in* MODERN POLICING, *supra* note 37, at 399, 409 ("In retrospect, RAND's report can be identified as one of the earliest indications of the shift in political consciousness that has promoted the privatization of a whole range of services previously seen as fundamentally public.").

[102] *See* KAKALIK & WILDHORN, *supra* note 72, at 24.

[103] *See* MAX WEBER, POLITICS AS A VOCATION 2 (H.H. Gerth & C. Wright Milss trans., 1965) (1946).

[104] *See* DAVID H. BAYLEY & CLIFFORD D. SHEARING, DEP'T OF JUSTICE, THE NEW STRUCTURE OF POLICING: DESCRIPTION, CONCEPTUALIZATION, AND RESEARCH AGENDA 5 (2001).

[105] *See* HALLCREST REPORT, *supra* note 22, at 312; *see also* Joh, *supra* note 87 (discussing the change in attitude represented in these and other reports).

[106] Because of my focus on the private police, I do not discuss in detail the increasing expectation that citizens assume some responsibility for their own safety. For an excellent discussion of the development of partnerships between communities and criminal justice agencies, see generally ADAM CRAWFORD, THE LOCAL GOVERNANCE OF CRIME (1997).

creased responsibility for crime prevention.[107] Official discussions of crime control and prevention today stress greater reliance on responsibility and self-help, concepts that translate practically into encouraging the creation of volunteer crime patrols, the purchase of locks and other personal safety measures, and, as discussed in this Part, the formation of partnerships between public and private police.[108]

At the same time, this shift in emphasis on the private sector should not be mistaken for the shrinking of criminal justice agencies. The advocacy of what some have called "responsibilization"[109] or "prudentialism"[110] within the private sphere does not assume that public police departments will diminish in size. Public police budgets, for example, did not decrease during the 1990s.[111] Nor do we yet know whether the partnerships are actually more effective than the public police alone in controlling crime and disorder. Rather, what has changed are the assumptions about the proper relationship between citizens, corporations, communities, on the one hand, and the responsibilities of the state on the other. As two police chiefs from the state of Washington suggest, "[g]one is the stereotype that [public] police are the guarantors of the . . . status quo."[112]

By end of the 1990s, the language of public-private partnerships permeated discussions of public police innovation. A 2000 report published by the Department of Justice, "Operation Cooperation," counts sixty cooperative programs throughout the country, and suggests that "[n]o city or met-

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[107] *Cf.* Home Office, CRIMINAL JUSTICE: THE WAY AHEAD 83 (2001) (noting that "[t]here has always been a wide range of people contributing to community safety in various forms, [including] . . . security guards in shopping centres . . . and the private security industry").

[108] As British Foreign Secretary Jack Straw states: "The Government's commitment to a partnership approach to tackling crime and disorder has paved the way for the private security industry to play a wider role in initiatives to reduce crime and improve community safety." *See* GEORGE & BUTTON, *supra* note 29, at vii.

[109] *See* Garland, *supra* note 28, at 452.

[110] *See* Pat O'Malley, *Risk, Power and Crime Prevention*, 21 ECON. & SOC. 252, 257 (1992) (describing prudentialism in part as "the privatization of public benefits as an aspect of the extension of privatized risk-based technique").

[111] Federal spending on police grew from $2,527,000,000 in 1982 to $14,797,000,000 in 1999; state spending from $2,833,000,000 in 1982 to $9,632,000,000 in 1999; and local spending from $14,172,000,000 in 1982 to $45,593,000,000 in 1999. *See* SIDRA LEA GIFFORD, DEP'T OF JUSTICE, JUSTICE EXPENDITURES AND EMPLOYMENT IN THE UNITED STATES 1, 3 (2002) (explaining that, even with adjustment for inflation, public expenditures on policing grew substantially from 1982-1999). *But see* WILLIAM C. CUNNINGHAM & TODD H. TAYLOR, DEP'T OF JUSTICE, THE GROWING ROLE OF PRIVATE SECURITY 3 (1984) (reporting that in a survey of law enforcement agencies, forty-four percent of police and sheriff's departments reported the same or fewer personnel in 1981 as five years earlier).

[112] Terrence J. Mangan & Michael J. Shanahan, *Public Law Enforcement/Private Security: A New Partnership?*, 59 FBI L. ENFORCEMENT BULL. 18 (1990).

ropolitan area should be without at least one."[113] The scope and size of the programs vary, ranging from the thirty members of the Northeast Florida Law Enforcement and Private Security Council that shares information on retail theft, to the one thousand-member New York Area Police/Private Security Liaison that has established a business crime squad in midtown Manhattan.[114] Membership on the private end of these alliances is sometimes comprised of contract security companies and corporate police departments; in others, they are private corporations themselves (that contract with private police agencies or employ their own).[115] The distinctions among these groups matter less than their shared objective of promoting relationships between private and public police.[116]

Within the range of partnerships, we can identify three general types. First, for some public police departments, the increased acceptability of partnerships has led to their greater willingness to enter into joint investigations with private police, both by lending public personnel, as well as by providing administrative and technical resources.[117] Second, some partnerships provide a formal means to share information on crime patterns and suspects.[118] Third, in special tax assessment districts (sometimes also

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[113] *See* INSTITUTE FOR LAW AND JUSTICE, DEP'T OF JUSTICE, OPERATION COOPERATION: GUIDELINES 1, 3 (2000).

[114] *See id.* at 7, 9; *see also* S. Woodruff Bentley, *An Alliance is Born*, 41 SECURITY MGMT. 77 (Oct. 1997) (describing Virginia Police and Private Security Alliance); Voelker, *supra* note 100, at 1-4 (describing operation of APPL program). For a review of similar partnerships in Canada, see RIGAKOS, *supra* note 18, at 42.

[115] The Business/Law Enforcement Alliance in California, established in 1994, is one such example. Its membership consists of private corporations and city, county, state, and federal law enforcement agencies. *See* David R. Green, *Joining Forces Against Crime*, 42 SEC. MGT. 95, 96 (May 1998).

[116] Thus, the OPERATION COOPERATION report lists among its examples both kinds of partnerships referred to here. *See* INSTITUTE FOR LAW AND JUSTICE, *supra* note 113, at 2, 4.

[117] Gary Marx discusses one such example: a sting conducted by the FBI and IBM that targeted the theft of technological trade secrets. *See* Gary Marx, *The Interweaving of Public and Private Police in Undercover Work*, *in* PRIVATE POLICING, supra note 69, at 172-73.

[118] *See* Voelker, *supra* note 100, at 2-3 (describing these activities with respect to the APPL partnership); Richard C. Dujardin, *City Police Team Up with Private Security Personnel*, PROVIDENCE J., Dec. 9, 2003, at C6 (reporting Providence police chief as saying that "the most powerful element in [its] new partnership" as "the sharing of information between private and public agencies"); Christopher Lee, *Police Ask Security Guards for Aid in Crime Crackdown*, DALLAS MORNING NEWS, Mar. 6, 1997, at 25 (quoting Dallas Police Chief as describing its public-private partnership as "really about information exchange"); *see also* Mangan & Shanahan, *supra* note 112, at 21:

> [C]ooperation between public law enforcement and private security must continue and, if there is one area where public law enforcement and private security have worked cooperatively for joint advantage, it has been in the area of collection and dissemination of records. The ability of both public law enforcement and private security to amass large amounts of personal data about peo-

known as business improvement districts), groups of private property owners in physical proximity to one another (and typically in urban commercial areas)[119] agree to tax themselves, in excess of their normal obligations, to pay for additional collective services such as private police and sanitation workers.[120]

Despite the fact that public agencies are involved in these alliances, there is no public regulation over the partnerships themselves. Nor are there any requirements that these partnerships measure the impact or success of their joint ventures. As a result, it will be nearly impossible, absent voluntary disclosure, to evaluate these emerging organizations.

Those private agencies that enter into joint investigations, participate in information-sharing networks, or establish special assessment districts are not the only private police to have benefited from partnerships. A more subtle effect of public support has been the increased legitimacy of private policing, and a greater willingness by public police to cooperate with them, whether or not they are engaged in formal partnerships. The International Association of Chiefs of Police and the American Society for Industrial Security (both professional organizations) together lobby for and draft proposed legislation on topics that promote the interests of both groups, such as increased private police access to criminal records.[121] Some public police academies now educate new recruits on the private police.[122] Advocates of partnerships attempt to characterize antagonism shown by the public police as obsolescence. They see obstacles to partnership—"turf battles, misun-

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> ple's personal histories, employment records, etc., poses serious liability problems during an era that has seen severe restrictions placed on the use and release of such data.

Id.

[119] Not all specially taxed districts include primarily commercial property owners. *See, e.g.*, JAMES F. PASTOR, THE PRIVATIZATION OF POLICE IN AMERICA 101-63 (2003) (conducting empirical study of Marquette Park Special Services Area, a special tax assessment district for a residential neighborhood in Chicago).

[120] *See* Mark S. Davies, *Business Improvement Districts*, 52 WASH. U. J. URB. & CONTEMP. L. 187, 192 (1997) (counting 134 BIDs in New York City); Joseph Mokwa & Terrence W. Stoehner, *Private Security Arches over St. Louis*, 39 SEC. MGT. 94 (1995) (describing operation of St. Louis BID); Marla Dickerson, *Suit Challenges Private Security Controls*, L.A. TIMES, Nov. 17, 1999, at C1 (counting 1,200 BIDs in North America and between 150 to 200 in California alone).

[121] *See* R. Moulton, *Should Private Security Have Access to Criminal Conviction Files?*, 54 THE POLICE CHIEF 35 (1987).

[122] *See* Norman R. Botton, Jr. & Kenneth R. McCreedy, *Private Security Lectures as Part of Southeast Florida's Police Recruit Training*, 53 FBI L. ENFORCEMENT BULL. 17 (1984).

derstood motives . . . and skepticism about the quality of security personnel and their training"—as relics of the past.[123]

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The proposal of a Congressional bill in 1996 shows how popular the idea of partnership has become. Introduced by Representative Bill McCollum (1981-2001), the Law Enforcement and Industrial Security Cooperation Act of 1996 would have established a twelve-person commission composed of members of Congress, as well as representatives from the private and public police.[124] Its mission would be to "encourage public agencies and private business and institutions to make use of effective models for cooperation in crime control and law enforcement," by studying existing partnerships, and by analyzing laws that "either enhance or inhibit cooperation."[125] The bill's proposed Congressional findings stated that 1) "seventy percent of all money invested in crime prevention and law enforcement each year in the United States is spent by the private sector"; 2) there were three private sector security employees for every one public police officer; and 3) that "more than half of the responses to crime come from private security."[126] While the bill was ultimately defeated in committee, its serious consideration reveals a social and political climate where such partnerships are becoming increasingly acceptable.[127]

B. THE CASE STUDY

A case study can add context and detail to the broad overview that I have provided above. This section discusses an extended example drawn from an empirical investigation of "T Company," a private police department in a large Eastern city. Why choose T Company over possible sites as a case study? One reason is practical: private police organizations are notoriously difficult to study, and T Company allowed me entry into their organization.[128]

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[123] Bentley, *supra* note 114, at 77; *see also* Mangan & Shanahan, *supra* note 112, at 113 ("Ironically, the emergence of the private security industry that now numerically and financially far exceeds its public counterpart occurred without much influence from or interaction with public police. In fact, until recently, there was a mixture of disdain and concern that the emergence of private security was threatening the professionalism of policing.").

[124] *See* Law Enforcement and Industrial Security Cooperation Act of 1996, H.R. 2996, 104th Cong. § 4 (1996).

[125] *See id.* § 3.

[126] *See id.* § 2.

[127] For a summary of the bill's history, see http://thomas.loc.gov/cgi-bin/bdquery/z?d104:h.r.02996: (last visited Apr. 20, 2004).

[128] *See infra* Appendix.

In addition, while the case study is not necessarily representative of all private policing organizations, it nevertheless provides us with an opportunity to evaluate some broad assumptions often made about private police. Consider again the views of Florida state court Judge Harris in *Sipkema v. Reedy Creek Improvement District*:[129] do private police merely perform "night watchmen" duties?[130] That is, are they only guarding against unlawful incursions onto private property? Alternatively, in view of the emerging conventional wisdom on the proper relationship between private and public, how well does a partnership model fit a private police department's relationship with the local public police?

Where an overview provides breadth, a case study can provide a depth of detail. The evidence from my study of T Company,[131] discussed below, casts doubt on the accuracy of both of the assumptions described above, and helps further refine our understanding of private policing. This section first describes the setting in which the study took place, then recounts certain aspects of the police work conducted there.

1. Its Setting

T Company is located in a large city in the Northeast United States. It is a property management company responsible for providing sanitation, maintenance, and policing services within six city blocks.[132] Within these

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[129] 697 So.2d 880 (Fla. Dist. Ct. App. 1997); *see supra* Introduction.

[130] *Id.* at 881. Disney provides an apt example of employers with multiple policing needs. Disney private police must contend with both the mundane, including the counterfeit bills passed in *United States v. Francoeur*, 547 F.2d 891, 892 (5th Cir. 1977), and the extraordinary, like its potential as a target of terrorism after September 11, 2001. Indeed, the Federal Aviation Administration granted no-fly zones to both Disneyland and Disney World on the eve of the nation's war with Iraq. The only other American commercial enterprise with the same special protection is the Valdez terminal of the Alaska oil pipeline. *See* Sean Mussenden & Henry Pierson Curtis, *Rules Bent to Give Disney No-Fly Zone*, CHI. TRIB., May 12, 2003, at 1; *see also* Sean Mussenden, *Disney Erects Bomb Barriers; Steel Barricades Block Service Entrances at Theme Parks*, ORLANDO SENTINEL, May 15, 2004, at A1 (noting installation of a "'advanced counter-terrorism barrier system'" designed to "stop a 20,000 pound truck bomb traveling 70 mph"); Mike Schneider, *Terrorism Hits Theme Parks in the Wallet*, FT. WAYNE J. GAZETTE (Ind.), Oct. 30, 2001, at 1D (describing the terrorism-sensitive security measures newly established at large American theme parks).

[131] T Company is a pseudonym for the site studied, and no individuals referred to here are identified by their real names, according to the conditions of my research access, discussed further in the Appendix. Unless noted otherwise, all references in the text that follow regarding T Company and employees are drawn from the observational work and interviews conducted.

[132] These cover approximately eleven acres. The public police district in which the Department is located employs approximately 300 officers. The community population that the precinct covers, according to the 2000 census, is 49,984 (information on file with author).

six blocks are nineteen high-rise buildings, containing retail businesses, law firms, investment banks, and restaurants that employ approximately 50,000 people.[133] The property also contains within it an outdoor plaza that functions as a quasi-public space where tourists, shoppers, and employees gather. (Indeed, Protection Department managers even refer to the property erroneously as public property.) Thus, the property policed by T Company resembles both a shopping mall and a corporate campus.

Housed within one of the buildings at the site is a full-time "Protection Department" employed directly by T company. The Department employs 160 people, of which the majority (between eighty to ninety) are "POs," an abbreviation for patrol officer.[134] Each officer carries a two-way radio, and wears a dark blue uniform with shoulder epaulets that identify the Department.[135] Their uniforms resemble those of the public police department

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[133] In 2000, according to the records kept by the Protection Department, there were 650 commercial tenants within the property policed by the Department.

[134] If the Protection officers are compared to public officers, this means that the Protection Department is larger than most of the nation's local police departments. *See* BRIAN REAVES & ANDREW GOLDBERG, DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS 2000, at 2 tbl.2 (2003). That report defines local departments as those operated by municipal, township, or county governments. *See id.* at 1.

[135] The Department, like many other private police agencies, creates an impression that their officers are in some manner related to public agents. *See* Marx, *supra* note 117, at 190 n.8. A number of states regulate the appearance of private police uniforms so that they are not unduly confusing. *See* Sklansky, *supra* note 6, at 1261 n.536. The misleading appearance of many private police agents, however, suggests that these laws are either underenforced or loosely interpreted. For examples of these statutes, see ARIZ. REV. STAT. ANN. § 32-2635 (West 2004) (requiring private uniforms that "will not deceive or confuse the public or be identical with that of any law enforcement officer"); CAL. BUS. & PROF. CODE § 7539(e) (West 2004); (prohibiting private investigators from wearing uniforms "with the intent to give an impression" that they are government agents); *id.* § 7583.38 (permitting local governments to regulate uniforms of private patrol officers "to make the uniforms and vehicles clearly distinguishable" from those worn by "regular law enforcement officers"); 225 ILL. COMP. STAT. ANN. 447/25-30 (West 2004) (requiring uniforms do not display the words "'police,' 'sheriff,' 'highway patrol,' 'trooper,' [or] 'law enforcement'"); MICH. COMP. LAWS ANN. § 338.1069 (1) (West 2004) (requiring that security uniforms "shall not deceive or confuse the public or be identical with that of a law enforcement officer"); MINN. STAT. ANN. § 626.88 (2) (West Supp. 2004) (permitting security uniforms to be "any color other than those specified by peace officers"); N.M. Stat. Ann. § 61-27A-12E (Supp. 2004) (prohibiting private investigators from wearing uniforms "with the intent to give an impression" that they are public officials); OHIO REV. CODE ANN. § 4749.08(B) (Anderson 2004) (requiring uniforms to appear "so . . . as to avoid confusion of a private investigator, security guard provider, or registered employee with any law enforcement officer"); OKLA. STAT. ANN. TIT. 59, § 1750.9(B) (West 2004) (prohibited security uniforms "that would lead a person to believe that [the guard] is connected in any way" with government); *id.* 1750.10 (prohibiting display of words "'police,' 'deputy,' or 'patrolman'" on private uniforms); TENN. CODE ANN. § 62-35-127 to -128 (2004) (requiring private police to affix badge over left breast pocket of uniform that is distinct in design from that used by any public police agency, and prohibiting

enough so that, upon a momentary glance, one might mistake them for the local public police.[136] Like most private guards,[137] the Department officers are unarmed[138] and do not possess any special legal powers beyond their ability as private citizens to arrest or detain persons for crimes, and their status as agents of the property owners.[139] The officers work in three shifts over a twenty-four hour period and are responsible for policing the outside spaces and interior lobbies of the buildings.[140]

What follows are the results of my observation of the Department during two periods, one in 1998, and the other in 2000. I also conducted open-ended interviews of its management staff, which is comprised of one director, two managers, and four supervisors. Finally, I interviewed the public police officer who served as the liaison for the city's public-private partnership, and attended three of the partnership's monthly meetings to supplement my understanding.

2. Beyond the Defense of Property

A considerable portion of private policing, as Shearing has pointed out, involves the protection of private property.[141] Central to the private

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any badge that "tends to indicate that such person is a sworn peace officer" or "includes the word 'police'"); VA. CODE ANN. § 52-9.2 (Michie 2004) (prohibiting private uniforms identical to any official public uniform or "so similar in appearance as to be likely to deceive the casual observer").

[136] *See also* Scott & McPherson, *supra* note 65, at 272 ("Public misunderstanding of the law [as to the authority of private police officers] undoubtedly gives private agents an additional advantage.").

[137] *See, e.g.*, HALLCREST REPORT, *supra* note 22, at 144 (projecting that by 2000, not more than five percent of private police personnel would be armed).

[138] Only one supervisor, who had retired after twenty years with the city police, carried a gun in a shoulder holster. Supervisors do not wear uniforms.

[139] State law requires that all the Department's officers, who are classified as security guards, receive the following training: eight hours of "pre-assignment training"; a minimum of sixteen hours of "on-the-job" training, and an eight hour annual in-service training course. According to the state's administrative code, the eight hours of pre-assignment training must at a minimum include 1) introduction (.25 hour); 2) role of a security guard (1.25 hours); 3) legal powers and limitations (2 hours); 4) emergency situations (1 hour); 5) communications and public relations (1 hour); 6) access control (.5 hour); 7) ethics and conduct (1 hour); and 8) review and examination (1 hour) (on file with author).

[140] In 2000, officers starting employment with the Department earned $11.98 per hour, and with seniority could earn $16.43 per hour. In comparative terms, Department officers earn a higher wage than the national median salary for a security guard, which was $17,570 in 2000, according to the Bureau of Labor Statistics. *See* BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK 350-52 (2002-03), *available at* http://www.bls.gov/oco/pdf/ocos159.pdf (last visited Feb. 12, 2004).

[141] *See, e.g.*, Shearing, *supra* note 64, at 526-29.

property right is the ability to exclude, which the Supreme Court has described as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[142] The role of private police in protecting property is often characterized as a passive one. The popular reference to security *guards* (rather than to "officers" or "investigators") gives the impression that private police are mainly engaged in passive action.[143] Likewise, the employees of the Protection Department are quick to minimize their own duties and powers.[144] Therefore, it would be reasonable to assume that the policing of private property, even property with quasi-public aspects, is passive and reactionary. The sections that follow, however, suggest that this portrait is not wholly accurate. The Protection Department, in fact, "actually perform[s] functions previously carried out by public officers."[145]

a. Bureaucratic Surveillance

To gain entry into the Protection Department's control center, you must first find it; its offices are tucked away along a dark hallway in one of the high-rise buildings on the property. You must then pass through a locked door monitored by closed circuit television cameras. Located inside is the Department's "control center." Enclosed within glass walls, the control center resembles a space launch command center in miniature, with multiple monitors, computers, and communications equipment.[146] From here, two Protection officers watch the cameras monitoring the property: sixteen in the outdoor spaces, and nearly three hundred within the buildings.[147] To demonstrate how well they worked, one officer operated a surveillance camera so that he, from several stories up, could read the headlines of a newspaper held by a person sitting in the outdoor plaza.

[142] Kaiser Aetna v. United States, 447 U.S. 164, 176 (1979).

[143] *See also infra* Part III.

[144] *See also* Sklansky, *supra* note 6, at 1183 ("Private security companies eager to appear unthreatening often stress that their personnel are limited to the search and arrest powers of ordinary citizens.").

[145] *Id.* at 1168.

[146] The analogy is not so far from reality. The company that supplies and services the Department's surveillance cameras at one time supplied equipment to NASA.

[147] As a comparison, Macy's department store in New York City employs about the same number of surveillance cameras to stop shoplifting. *See* Andrea Elliott, *In Stores, Private Handcuffs for Sticky Fingers,* N.Y. TIMES, June 17, 2003, at A1 (reporting that there are more than 300 surveillance cameras that are used by Macy's security department). Incidentally, Elliot also describes the Macy security headquarters as resembling a space command center. *Id.*

From the control center, the Protection Department relies on what sociologists Richard Ericson and Kevin Haggerty refer to as "bureaucratic surveillance": the routine and continuous recording of the frequency, location, and timing of people's movements.[148] Such close and constant monitoring is possible because the Department has a high "surveillance capacity."[149] Not only do officers monitor the cameras, they maintain logbooks for people who enter the buildings at night, collect and monitor work authorizations for hundreds of service employees who enter the property, and maintain electronic records on all employees who use computer identification cards to enter into the buildings.

The constant, systematic, and routinized collection of information means that some kinds of investigations are much easier for the private police than they would be for the public police. Consider the difficulties the public police would encounter in trying to determine a person's whereabouts on a particular day and in a specific location. Witnesses must be questioned, routines disrupted, and a trail leading back in space and time must be reconstructed. Within their own jurisdiction, by contrast, private police have a much easier time with such matters, for they may ask, as a condition of access, for all kinds of personal information, and implicitly receive consent to monitor personal movement.

The Department provided many examples of this capability. In one case, a business tenant asked the Department to review its electronic card access records on a particular night to see if one its employees had been within the building over the weekend when he was unauthorized to be there. (He had been.) Another tenant asked the Department to install hidden surveillance cameras within its premises, a restaurant, to help apprehend the person who had been stealing customers' wallets and purses. The public police also take advantage of the Department's surveillance capacity. During the period from Thanksgiving to Christmas, city police detectives looking for pickpockets watch the Department's surveillance cameras. Opening their doors to the city police is, according to a Department manager, "good for the quality of life of the city."

[148] *See* ERICSON & HAGGERTY, *supra* note 43, at 95 (defining bureaucratic surveillance as "the production and distribution of knowledge useful for risk management and administration"). Oscar Gandy describes eleven sources of such routinely collected information: personal credentials (driver's license); financial activity (ATM cards); insurance (health policy); social service (pension plans); utility service (telephone); real estate (sale); entertainment (travel documents); consumer activity (credit accounts); employment (applications); education (references); and legal (court files). *See* OSCAR H. GANDY, JR., THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION 63 (1993).

[149] *See* ERICSON & HAGGERTY, *supra* note 43, at 95 (defining surveillance capacity as the "ability to establish and sustain surveillance mechanisms").

b. Compliance-Based Policing

If one were to assess the police work at the Protection Department by arrest activity, there would be virtually nothing to study. I observed no arrests during the period of my observation, and conversations with Protection officers and managers revealed none in recent memory.[150] It would be wrong, however, to conclude that these private police fail to engage in "real" police work because they lack the indicia of productivity associated with the public police: arrest and clearance rates.[151] Rather, the absence of arrest provides an opportunity to compare the distinctive models of policing used by private and public police to control crime and disorder. Sociologist Albert Reiss would call them compliance and deterrence-based policing.

While both compliance and deterrence models seek law-abiding behavior, they differ in the means by which to achieve that result. Reiss distinguishes them in this manner:

> Compliance systems aim to prevent violations of the law from happening or to reduce their harmful consequences. Deterrence systems must allow violations of the law to occur so that those violations can be punished to produce the deterrent effect. The cost of deterrence is always some violation of the law.[152]

Because no model of policing adopts one form wholly to the exclusion of the other, compliance and deterrence models are best understood as ideal types. Nevertheless, these are useful distinctions because police organizations tend to prefer one model over another. As a consequence of historical change and because of the structure of the present criminal justice system, public police organizations rely principally (although not entirely) on a deterrence-based model. As public police departments emerged from the con-

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[150] The Department did not appear to keep any record of arrests. To some degree, the compilation and organization of information within private police organizations varies to the degree that this is required by law (not the case here), or to the extent to which the organization must use that information to promote its services (also not the case here). *Compare* RIGAKOS, *supra* note 18, at 35 ("To sell parapolicing [his term for private police], Intelligarde must provide both public and private clients with evidence of a tangible security product.").

[151] The symbolic importance of arrests, however, should not be mistaken for the actual frequency of arrests conducted by public police officers. As many public police researchers have observed, the average patrol officer conducts very few arrests. In his study of a Canadian public police department, Richard Ericson vividly described the realities of a patrol officer's typical day: "[T]he bulk of the patrol officer's time was spent doing nothing other than consuming the petrochemical energy required to run an automobile and the psychic energy required to deal with the boredom of it all." ERICSON, *supra* note 44, at 206; *see also* DAVID H. BAYLEY, POLICE FOR THE FUTURE 22-23 (1994) (describing a typical evening shift for a public patrol officer).

[152] Albert Reiss, *Consequences of Compliance and Deterrence Models of Law Enforcement for the Exercise of Police Discretion*, 47 LAW & CONTEMP. PROBS. 83, 94 (1984).

stable-watch system of the nineteenth century, they separated themselves from the inspectorate system, which operated on a compliance model.[153] In addition, the modern public police organization operates on the formal presumption that it exists to obtain arrests so that other actors in the criminal justice system can thereby control crime by punishing offenders.[154]

Private police organizations, by contrast, have no such direct relationship with the criminal justice system, and, as discussed earlier, may refer to an entirely different, and private, system of norm enforcement and sanctions.[155] Their methods of policing, therefore, can be quite distinct from those employed by the public police. Arrest, then, is a misleading basis of comparison. In our example, the Protection Department engages in a compliance model of policing,[156] or more specifically, in Reiss's terms, an incentive-based compliance model.[157] How the Protection Department handles crowds provides an illustration.

One July evening, the Department prepared for a concert of a popular singer to be staged in the outdoor plaza the next morning. By sunset, a large group (perhaps some seventy-five people) were milling about the plaza with the clear intention of staying there throughout the night. In the Department's "war room," the Director had tacked up a map of the plaza charting out policing arrangements. He instructed the Department officers to set up a "bull pen," metal crowd barricades (borrowed from the city police), arranged so as to control and limit the movement of the crowd. Throughout the night, the Protection officers, by polite instruction (and with the implicit threat of expulsion for non-compliance) moved the amorphous crowd into straight lines, and corralled them behind metal barricades, all without incident.

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[153] *Id.* at 83.

[154] *Id.* at 105. Although he emphasizes the dominance of a deterrence model within public police organizations, Reiss is also quick to point out that individual patrol officers sometimes rely upon a threat-based compliance model, particularly in dealing with "soft" or less serious crimes. *Id.* at 107. These compliance strategies, however, are rarely recognized formally by public police managers or legislators. *Id.* at 112.

[155] *See supra* Part I.C.

[156] Reiss himself identified the use of a compliance model by private police. Reiss, *supra* note 152, at 99. Of the private police, he observes briefly: "Their [the public police] competitors in private policing, however, are compliance- and discipline-centered, a factor that may figure in the latter's substantial growth and explain how their work accomplishes the ends of the private organizations which employ them. Private organizations ordinarily seek compliance, not deterrence." *Id.*

[157] Reiss distinguishes between two kinds of compliance: "Compliance is voluntary in incentive-based systems whereas it is to some degree coerced in threat-based systems." *Id.* at 91.

The war room plans showed that the Department, as it often does, had also hired off-duty city police. In 1998, the city police established an official program formally permitting its officers to accept private employment, in uniform, with private companies located in the city. To administer the program, the city police established a new internal department that processes paperwork for off-duty work, screens prospective employers, and maintains a list of volunteer officers who seek private employment. For the large crowd anticipated for the concert, the Department had hired eleven city officers: two to work from midnight to 6 a.m., and the other nine officers to be present from 6 a.m. to 10 p.m.

By the next morning, the crowd from the previous night had doubled. Within the space of a few hundred square feet, the police presence was formidable: a phalanx of public officers (some privately paid and some officers voluntarily stopping by to "help out"), several protection officers on duty, and plainclothes Department supervisors. Control center operators monitored the surveillance cameras and communicated any suspicious activity to the officers on the ground. To judge by the enthusiasm of the crowd, few perceived the police presence as threatening. And, like the evening before, all of the police working for the Department continued to instruct individuals in the crowd to move in one direction or another. The event, which took place within a busy section of the city at morning rush hour, ended with no arrests, nor any incidents of unruliness or recalcitrance among the crowd.

The Protection Department did not resort to arrests because no such powers were necessary. Its compliance-based policing relies on "manipulat[ing] means that induce conformity."[158] The willingness of the crowd to submit to instruction and obey private police commands turns on the Department's ability to deny access to a desired resource: here, the concert. The use of bureaucratic surveillance eases this task by permitting identification of the slightest opportunities for disorder or crime, and also the means to address these opportunities by enforcing compliance. Likewise, in their description of private policing at Disney World, Shearing and Stenning noted that in the Magic Kingdom, "[o]pportunities for disorder are minimized by constant instruction, by physical barriers which severely limit the choice of action available and any by the surveillance of omnipresent employees who detect and rectify the slightest deviation."[159] What might appear, then, to be *inaction* on the part of the private police is revealed, upon

[158] Reiss, *supra* note 85, at 25.

[159] Shearing & Stenning, *supra* note 69, at 319.

closer examination, as more subtle, "apparently non-coercive and consensual" methods.[160]

The presence of off-duty police illustrates another point: when compliance-based policing fails, the employment of public police in uniform permits the Department to turn to more coercive methods.[161] For instance, the Department prefers that the off-duty city police they hire address exclusively what it perceives as the "peddler problem": young men who skirt the boundaries of the plaza private property with stashes of counterfeit watches, handbags, and sunglasses, all wrapped in cloth bundles or garbage bags carried over their shoulders.[162] (The city's administrative code prohibits street vendors from selling their wares, unless approved by a city review panel, in the physical space near where the plaza is located.)[163] The Department management is not especially interested in stamping out illegal conduct; rather, as one manager explained, peddlers are "an eyesore." Peddlers are the main reason, according to Protection managers, why the Department hires off-duty police, because peddlers, a decidedly marginalized group, respond less compliantly to the demands of its own officers than to a city officer in public uniform. Actual arrests of these peddlers are rare. What matters is that the *threat* of arrest and public prosecution embodied in the city police uniform convinces peddlers to move away from the property.

Because the Department is interested in street peddling not as an illegal activity but as a *unsightly* one (detracting from the Center's image as a clean, orderly, and safe destination), the off-duty city police hired by the Department simply disperse peddlers they find. The peddlers who solicit the business of tourists, shoppers, and office workers walking through the outdoor plaza display their goods while nervously surveying their surroundings. When an off-duty cop sees and approaches a peddler, he gathers up his belongings and walks off the plaza grounds.

The unquestioning compliance with public police authority is useful on many occasions. On another evening, control center operators noticed from their surveillance monitors a crowd gathering around a street performer standing on the (private) plaza. A supervisor approached that day's off-duty cop, who, at the end of his shift, was waiting in the control center to

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[160] *Id.* at 322.

[161] For a similar observation, see *id.* at 320-21.

[162] For a description of the attempts by public police to control the counterfeiting trade, see Scott Malone, *Counterfeiting and Terrorism*, WOMEN'S WEAR DAILY, Sept. 15, 2003, *available at* 2003 WL 61796464.

[163] For an insightful discussion of how a group of New York City street vendors work and live within a similar system of regulation, see generally MITCHELL DUNEIER, SIDEWALK (1999).

complete his paperwork. Would the officer mind taking care of something, and would he be leaving the plaza *in uniform*? The supervisor pointed out the performer, visible on the monitors, to the officer, who agreed to the task. On his way home, the uniformed cop asked the performer to leave, thereby dispersing the crowd.

3. Relations with the Public Police

The Department belongs to the formal, city-wide partnership established in 1986 by the public police. Its official purpose is to foster cooperation between the public department and the hundreds of private policing operations in the city. In practice, cooperation is one, but not the only, kind of relationship the Department maintains with the public police.

a. The Old Boy Network

The term "old boy network," conveys in shorthand form the social ties among members of a given profession, such as politicians, judges, or as here, the police.[164] Among former public police, these informal connections provide access to information and privileges that the general public would find difficult to obtain. Clients of private police know that former public police may possess "dual allegiances" to their former agency and to their private employer.[165] In public professions, these informal ties pose potential troubling ethical dilemmas, for they suggest that despite the ostensible principles of equality and openness with which institutions like policing are conducted, some people may receive more favorable treatment than others.

To take best advantage of such connections, the Protection Department consistently hires former highly-ranked officers from the city's public police department. Directors N.K. and S.R., the two people who held the director's position during the time of my study,[166] bore fifty-five years of collective public police experience between them.[167] Their offices displayed all of the accoutrements of their former public lives: awards, plaques, and police helmets. When calling someone with the city police department,

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[164] For further discussion of the "old boy network" in private policing, see Joh, *supra* note 63.

[165] *See* Ralph Blumenthal, *Growing Ranks of Private Guards Cooperate in Public Policing*, N.Y. TIMES, July 13, 1993, at B1 (quoting Joseph Rosetti, former U.S. Senate investigator and currently vice chairman of Kroll Associates).

[166] By 2000, N.K. had moved on to manage another private security department within the city.

[167] N.K. had been with the city police for twenty seven years; S.R., twenty-eight. Both had risen to executive positions within the city police.

they even introduced themselves by their former titles, e.g., "Hello, it's Chief [R]."

Unsurprisingly, perhaps, I observed no specific examples of informal information exchanges between the Department and the city police, and no member of management spoke openly of any.[168] Yet, a number of patrol officers there point out that it was no coincidence that the Department always employed a former city police officer in the Director's position (as opposed to a private citizen or public officer from another jurisdiction). According to one of the Department directors, relations with the local precinct are friendly:

> The PD works very closely with us. The fact that there is a police officer who works strictly [for this center], during the week, [and] in addition whenever we have any special events here. The PD's very cooperative in sending us help, which is either through police officers or sending us barricades, but it's [a] very good rapport we have with them, whereby all it warrants is a phone call that either [the director] makes or myself makes or [another manager] makes, and once a call is made, you can actually say what's going to be done. Whenever they respond here, they respond in a very appropriate manner and I've never any had any problems with them.

It is probably impossible to gauge with real accuracy how much or how often any private department relies on informal connections to public police officials.[169] At the very least, the Department's hiring of former high ranking public officials facilitates those connections if desired.

b. The Uses of Partnership

The Department is also a formal member of the city's public-private partnership. The partnership is administered by its citywide coordinator, D.E., who is a city police officer, and his administrative assistant. Working from the police department's headquarters, the liaison organizes monthly meetings for the partnership's members, who include the private police directors for department stores, banks, corporations, and contract guard companies.

Formal meetings, which are usually hosted by a private police director at his or her workplace, provide a venue both for socialization among the members (of which there were 1,200 city-wide in 2000), and for the distribution of news and alerts by the public police liaison. In the coordinator's

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[168] Jones and Newburn encountered similar results. *See* JONES & NEWBURN, *supra* note 26, at 174 ("Informal discussions with security personnel suggested that [information exchange in the old boy network] almost certainly goes on, though we discovered little about the circumstances or extent.").

[169] *Cf.* PRIVATE SECURITY ADVISORY COUNCIL, *supra* note 84, at 14 (commenting that "'sub rosa' channels of communication" will probably always exist).

view, the public police motivation for promoting and participating in the partnership is simple:

> We double our eyes and ears by giving them information. It's almost unbelievable how many [private] officers are in the street, and some of them, they have security in the buildings in [the city]. A lot of larcenies and theft are in buildings, you know, laptops and stuff. If we can let them know, this is what someone looks like, he just hit four buildings in your area. The security people will be on top of it, tell their people, stop someone from leaving, because that's the guy. There's been times [when] they've caught people that we've been looking for, because they knew that something was going on. And of course that's nothing more than sitting down, having a cup of coffee, making friends and having a meeting. That's the main gist of what we do.

After repeated complaints by partnership members about theft within buildings, for example, the city police also provided training to private police directors in fingerprint collection techniques:

> Before if someone took a laptop or two, we'd take a report and that's kind of it. If there's [sic] witnesses, the [public] detectives would follow up with an investigation, but more often than not, no one saw what happened, and there's just a report. What we decided to do was train certain private security directors to lift for fingerprints at the crime scene in their building, and only on a larceny, not on a violent case . . . so why not have the director of security who might be past law enforcement or has been in private security long enough that it's enough for us to look at them as law enforcement.
>
> Let's train that guy to go into the cubicle where it was stolen, in a fifty story building, rather than cops following the basic lead. He takes his print kit out, dusts the area, and it could be an employee that did it or maybe he knows someone could be a tenant, a messenger. He gets a print, he gives it to us, and we can run it in our fingerprint system, and say hey that guy, maybe he's done a bunch of larcenies, he has no right to be there in that building, and his fingerprint puts him right in that building. We can question that person, maybe get a confession. And a lot of times they get confession, because there's a lot of employee theft.

Apart from property theft, terrorism is another source of concern for private police departments in the city, and the liaison spoke, although in a roundabout way, of alerting the partnership members about threats:

> If we send a message out to them, a definitive incident could happen in [the city], we're raising our security, you should do the same, they can kind of read between the lines that there's talk of maybe things could happen here . . . . Sometimes the intelligence division gets information that there's potential for things to happen, nothing specific, we'll let them know that.

c. Passive Non-Cooperation

To say that the Protection Department *relies* on its informal connections to the public police is to present only a partial truth, for the private police also sometimes engage in what I'll call passive non-cooperation. That

is, while I found no evidence that these private police deliberately conceal information requested from the police, in certain respects they choose not to reveal information that the public police might find relevant to their own work.

N.K., one of the directors (and a former high-ranking city police officer), explained that on some occasions not only did the Department choose not to call the public police, it would not welcome their presence. "They create chaos," he explained:

> We want to get there before the cops do. Why? Because if there is an attaché case on the street, they'll want to shut everything down. But was there a phone call? Was there a letter? What are the chances that it really is a bomb? The cops don't care. They figure 'you never know.' We don't want to just shut down for that. We want to protect ourselves from the police, to tell you the truth.

To this end, the Department employs its own bomb squad—two trained dogs and their handler—and had occasion to use them when suspicious packages were reported by tenants.

D.E., the city liaison, also noted that decisions by private police not to inform the public police of criminal activity were worrisome. Regarding employee theft, D.E. observed, "our problem is that a lot of times they'll terminate [the offender] rather than arrest. We don't like that." When asked why, he responded,

> It's their decision to prosecute or not. And the security director might want to, but a lot of times there's concern there could be [negative publicity], instead of arresting him [the employer decides], just get rid of him. We prefer to get an arrest because all [the offender is] going to do is get in trouble somewhere else, and that's a problem.

These comments suggest that private police neither work under the direction of the public police, nor cooperate fully even when the public police would wish them to.[170] Instead, private police managers cooperate with the public police when doing so serves their interests or, more specifically, their clients' interests. Thus, passive non-cooperation is also an important aspect of the relationship between the two groups.[171]

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[170] The remarks also suggests that private police organizations, concentrating upon a single site within a city or county, are less concerned with the possible displacement effects of their actions than public police organizations may be. *See infra* Appendix.

[171] *Cf. Cooperating with Law Enforcement: Do You Have More to Gain Than Fear?*, SEC. DIRECTOR'S REPORT, Feb. 2004, at 4 ("You may still choose to keep some security cases to yourself, but a stronger bond between your company and law enforcement is now a net gain, in SDR's view.").

4. Summary and Implications

Referring to the case study, we can correct some common misunderstandings about the private police. First, to say that private police only protect property is to underestimate considerably the extent to which they investigate, observe, and actively manage the behavior and movement of others.[172] Furthermore, private and public police cannot be said to operate in wholly separate spheres. Professional, social, and structural ties result in the interpenetration of both groups. Public and private police are also drawn to one another to the extent that they provide "functional alternatives" to one another.[173]

As we will see in the next Part, the legal rules governing the private and public police assume that there exist two wholly separate realms of policing separated by differences of jurisdiction, function, and expectations. As an illustration, the Protection Department's policing suggests why the boundary between private and public is more permeable and fluid than the distinction in law implies.

Most evident from the T Company example is the observation that public policing is deeply intertwined in private policing work. At T company, we can see the interlacement of public and private in several ways. First, the movement of personnel between the city police department and T company's management reinforces close organizational and personal ties between private and public. Former city police employed at T Company continue to see themselves as connected to the public police department, even though they are no longer formally associated with it.

Second, the regular employment of otherwise full-time public police, in public uniform, means that T company, as a private corporation, may make use of the public status, symbols, and authority of the public police for its own ends. Private police managers are frank about why they employ off-duty police: those persons who are least desired (e.g., street peddlers) on their private property are more inclined to listen to a public officer in uniform, regardless of who pays for the service.

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[172] Similarly, Thomas Scott and Marlys McPherson, in their study of private police in Minnesota, came to this conclusion:

> What appears to legally distinguish the private police from the public police is the purpose for which private agents are licensed and the method of compensation. The private police agent performs functions which are virtually identical in many respects to those carried out by public police but he performs them for other private individuals and is paid for his services a sum agreed upon by both parties without statutory limitations as to the amount.

Scott & McPherson, *supra* note 65, at 273-74.

[173] *See* Marx, *supra* note 117, at 182. This is discussed further *infra* Part III.

Third, the close contacts between T company and the city police mean that private policing at the Center is "effectively underwritten" by the public police.[174] It is the mandate of the public police to respond to citizen complaints, of course, but private police call on their public colleagues not out of helplessness, powerlessness, or an inability to find an effective resolution.[175] Rather, the private police seek public aid to reinforce judgments and resolutions they have already identified, such as ejecting a homeless person or dispersing an unruly crowd, and desire more coercive aid than that which is available to them, or that they wish to employ themselves.

At a more basic level, the T Company evidence suggests that however they describe themselves ("doing nothing" or "customer service"), private police engage in an active and interventionist enterprise in which they assume policing responsibility within their physical jurisdiction that is, in the main, no less "policing" than what most public police do. Through unremitting surveillance, constant instruction, employment of the public police, and membership in a partnership, T company does much of what a typical police department does: maintaining order and controlling crime. While the public police officer's heightened legal powers should not be minimized, the absence of arrests by T company police should not be interpreted as evidence of their relative disempowerment.

In this respect, both the insights of Shearing and Reiss warrant repeating. Private police do not resort to the more coercive methods associated with the public police because they *cannot*, but because they *need not*. Private police have at their disposal the means to deny access to those who are most easily persuaded to comply. Mall shoppers, airport travelers, and private employees all represent classes of persons amenable to the subtle controls imposed by private police that appear *de minimis* to the casual observer because they do not usually involve detentions, searches, or other forms of coercive control. As for other groups less likely to submit to their instruction (juveniles, the homeless, and other marginalized groups), the private police can resort to their close relationships to the public police.

(At the same time, it must be remembered that some private police do, unlike the Protection Department, engage in activity that might appear more

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[174] JONES & NEWBURN, *supra* note 26, at 181 (noting that private police have a "safety-net" in the public police).

[175] *Cf.* BAYLEY, *supra* note 42, at 20 (observing that the public police confront "the begrimed reality of the lives of people who have no one else to take their problems to").

conventionally "police-like": seizing evidence,[176] conducting pat-downs for weapons,[177] questioning suspected persons,[178] and effectuating arrests.[179])

Furthermore, the evidence from the Protection Department provides an opportunity to examine two of the assumptions underlying the new conventional wisdom of partnership. First, supporters assert that partnerships serve objectives shared by public and private police.[180] Second, advocates of partnership trumpet the benefits that accrue to "the public" or to "the community" as a result of close private-public relationships.[181]

While private and public police may share some objectives, this broad statement certainly needs qualification. The Protection Department police focus on those sources of crime and disorder that affect the value of the property they police. This includes a considerable number of issues, such as petty theft, vandalism, and crowd control, but not others. This means that the Department, like other private police agencies, will tolerate some *kinds* and *degree* of disorder if reacting to them is overly costly or disruptive to a client's concerns.[182] In addition, the Protection Department managers display some passive non-cooperation toward the public police. Private police cooperate to the extent that partnership suits their own needs,

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[176] *See, e.g.*, Sizemore v. State, 483 N.E.2d 56, 57 (Ind. 1985) (describing surveillance and seizure of stolen credit cards by Kmart security guards).

[177] *See, e.g.*, Cullom v. State, 673 P.2d 904, 904 (Alaska Ct. App. 1983) ("The guard took Cullom to the store's security office, recovered the [stolen] cologne set, read Cullom his Miranda rights, and then frisked Cullom for weapons. The weapons search is apparently a routine procedure."). While the guard read Cullom his Miranda rights, he was not vested with public police powers. *Id.* at 904-05; *see also* People v. Holloway, 267 N.W.2d 454, 455 (Mich. Ct. App. 1978) (describing pat-down conducted by drugstore security guard leading to weapons charges).

[178] *See, e.g.*, United States v. Garlock, 19 F.3d 441, 442 (8th Cir. 1994) (describing written confession obtained after thirty minute private interrogation of bank employee by bank security officer).

[179] *See, e.g.*, People v. Moreno, 135 Cal. Rept. 340, 341 (Cal. App. Dep't Super. Ct. 1976) (noting that security guard had arrested approximately three dozen people in eighteen months).

[180] *See, e.g.*, *Pending Crime Bills: Hearing on H.R. 2641, H.R. 2803, and H.R. 2996 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong. (1996), *available at* 1996 WL 134391 (stating that with regard to a proposed bill on partnerships, "[p]ublic law enforcement and the private security industry work toward the same goals").

[181] *See, e.g.*, INSTITUTE FOR LAW AND JUSTICE, *supra* note 113, at 3 ("Community policing, with its call to establish partnerships, requires cooperative efforts (including partnerships with 'corporate citizens'), and private security is a natural partner.").

[182] *Cf.* Shearing, *supra* note 64, at 534 ("The inevitable result of . . . instrumental policing is . . . that a certain amount of suspected deviance will often be tolerated because the costs of or the means of controlling it would threaten the interests of the client more than the deviance itself.").

including methods of "cooperation" that may thwart public police objectives.

Incidentally, the absence of complete conformity between private and public police goals also suggests that the apparent trend of ever-increasing numbers of police are unlikely to result in a "Big Brother" society, to the extent that Orwell's literary metaphor implies an overarching police structure with central coordination.[183] There are, as the Protection Department evidence suggests, areas of overlapping concern, but the public police do not direct the private police in any true sense.

As for the second assumption, while the Department polices a population, consisting of shoppers, employees, tourists, and other visiting urban residents, it can hardly be described as a "community," if by that term we mean a group of persons to whom the Department renders account. Simply put, the Department is only interested in the directions, approval, and guidance of its employer, T company. To the extent that there exists feedback by the population policed, it would consist of decreased popularity of the plaza as a place to visit, or the decreased desirability of the office buildings as spaces in which to do business. But this kind of indirect communication is not analogous to the structure, however flawed, of public criticism, response, and accountability associated with the public police departments. Thus, "community," as it is used in the partnership context, is an ambiguous, and perhaps a misleading, concept.

For all these reasons, the partnership model, in which the Protection Department takes part, threatens to distort basic values associated with public policing, specifically, and the criminal justice system, generally. In conventional legal scholarship, the shibboleths of public interest, equal treatment, and justice are used with such frequency they have become hackneyed phrases. The rise of private policing, however, provides a fresh perspective on these ideas, and suggests that ideas like "community" or "public interest" have meanings that are increasingly contestable.

III. PRIVATE AND PUBLIC DIVERGENCE: LAW

> I would like to invoke the folk wisdom that if an object looks like a duck, walks like a duck and quacks like a duck, it is likely to be a duck. If a security officer in an establishment open to the public dresses like a peace officer, carries a gun and a simulated badge or shoulder emblem like a peace officer, and conducts himself in the authoritative manner of a peace officer, he surely will be deemed in the eyes of the public and detained suspects to be the equivalent of a peace officer.

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[183] For an insightful discussion of competing privacy models inspired by George Orwell and Franz Kafka, see generally Daniel Solove, *Privacy and Power, Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393 (2001).

—Justice Mosk, concurring in *People v. Deborah C.*, 1981[184]

"Private security guards . . . fall into a 'gray' area astride the public-private distinction."

—Judge Kaufman, concurring in *People v. Holloway*, 1978[185]

As we have seen, private and public police now engage in substantially similar activities. Policing, then, is more than what the *public* police do. The law that regulates the public police, however, is largely inapplicable to the private police. An unyielding legal distinction divides the two groups.

By drawing such a contrast between public and private, the law advances a restrictive definition of the police. While I refer to private *police*, courts and legislatures more often than not choose a term like private *security*. Thus, when speaking of the police, we usually mean the *public* police. So it should be no surprise that the legal rules concerning police behavior, conventionally understood, have nothing to do with the private police. Indeed, to define a law of "private policing" requires the collation of various statutory and common law rules directed at a motley group of private detectives, guards, "special police," and even ordinary citizens.

This difference is not simply one of vocabulary. By drawing that distinction, legal decisions (both judicial opinions and statutes) promote normative and descriptive assumptions about who the "police" are. This observation is not particular to the police; legal decisions take part in shaping the interpretation of the empirical world, rather than simply applying rules to a fixed reality.[186] Legal scholars have pointed out, for instance, how our understanding of gender, race, and the family have been shaped by law.[187] We may not recognize policing as a similarly contested concept, but that is not so because the term—its content and interpretation—is any less open to debate.

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[184] 635 P.2d 446, 455 (Cal. 1981) (Mosk, J., concurring).

[185] 267 N.W.2d 454, 459 (Mich. Ct. App. 1978) (Kaufman, J., concurring).

[186] Elizabeth Mertz would call this "a 'moderate' social constructionist vision of law," in which there is "moderate skepticism regarding the fixed or natural character of categories." Elizabeth Mertz, *A New Social Constructionism for Sociolegal Studies*, 28 LAW & SOC'Y REV. 1243, 1244-45 (1994). For further discussion of that view and a helpful bibliography on constructionism and the law, see *id.*

[187] *See, e.g.*, Ariela Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641 (2003) (showing how presumptions regarding male-dominated households shaped the regulation of widows' benefits in nineteenth-century America and ideas about the "normal" family). In her review of scholarship by Martha Fineman and Linda Gordon, Alice Hearst observes that both show "how a particular idea of the family has become naturalized in American law and policy, resulting in a peculiarly narrow conception of the 'good' or 'normal' family." Alice Hearst, *Constructing the Family in Law and Policy*, 22 LAW & SOC. INQUIRY 131, 133 (1997).

How is it that the law has so far removed private from public policing? We can attribute this sharp distinction to at least two presumptions in the law of (public) policing that obscure private police activity from otherwise applicable rules. Call one the superficiality of state involvement; the other, the centrality of arrest.

By state involvement, I refer to the legal doctrine of state action, the fulcrum on which all of the federal constitutional law regulating public police behavior turns. In order for the judicially interpreted restraints of the Fourth, Fifth, and Sixth Amendments of the U.S. Constitution to apply to police action, there must exist activity attributable to the state, in contrast to, for example, action by private citizens in which public police involvement is incidental or absent. Judicial determination of whether state action exists in contested police action is usually superficial. In the vast majority of the cases regulating the public police, the presence of state action is undisputed; the character and extent of (public) police involvement, seemingly obvious.

The second presumption refers to the role of public police as initiators of the criminal justice process, by their identification and apprehension of offenders. While public police work, as I have discussed, involves more than investigation and arrest, the law places greatest importance on the police work that leads to a criminal prosecution.[188] Call this focus the centrality of arrest. Paying greatest attention to police behavior at the moment of arrest has troubled scholars of the public police more than the state action doctrine has. Egon Bittner, for example, observes that the public police stand in a producer-consumer relationship with the courts.[189] Because courts necessarily depend upon public police to produce cases for their consideration, Bittner suggests, courts are poorly situated to then control police behavior.[190] In addition, the centrality of arrest leaves largely ignored the many opportunities for the exercise of authority by police officers that do not lead to arrest, such as harassment or intimidation.[191]

Against the background of these two observations, this Part examines the legal regulation of private police conduct.[192] The legal construction of

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[188] *Cf.* Reiss, *supra* note 152, at 103 ("The legality of arrest behavior thus has become central to the processing of cases through that system.").

[189] *See* Bittner, *supra* note 45, at 113 (observing that "the present arrangement between prosecutors and judges, on the one hand, and the police, on the other hand, is not unlike that between any set of independent consumers and suppliers of services").

[190] *See id.* at 112-13.

[191] *See, e.g.*, Reiss, *supra* note 152, at 86-88, and *supra* notes accompanying Part I.

[192] Thus, I do not examine here many other important issues related to private policing, including the tort liability of those who employ private police who behave illegally; any obligation of private property owners to provide private police for tenants or visitors; the ability

policing, carried out through these two presumptions, has important practical consequences. Analysis of the rules regulating the private police illustrates how these presumptions reinforce a formal divide between public and private. That distinction is at odds with the organizational and social links between them. Because the law of criminal procedure, the rules constraining public police conduct, have been heavily "constitutionalized," the discussion here also pays greatest attention to federal constitutional law, although some consideration is given to other sources of legal control. This Part begins by reviewing the existing laws governing private police behavior, and then identifies three puzzles governing private police law that arise out of the divide between the formally distinct legal regimes controlling the public and private police.

A. THE EXISTING FRAMEWORK

Private policing law is a jumble of state regulations and common law doctrines.[193] There exist hardly any federal statutes directed specifically toward private police conduct. The most notable exception is the seldom-invoked federal statute outlawing the employment of Pinkerton police, enacted in 1893.[194] Most importantly, 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. This section provides an overview of that legal framework.

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of private police to enforce private speech regulations; or various workplace regulations that apply to private police as an occupational class. For examples of cases in these areas, see Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (holding that state constitutional rules allowing individuals to enter a shopping mall and gather petitions did not violate the property owners' First and Fifth Amendment rights under the U.S. Constitution); Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970) (holding that a landlord must take steps to minimize the risk of crime against tenants when he or she has knowledge of the insufficiency of existing security measures); *see also* Lawrence W. Sherman & Jody Klein, Major Lawsuits over Crime and Security: Trends and Patterns, 1958-1982, at 51 (1984) (unpublished research report, University of Maryland) (on file with the University of Maryland School of Law) (finding that of 186 security related lawsuits, the "lion's share" related to the failure to prevent crime).

[193] *See* Sklansky, *supra* note 6, at 1166-67.

[194] *See* 5 U.S.C. § 3108 (2004); *see also* Joh, *supra* note 87 (discussing the history of government hostility to private policing). At the time that this Article was written, Congress was in the midst of considering the Private Security Officer Employment Authorization Act of 2003, which would permit private police companies to request a criminal background check, based upon FBI records, on prospective employees. *See* Private Security Officer Employment Authorization Act of 2003, S. 1743, 108th Cong. (2003); *see also Private Security Officer Employment Authorization Act of 2003: Hearing on S. 1743 Before the House Comm. on the Judiciary*, 108th Cong. 11-26 (2004) (statement of Don Walker, Chairman, Pinkerton Security).

1. The Superficiality of State Involvement

Federal constitutional law regulates the daily work of the public police: the constraints found in the text of the Fourth, Fifth, and Sixth Amendments of the U.S. Constitution,[195] applied to the states through the Due Process Clause of the Fourteenth Amendment, and the exclusionary rules of evidence employed to reinforce them, as well as the restraints on interrogation provided for in *Miranda v. Arizona*.[196] (Many state constitutions also contain corresponding provisions.) Perhaps no other single occupation is so pervasively regulated by federal constitutional law as the public police. In order for the rules of constitutional criminal procedure to apply, however, it is first necessary to determine whether or not any activity attributable to government, or "state action," is present, either because the party charged with depriving another of a "right or privilege created by the State" has "acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."[197] Because courts rarely examine the state action principle with regard to the police, we lack a body of law setting forth the circumstances in which private may be distinguished rationally from public.[198] As one consequence, the police discussed in criminal procedure are presumptively the public police.

This result cannot be attributed to a careful parsing of the doctrine itself. As it has been developed by the U.S. Supreme Court, the state action doctrine, in the abstract, provides the analytical tools that permit a close review of private police action. The Court has identified the following three guiding factors:

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[195] The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Fifth Amendment provides, in part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Finally, the relevant language of the Sixth Amendment acknowledges the criminal defendant's right "to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI; *see also* Sklansky, *supra* note 6, at 1230-31.

[196] 384 U.S. 436, 478-79 (1966). Public police are also subject to the administrative and tort laws of the states in which they work. As noted earlier, I focus here on restraints imposed by federal constitutional law.

[197] Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982).

[198] *See* Sklansky, *supra* note 6, at 1230 ("The state action problem in criminal procedure has been largely neglected both by constitutional scholars and by criminal procedure scholars.").

> in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: [1] the extent to which the actor relies on governmental assistance and benefits, [2] whether the actor is performing a traditional governmental function, and [3] whether the injury caused is aggravated in a unique way by the incidents of governmental authority.[199]

In discussing the potential applicability of these legal tests to private policing, David Sklansky observes that judging the private police by any of these three factors would classify them as state actors.[200] Yet in practice, lower courts have given only superficial review to the state action doctrine where private policing is concerned: "virtually everything turns on whether the state has vested private personnel with an official title."[201] Moreover, in defining the boundaries of state action, 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. Thus, my intention here is not to retread the ground cleared by others regarding the hypothetical applicability of the state action doctrine to private policing.[202] Much of that scholarship takes the view that the state action doctrine, if carefully applied, would qualify private police as state actors. Instead, the following sections focus on those laws that *do* regulate private

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[199] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621-22 (1991) (internal citations omitted).

[200] *See* Sklansky, *supra* note 6, at 1250.

[201] *See id.* at 1246.

[202] For an excellent review of the inconsistencies of the state action doctrine as developed by the Supreme Court, see Sklansky, *supra* note 6, at 1247-65; *see also* student notes listed *supra* Part I. In particular, many commentators have noted that the Court's explanation of the "public function" doctrine in the case of *Marsh v. Alabama*, 326 U.S. 501, 505-07 (1946), provides a justification, in theory, for classifying private police as state actors. *See, e.g.*, John M. Burkoff, *Not So Private Searches and the Constitution*, 66 CORNELL L. REV. 627, 644-58 (1981); R. Scott Palmer, Comment, *Sticky Fingers, Deep Pockets, and the Long Arm of the Law: Illegal Searches of Shoplifters by Private Merchant Security Personnel*, 55 OR. L. REV. 279, 283 (1976); Note, *Private Assumption of the Police Function Under the Fourth Amendment*, 51 B.U. L. REV. 464, 474-75 (1971); Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608, 617 (1967). In *Marsh*, the Court reversed a decision holding that the First and Fourteenth Amendments did not apply to the privately owned company town of Chickasaw, Alabama. 326 U.S. at 509-10. Likening the town's status to privately owned bridges and ferries in which the "operation is essentially a public function," the Court did not find the wholly private ownership of the town determinative of the state action question. *Id.* at 506. In theory, *Marsh* would permit the application of the state action doctrine to wholly private police forces that had also adopted an essentially public function. Neither the Supreme Court, nor the lower courts, however, have shown a receptivity to this extension of *Marsh* in the half century since its decision. In addition, the Supreme Court appears to have severely limited Marsh itself to its facts. *See* Sklansky, *supra* note 6, at 1255 (citing Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 332 (1968) (Black, J., dissenting)).

police conduct. These rules, in sum, have resulted in the near absolute legal separation between private and public that belies the complex interrelationship between them described in the previous Part.

a. The Inapplicability of Federal Constitutional Law

Because there are few legal distinctions made between private *police* and other private actors (excluding special deputies and off-duty public police), it is useful to discuss first those Supreme Court decisions that have contrasted the actions of public police and private actors.

The Supreme Court addressed the applicability of the Fourth Amendment to private action almost a century ago, in *Burdeau v. McDowell.*[203] The employers of J.C. McDowell, a director of a natural gas company, suspected him of fraud. A company representative and a private detective raided McDowell's Pittsburgh office and obtained incriminating documents.[204] McDowell filed a petition in district court to seek return of his papers and to obtain an order barring their use before a grand jury.[205]

Reversing the district court's ruling in McDowell's favor, the Court found that the Fourth Amendment did not apply in the case because, even if the seizures were illegal, "no official of the federal government had anything to do with the wrongful seizure of the petitioner's property."[206] The "origin and history" of the Fourth Amendment's protections against unlawful searches and seizures, the Court reasoned, showed that "it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies."[207] Accordingly, because McDowell's papers were seized by persons "unconnected with the government," these actions, even if wrongful, did not prevent the introduction of the evidence in McDowell's prosecution.[208] In the years since that decision, the Court, citing *Burdeau*, has repeatedly reaffirmed the principle that the Fourth Amendment does not apply where "a private party . . . commits the offending act."[209]

With respect to the Fifth Amendment, the Court has addressed the state action requirement more recently, in *Colorado v. Connelly.*[210] There,

[203] 256 U.S. 465 (1921).
[204] *See id.* at 470-71.
[205] *See id.*
[206] *Id.* at 475.
[207] *Id.*
[208] *Id.* at 476.
[209] United States v. Janis, 428 U.S. 433, 455 n.31 (1976) (citing *Burdeau*, 256 U.S. at 475).
[210] 479 U.S. 157, 157 (1986).

the Court characterized "coercive [public] police activity" as a "necessary predicate" to finding a confession involuntary under the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment.[211] Accordingly, the lower courts have rejected claims that the prophylactic protections of the *Miranda* decision to protect the Fifth Amendment privilege against self-incrimination must apply to interrogations conducted by private police.[212]

Finally, although the Supreme Court has not yet directly addressed the question of whether the Sixth Amendment right to counsel applies to interrogations conducted by private police or other private actors, the lower courts have uniformly held the amendment inapplicable.[213] This uniformity is consistent with the Supreme Court's suggestion that the Sixth Amendment prohibits only action by "[public] police and their informant[s]" that is "designed deliberately to elicit incriminating remarks."[214]

b. Private Police Before the Supreme Court

Although private police appear as background characters in a number of significant Supreme Court decisions,[215] the Court has addressed the constitutional status of private police only twice. In each case the Court found that private police action was properly attributable to the state. While those conclusions may suggest that the Court was sensitive to private police power, closer examination shows that, in each case, the Court's decision rested upon formalistic ideas of public and private.

The Court first briefly considered the constitutional status of private police in *Williams v. United States*,[216] before addressing the main issue in the case, whether the federal statute, 18 U.S.C. § 242,[217] providing for

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[211] *Id.* at 167. *Connelly* narrowed the suggestion of the Court in *Bram v. United States*, 168 U.S. 532 (1897), that the Fifth Amendment barred use of a coerced confession against a federal defendant, no matter who had conducted the interrogation. *Connelly*, 479 U.S. at 176; *see also* Sklansky, *supra* note 6, at 1232.

[212] *See* discussion *infra* note 250 and accompanying text.

[213] *See* Sklansky, *supra* note 6, at 1233 (collecting cases).

[214] Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986).

[215] *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 66-68 (2003) (describing how Kmart security officers apprehended Leandro Andrade twice for shoplifting, eventually resulting in his "third strike" sentence of two consecutive terms of twenty-five years to life); United States v. Bagley, 473 U.S. 667, 670 (1985) (describing how the government's case against Bagley rested principally on the testimony of two "state law-enforcement officers employed . . . as private security guards" who assisted the Bureau of Alcohol, Tobacco, and Firearms in an undercover operation).

[216] 341 U.S. 97, 99-101 (1951).

[217] At the time of the case, the statute provided that:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any

criminal penalties to persons who "under color of law" violated the civil rights of others, could be applied in comportment with the Constitution to the use of the "third degree" by a private police officer.[218] (The statutory element of action taken "under color of law," found in § 242 and in other federal statutes, is equivalent to the state action requirement of the Fourteenth Amendment.)[219] The defendant, Jay G. Williams, operated his own private detective agency in Miami, Florida.[220] Concerned about thefts of lumber, the Dania Supply Company hired Williams to investigate the matter.[221] Williams placed three men in his own employ on the lumber company's payroll to spy on the company's employees.[222] Eventually, Williams and his men identified four men as thieves and used a "rubber hose, a pistol, a blunt instrument, a sash cord and other implements" to obtain confessions from three of them.[223] Present at the beatings was also one Ford, a public police officer dispatched from the Miami Police Chief to assist in the investigation.[224] It developed that Williams himself possessed a quasi-public status; he had taken an oath and was qualified by the city of Miami as a special police officer, although he received no payment from the city.[225]

> rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . shall be fined not more than $1000, or imprisoned not more than one year, or both.

Id. at 98 (quoting 18 U.S.C. § 52 (1946)).

[218] *See* United States v. Williams, 341 U.S. 70, 71 (1951), *aff'g* 179 F.2d 644 (5th Cir. 1950) ("[At the company's shack] the investigators subjected [the accused men] to the familiar 'third-degree' which, after blows, kicks, threats, and prolonged exposure to a brilliant light, yielded 'confessions.'").

[219] *See, e.g.*, Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999) ("Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state law element of § 1983 excludes from its reach 'merely private conduct . . . .'") (citations omitted); *see also* Brentwood Acad. v. Tenn. Secondary Sch. of the Arts, 531 U.S. 288, 296 n.2 (2001) ("If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes.") (quoting Lugar v. Edmonson Oil Co., 457 U.S. 922, 935 (1982)).

[220] *Williams*, 341 U.S. at 98.

[221] Williams v. United States, 179 F.2d 644, 646 (5th Cir. 1950), *aff'd by* United States v. Williams, 341 U.S. 70 (1951). On the evolution of the police interrogation tactics from the "third degree" to non-physical psychological techniques, see generally Richard Leo, Police Interrogation in America, A Study of Violence, Civility, and Social Change (1994) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with the Northwestern University Transportation Library).

[222] *Williams*, 179 F.2d at 646.

[223] *Williams*, 341 U.S. at 98.

[224] *Williams*, 179 F.2d at 646.

[225] *Williams*, 341 U.S. at 98.

Williams, two of his employees, Ford, and a lumber company employee were indicted on four counts under § 242; Williams alone was convicted.[226]

The Supreme Court affirmed Williams' conviction and rejected his challenge that the obtainment of confessions by force could not be reached by the statute.[227] Prior to doing so, the Court found "it clear that petitioner was acting 'under color' of law within the meaning of [the statute]."[228] While the participation by Ford, a public police officer, further supported the finding of state involvement in the investigation, the Court found most relevant the fact that Williams himself was cloaked with state authority. Noting that it was "common practice . . . for private guards or detectives to be vested with policemen's powers," the Court concluded that Williams "was asserting the authority granted him and not acting in the role of a private person."[229]

Thirteen years later, the Court again was called upon to resolve the constitutional status of a private police officer in *Griffin v. Maryland*.[230] On June 30, 1960, five black students—William L. Griffin, Marvous Saunders, Michael Proctor, Cecil T. Washington, Jr., and Gwendolyn Greene[231]—sought to protest the policy of the Glen Echo Amusement Park in Maryland to "exclude Negroes who wished to patronize its facilities."[232] When they attempted to board the Park's carousel, the defendants were approached by Francis Collins, an employee of the National Detective Agency. The Park had entered into a "'protection' contract" with the Agency.[233] Collins wore an Agency uniform with a deputy sheriff's badge, for he had been deputized at the request of the park management.[234] Maryland law provided for those appointed as "special deputy sheriffs" to possess the "same power and authority as deputy sheriffs possess within the area to which they are ap-

[226] *Williams*, 179 F.2d at 646. The remaining defendants were acquitted. *Id.* A new indictment was returned against all the defendants charging them with conspiracy to deprive others of their civil rights, under 18 U.S.C. § 241. *Id.* In a companion case to the one discussed in the text, *supra*, a plurality of the Supreme Court affirmed the Fifth Circuit's determination that § 241 applied "only to interference with rights which arise from the relation of the victim and the Federal Government, and not to interference by State officers with rights which the Federal Government merely guarantees from abridgment by the States." *Williams*, 341 U.S. at 81-82.

[227] *Williams*, 341 U.S. at 104.

[228] *Id.* at 99.

[229] *Id.* at 99-100.

[230] 378 U.S. 130 (1964).

[231] Griffin v. State, 171 A.2d 717, 718 (Md. 1961).

[232] *Griffin*, 378 U.S. at 131.

[233] *Griffin*, 171 A.2d at 718.

[234] *Griffin*, 378 U.S. at 132.

pointed. . . ."[235] After Griffin and his colleagues refused to leave at Collins' request, he arrested them for trespass.[236]

The five *Griffin* defendants argued that their convictions for trespass violated the Equal Protection Clause as racially discriminatory action. Maryland's highest state court rejected their claim because it found that state action could not be attributed to Collins' arrest of the defendants. Collins' deputization, in the court's view, "did not alter his status as an agent or employee of the operator of the park."[237] Under Maryland law, Collins was entitled, regardless of his special deputy status, to conduct a citizen's arrest for a misdemeanor committed in his presence.[238]

The Supreme Court reversed the Maryland Court of Appeals' decision. Although Collins was not a public employee, he "wore a sheriff's badge and consistently identified himself as a deputy sheriff rather than as an employee of the park," and thus, according to the Court, qualified as a state actor.[239] Having established the necessary predicate of state action, the Court then found that the arrest had violated the Equal Protection Clause because it constituted public enforcement of a private policy of racial discrimination. Rejecting the argument that Collins was "simply enforcing the park management's desire to exclude designated individuals from the premises," the Court instead found significant that the Park's management had specifically instructed the special deputy, who held himself out as a deputy sheriff, "to arrest Negroes for trespassing if they did not leave the park when he ordered them to do so."[240] *Griffin* left unanswered, however, the constitutional status of a private police officer who did not identify himself as a public official, or who performed policing duties but had not been deputized.[241]

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[235] *Id.* at 132 n.1.

[236] *Id.* at 133.

[237] *Griffin*, 171 A.2d. at 720-21.

[238] *Id.* at 721.

[239] *Griffin*, 378 U.S. at 135. A year after *Griffin*, the Court denied certiorari in *Drews v. Maryland*, which presented facts similar to those of *Griffin*: a group of blacks and whites who were arrested for refusing to leave an amusement park that excluded blacks. Dissenting from the denial of certiorari, Chief Justice Warren noted that the guard in *Drews* might have had the same quasi-public status as the guard in *Griffin*. Drews v. Maryland, 381 U.S. 421, 426 n.6 (1965) (Warren, C.J., dissenting from denial of cert.).

[240] *Griffin*, 378 U.S. at 137.

[241] Sklanksy finds *Griffin* a "paradoxical decision":

> The state's complicity in the amusement park's policy of segregation seems dependent, in the Court's view, upon the merging of the roles of landowner's agent and police officer in one individual. Moreover . . . it strongly suggested that Collins qualified as a state actor only because he held himself out as one: the result might have been different, the majority implied, if Collins had not worn a badge, and [if he] had relied specifically on his power of citizen's arrest.

Any hope that *Griffin* would give rise to a body of law regarding other, non-deputized private police was extinguished fourteen years later in *Flagg Bros. v. Brooks*.[242] There, the Court considered whether a self-help provision in New York state law granted to private merchants qualified as state action, and thus subjected that conduct to the Due Process Clause of the Fourteenth Amendment. The Court answered no. One exchange between the Justices on state action is particularly noteworthy. In his dissent, Justice Stevens observed that "it is clear the maintenance of a police force is a unique sovereign function, and the delegation of police power to a private party will entail state action."[243] Justice Rehnquist, writing for the majority, rejected Stevens' interpretation of *Griffin*:

> Contrary to Mr. Justice Stevens' suggestion, this Court has never considered the private exercise of traditional police functions. In *Griffin v. Maryland*, the State contended that the deputy sheriff in question had acted only as a private security employee, but this Court specifically found that he "purported to exercise the authority of a deputy sheriff." *Griffin* thus sheds *no* light on the constitutional status of private police forces, and we express no opinion here.[244]

In sum, on the few occasions that the Court has considered the status of private policing, it has resolved the matter in a way that is least helpful to lower courts to guide their decision-making. Critical to the Court's decisions in both *Williams* and *Griffin* is the formal delegation of special legal powers to private police. Deputization confers upon otherwise private actors the formal attributes of public police, and thus the privileges of these powers carry with them the constraints of constitutional law. Yet in neither case does the Court hint at how the constitutional status of private police should be resolved in the absence of deputization, nor whether such consideration might be different where substantive law other than the Equal Protection Clause or § 242 would be involved. Moreover, as we have seen, the delegation of formal peace officer powers is only one resource among many for the private police. Disempowerment cannot be inferred from its absence.

Sklanksy, *supra* note 6, at 1238-39.

[242] 436 U.S. 149 (1978); *see also* Sklanksy, *supra* note 6, at 1239.

[243] 436 U.S. at 172 n.8 (Stevens, J., dissenting).

[244] *Id.* at 163 n.14 (internal citations omitted) (emphasis added).

c. Private Policing in the Lower Courts

i. LOWER COURTS AND THE FEDERAL CONSTITUTION

With the state action jurisprudence and the other few cases in which the Supreme Court has addressed the status of private police, the lower courts have cobbled together a body of case law that replicates the strict boundary between public and private, classifying all public police on one side, and all private police and ordinary citizens on the other. To reiterate, these lower court decisions give only a cursory examination of the nature of the policing challenged. Instead, the absence or presence of special legal powers is determinative.

With regard to searches, lower courts have generally found that the Fourth Amendment and its accompanying exclusionary rule do not apply to private police, unless they have been accorded special deputized powers. For example, in *United States v. Lima*,[245] Lynn Johnson, a plain-clothes store detective for a Lord and Taylor department store, watched through the slats of a fitting room door and observed Adelaide Lima remove the tags from a blouse and place it in her purse. When Lima left the store, Johnson approached her, physically restrained her, and escorted her to the store's security office. Johnson searched Lima and recovered the stolen blouse from her purse.[246] Although the trial court suppressed evidence of the stolen blouse in Lima's prosecution for petit larceny, the District of Columbia Court of Appeals held the Fourth Amendment inapplicable to "mere employees performing security duties" and reversed.[247]

Rejecting Lima's argument that private police who "go around 'walking, talking, acting, and getting paid like policemen'" should be treated as state actors, the *Lima* court noted in support of its conclusion that "the fact that the private sector may do for its own benefit what the state may also do for the public benefit does not implicate the state in private activity."[248] The essence of Johnson's duties rested in the right of Lord and Taylor "to protect [its] property from damage and loss." Such businesses, unlike public police, "enjoy no special public trust."[249] In its reasoning, *Lima* is a representative case. Other courts have likewise distinguished plant guards,

[245] 424 A.2d 113 (D.C. Ct. App. 1980); *see also* Sklansky, *supra* note 6, at 1240-41.

[246] 424 A.2d at 115.

[247] *Id.*

[248] *Id.* at 121.

[249] *Id.*

store detectives, and private patrols from the public police in the Fourth Amendment's limitations on searches and seizures.[250]

Similarly, most courts have held that the prophylactic warnings required by *Miranda v. Arizona* in a setting of "custodial police interrogation"[251] are inapplicable when it is private police who conduct questioning. In *City of Grand Rapids v. Impens*,[252] the private detectives working at the Grand Rapids Meijer store observed Frederick Impens and two other men stealing audio tapes. The detectives, one of whom was an off-duty public officer, approached the three men, escorted them to the store's security office, and obtained from them signed and completed "Loss Prevention De-

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[250] *See, e.g.*, Cullom v. State, 673 P.2d 904, 906 (Alaska Ct. App. 1983) (finding no state action in a search where the "security guard was not hired or paid by the police and was not acting in any way in concert with the police"); People v. Taylor, 271 Cal. Rptr. 785, 790 (Cal. Ct. App. 1990) ("A citizen's arrest power presumes that a law-abiding citizen for his own personal purposes may desire to stop criminal activity just as a merchant has a personal interest in deterring theft of this goods."); State v. Sanford, 35 P.3d 764, 771 (Haw. Ct. App. 2001) ("The totality of the circumstances in this case clearly show that the [Sears asset protection agent] conducted a purely private search of [the defendant] immune from Fourth Amendment . . . scrutiny."); State v. Buswell, 460 N.W.2d 614, 620 (Minn. 1990) (finding that a search conducted by a security company leading to the defendant's prosecution for possession of controlled substances was "private, and thus not subject to Fourth Amendment constraints"); State v. Keyser, 369 A.3d 224, 225-26 (N.H. 1977) (observing that "courts have usually held that the efforts of private investigators and private security officers acting independently of governmental officials to obtain evidence of criminal conduct are not subject to fourth amendment standards and that such evidence will not be excluded from criminal prosecutions on constitutional grounds"); People v. Horman, 22 N.Y.2d 378, 380 (1968) (finding that a search by store detectives "had no connection with the police" because they "seized defendant's pistol in pursuance of their private responsibility to provide security for the store"); State v. McDaniel, 337 N.E.2d 173, 175 (Ohio Ct. App. 1975) (holding that a search by deputized private police was not state action where "[t]hey do not perform their duties for the benefit of the public but, rather, for the benefit of [their employer]"); *see also* Commonwealth v. Leone, 435 N.E.2d 1036, 1040-41 (Mass. 1982) (noting that while a deputized private officer "is bound to comply with the Fourth Amendment," no violation occurs when an investigation is "conducted on behalf of the private employer, in a manner that is reasonable and necessary for protection of the employer's property").

[251] 384 U.S. 436, 478-79 (1966). As the Court stated in *Miranda*:

> Procedural safeguards must be employed to protect the [Fifth Amendment] privilege [against self-incrimination] and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id.

[252] 327 N.W.2d 278 (Mich. 1982).

partment Voluntary Statements." Impens, eventually charged with disorderly conduct, objected to the admission of his signed statement at trial.

The Supreme Court of Michigan held that *Miranda* warnings were not required. According to the court, the "Meijer security personnel were working with the view of furthering their employer's interest only," and could not be characterized as state actors.[253] Moreover, while there was some suggestion that the three men detained were nervous when confronted by Meijer's private police, in the court's view, "the acts of the security guards did not present the kind of psychological coercion and threatening environmental custody" addressed by the U.S. Supreme Court in *Miranda*.[254] Other courts have agreed with the general conclusion arrived at by the *Impens* court.[255] Private police, then, are repeatedly deemed no different than private citizens.

Many courts have been more willing to characterize off-duty public police officers, privately employed, as retaining their public status, but the decisions in this area are discordant.[256] Curiously, some state courts have been willing to classify off-duty police as public actors where they have been victims of assault or have encountered resistance by the person whom they arrested. Although these cases do not involve federal constitutional law, they are nevertheless instructive regarding the judicial interpretation of

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[253] *Id.* at 281.

[254] *Id.* Nor did the presence of the off-duty public police officer alter the court's characterization of the private questioning. According to the court, not only was his role in Impens' detention "quite limited," but he also identified himself as a Meijer employee, not a public police officer. *Id.* at 282.

[255] *See, e.g.*, United States v. Antonelli, 434 F.2d 335, 337 (2d Cir. 1970) ("It would be a strange doctrine that would so condition the privilege of a citizen to question another whom he suspects of stealing his property that incriminating answers would be excluded as evidence in a criminal trial unless the citizen had warned the marauder that he need not answer."); Woods v. City Court of the City of Tucson, 626 P.2d 1109, 1111 (Ariz. Ct. App. 1981) ("We are not . . . inclined to extend Miranda to private activity because it may produce evidence which may be used in criminal prosecutions."); *In re* Deborah C., 635 P.2d 446, 449 (Cal. 1981) ("We think that routine detention and questioning by plainclothes store detectives present a substantially different situation [than one involving public police]. Unless they represent themselves as police they do not enjoy the psychological advantage of official authority, a major tool of coercion."); People v. Raitano, 401 N.E.2d 278, 281 (Ill. App. Ct. 1980) ("[W]e hold that . . . the statements given to the security guards were not rendered inadmissible by the alleged failure to give the warnings outlined in Miranda."); People v. Johnson, 422 N.Y.S.2d 296, 300 (Dist. Ct. Nassau County 1979) (finding no violation of Miranda where Gimbel's store detectives questioned the defendant, but "were neither acting for the police nor doing anything pursuant to their request"); State v. Giallombardo, 504 N.E.2d 1202 (Ohio Ct. App. 1986) (finding Miranda inapplicable to questioning conducted by security manager of department store leading to defendant's prosecution).

[256] For representative cases, see Sklansky, *supra* note 6, at 1244; *see also* Joh, *supra* note 63 (discussing moonlighting phenomenon).

the private-public distinction. In these cases, some courts have concluded that off-duty public officers are always "on-duty," and thus may be seen as performing their public duties when employed privately.[257] Others have cited public policy to support the characterization of off-duty public officers as performing public duties, particularly when officers don their public uniforms in their private employment.[258] By contrast, a minority of these decisions have found that off-duty public police lose their public status in private employment, precisely because of the private payment and assignment they receive.[259]

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[257] *See, e.g.*, Hutto v. State, 304 So.2d 29, 33 (Ala. Crim. App. 1974) (noting that state law obliges public police to enforce the law at any time, including during private employment); Meyers v. State, 484 S.W.2d 334, 339 (Ark. 1972) (noting that even a privately paid, off-duty officer is "on duty 24 hours a day, seven days a week"); Lande v. Menage Ltd. Partnership, 702 A.2d 1259, 1261 (D.C. 1997) (observing that "[m]embers of the police force are held to be always on duty") (internal quotations omitted); Carr v. State, 335 S.E.2d 622, 623 (Ga. App. 1985) (stating that privately employed off-duty police "carry this duty [to enforce the law] twenty-four hours a day, on and off duty"); People v. Barrett, 370 N.E.2d 247, 249 (Ill. App. Ct. 1977) (observing that status of off-duty officer does not turn on whether she is "in or out of uniform, [or] employed by a private party or on regular duty"); State v. Wilen, 539 N.W.2d 650, 659 (Neb. Ct. App. 1995) (noting that privately employed police have "a duty to preserve the peace and to respond as police officers at all times"); State v. Glover, 367 N.E.2d 1202, 1204 (Ohio App. Ct. 1976) (stating that a privately employed, "duly commissioned police officer holds a public office upon a continuing basis"); Monroe v. State, 465 S.W.2d 757, 759 (Tex. Crim. App. 1971) (stating that privately employed police officer is "on duty 24 hours a day").

[258] *See, e.g.*, Duncan v. State, 294 S.E.2d 365, 366 (Ga. App. 1982) ("The practice of uniformed officers in places susceptible to breaches of the peace deters unlawful acts and conduct by patrons in those places. The public knows the uniform and the badge stand for the authority of government."); *Wilen*, 539 N.W.2d at 660 ("The public expects that a uniformed law enforcement officer has the power to enforce the law and to arrest where necessary, powers which a private security guard generally does not possess."); State v. DeSanto, 410 A.2d 704, 705 (N.J. App. Div. 1980) (noting that the public police uniform "has the same significance to the public whether the wearer is technically on or off duty") (internal quotations omitted).

[259] *See, e.g.*, People in Interest of J.J.C., 854 P.2d 801, 802 (Colo. 1993) (finding no evidence to show that privately paid, uniformed off-duty police was "acting in the regular course of his assigned duties" when he arrested the defendant); Stewart v. State, 527 P.2d 22, 24 (Okla. Crim. App. 1974) ("We believe that when an off-duty police officer accepts private employment and is receiving compensation from his private employer he changes hats from a police officer to a private citizen when engaged in that employment and he is therefore representing his private employer's interest and not the public's interest."); *see also* Cervantez v. J.C. Penney Co., 595 P.2d 975, 980 (Cal. 1979) (concluding that because state law prohibits private compensation for public work, off-duty employment requires action as a private citizen); *cf.* State v. Palms, 592 S.W. 2d 236 (Mo. Ct. App. 1979) (holding that off-duty reserve officer in private employment not acting in public capacity).

ii. LOWER COURTS AND STATE CONSTITUTIONS

A few states have experimented with imposing greater legal restrictions upon private police than is expected of private citizens under their *state* constitutions, but these forays into state constitutional law have been short-lived.[260] The California Supreme Court's experience with the 1979 case *People v. Zelinski*[261] is illustrative. Store detectives detained Virginia Zelinski after observing her shoplift.[262] Their search of her revealed a pill bottle containing heroin, and Zelinski was subsequently prosecuted for possession of a controlled substance.[263] The *Zelinski* court noted that while statutory citizen arrest powers permitted the detectives to detain or arrest Zelinski, their search in this case, "to recover goods that were not in plain view," was illegal.[264] Recognizing the "increasing reliance placed upon private security personnel by local law enforcement authorities for the prevention of crime and enforcement of the criminal law,"[265] the court held that, under the state constitutional analogue of the Fourth Amendment,[266] the exclusionary rule applied to the illegally obtained evidence when private police "went beyond their employer's private interests,"[267] and thus were involved in state action. By acknowledging private police as occupying a category distinct from other private persons—a departure from federal constitutional law—*Zelinski* was significant.

The decision's promise was quickly extinguished, however. In 1982, California voters enacted Proposition 8,[268] which amended the state constitution[269] and prohibited the exclusion of all relevant evidence, except to the extent required by federal law.[270] *Zelinski* became a dead letter, and private

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[260] *See also* Sklansky, *supra* note 6, at 1245-46.

[261] 594 P.2d 1000 (Cal 1979).

[262] *Id.* at 1002.

[263] *Id.*

[264] *Id.* at 1004.

[265] *Id.* at 1005.

[266] "Article I, section 13 of the California Constitution provides in part that: 'The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches may not be violated . . . .'" *Id.* at 1004.

[267] *Id.* at 1006.

[268] *See* Jeff Brown, *Proposition 8: Origins and Impact—A Public Defender's Perspective*, 23 PAC. L.J. 881, 881 (1992).

[269] CAL. CONST. art. 1, § 28(d).

[270] *See In re* Lance W., 694 P.2d 744, 752 (Cal. 1985) ("What Proposition 8 does is to eliminate a judicially created remedy for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled."); *see also* Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989) ("[T]he continuing validity of Zelinski has been called into doubt by the enactment of Proposition 8, which amended California's Constitution to

police once again stood in the same position as private citizens. Attempts to extend the exclusionary rule under state constitutional provisions in Montana and West Virginia during the 1980s were similarly transitory.[271]

2. Other Sources of Regulation

In the absence of restrictions based on federal constitutional law, there are few sources of regulation specifically directed at private policing. Those that do include state licensing laws, tort law, and self-regulation.

a. State Regulations

Many state legislatures have enacted regulations for private police, but the scope and extent of these laws vary considerably,[272] and none appear to set standards on policing *behavior*.[273] Consider the regulation of private security guards, classified by most states to be those engaged in what I have

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prohibit California courts, in the absence of express statutory authority, from 'exclud[ing] evidence seized in violation of either the state or federal Constitution unless exclusion is compelled by the federal Constitution.'") (quoting *In re Lance W.*, 694 P.2d at 752).

[271] *Compare* State v. Muegge, 360 S.E.2d 216 (W.Va. 1987) (holding that the state constitutional analogue to the Fourth Amendment applies to private police acting under the state's security guard act), *with* State v. Honaker, 454 S.E.2d 96, 103-4 (W.Va. 1994) (overruling Muegge for the proposition that public police involvement is not necessary to find a statement involuntary under the state constitution); State v. George Anthony W., 488 S.E.2d 361, 367 n.13 (W.Va. 1996) ("State v. Muegge has been overruled to the extent that it involves arrests by individuals other than the [public] police."). In Montana, the state supreme court initially extended the exclusionary rule to the acts of private citizens, and not just to private police. *Compare* State v. Helfrich, 600 P.2d 816, 819 (Mont. 1979) (holding that "the right of individual privacy explicitly guaranteed by the State Constitution is inviolate and the search and seizure provisions of Montana law apply to private individuals as well as law enforcement officers"), *and* State v. Hyem, 630 P.2d 202, 206 (1981) ("When private citizens, acting on their own initiative, unreasonably invade the privacy rights of individuals, the evidence thus obtained against the other individuals is subject to the exclusionary rule."), *with* State v. Long, 700 P.2d 153, 157 (Mont. 1985) ("[W]e hold that the privacy section of the Montana Constitution contemplates privacy invasion by state action only."), *and* State v. Christensen, 797 P.2d 893 (Mont. 1990) (extending the prohibition in Long of the exclusionary rule to non-felonious conduct of private individual to felonious conduct as well).

[272] As of 1998, seven states had no statutes regulating security guards. *See* Jeffrey R. Maahs & Craig Hemmens, *Guarding the Public: A Statutory Analysis of State Regulation of Security Guards*, 21 J. CRIME & JUST. 119, 131 (1998).

[273] A handful of states require some training of guards before they may being employment. A survey conducted in 2003 by the Service Employees International Union (SEIU) found that only seven states required security guard applicants to undergo pre-assignment training of eight hours or more. They are California, North Dakota, Illinois, Alaska, Florida, Oregon, and Arizona. *See* SEIU, GRADING SYSTEM (2003) (on file with author).

elsewhere called protective policing.[274] In many states, such regulation consists of "little more than asking applicants to promise that they are qualified to be a security guard."[275] Some states only have one or two provisions regarding security guards.[276] In a significant minority of states, there is no state regulation of security guards at all.[277]

The most common statutory requirements imposed on security guards mandate fingerprinting and criminal records checks of applicants for guard jobs.[278] For the most part, state regulations attempt to identify those it deems unsuitable for private police employment at their initial job application, but even in this regard, these regulations succeed only modestly. Media accounts of former felons receiving private police employment in violation of these laws are numerous.[279] In sum, state regulations provide in

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[274] By protective policing, I refer to those private police whose primary responsibilities involve the protection of real or movable private property. *See* Joh, *supra* note 63 (providing a typology of the private police). States also vary in degree to which they regulate private investigators, either individually or as licensed businesses.

[275] Maahs & Hemmens, *supra* note 272, at 119; *see also* Sklansky, *supra* note 6, at 1184 n.84 ("Most states also license and impose administrative regulations on segments of the private security industry, but the regulations are generally quite minimal."). Robert Masciola, of the research department of the SEIU, notes that in conducting their state survey of guard regulation, "[i]t certainly was an eye-opener when we completed the survey and found how insufficient state regs were." E-mail from Robert Masciola, Research Department, SEIU (Feb. 19, 2004) (on file with author).

[276] Kansas requires only that applicants be taller than 5'2". *See* Maahs & Hemmens, *supra* note 272, at 131.

[277] In their survey of state laws regulating security guards, the SEIU found that eight states had no regulations regarding training, background checks, or any form of state oversight through a regulatory board or agency. *See* SEIU, *supra* note 273; *see also* SEIU, REPORT CARD ON SECURITY STANDARDS: MOST STATES ARE FAILING, *available at* http://www.seiu.org/building/security/statesecuritygrades.cfm (last visited Feb. 19, 2004); Hall, *supra* note 2, at 1A (reporting that state laws regulating guards are "spotty").

[278] *See* Maahs & Hemmens, *supra* note 272, at 130; Stephanie Armour, *In Guards We Trust, But Should We?*, USA TODAY, Dec. 3, 2001, at B1 (reporting that as of 2001, only twenty-three states required both a federal and state background check for security guard applicants).

[279] *See, e.g.*, Ray Long et al., *Security Laws Face Scrutiny*, CHI. TRIB., Oct. 14, 2001, at 1 (reporting that "thousands of people with criminal backgrounds [have been hired] to work as private guards in Illinois"); Phil McCombs, *On His Guard*, WASH. POST, May 14, 2002, at C1 (listing instances of former felons employed as security officers); Tom Topousis, *Guards & Monsters, Ex-Cons Work Security at Retirement Housing*, N.Y. POST, Nov. 10, 2003, at 9 (reporting of senior housing development illegally employing guards with criminal records); Anthony Twhyman & John P. Martin, *Breaches Persist in Security at Airports*, STAR-LEDGER (Newark, N.J.), Oct. 17, 2001, at 1 (reporting that the Argenbright corporation continued to employ convicted criminals as airport security workers after a prior investigation).

most cases only the most cursory of checks for security guards, and only when they first apply for employment.[280]

b. State Tort Law

State tort law provides civil remedies to those who claim injury at the hands of private police action, but the scope of these measures is also limited. Where, for example, a private police officer detains or arrests without legal authorization, that officer is subject to liability for false arrest.[281] Recovery against a private police officer who has acted reasonably (although erroneously) and with probable cause, however, is "likely to be quite low—which may explain why such cases appear to be rare."[282] Good faith will defeat punitive damages and mitigate actual damages.[283] In addition, many "merchant's privilege" statutes, permitting private police to detain briefly persons suspected of shoplifting, immunize merchants and their private police from false arrest or imprisonment liability.[284]

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[280] Most courts that have reviewed the issue have found that licensing does not turn private police into state actors. *See, e.g.*, City of Grand Rapids v. Impens, 327 N.W.2d 278, 281 (Mich. 1982) ("We do not believe that the mere licensing of security guards constitutes sufficient government involvement to require the giving of Miranda warnings."). *But see* Khalil Abdullah, *Mercer Must Release Crime Reports*, MACON TELEGRAPH, Jan. 27, 2004 (reporting the ruling of a Georgia state court that Mercer University must comply with the state's Freedom of Information laws regarding a request for crime records on the basis that its privately paid, deputized police, are certified by a state organization and are thus state actors).

[281] *See* Sklansky, *supra* note 6, at 1183. As causes of action, false arrest and false imprisonment have been deemed "virtually indistinguishable." *See* 32 AM. JUR. 2D *False Imprisonment* § 3 (2003). Where force is involved in the illegal detention or arrest, the officer may also be charged with assault. Also, a search of private property without the owner's consent can also expose a private police officer to liability for trespass. *See* Sklansky, *supra* note 6, at 1183.

[282] Sklansky, *supra* note 6, at 1186. For a different view, see *Private Police Forces: Legal Powers and Limitations*, *supra* note 6, at 555 (noting that suits against private police are "quite common," based on an interview with a private police executive). By contrast, public police officers who act reasonably and in good faith, even if they make a mistake about what is "objectively legally reasonable," are granted immunity from tort or criminal liability for false arrest. *See* Anderson v. Creighton, 483 U.S. 635, 644 (1987).

[283] *See* Sklansky, *supra* note 6, at 1186.

[284] *See, e.g.*, Mitchell v. Walmart Stores, Inc., 477 S.E.2d 631, 633 (Ga. Ct. App. 1996) (finding that the challenged detention was reasonable under the state's merchant's privilege statute); Ashcroft v. Mount Sinai Medical Center, 588 N.E.2d 280 (Ohio Ct. App. 1990) (finding probable cause to justify detention pursuant to the state's merchant's privilege statute); Wal-Mart Stores, Inc. v. Resendez, 962 S.W.2d 539 (Tex. 1998) (finding a detention reasonable under the state's "shopkeeper's privilege" statute); Johnson v. K-Mart Enterprises, 297 N.W.2d 74 (Wis. Ct. App. 1980) (holding that a detention by a security guard reasonable and based upon probable cause); *cf.* Moore v. Pay-N Save Corp., 581 P.2d 159

c. Self-Regulation

Finally, the studies sponsored by the Department of Justice propose yet another source of private police control apart from legal regulation: the adoption of voluntary guidelines, enacted and enforced by the private police agencies themselves. Private policing agencies support such guidelines because they forestall more sweeping external efforts by courts and legislatures. Experience with self-regulation, however, suggests that it is unlikely to provide a meaningful system of controls. The 1990 Hallcrest Report, for example, suggests that private police agencies in the United States might follow the British Security Industry Association (BSIA) in adopting national, "industry-imposed" regulations.[285] In 1992, Les Johnston examined the internal regulatory practices of the BSIA, which includes 124 of the largest British companies providing private police.[286] Member companies are required to submit to inspections and to background checks of their employees.[287] Adverse results can lead to disciplinary hearings and penalties.[288] Johnston found, however, that in practice, expulsions were rare, and inspections were always pre-arranged.[289] Assessing the state of British self-regulation in private policing, Johnston concluded that the existing regime was ineffective in producing any true mechanisms of control or accountability.[290] A study conducted eight years later also determined that there yet existed "no general regulation of the private security industry in Great Britain."[291]

In the United States, the American Society for Industrial Security, the largest national professional association for private police,[292] abolished its Standards and Codes Committee in 1981.[293] The authors of the Hallcrest

(Wash. Ct. App. 1978) (reversing summary judgment for defendants where the evidence regarding the reasonableness of the detention had to be resolved at trial).

[285] *See* THE HALLCREST REPORT, *supra* note 22, at 152.

[286] *See* Les Johnston, *Regulating Private Security*, 20 INT'L J. SOC. L. 1 (1992).

[287] *See id.* at 6.

[288] *See id.*

[289] *See id.* at 5-6.

[290] *See id.*

[291] *See* GEORGE & BUTTON, *supra* note 29, at 174.

[292] My reference to "professional" is borrowed from ASIS's own literature. Whether or not private policing has achieved the status of a profession warrants a discussion beyond the scope of this article. For an overview of the process of professionalization, see Bernard Barber, *Control and Responsibility in the Powerful Professions*, 93 POL. SCI. Q. 599 (1978); Harold L. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137 (1964); *see also* Ernest J. Criscuoli, Jr., *The Time Has Come to Acknowledge Security as a Profession*, 1998 ANNALS OF THE AM. ACAD. OF POLI. SCI. 98 (Jul. 1988).

[293] *See* HALLCREST REPORT, *supra* note 22, at 151.

Report attribute the elimination to fears that codified standards would lead to increased liability against the group's members.[294] More recently, ASIS issued an *Officer Selection and Training Guideline* in October 2003 for use by legislators in setting minimum guidelines for "private security officers."[295] The results of these suggestions, including the likeliness of their adoption and prospects for their success, have yet to be examined.

Both British and American experiences suggest that self-regulation can at best provide only a supplement to external legal controls. Moreover, proposed industry self-regulation focuses almost entirely on criteria for qualifications and training. None address private police behavior in the way that constitutional criminal procedure law does for the public police.

3. *The Regulatory Regime of Private Policing*

In sum, the rules regarding private policing are designed for a world in which public and private are easily distinguishable, and more importantly, one in which public police are unquestionably the dominant organization responsible for control of crime and the protection of persons and property. Only the latter, in this view, are considered the "police." The process of drawing this distinction is reenacted by every successive legal decision. In determining the law of criminal procedure, courts do not merely "find" state involvement, they shape and reinforce its content.

One might point out that one function clearly distinguishes public from private: law enforcement. Does a law enforcement objective justify the distinction between the private and public police that now exists? While initiating the criminal process is *a* task we entrust to the public police, it is not the only one. What is more, private police often *do* play a role in producing cases for the criminal justice system. The remainder of public police work is functionally indistinct from that of private policing. Yet, the existing law classifies most private police with nosy neighbors, vindictive associates, and other private citizens.[296] So too have legal scholars failed to disentan-

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[294] *See id.*

[295] *See* AMERICAN SOCIETY FOR INDUSTRIAL SECURITY, PRIVATE SECURITY OFFICER SELECTION AND TRAINING GUIDELINE, *at* http://www.asisonline.org/guidelines/guidelines-private.pdf (last visited Sep. 28, 2004).

[296] *Cf.* City of Grand Rapids v. Impens, 327 N.W.2d 278, 284 (Mich. 1982) (Kavanagh, J., dissenting) ("Unlike the little old lady next door who has a desire to assist in law enforcement, private security guards are in the business of law enforcement. It is the nature of the activities of private security guards that distinguishes them from private persons."); Steven Euller, *Private Security and the Exclusionary Rule*, 15 HARV. C.R.-C.L. L. REV. 649, 665 (1980) ("A private citizen who grabs another person and empties his coat pocket is performing a police role in only the most superficial sense.").

gle private police from ordinary citizens: a conceptual choice that muddles analysis.[297]

How are private police different than ordinary citizens? First, for private police, policing is an occupational objective, not a voluntary task. While courts often refer to the *citizen* power of arrest, theory is not practice. The vast majority of citizens would probably be hard pressed, for instance, to recall an occasion on which they followed credit card thieves,[298] or pursued armed robbers and searched them.[299] Second, private police are, to varying degrees, trained to behave like the public police. While the status associated with retired public police officers are the most obvious example, the authority conferred by symbolic representations (badges, uniforms, and sometimes firearms) should not be underestimated. Third, private police are more like public police and less like private citizens because they are, to stretch Marc Galanter's usage, "repeat players" who possess incentives to use legal rules strategically.[300] It is doubtful that most private citizens are familiar with criminal procedure law, while many private police can and do use their knowledge of it to their advantage. Ultimately, the classification of private police with ordinary private persons obscures the significant differences between them.[301]

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[297] Thus, for example, in his treatise on the Fourth Amendment, Wayne Lafave concludes that the exclusionary rule would "not likely deter the private searcher, who is motivated by reasons independent of a desire to secure criminal conviction and who seldom engages in searches upon a sufficiently regular basis to be affected by the exclusionary sanction." WAYNE R. LAFAVE, 1 SEARCH AND SEIZURE § 1.8 (2003) (emphasis added). Such comments implicitly classify ordinary citizens, who may never engage in police-like activity, with private police.

[298] *See, e.g.*, Sizemore v. State, 483 N.E.2d 56, 57 (Ind. 1985).

[299] *See, e.g.*, Commonwealth v. Corley, 491 A.2d 829, 830 (Pa. 1985) (noting that after hearing of a shooting and robbery, a department store guard "followed appellant out of the store, across the street, and into Gimbel's department store," where the guard detained, handcuffed, and searched the defendant for weapons).

[300] *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (analyzing why "repeat players" in law have much larger influence in legal change than "one shotters," those who are involved in lawsuits only infrequently).

[301] In its petition for rehearing in the *Zelinski* case, the State of California criticized the state supreme court's very attempt to distinguish private police from citizens as futile: "[T]his Court has created a rank of third-class citizens. Security personnel are, therefore, accorded only the lesser powers of private citizens and the greater disabilities of public police. The conclusion is illogical." Petition for Rehearing at 4, *Zelinski* (Crim. 20284).

Law takes little account of these distinctions.[302] In their review of private police action, most courts give too much evaluative weight to the formal attributes of private police, placing heavy emphasis on whether they have been granted special legal powers. Nor have legislatures filled in the gaps left by constitutional law. A minority of courts have recognized that "[p]rivately employed security forces pose a difficult problem of distinction between State and private action."[303] The rest maintain a boundary that ill comports with the picture of private policing we now possess.

Table 1

The Relationship Between State Action, Arrest, and Policing

	WHO POLICES?	WHO BENEFITS?	RESULT
A.	Private police	Public police	The reemergence of the silver platter doctrine
B.	Private and public	Private and public	Undermining state action?
C.	Private	Private	The unimportance of the exclusionary rule

B. THE CENTRALITY OF ARREST: SOME UNINTENDED CONSEQUENCES OF THE PUBLIC-PRIVATE DIVIDE

Like the superficiality of state involvement, the centrality of arrest obscures much of private police activity from legal oversight. Consider again the primary mechanism of control over public police action developed by the courts: the exclusionary rule.[304] It operates indirectly through the suppression of illegally obtained evidence from the criminal defendant's trial. The exclusionary rule is tied to state involvement, for it pertains only to *public* police behavior. More specifically, the exclusionary rule only addresses public police behavior that has led to arrest and, subsequently, prosecution. The central role of the public police in initiating the criminal

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[302] In this respect, I part company from more sanguine interpretations of the differential treatment of public and private police. *See, e.g.*, Sklansky, *supra* note 6, at 1272 (describing the two legal regimes as "ideal for cross-fertilization" and "perfectly suited for dialectical development").

[303] Commonwealth v. Leone, 435 N.E.2d 1036, 1039 (Mass. 1982).

[304] Of course, there exist also tort and criminal actions that may be brought against public police officers, as well as the possibility of investigation and oversight by administrative review boards.

process and the task of controlling public police action are thus deeply intertwined.

Because I have emphasized the contrast between an inflexible legal distinction and the actual permeability of private-public relationships, consideration of cases that lie at the public-private border can be instructive. Examples of such cases illustrate how the divide creates opportunities for exploitation of the existing law, and leaves gaps where the law has no application. Table 1 shows in brief the examples to be discussed: the police organization that procures the evidence, the police organization that makes use of it, and the application of the relevant law upon that evidence. My purpose here is less to argue for an expansion or elimination of the state action doctrine—a proposal that is probably politically and practically infeasible[305]—but rather to examine the consequences of two starkly different legal conceptions of the police.

1. The Reemergence of the Silver Platter Doctrine

Consider the reemergence of the "silver platter doctrine."[306] The term refers to an anomaly of federalism that developed in 1914, in *Weeks v. United States*.[307] In that case, the Supreme Court applied the exclusionary rule to federal officials for violating the defendant's Fourth Amendment rights. The rule did not, however, apply to local (non-federal) police.[308] Indeed, in *Wolf v. Colorado*,[309] the Court squarely addressed the issue, and declined to find the exclusionary rule constitutionally compelled against local police in state courts. As a result, until 1960, these police could obtain evidence in violation of a defendant's constitutional rights and offer their federal colleagues—on a "silver platter"—that same evidence for use in a federal prosecution.[310] Such deliberate manipulation of the federal-state

[305] *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 556 (1985) (arguing for elimination of state action requirement but pessimistic about likelihood of its adoption).

[306] The term was first used in *Lustig v. United States*, 338 U.S. 74, 79 (1949).

[307] 232 U.S. 383 (1914).

[308] *See id.* at 398 ("[T]he Fourth Amendment is not directed to individual misconduct of such [local] officials. Its limitations reach the Federal government and its agencies.").

[309] 338 U.S. 25 (1949).

[310] *See* Elkins v. United States, 364 U.S. 206, 210 (1960) ("[T]he *Weeks* case also announced, unobtrusively but nonetheless definitely, another evidentiary rule. Some of the articles used as evidence against Weeks had been unlawfully seize by local police officers acting on their own account. The Court held that the admission of this evidence was not error for the reason that 'the 4th Amendment is not directed to individual misconduct of such officials.'") (quoting *Weeks*, 232 U.S. at 398).

distinction was legally permissible. Finally, in *Elkins v. United States*,[311] the Court discredited the practice, and prohibited the use of evidence in federal court that had been illegally obtained by local police. There remained a final exception, a "reverse silver platter," in which evidence illegally obtained by *federal* officials could be used in *state* court proceedings, for which the Court had not yet required the exclusionary rule's use. Eventually, in *Mapp v. Ohio*,[312] the Court closed that loophole too,[313] and in 1961 applied the exclusionary rule to state courts. No evidence illegally obtained by either federal or local officials can be used in federal *or* state court.[314]

In eliminating the silver platter doctrine, the Supreme Court recognized that restricting the actions of some police (federal) but not others (local) created perverse incentives for local police to do legally what federal officials could not. Such incentives now exist between public and private. Legal scholarship has almost entirely ignored the last version of an issue that once provoked heated debate when it involved federal and local police.[315] Sociologist Gary Marx points out that a system of "hydraulic" pressures, virtually identical to the line of cases that led from *Wolf* to *Mapp*, exists in the differing structures of private and public police regulation. Increased restraint on the public police results in greater reliance on the private police to perform "dirty work."[316] In practical terms, this means that

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[311] 364 U.S. 206 (1960).

[312] 367 U.S. 643 (1961).

[313] The Court's decision in *Rea v. United States*, 350 U.S. 214 (1956) anticipated *Mapp*, although there the Court invoked not constitutional law, but its "supervisory powers over federal law enforcement officials." *Id.* at 217-18. In *Rea*, the petitioner sought in federal district court to enjoin a federal narcotics agent from testifying in state court on information derived from a federal search warrant that had already been deemed in violation of then Rule 41(a) of the Federal Rules of Criminal Procedure. The Court, agreeing with Rea, reversed the denial of his motion, and observed that the Federal Rules are "defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state court." *Id.* at 218.

[314] For a discussion on the development of a silver platter doctrine in an international context, see Robert L. King, *The International Silver Platter Doctrine and the "Shocks the Conscience" Test: U.S. Law Enforcement Overseas*, 67 WASH. U. L.Q. 489 (1989).

[315] *See Elkins*, 364 U.S. at 208 n.2 (citing articles). For a notable exception, see Burkoff, *supra* note 202, at 631-643. The only scholarship in this area has been limited almost entirely to student notes. For representative examples, see Gagel, *supra* note 6, at 1841-44 (1995) (discussing the return of the silver platter doctrine in private form); B.C. Petroziello, Comment, *The Platinum Platter Doctrine in Ohio: Are Private Police Really Private?* 2 U. DAYTON L. REV. 275 (1977) (arguing for an extension of the exclusionary rule to Ohio special police).

[316] Marx, *supra* note 117, at 185-86. ("Restrict the conditions under which the police can carry out searches and seizures and undercover activities, coercive interrogation after arrest, or collect data on those who are not specific subjects, and police may make increased use of

private police may obtain evidence in ways forbidden to the public police, and then they may turn over contraband, statements, and other kinds of evidence for use at trial.

In the new version of the silver platter doctrine, private police act, but public police benefit (Table 1, cell A). How often does this happen? Those who demand statistics on the frequency of such activity will be disappointed. We know little of the emergence of the new silver platter doctrine, other than what arises in occasional published opinions.[317] Given our experience with the federal-state example, it is reasonable to estimate that a comparable level of manipulation probably takes place between private and public. Indeed, the legal structure of state action and the new organizational forms of partnership create *incentives* that permit the circumvention of rules meant to constrain public police behavior.[318]

2. Joint Activity

When public police openly and directly control what private police do, courts have found little trouble finding state action, and therefore the applicability of constitutional criminal procedure law.[319] The same is true when courts determine that there has been a "joint endeavor" between public and private, as when a private investigator working for an insurance company searches a burned home with the local public police, or when private credit card fraud investigators work together with public police officers.[320] Not all collaboration is so easily amenable to clear characterization. What happens in cases where private and public action result in public *and* private benefits (Table 1, cell B)?

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private detectives and informants who are less accountable and not as subject to such limitations.").

[317] *See* notes *supra* Part III.A.1.c.

[318] *See, e.g.*, Blumenthal, *supra* note 165, at B2 (observing that, because of close working relationship to public police, "private security managers may be particularly sympathetic to law-enforcement requests for help with a criminal investigation").

[319] *See, e.g.*, LAFAVE, *supra* note 34 ("Quite clearly, a search is not private in nature if it has been ordered or requested by a government official."); *see also* Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971) ("The test . . . is whether [the 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 when she produced [incriminating evidence].").

[320] *See* Stapleton v. Super. Ct. of L.A. County, 70 Cal. 2d 97, 100 (1968) ("The search of petitioner's car was clearly part of a joint operation by the police and the credit card agents aimed at arresting petitioner and obtaining evidence against him."); State v. Cox, 674 P.2d 1127, 1130 (N.M. Ct. App. 1983) ("We hold that were, as here, a law enforcement officer participates in a joint endeavor as part of an ongoing criminal investigation, the effect is the same as if he engaged in the undertaking as one exclusively his own.").

The judicial analysis focusing on direct commands by public to private police focuses too narrowly on discrete interactions, and not enough on long-term working relationships. Similarly, criminal procedure scholars generally focus on matters of "fairness writ small":[321] the obligations of government to a person accused of a crime, in a particular criminal case. This microscopic approach provides little guidance for regulating ongoing relationships between private and public police. When public police share information with private police, is this state involvement?[322] Even if it were, is there any mechanism to ascertain how private police obtain their information? The "joint endeavor" and "direct control" cases all present circumstances in which private and public actors are either physically present together or explicit about their joint activity, but these cases provide little guidance about private police action that is more subtly encouraged or assisted by the public police.[323] Thus, Wayne LaFave notes in his treatise on the Fourth Amendment that "[e]ven where the government encouragement was rather strong and specific, but yet short of an explicit request for a search, courts have been inclined to declare the search private nonetheless if there was in addition a legitimate private purpose behind the search."[324] In other words, the existence of mixed motives encourages a finding of "purely" private action.

Perhaps the occasional encouragement of private citizens by public police poses no serious challenges to the current structure of criminal procedure law. But it is arguably another matter when public police encourage and solicit aid from the private police: persons, sometimes former public

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[321] Sklansky, *supra* note 6, at 1280.

[322] *Cf.* State v. Buswell, 460 N.W.2d 614 (Minn. 1990). In *Buswell*, the court noted that "[m]ere antecedent contact between law enforcement and a private party is inadequate to trigger the application of the exclusionary remedy under the Fourth Amendment." *Id.* at 619 (citing United States v. Coleman, 628 F.2d 961, 965 (6th Cir. 1980)). The "mere antecedent contact" included:

> In May 1998, before the commencement of [the private police employer's] racing season, [private police manager] Emerson had conferred in general terms with the Crow Wing County Sheriff and the local Minnesota Bureau of Criminal Apprehension agent relative to procedures to be employed for making arrests should security guards of North Country Security uncover illegal activity during a race meet. This conference results in agreement that if any incident encountered by North Country Security guards seemed to warrant an arrest for a crime, Emerson would first be notified, and, he, in turn, would decide whether to call in official law enforcement agencies.

Id. at 616. The facts of *Buswell* also suggest that in many of these non-joint activity cases, public police officers know perfectly well that they may receive evidence via the new silver platter doctrine of which I have spoken, *supra.*

[323] *See also* LAFAVE, *supra* note 34.

[324] *See id.*; *see also* Burkoff, *supra* note 202, at 628 n.7 (describing the joint endeavor cases as "inconsistent and confused").

officers, who typically possess the skills and resources unavailable to the ordinary private person.

3. Transplanting Criminal Procedure Law

Is the solution, as some have suggested, to expand the state action doctrine to apply to more private police activity? The short answer is no, at least not entirely. Simply transferring the rules of criminal procedure to private policing may not have the intended effect of controlling their behavior. The modern rationale for the exclusionary rule rests on the presumption that police illegality can be curbed by the threat of excluding relevant evidence from a defendant's trial.[325] This model of deterrence, however, can be effective only if the presumed incentives—that is, the desire to have that evidence used against a defendant in her prosecution—exist. What happens when there is private action for private benefit (Table 1, cell C)? To address this question, I return to the matter of private justice for two examples.[326]

a. The Mass Production of Private Justice

Consider the example of Cumberland Farms, a privately held company operating 1,100 convenience stores in eleven states.[327] Like many other convenience store companies, Cumberland management considered "shrink," or employee theft, to be a significant source of revenue loss.[328] Its

[325] Thus, while the Supreme Court has in the past cited the exclusionary rule's role in promoting judicial integrity, today the Court most often refers to the rule's deterrence rationale. *Compare* Elkins v. United States, 364 U.S. 206, 223 (1960) (observing that the federal courts should not act as "accomplices in the willful disobedience of a Constitution they are sworn to uphold"), *with* Stone v. Powell, 428 U.S. 465, 486 (1976) ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights."). *But see* State v. Keyser, 369 A.2d 224, 225 (N.H. 1977) ("One rationale for limiting the exclusionary rule to evidence obtained by government actions is that the rule will not deter private individuals from engaging in improper conduct because most private persons are unaware of the rule and, being motivated by reasons apart from, or in addition to, a desire to assist in security a criminal conviction, they are under no disciplinary compulsion to obey fourth amendment requirements. Arguably, this rationale is less compelling when it is applied to the actions of private investigators and security officers whose primary goals is often to obtain evidence of crimes, who often possess professional knowledge and skill and who conduct searches and seizures on a regular and institutionalized basis.") (internal citations omitted).

[326] *See also supra* Part I.C.

[327] For an overview of the Cumberland story, see Joan E. Marshall, Comment, *The At-Will Employee and Coerced Confessions of Theft: Extending Fifth Amendment Protection to Private Security Guard Abuse*, 96 DICK. L. REV. 37 (1991).

[328] *See* Frederic M. Biddle, *Cumberland Farms Had Policy of Grilling Employees*, BOSTON GLOBE, July 14, 1990, at 8.

loss prevention officers considered inventory loss exceeding one percent in any of its stores to be a problem warranting action.[329] In response, Cumberland private police systematically sought to obtain confessions and restitution from store employees.[330] A memo circulated in 1985 by the head of Cumberland's Loss Prevention Department to his staff (and later obtained by newspaper reporters) commended them for a record number of confessions for the month of December, resulting in $100,000 in restitution.[331] He reminded Loss Prevention officers that they were expected to obtain no fewer than thirty confessions per month, and that "'the primary and most important function' of a security officer is that of interrogator."[332] A former Cumberland loss prevention manager confirmed the existence of an interrogation quota, and added that the basis of selecting employees for interrogation was not direct suspicion but "that they were in a store with a bad inventory report during the period while they worked in the store."[333]

There is no evidence that Cumberland police did what public police unquestionably would have been required to do in the same circumstances: advise employees of their rights before proceeding with interrogations. Former Cumberland employees recalled being taken into back rooms and accused of taking money or merchandise. Accused employees were offered a choice between signing a confession or facing public prosecution.[334] When threatened with public prosecution, most employees preferred confessing or quitting.[335] In the period from January to June of 1986 alone, the company police force questioned 2,600 employees—nearly a third of its workforce—and obtained confessions from 1,492.[336] Restitutions paid by accused employees averaged at $511 per confession.[337] Interviews with former employees suggested that virtually every one of the more than

[329] *See* Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123, 1127 (D.N.J. 1990).

[330] Cumberland's practices came to light after several former employees sued the company under federal and state racketeering laws. *See* Curley v. Cumberland Farms, Inc., 134 F.R.D. 77, 78-79 (D.N.J. 1991).

[331] *See* Dianna Marder, *Stores Set Interrogations Quota, Memo Shows*, PHILA. INQUIRER, Sept. 30, 1990, at 1-A.

[332] *See id.*

[333] *See* Biddle, *supra* note 328, at 8.

[334] *See* Marder, *supra* note 331, at 8-A.

[335] *See* Dianna Marder, *Ex-Clerks Sue Chain Over Claims of Theft*, HOUSTON CHRON. July 15, 1990, at 2. One former employee described how Cumberland investigators threatened him: "'We have you on videotape and visual sighting for stealing merchandise,' he told me. He said, 'We can bring you upon on charges for this, and it can ruin your college career, or you can pay us a little cash.'" *See* Frederic M. Biddle, *Cumberland v. Its Employees*, BOSTON GLOBE, July 27, 1990, at 21.

[336] *See* Biddle, *supra* note 335, at 21.

[337] *See id.*

30,000 employees called in for questioning between 1976 and 1989 was subsequently fired.[338]

Assume for a moment that the prophylactic warnings of *Miranda* had been required of the Cumberland police, and that, therefore, these interrogations violated the employees' constitutional rights. Had the exclusionary rule been applicable to Cumberland Farms' private police staff (resulting in their having committed a constitutional law violation), it would have done little to alter their interrogation policy. A judicial sanction excluding the employees' confessions would have had no feedback effect on Cumberland policing, so long as the company was satisfied with termination and restitution as principal sanctions. In addition, while the Cumberland Farms case may have publicized one of the worst cases of a sustained, official private interrogation policy, it is probably not unique.[339] Transferring wholesale the law of criminal procedure to the private police would overlook the distinct incentives and functions of private police, which are *also* distinct from those of private citizens.[340] Private justice systems possess their own internal structure, independent of the criminal justice system. As discussed earlier, avoiding reliance on the public process allows near total control by private police over their resolution of problems.[341] Cumberland Loss Prevention officers sought to obtain confessions and restitutions. Public prosecution was valuable as a coercive threat against accused employees, but in many cases embodied no more than that.

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[338] *See* Marder, *supra* note 331, at 1-A. Seven years after it was first filed, the lawsuit against Cumberland ended when the presiding judge approved a $5.5 million settlement between Cumberland and its former employees. *See Store Chain Will Pay Millions to Ex-Cashiers*, STAR-LEDGER (Newark), Sept. 9, 1993, at 41.

[339] *See, e.g.*, Frederic Biddle, *Jordan Marsh Guards Were Pushed to Make Arrests, Papers Show*, BOSTON GLOBE, Oct. 19, 1990, at 1 (reporting that Jordan Marsh department store security guards were given dollar amounts quotas to halt shoplifters).

[340] Burkoff contends, however, that extension of the exclusionary rule in such cases would deter public police behavior: "The most significant deterrent effect of applying an exclusionary rule in this setting may well be to discourage law enforcement agents from encouraging or entering into unlawful, *sub rosa* compacts with private actors." *See* Burkoff, *supra* note 202, at 640.

[341] *See also* Susan Guarino Ghezzi, *A Private Network of Social Control: Insurance Investigation Units*, 30 SOC. PROBS. 521, 528 (1983) ("By being able to successfully deny [insurance] claims while circumventing judicial checks and controls, [special private investigation units are] implicitly granted the power to investigate as they see fit."). Jerome Skolnick has observed that public police also may shirk their duty to respect the constitutional rights of suspects when officers have no intention of referring cases to prosecution. *See* SKOLNICK, *supra* note 18, at 214.

b. "Justice can be done right in the store"[342]: The Civil Law Alternative

Private justice need not only be the product of back-room coercion. Merchants in nearly every state[343] may also rely on civil restitution or recovery laws to combat shoplifting.[344] These permit retailers to seek costs from detained shoplifters, at least for the amount of the item stolen, and in some states for administrative, legal, and security expenses associated with the theft as well.[345] While often a low priority for public police departments, the costs of shoplifting are considerable for merchants: approximately $13 billion in 2000, according to one estimate.[346] In a typical civil recovery case, [347] the person accused of shoplifting must surrender the item stolen, and provide the retailer with a name and address in order to be released from the premises.[348] The retailer then sends the shoplifter a "civil demand" letter for an amount permitted by state law. In New York, for instance, a retailer is permitted to demand the price of the item, up to fifteen hundred dollars, plus a penalty not to exceed the greater of either five times the retail price or seventy-five dollars.[349] Should the shoplifter fail to respond, the retailer may then file a civil action against the shoplifter for damages. Those targeted only for civil recovery receive no criminal record, and for this reason, in the view of retail merchants' associations, typically pay without protest.[350]

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[342] Patrick Rossello, *A Retailer's Nightmare, Shoppers and Clerks Who Steal*, BALT. EVENING SUN, Aug. 5, 1991, at B7.

[343] Delaware has not yet passed a statute. *See* Audrey J. Aronsohn, *Teaching Criminals the Cost of Crime*, 43 SECURITY MGMT. 63, 64 (1999).

[344] Civil recovery laws have also been adopted, at least provisionally, in the U.K. *See* Fiona Murphy, *Consumer: You'll Pay for That*, GUARDIAN, June 17, 1999.

[345] *See, e.g.*, Anthony F. Shannon, *New Civil Penalty Law Strengthens New Jersey's Battle Against Shoplifters*, STAR-LEDGER (Newark, N.J), Aug. 1, 1993, at 5 (describing New Jersey law as requiring shoplifters to "return the stolen item or repay its full value, along with up to $150 in damages, court costs and legal fees, if legal proceedings become necessary").

[346] *See* Joanne Kimberlin, *New Battle Lines in Shoplifting War*, VIRGINIAN-PILOT (Norfolk, Va.), July 15, 2002, at A1. The discovery of ties between some organized retail theft ("ORT") rings and purported terrorist funding may, however, spark new interest from prosecutors and police in shoplifting. *See id.*; Joanne Kimberlin, *The New Face of Shoplifting*, VIRGINIAN-PILOT (Norfolk, Va.), July 14, 2002, at A1 (describing the discovery of a $10 million contraband cigarette group in Charlotte, North Carolina with ties to Hezbollah).

[347] *See, e.g.*, Angela Dellisanti, *A New Law in the War on Shoplifting*, N.Y. TIMES, Aug. 8, 1993, at 13:9 (describing an example of such a civil recovery case).

[348] *See* Rossello, *supra* note 342, at B7.

[349] *See* N.Y. General Obligation Law § 11-105(5)(a)-(b) (McKinney 2004). For examples of other similar state laws, see CAL. CIV. CODE § 1714.1 (2004); N.J. STAT. § 2A:61C-1 (2004); TEX. CIV. PRAC. & REM. CODE § 134.005 (2004); VA. CODE ANN. § 8.01-44.4 (2004).

[350] *See* Rossello, *supra* note 342, at B7.

These civil recovery laws, most of which were enacted during the 1980s and 1990s,[351] exist independently of the criminal justice system. That is, civil recovery laws are distinct from alternative sentencing programs within the criminal justice system that may, for instance, allow restitution in lieu of incarceration.[352] The choice of whether to pursue civil recovery or criminal prosecution (or both) is left to the retailer. From the merchants' perspective, the choice is an easy one. There are greater incentives to prefer civil recovery over prosecution.[353] Criminal prosecution yields at most the return of the stolen item (although even this is not always guaranteed), whereas civil recovery can even be profitable for some businesses.[354] Merchants prefer the administration of demand letters and direct payment to "the arduous red tape associated with criminal proceedings."[355]

With the array of possible remedies for private police and their clients, the criminal justice system would seem to fall at the bottom of the hierarchy. Prosecution requires an expenditure of resources and effort,[356] and the criminal sanction fails to rectify the merchant's economic loss. Moreover, to the extent that the criminal justice system uniquely offers the state's official expression of moral disapproval for an offender's actions, such considerations, as discussed earlier, are remote from the concerns of private police and their clients.[357] Thus, the transplantation of criminal procedure rules to private policing would be less effective than its advocates have assumed.

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[351] Nevada passed the first merchant civil remedy law in 1973. *See Retailers Are Using New Weapon to Cut Losses of Shoplifting*, WALL ST. J., May 15, 1989. By 1995, Maine was the 49th state to have passed civil recovery laws. *See* Doug Kesseli, *Laws Target Bad Checks, Shoplifters*, BANGOR DAILY NEWS (Me.), Sept. 27, 1995, *available at* 1995 WL 8769340.

[352] *See, e.g.*, Ed Russo, *Those Who Attempt to Steal in Eugene, Ore.-Area Face Fines, Possible Jail Term*, KNIGHT-RIDDER TRIB. BUS. NEWS, Dec. 18, 2000, *available at* 2000 WL 31018809 (citing an example of such diversion programs).

[353] Richard Hollinger, an expert on retail security, has stated: "With criminal prosecution, it's a lose-lose situation because the store gets only negative publicity and the shoplifter gets the stigma of criminal penalty and forfeits employment requiring a criminal-background check." *See* Carolyn Hughes Crowley, *A Civil Alternative*, WASH. POST, May 24, 1994, at B5.

[354] In a trade publication, the loss prevention director of chain of stores, The Children's Place, stated that civil recovery statutes were a source of revenue, as well as a means of combating theft. *See* KERRY SEGRAVE, SHOPLIFTING: A SOCIAL HISTORY 129 (2002) (citing Michael Hartnett, *Paying the Price of Crime*, STORES 76, Dec. 1994, at 48, 53).

[355] Kathy Barrett Carter, *Merchants Could Sue Shoplifters Under Bill Approved by Senate*, STAR-LEDGER (Newark, N.J.), June 18, 1993.

[356] *See* Dellisanti, *supra* note 347, at 1 (reporting that retailers view prosecution as "expensive because it ties up salesclerks and security officers in municipal court and leaves valuable merchandise parked in police evidence lockers").

[357] *See supra* Part I.C.

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The centrality of arrest nevertheless strongly influences judicial review of the private police. An exclusive focus on the relationship between the private police and the criminal justice system means that courts will see private and public police as equivalent only to the extent that the former provide courts with defendants and evidence. Even reform efforts like the short-lived *Zelinski* decision of the California Supreme Court, previously discussed, reflect this presumption. When store detectives called public police after finding a vial of heroin in Virginia Zelinski's purse, they were, according to the court, "utilizing the coercive power of the state."[358] Had the detectives relied on their private system of justice, as the Cumberland police did, the court would have had no objection:

> Had the security guards sought out only the vindication of the merchant's private interests they would have simply exercised self-help and demanded the return of the stolen merchandise. Upon satisfaction of the merchant's interests, the offender would have been released. By holding defendant for the criminal process and searching her, they went beyond their private interests.[359]

In its broadest application, this means that so long as private police action does not result in public prosecution, it may permissibly result in "self-help": civil sanctions, firing, fining, and banning.[360]

4. *Effects on the Public and Private Police*

Not only is the legal divide between public and private overly formalistic, it also produces unintended effects on the behavior of both groups. The two presumptions identified at the beginning of this Part—that is, the presumed ease of identifying state action and the centrality of arrest as a locus of regulation—influence both groups of police. The lack of an identifiable and discrete set of rules for the private police results in an unfettered ability to behave organizationally like their public counterparts with fewer of the legal disabilities.[361]

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[358] People v. Zelinski, 594 P.2d 1000, 1006 (Cal. 1979).

[359] *Id.*

[360] One alternative may lie in the use of a civil exclusionary rule. *See Private Police Forces: Legal Powers and Limitations*, *supra* note 6, at 572 (suggesting that the adoption of a civil exclusionary rule has the potential to be more effective in deterring illegal private police conduct than the extension of the existing exclusionary rule used in criminal cases).

[361] *See, e.g.*, Scott & McPherson, *supra* note 65, at 271-72 (reporting that private police agencies heads interviewed "felt that legally conferred police power carried with it legal responsibilities that would place undesirable burdens on their security personnel and substantially restrict their methods of investigation").

This distinction influences public policing as well. Rather than occupy two wholly separate spheres, private and public police share multiple ties. Because many public police move to the private sector after retirement (and others when off-duty), both groups are linked through a shared occupational and social culture. Because the law of criminal procedure has led, for better or worse, towards increased regulation of the daily work of the public police, as Gary Marx argues, there exist structural pressures, perhaps ones that can never be measured satisfactorily, of delegating some "dirty work" to the private police.[362] Finally, the support of partnerships between private and public results in publicly sanctioned cooperation between the two. It seems a worthy hypothesis that all these factors lead to some strategic manipulation of the private-public borderline enshrined in law.

C. SUMMARY AND IMPLICATIONS

Many observers agree that the private police are left mostly to regulate themselves, a situation in stark contrast to the legal environment in which the public police find themselves. Those who would cloak the private police with the existing structure of criminal procedure underestimate, however, some significant differences between the private and public police. From the available evidence, private police appear to rely much less on the coercive aspects of policing work, especially arrest, and focus instead, for example, on a compliance model of policing. Even when they do resort to detention, arrest, or interrogation, private police do not always work with an eye toward processing cases for the criminal justice system.

The structure of the rules controlling public police behavior does not address either of these aspects of private policing. This Part has pointed out that the centrality of arrest—the assumption that the primary objective of police work is to generate criminal cases—in criminal procedure law means that there is diminished emphasis on controlling police behavior that stops short of arrest. If this creates regulatory lacunae in public policing, the observation is all the more true with private police, who may be organizationally inclined to turn towards a private justice system more often than to the criminal justice system. The lesson from this distinction is that the imposition of increased control of private police behavior, if borrowing from criminal procedure law, must incorporate the understanding of these qualitative differences.

Likewise, the inapplicability of the exclusionary rule to private police organizations means that public police may find private help advantageous for their own purposes. Public police, like all employees in complex or-

[362] Marx, *supra* note 117, at 183.

ganizations, work with the incentives and rules as they best understand them.[363] It would be hardly surprising to discover that the newest version of the silver platter doctrine is enacted frequently. Can we fault the public police as corrupt or unethical for taking best advantage of legal rules that courts repeatedly affirm?

A second aspect of the rules governing public police conduct poses a more basic problem that is unlikely to yield to easy resolution. Because the most significant rules controlling the public police only exist with the identification of *state involvement*, private police have thus far been exempt from their application. Judicial inquiry into the existence of state involvement is mainly superficial; formal deputization is often determinative. The nature and extent of state involvement in private police work, however, cannot be reduced to absence or presence. Rather, state action exists as a matter of degree in most cases, or more inelegantly, in a state of "continuumization."[364] As Part II discussed, public involvement in private policing can be so pervasive and multiform that not only does the state action doctrine appear highly formalistic, the very meaningfulness of private and public seem questionable.[365] State action is probably the most difficult to sort out in the emerging public-private partnerships.

Of course, none of this means that either arrest or government involvement is insignificant. The state can wield considerable power in people's lives, and arrest is indeed the beginning of a protracted contest between the defendant and the state. Nor does anyone suggest that private police are resolving by themselves violent crimes such as murder or rape. What I have attempted to show here, however, is that the nearly exclusive focus on the power of the state and the significance of arrest obscures the importance of other means police, and especially the private police, have at their disposal.

The muddling of the private-public distinction in policing represents but one example of the more general decline of this legal distinction.[366] But

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[363] *Cf.* SKOLNICK, *supra* note 18, at 174 (observing that the response of detectives to clearance rates can be explained by the following insight: "the worker always tries to perform according to his most concrete and specific understanding of the control system").

[364] Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1352 (1982) ("Continuumization means that people see most entities (institutions, actors, actions) as 'not absolutely one thing or another,' rather than reserving this status for a small class of intermediate terms, or collapsing everything into one pole or the other.").

[365] *Cf.* Theodore M. Becker, *The Place of Private Police in Society: An Area of Research for the Social Sciences*, *in* SOC. PROB. 21 (1974).

[366] *See, e.g.*, Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1428 (1982) (observing that "[p]rivate power began to become increas-

abstractions do not interest the police. The law separating private and public has little practical significance to the public police, who by social and institutional arrangements, often work with private police agencies. Where the distinction does matter, through the application of the exclusionary rule to their work, this Part has pointed out that the structure of the private-public divide permits (and perhaps encourages) exploitation of the separate legal regimes. Because they blur boundaries, partnerships raise the question of which source of law is appropriate. Finally, even if state action could be imputed to the private police, it is far from clear that the arrest-centered model of regulation that governs public policing would be a sensible mechanism for them.

The law offers private police agencies relative freedom compared to their public counterparts to maintain order and control crime. The existing rules from criminal and tort law are probably adequate to address private police scandals: those cases in which private police assault, discriminate against, or otherwise mistreat people. But the focus here has been on the relative paucity of rules designed to regulate the *routine* work of private police in the pursuit of their objectives. The contemporary regulation of policing carries with it an ironic paradox: the rules governing the two police groups grow ever more distinct, particularly as criminal procedure grows in complexity, yet the practical experiences of the two groups continue to grow closer together, and in the case of partnerships, merge so closely that it becomes difficult to say what is private and what is public.

IV. CONCLUSION: RETHINKING THE "POLICE" AND "POLICING"

Who may lay legitimate claim to being the "police"? After all, the word "police" has no natural definition or fixed content. Many people outside of the state once assumed primary responsibility for the tasks we now associate with the (public) police. Today, the private police, by their considerable and pervasive presence, raise new challenges to the definition and function of policing. The existence of basic data on the private police re-

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ingly indistinguishable from public power precisely at the moment, late in the nineteenth century, when large-scale corporate concentration became the norm"); Kennedy, *supra* note 363, at 1357 (observing that we live in an era in which the distinction cannot be taken "seriously as a description, as an explanation, or as a justification of anything"); Donald R.C. Pongrace, *Sterotypification of the Fourth Amendment's Public/Private Distinction: An Opportunity for Clarity*, 34 AM. U. L. REV. 1191, 1210 (1985) (describing public-private distinction in law as a "logical bankruptcy"). Policing is only one area in which scholars have questioned the public-private distinction. For insightful critiques of the public-private divide as it pertains to the family and the market, see Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Nikolas Rose, *Beyond the Public/Private Division: Law, Power and the Family*, 14 J. L. & SOC'Y 61 (1987).

mains inadequate, and a scholarly treatment underdone. This insufficient attention is striking because of the ever greater reliance placed upon private police organizations to act as partners, supplements, or independent agents in controlling crime, maintaining order, and, today, combating the threat of terrorism.

This latter point is all the more striking because of the differential legal treatment private and public police receive. The actual convergence of the two groups and their divergence in law creates legal anomalies at the boundary line between what are the largely "constitutionalized" set of rules controlling the public police, and the amalgam of laws cobbled together from property, tort, and contract law controlling private police behavior.

No uniform solution can address these problems. Should courts recognize an expansive notion of state action? Should lawmakers retreat from advocating partnerships? There are likely a number of possible responses, and unlikely a single, comprehensive agenda that will answer all of these questions. My modest goal has been to draw empirically supported attention to the divide between the social realities and the legal conception of the private police. Confrontation of that issue, whether by judicial, legislative, or political means, must draw upon a solid basis of research and scholarship on private police organizations.

Scholars of criminal procedure and of the (public) police have much to offer here, but their concerns must be redirected. Much of the scholarship on policing has not only ignored the private police,[367] it pays little attention to some fundamental questions that are now, ironically, being raised in the marginalized scholarship on private policing. Much public police scholarship today is highly instrumental, or as Austin Sarat and Susan Silbey might describe, is subjected to the "pull of the policy audience."[368] In other words, the study of the (public) police focuses upon questions pertaining to, for example, the improvement of patrol response rates and the identification of effective crime reduction techniques. These concerns, while certainly valuable, now overshadow issues like the definition of policing itself, and the appropriate mix of private and public policing in a democratic society. Moving private policing from periphery to center in the study of the "po-

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[367] *See* Maureen Cain, *Trends in the Sociology of Police Work*, 7 INT'L J. SOC. L. 143, 145 (1979) ("Nobody [in conventional policing scholarship] questioned what 'the police' meant. Thus private police forces, citizen protection groups, and other government policing bodies, were ignored.").

[368] *See generally* Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 L. & POL'Y 97 (1988).

lice" not only draws attention to a much overlooked subject,[369] it asks again and with a new perspective foundational questions that once animated study of the police and the law, and should once more.

[369] *See* Becker, *supra* note 365, at 450 (advocating a "new perspective . . . whereby researchers are 'sensitized' to the existence and importance of private police in society").

APPENDIX: RESEARCH METHODS

The case study of the "T Company" Protection Department, described in Part II, draws from observation of and interviews with a private policing department located in a large city of the Eastern United States. I discuss here the research methods adopted and some of the obstacles encountered.

The difficulty of researching private policing cannot be underestimated. It is in some ways more difficult than the study of the public police, about which numerous scholars have complained. Those who have conducted ethnographic research of the public police have repeatedly remarked upon the extreme reluctance of the police in providing information to outsiders.[370] Given that many private police executives are former public police officers, it should come as little surprise that I encountered considerable difficulty—in fact, almost no cooperation at all—in obtaining interviews with other private police organizations that I approached. I chose to study T company primarily because I was able to gain access to its director, and consequently was able to obtain permission to conduct observations. The public police department responsible for providing T company with off-duty officers, however, repeatedly denied my requests for interviews. Had it not been for a personal connection that provided me an opportunity to meet with its directors, first N.K, and then S.R., I almost certainly would have failed to complete the case study.

The research was conducted in two periods. In February of 1998, I interviewed the management of the Protection Department, and spent several day shifts observing its operations, especially by shadowing A.M., one its "investigators." In July 2000, I returned to the Department for a period of discontinuous observation that lasted four weeks, during which I was permitted to observe T company's policing operations. I alternated my observation periods between the early morning-day shifts, and the day-evening shifts. By the time of my second period of observation, T company had changed its leadership, and its new director, S.R., allowed me continue my observations on the condition that I not reveal the identity of the company or its location.

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[370] Thus, for example, Paul Chevigny notes of the New York Police Department:

> It must be admitted that the NYPD is difficult to study. Bureaucratized as it is, it turns a bland face to the public as well as to scholars. Everything has to be done through channels; hardly anyone in the department will talk to an outsider without approval from above, and once the approval is obtained, hardly anything of substance is revealed.

PAUL CHEVIGNY, EDGE OF THE KNIFE 33 (1995).

In order to supplement my observations, I interviewed the private sector liaison of the local public police department, and attended three meetings of the private-public alliance sponsored by the public police department. To gain a sense of comparison, I also interviewed the management of another private police department located in the same city as T Company.

The findings presented in Part II may suffer from several shortcomings. Some will fairly question the extent to which the case study is representative of other private policing operations. Case studies are a well-established method of research in contemporary sociology,[371] particularly in the study of the public police.[372] What case studies gain in richness of knowledge they may also lose something in their potential for generalizability.[373] The successful case study can, however, provide other researchers with working propositions that can be further explored in other settings.[374] As to these concerns, I suggest that my study of the T Company Protection Department is illustrative, rather than representative in a truly scientific sense, of the kinds of empirical complexity I suggest exists in private policing, and of the thorny problems that remain inadequately addressed by the law.[375]

Another limitation to be considered is the extent to which my presence altered or influenced the behavior of those I observed. To this end, I can say that I attempted in all respects to be as unobtrusive as possible. Nevertheless, those I spoke to and observed were no doubt more cautious in their working behavior than they otherwise would be. Occasionally, a seemingly casual conversation would end with the remark, "and you can put that in your book."

My descriptions sometimes place the department I studied in unflattering terms; nevertheless, I believe my observations to be accurate. I do not, however, wish to suggest that any of the people I describe deliberately or

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[371] *See generally* WHAT IS A CASE?: EXPLORING THE FOUNDATIONS OF SOCIAL INQUIRY (Charles C. Ragin & Howard S. Becker eds., 1992).

[372] *See, e.g.*, ERICSON, *supra* note 44 (conducting a five month study of Canadian police department); WILLIAM K. MUIR, JR., POLICE: STREETCORNER POLITICIANS (1977) (conducing interviews with twenty-eight officers in Laconia); *see also* RIGAKOS, *supra* note 18, at 29 (2002) (conducting a two month study of a Canadian private police company).

[373] *See* NICHOLAS ABERCROMBIE ET AL., DICTIONARY OF SOCIOLOGY 41 (4th ed. 2000).

[374] *See* Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 647 n.17 (2001) (describing the advantages of case studies).

[375] *See also* NEWBURN & JONES, *supra* note 26, at 118 (stating that their case study of Wandsworth was "illustrative rather than representative," and that its "worth lies more in the depth and quality of the data that can be collected, rather than the extent to which one could argue that what is observed there is necessarily transferable elsewhere").

consciously behaved in inappropriate or illegal ways. Indeed, the staff of T Company was overwhelmingly composed of individuals dedicated to what they believed was the pursuit of a safe and orderly environment. Instead, my intention has been to describe the activities of this department to illustrate general issues in private policing that arise out of the socio-legal framework in which it operates.