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Applying Restraints to Private Police

Heidi Boghosian*

Before he was convicted of bombing the federal building in Oklahoma City, Timothy James McVeigh worked as a security guard with Burns International Security in upstate New York.¹ Even though he came to work one day brandishing a sawed-off shotgun, he retained his job at Burns guarding Calspan Corporation, a firm conducting “classified research in advanced aerospace rocketry and electronic warfare” for the Defense Department.² Calspan described McVeigh as a “model employee,” noting that his one “quirk . . . was that he couldn’t deal with people” and would start “yelling at them” and could be “set off easily.”³

Mr. McVeigh is not the only security guard who has problems dealing with people. Although they perform a range of law enforcement-related activities, private security guards are frequently ill-trained, unsupervised, and may themselves have criminal records. In a startling disclosure, the Chicago Housing Authority police chief estimated that 20 percent of guards working private security at the Chicago Housing Authority in 1996 were active gang members.⁴ A man on probation for a misdemeanor robbery found employment as an armored-car guard where he worked for nearly two months before killing his partner and stealing \$300,000 while on the job.⁵

It is not surprising that security personnel frequently find themselves in court accused of using excessive force and violating the constitutional rights of others. The security industry partners with public police—and outnumbers public police by three to one in the United States—in a range of law enforcement activities that puts them in direct contact with the public. Yet security guards are private actors and are not subject to the same constitutional strictures as public police.⁶ They can stop, detain, and search individuals without probable

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1. DAVID HOFFMAN, *THE OKLAHOMA CITY BOMBING AND THE POLITICS OF TERROR* 51 (1998).

2. *Id.*; Mike Zielinski, *McVeigh on Guard*, COVERT ACTION Q., Fall 1995, at 50.

3. HOFFMAN, *supra* note 1, at 51-52.

4. Gilbert Jimenez & Jorge Oclander, *Gangs Infest CIA Security*, CHICAGO SUN-TIMES, Mar. 11, 1996, at A1.

5. Martha Irvine, *Armored Guard Suspect Is Apprehended in Utah*, CHATTANOOGA TIMES, Nov. 28, 1997, at A16.

6. *See, e.g.*, *United States v. Shahid*, 117 F.3d 322 (7th Cir. 1997) (Fourth Amendment does not apply to shopping mall security guards in detaining and searching store patron); *People v. Brouillette*, 258 Cal. Rptr. 635 (Cal. App. 1989) (shopping mall security guards not asserting state authority in conducting search, thus exclusionary rule did not apply); *Commonwealth v. Leone*, 435 N.E.2d 1036 (Mass.

cause and can sometimes turn over evidence obtained to local law enforcement. In some private sector jobs, security officers may even arrest suspects and file criminal charges in court. Such cooperation between private security personnel and public police is becoming routine in the United States. Despite extensive, costly litigation stemming from harmful encounters with security guards, the industry remains virtually unregulated.

This Article argues that equitable remedies in the form of improved training and oversight for private police should be requested as part of relief in all Section 1983 claims involving private police. Attempts at industry standardization have failed in Congress and are virtually non-existent in the states, but such measures would greatly benefit society by reducing the number of violent encounters between private security officers and the public, with a resulting decrease in costly litigation. Improved training would also benefit corporate security firm employers by reducing both litigation expenses and industry costs related to high attrition rates. The vast interrelationship between private security and public law enforcement officials—even the extent to which private security industry mimics public law enforcement through appearance and implied derivation of authority—supports the creation of oversight mechanisms for purposes of accountability and liability. In some instances, public law enforcement agencies have become dependent upon the otherwise unconstitutional actions of private security forces in efforts to control crime. Private security companies have effectively become a special branch of the police, free to act without constitutional restraint.

Part I of this Article reveals the dangers posed by the virtually unregulated private security industry, and the litigation that has resulted. Part II looks at the proliferation of the industry and some of the reasons public police forces increasingly rely on private security forces to perform public police functions. Part III addresses the origins and relationship of private security and a full-time public force in the United States. Part IV discusses several government-funded studies examining the role of private security in the United States and revealing a trend toward greater cooperation between private security and public police forces. It also argues that implied derivation of authority and intimidation by appearance greatly confuse the public and make it difficult to distinguish between the private and public sectors. Part V examines the application of Section

1982) (security guards may search employee's belongings if conducted in reasonable manner for protection of private employee's belongings or for protection of private employer's property); *State v. Long*, 700 P.2d 153 (Mont. 1985) (Montana sides with majority of states in ruling that private search not covered by exclusionary rule); *People v. Ray*, 480 N.E.2d 1065 (N.Y. 1985) (New York security officers do not have to give *Miranda* warnings). *But see* *Murray v. Wal-Mart, Inc.* 874 F.2d 555, 558-59 (8th Cir. 1989) (nexus existed between state and merchant, a state actor); *State v. Muegge*, 360 S.E.2d 216 (W. Va. 1987) (*Miranda*-like requirements apply to interrogation of suspected shoplifter by security guard—state prohibition of unreasonable searches also applies), *overruled on other grounds* by *State v. Honaker*, 454 S.E.2d 96 (W. Va. 1994).

1983 custom and practice litigation in private police cases where the private and public sectors work together in harming individuals. It urges litigators to seek equitable relief, in addition to damages, in the form of improved training, screening, and licensing.

I. PROBLEMS ENDEMIC TO THE PRIVATE SECURITY INDUSTRY

High attrition rates, inadequate personnel screening and selection, sub-standard training and supervision of personnel, low pay, and conflicts of interests plague the private security industry.⁷ Standardization aimed at improving these areas has been slow to evolve, in part because it is perceived as a restraint on business competition.⁸

A. High Attrition Rates Plague Private Security Industry

High turnover is an ongoing and costly problem in the private security industry. Security guard firms in Los Angeles County, for example, average 400 percent turnover in a given year.⁹

Prior to the events of September 11, 2001, industry turnover was already high, with 35 percent of the workforce having less than one year's experience.¹⁰ Such turnover increases the costs of hiring and training and also reduces safety, given that inexperienced personnel perform the job less effectively and may adapt less easily to new systems and job requirements than more highly trained workers.¹¹ These costs are shared by building owners, tenants, security contractors, and security officers.¹² After September 11th, turnover problems, combined with inadequate and inconsistent training, low wages, and variation in licensing across the states, have become even more pervasive.¹³

The General Accounting Office reports a rise in turnover rates among airport screeners.¹⁴ There was an average turnover rate of 126 percent at the nine-

7. WILLIAM C. CUNNINGHAM ET AL., *THE HALLCREST REPORT II: PRIVATE SECURITY TRENDS 1970-2000*, at 141-58 (1990). See also Mike Zielinski, *Armed and Dangerous: Private Police on the March*, *COVERT ACTION Q.*, Fall 1995, at 44, 48.

8. CUNNINGHAM ET AL., *supra* note 7, at 150-52.

9. Karen Teitelman, *Security Guard Firms—Statistical Data Included*, L.A. BUS. J., Mar. 5, 2001.

10. SERVICE EMPLOYEES INTERNATIONAL UNION, *BUILDING A SECURITY WORKFORCE FOR THE NEW SECURITY ENVIRONMENT*, available at http://www.seiu.org/docUploads/building_security_summary.pdf (last visited Jan. 23, 2005).

11. *Id.*

12. *Id.*

13. *Id.*

14. UNITED STATES GEN. ACCOUNTING OFFICE, *AVIATION SECURITY: LONG-STANDING PROBLEMS IMPAIR AIRPORT SCREENERS' PERFORMANCE* 24 (June 2000) [hereinafter *AVIATION SECURITY*].

teen largest airports in the United States from 1998-1999.¹⁵ Turnover among airport screeners ranges from 37 percent in Honolulu to 416 percent in Saint Louis¹⁶ and is illustrative of an area that is especially vulnerable to national security breaches as a result of such high attrition. In addition to the increased costs this brings to training, it also reduces the incentive to provide all workers with a thorough and extensive training program.¹⁷ High turnover has another downside, potentially of incalculable cost to society: it makes it easier for terrorists or their accomplices to obtain positions as airport security officers.¹⁸ The President's Commission on Aviation Security and Terrorism and The White House Commission on Aviation Safety and Security concluded that performance could be enhanced by improving the selection, training and testing of airport screeners.¹⁹ And the 1999 National Research Council found that the Federal Aviation Administration should improve training and qualification procedures for airport screeners who operate equipment.²⁰

B. Deficient Screening and Selection Processes for Security Officers

There are no federal guidelines governing the private security industry. In 1993, Representative Martinez introduced the Private Security Officers Quality Assurance Act that would have directed the Attorney General to create a fingerprint checking system to determine if prospective employees have criminal records prior to hire.²¹ The House of Representatives twice passed the Act, once by a vote of 415-6,²² but it stalled in the Senate after objections from the Fraternal Order of Police.²³ The 2001 version of the Act would have established an expedited process for obtaining criminal background checks for prospective security personnel through the FBI.²⁴ The Judiciary Committee approved the

15. *Id.*

16. *Id.* at 25 tbl. 2.

17. See generally AVIATION SECURITY, *supra* note 14.

18. See generally *id.*

19. *Id.* at 26.

20. *Id.*

21. H.R. 1534, 103d Cong. (1993).

22. The 104th Congress passed the bill by a vote of 415-6. H.R. 2092, 104th Congress (1996); 142 CONG. REC. H11245 (daily ed. Sept. 26, 1996). The 105th Congress passed HR 103 by a voice vote. H.R. 103, 105th Congress (1997); 143 CONG. REC. H5857 (daily ed. July 28, 1997).

23. Gail M. Simonton, *Embracing Officer Authorization*, ACCESS CONTROL & SECURITY SYS. INTEGRATION, May 1, 1998, available at http://securitysolutions.com/mag/security_embracing_officer_authorization.

24. Fact Sheet Issued by Congressman Barr's Office, The Private Officer Quality Assurance Act of 2001, available at <http://www.house.gov/burton/RSC/word/Barr7.doc> (last visited Mar. 23, 2005).

legislation as an amendment to the 2001 USA PATRIOT Act; however, the language pertaining to the private security industry was later removed.²⁵

Regulations vary widely in most states in the areas of licensing, background checks, and training of security company personnel. Even though up to 90 percent of private security employees are unarmed, they are placed in positions of authority, giving the public a legitimate expectation that they are properly screened, hired, trained, and supervised.²⁶ Appropriate screening of prospective employees is virtually impossible, however, since private security firms cannot access the National Criminal Information Center. Most security companies are only able to conduct statewide criminal checks, so criminal records in other states do not show up. In 1996, nearly two thousand guard licenses were revoked, suspended, or denied on the basis of criminal behavior in California, where 164,000 licensed guards and thousands more unlicensed guards work.²⁷

Some states have enacted legislation creating training standards. In 2002, Michigan passed SB 425,²⁸ requiring private security guards to have a high school diploma or its equivalent and to be at least 18 years of age, younger than the previous requirement of 25 years of age.²⁹ Under the statute, guards will have to pay more for a state license.³⁰ Companies licensed under the new laws must fingerprint prospective personnel and cannot hire applicants who have been convicted of a misdemeanor involving fraud or carrying an illegal firearm or who have had two or more alcohol-related offenses.³¹ However, the legislature defeated measures that would have created a Security Provider Advisory Commission to develop training standards.³² The commission would have had six months to present the recommendations to the Department of State Police, which would then have had a month to implement them.³³ Michigan's legislative efforts were in part the result of several incidents arising out of encounters with private security guards over minor offenses.³⁴ While other states and national security industry associations have attempted to establish standards, no industry-wide standards have been established.

25. *Id.*

26. INT'L ASS'N OF CHIEFS OF POLICE, PRIVATE SECURITY OFFICER SELECTION, TRAINING AND LICENSING GUIDELINES 4 (Apr. 24, 2002), *available at* <http://www.theiacp.org/documents/pdfs/Publications/privatesecurityofficer%2Epdf>.

27. Geoff Boucher, *Who's Keeping an Eye on the Security Guards?*, L.A. TIMES, Oct. 19, 1997, at A1.

28. S. 425, 91st Leg., Reg. Sess. (Mich. 2002) (codified at MICH. COMP. LAWS ANN. § 338.1051-1088 (2004)).

29. MICH. COMP. LAWS ANN. § 338.1067.

30. *Id.* § 338.1059.

31. *Id.* § 338.1060.

32. S. 420, 91st Leg., Reg. Sess. (Mich. 2002).

33. *Id.*

34. Michigan Retailers Ass'n, Capitol Facts of the Week (Mar. 9, 2001), *at* <http://www.retailers.com/govaffairs/capfax/010309.html>.

In California, the state screening process can take 120 days or more, and only California crime records are checked, allowing out-of-state felons to avoid detection.³⁵ Legislation mandating training and background checks and attempting to improve the speed of background checks has failed.³⁶ Given that FBI checks can take up to eighteen months to complete, many security companies rely on application forms and interviews and employ unlicensed guards because it is less expensive to do so.³⁷ Penalties for employing unlicensed guards may be so low that they do not serve as a deterrent.³⁸

C. Woefully Inadequate Training and Supervision in the Private Sector

Training is usually minimal for security personnel. The average uniformed security guard receives approximately four to six hours of pre-assignment training.³⁹ Only twenty-one states require training for unarmed security guards and only twenty-eight require guards to be licensed.⁴⁰ California has the highest standards for training—in 2002 it increased state training requirements from three to forty hours.⁴¹ San Diego security consultant John Christman attributes the paucity of training and the low wages to the fact that security guard companies do not attract high-quality candidates.⁴² Companies do not invest in training when “[t]hey get a lot of guys from walk-ins and ads”

35. Boucher, *supra* note 27.

36. Bill Number AB 2312 was introduced by Assembly Member Morrissey on February 19, 1998:

Section 7583.9 of the Business and Professions Code is amended to read:
7583.9. (a) Within three working days after employment, any employee who performs the function of a security guard or security patrolperson who is not currently registered with the bureau, shall submit to the bureau a completed application for registration on a form

A.B. 2312, 1997-1998 Leg., Reg. Sess. (Cal. 1998).

37. Boucher, *supra* note 27. In California, standard wages range from \$6-10 per hour for licensed guards, while unlicensed earn about \$4-5. *Id.* College campus security proves an exception, according to a U.S. Justice Department study, which found that 98 percent of agencies with sworn police officers ran criminal record checks of applicants, and that 80 percent of agencies employing non-sworn officers conducted background checks. BRIAN A. REAVES & ANDREW L. GOLDBERG, U.S. DEP'T OF JUSTICE, CAMPUS LAW ENFORCEMENT AGENCIES, 1995 (1996).

38. In California, for example, the penalty for employing unlicensed guards is only \$12 under state law. Boucher, *supra* note 27.

39. CUNNINGHAM ET AL., *supra* note 7, at 148.

40. Mimi Hall, *Private Security Guards: Homeland Defense's Weak Link*, USA TODAY, Jan. 23, 2003, at A1.

41. Press Release, Service Employees International Union, Security Officers Win Major Training Increase to Protect Building Tenants, Public (Sept. 27, 2002), available at <http://www.seiu.org/media/press.cfm?id=1070>.

42. Scott Winokur, *Security Guards' Abuses Alarming, Experts Say*, S.F. CHRON., Dec. 29, 2003, at A1.

who may not stay longer than a few weeks on the job.⁴³ “They don’t know anything and they’re out there with a badge.”⁴⁴ Training can consist of as little as a video presentation and short quiz, followed by uniform fitting. Some new employees receive no pre-assignment training and are trained on the job.⁴⁵ The usual subjects covered during training, if it does occur, include investigation procedures and legal powers, report writing, fire prevention and protection, and building safety.⁴⁶ Manuals, lectures, and visual aids are the usual methods of training.⁴⁷ Nationally, there has been an increase in the numbers and kinds of academic programs for security management positions, with the number of certificate and degree programs increasing greatly.⁴⁸ However, no vocational programs exist for guards—who deal directly with the public—and whose compensation is often just slightly higher than minimum wage.

Training is not even required for armed guards in twenty-seven states.⁴⁹ On the average, firearms training for armed personnel usually does not exceed eight hours.⁵⁰ Although many security personnel have had prior firearms training, especially if they are law enforcement officials working part-time in the private sector, a great deal of firearms training focuses solely on the mechanical aspects of weapon safety and firing a gun, but does not deal with real-life situations that might be encountered on assignment.⁵¹ In addition, nearly half of armed security personnel have had sports or recreational firearms experience but no experience in the kinds of real-life situations confronted by private security jobs.⁵²

In July 2003, California’s Bay Area joined Chicago as the only metropolitan areas in the country to approve contracts covering private security officers.⁵³ Members of SEIU Local 24/7 approved a four-year contract, covering over three thousand security personnel in the Bay area, that calls for the creation of a new training program to greatly improve officers’ ability to respond to emergencies and conduct other activities.⁵⁴ The contract improves wages and benefits by an average of 24 percent and provides for full employer-paid health

43. *Id.*

44. *Id.*

45. CUNNINGHAM ET AL., *supra* note 7, at 148.

46. *Id.*

47. *Id.*

48. *Id.* at 150.

49. *Id.* at 147.

50. *Id.* at 144.

51. *Id.*

52. *Id.*

53. Press Release, Service Employees International Union, Historic Contract Paves Way for Improved Security in Bay Area Office Buildings (July 17, 2003), available at <http://www.seiu.org/media/press.cfm?ID=1142>.

54. *Id.*

insurance.⁵⁵ In conjunction with the contract, SEIU Local 24/7 conducted a comprehensive advertising campaign aimed at educating the public about the importance of having properly trained security guards.⁵⁶

D. Low Salaries Sully the Industry

The median annual income in 2002 for security guards was \$19,140.⁵⁷ The middle 50 percent earned between \$15,910 and \$23,920; the lowest 10 percent earned under \$13,740, and the highest 10 percent earned over \$31,540.⁵⁸ The federal government pays slightly higher. In 2001, new hires' salaries ranged from \$21,950 to \$27,190 annually, depending on experience.⁵⁹ Guards employed by the government earned an average of \$28,960 annually in 2001.⁶⁰ They generally receive overtime pay for second and third shifts.⁶¹

In contrast, the median yearly income in 2002 for police and sheriff's patrol officers is over twice that of security personnel, at \$42,270.⁶² The middle 50 percent earned between \$32,300 and \$53,500; the lowest 10 percent earned under \$25,270, and the highest 10 percent earned over \$65,330.⁶³ Median annual earnings were \$47,090 in state government, \$42,020 in local government, and \$41,600 in federal government.⁶⁴ That same year the median annual income for supervisors of police and detectives was \$61,010.⁶⁵ Median annual income was \$78,230 in federal government, \$59,830 for local government, and \$64,410 for state government.⁶⁶

In an extreme example of exploitation, a job training program in New York called "Pathways to Employment," developed by two Business Improve-

55. *Id.* The security companies involved are Pinkerton, Burns, ABM, ProTech, Sentinel Guard Systems, Universal Protection Service, Barton Protective Services and Ligouri Associates. *Id.*

56. *Id.*

57. *Security Guards and Gaming Surveillance Officers*, in BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 2004-05 EDITION, available at <http://www.bls.gov/oco/ocos159.htm>.

58. *Id.*

59. *Security Guards and Gaming Surveillance Officers*, in BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 2002-03 EDITION, available at <http://web.archive.org/web/20020806031349/www.bls.gov/oco/ocos159.htm>.

60. *Id.*

61. *Id.*

62. *Police and Detectives*, in Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook, 2004-05 Edition, available at <http://www.bls.gov/oco/ocos160.htm>.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

ment Districts, the Grand Central Partnership and 34th Street Partnership, employed homeless adults as security guards and contracted them out to outside businesses.⁶⁷ The program paid as little as \$1 an hour at annual events in 1993 and 1994.⁶⁸ In 1994, over one hundred participants in the Grand Central Partnership sued in federal court for violation of state and federal minimum wage laws.⁶⁹

II. TROUBLESOME CONFLICTS OF INTEREST

Over eighty percent of police departments permit public police to moonlight in private security. This creates a conflict of interest for police officers about which laws to enforce—those of the private organization or those of the police department. Not surprisingly, liability issues related to moonlighting have spawned tort actions and raised conflict of interest issues. If a police officer sees a crime in progress while on detail work, he may be required by statute to abandon his detail and respond to the crime.⁷⁰ As sworn officers of the peace, police officers are bound to uphold certain laws such as forbidding minors from drinking or imposing occupancy limits on businesses that may interfere with their private employer's business objectives.⁷¹

Another problem of having uniformed officers on private detail is that it gives the appearance that the officers are on duty and available to assist the general public.⁷² It is also unclear who should pay sick leave or disability if a police officer is wounded or seriously injured while working a security detail and forced to retire. The city of Phoenix, Arizona, was ordered by the court to pay death benefits to a moonlighting police officer killed by a robbery suspect even though the officer was being paid for detail work by the motel when he was killed.⁷³ In *Traver v. Meshriy*,⁷⁴ an off-duty officer moonlighting as a security teller and involved at an incident at a bank was found to be acting under color of law for Section 1983 purposes.⁷⁵

67. *Archie v. Grand Cent. P'ship, Inc.*, 997 F. Supp. 504, 507, 514 (S.D.N.Y. 1998).

68. *Id.* at 513. Pay ranged from \$40-60 a week. *Id.*

69. 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, 399 (1997).

70. Suzy Spencer, *Private Security*, ON PATROL (Winter 1996-1997), available at <http://web.archive.org/web/20011006061909/www.onpatrol.com/cs.privsec.html>.

71. Laura Stuchinsky, *Security Matters*, METRO (May 2, 1996), available at www.metroactive.com/papers/metro/05.02.96/rentacop-9618.html.

72. *Id.*

73. *City of Phoenix v. Indus. Comm'n of Ariz.*, 742 P.2d 825 (Ariz. Ct. App. 1987).

74. 627 F.2d 934 (9th Cir. 1980).

75. *Id.* at 938.

Responsibility varies by state in lawsuits resulting from an officer's actions while on private detail. The city of Birmingham, Alabama, was found liable for over \$1.5 million when a minor was killed outside a bar where an off-duty officer was on private detail.⁷⁶ The officer, in full uniform, equipped with police paraphernalia, escorted several minors outside after an altercation erupted.⁷⁷ He then returned inside the bar, after which one of the youths was beaten by the others and run over by a car.⁷⁸ The court found that the officer should have taken further steps to protect the minor and that, although off duty, he was an agent of the city and was acting within the scope of his duty.⁷⁹

A. Implied Derivation of Authority Benefits Private Police and Confuses Public

Private security employers who hire moonlighting public police benefit from the fact that those officers often wear official public police uniforms and paraphernalia and may even drive public police vehicles. Public police benefit, in turn, from having a private arm that reports crimes, that may detain and search citizens, and that may even testify in court, admitting evidence that might otherwise be excluded had it been subject to the exclusionary rule of the Fourth Amendment.

However, these mutual benefits also present a host of conflicts of interest and increase the chance of litigation when police officers moonlight on private detail. The sharing of public resources, such as uniforms and police vehicles, confuses the general public about the authority these officers can exercise.

Wholly private security further confuses the general public regarding the distinction between public and private police. Private police dress and act like public law enforcement: by mimicking appearance and demeanor they imply that they are acting with state authority. They benefit from this borrowed legitimacy—the implication that they have state authority—and the public's frequent mistake that they are indeed public police. Because the private sector frequently works by contract for the government and in cooperation with law enforcement, and because private police benefit from the public's perception of their state authority, employers of private security personnel should be held liable for excessive use of force and infringements on constitutional rights, and the courts should mandate improved training of personnel.

76. *City of Birmingham v. Benson*, 631 So. 2d 902 (Ala. 1993).

77. *Id.* at 903.

78. *Id.*

79. *Id.* at 906-07. *See also* *Groom v. Safeway, Inc.*, 973 F. Supp. 987 (D. Wash. 1997).

B. Special Police Officer Status Adds to Confusion

A few states, such as North Carolina, have enacted laws giving the attorney general the authority to certify an agency—in North Carolina it is the Metro Special Police & Security Services, Inc.—as a company police agency, “commissioning” individuals as company officers.⁸⁰ The North Carolina act creates three categories—campus police officers, railroad police officers, and special police officers.⁸¹ They have the same legal arrest authority as municipal officers but must be assigned and contracted to a specific piece of real property.⁸² Company police officers are allowed to use sirens and blue lights on vehicles used while performing their duties, but only within their territorial jurisdiction.⁸³ In North Carolina, special police officers are trained to carry firearms and, depending on the assignment, may carry the weapon openly if wearing a police uniform or concealed if in plain clothes; they also carry Oleum Capsicum spray and wooden batons.⁸⁴ They receive annual firearms training from training officers and may attend in-service trainings through state certified police training academies.⁸⁵

Special police in North Carolina must meet the same pre-employment training standards as those required for state law enforcement officers.⁸⁶ They complete a twenty-six week introduction to basic law enforcement, firearms, and other police related courses.⁸⁷ Background investigations are forwarded “to the North Carolina Department of Justice Training and Standards for final review and approval of the employment of that officer.”⁸⁸

C. Litigation Resulting from Industry-wide Problems

The problems in the private security industry have resulted in an explosion of litigation. Corporate employers who do not conduct thorough background checks or provide training and supervision to employees risk costly lawsuits alleging, *inter alia*, negligent pre-employment investigation, training,

80. The Company Police Program was established by the North Carolina General Assembly. N.C. GEN. STAT. §§ 74E-1 to -13 (2003); *see also* Metro Special Police & Security Services, Inc., About Metro, *available at* <http://www.metrospecialpolice.com/about.htm> (last visited Mar. 9, 2005).

81. N.C. GEN. STAT. § 74E-6(b).

82. *Id.* § 74E-6(c).

83. Metro Special Police & Security Services, Inc., FAQ, *available at* <http://www.metrospecialpolice.com/faq.htm> (last visited Mar. 9, 2005).

84. *Id.*

85. *Id.*

86. N.C. GEN. STAT. § 74E-8.

87. Metro Special Police & Security Services, *supra* note 83.

88. *Id.*

and supervision.⁸⁹ In several states, security officers may be granted full police power by licensing them as "special police."⁹⁰ With these powers, security guards can make arrests that private citizens cannot, including certain misdemeanors and felonies based on probable cause.⁹¹ Ordinary citizens usually can only arrest someone who they have witnessed commit a felony.⁹² When licensed with police powers, private employers may make a higher number of unwarranted arrests and thus may face a greater risk of civil liability.⁹³

In July 2003, a federal judge ruled that a lawsuit alleging abuse by security guards at an apartment complex could proceed as a class action.⁹⁴ The class included all Hispanic non-Caucasian persons who had resided, were residing, or would reside at an apartment complex in Nashville, Tennessee.⁹⁵ The suit, filed against Security Express Protective Services and the apartment's management companies, alleges the targeted harassment and intimidation of Hispanic residents.⁹⁶ The suit also alleges that the apartment complex's management companies failed to supervise the companies they hired for security to ensure that they were not harassing residents.⁹⁷

The state of New York filed a lawsuit in 2002 against International Protective Services, Inc., for failure to properly screen its security guards.⁹⁸ Many of the agency's personnel had criminal convictions yet were charged with guarding state facilities, including the military installation Camp Smith, which houses arms and munitions.⁹⁹ The company failed to conduct reference or credit checks and failed to conduct mandatory drug testing for more than half of the guards working under contract.¹⁰⁰ Guards working at New York City homeless shelters were not registered with the Department of State as required by

89. See, e.g., *Gonzales v. Southwest Sec. & Prot. Agency*, 665 P.2d 810 (N.M. Ct. App. 1983) (\$15,000 awarded against security company who negligently hired and trained guards who beat spectator); 30 A.T.L.A. L. REP. 416-17 (Nov. 1987) (reporting *Niakeen v. Hettig & Co.*, No. 86-02294 (Harris County Dist. Ct., Tex. filed July 8, 1987)); 30 A.T.L.A. L. REP. 272 (Aug. 1987) (reporting *Potucek v. Zody's Dep't Store*, No. C302021 (Los Angeles Superior Ct., Cal., filed Mar. 5, 1987)).

90. CLIFFORD E. SIMONSEN, *PRIVATE SECURITY IN AMERICA* 97-98 (1998).

91. *Id.* at 98.

92. *Id.*

93. *Id.* at 100.

94. Press Release, Tennessee Fair Housing Council, Court Grants Class-action Status to Hispanic Abuse Suit (July 23, 2003), available at <http://www.fairhousing.com/index.cfm?method=page.display&pageid=3297>.

95. *Id.*

96. *Id.*

97. *Id.*

98. Press Release, Office of the State of New York Attorney General, State Acts in Security Guard Scandal: Coordinated Legal and Administrative Action Seeks to Suspend Company License and Recover Millions of Dollars (June 28, 2002), available at http://www.oag.state.ny.us/press/2002/jun/jun28a_02.html.

99. *Id.*

100. *Id.*

New York law.¹⁰¹ Word of the misconduct was brought to the attention of the New York State Attorney General after an audit by the State Comptroller of a \$956,000 contract uncovered information that a majority of the guards protecting state facilities did not meet screening and training requirements.¹⁰²

In *Abraham v. Raso*,¹⁰³ an off-duty police officer moonlighting as a mall security guard responded to a call for assistance from two Macy's security officers in the same mall after two shoplifters took large amounts of merchandise.¹⁰⁴ Kimberly Raso, the off-duty police officer, ordered one of the shoplifters to stop and drew her weapon.¹⁰⁵ Raso fired a shot into the side window as the shoplifter continued to drive away.¹⁰⁶ The shoplifter collided with another car and hit a tree before he died.¹⁰⁷ His widow filed a suit and prevailed, with the court finding that Raso acted under color of state law.¹⁰⁸ She had worn her municipal police uniform, identified herself as a police officer to the shoplifter, and responded to a call for help from off-duty police officers working mall security.¹⁰⁹

The discretion afforded private security guards has resulted in a spate of legal cases, ranging from excessive force claims to claims of "consumer racism" against minority shoppers by private security guards in retail stores.¹¹⁰ In a well-publicized case, a federal jury found that a security guard employed by the chain store Eddie Bauer falsely imprisoned and demeaned three young African American men when one entered the store wearing a shirt he had purchased there the previous day.¹¹¹ The security guard asked the young man to remove his shirt and leave when he could not produce a receipt, detained his two friends, and ignored the store cashier's verification that the young man had purchased the shirt from her.¹¹² The court ordered Eddie Bauer to pay \$1 million in civil damages.¹¹³

In 1992, Wells Fargo paid \$3.7 million to customers who had been robbed in thefts linked to Fargo guards.¹¹⁴ A \$300,000 settlement was reached in one

101. *Id.*

102. *Id.*

103. 183 F.3d 279 (3d Cir. 1999).

104. *Id.* at 283.

105. *Id.* at 284.

106. *Id.* at 290.

107. *Id.* at 286.

108. *Id.* at 287.

109. *Abraham v. Raso*, 15 F. Supp. 2d 433, 442-43 (D. N.J. 1998), *rev'd in part and vacated in part* by 183 F.3d 279 (3d Cir. 1999).

110. Philip P. Pan, *More Blacks Suing Over Retail Bias*, WASH. POST, Oct. 8, 1997, at A01.

111. David Stout, *3 Blacks Win \$1 Million in Bauer Store Incident*, N.Y. TIMES, Oct. 10, 1997, at A16.

112. *Id.*

113. *Id.*

114. Zielinski, *supra* note 7, at 48.

case in which the employer allegedly failed to conduct a pre-employment investigation on an apartment security guard who beat a visitor.¹¹⁵ In another case, a security guard pleaded guilty to stealing sixteen television sets from NBC at the 1996 Republican Convention.¹¹⁶

In San Jose, nightclubs' city-issued entertainment permits mandate that clubs hire either uniformed off-duty police officers or state-registered security guards.¹¹⁷ Most of the complaints alleging excessive force were brought against moonlighting officers.¹¹⁸ Roughly half of the San Jose police department moonlights—higher than the average of 20 percent in most departments.¹¹⁹ And off-duty officers wear their police uniforms while on security detail.¹²⁰ Although businesses in the downtown area like having the extra police stationed in the area on weekends as an added deterrent, having officers on guard has not been without incident.¹²¹ A 21-year-old man was killed in a brawl outside a local nightclub even though seven off-duty officers were stationed outside.¹²²

Yet, depending on the jurisdiction, police officers on detail work may not act under "color of their authority" while working for a private employer despite being vested with 24-hour police authority by law. They must act within the scope of the employment agreement and work to further the interests of their part-time employer.¹²³ Despite this mandate not to act under color of authority, about three fourths of police departments nationwide permit officers to wear police uniforms while on private detail, and many others also allow them to use radios and police vehicles.¹²⁴ In cases in which private security guards

115. 30 A.T.L.A. L. REP. 416-17 (Nov. 1987) (reporting *Niakeen v. Hettig & Co.*, No. 86-02294 (Harris County Dist. Ct., Tex., filed July 8, 1987)).

116. *Del Jones & Ellen Neuborne, False Sense of Security*, USA TODAY, Sept. 12, 1996, at 1B.

117. Stuchinsky, *supra* note 71.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* An independent police auditor, Teresa Guerrero-Daley, studied the San Jose Police Department's off-duty policy. *Id.* The office opened in 1993 and fields complaints of police misconduct. *Id.*

123. *Id.*

124. The New York Police Department introduced a plan in 1998, still in effect, to allow officers to perform off-duty private security work in police uniform. New York Police Dep't, Paid Detail Unit, at http://www.nyc.gov/html/nypd/html/misc/paid_detail.html (last visited Mar. 23, 2005). The Police Department's "Paid Detail Unit" coordinates the work, maintaining a list of nearly 160 businesses seeking to hire off-duty officers. *Id.* Prospective employers must provide a certificate of insurance and the police department conducts a credit and background check before assigning officers. *Id.* The officers retain their full law enforcement authority. *Id.* Should an arrest situation arise, they are expected to call a supervisor. *Id.* Arrests for minor infractions are usually assigned to an on-duty officer while more serious infractions may call for the paid detail officer to process the arrest on public police overtime. *Id.*

are police officers on private detail, some courts have imposed Fourth Amendment limitations.¹²⁵

III. PROLIFERATION OF THE PRIVATE SECURITY INDUSTRY

Government expenditures on private security services in the United States are more than double the amount spent on public law enforcement—a staggering \$100 billion compared to law enforcement’s \$45 billion.¹²⁶ The private security industry virtually exploded in the 1990s, when private security expenditures grew to approximately \$52 billion as compared to law-enforcement expenditures of \$30 billion.¹²⁷ From 1964 to 1992 the number of security organizations grew by over 800 percent with employment in these groups increasing by nearly 925 percent.¹²⁸ Currently, private security companies employ approximately two million guards, compared to public law enforcement’s 725,000.¹²⁹ Reasons for this growth include increased perception by the public of growth in workplace-related crimes (even though crime rates are actually declining), limited fiscal resources for public protection, and a lack of satisfaction with public policing as a deterrent.¹³⁰

It is helpful to understand the forces that have led to privatization. Proponents of the privatization of criminal justice services cite two main benefits: reduced costs and enhanced quality of services. A third claimed benefit is that privatizing certain police services frees up public police to spend more time fighting violent crime.¹³¹ The state increasingly relies on the privatization of law enforcement efforts by contracting with private security companies or allowing them to augment police forces, all without the constitutional strictures adhered to by public police. Supplementary security forces provide an additional benefit to the state by creating a private arm to seize evidence that can be passed on to public police for use in criminal prosecutions.

125. *Commonwealth v. Leone*, 435 N.E.2d 1036 (Mass. 1982). *See also* Paul G. Reiter, Annotation 36 A.L.R. 3d 553, 567-71 (2005) (addressing private security guard issues).

126. William C. Cunningham, U.S. Private Security Trends, Address at Law Commission of Canada’s “In Search of Security” Conference (Feb. 2003), *available at* http://www.lcc.gc.ca/en/ress/conf/conf_flyer/speakers_abstract/cunningham.asp.

127. Zielinski, *supra* note 7, at 15.

128. Bruce L. Benson, The Independent Institute, The Countervailing Trend to FBI Failure: A Return to Privatized Police Services (May 29, 2001), *available at* <http://www.independent.aristotle.net/newsroom/article.asp?id=389>.

129. Cunningham, *supra* note 126.

130. *See, e.g., CUNNINGHAM ET AL., supra* note 7.

131. Adrian T. Moore, *Private Services Expand Police Effectiveness*, PRIVATIZATION WATCH (Reason Pub. Policy Inst.), Sept. 1996, at 1.

A. Initial Cost Effectiveness in Privatizing Some Police Functions

The high costs associated with the government's handling of many criminal justice-related services have resulted in privatizing such services, most notably in the area of penal institutions. Overcrowding, poor conditions and practices, high turnover among personnel, and the increased costs of providing correctional services are some of the conditions that created a trend toward privatization in the prison industry.¹³² While the cost-effectiveness of contract policing has not been formally evaluated, corrections services have been the subject of independent evaluations. These studies conclude that privatization could yield savings of approximately "20 percent in construction costs and from 5 to 15 percent [savings] in [the] private management of prison units."¹³³ Tom Beasley, vice-president of Corrections Corporation of America, stresses that private industry gets better prices from contractors than the government does since contractors traditionally charge the government more.¹³⁴

The National Institute of Justice, in a report on corrections and the private sector, highlighted five areas in which private sector facilities may be effective: (1) rapid mobilization (to quickly bring additional facilities and person power); (2) experimentation (testing new models without committing to permanent changes); (3) decentralization (allowing for greater geographic and program diversity); (4) specialization (flexibility to satisfy unique needs); and (5) regionalization (not being bound by jurisdictional politics in trying to create shared facilities among states or counties).¹³⁵

The ability of private industry to be more flexible in providing services than government is also cited as a considerable factor in cost savings. One researcher suggests that lack of community satisfaction with governmental crime control stems in part from the failure of government agencies to respond quickly to changing demands, which is attributable in part to the "political and

132. SIMONSEN, *supra* note 90, at 105.

133. BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE 28 (1998) (citing CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS (1990); CHARLES H. LOGAN & BILL W. MCGRIFF, COMPARING COSTS OF PUBLIC AND PRIVATE PRISONS: A CASE STUDY (1989); PRIVATIZING CORRECTIONAL INSTITUTIONS (Gary W. Bowman et al. eds, 1993); Samuel J. Brakel, *Private Collections*, in PRIVATIZING THE UNITED STATES JUSTICE SYSTEM 254, 257-61 (Gary W. Bowman et al. eds., 1992); 2 JOHN SHARP, BREAKING THE MOLD: NEW WAYS TO GOVERN TEXAS (1991); WILLIAM G. ARCHAMBEAULT & DONALD R. DEIS, JR., EXECUTIVE SUMMARY: COST EFFECTIVENESS COMPARISONS OF PRIVATE VERSUS PUBLIC PRISONS IN LOUISIANA (1996)). *But see* Jennifer S. Light, *The Effects of Privatization on Public Services: A Historical Evaluation Approach*, in EVALUATION FINDINGS THAT SURPRISE 25 (Am. Evaluation Ass'n, New Directions for Evaluation No. 90, 2001).

134. BENSON, *supra* note 133, at 30 (citing Kevin Krajick, *Private, For-Profit Prisons Take Hold in Some States*, CHRISTIAN SCI. MONITOR, Apr. 11, 1984, at 24).

135. SIMONSEN, *supra* note 90, at 105.

organizational inflexibility” of local government.¹³⁶ In Florida, for example, the City of St. Petersburg contracted with a private firm to add security personnel in response to increased vandalism in public recreational and park areas, rather than increasing the number of public law enforcement officials.¹³⁷ Contracting with a private firm was less expensive and could be terminated when the need lessened, a far more flexible alternative than trying to reduce the number of public police officers.¹³⁸

Private agencies can also save enormous amounts on labor costs. Private industry is not subject to civil service rules and can hire nonunion labor.¹³⁹ Also, private industry can elect to employ a smaller staff than government might employ for the same job.¹⁴⁰

Finally, the profit motive may encourage private firms to be innovative in providing services.¹⁴¹ Competition from other private firms for frequently renewing contracts motivates firms to cut costs and to enhance quality at the same time.¹⁴² Public sector providers, such as police chiefs, are not concerned with profit and may thus be less motivated to monitor employees and curtail wasted resources.¹⁴³

B. Privatization Proponents Cite Better Quality for Some Functions

Contracts with private security agencies for certain police support tasks and for some functions traditionally performed by police suggests improvement of quality. A contract to investigate and recover bad checks in Kentwood, Michigan, for example, exceeded the national bad check recovery rate by a range of 12-37 percent in its first year.¹⁴⁴ On the other hand, private attorneys contracted to serve as public defenders may have incentive to dispense with cases quickly and may encourage plea bargains without fully apprising the defendant of other options or the probability of success at trial.¹⁴⁵

Advances in technology for electronic detection equipment add to the appeal of private security. The security industry provides a wide range of effective, cost-efficient technologies and integrated systems including assessment and surveillance, intrusion detection, access control, personal identification numbers, smart cards, and video comparator systems.¹⁴⁶ Moreover, the equip-

136. BENSON, *supra* note 133, at 31 (citation omitted).

137. *Id.*

138. *Id.*

139. *Id.* at 30.

140. *Id.* at 30-31.

141. *Id.* at 32.

142. *Id.*

143. *Id.*

144. *Id.* at 38.

145. *Id.* at 39.

146. SIMONSEN, *supra* note 90, at 326-31.

ment requires trained and qualified personnel to manage it, and private agencies are considered better equipped to handle these tasks.¹⁴⁷

Because the private sector can specialize, proponents argue that more is produced with the same resources. A police department in Amarillo, Texas contracted with Allstate Security to respond to alarms.¹⁴⁸ It was estimated that approximately 3,420 hours were saved annually, roughly the equivalent of adding 1.75 employees a year to the police department.¹⁴⁹ In addition, rather than having taxpayers pay for the cost of having the police respond, the cost is shifted to those individuals benefiting from the alarm services.¹⁵⁰ The benefits of specialization are to provide a deterrent effect in the specified geographical area that is protected by the security company.¹⁵¹

Researchers evaluated a large private security system in Starrett City, in the East New York section of Brooklyn, consisting of fifty-six residential buildings with 5,881 apartments.¹⁵² The majority of survey respondents, nearly 90 percent, felt safe within Starrett City while only 41 percent felt safe outside of Starrett City.¹⁵³ The report concluded that Starrett City could be considered one of the safest communities in the country.¹⁵⁴ Nearly 80 percent of Starrett residents who responded to the survey said they would report an assault to the private security force, while only about 13 percent would call the New York City Police Department.¹⁵⁵

Arguments against privatization, on the other hand, are many. Short-term cost-cutting does not necessarily result in long-term savings. A coalition of seventy-three labor unions, employee coalitions, and non-profit organizations, including the AFL-CIO, AFSCME, the American Federation of Government Employees, and the National Resources Defense Council, called on Congress in late 2003 to stop the Bush Administration's plans for greater privatization of government services.¹⁵⁶ John Gage, president of the American Federation of Government Employees, representing about six hundred thousand federal workers, says that contracting out does not save money and prevents the American people from having a say in the way government is run.¹⁵⁷ The UAW

147. BENSON, *supra* note 133, at 174.

148. *Id.* at 150.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 153-56. The researchers used records of the New York Police Department, records of the Starrett City Security Unit, and questionnaires and interviews. *Id.*

153. *Id.* at 154.

154. *Id.*

155. *Id.*

156. Press Release, The American Federation of Government Employees, Broad Coalition Calls on Bush Administration to Halt Plans to Privatize Government Services (Oct. 28, 2003), available at <http://www.afge.org/Index.cfm?Page=PressRelease&PressReleaseID=308>.

157. *Id.*

and other unions are vehemently against privatization of functions delivered in the public interest and cite several problems of contracting out. Low-ball bids by vendors may understate the long-term costs. When the city of Albany, New York, outsourced maintenance of city vehicles, expecting to save thousands of dollars annually, it ended up overspending by 20 percent, not including the expenses of contract auditing and supervising.¹⁵⁸ Privatization results in the replacement of higher paying union jobs with low paying positions without benefits. Communities lose public sector jobs, and local businesses that once provided equipment and supplies are no longer used.¹⁵⁹

C. Freeing the Public Police to Focus on Violent Crime

The functions of public police fall into two broad categories. The first includes law enforcement, maintaining public order, patrol duty, and traffic enforcement. The second often consumes up to 80 percent of public officers' time but consists of services that arguably do not require police academy training, such as responding to burglary alarms, citing parking violations, and escorting funeral processions. By privatizing this second group of services, police departments may substantially reduce costs. The budgets of public police departments have increased at a rate of about 3 percent annually, while the demand for police services is growing at a much faster rate.¹⁶⁰ Eliminating many of these general assistance functions can free up public officers to focus more on fighting violent crime and fulfilling other responsibilities that require special training.¹⁶¹ Many forces, including the quest for efficiency and effectiveness, are driving the growing transfer of police power to private agencies.

Financial savings, increased effectiveness, and greater flexibility for police make privatization seem like a panacea. As we have seen, it is not. These so-called benefits come at the cost of safety, accountability, and civil rights protections because the actions of private police are not subject to the same constitutional scrutiny as those of public police. The next Part of this Article examines the history of cooperation between public and private police. Private citizens and organizations have performed what are now considered public police functions since before the United States was formed. This historical cooperation supports calls to extend those remedies available for constitutional violations by public police to similar violations by private police.

158. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Community Action Program, Issues II: Privatization (2004), available at <http://www.uaw.org/cap/04/issues/issue12.cfm>.

159. *Id.*

160. Moore, *supra* note 131, at 3.

161. *Id.*

IV. HISTORY OF COOPERATION BETWEEN PRIVATE SECURITY AND LOCAL POLICE

Private security and full-time public police forces in the United States were established at around the same time—the mid-1800s. Before that, the town constable and sheriff played roles similar to the system of “watch and ward” enacted in England after passage of the Statute of Westminster in 1285.¹⁶² Sheriffs were paid by the number and type of offenders caught; constables worked for the court to serve subpoenas and make arrests.¹⁶³ When American public police forces were established in the mid-1800s,¹⁶⁴ the watch and ward relied on community watchmen.¹⁶⁵ Even after public police forces were established, private citizens continued to play a role in protecting both persons and property.¹⁶⁶ Industrialization and the rapid growth of urban areas brought a concomitant growth in crime that public departments had difficulty containing.¹⁶⁷

The modern private security industry had its official beginnings in 1850, when Allen Pinkerton formed Chicago’s first private detective agency.¹⁶⁸ Five years later he formed the North West Police Agency, which provided security for the railroad industry.¹⁶⁹ Two years later, Pinkerton created the Pinkerton Protection Patrol that provided watchmen for a range of industrial clients.¹⁷⁰ Even in the early days of public police forces and emerging private security, the United States government contracted with the private sector by hiring Pinkerton “to provide intelligence gathering and VIP security for the military during the Civil War.”¹⁷¹

The twentieth century witnessed an increased need for a range of private security services.¹⁷² In the years before and during World War I, private security expanded to protect factories and to help the government control espio-

162. The Statute of Westminster required that security forces be established in every area of England to patrol against outlaws. Watch members were unpaid and all able men were required to take turns on the security force. SIMONSEN, *supra* note 90, at 14.

163. Brian Forst, *The Privatization and Civilianization of Policing*, in 2 CRIMINAL JUSTICE 2000: BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 19, 27 (Nat’l Inst. of Justice, 2000).

164. SIMONSEN, *supra* note 90, at 14-15. The first public police force was established in New York City in 1844. *Id.* at 15. Soon after, forces were established in Chicago, San Francisco, Boston, Los Angeles and Philadelphia by 1856. *Id.*

165. *Id.* at 14-15.

166. *Id.* at 15.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 16.

nage.¹⁷³ After the war and during the Depression, security declined greatly, although the Burglary Protection Council was formed in 1921 to provide standards, testing, and certification of alarm systems.¹⁷⁴ The private security industry revived with World War II when government needed contractors to provide security to protect defense plants from espionage and sabotage.¹⁷⁵ After the war, plant security continued and expanded from defense plants to other segments of the industrial sector.¹⁷⁶ During the Cold War, private security continued to burgeon to meet the need for highly trained security personnel at defense industry sites.¹⁷⁷

By the end of the nineteenth century, municipal police departments became associated with corruption, including payoffs for selective non-enforcement and for providing protection.¹⁷⁸ Public policing had expanded to include a wide range of functions including sheltering the homeless, enforcing sanitation laws, and inspecting fire escapes.¹⁷⁹ From 1930 on, public policing became more professionalized, with better screening and training of personnel and restricting the function to crime control.¹⁸⁰

As public police began to be viewed as experts and professionals in crime-fighting, they became distanced from the community.¹⁸¹ In many jurisdictions police began spending less time patrolling the streets.¹⁸² The mission of public police became further restricted to crime control, but ironically as the public grew to mistrust their professionalism, their ability to effectively control crime became limited.¹⁸³ In the 1980s, researchers found that bringing the police closer to the community increased the public's satisfaction with policing and had a positive effect on the public's perception of quality of life.¹⁸⁴ At the same time, the private sector's responses to dealing with crime reemerged as pressure to control public expenditures has grown and public police have reached their limits in dealing with crime.¹⁸⁵

173. *Id.* at 17.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 17-18.

178. Forst, *supra* note 163, at 28.

179. *Id.* at 29.

180. *Id.* at 30.

181. *Id.* at 32.

182. *Id.*

183. *Id.*

184. *Id.* at 33 (citing ANTONY M. PATE ET AL., *REDUCING FEAR OF CRIME IN HOUSTON AND NEWARK: A SUMMARY REPORT* (1986)).

185. *Id.* at 34.

V. FROM "JUNIOR PARTNER" TO "EQUAL PARTNER"—
PRIVATE/PUBLIC COOPERATION¹⁸⁶

In 1971, the Department of Justice commissioned the RAND Corporation to conduct an overview of private security in the United States.¹⁸⁷ The report presented the growth of private security as due largely to a lack of resources for public police.¹⁸⁸ The RAND study put forth a "junior partner" theory, under which private security primarily performed the prevention aspects of policing and did not intrude on the more central functions of public policing.¹⁸⁹

The National Institute of Justice funded another private security research project in 1989 and 1990.¹⁹⁰ Hallcrest Systems, Inc., was contracted to look at the expansion and changes in private security over twenty years, to identify trends in the private security industry and its relationships with public law enforcement, and to make recommendations aimed at promoting increased cooperation between the private and public sectors.¹⁹¹ The Hallcrest Report found that, beginning in the mid-1980s, responsibility for protection had shifted from public law enforcement to private security; it suggested a need for role-shifting and increased cooperation between the public and private sectors.¹⁹² The Hallcrest Report replaced the earlier "junior partner" theory with an "equal partner" model:

Shift in Turf. A shift (measured in terms of spending and employment) in the primary responsibility for protection from public law enforcement to private security has occurred. This shift suggests a need for realignment of roles and greater cooperation between the public and private sectors. The traditional approach by law enforcement of working independently of citizens and businesses will change. Greater coproduction of neighborhood (residential, business, etc.) security by citizens, law enforcement, and private security will occur as the members of various communities take a larger stake in decision making about their protective options.¹⁹³

Indeed, private industry now performs functions traditionally performed by police, such as alarm response, building and retail security, airport security,

186. 1 JAMES S. KAKALIK & SORREL WILDHORN, PRIVATE POLICE IN THE UNITED STATES: FINDINGS AND RECOMMENDATIONS (United States Dep't of Justice ed., 1971).

187. 2 JAMES S. KAKALIK & SORREL WILDHORN, THE PRIVATE POLICE INDUSTRY: ITS NATURE AND EXTENT (United States Dep't of Justice ed., 1971).

188. *Id.*

189. TREVOR JONES & TIM NEWBURN, PRIVATE SECURITY AND PUBLIC POLICING 98 (1998).

190. CUNNINGHAM ET AL., *supra* note 7.

191. *Id.* at xiii.

192. *Id.* at 319.

193. *Id.*

special events, public housing security, and prisoner transport.¹⁹⁴ Cooperation between the private sector and the police has been credited by many with a decrease in crime, especially in urban centers.

Business Improvement Districts are one example of cooperative efforts to improve public safety.¹⁹⁵ In New York City, the Grand Central Partnership works closely with city police to keep a 51 million square foot district patrolled by private security guards.¹⁹⁶ Property owners in the district pay taxes to support this arrangement, which has reportedly resulted in a greater than fifty percent decrease in reported crime.¹⁹⁷ Some of the sixty security guards are armed, others have "peace officer" status which in New York permits them to make warrantless arrests and searches, unlike police officers, and to use deadly force in arresting or preventing an escape.¹⁹⁸ In downtown St. Louis, a nearly twenty-six percent decrease in crime was reported from 2002 to 2003 after the metropolitan police department and a Downtown Community Improvement District entered into a partnership, providing mounted and bicycle patrols.¹⁹⁹

A program in Dallas, Texas, encourages cooperation between law enforcement and private security agencies, allowing the city police department to call on security officers when needed.²⁰⁰ Programs include workshops by police representatives in areas related to police procedures such as search and seizure, petty theft and trespassing and privacy issues.²⁰¹ In addition, private security groups can communicate directly and regularly with Dallas police on a range of issues.²⁰² Workshops are offered for police officers describing such aspects of private security as licensing requirements and background checks.²⁰³

194. See MARCIA CHAIKEN & JAN CHAIKEN, PUBLIC POLICING—PRIVATELY PROVIDED app. D, at 43-44 (Nat'l Inst. of Justice ed., 1987). See also CUNNINGHAM ET AL., *supra* note 7, at 247-81.

195. James Brooke, Police/Security Partnerships: Privatization Models that Impact Crime, CRIME & JUSTICE INT'L, Apr./May 1996, available at <http://158.135.23.21/cjcweb/college/cji/index.cfm?ID=206>. See also David J. Kennedy, Note, *Restraining the Power of Business Improvement Districts: The Case of Grand Central Partnership*, 15 YALE L. & POL'Y REV. 283, 284-85 (1996).

196. Brooke, *supra* note 195.

197. *Id.* Property owners pay "an additional 12.5 cents per square foot" in taxes. *Id.*

198. See N.Y. CRIM. PROC. LAW. § 2.20(1)(a)-(c) (McKinney 2003).

199. St. Louis Metro Police Dep't Downtown St. Louis P'Ship, 4th District Police Officer Awards and the Downtown St. Louis Safety Report 2003, at 3 (Mar. 31, 2004) (on file with *Missouri Law Review*).

200. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, OPERATION COOPERATION: GUIDELINES FOR PARTNERSHIPS BETWEEN LAW ENFORCEMENT AND PRIVATE SECURITY ORGANIZATIONS 3 (2000).

201. Teresa Anderson, *Dallas Gets DERT on Downtown*, SECURITY MGMT., Sept. 2004.

202. *Id.*

203. *Id.*

Contractual cooperation between the government and private security is enormous. Approximately 36,000 of the estimated 1.1 million private security personnel in 1985 were assigned to government contracts: 11,000 to the federal government, 16,000 to local government, and 9,000 to state government.²⁰⁴ A residential community with no police force in North Barrington, Illinois, contracted with a security company to provide emergency response, "loss prevention," and "rule enforcement."²⁰⁵ While 5,000 federal police performed security in government buildings in 1971, in 1996 the number shrank to a mere 409; private security personnel comprised the remainder.²⁰⁶ Over objections from the American Federation of Government Employees, Congress has supported this move to privatize police.²⁰⁷ Commanding officers of the New York City Police Department and security directors in the city created the Area Police-Private Security Liaison (APPL) in 1986.²⁰⁸ The goal was to enhance public/private cooperation in the protection of people and property, to foster an information exchange, and to diminish the credibility gap between police and private security officers.²⁰⁹

In joint investigations, public law enforcement officials have worked with private businesses to conduct sting operations. The FBI worked with IBM in a sting related to the sale of computer secrets, creating a bogus consulting firm called Glenmar Associates.²¹⁰ The sting resulted in the filing of criminal charges against twenty-one people, and IBM filed suit against Hitachi and affiliated companies asking for damages for the alleged theft of trade secrets.²¹¹ Defense attorneys in the case claimed that IBM had controlled the sting operation and that it was part of a business fight against international competition.²¹² The government would not provide documents requested by the defense to assess its claim and, as a result, some charges against some defendants were dropped.²¹³

Attempting to deal with some of the issues raised by private security's lack of accountability, the private sector often hires public police officers for part-time work.²¹⁴ However, even the procedures by which police obtain jobs

204. CUNNINGHAM ET AL., *supra* note 7, at 276.

205. *Id.* at 278 (citing *Private Security Takes to the Streets*, SECURITY, Sept. 1989, at 19).

206. Zielinski, *supra* note 7.

207. *Id.*

208. CUNNINGHAM ET AL., *supra* note 7, at 262.

209. *Id.*

210. Gary T. Marx, *The Interweaving of Public and Private Police in Undercover Work*, in PRIVATE POLICING 172, 173 (Clifford D. Shearing & Philip C. Stenning eds., 1987).

211. *Id.*

212. *Id.*

213. *Id.* Other such stings have existed between private security personnel working with the government. *Id.* at 173-74.

214. *Id.* at 177-79.

moonlighting in private security are not standardized. Although nearly one-third of the half-million city police officers work part-time "detail work" in private industry, the procedures governing part-time work vary among the estimated thirteen-thousand municipal police departments in the United States.²¹⁵ Despite the fact that only approximately 20 percent of police departments nationwide prohibit detail work, nationally standardized procedures have not been developed to protect police officers from on-the-job conflicts of interests, to ensure that officers do not act under color of police authority while working for private companies, and to establish consistent procedures for the use of police vehicles, radios, and technology while on private detail work.²¹⁶

In Fairfield, Connecticut, the Police Department is

authorized to have up to one hundred special police officers [under the Special Services Division]. These officers work with . . . regular police officers and assist . . . with . . . community policing efforts. Special police officer[s] perform a wide range of functions including: parking enforcement at beaches, railroad stations and the center of Town; security at railroad stations and beaches; community policing patrols in the downtown area; [and] traffic details as needed. Special police officers work part-time and their assignment can vary according to the needs of the Police Department. They receive training in issuing parking tickets, traffic con-

215. Of the approximately 17,000 law enforcement agencies in the United States, 12,409 are municipal police agencies, 3,070 are sheriff's departments, 1,376 are special police units with limited jurisdiction such as airports and parks, and 49 are state police agencies. BRIAN A. REAVES & MATTHEW J. HICKMAN, *CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2000* (Bureau of Justice Statistics, Bulletin No. NCJ 194066, Oct. 2002).

216. *See* *Bowman v. Township of Pennsauken*, 709 F. Supp. 1329 (D. N.J. 1989) (city could not require police officer working off duty security jobs to obtain indemnity agreements from secondary employer for their acts as police officers); *McNamara v. City of Chicago*, 700 F. Supp. 917 (N.D. Ill. 1988) (civil rights suit allowed for interfering with a police officer's secondary employment; political motivation alleged); *Long Beach Police Officers Ass'n v. City of Long Beach*, 759 P.2d 504 (Cal. 1988) (employer not restricted from adding further restrictions by statute prohibiting public employees from accepting off-duty employment that conflicts with their public duties); *Morton v. Bell*, 452 S.E.2d 103 (Ga. 1995) (off-duty police officers could not use city vehicles while working at secondary employment); *Fraternal Order of Police, Local Lodge 73 v. City of Evansville*, 559 N.E.2d 607 (Ind. 1990) (upholding police rule prohibiting secondary employment where alcoholic beverages are consumed or sold); *Lugo v. City of Newburgh*, 618 N.Y.S.2d 420 (N.Y. App. Div. 1994) (upheld officer's termination who continued outside employment in violation of direct prohibition imposed because of excessive sick leave).

trol and other [areas], but they are not certified police officers. Special police officers in Fairfield do not make arrests.²¹⁷

The increased cooperation between the public and private sectors has continued for nearly twenty years, as predicted in the Hallcrest II report. The shift in responsibility for protection from public law enforcement to private security that Hallcrest researchers observed has indeed resulted in increased cooperation between the public and private sectors, with the "equal partner" model arguably ascendant.

A. Similarity and Blurring of Activities

The "equal partner" theory espoused by Hallcrest researchers is evident in all aspects of the private security industry and has, in fact, become customary practice across the United States. Sharing personnel is one form of increased cooperation that supports the equal partner model and blurs the line between the private and public sectors. Private companies routinely hire off-duty police officers and enter into cooperative investigations with the police. In so doing, private companies benefit from the state police's ability to use weapons and to gain access to otherwise protected information, while reducing their own liability.²¹⁸ The growth of public undercover police tactics has resulted in highly experienced public law enforcement officials who bring their talents to the private sector.²¹⁹ Many public police officers retire at comparatively young ages or leave the public force to find employment in the private sector.²²⁰ Some private entities hire former public officers to conduct investigations because of their ability to gain access to needed information.²²¹

Recently, the private sector has become increasingly interested in criminal prosecution.²²² It has cooperated with public law enforcement and benefits from public resources in undercover operations in particular. In one joint venture, the State of Connecticut contributed money and two police officers to an undercover operation focusing on insurance fraud.²²³ In another case, private investigators prominently assisted in a Massachusetts arson case in which the insurance agency paid handsomely to provide protective custody for the government's chief witness, to subsidize state employees' overtime, and to augment the Massachusetts attorney general's investigation.²²⁴ Some of the private

217. Fairfield Police Dep't, Special Police, at http://www.fpdct.com/special_police.htm (last visited Mar. 23, 2005).

218. Marx, *supra* note 210, at 183.

219. *Id.*

220. *Id.* at 181.

221. *Id.*

222. *Id.* at 177.

223. *Id.* at 177-78.

224. *Id.* at 178.

investigators worked as consultants to the state while others worked for the insurance companies involved, but both worked in conjunction with the public officials.²²⁵ As a result, over thirty individuals were indicted.²²⁶

Further blurring the line between the public and private sectors is the creation of joint entities, such as the Law Enforcement Intelligence Unit that was founded as a private organization for the sharing of intelligence files between local and state police.²²⁷ Its private nature allows an exchange of information that would otherwise be prohibited for agents working purely in their public capacity, and also avoids the privacy considerations that protect the collection and sharing of such information.²²⁸ Similarly, the New York Police Department (NYPD) established a committee in 1985 to improve coordination with the private security industry²²⁹ in sharing information about internal crimes, observations and crime trends, wanted persons, and recent patterns of crime.²³⁰

In addition to the formation of joint agencies, government expenditures support the proposition that "equal partnership" is customary: state and local government spending on private security grew to \$100 billion in 1987, up from about \$27 billion ten years earlier.²³¹ The federal government spent nearly \$2 billion in 1987.²³² Los Angeles County alone had thirty-six contracts for private security services in the early 1980s.²³³ The similarity of activities, derived from an expanded view of public policing that adds crime prevention and fear reduction to law enforcement,²³⁴ contributes to the blurring of the line between public and private policing.

Private security's status as "equal partner" with public law enforcement necessitates the creation of minimum training standards. In the absence of legislation requiring a basic level of education, litigators bringing cases against private security personnel should seek equitable relief aimed at improving training for private police.

225. *Id.*

226. *Id.*

227. *Id.* at 179.

228. *Id.*

229. Forst, *supra* note 163, at 57.

230. *Id.*

231. *Id.* at 35 (citing WILLIAM C. CUNNINGHAM ET AL., PRIVATE SECURITY: PATTERNS AND TRENDS 2 (United States Dep't of Justice, Nat'l Inst. of Justice eds., 1991)).

232. *Id.* (citing CUNNINGHAM ET AL., *supra* note 231, at 2.).

233. *Id.* (citing E.S. SAVAS, PRIVATIZATION: THE KEY TO BETTER GOVERNMENT 183 (1987)).

234. *Id.* at 33.

*B. Intimidation by Appearance:
Implying State Sanctioned Use of Force*

Perhaps the most distinct illustration of how intertwined public and private police have become is the use of uniforms. A police officer's uniform is one of the most easily recognized visual emblems signifying law enforcement. It represents the power to arrest and the power to discipline.²³⁵ In fact, the police officer and uniform are such strong signifiers that the general public may have difficulty distinguishing between law enforcement and the law itself.²³⁶

The mandate to use force lawfully has been called "the defining feature of the role of police in society."²³⁷ As John Crew of the ACLU has explained,

The public gives the police unique powers to deprive us of our freedom and to use force. The uniform and badge are the visual symbols of those powers. Those symbols shouldn't be displayed unless police officers are on duty and using those powers for all, not just on behalf of those able to pay.²³⁸

Nevertheless, the private police industry relies on uniforms to imbue its agents with the public police's implied monopoly on state-sanctioned use of force and coercion. It is customary for private security personnel to wear guard uniforms that are often indistinguishable from public police uniforms. As a result, private security personnel are frequently mistaken for public police. In some jurisdictions, public police officers moonlighting on private detail are allowed to wear their public uniforms, and the public perceives them to be acting in their official, public capacity. Moreover, the laws in most states support that assumption: if a moonlighting officer witnesses a violent crime he must then act in his public capacity and intervene.

The power to intimidate that a police uniform carries with it, especially when accompanied by a weapon, is well known in Fourth Amendment jurisprudence. Officers in uniform often signify to individuals, rightly or wrongly, that they do not have the right to refuse a search.

While private police do not possess the same powers as public police, most individuals stopped by a uniformed security guard assume that the guard

235. ALAN COFFEY ET AL., AN INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM AND PROCESS 43 (1974).

236. *Id.* at 42.

237. Karen L. Amendola, *Office Behavior in Police-Citizen Encounter: A Descriptive Model and Implications for Less-Than-Lethal Alternatives*, POLICE FOUND. REP. (Sept. 1996), available at <http://www.policefoundation.org/pdf/officerbehavior.pdf>.

238. Stuchinsky, *supra* note 71 (quoting John Crew, Director of the Police Practices Project of the ACLU of Northern California).

possesses legal authority to search and seize.²³⁹ In fact, the Private-Sector Liaison Committee of the International Association of Chiefs of Police acknowledges that "private security personnel . . . [are placed] in a wide range of positions which call for the use of authority on the property they protect."²⁴⁰ This confusion about the law affords private police an additional advantage over private citizens making citizens' arrests.²⁴¹

The wearing of uniforms, badges, and sometimes guns—all of which are at first glance nearly identical to those of the public police—amounts to "intimidation by appearance."²⁴² "Police associations have been critical of this tendency, arguing that citizens [frequently believe that] they are dealing with a police officer when a security guard approaches them."²⁴³ But many private security executives argue that their officers *should* resemble public police and need handcuffs and weapons because they are performing active policing just like public officers.²⁴⁴

The police uniform is so clearly identified with "the job" that proposed changes to uniform garb have provoked strong reaction from public police for the last four decades. In the late 1960s and early 1970s, police departments across the country experimented with changing police uniforms in an effort to improve public perception of the police. But as C.D. Cochran and Ronald Wiley have noted, "The proposal to change the traditional police uniform pro-

239. There is a dearth of empirical evidence of the effect of uniforms on public perception. P. N. Hamid has written that early on in life we learn that differences exist among people based on the clothing they wear:

Such distinctions enable the child to identify men, women, policemen, firemen, soldiers, nurses, etc., with speed and reliability. Dress, therefore, provides an efficient cue for the classification of others. Thus, just as emotion can be attributed to certain facial expressions, so too actions and activities can be attributed to persons in different modes of dress.

Paul N. Hamid, *Changes in Person Perception as a Function of Dress*, 29 PERCEPTUAL & MOTOR SKILLS 191, 191 (1969).

240. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 26, at 4.

241. Rick Sarre, *The Legal Basis for the Authority of Private Police and an Examination of Their Relationship with the "Public" Police*, 23 AIC Conference Proceedings, in PRIVATE SECTOR AND COMMUNITY INVOLVEMENT IN THE CRIMINAL JUSTICE SYSTEM 167, 168 (Australian Inst. of Criminology Conference Proceedings No. 23, 1994), available at <http://www.aic.gov.au/publications/proceedings/23/Sarre.pdf> (citing Thomas M. Scott & Marlys McPherson, *The Development of the Private Sector of the Criminal Justice System*, 6 LAW & SOC'Y REV. 267, 272 (1971)).

242. *Id.* at 172.

243. LAW COMMISSION OF CANADA, IN SEARCH OF SECURITY: THE ROLES OF PUBLIC POLICE AND PRIVATE AGENCIES: DISCUSSION PAPER 17 (2002), available at <http://www.lcc.gc.ca/en/themes/os/PDF/37789English.pdf>.

244. *Id.*

duces highly emotional responses and it seems to touch on some very basic motivations and attitudes of police officers.”²⁴⁵

As any other private actor, private security guards have limited rights to make citizens’ arrests when they believe that a crime is being committed on private property. People may believe that private police have the same authority as public police because of the uniform and trappings of police power, but they are mistaken. The poor screening, training, and supervision of private security forces makes this a dangerous mistake. Moreover, it is a mistake that has been fostered by the government’s failure to regulate the private security industry, while increasingly relying on it at the same time.

Widespread misperception of private officers’ authority may subject individuals to a risk of harm. The public expects the government to protect its citizens and ensure that their rights are not violated. Because the state must not put its citizens at risk through public policing, it should not subject individuals to the risk of harm posed by state-contracted private security services. In addition, because of the special powers of the police to arrest, use force, and conduct searches and seizures, a system of checks must be established to minimize the use of police powers.²⁴⁶

The government has not acted to impose any standards guiding private security’s power to search and seize despite having effectively given this power over to private security agencies through extensive contractual arrangements. By cooperating with an industry plagued by insufficient training, poorly qualified or even dangerous personnel, and a virtual lack of standards, the state creates an unreasonable risk of injury to the public.

VI. SECTION 1983 LITIGATION FOR INSTITUTIONALIZED UNCONSTITUTIONAL ACTIONS OF PRIVATE POLICE: CUSTOM AND PRACTICE

As argued in Part IV, the interchangeability of the private and public sectors in performing the full panoply of police-related activities precludes a rational division between state-sanctioned action, on the one hand, and private action completely free from governmental direction on the other. At the same time, as shown in Part I, the private security industry is plagued by incompetence and conflicts of interest. This raises the question: what protects the citizenry from harmful actions by private police?

The constitutional protections covering actions by government police are largely inapplicable to private police. However, the government may be held liable for the harmful actions of private actors when the government conspires

245. Ronald E. Wiley & C.D. Cochran, *Blazers: A National Survey of Attitudes*, POLICE CHIEF, July 1972, at 68.

246. DAVID L. CARTER & LOUIS A. RADELET, *THE POLICE AND THE COMMUNITY* 99 (6th ed. 1999).

with the private actor to cause the harm,²⁴⁷ or where the government has a special relationship with the victim.²⁴⁸

Most of the constitutional rights of individuals are protected only against governmental intrusion, or "state action."²⁴⁹ But in some cases, actions by private individuals, or a group of individuals, may be considered state action subject to constitutional restraints. Under 18 U.S.C. § 1983 (the Civil Rights Act of 1871), plaintiffs may seek a remedy for deprivations of constitutional or federal statutory rights resulting from authorized as well as unauthorized actions of state officials or private citizens acting "under color of law."²⁵⁰ In order to establish a Section 1983 claim, the plaintiff must show (1) a deprivation of a federal constitutional or statutory right²⁵¹ (2) by a person or entity acting under color of state law.²⁵² In the usual case, the plaintiff must prove that a state governmental entity or officer has deprived her of a right protected by the Constitution of the United States or by federal statute. Entities acting under color of state law are generally one of the following: a municipality, municipal agency or department, state agency or other entity, and its employees charged with exercising state powers.²⁵³

However, private defendants may also act under color of law. Liability may attach in certain instances when a private entity works in conjunction or in conspiracy with a governmental official.²⁵⁴ In *Lugar v. Edmondson Oil Co.*,²⁵⁵ the Supreme Court allowed a Section 1983 action against a private actor who seized the plaintiff's property in violation of his Fourth and Fourteenth Amendment rights.²⁵⁶ The Court found that even a private defendant is acting "under color of law" if his actions constitute state action under the Fourteenth

247. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

248. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

249. A notable exception is the Thirteenth Amendment which prohibits any form of slavery or involuntary servitude, whether public or private.

250. See MICHAEL AVERY ET AL., *POLICE MISCONDUCT: LAW AND LITIGATION* §§ 1:1-1:2 (3d ed. 2003).

251. *Baker v. McCollan*, 443 U.S. 137, 140 (1979) (initial inquiry under any Section 1983 suit is whether plaintiff has been deprived of constitutional right).

252. *West v. Atkins*, 487 U.S. 42, 48 (1988).

253. Section 1983 reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (2000).

254. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

255. 457 U.S. 922 (1982).

256. For deprivations of rights secured (or incorporated) by the Fourteenth Amendment, the plaintiff must also show state action. *Id.* at 924.

Amendment.²⁵⁷ The *Lugar* Court spelled out an approach for determining if private conduct depriving an individual of her constitutional rights was attributable to the state:

the deprivation must be caused by the exercise of some right or privilege created by the State . . . [and] the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.²⁵⁸

Security guards and police officers working for private entities, licensed as special police officers and granted police powers, may be found to be acting under color of law.²⁵⁹ However, some courts have ruled that special police status alone does not establish color of law and that the imposition of liability depends on whether the officers were performing a “public function”—one traditionally performed for the public good by the state. The Supreme Court has been clear that the scope of public functions is limited, reaching only activities that have been “traditionally the exclusive prerogative of the State.”²⁶⁰ The

257. *Id.* at 935. It should be noted that “state action” and action “under color of law” are not completely identical: while all state action occurs under color of law, not all action under color of law will qualify as state action. *Id.* at 935 n.18. Several doctrinal variations exist for determining if private actions constitute “state action.” Essentially, these tests are theoretical and have provided little practical assistance in holding private security guards accountable. The Supreme Court’s record in finding no state action in such cases has been consistent and clear—it repeatedly distinguishes precedent in order to avoid finding state action on the part of private actors. See Jody Freeman, *Private Role in Public Governance*, N.Y.U. L. REV. 543, 576 (2000). The nexus test, symbiotic relationship test, joint action test, state compulsion test, state involvement test, joint participation test, and public function test have only rarely resulted in the Supreme Court holding private officers liable under Section 1983. See LYNNE WILSON, *PRIVATE POLICE VIOLENCE AND THE SCOPE OF SECTION 1983*, at 27-28 (Nat’l Police Accountability Project, Research Paper), available at http://www.nlg.org/npap/research_papers/LWprivatepolice.wpd (citing *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980) (private officers liable if “willful participant in a joint action with the state or its agents”) and *Davis v. Murphy*, 559 F.2d 1098 (7th Cir. 1977) (fireman willing participant and acting in concert with police)).

258. *Lugar*, 457 U.S. at 937.

259. See *Williams v. United States*, 341 U.S. 97 (1951); *Thompson v. McCoy*, 425 F. Supp. 407 (D. S.C. 1976); AVERY ET AL., *supra* note 250, § 1:2.

260. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)). See also *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). In *Flagg Brothers v. Brooks*, a warehouseman had a lien on goods stored with him to cover unpaid storage charges. *Id.* at 153. He sold the goods and the owner claimed that due process was required because the resolution of dis-

Court has found two functions are exclusively governmental: running elections²⁶¹ and running a town.²⁶² The Court has not established what constitutes "traditional exclusivity" with respect to police protection, although some opinions recognize police activities as exclusively a state function.²⁶³

A private defendant, "jointly engaged with state officials in the challenged action, [is] acting 'under color' of law."²⁶⁴ The Supreme Court held in *Dennis v. Sparks*²⁶⁵ that the proper test for determining whether a private party is liable under Section 1983 is whether the party was "a willful participant in joint action with the State or its agents."²⁶⁶ In *Adickes v. S.H. Kress & Co.*,²⁶⁷ the Court held that the involvement of a policeman in an alleged conspiracy provided the necessary state action to prove a violation of Fourteenth Amendment rights entitling the petitioner to relief under Section 1983.²⁶⁸ In *Adickes*, the Court reasoned that if the state compels the performance of unconstitutional practices, the fact that the practice is carried out by a private actor rather than a public actor should not preclude liability.²⁶⁹

putes is a "public function." *Id.* at 157-58. The Court held that "the settlement of disputes between debtors and creditors is not traditionally an exclusive public function." *Id.* at 161. Justice Rehnquist mentioned "education, fire and police protection, and tax collection" as being traditionally exclusive, but did not write whether government might delegate performance of such functions to private entities and thus avoid Fourteenth Amendment restrictions. *Id.* at 163-64.

In *Yeager v. City of McGregor*, 980 F.2d 337 (5th Cir. 1993), the Fifth Circuit Court of Appeals found that a volunteer fire company was not performing an exclusive government function for two reasons: (1) state law in Texas did not compel the city to establish a fire department, even though it allowed it; and (2) fire fighting is not generally an exclusive government function due to the existence of a variety of private sector fire fighting alternatives. *Id.* at 340-41.

261. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 268 U.S. 73 (1932).

262. *Marsh v. Alabama*, 326 U.S. 501 (1946).

263. *Gimore v. City of Montgomery*, 417 U.S. 556, 574 (1974).

264. *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980). The court in *Murray v. Wal-Mart, Inc.*, 874 F.2d 555 (8th Cir. 1989), found that store security guards acted under color of law. *Id.* at 558-59. The store manager testified that the store's practice was to work with police in prosecuting shoplifters—guards notified and asked for assistance from police, the guards were also police department employees and state law permitted merchants to detain suspected shoplifters for a reasonable period of time. *Id.* at 559.

265. 449 U.S. 24 (1980).

266. *Id.* at 27.

267. 398 U.S. 144 (1970).

268. *Id.* at 150-52.

269. *Id.* at 170-71.

A. Equitable Relief for Unconstitutional Customs and Practices

An important means of addressing civil rights abuses is to bring "custom or practice" claims against municipalities. In municipalities where police departments cooperate with private police, custom-or-practice suits are an especially effective way to try to limit future harms. Under *Monell v. Department of Social Services*,²⁷⁰ municipalities may be held liable for customs, practices, or policies that repeatedly place police officers in situations that may violate the constitutional rights of citizens. Such lawsuits, also known as "pattern and practice" suits, have been successful in holding municipalities accountable for poor policies and requiring the policies be changed.

Custom is defined as a "widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law,"²⁷¹ even absent formal written policy or absent official policymakers' actual knowledge of the practice:

"[The] 'custom and usage' [in question will] be attributed to a municipality when the duration and frequency of the practices warrants a finding of either actual or constructive knowledge by the . . . governing body [or policymaker with responsibility for oversight and supervision] that the practices have become customary among its employees"²⁷²

Constructive changes frequently occur when government agencies are forced to defend their policies in court. Affirmative litigation not only results in judgments holding certain practices unconstitutional, but also serves to raise public awareness of such unlawful police activities. Examples of laws governing police department policy held unlawful include a Tennessee statute allowing police officers to fire their weapons at individuals fleeing from police, whether or not a threat was posed.²⁷³ Another example is failure to train police officers. In *City of Canton v. Harris*,²⁷⁴ the Court found that a municipality must be deliberately indifferent to the rights of individuals coming into contact with its officers in order to be liable.²⁷⁵ The Court held that deliberate indifference may be evinced by failure to train employees to handle recurring situations with constitutional implications when that failure actually results in a violation of civil rights.²⁷⁶ Failure to train may also be found when a municipality does

270. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

271. *McTigue v. Chicago*, 60 F.3d 381, 382 (7th Cir. 1995) (citations omitted).

272. AVERY ET AL., *supra* note 250, § 4:19 (quoting *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987)).

273. *Tennessee v. Garner*, 471 U.S. 1, 15-16 (1985).

274. 489 U.S. 378 (1989).

275. *Id.* at 388-89.

276. *Id.* at 390.

not provide additional training after learning of a pattern of unconstitutional police practices.²⁷⁷

Municipal liability has been found in several kinds of practices involving public police cooperation with private entities performing law enforcement-type activities. An unconstitutional custom was found when private parties hired police officers to accompany them in serving process in civil actions and to stay on the premises while the private actors carried out seizures.²⁷⁸ Municipal liability was also found in a policy allowing police to arrest individuals, without conducting any additional investigation, solely on the word of merchants who suspected them of shoplifting.²⁷⁹ Another policy involving public/private cooperation permitted private clubs to essentially act as law enforcement, resulting in a suspect being beaten to death while in the custody of a bar owner.²⁸⁰

As litigation against private security companies increases, the complexities of private/public police cooperation may give rise to pattern and practice lawsuits against private security companies. In order to effect systemic improvements to the private security industry and to the manner in which public and private police cooperate, litigators should seek declaratory and equitable relief, in addition to monetary damages, in pattern and practice cases. Equitable remedies should seek to address the underlying problem. The relief sought can include improved mandatory training, better screening and hiring practices, and improved supervision for private security personnel. If requests for equitable relief—either injunctions or declaratory judgments—become common practice, over time the private security industry may take responsibility, either through compliance with court orders or as a means of avoiding further litigation, for improving training, hiring, and supervision of all personnel who have direct contact with the public. Equitable relief is especially appropriate when there is a threat of continuing conduct that violates citizens' rights. When a practice or custom of police exists and poses a threat of future injury, a request for an injunction or declaratory judgment should be made a standard part of the complaint.²⁸¹

Courts have imposed equitable relief on cities whose police departments systematically engage in unconstitutional patterns and practices. In 1994 Congress gave the federal government the authority to investigate cities or towns whose police forces were exceeding or abusing their authority. With passage of the Violent Crime Control and Law Enforcement Act, the U.S. Attorney General may file a federal lawsuit aimed at ending unconstitutional police patterns

277. *Id.* at 390 n.10.

278. *Open Inns, Ltd. v. Chester County Sheriff's Dep't*, 24 F. Supp. 2d 410, 429-30 (E.D. Pa. 1998).

279. *Lusby v. T.G. & Y. Stores, Inc.* 749 F.2d 1423 (10th Cir. 1984), *vacated by* 474 U.S. 805 (1985).

280. *Horton v. Charles*, 889 F.2d 454 (3d Cir. 1989).

281. *AVERY ET AL.*, *supra* note 250, § 15:1.

and practices.²⁸² The Act included a provision under which the Department of Justice can sue for declaratory and equitable relief if any governmental authority or person acting on behalf of any governmental authority "engage[s] in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."²⁸³

Pattern and practice lawsuits, as well as consent decrees (judicial orders spelling out the terms of an agreement between parties), are considered an essential part of effecting large-scale institutional reform in police departments. Former U.S. Assistant Attorney General John Dunne, for example, is on record as supporting pattern and practice suits, noting that consent decrees are an effective means of forcing high-level police officials to make a commitment to reform.²⁸⁴ Human Rights Watch, in its report *Shielded from Justice: Police Brutality and Accountability in the United States*,²⁸⁵ and in a letter to the Department of Justice, called pattern and practice suits "essential tools to improve police behavior and oversight."²⁸⁶

In 1996 the Department of Justice in fact initiated several such federal pattern and practice investigations of police departments which resulted in agree-

282. Section 210401 of the Violent Crime Control and Law Enforcement Act of 1994, reads:

Sec. 210401. CAUSE OF ACTION.

(a) UNLAWFUL CONDUCT.—It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) CIVIL ACTION BY ATTORNEY GENERAL.—Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

H.R. 3355, 103rd Cong. (1994).

283. 42 U.S.C. § 14141 (2000).

284. ALEXIS AGATHOCLEOUS & HEATHER WARD, VERA INST. OF JUSTICE, PROSECUTING POLICE MISCONDUCT: REFLECTIONS ON THE ROLE OF THE U.S. CIVIL RIGHTS DIVISION 17 (1998).

285. HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES (July 1998).

286. *Id.* Letter from Human Rights Watch to Assistant Attorney General Bill Lann Lee (Feb. 14, 2000), available at <http://www.hrw.org/press/2000/03/nyr314.htm>.

ments with local police departments around the country.²⁸⁷ The first such consent decree was with the City of Pittsburgh, which had been plagued by a great mistrust of police, especially within the black community, since the 1960s.

In the 1990s, mistrust of Pittsburgh police was fueled by several high-profile incidents of police misconduct.²⁸⁸ In 1995, police killed two black men in custody.²⁸⁹ In another incident, police fired fifty-one bullets into a civilian, killing him.²⁹⁰ Yet another man was stopped by police while driving in the suburbs and was then beaten and suffocated by the officers.²⁹¹ These incidents occurred during a period of internal changes within the police department.²⁹² From 1994-1995, then Mayor Sophie Masloff created incentives for older officers to retire.²⁹³ Vacancies were filled by mostly young, inexperienced white male officers, leaving very few veteran officers to supervise.²⁹⁴ Adding to this, in 1991 the mayor had slashed the budget of the investigatory office for police accountability and filled vacancies with police officers rather than civilians.²⁹⁵

The United States Justice Department's Civil Rights Division looked into allegations of systemic police misconduct in Pittsburgh and negotiated a five-year consent decree, instituting reforms aimed at curbing violative practices.²⁹⁶ A federal judge lifted most of the oversight impositions in 2002 with the exception of those governing the Office of Municipal Investigation that looks into allegations of police misconduct.²⁹⁷ The City acknowledged that the Office needed to clear a backlog of cases and agreed to clear the backlog, not allow another backlog to develop, and maintain a computerized database to track claims of misconduct and investigations.²⁹⁸ In addition, the City agreed to report monthly to a court-appointed auditor and to ensure that open case files

287. HEIDI BOGHOSIAN, *THE ASSAULT ON FREE SPEECH, PUBLIC ASSEMBLY, AND DISSENT: A NATIONAL LAWYERS GUILD REPORT ON GOVERNMENT VIOLATIONS OF FIRST AMENDMENT RIGHTS IN THE UNITED STATES* 14 (2004).

288. ROBERT C. DAVIS ET AL., *VERA INSTITUTE OF JUSTICE, TURNING NECESSITY INTO VIRTUE: PITTSBURGH'S EXPERIENCE WITH A FEDERAL CONSENT DECREE* 3-8 (Sept. 2002), available at http://www.vera.org/publication_pdf/180_326.pdf.

289. *Id.* at 5.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 3-4.

294. *Id.* at 4.

295. *Id.* at 5.

296. *Id.* at 7-8; *United States v. City of Pittsburgh*, No. 97-0354 (W.D. Pa. Apr. 16, 1997) (consent decree), available at <http://www.usdoj.gov/crt/split/documents/pittssa.htm>.

297. Torsten Ove, *Judge Lifts U.S. Oversight of City of Pittsburgh Police*, *PITTSBURGH POST-GAZETTE* (Sept. 14, 2002), available at http://www.post-gazette.com/neigh_city/20020914decree0914p2.asp.

298. *Id.*

contain adequate information for the auditor to determine if the Office is in compliance with the consent decree.²⁹⁹

In 1995, an investigation of police misconduct in Philadelphia's 39th District revealed startling evidence that police officers routinely lied while testifying in court.³⁰⁰ Six officers were convicted and 160 criminal convictions were overturned.³⁰¹ The National Association for the Advancement of Colored People (NAACP), the Police-Barrio Relations Unit, and the American Civil Liberties Union of Philadelphia threatened to bring a class action alleging that the City of Philadelphia condoned systemic police practices of violating the civil rights of citizens.³⁰² In 1996, the City entered into a settlement calling for a system of reforms aimed at ensuring that complaints against police would be properly investigated; the creation of an Integrity and Accountability Office was part of a system of reforms aimed at reducing police misconduct.³⁰³

The 1996 settlement of *NAACP v. City of Philadelphia*³⁰⁴ resulted in an agreement allowing the ACLU to monitor internal records to determine the Philadelphia Police Department's progress in implementing systemic reforms.³⁰⁵ As of 2000, the lawyers completed four reports analyzing pedestrian and car stops as well as internal affairs and narcotics investigations.³⁰⁶ A change in police reporting systems was negotiated in response to reports on racially discriminatory law enforcement stops.³⁰⁷ In their fifth annual report, however, the monitors noted that the department failed to cure the illegal stopping of pedestrians and drivers without reasonable suspicion and the illegal targeting of African-Americans.³⁰⁸

In 1999, a federal class action lawsuit was filed on behalf of all African-American residents of Hobbs, New Mexico, alleging a pattern and practice of unlawful searches and seizures, physical abuse, and harassment by the Hobbs Police Department.³⁰⁹ Two years after the suit was filed, the City of Hobbs

299. *Id.*

300. Gwen Shaffer, *Internal Affairs*, PHILADELPHIA CITY PAPER, Jan. 8-15, 1998, available at <http://citypaper.net/articles/010898/cov.cops.shtml>.

301. *Id.*

302. Carlton L. Johnson, *Philadelphia Law Department Civil Rights Unit Serves as National Model*, PHILLY SOLICITOR (Office of The City Solicitor, Philadelphia, Pa., Vol. 2, Issue 1).

303. Shaffer, *supra* note 300.

304. NAACP v. City of Philadelphia, No. CV-96-6045 (E.D. Pa. filed Sept. 4, 1996).

305. Shannon P. Duffy, *Police Monitors: Race Still a Factor in Improper Stops*, LEGAL INTELLIGENCER (Dec. 8, 2000), available at <http://www.waste.org/~roadrunner/writing/camilo/racial.html>.

306. *Id.*

307. *Id.*

308. *Id.*

309. Johnson v. City of Hobbs, No. CIV 99-348 (D.N.M. June 2, 1999), available at <https://www.nmcourt.fed.us/isys/ISYSQuery/IRL681.tmp/3/doc>.

approved a stipulated class action agreement pledging to improve police practices.³¹⁰ The agreement requires the police department to improve its internal reporting procedures, racial data collections, investigation of officer misconduct and training and discipline, as well as improve its procedures regarding searches, seizures, arrests, detentions, and the use of force.³¹¹ Police officers will receive a minimum of forty hours of in-service training in the areas of use of force, integrity, ethics, and cultural diversity.³¹² An independent monitor/mediator, UCLA Police Chief Clarence Chapman, will ensure that the stipulated agreement is implemented for a three-year period.³¹³ He is mandated to review statistical data, citizen complaints, and reports and make recommendations about remedial measures needed to address any problems raised in complaints and reports.³¹⁴

In *Daniels v. City of New York*,³¹⁵ a class action under Section 1983 against the New York City Police Department (NYPD), the plaintiffs asked for an injunction barring the NYPD's Street Crime Unit (SCU) from its policy, practice, and custom of unconstitutionally stopping and frisking individuals based on their race and/or national origin without reasonable suspicion of criminal activity.³¹⁶ In 1994, then-Mayor Rudolph Giuliani and then-Police Commissioner William Bratton directed the SCU—whose slogan was “We Own the Night,”—to launch an aggressive campaign to rid the streets of illegal weapons.³¹⁷ The Unit focused on stopping and frisking residents of lower-income neighborhoods, resulting in allegations of minority harassment.³¹⁸ The SCU gained national attention in 1999, when four of its white officers fired nineteen bullets into Amadou Diallo, who was unarmed.³¹⁹ In addition to damages, plaintiffs sought a judgment declaring the practice unconstitutional and also sought a court order eliminating the SCU or barring it from making any more improper stop-and-frisks.³²⁰

310. Stipulated Agreement at 2-3, Johnson (No. CIV 99-348).

311. *Id.* at 27-28.

312. *Id.*

313. *Id.*

314. On February 12, 2003, lawyers with the American Civil Liberties Union of New Mexico filed the third and final motion against the City of Hobbs and its Police Department for non-compliance with the stipulated agreement. Press Release, American Civil Liberties Union, ACLU Takes Action Against Hobbs Police Department for Repeated Violations of Negotiated Agreement (Feb. 12, 2003), *available at* <http://www.aclu-nm.org/news-press-2003-02-12.htm>.

315. 138 F. Supp. 2d 562 (S.D.N.Y. 2001) (mem.).

316. *Daniels v. City of New York*, 198 F.R.D. 409, 411 (S.D.N.Y. 2001).

317. TIMOTHY LYNCH, “WE OWN THE NIGHT:” AMADOU DIALLO’S DEADLY ENCOUNTER WITH NEW YORK CITY’S STREET CRIMES UNIT 4-5 (Cato Inst. Briefing Paper No. 56, Mar. 31, 2000).

318. *Id.* at 3.

319. *Id.* at 6.

320. *Daniels v. City of New York*, 198 F.R.D. 409, 412 n.2 (S.D.N.Y. 2001).

While the case was still in progress, the NYPD disbanded the Street Crimes Unit.³²¹ In 2003, a settlement was reached incorporating the order prohibiting racial profiling by the NYPD and making it legally binding on all New York City police officers.³²² The settlement also included a requirement that the NYPD audit officers and supervisors who conduct stop-and-frisks to determine if they are based on reasonable suspicion and if they are being documented.³²³ Audit results are to be given to plaintiffs' counsel.³²⁴ An independent auditor will conduct a quarterly review of all stop-and-frisks to monitor for compliance.³²⁵

The strategy employed in these public police cases may also be used to limit municipal police forces' reliance on private security forces, and to impose more stringent standards for the selection, training, and oversight of private security forces on whom municipalities now rely. As the preceding discussion suggests, requests for equitable relief against private security forces would be most likely to succeed where the municipality has a custom of reliance on and cooperation with the private security force.

*B. Sample for Seeking Equitable Relief:
Proposed Standards for Selection, Training,
and Licensing of Private Security Officers*

There are several models of training guidelines for litigators to modify or borrow from when seeking equitable relief in the form of mandated training for private police. In 2001, ASIS International, an organization for security professionals worldwide, formed the ASIS International Commission on Guidelines to respond to the need for security guidelines in the United States.³²⁶ In October 2003, the ASIS Commission on Guidelines approved a draft of private security

321. The street crime unit was dismantled on April 9, 2002. Alice McQuillan, *Street Crime Unit Axed: Mayor Says Teams' Demise Not Diallo-linked*, N.Y. DAILY NEWS (Apr. 10, 2002), available at <http://www.nyfinestnews.com/streetcrime1.html>. Following the fatal shooting of Amadou Diallo in 1999, the street crime unit lost most of its autonomy as it underwent several reorganizations. *Id.* In 1999, the unit was divided into eight parts. *Id.* With the 2002 disbanding, most of the unit's officers were transferred to plainclothes anti-crime teams or precinct detective squads. *Id.*

322. Stipulation Agreement at 5 & exhibit A, *Daniels* (No. 99 Civ. 1695).

323. *Id.* at 5-6.

324. *Id.* at 6.

325. *Id.*

326. ASIS International, Guidelines, available at <http://www.asisonline.org/guidelines/guidelines.htm> (last visited Mar. 9, 2005). ASIS had participated in the Law Enforcement Assistance Administration National Advisory Committee on Criminal Justice Standards and Goals in 1976. See ASIS INT'L, ASIS COMM'N ON GUIDELINES, PRIVATE SECURITY OFFICER SELECTION AND TRAINING GUIDE 4 (2003), available at <http://www.asisonline.org/guidelines/guidelinesprivate.pdf>.

officer selection and training guidelines.³²⁷ Recommendations for training include a requirement that each private security officer receive forty-eight hours of training for the first one-hundred days of work, broken into eight pre-assignment, sixteen post-assignment and twenty-four additional post-assignment.³²⁸ Thirty-four training topics are listed, ranging from blood-borne pathogens, laws of evidence, and use of force and force continuum, to diversity in the workplace, customer service, and public relations.³²⁹

An earlier set of guidelines for standardizing private security officer selection, training, and licensing was developed by the Private-Sector Liaison Committee, with representatives of the National Sheriffs' Association, the National Association of Security Companies, the National Association of Security and Investigator Regulators, and the American Society for Industrial Security.³³⁰

The Private-Sector Liaison Committee guidelines call for screening out anyone convicted of, or who pleaded guilty or *nolo contendere* to, a felony in any jurisdiction.³³¹ This is based on the likelihood that security officers may be in contact with active crime scenes.³³² Also screened is anyone who has been convicted of, or pleaded guilty or *nolo contendere* to, "a misdemeanor involving moral turpitude, acts of dishonesty or acts against governmental authority, including the use and/or possession of a controlled substance" in the past seven years; and "to any crime in any jurisdiction involving the sale, delivery, or manufacture of a controlled substance."³³³

The guidelines also recommend that candidates should not have been "[d]eclared by any court to be incompetent by reason of mental disease or defect."³³⁴ Applicants for security guard positions must submit two sets of fingerprints and a statement of conviction of crimes for a state criminal record check and an FBI criminal history check.³³⁵ The candidates must supply prior employment history.³³⁶ The employer should make a reasonable attempt to verify the past seven years of employment history and check three personal references.³³⁷ Applicants must pass a drug screen and unarmed guards must be at least eighteen years of age; armed security officers must be at least twenty-one years-old.³³⁸

327. *Id.* at 1.

328. *Id.* at 11.

329. *Id.*

330. Thomas Seamon, IACP's Private Sector Liaison Committee: Partners in Public Safety, *POLICE CHIEF MAG.* (June 1999), at 17.

331. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 26, at 5.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

The Private-Sector Liaison Committee recommends three classifications for licensing and certification.³³⁹ They divide into Class I for Security Officer and Unarmed Alarm Responder, Class II for Armed Security Officer/Armed Alarm Responder, and Class III for Armored Car Security Officer.³⁴⁰ The guidelines provide for temporary security officer permits that may be issued to individuals meeting the qualifications and selection criteria if the employer has provided the state licensing board with the required application for a registration permit.³⁴¹ Employers must also include a "statement from a certified trainer [acknowledging] completion of [all] pre-assignment training requirements."³⁴²

Individuals applying for class II and III licenses or certification must be at least 21 years old, must "[s]ubmit a statement by a state-recognized firearms instructor verifying that the firearms training and range qualification requirements of these guidelines have been" met, and must also pass annual range qualification tests certified by a state-recognized firearms instructor.³⁴³ Licenses should be renewed every two years and regulators should conduct state and national checks again at the time of license renewals.³⁴⁴

CONCLUSION

Law enforcement and the private security industry are intimate partners in nearly all facets of police services in the United States. Virtually indistinguishable from municipal police in certain instances, improperly trained and supervised private security guards performing public policing functions frequently expose the public to a risk of harm. Traditional tests to find state action and hold private actors accountable for constitutional violations are ill-defined and usually fail in private police cases. By virtue of similarity of function and activities, and of private officers' availing themselves of the vestiges of police uniforms, badges, and even weapons—each of which contributes to the implied state-sanctioned use of coercion and force—security personnel and private contractors should be subject to training as thorough and rigorous as that of public police.

As the private security industry continues to grow, and the dependency of law enforcement on privatized functions increases, litigation against private security companies will continue. When bringing lawsuits against private security companies, litigators should seek equitable relief in the form of improved mandatory training for private security personnel. If requests for equitable relief become common practice, over time the private security industry may take responsibility for improving training, hiring, and supervision of all personnel who have direct contact with the public.

339. *Id.* at 6.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*