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The Platinum Platter Doctrine in Ohio: Are Private Police Really Private?

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THE PLATINUM PLATTER DOCTRINE IN OHIO: ARE PRIVATE POLICE REALLY PRIVATE?

I. INTRODUCTION

Perhaps one of the greatest aids to beleaguered municipal and county police forces in the fight against crime is the use of special policemen[1] by department stores and factories. As is often the case with any good preventative, however, there is great potential for abuse. While special police beneficially free more regularly employed municipal and county police officers for other duties, their increasing use is beginning to raise a number of legal issues which are not easily resolved.

Many of the issues involve constitutional questions of great importance, particularly in the areas of the fourth[2] and fifth[3] amendments, and rights secured by *Miranda v. Arizona.*[4] Questions also exist concerning the powers and jurisdiction exercisable by the special police,[5] as well as with the numerous statutory grants which authorize the creation of special police forces.[6]

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1. The term "special police" will be used in this comment to describe those private security employees who are commissioned or licensed by a governmental subdivision as special or auxiliary police officers, who work solely in that capacity for private employers, rather than for the licensing subdivision. It will be used to describe those security employees who are variously termed special police, special patrolmen, special deputy sheriffs, auxiliary police, private guards, special constables, railroad police, or employees of any of the agencies which contract to provide such services. The term, however, does not include those private detectives or investigators licensed by the state who do not work for stores or factories as internal security forces.

For an excellent treatment of the history of police and private police in the United States and England, *see* Comment, *Who's Watching the Watchmen? The Regulation, or Non-Regulation of America's Largest Law Enforcement Institution, The Private Police,* 5 GOLDEN GATE L. REV. 433 (1975) [hereinafter cited as *Watchmen*].

2. The fourth amendment questions deal with the applicability of the prohibitions against unreasonable searches and seizures by special police officers who are in one sense private individuals, but who are also agents of the state. *See* Burdeau v. McDowell, 256 U.S. 465 (1921); State v. McDaniel, 44 Ohio App. 2d 163, 337 N.E.2d 173 (Franklin County Ct. App. 1975); People v. Diaz, 85 Misc.2d 41, 376 N.Y.S. 2d 849 (N.Y.C. Crim. Ct. N.Y. County 1975); Comment, *Sticky Fingers, Deep Pockets, and the Long Arm of The Law: Illegal Searches of Shoplifters by Private Merchant Security Personnel,* 55 ORE. L. REV. 279 (1976).

3. *See* State v. Bolan, 27 Ohio St. 2d 15, 271 N.E. 2d 839 (1971), holding that store employees who detain a suspected shoplifter pursuant to OHIO REV. CODE ANN. § 2935.041 (Page 1975) need not give the warnings required by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966).

4. 384 U.S. 436 (1966).

5. Most of the questions concerning special police powers involve their powers to arrest, to investigate crime in general, and to carry weapons. The jurisdictional problems concern whether the special policemen are confined to their place of employment or whether they can operate anywhere within the limits of the licensing subdivision.

6. In Ohio there are no less than five statutes dealing with the creation of special police officers. *See* Section II *infra* and note 9 *infra.*

Moreover, since the status of special police officers has not been settled, a situation has developed similar to the now overruled "silver platter doctrine."[7] This doctrine involved the sharing of illicit evidence between state and federal law enforcement officers,[8] while the modern form, which might be called a "platinum platter," involves widespread sharing of illicit evidence between private and regular police officers.

The major purposes of this comment will be to review relevant Ohio statutory material as well as some of the major judicial decisions in the hope of stimulating thought and action to correct the existing problems, and to provide some useful material to practitioners who are involved with matters concerning special police.

II. AN OVERVIEW OF THE OHIO SPECIAL POLICE STATUTES

The natural starting point in analyzing the legal issues surrounding the use of special police is to survey the statutes that authorize their creation and define their powers. In Ohio, there is a multi-level statutory "hodge-podge" that authorizes various state government subdivisions to commission special police to supplement their regular police forces.[9] In addition, two statutes authorize certain enumerated private organizations to employ special police,[10] and yet another allows any store employee to detain shoplifters.[11] Finally, the common law allows the creation of non-statutory deputy sheriffs.[12] Of the statutes mentioned, the Shoplifter Detention

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For a brief comparison of other state laws which pertain to licensing and regulation of special police, *see Watchmen, supra* note 1, at 450-56; 3 J. KAKALIK & S. WILDHORN, PRIVATE POLICE IN THE UNITED STATES: FINDINGS AND RECOMMENDATIONS 15 (1971) (Part of a six volume study prepared by the Rand Corporation for the Dept. of Justice).

7. In Lustig v. United States, 338 U.S. 74, 79 (1949), the Court used this term to describe the then current status of federal involvement in evidence seized by state officials. Elkins v. United States, 364 U.S. 206, 208 n.2 (1960).

8. *See* Elkins v. United States, 364 U.S. 206 (1960) and Mapp v. Ohio, 367 U.S. 643 (1961), which put an end to the trade in illegally seized evidence between state and federal officials.

9. OHIO REV. CODE ANN. § 737.05 (Page 1976) (Composition and control of police department) [hereinafter cited as the Special Police Statute]; OHIO REV. CODE ANN. § 1907.201 (Page 1976) (Appointment of special constables); OHIO REV. CODE ANN. §§ 737.15-.19(Page 1976) (Appointment, powers and duties of village marshals).

10. OHIO REV. CODE ANN. §§ 4973.17-.99 (Page 1954) (Commissions for special police for banks, building and loan associations, railroad companies, and atomic energy facilities) [hereinafter cited as the Railroad Police Statute]; OHIO REV. CODE ANN. § 3345.04 (Page 1976) (Commissions for special police officers for state universities).

11. OHIO REV. CODE ANN. § 2935.041 (Page 1975).

12. Although OHIO REV. CODE ANN. § 311.04 (Page 1976) authorizes a sheriff to appoint "in writing, one or more deputies," these appointees are regular county employees. The creation of special deputies is not authorized by Ohio statute, but is authorized by common

Statute, the Special Police Statute, and the Railroad Police Statute will be the focal point of this comment, as well as the common law use of special deputy sheriffs. These have the most impact on Ohio citizenry and practitioners,[13] and the most interaction with constitutional issues.

A. *The Shoplifter Detention Statute*

The Shoplifter Detention Statute[14] is not a specific authorization to any governmental subdivision to create or license special police; rather, it is a blanket grant of the power of detention to any merchant and his employees with probable cause to believe both that criminal activity has taken place on the merchant's business premises in the form of shoplifting,[15] and that the person so detained has committed the crime.[16] The suspect may be detained on or near the store premises,[17] but in a reasonable manner,[18] for only a reason-

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law. State v. McDaniel, 44 Ohio App. 2d 163, 337 NE.2d 173 (Franklin County Ct. App. 1975); State *ex rel* Geyer v. Griffin, 80 Ohio App. 447, 76 N.E.2d 294 (Allen County Ct. App. 1946).

13. These statutes are more or less representative of the others, and the analysis and observations made will, for the most part, apply to the others. The text of each statute must be read carefully, since some are more specific than others in defining the powers to be exercised.

14. OHIO REV. CODE ANN. § 2935.041 (Page 1975) Detention of Shoplifters:

> A merchant or his employee or agent, who has probable cause for believing that items offered for sale by a mercantile establishment have been unlawfully taken by a person, may, in order to recover such items without a search or undue restraint or in order to cause an arrest to be made by a police officer until a warrant can be obtained, detain such person in a reasonable manner for a reasonable length of time within the said mercantile establishment or the immediate vicinity thereof.
>
> Any police officer may, within a reasonable time after such alleged unlawful taking has been committed, arrest without a warrant, any person he has probable cause for believing has committed such unlawful taking in a mercantile establishment.

15. A store employee may safely act under the statute without incurring liability when it can be demonstrated that probable cause existed to support the detention. Isaiah v. Great Atlantic & Pacific Tea Co., 111 Ohio App. 537, 174 N.E.2d 128 (Summit County Ct. App. 1959).

16. OHIO REV. CODE ANN. § 2935.041 (Page 1975).

17. State v. Stone, 16 Ohio Misc. 160, 241 N.E.2d 302 (Hamilton County Mun. Ct. 1968).

18. Difficulties arise under the statute when an employee who effects the detention also possesses power to arrest under one of the special police statutes, which is often the case in major department stores. In such a situation, it is possible to claim that only the authority of the detention statute is being used, thus rendering the special policeman a private individual. The effect is to allow the special policeman to employ methods of doubtful constitutionality to obtain evidence or confessions which will be fully admissible at trial. *See* discussion Section III A. *infra*. There is no doubt that such methods violate the command of the statute that all detentions be in a reasonable manner and without a search. However, this argument has been overlooked by both courts and defense attorneys. Indeed the statute would seem to preclude any search of a suspected shoplifter by a plain reading of its language. *See also* State v. Bolan, 27 Ohio St. 2d 15, 271 N.E.2d 839 (1971).

able time, and, more importantly, without a search.[19] Although detention is allowed, arrests under the statute can only be made by a regular police officer, and when the proper showing of probable cause is made, the arrest can be effected without a warrant.

The statute benefits merchants in that it allows store employees who are in the best position to detect shoplifting, to prevent a substantial loss of merchandise. The statute confers a limited power only, however, since it does not elevate a merchant or his employee to the status of a law enforcement officer.[20] Despite the advantages derived from this statute, this approach to crime detection is fraught with dangers, as it is applicable to situations in which it is often easy to obtain evidence or confessions which would be in contravention of the constitution, if done by a regularly employed police officer.[21]

B. The Special Police Statute

The Special Police Statute[22] authorizes the Director of Public Safety or his equivalent to commission private policemen. These appointees are not full time civil service employees, but rather work for private employers. They are controlled by whatever regulations the legislative authority of the city prescribes, including organization, training, control, procedures, and conduct. Unfortunately, the regulations can be as detailed or lax as the city desires, since there

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19. *See* State v. Edwards, No. 5171 (Montgomery County Ct. App. filed Nov. 30, 1976) which involved the removal of stolen property from the defendant's open shopping bag. The court concluded that since the store security employees had seen the theft occur, the removal of the stolen items was a lawful repossession of the store's property and not a search in the constitutional sense. Since the court held that there was *no* search, the provisions of the Shoplifter Detention Statute could not have been violated.

20. Even so, detention is a power greater than that possessed by the ordinary citizen who has no power to arrest or detain for *misdemeanors* in Ohio. OHIO REV. CODE ANN. § 2935.04 (Page 1975). Whether or not one is a law enforcement officer is constitutionally important in Ohio since the Ohio Supreme Court has interpreted the giving of Miranda warnings to be necessary only where a law enforcement officer is conducting a custodial interrogation. *See* State v. Bolan, 27 Ohio St. 2d 15, 271 N.E.2d 839 (1971).

21. *See* analysis in Section III *infra*.

22. OHIO REV. CODE ANN. § 737.05 (Page 1976), which provides in pertinent part: Composition and control of police department.

> . . . .
>
> The director of public safety of such city shall have the exclusive management and control of all other officers, surgeons, secretaries, clerks, and employees in the police department as provided by ordinances or resolution of such legislative authority. *He may commission private policemen, who may not be in the classified list of the department, under such rules and regulations as the legislative authority prescribes* (emphasis added).

See also OHIO REV. CODE ANN. § 737.051 (Page 1976) which authorizes the director of police to create auxiliary police units for a city.

is no guidance whatsoever in the statute. Thus, licensing requirements,[23] qualifications, and duties are left to the cities' discretion.[24] Because the power over special police is lodged in the local legislature[25] without any specific guidelines from the Special Police Statute, special police powers and jurisdiction may easily vary from city to city.

Since the power to commission special police is hazily defined, it is appropriate to examine the scope of the power that can be conferred and the powers that are desirable. The response to the first facet of the inquiry is that all the powers that the state could confer on its special police can in fact be given by the city to its private policemen.[26] Authority for this conclusion is provided by two sources other than the broad language of the Special Police Statute itself. The first source is *Neapolitan v. United States Steel Corp.*,[27] in which the court stated that a private policeman can possess all the powers conferred on the state-created railraod police under the

23. Under the ordinances of the City of Dayton, for example, there must be a showing of necessity for the employment of special police, and the number of licenses granted is discretionary with the Director of Police. Other requirements include filing and posting of bond. DAYTON, OHIO, CODE OF GENERAL ORDINANCES §§ 1025 and 1028 (1971).

See also COLUMBUS, OHIO, CITY CODE §§ 1907.01-.03 (1971) authorizing the commissioning, bonding, terms of office, and control by the Chief of Police under regulations provided by the Director of Public Safety.

24. *See* DAYTON, OHIO, CODE OF GENERAL ORDINANCES § 1028-3. This section generally spells out the duties and requirements for uniforms and possession of weapons, among other things. It also specifies that a special policeman who has knowledge of a crime should notify the police and stand by until the regular police arrive. This would seem to conflict with other provisions conferring the power of arrest and will undoubtedly cause confusion.

The Dayton ordinance also defines a special policeman as "any person in uniform who, for hire or reward performs any police service within the city of Dayton." DAYTON, OHIO, CODE OF GENERAL ORDINANCES § 1024(a) (1971). The definition excludes private and factory guards who are defined as being paid by their employer and who are confined to their employer's property. DAYTON, OHIO, CODE OF GENERAL ORDINANCES § 1024(a) (1971). The provision, however, also states that whenever these officers perform a police service while not on the premises of their employer, they shall be deemed special policemen. The ordinance defines a police service as including, but not being limited to, "the protection of life and property from death, injury, or damage thereupon, criminal acts, violence, accident or disaster. . . . The detection and apprehension of persons committing or who have committed any criminal act, whether felony or misdemeanor." *Id.* § 1024(d).

25. This is achieved by § 3, Art. XVIII of the Ohio Constitution, which is more commonly known as the Ohio home rule provision. In State *ex rel* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958), the Ohio Supreme Court declared the operation of a police department to be an exercise of the powers of local government conferred upon it by § 3, Art. XVIII, with which the state cannot interfere, in the absence of more than mere state concern. *Cf.* Neapolitan v. U.S. Steel Corp., 77 Ohio L. Abs. 376, 149 N.E.2d 589 (Mahoning County Ct. App. 1956).

26. *See* OHIO REV. CODE ANN. §§ 4973.17-.99 (Page 1954) for an example of the powers conferred on private railroad police by the state.

27. 77 Ohio L. Abs. 376, 149 N.E.2d 589 (Mahoning County Ct. App. 1956).

Railroad Police Statute.[28] To the same effect is an opinion of Attorney General William Saxbe[29] which is based to a great extent on *Neapolitan*. The substance of the opinion is that a private police officer "derives his authority from the ordinances of the appointing municipality and from the laws of the state,"[30] and has the same powers and jurisdiction as given other police officers by state law including the authority to arrest one who commits a misdemeanor in his presence.[31] It should be kept in mind that fourth amendment inquiries often turn on how much power the special police possess and the capacity in which it is used. Because of the lack of effective guidelines under the current Special Police Statute, the decisions reached have not been easy or desirable.[32]

The foregoing discussion on the powers of special police applies to their jurisdiction as well; that is, whether the activities of the special police are strictly tied to their employer's premises or whether they are free to roam the city in search of criminal activity. The broad sweep of the statute's language, the *Neapolitan* decision, and the Saxbe opinion imply that jurisdiction is co-extensive with the appointing city's limits.[33] While some flexibility is desirable, conferring city-wide jurisdiction may be too extreme.

C. *The Railroad Police Statute*

The Railroad Police Statute[34] authorizes banks, building and loan associations, railroad companies, and those who contract with the United States Atomic Energy Commission to designate employees to be appointed "railroad policemen" by the governor. To protect their properties, these associations are empowered to make rules and regulations which the railroad police are charged with enforcing. For railroad police, the power to enforce is also the power to arrest.[35] The statute is primarily important to this discussion in

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28. OHIO REV. CODE ANN. § 4973.17 (Page 1954); *see* discussion in Section II (c) *infra*.

29. 66 OP. ATT'Y GEN. 179 (1966).

30. *Id.* at 386.

31. *Id.* at 389.

32. The manner in which the courts have addressed the powers that have been conferred on special police in conjunction with fourth and fifth amendment problems will be explored in Section III *infra*.

33. *Compare with* OHIO REV. CODE ANN. § 2935.041 (Page 1975) which allows detention of shoplifters on or near store premises by express provision. *See* note 27 *supra* for authority that they can. *See also* DAYTON, OHIO, CODE OF GENERAL ORDINANCES § 1024(d) (1971).

34. OHIO REV. CODE ANN. §§ 4973.17-.99 (Page 1954).

35. OHIO REV. CODE ANN. § 4973.19 (Page 1954) which provides in pertinent part:

> Power of police to enforce regulations and make arrests.
>
> A company which avails itself of sections 4973.17 and 4973.18 of the Revised Code may make needful regulations to promote the public convenience and

terms of the litigation that it has spawned concerning the liability of employers and their special and railroad police for tortious conduct in the performance of their duties,[36] and for the direct grants of power it gives to railroad policemen.[37]

D. *Ohio Special Deputies*

One category of special police deserves special mention: the non-statutory special deputy sheriffs.[38] The authority for their creation is established by common law.[39] Today this common law power is exercised by the filing of the necessary applications and fees and approval by a common pleas judge, who is without authority to place any limitations on the duties to be performed by the special deputy.[40] The duties and services that these special deputies perform for their employers are similar to those performed by municipal special police; the main difference is the level of government issuing the licenses. Due to the lack of statutory authority for their creation and the difficulties that this category has caused at least one court,[41] special deputy sheriffs are mentioned here as the ultimate square peg in the Ohio statutory scheme.

III. Overview of the Case Law on Special Police

The first decisions dealing with special police involved railroad police.[42] These cases primarily concerned the liability of railroad

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> safety in and about its depots, stations, and grounds, not inconsistent with law. . . . Policemen appointed under such sections shall enforce and compel obedience to such regulations. . . .

Ohio Rev. Code Ann. §§ 4973.23 and 4973.25 (Page 1954) also give conductors the power to arrest while on duty. Note that this section is one of the few that directly confers the power to arrest on special police. Also, the grant of authority comes directly from the state and the actions of the railroad police are, therefore, those of the sovereign.

36. *See* Pennsylvania R.R. Co. v. Deal, 116 Ohio St. 408, 156 N.E. 502 (1927); New York, Chi. & St. L. R.R. Co. v. Fieback, 87 Ohio St. 254, 100 N.E. 889 (1912); McKain v. Baltimore & O.R.R. Co., 65 W.Va. 223, 64 S.E. 18 (1909); Annot., 35 A.L.R. 645, 677-89 (1925); Annot., 77 A.L.R. 927, 932-34 (1932), *superseded by* Annot., 92 A.L.R.2d 15, 65-74 (1963).

37. For a brief history of the Railroad Police and some of the statutory variations *see* Watchmen, *supra* note 1, at 474-76 (1975).

38. *See* note 12 *supra.*

39. *See* State v. McDaniel, 44 Ohio App. 2d 163, 337 N.E.2d 173 (Franklin County Ct. App. 1975); State *ex rel* Geyer v. Griffin, 80 Ohio App. 447, 76 N.E.2d 294 (Allen County Ct. App. 1946).

40. State *ex rel* Geyer v. Griffin, 80 Ohio App. 447, 76 N.E.2d 294 (Allen County Ct. App. 1946).

41. *See* discussion of State v. McDaniel, 44 Ohio App.2d 163, 337 N.E.2d 173 (Franklin County Ct. App. 1975) in Section III *infra.*

42. There is scant case law in Ohio and decisions from other jurisdictions will be cited where germane to the discussion.

police and their employers for tortious acts, false arrest, and malicious prosecution[43]—master-servant problems which did not give the courts occasion to deal with any constitutional questions.

Representative of the liability decisions and premier in Ohio is *New York, Chicago and St. Louis R.R. v. Fieback*[44] which laid down a standard for liability that recognized a split function for the private policeman[45]—one official and one purely private. While this analysis was appropriate for determining tort liability, it is inadequate for ascertaining the status of special policemen when constitutional questions arise. The difficulties are increased by the United States Supreme Court decision of *Burdeau v. McDowell,*[46] which restrictively interpreted the fourth amendment[47] prohibitions against unreasonable searches and seizures. Thus, in analyzing constitutional questions it is necessary to examine the powers possessed by the special policeman in each instance, and how he used them. This represents current thinking,[48] but, as will be shown later, there is a better method of determining when a special policeman has overstepped his constitutional boundaries.[49]

It should be noted that although a special policeman can be granted all of the powers of a regularly employed police officer, and these powers have often been interpreted broadly,[50] when faced with deciding their status for applying constitutional prohibitions, courts have most often decided that they are private individuals.[51] This has

43. *See* note 36 *supra.*

44. 87 Ohio St. 254, 100 N.E. 889 (1912).

45. The court held that although a special railroad policeman is commissioned at the request of a private company, and is paid solely by that company, he is nevertheless a public officer deriving his authority from the state, and his acts will be presumed to have been performed in his capacity as such officer, until such presumption is overcome by sufficient evidence. *Id.*

46. 256 U.S. 465 (1921).

47. U.S. CONST. amend. IV provides, in pertinent part:

> The right of the people to be secure in their persons, 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.

48. *See* State v. McDaniel, 44 Ohio App. 2d 163, 337 N.E.2d 173 (Franklin County Ct. App. 1975); State v. Bolan, 27 Ohio St. 2d 15, 271 N.W.2d 839 (1971).

49. The standard which will be advocated is whether the person violating the defendant's rights is paid to seek evidence of crime. *See* Section III *infra; see* Annot., 36 A.L.R.3d 553, 563 n.5 (1971).

50. *See* N.L.R.B. v. Jones & Laughlin Steel Corp., 331 U.S. 416, 429 (1947), where the Supreme Court stated that special police "when they are performing their police functions, . . . are acting as public officers and assume all the powers and disabilities attaching thereto." *See also* Neapolitan v. U.S. Steel Corp., 77 Ohio L. Abs. 376, 149 N.E.2d 589 (Mahoning County Ct. App. 1956).

51. Burdeau v. McDowell, 256 U.S. 465 (1921); Barnes v. United States, 373 F.2d 517

led to an unfortunate parallel to the "silver platter doctrine"[52] but on a much grander scale. As long as a special policeman is treated as a private individual, a defendant will not be entitled to suppression of evidence at trial under the exclusionary rule of *Weeks v. United States*,[53] even if the method of obtaining the evidence would otherwise contravene the Constitution. In effect the evidence is handed over to local police and prosecutors on a platinum platter. This section will attempt to analyze the principal Ohio decisions that have led to this unfortunate result.

A. *Special Police and the Fourth Amendment*

It has long been held that the fourteenth amendment prohibitions against unreasonable searches and seizures apply only to the government and its agents.[54] The prohibitions do not apply to private individuals unless they act in concert with, or at the direction of, the police.[55] Since most special policemen are employed to maintain order and detect evidence of crime, they are often involved in situations where their activities may result in searches and seizures that are of doubtful constitutionality. Where the same actions are taken by regular police officers, the proper remedy is the exclusion of the illegally seized evidence at trial.[56] Thus, at present, when a special policeman is involved in an unreasonable search, it must be ascertained whether the powers he has been given constitute sufficient state involvement to require exclusion of evidence.

The most recent Ohio decision on this point is *State v.*

(5th Cir. 1967); State v. Bolan, 27 Ohio St. 2d 15, 271 N.E.2d 839 (1971); State v. McDaniel, 44 Ohio App. 2d 163, 337 N.E.2d 173 (Franklin County Ct. App. 1975); City of University Heights v. Seibert, 26 Ohio Misc. 234, 270 N.E.2d 381 (Shaker Heights Mun. Ct. 1971); City of University Heights v. Conley, 20 Ohio Misc. 112, 252 N.E.2d 198 (Shaker Heights Mun. Ct. 1969).

52. *See* notes 7 and 8 *supra*.

53. 232 U.S. 383 (1914).

54. Burdeau v. McDowell, 256 U.S. 465 (1921); Barnes v. United States, 373 F.2d 517 (5th Cir. 1967); City of University Heights v. Seibert, 26 Ohio Misc. 234, 270 N.E. 2d 381 (Shaker Heights Mun. Ct. 1971); Gunter v. State, 257 Ind. 524, 275 N.E.2d 810 (1971); Guthrie v. State, 254 Ind. 356, 260 N.E.2d 579 (1970); City of University Heights v. Conley, 20 Ohio Misc. 112, 252 N.E.2d 198 (Shaker Heights Mun. Ct. 1969); People v. Randazzo, 220 Cal. App. 2d 768, 34 Cal. Rptr. 65, *cert. denied*, 377 U.S. 1000 (1964).

55. Gandy v. Watkins, 237 F. Supp. 266 (M.D. Ala. 1964), *cert. denied*, 380 U.S. 946 (1965); State v. McDaniel, 44 Ohio App. 2d 163, 337 N.E.2d 173 (Franklin County Ct. App. 1975); Gunter v. State, 257 Ind. 524, 275 N.E.2d 810 (1971); Guthrie v. State, 254 Ind. 356, 260 N.E.2d 579 (1970); People v. Horman, 22 N.Y.2d 378, 292 N.Y.S. 2d 874, 239 N.E.2d 625, 36 A.L.R.3d 547 (1968), *cert. denied*, 393 U.S. 1057 (1969).

56. Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960); Weeks v. United States, 232 U.S. 383 (1914).

McDaniel,[57] argued before the Court of Appeals for Franklin County. In that case security personnel of a Lazarus department store, some eighty percent of whom were validly commissioned special deputy sheriffs for Franklin County, had employed a systematic method of detecting shoplifting. The system consisted of mingling with store patrons to detect suspicious activity, plus surreptitious observations of patrons in store fitting rooms.[58] In all of the cases before the court[59] there was insufficient probable cause for the observations which had resulted in the defendants' detention pursuant to the Shoplifter Detention Statute. Only one of the security employees who made the contested observations, however, was a special deputy sheriff.[60]

The court easily found that the search was unreasonable.[61] Before the evidence could be supressed, however, the court had to find state action. While the appellants conceded that the lone special deputy involved was probably a police officer,[62] the court concluded that she was not. The court further reasoned that the security employees were acting wholly outside any authority they may have possessed as special deputies, but within the scope of the authority of their employers.[63] They were thus acting as private individuals under the *Burdeau* rationale, and the exclusionary rule of *Weeks v. United States*[64] was not applicable.

Although this result may be technically correct based on the

57. 44 Ohio App. 2d 163, 337 N.E.2d 173 (1975), *motion to certify the record denied*, September 18, 1975.

58. Many ways of observing patrons in fitting rooms were revealed, including the removal of ceiling tiles to enable the security employee to observe as many as 12 unsuspecting patrons at one time. The potential for abuse of a patron's privacy in this type of situation is obvious. It should also be noted that no signs were posted which warned any customers that security personnel may be observing them. 44 Ohio App. 2d 163, 164-65, 337 N.E.2d 173, 175 (1975).

59. Six defendants in all were detected in this manner.

60. 44 Ohio App. 2d at 165, 337 N.E.2d at 175.

61. In dealing with the question of the reasonableness of the searches, the court, relying on Katz v. United States, 389 U.S. 347 (1967), concluded that the fitting rooms provided a reasonable expectation of privacy by the user, and that the observations were not supportable by probable cause. Since the views of the defendants' activities that were obtained by the security employees were not those that could normally be obtained by a store patron in the area, that is, in open view, they were, therefore, unreasonable. For other cases involving searches in private enclosures, *see* Kroehler v. Scott, 391 F. Supp. 1114 (E.D. Pa. 1975); Buchanan v. State, 471 S.W.2d 401 (Tex. Crim. App. 1971) *cert. denied*, 405 U.S. 930 (1972); Brown v. State, 3 Md. App. 90, 238 A.2d 147 (1968); Britt v. Superior Court, 58 Cal. 2d 469, 374 P.2d 817, 24 Cal. Rptr. 849 (1962).

62. Brief of Appellant at 8, State v. McDaniel, 44 Ohio App. 2d 163, 337 N.E.2d 173 (Franklin County Ct. App. 1975).

63. 44 Ohio App. 2d at 173-74, 337 N.E.2d at 180 (1975).

64. 232 U.S. 383 (1914).

lack of statutory authority for the creation of special deputies, it is not sustainable in logic. If the underlying reason for the exclusionary rule is to deter the sovereign and its agents, the police, from trampling on the rights of defendants, then the situation presented in *McDaniel* is one where the rule should have a deterrent effect. Furthermore, it is not at all clear that special police, including special deputies, are merely private individuals. Their detection activities are sanctioned by statutory grants[65] or common law and they possess powers beyond that of the ordinary citizen; that is, the power to detain, to arrest, and to carry a concealed weapon after posting bond. Although not full time government employees, they function as police officers. The granting of licenses and the sanctioning of weapons and uniforms is solely for the benefit of the employer in that the state seeks to cloak special police with an aura of officiality in order to enable them to effectively protect their employer's premises and customers. Such protection is normally the duty of the state and is being delegated to the special police.

That special police are given a semblance of officiality is borne out by an opinion of the Ohio Attorney General[66] rendered in response to a request for information regarding county liability for actions of special deputies. The Attorney General described the special deputies as follows:

> In most cases these commissions are issued to men who are employed as industrial plant guards, funeral escorts, shopping center policemen, and similar occupations where the *holding of such a commission, and the attendant uniform, badge, and right to carry a gun, are instrumental to the performance of their duties.* Generally speaking, these men are not employed by the Sheriff, nor do they receive any compensation from County funds. They are not under the supervision of the Sheriff with regard to their employment; however, they do constitute a reserve of deputies subject to call by the Sheriff if needed.[67]

It is easily concluded from the description given that these special deputies act in a capacity far different from private individuals, and are clothed with every indicia of the police power of the state. It is difficult to square this fact with the decision in *McDaniel.*

At this point a comparison to several New York decisions dealing with special patrolmen[68] is useful. In *People v. Diaz,*[69] on facts

65. *See* notes 9, 10, 11, and 12 *supra.*

66. 1958 OP. ATTY GEN. 1645 (1958).

67. *Id.* at 41.

68. The New York equivalent of an Ohio special policeman licensed under the Special Police Statute.

nearly identical to those in *McDaniel,* the court held that a special patrolman was indeed acting in an official capacity even though privately employed. This determination invoked the exclusionary rule of *Weeks.* Although the New York statute is more specific,[70] the functions of the special patrolman are identical with the functions of the Ohio special police. In concluding that special patrolmen "possess power beyond those of the ordinary citizen,"[71] the court cited *People v. Smith*[72] where that court said:

> [T]he special patrolman is appointed by the police commissioner, subject to the orders of the commissioner, and may be removed by the commissioner. Furthermore, while on duty she had the power to arrest, book, fingerprint and photograph the defendant, bring the defendant to court, appear with the defendant in the detention facility pending arraignment, and possess[es] all the powers and [performs] all the duties of a peace officer while in the performance of . . . [her] official duties.[73]

The *Smith* court also quoted from *People v. Brown:*[74]

> It is . . . cynical to hold that the Fourth Amendment protections apply to searches by police officers but not by other agents of the city who are required . . . to perform like governmental functions, as here, and at the same time claim that they are immune from constitutional restrictions placed upon governmental authority.[75]

Although the decisions in *McDaniel* and *Diaz* may be harmonized on the basis that *McDaniel* concerned a non-statutory deputy sheriff whose powers were ambiguous while the controlling New York law in *Diaz* is quite specific, the distinction is superficial. Non-statutory special deputies wield the same power and perform the same functions as do Ohio special policemen and New York special patrolmen.

Even the United States Supreme Court had no difficulty in finding that special deputy sheriffs possess substantial power of the state. In *Griffin v. Maryland,*[76] a private security guard for an amusement park who was deputized at the request of the park,

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69. 85 Misc. 2d 41, 376 N.Y.S.2d 849 (N.Y.C. Crim. Ct. N.Y. County 1975).
70. NEW YORK, N.Y., ADMIN. CODE § 434a-7.0(e) (1970).
71. 85 Misc.2d 41, 44, 376 N.Y.S.2d 849, 851-52 (N.Y.C. Crim. Ct. N.Y. County 1975).
72. 82 Misc. 2d 204, 368 N.Y.S.2d 954 (N.Y.C. Crim. Ct. N.Y. County 1975).
73. *Id.* at 207-08, 368 N.Y.S.2d at 957.
74. N.Y.L.J., Dec. 15, 1970, at 19, col. 2 (App. term, 1st Dept. 1970).
75. People v. Smith, 82 Misc. 2d 204, 208, 368 N.Y.S.2d 954, 958 (N.Y.C. Crim. Ct. N.Y. County 1975) (dealing with a private guard at a city facility). When the special police are acting under a grant of state authority, however, the public-private distinction is superficial.
76. 378 U.S. 130 (1964).

ordered several protesting blacks out of the facility in an attempt to enforce the park's policy of racial segregation.[77] To obtain a warrant, the employee asserted his status as a special deputy. The United States Supreme Court held that the arrest constituted state action under the fourteenth amendment,[78] and reasoned that "[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law."[79]

In light of this characterization, the decision in *McDaniel* is unsupportable. The same would be true even assuming the special deputy claimed the lesser authority of the Shoplifter Detention Statute. Since an ordinary citizen cannot arrest or detain for misdemeanors in Ohio, the statute vests the merchant or his employee with a parcel of state power that is not given to the normal private individual. An individual who possesses this type of power is not a private citizen as contemplated by the fourth amendment and *Burdeau.*[80] When the power to detain is coupled with a special deputy's commission, the conclusion is inescapable that the special deputy should be subject to the constitutional checks on the abuse of police power.

A different result could have been reached in *McDaniel* with respect to the non-commissioned security employees as well by applying the sole recognized exception to the rule in *Burdeau,* that is, where a private individual is acting in concert with, or at the direction of a police officer.[81] Eighty percent of the security force involved possessed special deputy commissions as well as the security director. Therefore, his security force would have been acting in concert with him or at his direction in pursuing their activities.

The confusion caused by the current state of the law could be obviated by the use of a much simpler and more preferable standard. The substance of this standard encompasses a different view of what is meant by a private individual: no one should be considered private under *Burdeau* if he is employed or paid to detect

77. *Id.* at 131-32.
78. *Id.* at 135.
79. *Id.*
80. Unfortunately, not many courts agree with this position: *see* State v. Bolan, 27 Ohio St. 2d 15, 271 N.E.2d 839 (1971); City of University Heights v. Seibert, 26 Ohio Misc. 234, 270 N.E.2d 381 (Shaker Heights Mun. Ct. 1971); City of University Heights v. Conley, 20 Ohio Misc. 112, 252 N.E.2d 198 (Shaker Heights Mun. Ct. 1969).
81. *See* note 55 *supra.*

evidence of crime, or is delegated any more power than that possessed by the average citizen. Whenever a person meeting either of these qualifications trammels a defendant's rights, the evidence so gathered should be excluded at trial.

Perhaps a re-examination of the rationale of *Burdeau* is in order as well. When *Elkins v. United States*[82] signalled the end of the silver platter doctrine and *Mapp v. Ohio*[83] extended the exclusionary rule to the states, the United States Supreme Court was not given an opportunity to re-examine the validity of *Burdeau.*[84] Such a re-examination is in order in view of the tremendous amount of evidence to which special police have access in the performance of their duties.

In this regard it should be noted that when *Elkins* dispelled the notion that the fourth amendment applied only to activities of federal law enforcement officials, the Supreme Court had occasion to note that:

> [t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis. Such a distinction indeed would appear to reflect an indefensibly selective evaluation of the provisions of the Constitution.[85]

The Court also cited then Judge Cardozo, in *People v. Defore,*[86] where he stated that, "[t]he professed object of the trespass rather than the official character of the trespasser should test the rights of government. . . . A government would be disingenuous, if, in determining the use that should be made of evidence drawn from such a source, it drew a line between [federal and state officials]."[87] Similarly it would make no sense to sanction the use of special police, and then shield them from the reach of the Constitution—the violation of the defendant's rights is the same.

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82. 364 U.S. 206 (1960).

83. 367 U.S. 643 (1961).

84. *See* People v. Williams, 53 Misc. 2d 1086, 281 N.Y.S.2d 251 (City Ct. of the City of Syracuse, Crim. Div. 1967). The court reluctantly followed *Burdeau,* but urged a reexamination of its rationale. The court stated:

> It seems ludicrous to say that a District Attorney in prosecuting a defendant cannot use evidence obtained by a policeman in derogation of a defendant's constitutional rights, but can use the same evidence obtained by a private person in derogation of a defendant's constitutional rights which in turn is handed over to a policeman who then hands it over to a District Attorney. 53 Misc.2d 1086, 1091, 281 N.Y.S.2d at 256 (1967).

85. 364 U.S. 206, 215 (1960) (footnotes omitted).

86. 242 N.Y. 13, 150 N.E. 585, *cert. denied,* 270 U.S. 657 (1926).

87. 364 U.S. 206, 215 n.7 (1960).

B. Special Police and the Fifth Amendment.

While the focal point of the discussion so far has been the interaction of special police and the fourth amendment, their status with regard to the fifth amendment bears brief mention. Much of the preceding commentary regarding the fourth amendment applies to the fifth as well. The use of the police power of the state by special police should require them to respect a potential defendant's rights against self-incrimination. Further, the standard should be the same. Those who are employed or paid to seek evidence of crime, or are given any more power than the power possessed by the average citizen should be required to give the warnings set out in *Miranda v. Arizona.*[88]

That a special policeman who has been duly commissioned is involved should present no problems in enforcing the dictates of *Miranda;* however, when a non-commissioned store employee has made a detention pursuant to the Shoplifter Detention Statute a thorny question arises. Several state courts have held that a person exercising authority under a state shoplifter detention statute need not apprise a defendant of his constitutional rights.[89]

That *Miranda* warnings are not required is true of Ohio as well. In *State v. Bolan*[90] the Ohio Supreme Court held that store employees acting pursuant to the Shoplifter Detention Statute need not give a detained shoplifter any *Miranda* warnings. The rationale is that *Miranda* applies only to law enforcement officers who are conducting a custodial interrogation. In such a situation the seemingly overwhelming power of the state is brought to bear on the accused. When private security guards conduct a custodial interrogation, however, the trauma and danger to the defendant can be even greater since there is no effective check on the guards' activities. In the time that it takes for the regular police to arrive, even assuming that they are called in immediately, store employees can coerce a confession which will be fully admissible in court.[91]

88. 384 U.S. 436 (1966).

89. *See* cases collected in State v. Bolan, 27 Ohio St. 2d 15, 18-19, 271 N.E.2d 839, 842 (1971). It should be noted that many of the cases relied on by the court do not involve custodial interrogations by special police, but are concerned with statements to purely private individuals to whom *Miranda* was never meant to apply. Of those cases cited in *Bolan* only State v. Masters, 261 Iowa 366, 154 N.W.2d 133 (1967); State v. Hess, 9 Ariz. App. 29, 449 P.2d 46 (1969); People v. Vlcek, 114 Ill. App. 2d 74, 252 N.E.2d 377 (1969); and People v. Wright, 249 Cal. App. 2d 692, 57 Cal. Rptr. 781 (1967) are really apposite.

90. 27 Ohio St.2d 15, 271 N.E.2d 839 (1971).

91. This type of activity, if conducted by special police or merchants' employees, may also be violative of the dictates of the Shoplifter Detention Statutes which decrees that the detention be in a reasonable manner for a reasonable time.

For the same reasons that they are considered to be public officials for the fourth amendment, special police should also be considered public officials for the purposes of the fifth amendment. When special police conduct a custodial interrogation without the benefit of the required *Miranda* warnings, any confessions obtained should be held inadmissible. To the extent that it holds to the contrary, *State v. Bolan* is untenable.

IV. Conclusion

While the use of special police can be a great source of problems, the situation is by no means hopeless.[92] The first positive step in remedying the confusion surrounding the use of special police is to urge the repeal or consolidation of the multitude of statutes that authorize the various types of special policemen, and to draft a fairly specific statute that will apply to all governmental levels, including the counties, thus clearing the doubts surrounding non-statutory special deputies. The statute should also attempt to define the powers and jurisdiction that can be conferred on special police.[93]

In the meantime, the courts should expressly recognize the quasi-public status of the special police and strictly enforce the constitutional curbs on the use of the special police powers. The special police, then, would no longer be able to hand over illicit evidence on a platinum platter. To this end a re-examination of the rationales of *Burdeau, Bolan,* and *McDaniel* are in order.

B.C. Petroziello

92. In this connection *see* Comment, *Private Police in California: A Legislative Proposal,* 5 Golden Gate L. Rev. 115 (1974).

93. Some of the other specifics should be aimed at curbing potential abuses of the special police power. These provisions should attempt to insure that restrictions on weapons are strictly enforced and that the special police are at least minimally trained. The current training requirements are specified in Ohio Rev. Code Ann. § 109.77 (Page Supp. 1975). *See also* Comment, *Private Police in California: A Legislative Proposal,* 5 Golden Gate L. Rev. 115 (1974).