PRIVATE SECURITY AND THE LAW

THIRD EDITION

CHARLES NEMETH

Private Security and the Law

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PRIVATE SECURITY AND THE LAW, THIRD EDITION

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To Smiling John and Mighty Joe, twin sons who continue to be not only gifts, but also young men I am deeply proud of.

To Saint Thomas Aquinas

It is lawful for any private individual to do anything for the common good, provided it harm nobody: but if it be harmful to some other, it cannot be done, except by virtue of the judgment of the person to whom it pertains to decide what is to be taken from the parts for the welfare of the whole.

Summa Theologica, II–II, Question 64, Article 3

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Acknowledgments

As this text commences the third edition, I continue to marvel at its staying power. At first glance, the subject matter appears a little too esoteric and not as dramatic as other criminal justice curricula. Yet, despite this, the clamor for this type of work remains constant. The industry continues its frenetic unfolding and the evolution of privatized criminal justice services goes on unabated. Dramatic growth everywhere—prisons, courts, policing, community services—all are drawn into the world of privatization. How the law works its way in this maze, and especially how the law as we have come to expect in public criminal justice, is still mysterious in security. Like Teflon, private security resists the same regimen that its public counterparts labor under each day. Edifying and explaining this and other mysteries remain this text's primary aim.

Naturally, my endeavors require the support of numerous individuals. At Butterworth-Heinemann, the assistance of Mark Listewnik, the Acquisitions Editor for Security Books, and the project manager for production, Kyle Sarofeen, was both personable and competent. Butterworth was a joy to work with.

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As in all my productions, family drives the enterprise. I know I owe the deepest of gratitudes to my beloved family, Jean Marie, Eleanor, Stephen, Anne Marie, John, Joseph, Mary Claire, and Michael Augustine.

Finally, while I fully recognize this final result as the product of man, I am far more certain that it is more the product of grace.

Charles P. Nemeth
Pittsburgh, PA

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1

Historical Foundations of Private Security

INTRODUCTION: THE CONCEPTS OF SELF-HELP AND SELF-PROTECTION

Historically, the concepts of self-help and self-protection are considered foundational to the enforcement of law and the assurance of social order. Public safety and the policies behind it, whether it is private or public in design, are borne out of influence or environment. Like any other type of institution, an evolution over time occurs. Any clear and accurate assessment of private security or public sector justice requires an examination of its historical underpinnings. These principles, derived under English law and adapted to American jurisprudence, define what is socially and justifiably acceptable in terms of private and communal protection of life and property. It was in the area of protection of one's property that English law first recognized the right of self-help. A man's home was indeed his castle, if he was fortunate enough to possess one. To protect his property and life, a person was entitled to use even deadly force.

Self-help and self-protection are historical legal traditions that can be traced to the earliest civilizations. For example, the maintenance of law and order in the Greek and Roman empires were primarily the function of the military and its command structure. Order was maintained in the empire not because of some formal entity, but because the power base was rooted in military authority. "Although the word 'police' has a classical origin—the Greek *politeuein* 'to act as a citizen of a polis'—the metropolitan police forces we are accustomed to did not exist in the ancient world. A few cities had some form of institutionalized keepers of the peace—'magistrates of the peace'—but municipal police forces are a nineteenth century phenomenon: the British 'bobbies' named for the Prime Minister Robert Peel appear in the 1830s."[1] Upholding the law and the protection of private and communal property was, and is still considered, the responsibility of the individual and the community. The law is most effectively served by those

who serve themselves. "An unwritten tenet of democracy places enforcement of the law within the domain of ordinary citizens . . . under the principles of common law any man still possesses wide authority to protect himself, his family, and to some degree the general peace of the land."[2]

Although self-help in the protection of one's life and property was socially acceptable, other factors often dictated the practice as the only viable form of law enforcement. For the majority of European and American history, sparsely populated areas, rugged geography, and a strong distrust of any proposed national police organization forced individual citizens and communities to enact and enforce the law through the best available means. Oftentimes, private individuals acting on their own, or at the behest of communal interests, would be forced to take the law into their hands. This was best demonstrated in the tribal "blood feuds" of the Dark Ages. Order and protection was threatened by nomadic bands of rogues and barbarians, territorial fiefdoms, and blood feuds. Anguished communities were held captive by hordes of intruders.[3] Primitive justice centered on the retribution of wrongs:

> An injury done was primarily the affair of the party injured and of his kindred. It was for him and them to avenge the wrong on the wrongdoer and his kin, and to prosecute a "blood feud" against them until the wrong originally done was wiped out by retaliation.[4]

Although the self-help protection philosophy gave no clear-cut parameters as to what was fair and equitable justice, the origins of common law did develop from a notion of reasonable, nonlethal force in the protection of one's property. When criminal action threatened only property, the law did not condone the use of deadly, retaliatory force. The law rightfully considered human life more precious than mere property.[5]

The issue of self-protection did not, however, exclude the use of deadly force in the protection of life. To be a legitimate use of deadly force, the use of force had to be justifiable, and not disproportionate to the force threatened.[6] A person, with justifiable cause, could use force in defense of family and self, and also in the defense of others.[7] Under the feudal system, the relationship between lord and vassal resembled the present day system of contract security.

HISTORICAL FOUNDATIONS

The Middle Ages

Although modern law enforcement, security organizations, and duties were not initiated during the Middle Ages, an idea of the need and design for law enforcement and security did originate. It is important to understand the chaos and circumstances of Medieval England and Europe that

led to the establishment of private, self-policing forces. The vassal–lord relationship had developed a reciprocal self-help approach to the security of one's life and property. Life in feudal times centered on the manors and villages, each responsible for their own protection. Small villages provided their own citizen-police, centering on the ancient "hue and cry" by which the able-bodied men could be summoned to lend assistance when criminal acts occurred or a felon needed to be apprehended.[8] This proved effective, but only within the limited range of the feudal territory or lord's domain.

With each lord having his own system of security and no codified system of English law, the issue of national or regional security was a muddled mess of self-interests and conflicting jurisdictions. As the small manors of feudalism evolved into towns, villages, and eventually cities, the old system of self-help could not keep up with the rising crime rate.

From 1000 to 1300 A.D., the development of an ordered system of law enforcement began in England. The king was able to appoint *shire-reeves*, who had law enforcement responsibilities in English counties or precincts. "The shire-reeve seems to have developed from the king's reeve, the local official who looked after the king's business."[9] He was a royal representative, and it was intended that he would protect the royal interests if they conflicted with the local claims of anyone, including the lord of the county. Above all, the shire-reeve was still the chief officer of the county.[10] Within the manor, an appointed officer known as a "constable" was responsible for dealing with legal matters. Both the shire-reeve, later shortened to sheriff, and the constable were the forerunners of modern sworn police officers.

The system of English legal protection continued to expand and define itself more clearly. Under the Statute of Winchester of 1285 a system of "watch and ward" was established to aid constables.[11] This system was comprised of a justice of the peace, constable, constable's assistants, and night watchmen whose primary function was the care and tending of a designated area of a town or city known as a "ward."[12] Even today political subdivisions are often broken down into the ward structure. Regular patrols of citizens were established to stand watch nightly and to arrest criminals and strangers found wandering at night. When an offender was caught in a criminal act, the "hue and cry" was raised. It was then the duty of all men in the community, fifteen years and older, to rally at the scene and uphold justice. In addition, they were required by law to carry arms and form a *posse comitatus* to pursue criminals.[13] Maintaining the king's peace and enforcing the law remained a public responsibility.[14]

Although all men had the general duty and the right to make arrests, the constables and sheriffs had additional specific peacekeeping duties and powers. Unfortunately, the officers were ill-equipped to handle the urban growth that created cities with huge populations. Because constables were unpaid, ill-trained, and ill-equipped, English law enforcement was in dire straits. Lord Chancellor Bacon, in 1618, complained that constables were "of inferior stock, men of base conditions. . . ."[15] The towns and cities of England, especially London, fell into virtual anarchy because of the lack

and inadequacy of publicly appointed and underpaid professional peacekeepers. Unfortunately the bulk of the watchmen and constables lacked the essential qualities for success.[16] In his book, *Hue and Cry*, Patrick Pringle states:

> Such is our respect for institutions that when an established system breaks down we are quick to blame people and defend the system; but the lesson of history seems to be that systems must be made for people, because people cannot be made for systems. To be effective, any system—whether political, religious, economic, or judicial—must expect people to be base and selfish and venal.[17]

Due to the rising crime rate, and the inability of the poorly organized English system of law enforcement to effectively combat it, private persons and businesses developed their own means of protection. As towns and cities expanded, merchants and artisans banded together for mutual protection. In his book *On Guard*, Milton Lipson relates how

> guild members united to perform the duty of watching their contiguous property in the heart of these medieval towns, serving as watchmen themselves, later assigning their apprentices and thereafter hiring special guards. In these practices are the visible roots of both modern insurance and private security.[18]

The expanding trade and transportation of vital goods and services were temptations for criminals. It also demanded the need for protection of private interests, property, and self. Thus arose the concepts of proprietary and contract security. Throughout the sixteenth century, different kinds of police agencies were privately formed. Individual merchants hired men to guard their property and merchant associations created merchant police to guard shops and warehouses.[19]

The status of these private guards "was by no means uniform; some were sworn in as constables, while others continued in employment as private watchmen or guards. There were also no general scales of payment, rules of conduct, or assigned duties for these newly created private security forces."[20] These areas were solely under the discretion of the employer. The essence of private security was born in the chaos of the Middle Ages, especially that of the urban and commercial variety, but its essential definition of organization and duties was yet to come.[21]

Colonial America

The influence of the English culture and tradition in America is quite evident in our legal system, and was especially so in early colonial law enforcement. Colonial America incorporated the systems of sheriff, constable, and watch as its earliest forms of law enforcement. However, the

concept of a uniform police force was still far in the future. George O'Toole contends in his book, *The Private Sector*, that:

> police, public or private, are not one of America's oldest traditions: the Republic was nearly 70 years old before the first public force was organized, the infant nation had few laws to enforce, and the protection of life and property was largely a do-it-yourself matter in the tiny wilderness communities that made up the frontier.[22]

As in Medieval England and Europe, population and geographic factors in Colonial America favored a loosely structured communal law enforcement system. Generally, the sheriff served in unincorporated areas, the constables in towns and villages.[23] In Colonial America, the sheriff was charged with the execution of all warrants directed to him, both civil and criminal. He shared with other peace officers special powers of arrest without warrant, but did not serve as an important agent in the detection and prevention of crime.[24]

In 1607, the first constable was appointed in Jamestown, Virginia, becoming the first duly appointed law officer in the New World.[25] As in England, the constable's position was difficult to fill. His duties were many and varied, the pay was minimal, the hours long, and the prestige associated with the job was low.[26] The constable was, however, the main law enforcement officer for the local American government in the 1800s.[27]

The watch system in America was derived as colonists coming to the New World banded together for mutual safety and business protection.[28] The first night watch formed in Boston in 1634.[29] Serving as a watchman was the duty of every male citizen over the age of eighteen. The tour of duty usually began at 9:00 or 10:00 P.M. and ended at sunrise.[30] Like constables, finding men of high caliber to serve watch was difficult. The powers of the night watch were more limited than those of constables, and they had no policing power and limited arrest authority.[31]

Primarily, the early colonial need for security did not center on proprietary or commercial interests, but on the fear of fire, vagrants, and Indian attacks. As urban populations grew, the system of sheriffs, constables, and the watch proved inadequate in meeting law enforcement needs. The diversity of the original colonies did not promote any concept of uniform law enforcement practices or a national police. Even with urban congestion and a rising crime rate, little would change in American law enforcement. "Watchmen remained familiar figures and constituted the primary security measures until the establishment of full-time police forces in the mid-1800s."[32]

The seemingly unchanging organization of colonial American law enforcement was not so much a sign of social stability, but more likely a wariness of any public or national force controlled by a federal government. "The principle of states' rights had a profound and continuing impact upon law enforcement."[33] Americans, especially right after the American

Revolution, were leery of any federal entity that sought to control and administrate over state and local matters. Law enforcement and security, like other facets of life, were to be controlled by state and local government, which reflected the "states' rights" mentality of the age. Although local and state jurisdictions might have felt politically comfortable with the watch system of security, other factors necessitated a change in American security practices. As in England, the old systems of law enforcement became outdated and inadequate in facing the security problems of the growing nation. "The basic deficiencies of the watch and constable systems rendered them ill-prepared to deal with the unrest that occurred in many American cities during the first half of the nineteenth century."[34] New methods of organizing and defining public and private law enforcement were needed to combat urban problems.

Law Enforcement in the Industrial Revolution

The first half of the nineteenth century saw a rise in urbanization, crime, and the need for better law enforcement.[35] Private security existed, but only on a small scale for business and merchant protection. Although private police greatly contributed to keeping the peace, it became obvious, particularly in the cities, that a centralized public police department was a necessity. In England, an early version of public policing was affectionately labeled, "Bow Street Runners," since their activities emanated from London's Bow Street in Covent Garden. A magistrate's court would instruct these early "police" types to run after and pursue criminals.

The first legitimate police force would arise in England. The *Metropolitan Police Act*, passed in 1829 under the sponsorship of Sir Robert Peel, created a carefully selected corps of policemen trained and organized in a military fashion.[36] Sir Robert Peel, the oldest son of a wealthy cotton manufacturer, was educated at Harrow and Oxford University.[37] Peel's system became the primary model for efficient urban public policing. Peel, widely known as the "Father of Policing," recognized the need for a more effective police force to replace the old watch and ward system as well as the limited capabilities of the Bow Street Runners. Peel believed that by organizing a group of professionally trained full-time police officers, he would be able to reduce the level of crime through proactive prevention techniques instead of relying solely on prevention through punishment. To accomplish this evolutionary process, Peel promulgated new rules for police operations, some of which are included below:

- To prevent crime and disorder.
- To recognize that the power of the police is dependent on public approval and respect.
- To secure the respect of the public means also securing the cooperation of the public.

- To seek and to preserve public favor by constantly demonstrating impartial service to law, without regard to the justice or injustices of individual laws, without regard to wealth or social standing; by exercise of courtesy and friendly good humor; and by offering of individual sacrifice in protecting and preserving life.
- To use physical force only when necessary on any particular occasion for achieving a police objective.
- To recognize always the need for strict adherence to police-executive functions.
- To recognize always that the test of police efficiency is the absence of crime and disorder.[38]

The Peelian model was extremely influential in nineteenth-century American law enforcement. "The riots of the 1840s provided an impetus for finding a more effective means of dealing with urban unrest."[39] The need for a unified public force would begin to override the self-interest protection provided by private security. However, both fields would continue to grow together, defining themselves as separate, yet cooperating, law enforcement sectors.

The early 1800s witnessed the birth of American policing as a viable peacekeeping force. New York City had started the rudiments of a police department in 1783, and by 1800 had established the first paid daytime police force. Daytime police forces were also started in Philadelphia (1833) and Boston (1838).[40] These early departments did not supplant the system of the watch but worked as the daytime counterpart. Since the day and night watches would prove inadequate in fighting crime, New York City became the first city to combine its day and night watches into a unified police force in 1844.[41] "Other large cities began to follow the lead—Chicago in 1851, New Orleans and Cincinnati in 1852, and Providence in 1864. The snowballing effect stimulated the modernization of American policing."[42]

The rapid development of the modern police force in no way sounded the death knell of private security. On the contrary, private security forces would continue to grow, expand, and complement other law enforcement agencies in fighting crime. Now, two arms of law enforcement were becoming more closely defined along public and private lines.[43]

Thus, by 1830 in England, and within a decade or so thereafter in the United States, the beginnings of a separation of the security function into two spheres of responsibility were taking place. Public police departments, with their sworn duties, were charged with maintaining law and order. The burden of security for private property and personal safety thereon had to be redefined. The world of private security was to be limited.[44]

With public police forces centering their efforts on the enforcing of law and order, private security would expand and grow as guardians of the corporate sector.

COMING OF AGE: PRIVATE SECURITY

Major factors which served as the impetus for the growth of the private security industry included the growth of the commercial sector, the strained administrations of public law enforcement agencies, and the great westward expansion of America in the 1840s and 1850s.

Lack of an Effective Public Force

It became apparent that with the growth of the private business and commercial sector in the United States during the 1800s, the newly created public police agencies were unable or unwilling to provide for their security needs. Public police organizations had little experience or capabilities in handling wide-scale security protection services. With the newly created sworn police serving mainly in metropolitan areas, their jurisdictions were strictly limited to their own territory. Local sheriff and watch were also restricted to local, county, or state lines.[45] Big business and industries found criminal problems surpassing the jurisdictional and functional capabilities of the public police. With interests that often covered vast areas and multiple jurisdictions, businesses and commercial associations began to hire their own protective sources.

Movement of Goods and Services

The transportation industry was instrumental in developing the private security industry. Henry Wells and William G. Fargo had established the American Express Company and Wells Fargo in the 1850s as protective services for commercial shipments both in the East and the Far West. Wells Fargo security measures included the use of armed guards, ironclad stagecoaches, and an expert investigative service.

The railroad industry also had substantial security needs. As the greatest source of commercial transportation of the nineteenth century, railroads were also susceptible to criminal activity. Prior to the Civil War, the railroads contracted with private detective companies, namely the Pinkertons. After the war, the trend was toward developing company-owned internal police forces. The railroad police became instrumental in pursuing train robbers, watching out for petty theft and embezzlement, and securing the trains from unwanted vagrants.[46] On industry-wide problems, the security forces of different railroad companies often cooperated, increasing the security and efficiency of the industry as a whole. Railroad police, with their far-reaching jurisdictions and official powers, would represent the closest America would ever come to a national police force. During the latter half of the nineteenth century,

> only the railroad police agencies were with full police powers. In many areas, especially the West, the railway police provided the only security services until effective local government units were established.[47]

The Pinkerton Factor: Industrialization and Unionization

Allan Pinkerton started the first contract private security agency in America.[48] A Scottish immigrant and barrel maker by trade, Pinkerton had developed an interest in detective work and had been named the city detective of Chicago in 1849. In 1850, he formed his own North-Western Police Agency, the first private detective agency in America. Capitalizing on the rapid growth of the country's railroad industry, Pinkerton began to contract his security forces to protect the railroads of the Midwest. The Illinois Central, Michigan Central, Michigan Southern and Northern Indiana, Chicago and Galena Union, Chicago and Rock Island, Chicago, Burlington, and Quincy Railroads all utilized Pinkerton's protective services.[49] It was through his association with the railroad industry that Pinkerton met George B. McClellan, vice-president and chief engineer of the Illinois Central Railroad, and later commander in chief of the Union Army during the Civil War. With the outbreak of the Civil War, McClellan would take Pinkerton and his detectives along as the United States' first military intelligence unit.

Pinkerton's early success helped define the role and abilities of the private security industry.[50] For more than 50 years, the "Pinks" were the only officers involved in interstate activities such as the provision of security for transcontinental railroads and multilocation industrial concerns.[51] Pinkerton had definitely developed into the biggest protective service in the United States, but it would be in post-Civil War America where the greatest test for the fledgling industry would take place.

> Post-war industrial expansion, fed by an increasing flow of immigrants, also helped Pinkerton's business. With growth came labor unrest and movements to organize workers. In the strife that ensued, the use of private security guards to combat efforts to unionize became commonplace. Pinkerton and his company were used by industry, especially railroads and mining groups.[52]

While Pinkerton officers were serving as the protectors of American railroads and as, basically, the only uniform system of law in the West, labor-management conflicts developed in the latter decades of the nineteenth century in the East. As America was immersed in its Industrial Revolution, a growing consensus of American laborers, usually immigrants who toiled in the mines and mills, worked for the development of labor representation. In many instances, management refused to bargain with labor organizations and would send in strike-breakers to dismiss the mobs. On the other hand, labor unions and secret societies often used unethical tactics in their determination to change unfair labor practices.

Pinkertons, Baldwin-Felts, and others were often hired by business management to disrupt and disband labor activities. In all, Pinkerton's agency would involve itself in over 72 labor-management disputes in the second half of the nineteenth century.[53]

One of the first labor disputes the Pinkerton Company contracted out for involved the Molly Maguires. The Molly Maguires was a secret society that originated out of nineteenth-century Ireland, a country then racked by poverty and hunger. Their life in America had improved little as they toiled in the coal mines of northeastern Pennsylvania. Pinkerton used undercover agents such as James McParland, who lived and worked with the Molly Maguires under the assumed name Jim McKennon, from 1873–1886. It was McParland's subsequent testimony in a murder trial, changing certain important players in the organization, that effectively ended the Molly Maguires as an effective labor organization. At the same time in southern West Virginia it was the Baldwin-Felts Detective Service that was assigned by management to uphold justice and disband union experts in the coal mining towns.[54]

Another landmark labor-management dispute that involved the Pinkerton Agency was the Homestead Steel Strike of 1892.[55] In July of 1892, workers at the Carnegie Steel Company in Homestead, Pennsylvania went on strike, protesting a proposed pay cut set forth by Carnegie Steel's new manager, Henry Clay Frick. Frick cited poor business as the reason for the designed wage cuts. Instead of acquiescence to management's demands, the striking steel workers blockaded and fortified the steel plant. In response, Frick secretly ordered his hired Pinkerton men to regain control of the plant. As 300 armed Pinkerton guards attempted to sneak up the river side of the plant, an estimated 10,000 angry steelworkers confronted the Pinkerton force. In the intense battle that ensued, eight were killed (three Pinkerton officers and five steelworkers). The Pinkerton officers were surrounded, forced to surrender, and were physically escorted to the railroad station. The Homestead Massacre was a debacle that ultimately hurt the image of private security agencies, and for a time the Pinkerton Company. The name Pinkerton became synonymous with labor spying and strikebreaking during the late nineteenth and early twentieth centuries. Its image was so badly tarnished that a House Judiciary Subcommittee began a formal investigation of Pinkerton and the private security industry in 1892.

In 1893, the House passed the Pinkerton Law, which stated:

> an individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the government of the United States or the government of the District of Columbia.[56]

In the aftermath of the Pinkerton Law, Pinkerton announced it would no longer take sides in any labor disputes. Again, the roles and parameters of the private security industry were being redefined. Strikebreaking was out and labor surveillance within legitimate bounds was in.

Western U.S. Expansionism

While the labor disputes of the nineteenth century were an important watershed in the development of private security, they certainly did not signal a decline in the uses and demand for private security forces. Pinkerton and other private security forces were attaining a booming business in the as-yet unsettled frontiers of the American West. With Pinkerton controlling the security and investigative services of the railroads, and Wells Fargo controlling the stages, law enforcement in the towns and territories of the West was largely in the hands of sheriffs or private individuals. The ancient legal tenet of self-help saw its last vestiges of practice in the American West.

As the guilds and businesses had done in a previous age, western businessmen, traders, bankers, and ranchers banded together for mutual benefit. "Business sponsorship of law enforcement started with the earliest days of the frontier . . . railroads, ranchers, mining concerns, oil field operators—all established their own investigating and law enforcement agencies."[57]

In some cases, private security was provided by an association of businesses in the same area of commerce. A system of Merchant Police was formed in the towns and cities to safeguard mercantile interests. Cattle ranchers in the West joined forces to create associations that frequently employed agents to prevent and investigate cattle rustling.[58] These detectives, although paid by private groups, were often given official state or territorial recognition, and sometimes were given powers as official public law enforcement officers. Detective forces, each specializing in various forms of business and trade, appeared on the western scene in increasing numbers. F. Prassel's work, *The Western Peace Officer*, described their purpose:

> At their worst, such security organizations constituted a combination of the protection racket and violence for hire. . . . At its best, a private detective force could provide real services with integrity and discretion.[59]

By contemporary standards, western justice and law enforcement had less regard for procedural due process. Vigilantes, private individuals with no formal authority acting in self-interest or in the interests of a specific group, served as enforcers. The first American vigilantes, the South Carolina Regulators, appeared in 1767, but only really flourished after 1850.[60] Both the Los Angeles and San Francisco police departments originated as volunteer vigilante forces.[61] "The true vigilante movement was in social conformance with established procedures and patterns of structural leadership."[62] This was not often the case, as abuses of legal power became commonplace. Wyoming had such a distrust of private security forces as to adopt a statute in 1889, which stated:

> No armed police force, or detective agency, or armed body, or unarmed body of men, shall ever be brought into this state, for the suppression

> of domestic violence, except upon the application of the legislature, or executive, when the legislature cannot be convened.[63]

Other western states passed similar laws in attempts to curb abuses by private individuals or security forces. For many years, only private security forces served as the quasi-law enforcement agencies in the West. All major transportation systems and various commercial interests were protected by private security forces in one way or another.

CONTEMPORARY PRIVATE SECURITY

World War II and the years that followed would have a profound effect on the type, organization, and need for American private security. The secrecy and vulnerability of war usually brings a demand for more internal security. With the dual need for fighting soldiers and security protection, the government could not solely rely on the depleted ranks of the local and state police. "Wartime requirements compelled local police establishments, already strapped because their young men had gone to war, to take on tasks beyond those it normally assumed. Industrial plants, drinking water and its sources, utilities and their transmission lines, and other vital services had to be guarded."[64]

With these massive security problems facing the United States, thousands of men and women served their country in the ranks of private security forces. By war's end, over 200,000 individual private security personnel had worked for the government.[65] With the end of World War II, the importance and usefulness of private security personnel would be a given, and the need for various forms of security increased dramatically. The Private Security Task Force of 1976 claims that, "after the war, the use of private security services and products expanded from an area of defense contractors to encompass all segments of the private-public sectors."[66]

With the United States assuming the status of a world power came heightened security problems, coupled with increased political and governmental suspicion and secrecy. Cold War reality and rumor led to an increased use of private security forces to protect government installations and secrets. Protection against information theft also became a growing security field. The fears of the 1950s allowed former FBI agent George R. Wachenhut and three other former agents to found the Wachenhut Corporation.[67] With a long list of experienced personnel, the Wachenhut Corporation grew to be one of the largest private security contractors in the United States. Remarkably, Wachenhut was also able to skirt the previous legislative intention of the Pinkerton Law of 1893 by gaining security contracts for government installations, including NASA and the Department of Defense.

Since then, the private security industry has faced steady growth. "Private security personnel also significantly outnumber sworn law

enforcement personnel and nonmilitary government guards by nearly 2 to 1."[68] Today, the public interacts with and depends upon a private-sector model whose tentacles reach into every aspect of communal living. The American Society for Industrial Security sees the opportunities present in the field now and in the future, and states that the

> demand for heightened security is being increased by theft of information, workplace violence, terrorism, and white collar crime. The security industry in the United States is a $100 billion a year business and growing. Opportunities exist at all levels with the security industry. All businesses, no matter how small, have security concerns such as fraud, theft computer hacking, economic espionage or workplace violence.[69]

The developing complexity of the world marketplace, the technological evolution of goods, services, and the transference of money and other negotiable instruments, served as a catalyst to private security growth. By way of example, ponder the cyclonic revolution in the banking industry, from ATM machines to paperless checks, from wire transactions to credit card issuances. All of these practices are essentially novel, and at the same time, the subject of some inventive criminality. Look at the range of security concerns one division of Citibank of New York has:

> traveler's checks, money orders, official checks, and other instruments issued by the Citicorp financial organization. . .[70]

Its security response is quite sophisticated:

> The 33-member staff, located in eight countries around the world, is a blend of individuals from various law enforcement backgrounds—including the Royal Hong Kong Police, the Belgium Police, Scotland Yard, the New York City Police Department, and the Drug Enforcement Agency.[71]

Private security engages citizens even more than its public counterpart. And it has done so without the fanfare to match its astonishing rise. David Sklansky's, *The Private Police*, targets the central implications.

> For most lawyers and scholars, private security is terra incognita—wild, unmapped, and largely unexplored. . . . Increasingly, though, government agencies are hiring private security personnel to guard and patrol government buildings, housing projects, and public parks and facilities, and a small but growing number of local governments have begun to experiment with broader use of private police.[12]

The *Quiet Revolution*[13] of private security could not have greater impact. More than ever, the enormous public demands piled upon the private security industry call for professional planning and policy making, and a renewed dedication to the advancement of this dynamic industry.

Combine technology with a rampant wave of economic crime and the climate of accommodation to the private security industry could not be better.

There is no question that much "ordinary crime"—burglary, larceny, robbery, for example—substantially affects business. In retailing, the U.S. Department of Commerce estimates that the combination of shoplifting by customers and internal pilferage by employees add as much as 15 percent to customer retail prices. Crime in the workplace includes such white-collar crimes as fraud and embezzlement. Computer-related crime is perhaps the most devastating of these crimes, because losses are often in the hundreds of thousands of dollars. Credit-card fraud has been estimated as high as $3 billion a year, with the 1983 losses for only two companies—VISA and MasterCard—estimated by the American Bankers Association to be $200 million. Using crime index and inflation-adjusting techniques, the direct cost of the two major categories of economic crime, white-collar and "ordinary," is estimated as at least $67 billion for 1980.[72] The rise of these sorts of criminal behaviors gives impetus to privatized services.

The National Institute of Justice has insightfully discerned the shift back to privatized justice in the form of nonpublic law enforcement—

> Such expanded use of private security and increased citizen involvement signals an increasing return to the private sector for protection against crime. The growth and expansion of modern police reflected a shift from private policing and security initiatives of the early nineteenth century. Now the pendulum appears to be swinging back. Despite the expanded role of the police in crime prevention in recent years, it appears that the private sector will bear an increased prevention role while law enforcement concentrates more heavily on violent crimes and crime response. Economic realities are forcing law enforcement to seek ways to reduce workloads.[73]

It appears private security's role in the administration of American justice is both multifaceted and entrenched. Its areas of service not only entail private, individual, or property security, but loss prevention, insurance, and computer security. Security as a practice, process, and system is embedded in the nation's tradition and is an essential contributor to justice in modern America.

DISCUSSION QUESTIONS

1. Historically, policing efforts were private in nature. Could the converse have been true? Is it more likely that policing should have originally been the result of a public rather than a private emphasis?
2. What other areas in the private sector economy has the private security industry fit and served well?
3. What is the contemporary version of self-help or the calling of a posse?

4. How does modern western law enforcement reflect its historical heritage, particularly in states like California, Texas, and Arizona?
5. By the nature of its mission, would it have been possible for the private security industry to have been supportive of the union movement rather than antagonistic to it?
6. Is private security's tradition the protection of assets and business and commercial property rather than persons?
7. Can you name the oldest contract security company in your geographic region?
8. Did early law enforcement processes in the American Colonies imitate the British system?

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2

Regulation, Licensing, Education, and Training: The Path to Professionalism in the Security Industry

INTRODUCTION: THE IMPETUS FOR INCREASED REGULATION

Much needs to be said about the security industry's call for increased professionalism and standards. Is it merely shallow puffery—calling for respect, skilled personnel, occupational status, and direction without taking the requisite steps to insure that reality? Or is security following the path to professionalism, insisting on well-regulated personnel, highly proficient in security's varied tasks, properly educated and motivated to continuous training and professional improvement? "Professionalism carries with it certain responsibilities as well as certain privileges."[1]

> Any quest for professionalism mandates serious licensing requirements and quantifiable standards or levels of personal achievement, education, and experience. Security personnel must be both aware and strictly attentive to the dramatic surge of law and legislation outlining required levels of training and standards. "The private security field is entering a new era—an era of governmental regulation . . . and training of the guard force is a major focus of this regulatory thrust."[2]

The *National Private Security Office Survey* (1992), whose respondents included security directors, facilities and plant managers, security executives, and professional organizations, manifests an appreciation for regulation,

either of a public or private variety, to insure a quality workforce.[3] Some findings were:

- 75 percent check personal references,
- 24 percent use psychological evaluation,
- 40 percent use drug screening,
- 53 percent believe there will be increased federal regulation of security officers, and
- 40 percent favor increased regulation.[4]

A bipartisan bill, the Private Security Officer Employment Standards Act of 2002, sponsored by Senators Levin, Thompson, Leiberman, and McConnell sought review of past criminal histories of private security personnel. The rationale behind the act is very instructive:

Congress finds that

1. employment of private security officers in the United States is growing rapidly;
2. private security officers function as an adjunct to, but not a replacement for, public law enforcement by helping to reduce and prevent crime;
3. such private security officers protect individuals, property, and proprietary information, and provide protection to such diverse operations as banks, hospitals, research and development centers, manufacturing facilities, defense and aerospace contractors, high technology businesses, nuclear power plants, chemical companies, oil and gas refineries, airports, communication facilities and operations, office complexes, schools, residential properties, apartment complexes, gated communities, and others;
4. sworn law enforcement officers provide significant services to the citizens of the United States in its public areas, and are supplemented by private security officers;
5. the threat of additional terrorist attacks requires cooperation between public and private sectors and demands professional security officers for the protection of people, facilities, and institutions;
6. the trend in the nation toward growth in such security services has accelerated rapidly;
7. such growth makes available more public sector law enforcement officers to combat serious and violent crimes;
8. the American public deserves the employment of qualified, well-trained private security personnel as an adjunct to sworn law enforcement officers;
9. private security officers and applicants for private security officer positions should be thoroughly screened and trained; and
10. standards are essential for the selection, training, and supervision of qualified security personnel providing security services.[5]

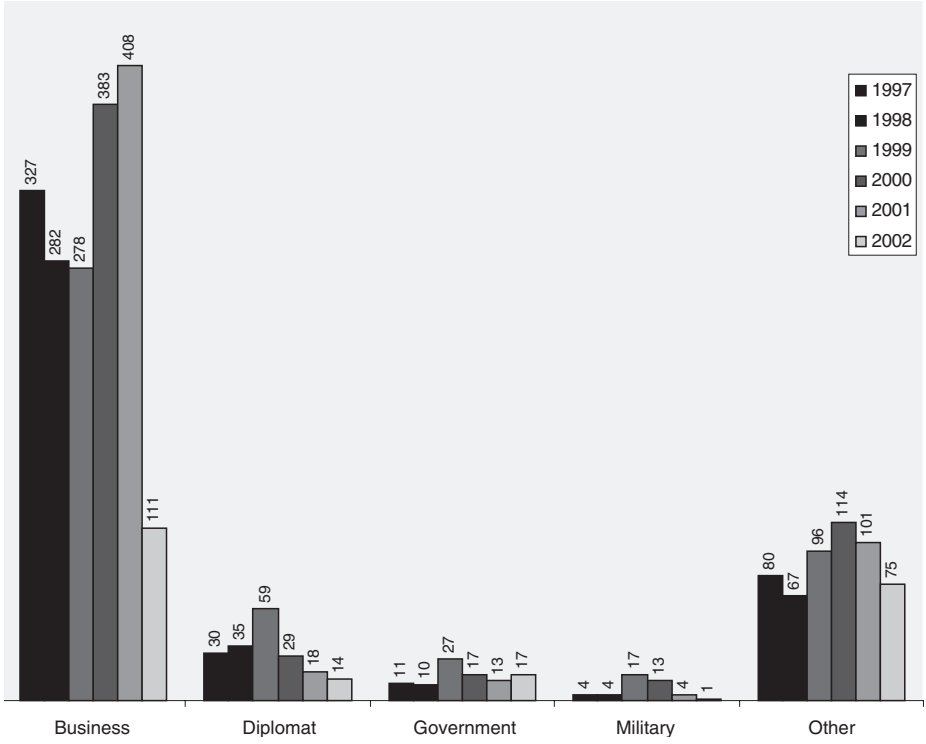

Figure 2.1 Terrorism data through 2002.

Terrorism alone justifies a new vision of professionalism.[6] The U.S. State Department paints a grim picture of terrorism's impact on asset and facility integrity. Terrorism has changed the landscape. Data on numbers of international attacks from 1997 to 2002, shown in Figure 2.1, boggles the mind.[7]

The security industry itself wishes some level of standardization. Because private security personnel are increasingly involved in the detection and prevention of criminal activity, use of ill-trained, ill-equipped, and unsophisticated individuals is unwarranted. See Table 2.1.[8]

Consider the potential liabilities, both civil and criminal, that can emerge from a security employee who has little or no training, or has not been diligently screened. J. Shane Creamer, former Attorney General for the Commonwealth of Pennsylvania, argues decisively:

> There is a variety of problems involving abuse of authority which impact society itself. These range from very serious instances in which

Table 2.1 Employment Projections

Occupation	Total employment (000's)		2000-2010 change in total employment		2000 self-employed percent	2000-2010 average annual job openings (000's)		Percent		Median annual earnings (dollars)	Median annual earnings quartile*	Education/training category
	2000	2010	Number (000's)	Percent		Due to growth and total replacement needs	Due to growth and net replacement needs	Part-time workers quartile*	Unemployed workers quartile*			
Private detectives and investigators	39	48	9	23.5	39.3	10	2	H	VH	26,750	H	Work experience in a related occupation

* VH = Very High; H = High; L = Low; VL = Very Low; n.a. = not available

> a private security officer shoots someone to a minor instance of using offensive language. These actions occur in the context of an attempted arrest, detention, interrogation or search by a guard or a retail security officer. There is a striking consistency among private security executives' views, personal-injury claims statistics, responses of security personnel, complaints recorded by regulatory agencies, court cases, and press accounts. One is led to the inescapable conclusion that serious abuses occur—even if their frequency is unknown.[9]

Lack of proper standards, training, and educational preparedness results in a predictable dearth of skilled and dutiful security practitioners. Promotion of these traits and professional characteristics could and does curtail a plethora of common private enforcement problems, including:

- unnecessary use of force
- false imprisonment claims
- false arrest assertions
- improper or illegal search and seizure techniques
- the proliferation of lawsuits
- misuse of weaponry
- abuse of authority

Certainly, state legislatures, federal authorities, and even local governing bodies are mindful. "On the local level governmental regulation dealing with training is proliferating. Cities, counties, and states are contemplating, or have already enacted, legislation or ordinances mandating standards for private security guards within their jurisdiction—standards

that rarely fail to include training requirements."[10] Oversight is fairly expected and sensibly demanded of our governmental bodies.

> The states have the authority to regulate and license the private security industry, whether it be private detectives, watchmen, guard services, security agencies or any other activity related to personal and property security. The state may set reasonable standards and requirements for licensing. The courts stand ready to examine the regulations to determine if they are reasonable or arbitrary. Furthermore, they stand ready to examine the implementation of the regulations.[11]

The ramifications of inadequate regulation and licensing are far reaching. The 1985 study, *Crime and Protection in America: A Study of Private Security and Law Enforcement Resources and Relationships,* by the National Institute of Justice,[12] listed the unprofessional results:

- deceptive advertising
- improper equipment
- conflicting uniform designs
- aggressive, unprofessional techniques
- deceptive sales techniques
- fictitious bidding processes
- high turnover rates (personnel)
- lack of business longevity
- internal fraud and criminal corruption
- avoidance of confrontation
- lack of liability insurance
- low-grade personnel[13]

Even from a self-interest point of view, increased standards and regulatory requirements seem to have a direct correlation to salary and position. The ASIS (American Society for Industrial Security) database and study, *Compensation in the Security Loss Prevention Field* corroborates the correlation:

> The survey serves as a benchmark, confirming what many industry professionals have known: For instance, unarmed security officers rank at the low end of the salary spectrum, with an average income of less than $16,000 a year. The compensation study also highlights some more novel findings, pointing to the Certified Protection Professional (CPP) designation as a distinct factor in higher income.[14]

Salaries also vary by geographic region and by armed or unarmed status. In 1993, unarmed salaries ranged between $12,000 and $21,000, and salaries for armed security officers ranged between $13,000 and $35,000.[15]

As the public justice system privatizes further, increased regulation and licensing will occur. Without it, abuse of authority will be unchecked. At present, there is no national regulatory consensus to ensure a uniform design though most states fall into one of these categories:

1. Some jurisdictions have absolutely no regulatory oversight in the private security industry.[16]
2. Some jurisdictions heavily regulate[17] armed security professionals, but disregard other private security activities.
3. Some jurisdictions use existing state and municipal police forces to regulate the industry, while others promote self-regulation and education.[18]
4. Some jurisdictions cover the activities of alarm companies, while others exempt them.
5. Some jurisdictions devise separate regulatory processes for private detectives, but not for security guards or officers, while others make no distinction.[19]
6. Most jurisdictions have little education or training requirements, though the trend is toward increased education.[20]
7. Jurisdictions that require examinations for licensing are in the minority.
8. Those that regulate have an experience requirement.
9. Criminal record checks for prospective private employees for those states that regulate are increasing.

At present, the regulatory climate is a hodgepodge of philosophies exhibiting increasing uniformity. Moreover, regulation at the state and local levels has often been hastily developed and quickly enacted following the media accounts alleging abuses of security guards' powers and the commission of criminal actions by the guards.[21] One usually hears about the regulatory crisis when scandal erupts or some criminality occurs within the security community. It is indisputable that there is a linkage between the behavior, good or bad, and the level of regulatory requirements and oversight in the security industry. More effective licensing and regulation for the private security industry can be attained by statewide preemptive legislation and interstate licensing agency reciprocity. With the number of national private security companies, the legislatures must address these two critical components of the licensing and regulation process. In states with a proliferation of local licensing ordinances, legislatures must take a leadership role in establishing uniform and fair legislation.

In addition, states must enter into interstate licensing reciprocity similar to that used by public law enforcement agencies in such matters as auto licenses, driver's licenses, and similar regulation. Currently, the national security companies are required to be licensed in many states. This is not cost effective either for the security companies or ultimately the users of security services. The same burden is experienced by many

smaller security companies that operate in several jurisdictions in adjacent states.[22]

Given these dynamics, a call for professionalism both from industry sources as well as governmental entities has been continuous and steadfast and there are signs of significant progress. At both the federal and state level, the push is on for increased controls, but our examination will weigh these questions:

Federal and State Regulation
What is the present level of governmental regulation of the security industry? Has there been increased attention given to qualifications? To education and training? Is a movement afoot to professionalize legislatively?
Education and Training
How much education and training has been legislated for security personnel? Is security education a viable academic exercise? What forms of specialized education should be legislatively or administratively required?
Model Statutory Designs that Promote Security Professionalism
How are statutes that involve the security industry composed? What types of statutory designs exists? What types of statutory authority promote professionalism in the security industry?

As the security industry takes on higher levels of responsibility in the elimination of crime, the enforcement of law, and the maintenance of the community, legislation and regulatory policy can only accelerate.

FEDERAL REGULATION

Aside from the states' efforts to professionally regulate the security industry, the federal government, through both direct and indirect means, has had some input into this industry's current standing. Historically, private security's union/business activities, from the Molly Maguires to the Homestead Steel Strike, have forced national scrutiny of the industry.[23] Through the opinions of the U.S. Attorney General and congressional passage of the Anti-Pinkerton Acts, private security has been the subject of continuous governmental oversight.[24]

The administrative agencies of the federal government, who extensively contract out for private security services, also influence private sector qualifications through their numerous requirements. These regulatory agencies have set standards on age, experience, education, and character:

- Homeland Security Agency
- Federal Aviation Administration

- Department of Defense
- Interstate Commerce Commission
- Nuclear Regulatory Commission
- Securities and Exchange Commission
- Food and Drug Administration
- Office of the Inspector General
- General Accounting Office[25]

Federal legislation that impacts on private security practice is another means of regulatory control. Throughout the Clinton and Bush years, and certainly since the debacle of 9/11, various bills have been proposed to nationalize and standardize the security industry and its practice. In reaction to terrorism, Congress has enacted a host of measures which deliver security services in many contexts.[26] The Homeland Security Act of 2002[27] signifies a major reorientation in the legislative landscape. The Mission of the Homeland Security Agency notes, "In technology and safety, rules and facilities practices, the security world has been turned on its head."[28]

Data collection, information gathering, and its maintenance are often the subject of federal legislation such as

- The Fair Credit Reporting Act[29]
- The Freedom of Information Act

Polygraphs have also been the subject of congressional oversight with the passage of the Polygraph Protection Act of 1980[30] and the Employee Polygraph Protection Act (1988).[31] With extensive limitations on pre-employment screening and further encumbrances on internal investigations, employees and polygraph vendors see little promise in the future role of the polygraph,[32] yet the statutes manifest a federal nervousness about the industry.

There is momentum for increased regulation, particularly since the terrorist attacks of 2001. At the federal level, The Law Enforcement and Industrial Security Cooperation Act of 1996 (HR 2996) was introduced, though not passed. HR 2996 encouraged cooperation between the private and public sectors. If passed, this bill would have been a solid step for the security industry to take toward an active roll in opening the lines of communication with law enforcement and in turn, sharing ideas, training, and working in conjunction with each other, all indirectly influencing standards. The content of the proposed bill is instructive and certainly foretells an active future for the security industry. The rationale for bill adoption is fourfold:

1. Seventy percent of all money invested in crime prevention and law enforcement each year in the United States is spent by the private sector.

2. There are nearly three employees in private sector security for every one in public law enforcement.
3. More than half of the responses to crime come from private security.
4. A bipartisan study commission specially constituted for the purposes of examining appropriate cooperative roles between public sector law enforcement and private sector security will be able to offer comprehensive proposals for statutory and procedural initiatives.[33]

Already noted, the Private Security Officer Employment Standards Act of 2002[34] represents formidable federal involvement.

The impetus for federal legislation is real and forceful. So much of what the industry does has grave consequences. Technical and electronic intrusions into the general citizenry, especially in the age of computers, raise many concerns. The private security industry must be attuned to legal and human issues that involve privacy. The industry must adopt policies and practices that achieve "a delicate balance between the forces of liberty and authority—between freedom and responsibility."[36]

STATE REGULATION

Few would argue the trend toward regulation. Even police organizations such as the IACP (International Association of Police Chiefs) have promulgated minimum standards. All private security officers must meet the applicable statutory requirements and the established criteria of the employer, which may exceed minimum mandated requirements. Federal law mandates that candidates for employment must be citizens or possess legal alien status prior to employment. All applicants who are hired or certified as a private security officer should meet the following minimum criteria:

A. Be at least 18 years of age—"unarmed" private security officer.
B. Be at least 21 years of age—"armed" private security officer and comply with U.S. Public Law 104-208 Section 658 (The Omnibus Consolidated Appropriations Act of 1997).
C. Possess a valid state driver's license (if applicable).
D. Not have been:
    1. Convicted or pled guilty or nolo contendere to a felony in any jurisdiction;
    2. Convicted or pled 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 within a seven-year period;

3. Convicted or pled guilty or nolo contendere to any crime in any jurisdiction involving the sale, delivery, or manufacture of a controlled substance; or
4. Declared by any court to be incompetent by reason of mental disease or defect that has not been removed or expunged.

E. Submit two sets of classifiable fingerprints and two passport-sized photographs, along with applicant's name, address, date of birth, social security number, citizenship status, and a statement of conviction of crimes in order to conduct a state criminal record check, and a FBI criminal history check, prior to permanent employment as a private security officer. In all instances, these actions must be taken prior to the private security officer's being armed.
F. Furnish information about all prior employment through the employer making a reasonable effort to verify the last seven years of employment history, and checking three personal references.
G. Successfully pass a recognized preemployment drug screen.

Suggested nonregulated preemployment applicant criteria include the following:

A. High school education or equivalent;
B. Military discharge records (DD 214);
C. Mental and physical capacity to perform duties for which being employed;
D. Armed applicants shall successfully complete a relevant psychological evaluation to verify that the applicant is suited for duties for which being employed.[37]

An overwhelming majority of American states have passed legislation governing the security industry. This legislation promulgates standards on education and training, experiential qualifications, and personal character requirements.

That the power to regulate is quite extraordinary is indisputable. The grant or denial of a license has economic and professional implications and regulatory authority must be attentive to due process and constitutional challenges. In *Moates v. Strength*,[38] an appeals court granted summary judgment to the licensing authority because appellant was incapable of showing a disregard for procedural regularity. The court noted, "The court cannot recognize a party's subjective belief that wrongdoing will occur as a viable claim for deprivation of that party's civil rights."[39]

While it is not the function of this section to review each and every piece of legislation promulgated by the states, the reader will be provided with a broad-based overview of legislative trends and standards.

To commence, review the complete Florida Act given in Appendix 1. In Florida, as in most jurisdictions, state legislation tends to emphasize these regulatory categories:

- Age
- Experience Requirements
- Gradations of Licensure
- Personal Character
- Education and Training

Age

Age and its relation to eligibility are evident in most regulatory frameworks. Does age provide any assurance of better performance, ethical adherence and professional demeanor? When one considers the seriousness of many security tasks, it seems logical that age is a crucial factor in licensing and regulation. Connecticut's statutory provision is a case in point:

> §29-154a. Qualifications for License.
>
> (2) *Watchman, guard or patrol service*: The applicant for a license as a watchman, guard, or patrol service shall not be less than twenty-five years of age, of good moral character and shall have had at least five years' experience as a supervisor or administrator in industrial security or in the employment of a private guard, watchman, or patrol service or with a federal security agency or a state or organized municipal police department.[40]

Most states are less rigorous than Connecticut, though age is usually a factor according to the type of license applied for. In many jurisdictions, age limitations are outlined when applying for a private investigator's license. Examples include:

Hawaii	18 years of age[41]
Indiana	21 years of age[42]
Delaware	25 years of age[43]
Arkansas	21 years of age[44]

More typically, state legislatures propose minimal age requirements. Iowa makes a qualification for a license conditional on being at least 18 years of age.[45] Other jurisdictions following the 18-year-old rule for numerous licensed positions in security include Maine[46] and Georgia.[47] All in all, most jurisdictions allow applicants to be admitted at the legal age of majority.

Experience Requirements

A majority of states have an experience requirement, a fact somewhat inconsistent with the age qualifications. North Carolina experience provisions are more stringent than most states:

> *Counterintelligence License*
> Three (3) years experience within the past five (5) years in counterintelligence, or successfully complete a counterintelligence course at a Board approved school. (Section .0402 of the Administrative Code)
>
> *Private Investigator License*
> Three (3) years experience within the past five years in private investigative work, or two (2) years within the past five (5) years in an investigative capacity as a member of a law enforcement agency. (Section .0401 of the Administrative Code)
>
> *Security Guard and Patrol License*
> Three (3) years experience within the past five (5) years as a manager, supervisor, or administrator with a contract security company or law enforcement agency performing a guard and patrol function. (Section .0301 of the Administrative Code)
>
> *Polygraph License*
> Successfully complete a Polygraph course at an approved school, pass an examination and performance test administered by the State Bureau of Investigation, and one (1) year experience within the past three (3) years. NOTE: If you do not have one (1) year of experience, you will be required to complete six (6) months as a trainee. (Section .0500 of the Administrative Code)
>
> *Guard Dog Service License*
> Three (3) years experience within the past five (5) years as a manager, supervisor, administrator, or dog handler with an organization performing guard dog functions or two (2) years experience within the past five (5) years as a dog handler with a law enforcement agency.[48]

Requiring experience in justice-related occupations seems the norm. Georgia's experience requirements represent this tendency:

> The applicant for a private detective company license has had at least two years' experience as an agent registered with a licensed detective agency, or has had at least two years' experience in law enforcement, or has a four-year degree in criminal justice or a related field from an accredited university or college; and the applicant for a security company license has had at least two years' experience as a supervisor or administrator in in-house security operations or with a licensed

> security agency, or has had at least two years' experience in law enforcement, or has a four-year degree in criminal justice or a related field from an accredited university or college.[49]

The Georgia legislature allows police and law enforcement training as a substitute for the experience requirement. Other substitute activities for the experience requirements are:

- One year's training in investigation at an accredited college[50]
- Practicing attorney[51]
- Licensed insurance adjuster[52]
- Auditor[53]
- Military background[54]

The emphasis placed on experience is a positive sign in the industry's quest for professionalism. Inept and inexperienced persons should not be entrusted with the obligations of private security. This trend toward security professionalism is further evidenced by the statutory reciprocity that exists between public and private justice, namely credit granted for law enforcement experience, or a waiver of the experience qualifications for those who have served in public law enforcement. Hawaii's statute is typical of this reciprocity:

> *Experience requirements.* The board may accept the following:
> Private Detectives and Detective Agencies:
> at least four years of full-time investigational work.[55]

While great strides are evident in the jurisdictional experience rule, many states blatantly disregard the experience issue. Kansas lacks experience requirements.[56] Equally silent on experience is New Jersey.[57]

Licensure

Regulation by license is the state's effort to regularize security practice and its particular positions. By overseeing occupations and professions, from lawyers to security officers, the state gives credence to the field's influence and importance and symbolizes a need to quality control those engaging in its activities. Review the Private Detective, Private Alarm, Private Security, and Locksmith Act of 2004.[58] Licensure classifications include:

Classes of Individual Licenses
- Private Detective[59]
- Private Security Contractor[60]
- Private Alarm Contractor[61]

Classes of Business Certification
- Private Detective Agency[62]
- Private Security Contractor Agency[63]
- Private Alarm Contractor Agency[64]

Varying degrees of experience, education and training, bond, and age are cited, depending upon the license desired. Not surprisingly, the licensure requirements impose the heaviest burdens on those who can exert force, handle weaponry, or those owning and operating a security agency.

These statutory gradations are testimony to the dynamic growth and maturation of the security industry. Legislators, as a rule, make laws when pressed or prodded by the ebb and flow of social and political pressure. At times, political action comes from enlightened activism, at others, the impetus is scandal or some reactionary setting. "This new era—an era of regulation for the private security industry offers a great challenge, and that challenge will be met if the interested parties recognize their common business interests as well as their collective responsibility to the community at large."[65]

The Florida legislature poses another set of licensure categories even more grandiose:

Private Investigations

• Class "A"	Agency
• Class "C"	Private Investigator
• Class "C" and Class "G"	Armed Private Investigator
• Class "AA"	Branch Office
• Class "C" or Class "MA" or Class "M"	Manager
• Class "CC"	Intern

Private Security

• Class "B"	Agency
• Class "D"	Security Officer
• Class "D" and Class "G"	Armed Security Officer
• Class "BB" license	Branch Office
• Class "MB" or Class "M"	Manager

Repossession Activity

• Class "R"	Agency
• Class "E"	Recovery Agent
• Class "RR" license	Branch Office
• Class "MR" or Class "E"	Manager
• Class "EE"	Intern

Combined Private Investigation and Security

• Class "A" and Class "B"	Agency
• Class "AB"	Branch Office
• Class "M"	Manager

School

• Class "DS"	Security Officer School or Training Facility
• Class "DI"	Security Officer Instructor
• Class "RS"	Recovery Agent School or Training Facility
• Class "RI"	Recovery Agent Instructor

Firearms

• Class "K"	Instructor
• Class "G"	Statewide Firearm License

Managers

• Class "C," Class "MA," or Class "M"	Private Investigative Agency or Branch
• Class "MB" or Class "M"	Private Security Agency or Branch
• Class "E" or Class "MR"	Recovery Agency or Branch
• Appropriate Manager's license and Class "G"	Armed Manager[66]

Florida licensing law promotes an interplay and reciprocity between public and private law enforcement by granting credit for public law experience. Equally stressed is education, its level obtained and degree correlating to the security position. In sum, the more complicated the position, the higher the regulatory demand. For example, a private investigator applicant may substitute some of the experiential requirements by adhering to the following regulatory pattern:

> An applicant for a Class "C" license shall have 2 years of lawfully gained, verifiable, full-time experience or training in one, or a combination of more than one, of the following:
>
> a. Private investigative work . . .
> b. College course work related to criminal justice, criminology or law enforcement administration, . . . except that no more than one year may be used for this category.
> c. work as a Class "CC" licensed intern.[67]

Additionally, the Florida statute fully recognizes the serious burden that is placed upon the *armed* security officer. Both armed personnel and their instructors are placed under stringent guidelines:

> In addition to any other requirements, an applicant for a Class "G" license must: have a minimum of 28 hours of range and classroom training taught and administered by a firearms instructor licensed by the Department of State; and Demonstrate fitness to carry a firearm based upon a complete background investigation by the department of the individual's police record and general character.[68]

Licensure grades and requirements vary according to the level of responsibility exerted. Some states need the security agency itself to perform internal oversight of its own employees. Thus the security firm or proprietor needs a license that includes a right to supervise or evaluate those under its command. Given the growth of security personnel, it makes good sense to transfer the task of policing one's own to those in occupational proximity, the agency itself. New Mexico sets up such a policy in its list of qualifications for Operation of Business. The statute holds

> A licensee shall at all times be legally responsible for the good business conduct of each of his employees, including his managers.[69]

In sum, these legislative classifications are further evidence of the technical, business, and professional sophistication evolving in the security industry. As the field matures and develops, legislative activity and regulation mirrors the development.

Personal Character

Traditionally, "good" character was the chief criteria for license issuance. Stating such criteria is easy. Definition and interpretation of these criteria is highly subjective. The diversity of good character definitions is testimony to the creative draftsmanship of legislators. The desire is plain—to license only those individuals who are not thieves, liars, untrustworthy scoundrels, or other reprehensible characters. Character bespeaks loudly the man or woman's suitability for the job.

In North Carolina, a license will be issued to a person who "shall be of good moral character, temperate habits and good reputation for truth, honesty and integrity."[70] Who is the judge of temperance? Can this trait be objectively measured? Indiana, tries to make it plain by denying a license to applicants who have not:

1. Committed an act, which, if committed by a licensee would be ground for the suspension or revocation of a license under this chapter;
2. Been convicted of a:
   A. Felony; or

B. A misdemeanor that has a direct bearing upon the applicant's ability to practice competently;

3. Been refused a license under this chapter or had a license revoked.[71]

With this legislative guidance, how can there not be imprecision and abuse of discretion in the analysis of character?

Ohio provides more objective criteria. To be licensed the applicant must have "a good reputation for integrity, has not been convicted of a felony within the last twenty years or any offense involving moral turpitude."[72] With this statutory definition, the evaluator measures the applicant by a past criminal history.

Arizona does an even better job of delineating the notion of good character. The applicants shall:

> Within the five years immediately preceding the application for an agency license, not have been convicted of any misdemeanor act involving:
>
> (a) Personal violence or force against another person or threatening to commit any act of personal violence or force against another person.
> (b) Misconduct involving a deadly weapon as provided in section 13-3102.
> (c) Dishonesty or fraud.
> (d) Arson.
> (e) Theft.
> (f) Domestic Violence.
> (g) A violation of title 13, chapter 34 or 34.1 or an offense that has the same elements as an offense listed in title 13, chapter 34 or 34.1.
> (h) Sexual misconduct.[73]

Arkansas[74] adds further criteria in its search for acceptable conduct and character—alcohol and drug abuse. The statute holds that before issuance of a license prospective security professionals should not be suffering from habitual drunkenness or from narcotic addiction or dependence.

Other states, such as New Jersey[75] and New York[76] attempt to prove character by relying on the judgment of others. New York specifically requests:

> In the case of an application subscribed by a resident of the state of New York such application shall be approved, as to each resident person or individual so signing the same, by not less than five reputable citizens of the community in which such applicant resides or transacts business.[77]

"Moral turpitude" is defined as an act of baseness, vileness, or depravity in the private and social duties a person owes to another person,

or to society in general, contrary to the accepted and customary rule of right and duty between persons, and conduct which is contrary to justice, honesty, or good morals. The following is a nonexclusive list involving moral turpitude:

1. Any act involving dishonesty or fraud;
2. Any criminal act involving deception;
3. Any act involving sexual misconduct;
4. Any offense with an element of specific criminal intent.

Iowa requires the following:
1. Applications for a license or license renewal shall be submitted to the commissioner in the form the commissioner prescribes. A license or license renewal shall not be issued unless the applicant:

a. Is eighteen years of age or older.
b. Is not a peace officer.
c. Has never been convicted of a felony or aggravated misdemeanor.
d. Is not addicted to the use of alcohol or a controlled substance.
e. Does not have a history of repeated acts of violence.
f. Is of good moral character and has not been judged guilty of a crime involving moral turpitude.
g. Has not been convicted of a crime described in sections 708.3, 708.4, 708.5, 708.6, 708.8, or 708.9.
h. Has not been convicted of illegally using, carrying or possessing a dangerous weapon.
i. Has not been convicted of fraud.
j. Provides fingerprints to the department.
k. Complies with other qualifications and requirements the commissioner adopts by rule.[78]

Education and Training

Professionalism remains an empty promise without a commitment to education, scholarly research and development, and academic integrity. Regulatory bodies throughout the United States have been placing heightened emphasis on education and training as part of the minimum qualifications of an applicant.[79] The Private Security Advisory Council,[80] a federally funded consortium of public law enforcement specialists and private security experts, has made numerous recommendations concerning the upgrading of educational standards. The Council notes eloquently:

> [W]hile private security is a vast crime prevention and reduction resource, it will for the most part remain only a potential resource until

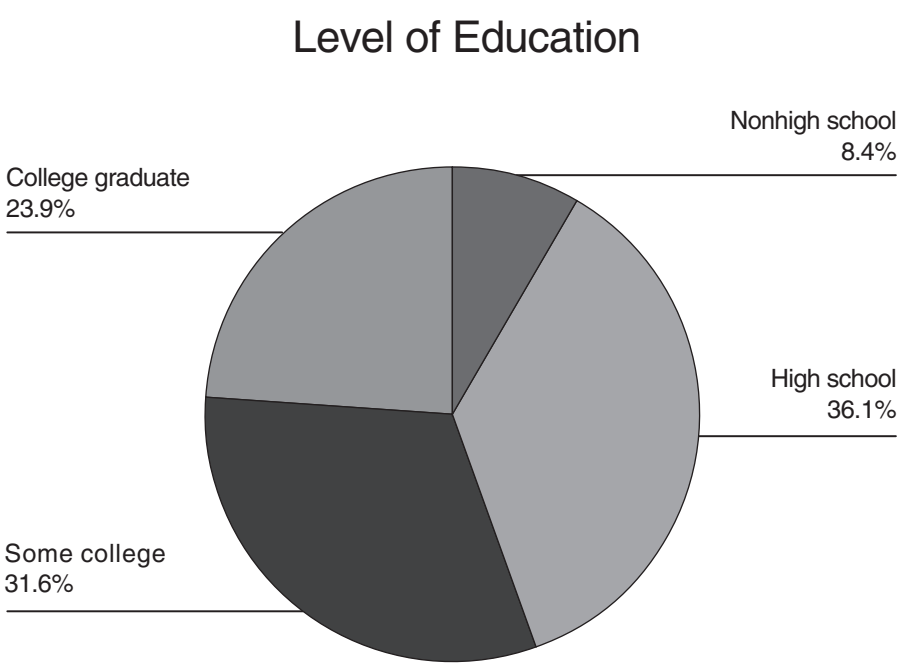

Figure 2.2 2002 Virginia Security Officer Survey

> steps are taken to eliminate incompetence and unscrupulous conduct. Many private security personnel are only temporary or part-time employees who are often underpaid and untrained for their work. The protection of lives and property is an awesome societal responsibility, and the public interest demands that persons entrusted with such responsibilities be competent, well-trained, and of good moral character.[81]

In the early 1990s the *National Private Security Officer Survey* portrayed an industry pool in need of higher educational achievement, reporting that most positions require a high-school diploma.[82] The requirements seem to be elevating on some levels. The *2002 Virginia Security Officer Study* reported that over 55 percent of the survey respondents possessed at least some college level education.[83] See Figure 2.2.

From the lowest echelon employee in a security organization to the highest supervisory personnel, education and training is inexorably tied to occupational development.[84] A 1973 study, *Private Police in the United States: Findings and Recommendations*, heralds education as a remedy to deficiencies in the security industry. Insisting on minimums, the

study relays:

- All types of private security personnel should receive a minimum nitial training program of at least 120 hours.
- Federal funds should be made available to develop appropriate training programs, including curricula, materials, and methodology.
- State regulatory agencies should require minimum training programs—in terms of quality, curriculum, and hours of instruction for all types of private security personnel.
- Appropriate higher education, such as a bachelor's degree in police science and administration should also be a substitute for part of the minimum experience requirements.[85]

The Private Advisory Council, as well as a RAND Study on private security,[86] critique the paucity of the education and training provided to security personnel. The RAND Study concludes:

> 65 percent of private security personnel had no training at all prior to commencing job assignments. Approximately one-half of private security personnel carried firearms, but less than 20 percent had ever received any firearms training in their present job.[87]

The National Association of Private Security Industries, Inc. of Dallas, Texas, confirms the urgent need for training and education for the contract guard firm. A recent report by the National Association of Private Security Industries stated that contract guard firms want their officers to be trained in liability avoidance, documentation and reports, patrol techniques, mid-level security supervision, laws of arrest, and first aid.[88]

The call for increased education and training has been broad-based.[89] "In security, as in other functions of an organization, the higher an executive climbs, the broader is his need for education."[90] Education of public and private law enforcement can "dismiss prior notions or opinions, that is, to motivate them to think on a factual basis. The appalling lack of knowledge of the law can be corrected by immersing the officer in a study of the legal problems. Topics such as powers and restrictions on private police, law of arrest, search and seizure procedures, electronic eavesdropping, civil liabilities, and licensing statutes can be studied. Perhaps through an educational experience an officer may not allow enthusiasm to overcome judgment in his daily rounds.[91]

The development and legitimization of the academic discipline of Security Studies has been both steady and impressive. Currently there are 1,476 institutions in the United States that offer programs in Security and Protective Studies.[92] Some of the institutions offering degrees and courses in the field are:

- Alabama State University
- American University

- Auburn University—Montgomery
- Baylor University
- California State University—various locations
- Fairmont State College
- Jackson State University
- John Jay College of Criminal Justice
- Marquette University
- Seton Hall University
- Texas A & M University
- Xavier University

Criminal justice education illustrates the long and sometimes vicious battle for legitimacy within traditional academic circles. Now an academic discipline firmly entrenched in more than 1,100 colleges and universities, criminal justice's search for legitimacy in stodgy academic environs may soon be over.[93] Security training has been an integral course within criminal justice studies but is in its seminal stage at the undergraduate level. "Growth in security academic programs has been significant. Nationwide, there were 33 certificate and degree programs 15 years ago. By 1990, the total had increased to 164."[94] In a degree-granting framework there has been steady growth particularly at the graduate level.[95] The American Society of Industrial Security (ASIS), through its Foundation, established a master's degree in security management at Webster University. "The Webster curriculum features a Master of Arts (MA) and a Master of Business Administration (MBA) option and reflects current security theory and practice. The program, guided by the Foundation, will be frequently revised to better meet the needs of students and will reflect input from university studies, corporate surveys and other assessments."[96]
Its core curriculum contains seven required business courses:

- Statistical Analysis
- Business Accounting Systems
- Business Information Systems
- Financial Planning
- Operations and Production Management
- Economics for the Firm
- Business Policy

It also requires eight security courses, which are the same courses required for the M.A. degree:

- Security Management
- Legal and Ethical Issues in Security Management

- Security Administration and Management
- Business Assets Protection
- Human Behavior and Deviant Behavior
- Information Systems Security
- Emergency Planning
- Integrate Studies in Security Management[97]

Jim Calder of the University of Texas argues:

> Security Studies must move from separate-but-equal status to total interaction with other aspects of criminal justice education. My premise is that the criminal justice system cannot reduce property crime profoundly (because of social structural limitations) and thus must rely more heavily on security forces.[98]

There has been discussion about whether security studies need to exist independently or as an aligned subject matter with criminal justice. Christopher Hertig, CPP, remarks:

> Security curricula exist on many campuses today, and an increasing number of criminal justice programs include courses in security, loss prevention, or safety. While many people dispute the wisdom of having security courses attached to criminal justice programs, the reality is that the majority of courses are within criminal justice curricula. This is not likely to change anytime soon. I believe that working with an existing program is generally more productive than idly wishing for something that may never be.[99]

Since 9/11 certificates and even degrees are popping up in "Homeland Security."[100] Indeed some argue that a new academic discipline is emerging.[101] If anything, security education is a major complement to traditional criminal justice and police science programs. "Security studies can offer criminal justice education an end to the past overbearing concern for the quantity of crime as the primary indication of social and political controls. Security is less concerned with quantity than it is about location, specifically, whether crimes of all types are committed within a social location under its control."[102]

The argument for security education and training is compelling, particularly when coupled with the drive toward professionalism. One certainly cannot exist without the other as Richard Post lucidly poses:

> Is security a profession? No, probably not to the extent that law enforcement or many of the other areas of criminal justice are professions . . . But, we have made a start. Things are beginning to move forward, and it is entirely possible that security may be considered the profession of the future.[103]

STATE OF ARIZONA

DEPARTMENT OF PUBLIC SAFETY

SECURITY GUARD TRAINING PROGRAM

As required by A.R.S. 32-2613 and 32-2632, I, _____, acting for_____, do indicate that the following training program be provided for security guards employed by this agency.

(1) FIRST AID

Subject Material

Duration of Training

Type of Training

(2) FIREARMS

Subject Material

Duration of Training

Type of Training

(3) LAWS OF ARREST

Subject Material

Duration of Training

Type of Training

(4) SEARCH AND SEIZURE

Subject Material

Duration of Training

Type of Training

Figure 2.3 Arizona curriculum for security guards.

Continued

(5) CRIMINAL LAW

Subject Material

Duration of Training

Type of Training

(6) OTHER:

_____

(Licensee Signature)

SUBSCRIBED AND SWORN TO BEFORE ME ON _____

_____

NOTARY PUBLIC

Figure 2.3 Cont'd.

Considering these arguments, have the states enhanced educational requirements for licensure? Does the legislative process recognize the role education and training play in the future of security as an industry and the privatization movement? Legislative analysis manifests some sound redirection in favor of education and training. While some states like Colorado[104] are constitutionally unable, at least at this juncture, to mandate licensure requirements, and others simply do not require it, more and more states require some level of training for personnel.

Education and training can take many forms, such as that mandated in Arizona. Figure 2.3[105] outlines the training topics that security companies are required by law to provide to their personnel.

Other states require applicants to pass an examination covering a broad range of topics. State administrative agencies even provide bibliographic lists to help applicants prepare.[106] Recent statutory amendments in Illinois highlight the trend toward education and training. For the applicant in Illinois, a security-training program of at least 20 hours must be documented. Topics include:

1. The law regarding arrest and search and seizure as it applies to private security.
2. Civil and criminal liability for acts related to private security.
3. The use of force, including but not limited to the use of nonlethal force (i.e., disabling spray, baton, stun gun, or similar weapon).
4. Arrest and control techniques.
5. The offenses under the Criminal Code of 1961 that are directly related to the protection of persons and property.
6. The law on private security forces and on reporting to law enforcement agencies.
7. Fire prevention, fire equipment, and fire safety.
8. The procedures for service of process and for report writing.
9. Civil rights and public relations.[107]

Education is the centerpiece of the Illinois legislation. When combined with undergraduate training and experience, the proviso rewards those seeking licensure with such backgrounds. Applicants can substitute certain experience requirements with post-secondary education. Specifically for private security contractors, the educational provision states that in lieu of experience, the applicants may demonstrate that they have:

> obtained a baccalaureate degree in police science, or related field, or a business degree from an accredited college or university shall be given credit for 2 of the 3 years experience required under this Section. An applicant who has obtained an associate degree in police science or a related field, or in business from an accredited college or university shall be given credit for one of the 3 years experience required under this Section.[108]

Additionally, Georgia insists on certification for all security personnel utilizing weaponry.[109] Louisiana education and training for an armed security guard includes:

- Legal powers and limitations of a security officer
- Emergency procedures
- General duties/field notes/report writing
- Legal limitations on use of weapons
- Handling a weapon
- Safety and maintenance
- Dim light firing

- A shoot, don't shoot program
- Stress factors[110]

Naturally, as the complexity of security work increases, so too the educational and training requirements. Florida sets up a variable system of educational requirements, depending on job classifications. For example:

> Class "G"shall include, but is not limited to 24 statewide hours of range and classroom training, no more gun permit than 8 hours of such training shall consist of range training.[111]

The requirements are not staggering by any stretch of the imagination, but a start; a posture emphasizing the role education plays in attaining professionalism.

Delaware has mandatory firearms training for all private detectives and investigators. Delaware's Board of Examiners is the watchdog agency for the security industry and decided effective July 30, 1979, that:

> No person duly licensed by the Board shall be permitted to carry a pistol, revolver, or any firearm, prior to the completion of a course of instruction as designed by the Division of State Police. Instruction shall include, but not be limited to, safety, use of deadly force and marksmanship training. Each person shall thereafter be recertified annually.[112]

Legislative coverage, at least in the education and training area, is becoming more specialized. With strong advocacy for specialized training and instruction in computer-based fields,[113] airport and aircraft,[114] and animal handling, both the industry itself and governmental authorities are focusing on training requirements. Virginia, as an example, has promulgated *Compulsory Minimum Training Standards for Courthouse and Courtroom Security Officers*. The coverage comprises:

1. Basic Security Procedures
   - A. Security Threats
   - B. Search Procedures and Prisoner Movement in Court Environment
   - C. Explosives and Bomb Search and Security Procedures
2. Court Security Responsibilities
   - A. Duties and Responsibilities of Court Security Personnel
   - B. Identification of Personnel, Package Control, and Detection Devices
   - C. Sequestered Juries and Witnesses
   - D. Recognizing and Handling Abnormal Persons
3. Legal Matters
   - A. Constitutional Law and Liabilities
   - B. Virginia Court Structure
4. Notebook and Report Writing

5. Skills
   A. Firearms
   B. Moot Problem
   C. Disorders and Proper Techniques of Removing Unruly Prisoners from the Courtroom
   D. Courtroom Demeanor and Appearance[115]

Professional and Continuing Education

The industry's professional associations and groups have played a distinct role in the delivery of education services. The ASIS Certified Protection Professional (CPP) Program tests rigorously those wishing the designation. Topics covered are:

- Emergency planning
- Legal aspects
- Personnel security
- Protection of sensitive information
- Security management
- Substance abuse
- Loss prevention
- Liaison
- Banking
- Computer security
- Credit card security
- Department of Defense
- Educational institutions
- Manufacturing
- Utilities
- Restaurants and lodging
- Retail security
- Transportation and cargo security
- Telecommunications[116]

Jon C. Paul, Director of Security Services for a major hospital, applauds the CPP designation. "The CPP designation is the hallmark of excellence in our profession—a fact that is recognized in our industry and is becoming more widely recognized by the organizations we serve."[117] The American Banker's Association awards the Certified Financial Services Security Professional (CFSSP) to those passing an exam covering banking practices. Other continuing education programs, training seminars, and other advanced studies are provided by a wide array of professional associations and groups whose addresses and phone numbers are listed in Appendix 2.

CPP Chris Hertig advises busy security operatives that even Web-based education is now readily available. These newer programs take "correspondence courses" one step further. "There's the Certified Protection Officer (CPO) and Security Supervisor programs from the International Foundation for Protection Officers (IFPO) Bellingham, Wash., and Calgary, Canada," says Hertig. In addition, the Carrollton, Texas-based Professional Security Television Network offers a video-cassette series. The U.S. Department of Defense offers distance learning for its facility security managers. And firms such as Defensive Tactics Institute in Albuquerque, New Mexico offer video training and critiques in areas such as personal protection. Universities offering criminal justice and security degree programs may also have independent distance studies.[118]

From all perspectives—academically, legislatively, and industrially—there is a major push for increased education and training. The industry and its participants recognize the need to upgrade their image as a professional occupation and the parallel necessity of increased educational requirements. CPP Lonnie Buckels understands the interrelationship between education and professionalism:

> The designation of professional has to be earned. For example, look at the medical profession. For decades, practicing medicine was thought to be part of the black arts. In some regions of the world it still is. However, after years of hard work, coupled with agonizingly slow technical advancements, medical practitioners are honored professionals. We have made steady progress in our quest for professional designation in the security industry. But we must continue this progress and be patient—professionalism takes time.[119]

Model Educational Programs: Curricula

Previously we discussed the influence of the Private Security Advisory Council, whose many impacts include the development of model curricula for security professionals. Their recommended training program for armed security officers is reproduced below.

> Minimum Training Standards for Armed Security Officers
> *Preassignment Training*
>
> Prior to assuming any actual duty assignment, each new security officer should receive at least 8 hours of formal classroom training and successfully pass a written examination on the subjects.
>
> Orientation and overview in security—2 hours
> Criminal justice and the security officer, including legal powers and limitations—2 hours
> Emergencies—2 hours
> General duties—2 hours

Weapons Training

Prior to being issued a firearm or taking an assignment requiring the carrying of or having access to a weapon, the security officer should receive at least 6 hours formal classroom training, successfully pass a written examination on the subjects and successfully complete an approved 18-hour firearms target shooting course.

Classroom:
Legal and policy restraints on the use of firearms—3 hours
Firearms safety, care, and cleaning—3 hours

Range:
Principles of marksmanship—6 hours
Single action course—6 hours
Double action course—6 hours

Basic Training Course

Within three months of assuming duties, a security officer should complete a 32-hour basic training course. At least 4 hours should be classroom instruction and up to a maximum of 16 hours may be supervised, on-the-job training.

Classroom:
Prevention in security systems—1 hour
Legal aspects and enforcement of rules—1 hour
Routine procedures—1 hour
Emergency and special procedures—1 hour

The IACP also promulgates minimum coverage in training. The following are recommended:

- Minimum basic training requirements and relevant, continuous in-service training for private security officers should be required. A formal mechanism to establish curriculum requirements and hours of training should be established.
- All private security officer training should be reviewed and approved for certification by a state regulatory agency. Instructors will also be certified by the state regulatory agency. All training will be validated by approved testing criteria.
- Private security officer basic or in-service training should include the following elements based upon needs analysis related to job function:
    1. Security officers fall into one or more of these categories based upon their job function:
        a. Unarmed security officers
        b. Armed security officers
        c. Unarmed nonsworn alarm responder

d. Armed nonsworn alarm responder
e. Armored car guard

2. Security officers' training needs will be addressed in large part under these topic areas as appropriate:
   a. Legal
   b. Operational
   c. Firearms
   d. Administrative
   e. Electronic
   f. Armored transport
   g. Use of force

- Due to the varied nature of security tasks and duties along with the proper training for each, the demands for each specific setting should be assessed for the level of training certification to build public trust and confidence.[120]

Annual Firearms Proficiency Re-Qualification

Each armed security officer must re-qualify at least once every twelve months in an 8-hour firearms proficiency course.

Legal and policy restraints on the use of firearms	3 hours
Range re-qualification in target shooting	5 hours[121]

States have utilized the PSAC advisory recommendations in designing their own curricula. Assess the similarities as well as differences in the educational components of the North Dakota plan.[122]

State of North Dakota
Appendix A—Apprentice Security Officer Training Curriculum Outline (16 Hours)

SECTION I. SECURITY ORIENTATION/OVERVIEW:

A. Introduction and overview.
   1. To the course.
   2. To the employing organization.
B. Role of private security.
   1. Brief history of private security.
   2. Overview of organization's security operations.
   3. Role of security in crime prevention and assets.
   4. Protection.
   5. Components of private security services.
   6. Primary functions/activities of security personnel.
C. Ethical standards for security personnel.
   1. Code of ethics for private security personnel.
D. Qualities essential to security personnel.
   1. Attitude/public relations.
   2. Appearance.

3. Personal hygiene.
4. Physical fitness.
5. Personal conduct/deportment.
6. Discipline.
7. Knowledge of responsibilities.

SECTION II. CRIMINAL JUSTICE AND SECURITY PERSONNEL:

A. The nature and extent of crime.
   1. Overview.
      a. The criminal law.
B. The criminal justice system.
   1. Overview.
      a. The security person's relationship.
C. Legal powers and limitations.
   1. Rights of a property owner.
   2. Detention/arrest powers (citizen's or statutory).
   3. Search and seizure.
   4. Use of force.

SECTION III. GENERAL DUTIES:

A. Patrol techniques.
   1. Functions of patrol.
   2. Types of patrol.
   3. Preparing for patrol.
   4. Dealing with juveniles.
   5. Personal safety on the job.
   6. Traffic control.
B. Access control.
   1. Why access control.
   2. Types of access control systems.
   3. Controlling an entrance or exit.
C. Notetaking/report writing.
   1. Importance of notetaking/report preparation.
   2. Daily/short reports.
   3. Incident/special reports.

SECTION IV. EMERGENCIES:

A. Fire prevention and control.
   1. What is fire.
   2. Causes of fire.
   3. Classes of fire.
   4. Recognition and identification of fire hazards.
   5. Firefighting, control and detection equipment.
   6. Role in fire prevention.
   7. What to do in case of fire.
B. Handling emergencies.
   1. Bomb threats and explosions.

2. Natural disasters.
3. Mentally disturbed persons.
4. Medical emergencies.
5. First aid.

Appendix B Security Officer Training Curriculum Outline (32 Hours)

SECTION I. SECURITY SYSTEMS:

A. Physical security.
   1. Definition.
   2. Purpose.
   3. Locks and key control.
   4. Barriers.
   5. Access control systems.
   6. Alarm systems.

B. Information security.
   1. Definition.
   2. Information classifications.
   3. Information and document control procedures.

C. Personnel security.
   1. Threats to employees.
   2. Employee theft.

SECTION II. EMERGENCY PROCEDURES:

A. Medical emergencies of other emergency procedures.
B. Defensive tactics.
C. Unusual occurrences.
   1. Strikes, demonstrations, etc.

SECTION III. ROUTINE PROCEDURES:

A. Patrol.
   1. Prevention.
   2. Response to calls for service.
   3. Response to crime-in-progress.
   4. Crime scene protection.

B. Reporting.
   1. Information collection.
   2. Report preparation.

C. Dealing with problems unique to the individual's assignment.

SECTION IV. LEGAL ASPECTS AND ENFORCEMENT OF RULES:

A. Legal authority.
   1. Authority of security personnel.
   2. Regulation of security personnel.

B. Observing and reporting infractions of rules and regulations.
   1. Organizational rules and regulations.
   2. Security rules and regulations.

Arkansas also provides a formidable program of instruction for prospective security professionals.

§ 17-40-208. **Training of Personnel.**

(a) The Arkansas Board of Private Investigators and Private Security Agencies shall establish training programs to be conducted by agencies and institutions approved by the board.

(b) The basic training course approved by the board may include the following:
  (1) Legal limitations on the use of firearms and on the powers and authority of the private security officer;
  (2) Familiarity with this chapter;
  (3) Field note taking and report writing;
  (4) Range firing and procedure and handgun safety and maintenance; and
  (5) Any other topics of security officer training curriculum which the board deems necessary.

(c) The board shall promulgate all rules necessary to administer the provisions of this section concerning the training requirements of this chapter.

(d) When an individual meets the training requirements approved by the board, that individual shall not be required to be trained over again until registrant renewal training is required, which is one (1) year after the registrant is licensed, regardless of which company the registrant is employed or trained by.[123]

ETHICAL CONSIDERATIONS

The true test of professionalism should be its unwavering dedication to ethical conduct, professional values, and occupational integrity. Many states describe and outline conduct that is unlawful and thus unethical. The Committee of National Security Companies (CONSCO) has ratified a Code of Ethics that promotes ethical rigor:

Officer Code of Ethics

- Serve employer and clients loyally and faithfully.
- Perform duties in compliance with the law.
- Conduct themselves professionally.
- Perform duties fairly and impartially.
- Render complete, accurate, and honest reports.
- Remain alert to client's interest.
- Earn respect through integrity and professionalism.
- Improve performance through training and education.[124]

Pinkerton's Security Inc., a massive security service provider, also publishes ethical standards for its employees. See Figure 2.4.[125]

The ASIS Code of Ethics is reproduced to demonstrate the continuing correlation between the professional duties and the framing of ethical standards. See Figure 2.5.[126]

The Company and its employees shall not:

(1) Engage in any unlawful activity or use unethical or reprehensible practices to obtain information or engage in any controversial or scandalous case which might damage the Company's reputation.
(2) Accept business from persons with disreputable reputations, or from those engaged in an illegitimate, disreputable or questionable enterprise.
(3) Induce a person to commit a crime (entrapment).
(4) Knowingly engage in work for one client against the interest of another client.
(5) Guarantee success, or accept business for a fee contingent upon success.
(6) Accept rewards or gratuities or permit its employees to do so.
(7) Engage in work in behalf of a defendant in a criminal action.
(8) Compromise with felons, or negotiate for the return of stolen property.
(9) Seize (repossess) property without due process of law.
(10) Obtain secret formulas, processes, designs, records, the names of customers or other private business information.
(11) Represent claimants against insurance companies and self-insurers.
(12) Shadow jurors.
(13) Engage in wire tapping.
(14) Collect amounts.
(15) Investigate the morals of women, except in criminal cases or on behalf of their employers.
(16) Obtain information or evidence for use in divorce actions.
(17) Investigate public officers in the performance of their official duties.
(18) Investigate a political party for another.
(19) Investigate the lawful activities of a labor union.
(20) Report the union affiliations of employees or prospective employees.
(21) Report the events transpiring at labor union meetings or conventions, except those open to the public without restrictions.
(22) Shadow officers, organizers or members of a labor union for the purpose of reporting their lawful union organizing or other lawful activities.
(23) Supply the names of union members, officers, organizers or sympathizers.
(24) Report to employers the reaction and attitude of employees and union officers and representatives expressed or implied, with respect to union organizing or bargaining processes.
(25) Arrange to report on the lawful organizational activities of employees and their collective bargaining processes, irrespective of whether the report be made to an employee of the Company or indirectly to the client.
(26) Supply persons to take the place of those on strike.
(27) Furnish armed guards upon the highways for persons involved in labor disputes.
(28) Interfere with or prevent lawful picketing during labor controversies.
(29) Transport in interstate commerce any person with the intent of employing such person to obstruct or interfere with lawful picketing.
(30) Furnish to employers any arms or ammunition, etc.

Figure 2.4 Pinkerton's ethical code.

It is unlawful to:

(1) Interfere with, restrain, or coerce employees to join or assist any labor union.
(2) Interfere with or hinder the lawful collective bargaining between employees or employers.
(3) Pay, offer, or give any money, gratuity, favor, consideration or anything of value, directly or indirectly, to any person for any oral or written report of the membership meetings, or lawful activities of any labor union, or for any written or oral report of the lawful activities of employees in their collective bargaining processes in the exercise of their right of self-organization.
(4) Advise orally or in writing anyone of the membership of an individual in a labor organization.
(5) Supply persons to take the place of those on strike.
(6) Furnish armed guards upon the highways for persons involved in labor disputes.
(7) Interfere with or prevent lawful picketing during labor disputes.
(8) Transport in interstate commerce any person with the intent to employ such person to obstruct or interfere with peaceful picketing.
(9) Furnish to employers arms or munitions, etc.
(10) Attempt to influence anyone to disclose records or information made secret by law and not available to the public.
(11) Obtain business secrets.
(12) Obtain names of customers.
(13) Tap wires.
(14) Eavesdrop.
(15) Possess or carry a weapon without being licensed to do so. (In some states.)
(16) Impersonate a law enforcement officer.
(17) Shadow jurors.
(18) Compound a felony.
(19) Collect accounts. (In some states.)
(20) Report on the race, color, religion and place or origin of any person. (In some states.)
(21) Wear a military uniform without authority.

Figure 2.4 Continued

A.S.I.S. Code of Ethics and Ethical Considerations

Approved June 27, 1980

PREAMBLE

Aware that the quality of professional security activity ultimately depends upon the willingness of practitioners to observe special standards of conduct and to manifest good faith in professional relationships, the American Society for Industrial Security adopts the following Code of Ethics and mandates its conscientious observance as a binding condition of membership in or affiliation with the Society:

CODE OF ETHICS

I. A member shall perform professional duties in accordance with the law and the highest moral principles.
II. A member shall observe the precepts of truthfulness, honesty, and integrity.
III. A member shall be faithful and diligent in discharging professional responsibilities.
IV. A member shall be competent in discharging professional responsibilities.
V. A member shall safeguard confidential information and exercise due care to prevent its improper disclosure.
VI. A member shall not maliciously injure the professional reputation or practice of colleagues, clients, or employers.

ARTICLE I

A member shall perform professional duties in accordance with the law and the highest moral principles.

Ethical Considerations

I-1 A member shall abide by the law of the land in which the services are rendered and perform all duties in an honorable manner.
I-2 A member shall not knowingly become associated in responsibility for work with colleagues who do not conform to the law and these ethical standards.
I-3 A member shall be just and respect the rights of others in performing professional responsibilities.

ARTICLE II

A member shall observe the precepts of truthfulness, honesty, and integrity.

Ethical Considerations

II-1 A member shall disclose all relevant information to those having the right to know.
II-2 A right to know is a legally enforceable claim or demand by a person for disclosure of information by a member. Such a right does not depend upon prior knowledge by the person of the existence of the information to be disclosed.
II-3 A member shall not knowingly release misleading information nor encourage or otherwise participate in the release of such information.

ARTICLE III

A member shall be faithful and diligent in discharging professional responsibilities.

Ethical Considerations

III-1 A member is faithful when fair and steadfast in adherence to promises and commitments.
III-2 A member is diligent when employing best efforts in an assignment.
III-3 A member shall not act in matters involving conflicts of interest without appropriate disclosure and approval.
III-4 A member shall represent services or products fairly and truthfully.

Figure 2.5 ASIS Code of Ethics.

ARTICLE IV
A member shall be competent in discharging professional responsibilities.

Ethical Considerations
IV-1 A member is competent who possesses and applies the skills and knowledge required for the task.
IV-2 A member shall not accept a task beyond the member's competence nor shall competence be claimed when not possessed.

ARTICLE V
A member shall safeguard confidential information and exercise due care to prevent its improper disclosure.

Ethical Considerations
V-1 Confidential information is nonpublic information, the disclosure of which is restricted.
V-2 Due care requires that the professional must not knowingly reveal confidential information, or use a confidence to the disadvantage of the principal or to the advantage of the member or a third person, unless the principal consents after full disclosure of all the facts. This confidentiality continues after the business relationship between the member and his principal has terminated.
V-3 A member who receives information and has not agreed to be bound by confidentiality is not bound from disclosing it. A member is not bound by confidential disclosures made of acts or omissions which constitute a violation of the law.
V-4 Confidential disclosures made by a principal to a member are not recognized by law as privileged in a legal proceeding. The member may be required to testify in a legal proceeding to the information received in confidence from his principal over the objection of his principal's counsel.
V-5 A member shall not disclose confidential information for personal gain without appropriate authorization.

ARTICLE VI
A member shall not maliciously injure the professional reputation or practice of colleagues, clients, or employers.

Ethical Considerations
VI-1 A member shall not comment falsely and with malice concerning a colleague's competence, performance, or professional capabilities.
VI-2 A member who knows, or has reasonable grounds to believe, that another member has failed to conform to the Society's Code of Ethics shall present such information to the Ethical Standards Committee in accordance with Article VIII of the Society's bylaws

Figure 2.5 Continued

Maine Revised Statutes
Title 32. Professions and Occupations
Chapter 93. Private Security Guards
§ 9412. Unlawful Acts

1. Acting without license; false representations. It is a Class D crime for any person knowingly to commit any of the following acts:

A. Subject to section 9404, to act as a security guard without a valid license;

B. To publish any advertisement, letterhead, circular, statement or phrase of any kind which suggests that a licensee is an official police agency or any other agency, instrumentality or division of this State, any political subdivision thereof, or of the Federal Government;

C. To falsely represent that a person is or was in his employ as a licensee;

D. To make any false statement or material omission in any application, any documents made a part of the application, any notice or any statement filed with the commissioner; or

E. To make any false statement or material omission relative to the requirements of section 9410-A, subsection 1, in applying for a position as a security guard with a contract security company.

2. Failure to return equipment; representation as peace officer. It is a Class D crime for any security guard knowingly to commit any of the following acts:

A. To fail to return immediately on demand, or within 7 days of termination of employment, any uniform, badge, or other item of equipment issued to him by an employer;

B. To make any representation which suggests, or which would reasonably cause another person to believe, that he is a sworn peace officer of this State, any political subdivision thereof, or of any other state or of the Federal Government;

C. To wear or display any badge, insignia, device, shield, patch or pattern which indicates or suggests that he is a sworn peace officer, or which contains or includes the word "police" or the equivalent thereof, or is similar in wording to any law enforcement agency; or

D. To possess or utilize any vehicle or equipment displaying the words "police," "law enforcement officer," or the equivalent thereof, or have any sign, shield, marking, accessory or insignia that may indicate that the vehicle is a vehicle of a public law enforcement agency.

Paragraph A does not apply to any proprietary security organization or any employee thereof.

3. Representations as to employees; failure to surrender license; posting of license. It is a Class D crime for any person licensed under this chapter knowingly to commit any of the following acts:

A. To falsely represent that a person was or is in his employ as a security guard;

B. To fail or refuse to surrender his license to the commissioner within 72 hours following revocation or suspension of the license; or after the licensee ceases to do business subject to section 9410;

C. To post the license or permit the license to be posted upon premises other than those described in the license; or

D. To fail to cause the license to be posted and displayed at all times, within 72 hours of receipt of the license, in a conspicuous place in the principal office of the licensee within the State.

Figure 2.6 Maine Statutory Authority in Unlawful Conduct.

4. **Other unlawful acts.** It is a Class D crime for any person licensed under this chapter, or for any employee thereof, knowingly to commit any of the following acts:

A. To incite, encourage or aid any person who has become a party to any strike to commit any unlawful act against any person or property;

B. To incite, stir up, create or aid in the inciting of discontent or dissatisfaction among the employees of any person with the intention of having them strike;

C. To interfere with or prevent lawful and peaceful picketing during strikes;

D. To interfere with, restrain or coerce employees in the exercise of their right to form, join or assist any labor organization of their own choosing;

E. To interfere with or hinder lawful or peaceful collective bargaining between employers and employees;

F. To pay, offer to give any money, gratuity, consideration or other thing of value, directly or indirectly, to any person for any verbal or written report of the lawful activities of employees in the exercise of their right to organize, form or assist any labor organization and to bargain collectively through representatives of their own choosing;

G. To advertise for, recruit, furnish or replace or offer to furnish or replace for hire or reward, within or outside the State, any skilled or unskilled help or labor, armed guards, other than armed guards employed for the protection of payrolls, property or premises, for service upon property which is being operated in anticipation of or during the course or existence of a strike;

H. To furnish armed guards upon the highways for persons involved in labor disputes;

I. To furnish or offer to furnish to employers or their agents any arms, munitions, tear gas implements or any other weapons;

J. To send letters or literature to employers offering to eliminate labor unions; or

K. To advise any person of the membership of an individual in a labor organization for the purpose of preventing the individual from obtaining or retaining employment.

5. **Dangerous weapons at labor disputes and strikes.** It is a Class D crime for any person, including, but not limited to, security guards and persons involved in a labor dispute or strike, to be armed with a dangerous weapon, as defined in Title 17-A, section 2, subsection 9, at the site of a labor dispute or strike. A person holding a valid permit to carry a concealed firearm is not exempt from this subsection. A security guard is exempt from this subsection to the extent that federal laws, rules or regulations require the security guard to be armed with a dangerous weapon at the site of a labor dispute or strike.

6. **Class E crimes.** It is a Class E crime for any person licensed under this chapter or for any employee of such a person, to knowingly commit any of the following acts:

A. To perform or attempt to perform security guard functions at the site of a labor dispute or strike while not physically located on property leased, owned, possessed or rented by the person for whom the licensee is providing security guards.

Figure 2.6 Continued

Vermont Statutes Annotated
Title 26. Professions and Occupations
Chapter 59. Private Investigative and Security Services
Subchapter 4. Unprofessional Conduct and Discipline
§ 3181. Unprofessional conduct

(a) Unprofessional conduct is the conduct prohibited by this section, or by section 129a of Title 3, whether or not taken by a license registrant or applicant.
(b) Unprofessional conduct means any of the following:
  (1) Conviction of a crime of moral turpitude.
  (2) Failing to make available, upon request of a person using the licensee's services, copies of documents in the possession or under the control of the licensee, when those documents have been prepared for and purchased by the user of services.
  (3) Conduct which evidences moral unfitness to practice the occupation.
  (4) Allowing any person to practice under a license who is not a partner or employee.
  (5) Violating a confidential relationship with a client, or disclosing any confidential client information except
    (A) with the client's permission,
    (B) in response to a subpoena or court order,
    (C) when necessary to establish or collect a fee from the client, or
    (D) when the information is necessary to prevent a crime that the client intends to commit.
  (6) Accepting any assignment which would be a conflict of interest because of confidential information obtained during employment for another client.
  (7) Accepting an assignment that would require the violation of any municipal, state or federal law or client confidence.
  (8) Using any badge, seal, card or other device to misrepresent oneself as a police officer, sheriff or other law enforcement officer.
  (9) Knowingly submitting a false or misleading report or failing to disclose a material fact to a client.
  (10) Falsifying or failing to provide required compulsory minimum training in firearms or guard dog handling as required by this chapter.
  (11) Failing to complete in a timely manner the registration of an employee.
  (12) Allowing an employee to carry firearms or handle guard dogs prior to being issued a permanent registration card.
  (13) Allowing an employee to work without carrying the required evidence of temporary or permanent registration.
  (14) Allowing an employee to use or be accompanied by an untrained guard dog while rendering professional services.
  (15) Failing to provide information requested by the board.
  (16) Failing to return the temporary or permanent registration of an employee.
  (17) Failing to notify the board of a change in ownership, partners, officers or qualifying agent.
  (18) Providing incomplete, false or misleading information on an application.

Figure 2.7 Vermont Unprofessional Conduct Statute.

(19) Any of the following except when reasonably undertaken in an emergency situation in order to protect life, health or property:
  (A) practicing or offering to practice beyond the scope permitted by law;
  (B) accepting and performing occupational responsibilities which the licensee knows or has reason to know that he or she is not competent to perform; or
  (C) performing occupational services which have not been authorized by the consumer or his or her legal representative.

(20) For armed and guard dog certified licensees, brandishing, exhibiting, displaying or otherwise misusing a firearm or guard dog in a careless, angry or threatening manner unnecessary for the course of the licensee's duties.

(c) After hearing, the board may take disciplinary action against a licensee, registrant or applicant found guilty of unprofessional conduct. Discipline by the board against an applicant, licensee or registrant for unprofessional conduct may include denial of an application, revocation or suspension of a license or registration, imposed supervision, reprimand, warning, or the required completion of a course of action.

Figure 2.7 Continued

State legislatures give codified instruction on acceptable behavior. Review Figures 2.6 and 2.7 as examples of this effort. Will these guidelines promote professionalism?

SUMMARY

Security's road to professionalism is filled with hidden dangers—rhetoric without substance, intentions without purpose, and commitment without resources. The security industry must take this professional sojourn seriously, if only because inaction will cause a legislative substitute. No doubt, many states are lagging behind in this impetus, but more states are set to raise age requirements, experience level, and educational qualifications as well as personal standards of conduct. The future appears inclined toward heightened regulation and standards.

DISCUSSION QUESTIONS

1. What level of qualifications are necessary for entry into the security industry in your jurisdiction?
2. Determine how many private and public institutions of higher education provide academic studies in private security?
3. What is the proper definition of good character? Should minor drug usage be an example of negative character?
4. Should a written examination be required before licensure as a security officer? What subjects should be included?

5. Devise a security training program totaling 100 hours of instruction.
6. Name at least two ethical considerations or concerns that constantly arise in the private security industry.
7. Should there be differing levels of qualification depending on the private security position?

NOTES

1. David W. Sackman, *At the Crossroads of Professionalism*, 30 Sec. Mgmt. 73 (1986).
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3

The Law of Arrest, Search, and Seizure: Applications in the Private Sector

INTRODUCTION

Private policing, as noted in *The Hallcrest Report II*, plays an integral role in the detection, protection, and apprehension of criminals in modern society. It is deemed, by many interested sources, as the more responsive, efficient, and productive player in the administration of justice. Plainly, business and industry prefer to deal with private sector justice since their own private police forces are not as constrained by constitutional dimensions. As Professor William J. O'Donnell eloquently notes:

> The growth of the private security industry is having an increasingly controversial impact on individual privacy rights. Unlike public policing, which is uniformly and comprehensively controlled by applied constitutional principles, private policing is not. Across the various jurisdictions, both statutes and case law have been used to curb some intrusion into privacy rights but this protective coverage is neither standardized nationally nor anywhere near complete. The net result is that some rather debatable private police practices are left to the discretion of security personnel.[1]

Constitutionally, the private sector has the upper hand since the extension of traditional police protections have never materialized. As the role of private security and private police develops, criminal defendants and litigants will clamor for increased protection. Already, defense advocates argue that Fourth, Fifth, Sixth, and Fourteenth Amendment standards regarding arrest, search and seizure, and general criminal due process are applicable to private security.[2]

The primary aims of this chapter are to provide a broad overview of the legal principles of arrest, search, and seizure in the private sector; analyzing the theoretical nexus between the private and public sector in the analysis of constitutional claims; and reviewing specific case law decisions, particularly at the appellate level. In addition, a review of the theory of citizens' arrest, both in common and statutory terms, is also covered. Finally, the research will assess the novel and even radical theories which seek to make applicable constitutional protections in the private sector including:

- The Significant Involvement Test
- The Private Police Nexus Test
- The State Action Theory
- Common Law and Statutory Review of Private Security Rights and Liabilities
- The Parameters of Private Search Rights

The precise limits of the authority of private security personnel are not clearly spelled out in any one set of legal materials. Rather, one must look at a number of sources in order to define, even in a rough way, the dividing line between proper and improper private security behavior in arrest, search, and seizure. Even traditional constitutional inquiry in the public sector can be complicated. So, when these same obtuse principles are applied to private security, confusion can result.

The Private Security Advisory Council recognizes this complexity:

> In order to perform effectively, private security personnel must, in many instances, walk a tightrope between permissible protective activities and unlawful interferences with the rights of private citizens.[3]

Given the fact that the criminal justice system is already administratively and legally beleaguered, it is natural for both the general public and criminal justice professionals to seek alternative ways for stemming the tide of criminality, and carrying out the tasks of arrest, search, and seizure. Privatization is a phenomena that surely will not dissipate.[4] Private security has played an increasingly critical role in the resolution of crime in modern society.

Profound questions arise in the brave new world of private policing. Should private sector justice adhere to constitutional demands imposed on the public sector when detecting criminality or apprehending criminals? Should the Fourth Amendment apply in private sector cases? Are citizens who are arrested and have their persons and property searched and seized by private security personnel entitled to the same protections as an individual apprehended by the public police? Have public and private police essentially merged, or become so entangled as to prompt constitutional protections? Does public policy and constitutional fairness call for an

expansive interpretation of the Fourth, Fifth, Sixth, and Fourteenth Amendments regarding private security actions? Clarification of these constitutional dilemmas is the prime aim of this chapter.

CONSTITUTIONAL FRAMEWORK OF AMERICAN CRIMINAL JUSTICE

Considerable protections are provided against governmental action that violates the Bills of Rights. Most applicable is the Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue upon their probable cause supported by oath, affirmation and particularly describing the place to be searched and the persons or things to be seized.[5]

Responding to the clamor for individual rights, calls for a reduction in arbitrary police behavior, and a general recognition that the rights of the individual are sometimes more important than the rights of the whole, judicial reasoning, public opinion, and academic theory for the last twenty years have suggested and formulated an expansive interpretation of the Fourth Amendment.[6] When and where police can be constrained and criminal defendants liberated appears to be the trend.

On its face, and in its express text, the Fourth Amendment is geared toward public functions.[7] The concepts of a "warrant," an "oath," or "affirmation" are definitions that imply public officialdom. Courts have been reticent to extend those protections to private sector activities. In *Burdeau v. McDowell,*[8] the Supreme Court held unequivocally that Fourth Amendment protection was not available to litigants and claimants arrested, searched, or seized by private parties. The Court explicitly remarked,

> The Fourth Amendment gives protection against unlawful searches and seizures.... Its protection applies to governmental actions. Its origin and history clearly shows that it was intended as a restraint upon the activity of sovereign authority and was not intended to be a limitation upon other than governmental agencies.[9]

The Court's ruling is certainly not surprising, given the historical tug-of-war between federal and states' rights in the application of constitutional law. Historically, courts have been hesitant to expand constitutional protections to cover the actions of private individuals rather than governmental actions. *Burdeau* has been continuously upheld in a long sequence of cases and is considered an extremely formidable precedent.[10]

The *Burdeau* decision and its progeny enforce the general principle that the Fourth Amendment is applicable only to arrests, searches, and

seizures conducted by governmental authorities. The private police and private security system have historically been able to avoid the constrictions placed upon the public police in the detection and apprehension of criminals.[11]

If constitutional protections do not inure to defendants and litigants processed by private sector justice, then what protections do exist? Could it be argued that the line between private and public justice has become indistinguishable? Are private citizens, subjected to arrest, search, and seizure actions by private police, entitled to some level of criminal due process that is fundamentally fair and not overly intrusive? Does the Fourth Amendment's strict adherence to the protection of rights solely in the public and governmental realm blindly disregard the reality of public policing? Is this an accurate assessment of what the general citizenry experiences? Or should the constitution be more generously applied to encompass the actions of private police and security operatives?

ARREST AND PRIVATE SECTOR JUSTICE

As a general proposition, private security officers, private police, and other private enforcement officials possess the same rights as any private citizen in carrying out an arrest. "While many private security personnel perform functions similar to public law enforcement officers, they generally have no more formal authority than an average citizen. Basically, because the security officer acts on behalf of the person, business, corporation, or other entity that hires him, that entity's basic right to protect persons and property is transferred to the security officer."[12] When one considers the amazing similarity of service and operation between public and private police functions, the general assertion that security officers and other responsible personnel are guided only by the rights of the general citizenry is extraordinary. Private police serve a multiplicity of purposes, including the protection of property and persons from criminal activity, calamity, and destructive events; the surveillance and investigation of internal and external criminal activity in business and industry; and the general maintenance of public order. Therefore, it would seem prudent that private police be guided by some level of constitutional and statutory scrutiny. However, "unless deputized, commissioned, or provided for by ordinance or state statute, private security personnel possess no greater legal powers than any private citizen."[13] Within the language of the guiding constitutional documents that cover "state action," the private agent sidesteps constitutional requirements. This is the stark reality.

Since private police do not derive their authority from constitutional or governmental enactments, the foundation for the arrest action rests in the common and statutory law—those codifications that give the power of arrest to a private person. "The security officer has the same rights both as

a citizen and as an extension of an employee's right to protect his employer's property. Similarly, this common law recognition of the right of defense of self and property is the legal underpinning for the right of every citizen to employ the services of others to protect his property against any kind of incursion by others."[14]

The Law of Citizen's Arrest—The Private Security Standard

The scope of permissible citizen's arrest has remained fairly constant in American jurisprudence. At common law, the private citizenry could make a permissible arrest for the commission of any felony in order to protect the safety of the public.[15] An arrest could also be effected for misdemeanors which constituted a breach of the peace or public order, but only when immediate apprehension and a presence of an arresting officer was demonstrated. Much of our contemporary analysis of reasonable suspicion and probable cause also relates to the citizen's right to subject another individual to the arrest process. "A citizen could perform a valid and lawful arrest on his own authority, if the person arrested committed a misdemeanor in his presence or if there were reasonable grounds to believe that a felony was being or had been committed by the arrestee although not in the presence of the arresting citizen."[16] Private citizens are also permitted to search individuals that they have arrested or detained for the purposes of safety reasons, and this right is comparable to the *incident to arrest* or *stop and frisk* standard applicable in the public jurisdiction. "When an articulable suspicion of danger exists, granting a private policeman or citizen the authority to search for the purpose of finding or seizing weapons of an arrestee is at least equivalent to a pat down approved by *Terry*, and seems to be a necessary concomitant of the power to arrest."[17]

When compared to public officials' arrest rights, the private citizen has a heavier burden of demonstrating actual knowledge, presence at the events, or other firsthand experience that justifies the apprehension. These added requirements of citizen's arrest reflect caution. In some states, a private citizen can arrest under any of the following scenarios:

1. for the public offense (misdemeanor) committed or attempted in his presence
2. when the person arrested has committed a felony and the private citizen has probable cause to believe so, although not in his presence
3. when the felony has been in fact committed and the private citizen has reasonable cause for believing the person arrested has committed that offense.

Statutorily, the scope of citizen's arrest varies according to jurisdiction. A list of statutory enactments, from Alaska to Florida, can be found in

the Appendix 1. Two examples are:

Alaska: A private person or peace officer without a warrant may arrest a person:

1. for a crime committed or attempted in the presence of the person making the arrest;
2. when the person has committed a felony, although not in the presence of the person making the arrest;
3. when a felony has in fact been committed, and the person making the arrest has reasonable cause for believing the person to have committed it.[18]

New York: Any person may arrest another person:

1. for a felony when the latter has in fact committed such felony, and,
2. for any offense when the latter has in fact committed such offense in his presence.[19]

In Illinois, a police officer "can make an extraterritorial warrantless arrest in the same situation that any citizen can make an arrest."[20]

To thwart and effectively defend against citizen-based challenges to the regularity of the citizen arrest, the security officer conducting any arrest should complete documentation that justifies the decision making. First, an *incident report*, which details the events comprising the criminal conduct, should be completed (see Figure 3.1).[21] Second, an *arrest report* (Figure 3.2),[22] records the officer's actions.

Generally, legislation concerning citizen's arrest covers a good deal of territory including the category of crimes, standards of action, time of day, and alternative means. Critics have charged that the codification appears to be "more a product of legislation in discrimination than a logical adaptation of a common law principle to the conditions of modern society."[23] While legislators hope and wish for skilled, trained, and educated individuals to effect as many arrests as possible, the statutes have essentially sought a middle ground permitting arrests only when needed and emphasizing the system of citizen referral when at all possible. However, the process of citizen's arrest is "filled with legal pitfalls" which "may depend on a number of legal distinctions, such as the nature of the crime being committed, proof of actual presence at the time and place of the incident."[24] Some analyses of these variables and factors follow.

Time of the Arrest

Both common law and statutory rationales for the privilege or right of citizen's arrest impose time restrictions on the arresting party. In the case of felonies, the felon's continuous evasion of authorities was considered a substantial and continuing threat against the public order and police.

Building Security Inspection Report

A security Inspection was made at _____ on date and at the time shown below. Conditions, if any, having a bearing on the protection of Company property are also noted below.

Security Representative _____

District _____ Date _____ 20 ___

Complete Address of Property Inspected _____ Time: From AM

Central Office ( ) District ( ) Garage ( ) Locker ( ) Work Center ( ) _____ PM

Carrier Hut ( ) Vehicle ( ) Acctg. Bldg. ( ) Commerical Bldg. ( ) To AM

_____ PM

Regular Means of Admittance Guard ( ) Locked Door or Gate ( ) Door Tele. ( )

Code Key Set ( ) Cable Box Lock ( ) Sesame Lock ( )

No.	Item		Satisfactory	Unsatisfactory	Remarks – Briefly describe Conditions That Prompted "Unsatisfactory" Classification and Corrective Action Taken
1.	Appropriate Ilumination				
2.	Condition of Locks				
3.	Condition of Fences				
4.	Condition of Gates				
5.	Basement Entrances				
6.	Outside Doors				
7.	Windows				
8.	Guard Services				
9.	Storage – Cable				
10.	Material Storage, Cages				
11.	Tool Storage				
12.	Talking Set Storage, Cages				
13.	Car or Bin Doors Unlocked				
14.	Fire Hazards				
15.	Identification & Accountability of Others Found on Premises	Employees			
		Non-employees			
16.	Responsible Department Advised:		Date:	Title:	Name:
17.	Repeated Condition:		Number ( ) above		

Use other side if necessary

Figure 3.1 Building security inspection report.

ARREST REPORT

14 REP AREA	1 SUSPECT'S NAME (LAST, FIRST, MIDDLE)							1A M.O. NO.			2 COMPLAINT NO.
15 LOCATION OF ARREST	3 SUSPECT'S ADDRESS				CITY						4 ARREST NO./GRADE
16 DESCRIBE TYPE OF PREMISES	5 SEX	RACE	D.O.B.	HT	WT	HAIR	EYES	6 I.D. NO			
17 DAY, DATE/TIME ARRESTED	7 N.C.I.C. CHECK		TIME					8 SOCIAL SECURITY NO.			
18 BREATHALYZER/OPERATOR/TIME READING	19 PARENT/GUARDIAN/TIME NOTIFIED ☐ YES ☐ NO		9 PLACE OF BIRTH			10 WEAPON (DESCRIBE)				SERIAL NO.	
20 RESIST ☐ YES ☐ NO	21 NARCOTIC? ☐ YES ☐ NO	22 ARMED? ☐ YES ☐ NO	11 OCCUPATION			12 RES. PHONE				13 BUS. PHONE	
23 WHERE SUSPECT EMPLOYED OR SCHOOL	24 DAY, DATE/TIME OCCURRED					125 DATE/TIME REPORTED					
26 SUSPECT OPERATOR'S LIC. NO. STATE	27 FORMAL CHARGES									28 U.C.R.	
29 HOLD PLACED ON VEHICLE ☐ YES ☐ NO	TOWED TO	30 CHARES CHANGED TO								DATE/TIME	
31 VEHICLE INVOLVED	YEAR-MAKE-MODEL	COLOR(S)	REG. NO. STATE YEAR	31A VEHICLE REGISTERED OWNER					ADDRESS		

CODE: C – COMPLAINANT V – VICTIM W – WITNESS P – PARENT/GUARDIAN CO - SUSPECT

32 NAME	CODE	RESIDENCE	CITY	RES. PHONE	BUS. PHONE
(1)					
(2)					
(3)					
(4)					
(5)					

33 ARREST PROCEDURE

(A) ARRESTED ____ HRS. (B) RIGHTS _____ (C) TRANSPORTED _____ HRS. (D) ARRIVED _____ HRS.
(E) PROCESSED & RIGHTS _____ HRS. (F) INTERVIEWED _____ HRS. (G) ARRAINGNED _____ HRS. (H) RELEASED COMMITTED _____ HRS.
(I) IMPLIED CONSENT LAW _____ HRS.

ITEM NO.	34 NARRATIVE (1) CONTINUATION OF ABOVE ITEMS (INDICATE "ITEM NUMBER" AT LEFT) (2) DESCIRBE DETAILS OF INCIDENT NOT LISTED ABOVE (3) IDENTIFY ADDITIONAL WITNESSES, VICTIMS, ETC. FROM BLOCK NO. 32.

35 TRANSPORTING OFFICER NO.	36 ARRESTING OFFICER NO.	37 BOOKING OFFICER NO.
38 TRANSPORTING OFFICER NO.	39 ARRESTING OFFICER NO.	40 SEARCHED BY NO.
41 SUSPECT'S MONEY	42 SUPERVISOR APPROVING	43 DAILY BULLETIN ☐ YES ☐ NO / PAGE OF

Figure 3.2 Arrest report.

44 OFFICER'S OBSERVATIONS

ODOR OF
ALCOHOL: STRONG ☐ MODERATE ☐ FAINT ☐ OTHER _____
COMPLEXION: FLUSHED ☐ MOTTLED ☐ PALE ☐ NORMAL ☐ OTHER _____
EYES: BLOODSHOT ☐ WATERY ☐ GLASSY ☐ CONTRACTED ☐ DILATED ☐ OTHER _____
WEARING GLASSES ☐ CONTACT LENSES ☐
SPEECH: INCOHERENT ☐ CONFUSED ☐ JERKY ☐ PROFANE ☐ STUTTERING ☐ GOOD ☐ OTHER _____
BALANCE: STAGGERING ☐ SWAYING ☐ UNABLE TO STAND ☐ NEEDED ASSISTANCE TO WALK ☐ OTHER _____
MENTAL
ATTITUDE: POLITE ☐ EXCITED ☐ TALKATIVE ☐ HILARIOUS ☐ COMBATIVE ☐ STUPEFIED ☐ OTHER _____
CLOTHING
CONDITION: DISORDERLY ☐ ORDERLY ☐ SOILED BY VOMIT ☐ SOILED BY URINE ☐ PARTLY DRESSED ☐ OTHER _____
CLOTHING *(Describe Clothing and Color of Garments)* _____
_____
DEFENDANT INJURED? Yes ☐ No ☐ Retained In Hospital? Yes ☐ No ☐ Doctor _____
NATURE OF INJURIES _____
_____

45 REASON FOR STOP:

DRIVING TOO FAST/SLOW ☐ ACCIDENT ☐ DRIVING IN INAPPROPRIATE AREA ☐ WEAVING/DRIFTING ☐
NEARLY STIKING CAR OR OBJECT ☐ WIDE RADIUS TURN ☐ STOPS WITHOUT CAUSE ☐ LOOKS INTOXICATED ☐
NOT IN MARKED LANE ☐ EQUIPMENT VIOLATION ☐ RAN STOP SIGN/LIGHT ☐ FOLLOWING TOO CLOSELY ☐
BRIGHT/NO LIGHTS ☐
OTHER _____

46 FIELD TEST

1	2	3	MARK
WALK AND TURN	**ONE LEG STAND**	**ALCOTEST**	**LEVEL**
☐ CAN'T KEEP BALANCE WHILE LISTENING TO INSTRUCTIONS	☐ SWAYING WHILE BALANCING		OF
☐ STARTS BEFORE INSTRUCTIONS FINISHED	☐ USES ARMS TO BALANCE		DISCOLORATION
☐ STOPS WHILE WALKING TO STEADY	☐ QUITE UNSTEADY		
☐ DOES NOT TOUCH HEEL TO TOE	☐ PUTS FOOT DOWN		
☐ LOSES BALANCE WHILE WALKING	☐ CANNOT/REFUSES TEST (5)		
☐ INCORRECT NUMBER OF STEPS			
☐ CANNOT/REFUSES TO DO TEST (9)			

INSTRUCTIONS READ PER MTL. FORM _____ ☐

47 CHEMICAL TESTING

TIME OF TEST _____
CHEMICAL BREATH TEST: ADMINISTERED BY _____ SERIAL # _____
DEVICE _____ SERIAL # _____
RESULTS _____

URINE TEST SAMPLE: OBTAINED BY _____
SAMPLE STORED IN _____

BLOOD SAMPLE: TAKEN BY _____ AT _____ HOSPITAL
SAMPLE STORED IN _____ AT MTLP FOR TRANSPORTATION
TO _____ LAB _____

Figure 3.2 Continued

Therefore, an arresting party could complete the process regarding a felon at any time. Persons committing misdemeanors, however, were afforded greater protection from private citizen arrest actions. Some states require that the person committing a misdemeanor be arrested by a private citizen only when actually engaging in conduct that undermines the public order. However, other states have dramatically expanded the misdemeanor defense category beyond the breach of the public peace typology. More specifically, states have expanded the arrest power to include petty larceny and shoplifting,[25] and have provided a rational barometer of when citizens' arrests are appropriate.

Also relevant to time limitation analysis is freshness of the pursuit. A delay or deferral of the arrest process will result in a loss of the arrest privilege. Predictably, freshness in the pursuit may be difficult to measure in precise terms. Timing restrictions "serve to compel reliance on police once the danger of immediate public harm from criminal activity has ceased."[26]

Presence and Commission

Presence during commission of the offence is a clear requirement in a case involving misdemeanors where firsthand, actual knowledge corroborates the arresting party's decision making. "The purpose of the requirement is presumably to prevent the danger and imposition involved in mistaken arrests based upon uncorroborated or second hand information. Its principal impact is in cases where the citizen learns the commission of a crime and assumes the responsibility of preventing the escape of an offender."[27] If firsthand observation is called for, the arrest is based on an eyewitness view. In other cases, especially the full range of felonies, a citizen can arrest another person based on the standard of reasonable grounds, a close companion to the probable cause test. To find probable cause, one must demonstrate that someone has committed, is likely committing, or is about to commit a crime. Being present during an offense plainly meets this standard. But numerous other cases are just as probative despite a lack of immediate presence. Critics have charged that requiring presence as a basis for the privilege to arrest is nonsensical. A note in the *Columbia Law Review* gives an example by analogy:

> It is here that the requirement produces incongruous results. If a citizen hears a scream and turns around to see a bleeding victim on the ground and a fleeing figure, he can arrest the assailant with impunity. Yet if he comes upon the scene but a moment later under identical circumstances, his apprehension of the fugitive would be illegal.[28]

A few jurisdictions have attempted to reconcile this dilemma by allowing felony arrests to occur without a presence requirement. Presence is simply replaced with a reasonable grounds or reasonable cause criteria.

The Report of the Task Force on Private Security from the National Advisory Committee on Criminal Justice Standards and Goals addresses this qualification.

> Under the statutes that authorize an arrest based on "reasonable cause" or "reasonable grounds" it has been held in most jurisdictions that these terms generally mean sufficient cause to warrant suspicion in the arrester's mind at the time of the arrest. Some jurisdictions have expanded the rule of suspicion to require a higher standard; yet, there are no uniform criteria emerging from the numerous decisions on the questions.[29]

A review of citizen's arrest standards on a state-by-state basis is provided in Table 3.1.

Note that Table 3.1 makes a distinction between minor and major offenses, namely between felonies and misdemeanors. It also outlines the general grounds leading to a finding of probable or reasonable grounds required to affect an arrest. Some general statutory conclusions can be made:

1. Probable cause, the standard utilized for arrest, search, and seizure by public officials is not commonly employed in the citizen's arrest realm.
2. *Reasonable grounds* is the standard generally employed by statutes outlining a citizen's right to arrest.
3. Presence is generally required in all minor offenses commonly known as misdemeanors.
4. Presence is required in a minority of jurisdictions in felony cases.
5. Before an arrest can be effected in a felony case, the private citizen must have some definitive knowledge that a felony has been committed.

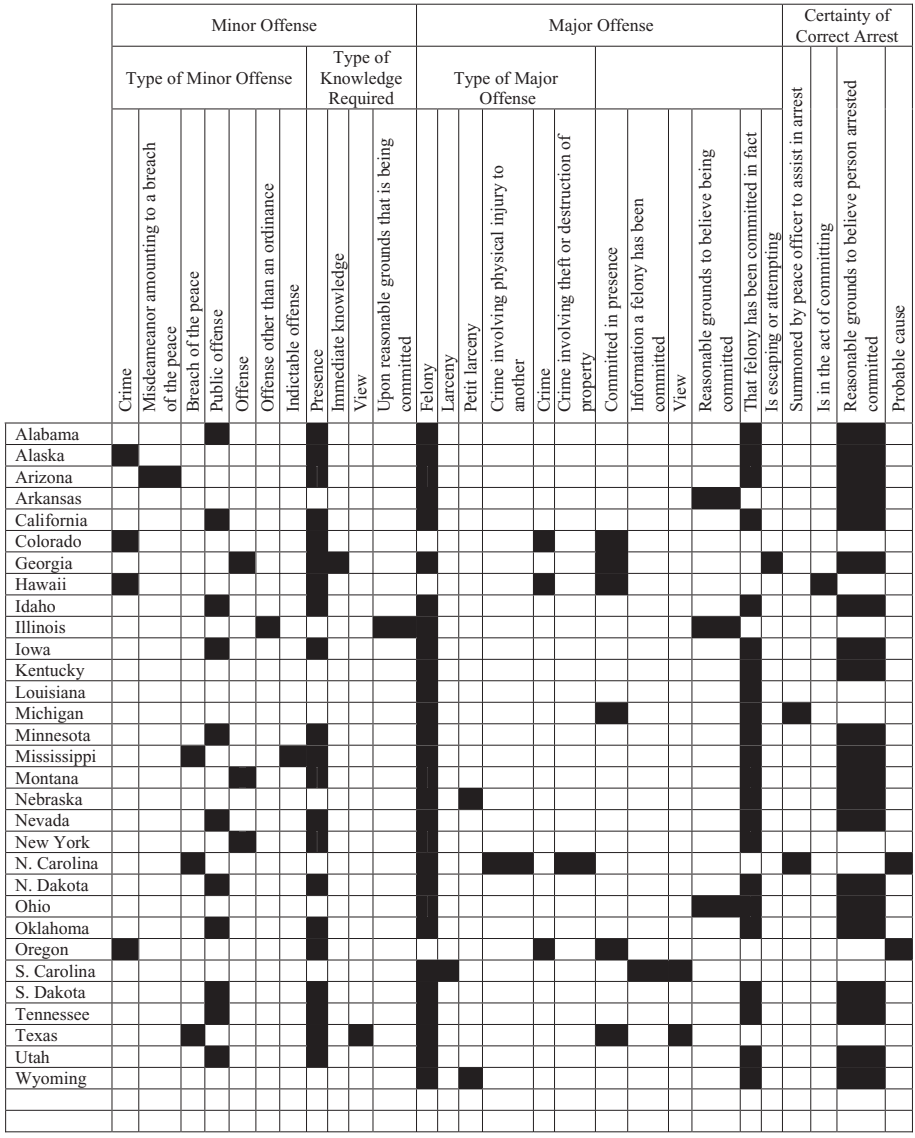
In sum, hunches, guesses, or general surmise is not a satisfactory framework in which to conduct citizens' arrests. Just as the public police system must adhere to some fundamental standards of fairness regarding the arrest, search, and seizure process, so too must private sector justice. Arrest based on *reasonable grounds* is the benchmark.

The *Restatement of the Law of Torts* cogently justifies a citizen's arrest in these circumstances:

a. If the other person has committed a felony for which he is arrested;
b. If a felony has been committed and the arrestor reasonably suspects the arrestee has committed it;
c. If the arrestee in the arrestor's presence is committing a breach of the peace or is about to renew it;
d. If the arrestee has attempted to commit a felony in the arrestor's presence and the arrest is made at once or in fresh pursuit.[30]

Other factors to be considered by security personnel in the arrest process, depending upon jurisdiction, include *notice*, that is, an announcement advising a suspect of one's intention to arrest. Also to be remembered

Table 3.1 State Survey of Citizen's Arrest Laws



is the level of force utilized and the detention techniques for persons awaiting formal processing by the criminal justice system.

THE LAW OF SEARCH AND SEIZURE: PUBLIC POLICE

There are two fundamental ways in which a public peace officer can conduct a search and seizure—with or without a warrant. Warrants are expressly referenced in the Fourth Amendment and their probable cause determination is explicitly mentioned. Searches with warrants are mandated unless one of the various exceptional circumstances exists to justify a warrantless action. There are numerous exceptions to the warrant requirement from consent to public safety questions.

When public police search without justification or legal right, the evidence so taken is excluded due to the constitutional infringement. This restrictive policy is labeled the *exclusionary rule*.[31] In *Mapp v. Ohio*[32] the U.S. Supreme Court rendered inadmissible evidence obtained by public law enforcement officials in violation of the Fourth, Fifth, and Sixth Amendments of the U.S. Constitution. The Fourteenth Amendment has selectively incorporated these three Amendments as they apply to state police action.

For an example of a federal search warrant see Figure 3.3. An arrest warrant is at Figure 3.4.

For the average police officer, the bulk of arrests are warrantless. As part of routine procedure, a police officer who makes a lawful and valid arrest, with or without an arrest warrant, or at arm's length, is entitled to search the suspect and the area within his *immediate control*. At other times, the search and eventual seizure may arise from a *plain view* observation. *Plain view* permits any law enforcement official who sees contraband, weaponry, or other evidence of criminality within direct sight or observation to seize the evidence without warrants or other legal requirements. Police may search and seize contraband in any *open space* environment, such as agricultural centers for narcotics. This warrantless exception is often referred to as the *open field* rule.[33] Police can search and seize evidence in any *abandoned* property or place. Warrant requirements for police are waived in cases of extreme emergency known as *exigent* situations, as when there is a high likelihood of lost evidence. Naturally, police have also been given leeway to conduct warrantless searches when their *personal safety* is at risk. *Auto* searches and *consent* searches generally bypass the more restrictive warrant requirements. *Stop and frisk*, as outlined in *Terry v. Ohio*,[34] allows police to "pat down" a suspect if it's reasonable to suspect weaponry or other potential harm.[35] One other factor is worth mentioning as well. Historically, public officers operated under some level of "immunity" whether whole or qualified in design. That immunity insulated government agents from liability as long as his or her "actions [are] taken in good faith pursuant to their discretionary authority."[36] Determining whether a public official is entitled to qualified

✎AO 93 (Rev. 8/98) Search Warrant

UNITED STATES DISTRICT COURT

_____ District of _____

In the Matter of the Search of
(Name, address or brief description of person or property tobe searched)

SEARCH WARRANT

Case Number:

TO: _____ and any Authorized Officer of the United States

Affidavit(s) having been made before me by _____ who has reason to believe
Affiant

that ☐ on the person of, or ☐ on the premises known as (name, description and/orlocation)

in the _____ District of _____ there is now concealed a certain person or property, namely (describe the person or property)

I am satisfied that the affidavit(s) and any record testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before _____
Date

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search ☐ in the daytime 6:00 AM to 10:00 P.M. ☐ at anytime in the day or night as I find reasonable cause has been established and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to _____ as required by law.
U.S. Judge or Magistrate

_____ at _____
Date and Time Issued City and State

_____ _____
Name and Title of Judicial Officer Signature of Judicial Officer

Figure 3.3 Search warrant.

AO 93 (Rev. 8/98) Search Warrant (Reverse)

RETURN	Case Number:	
DATE WARRANT RECEIVED	DATE AND TIME WARRANT EXECUTED	COPY OF WARRANT AND RECEIPT FOR ITEMS LEFT WITH
INVENTORY MADE IN THE PRESENCE OF		
INVENTORY OF PERSON OR PROPERTY TAKEN PURSUANT TO THE WARRANT		

CERTIFICATION

I swear that this inventory is a true and detailed account of the person or property taken by me on the warrant.

Subscribed, sworn to, and returned before me this date.

U.S. Judge or Magistrate — Date

Figure 3.3 Continued

✎AO 442 (Rev. 10/03) Warrant for Arrest

UNITED STATES DISTRICT COURT

_____ District of _____

UNITED STATES OF AMERICA

V.

WARRANT FOR ARREST

Case Number:

To: The United States Marshal
and any Authorized United States Officer

YOU ARE HEREBY COMMANDED to arrest _____
Name

and bring him or her forthwith to the nearest magistrate judge to answer a(n)

☐ Indictment ☐ Information ☐ Complaint ☐ Order of court ☐ Probation Violation Petition ☐ Supervised Release Violation Petition ☐ Violation Notice

charging him or her with (brief description of offense)

in violation of Title _____ United States Code, Section(s) _____

_____ _____
Name of Issuing Officer Signature of Issuing Officer

_____ _____
Title of Issuing Officer Date and Location

RETURN		
This warrant was received and executed with the arrest of the above-named defendant at		
DATE RECEIVED DATE OF ARREST	NAME AND TITLE OF ARRESTING OFFICER	SIGNATURE OF ARRESTING OFFICER

NAME AND TITLE OF ARRESTING OFFICER

Figure 3.4 Arrest warrant.

AO 442 (Rev. 10/03) Warrant for Arrest

THE FOLLOWING IS FURNISHED FOR INFORMATION ONLY:

DEFENDANT'S NAME: _____

ALIAS: _____

LAST KNOWN RESIDENCE: _____

LAST KNOWN EMPLOYMENT: _____

PLACE OF BIRTH: _____

DATE OF BIRTH: _____

SOCIAL SECURITY NUMBER: _____

HEIGHT: _____ WEIGHT: _____

SEX: _____ RACE: _____

HAIR: _____ EYES: _____

SCARS, TATTOOS, OTHER DISTINGUISHING MARKS: _____

_____

_____

FBI NUMBER: _____

COMPLETE DESCRIPTION OF AUTO: _____

_____

INVESTIGATIVE AGENCY AND ADDRESS: _____

_____

_____

_____

Figure 3.4 Continued

immunity, then, "requires a two-part inquiry: (1) Was the law governing the state official's conduct clearly established? (2) Under that law could a reasonable state official have believed his conduct was lawful?"[37] This standard "gives ample room for mistaken judgments by protecting 'all but the plainly incompetent or those who knowingly violate the law.'"[38, 39]

THE LAW OF SEARCH AND SEIZURE: PRIVATE POLICE

The rationale behind the exclusionary rule is to deter police misconduct and to halt illegal and unjustifiable investigative processes. As noted previously, in *Burdeau v. McDowell*,[40] the Supreme Court of the United States

was unwilling to extend the exclusionary rule to private sector searches. *Burdeau* held exclusionary rule inapplicable since it was clear that there was "no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure as whatever wrong was done by the act of individuals in taking the property of another."[41] Trial attorney John Wesley Hall, Jr. writes in *Inapplicability of the Fourth Amendment*:

> One of the oldest principles in the law of search and seizure holds that searches by private or non-law enforcement personnel are not protected by the Fourth Amendment regardless of the unlawful manner in which the search may have been conducted. The Fourth Amendment historically only applies to direct governmental action and not the passive act of using relevant evidence obtained by a private party's conduct.[42]

Others disagree with these lines of legal explanation especially when one considers how extensive the inroads of private sector justice are in the war on crime. The regularity of arrest, search, and seizure processes in private security settings are now amply documented. In retail establishments, security personnel regularly search individuals suspected of shoplifting. Searches are also seen in business and industrial applications. "These could include search of a car or dwelling for pilfered goods or the use of electronic surveillance devices to obtain information for use in making legal, business or personal decisions."[43] Additionally, surveillance by private security companies utilizing various forms of electronic eavesdropping, emerging technologies, and other interception devices, while still regulated to some extent in the public sector, are more readily utilized and commonly employed in the private sector.

The Private Security Advisory Council[44] ponders a noticeable lack of either common law or statutory authority governing private search parameters. Yet even with the industry's practices, this lack of restrictions in the private sector is inexcusable. The Council does list these instances as legitimate private search actions:

1. Actual consent by a person
2. Implied consent as a condition of employment or part of an employment contract
3. Incidental to valid arrest
4. Incidental to valid conditions[45]

In some respects, these four categories parallel the very conditions under which public law enforcement may permissibly conduct warrantless searches. "As a general consideration since the public police are intended to be society's primary law enforcers, the limitations on public police search should set the upper boundaries of allowable search by private police."[46] Of course, it is also critical to note that while constitutional restrictions may not yet apply in the private security realm without a more demonstrable showing, other remedies are available to those who have

been illegally arrested, searched, or had personal effects or property unjustly seized. These tort actions and corresponding remedies include, but are not limited to:

- battery
- theft
- trespass
- false imprisonment
- invasion of privacy or being placed in a false or humiliating light
- an action for false imprisonment or malicious prosecution as well as potential civil rights violations

Up to the present, the precedential import of *Burdeau v. McDowell* has not diminished.

To track a private sector search of the person, review the checklist at Figure 3.5.[47]

In summary, the constitutional guidelines and case law interpreting standards of public police practice have yet to make a remarkable dent in private security activity. Relying upon strong precedent, statutory non-involvement, and a general hesitancy on the part of the courts and the legislatures to expand constitutional doctrines like the exclusionary rule, private security practitioners are still provided a safe haven in the law of arrest, search, and seizure.

CHALLENGES TO THE SAFE HARBOR OF PRIVATE SECURITY

In *People v. Zelinski*,[48] the California Supreme Court ruled that security officers were thoroughly empowered to institute a search to recover goods that were in plain view, but that any intrusion into the defendant's person or effects was not authorized as incident to a citizen's arrest or protected under the *Merchant's Privilege Statute*. The court concluded that the evidence seized was "obtained by unlawful search and that the constitutional prohibition against unreasonable search and seizure affords protection against the unlawful intrusive conduct of these private security personnel."[49] The decision temporarily shook the status quo. The court fully recognized its own disregard of previous U.S. Supreme Court rulings, stating:

> Although past cases have not applied the constitutional restriction to purely private searches, we have recognized that some minimal official participation or encouragement may bring private action within the constitutional restraints on state action.[50]

Mindful of the facts of this case, the Supreme Court of California could not recite any cases where there was a connection or legal nexus between private and public police activity. Instead, the court simply

1. What were the arresting security officers doing when you first saw them?
2. What were you doing when you first saw the security officers?
3. What were you wearing?
4. What did the arresting security officers say and do before they touched you?
5. Did you make any sudden move to conceal or dispose of anything in your possession in view of the security officers? Give details.
6. Were the security officers able to observe any incriminating objects on your person before they touched you? What?
7. Were there any bulges discernible to suggest incriminating objects concealed beneath your clothing?
8. Did you make any sudden movements that might appear to be threatening to the arresting security officers or other persons?
9. Did you attempt to escape or flee?
10. Describe the visibility in the area of the arrest.
11. Did the security officers ever tell you that you were under arrest, or utter words to that effect? What exactly did they say?
12. Did the security officers use force or threats to restrain you in any way?
13. Did the security officers tell you the reason you were being arrested?
14. Did they search your person? Describe in detail the manner and thoroughness of the search.
15. Did you resist the arrest or search in any way? Describe.
16. Did the security officers use force or threats of force to search your clothing or your person?
17. Did the arresting security officers search you at the place of the arrest?
18. If not, how long after the arrest were you searched?
19. How far from the site of the arrest was the search conducted?
20. Were you taken to your home or car before being searched?
21. Was anything else searched besides your person?
22. What was seized by the arresting security officers? Describe in detail.
23. How long had you been carrying it before the arrest and search?
24. From whom had you obtained it?
25. Did the security officers say or do anything to suggest that they knew in advance what they would find or where they would find it? Describe the acts and behavior of the security officers in detail.
26. Did anyone know you were carrying the objects seized? Who?
    * Was he under investigation for any crime?
    * Has he been in police custody recently?
    * Has he a criminal record?

Figure 3.5 Checklist for search.

dismissed previous decisions based upon a variety of rationales, including the security industry's new and dynamic involvement in the administration of justice.[51] The court cited that the "increasing reliance placed upon private security personnel by local enforcement of criminal law"[52] particularly as it relates to privacy rights and procedural rights of defendants. In the end, the California Supreme Court relied upon its own Constitution, Article 2, Section 13, which ironically is a mirror image of the federal provision.

Upon closer reading, the decision is a startling departure, at least at the state level. Stephen Euller, in his article *Private Security in the Courtroom: The Exclusionary Rule Applies*,[53] made a bold prediction:

> Like it or not the *Zelinski* rule is coming. There are good reasons why professionals should welcome it. The *Zelinski* court recognized that private security personnel play an important role in law enforcement and often act on the public's behalf. Part of the reason some people are concerned about abuse is simply because security professionals have at times demonstrated rather impressive investigative skills and sophistication. The new rules will encourage the private security industry to upgrade itself, its level of professionalism, to discipline itself, to erase the image of the lawless private eye.[54]

Just when the private act transforms into a public one is difficult to tell. The level of public inducement, solicitation, oversight, and joint effect manifest a transformation. In *State of Minnesota v. Beswell*,[55] the court claims to have witnessed the transformation of private security personnel, at a racetrack, conducting searches on patrons, into a public persona. When cocaine was discovered, defendants assert that the private security agents had sufficient public connections to trigger a series of constitutional protections. The court qualified its public finding by corroborating the private/public interplay. It stated:

> In the instant case, a meeting occurred where public officials and private personnel reached an understanding regarding arrest procedures to be utilized upon the discovery of contraband by the private guards. Although this meeting dealt with the aftermath of searches, and not the manner of searching, the meeting produced a standing arrangement for contacts by the supervising security agent with police during the hours of operation, and a police officer was designated on call to assist with arrests.[56]

Add to this reasoning was the adoption of the "public function" test, that imputes constitutional remedies when the nature and scope of private police conduct exhibits all the qualities and characteristics of a "public" act.

> Regardless of direct police involvement, systematic use of random contraband searches serves the general public interest and may reflect pursuit of criminal convictions as well as protection of private interests. *Marsh v. Alabama*,[57] supplies the basis for concluding that private investigators and police may be subject to the fourth amendment where they are with some regularity engaged in the "public function" of law enforcement.[58, 59]

Courts in the mold of *Beswell* look to corroborate the advocate's assertions. In short, does the private security officer act like a public police officer? Wearing police uniforms, and using police restraint processes "(handcuffing appellants to fences, conducting body searches), indicates the similarity of function and role."[60] Function infers a similarity of approaches and thereby awards an identical series of protections—at least

in a theoretical sense. Finally, the court weighted the security agency hiring a full-time public police officer as further evidence of the transformation.

Such officers are formally affiliated with the government and usually given authority beyond that of an ordinary citizen. Thus, they may be treated as state agents and subject to the constraints of the Fourth Amendment.[61]

Zelinski and *Beswell* manifest a voice of discontent and a resulting intellectual demand for change in traditional constitutional applications in the private security industry.[62] In this sense, *Zelinski and Beswell* signify a slow evolution and a small rebuke to settled law.

The Platinum Platter Doctrine

A creative legal challenge to the exclusionary rule looks to the history of the exclusionary rule. Initially, the rule was held applicable to federal action alone and was not applicable in state cases.[63] Federal agents realized this early on and clandestinely employed the services of state agents who delivered up evidence or other treasure while avoiding the constitutional challenges. For state police officers, the delivery of the evidence, despite its procedural impropriety, was handed over on a "silver platter."[64]

These types of abuses have long been corrected with the liberalization of Fourteenth Amendment interpretation that subsumes the entire Bill of Rights into the state theater. But private security is still exempt from the constitutional mandates. This preferred status has given rise to another version of the platter—the platinum variety. Hence, the use by state and federal officials of private security operatives to arrest, search, or seize, without the usual constitutional requirements, is labeled the "Platinum Platter Doctrine." In arguing that the entanglement of private sector/state involvement creates a relationship substantial enough to justify expansion of the Fourth Amendment, B.C. Petroziello, calls for a reexamination of the *Burdeau* doctrine. Referring to special police officers in the state of Ohio as quasi-public figures, he argues that special police should no longer be permitted to hand over elicit evidence on a "platinum platter."[65] His comments provide food for thought:

> The confusion caused by the current state of the law could be obviated by the use of a much simpler and more preferable standard. The substance of this standard encompasses a different view of what is meant by private individual: no one should be considered private under *Burdeau* if he is employed or paid to detect evidence of crime or has delegated any more power possessed by the average citizen. Whenever a person meeting either of these qualifications tramples a defendant's rights the evidence so gathered is to be excluded at trial.[66]

As private security operatives work for the benefit of the public sector, the occupational status metamorphosizes from private to public. As attractive as the theory is, it has problems. *Burdeau* should not be

inapplicable simply because a person is employed or paid to detect criminality or because that person is chartered by the state or other governmental authority. If such reasoning were followed, then any attorney or licensed individual, including truck drivers, polygraph examiners, forest rangers, or park attendants, who are subject to governmental review, would fall within this scheme. In the age of privatization, adoption of a public function theory may be plausible in a host of contexts.

Private Action as State Action

A second strategy that attempts to apply the Fourth Amendment in private sector arrests, searches, and seizures, is to manifest the public nature of the alleged private conduct or action. The traditional method of conducting this analysis is to determine the extent of the government's involvement. If the government's role in the search and seizure is significant, the Fourth Amendment applies.[67] State action, that is, the involvement of state and local officials, including police and law enforcement officials, with, by, and through private security operatives makes the once clear line of demarcation muddled. "It has been argued that despite the *Burdeau* doctrine, private conduct or actions may be subject to some level of constitutional scrutiny if they are sufficiently impregnated with state actions."[68] Expansive judicial reasoning like this was used to justify a plethora of civil rights decisions during the mid-1960s and early 1970s.[69]

Few functions, systems, enterprises, endeavors, or institutions are completely free from some level of governmental involvement or oversight. For example, governmental control in the operation of a simple business are evidence of this. The security industry, like any other commercial concern, is subject to a sweeping list of governmental requirements including but not limited to:

1. State licensing requirements.
2. State taxes.
3. State inspections.
4. Reporting requirements.
5. Statutory grant of authority to merchants, business, or industries to protect its property and interests.
6. Immunities and privileges granted by legislatures for certain conducts and behaviors.
7. Subcontractor and delegation rules.

Some plaintiffs think any interaction is sufficient. In *Copeland v. City of Topeka*[70] the court threw out the allegation of public involvement, commenting:

> Nothing in plaintiff's complaint sufficiently alleges that defendants, or either of them, engaged in acts under color of state law. Instead, the

> seizure and subsequent treatment of plaintiff at Dillons cannot be fairly attributed to the City of Topeka under any of the tests for state action. For a merchant or its security officers to call the police when they suspect shoplifting or destruction of property is insufficient to constitute state action. No acts allegedly taken by officers of the City of Topeka at the scene reveal prior collusion with defendants, or compliance with any requests by the defendants, or either of them, let alone the requisite joint action. Plaintiff's assertion that defendants "directed and controlled" the City police department is conclusory and unsupported by the facts alleged in the complaint.[71]

Licensure and the state's grant to operate is a favorite of those hoping to prove the interplay of the public and the private. The theory is that the mere act of licensure imputes a public quality to a private entity. When the "public" quality of the act is repeatedly emphasized, the private concern takes on a new public quality, thereby justifying the imposition of new constitutional requirements.

Consider the case of *United States v. Francoeur*.[72] Defendants sought to reverse a conviction by asserting a constitutional violation by private employees. While in a Disneyland amusement park, security personnel detained and emptied the pockets of multiple suspects. Subsequently, counterfeit bills were retrieved and these suspects were eventually found guilty of various offenses. To challenge the admission of the evidence, defendants claimed that since Disneyland was a public place, freely accessible and open to the world, the security officials working within its borders were government officials. To uphold this appellate argument would have had far-reaching ramifications, and the Court reminded the defendants that any possible remedy was civil in nature rather than constitutional. It stated:

> The exclusionary rule itself was adopted by the courts because it was recognized that it was only by preventing the use of evidence illegally obtained by public officials that a curb should be put on overzealous activities of such officials. The Supreme Court has in no instance indicated that it would apply the exclusionary rule to cases in which evidence was obtained by private individuals in a matter not countenanced if they were acting for state or federal government.[73]

Unquestionably, all security entities have some level of state involvement that is of an "institutional character, derived at least in part from grants of state authority and reflect governmental functions from which one may infer state action."[74] While such an argument is partially meritorious, it lacks the substantiality to achieve state action. While modern constitutional jurisprudence has been comfortable elasticizing principles of state action, especially in race and sex discrimination cases, these principles are a harder sell in the occupational marketplace. Race and sex discrimination cases seem more than willing to stretch principles of state action but that form of behavior need not be extended to law enforcement activities.

Even so, arguments regarding state action in the security environment do have a following. Arguably, a case of state action exists if there is direct participation and assistance by public police officers in the seizure of evidence by private security officers. John Wesley Hall comments:

> In view of the long-standing rule permitting private searches it will be incumbent on defense counsel to demonstrate some form of law enforcement participation in the search. Mere acceptance of the benefits of a private search by the prosecution authorities is not participation in the private search and seizure.[75]

Direct involvement or participation is not proven by inference, but instead, by a defendant's demonstration of direct involvement. In *United States v. Lima*,[76] the D.C. Appellate Court articulately espoused that private individuals can become agents or instruments of the state if the government is sufficiently involved in the development of actual plans or actions carried out by private persons. The *Lima* decision mandates "a significant relationship … between the state and private security employees to find state action; something whereby the state intrudes itself into private entity."[77] The *Lima* case contends that mere licensing is not a sufficient basis for state action, and that the D.C. licensing statute vested no particular state authority to license security personnel.[78]

A second rationale for finding state action, outside of direct assistance or participation, is when private security personnel are found to have acted alone but at the direct suggestion, supervision, or employment of the public police system. In short, the private security officers act as fronts for the public police. This form of supervision, control, or direction would include instigation, encouragement, direct suggestions as to an operation, or any other strategy illustrating law enforcement involvement. "Whether there has been enough police contact for an agency, the relationship to have existed is a question of fact to be answered by the court."[79]

In *Snyder v. State of Alaska*,[80] a defendant appealed his conviction, asserting that his Fourth Amendment rights were violated. An airline baggage employee had called police on at least 12 previous occasions to report the discovery of drugs and illegal goods. Police informed airline employees that they themselves were not permitted to open packages without a warrant, but that under Civil Aeronautic Board rules, airline employees had a right to open packages if they believed there was something wrong or that the items listed on the bill of lading did not accurately reflect what was in the parcels. The airline employee opened the package, on direction of the Alaskan Police authorities, and the defendant contended that this level of active involvement, encouragement, and investigation transformed private conduct into state action. The court denied that there was a sufficient level of conduct to find state action, holding that the airline employee was:

> Performing his duties as private employee of a private company in opening the package received under circumstances reasonably arousing….

> The prior contact, of a general nature, between the State police and airline employees did not cause the employees to become agents of the police. A zealous citizen does not subject his activities to the requirements of the Fourth Amendment in Article 1, Section 14 of the Alaskan Constitution.[81]

A synonymous result was reached in a Georgia case, *Lester v. State*.[82] Appellant moved to suppress as evidence pieces of copper tubing, which a fire investigator had taken from the ruins of the appellant's house. Claiming that the investigator engaged in governmental activity, the defendant sought to have his conviction overturned on Fourth Amendment principles. The Court ruled with little trepidation that:

> Even assuming *arguendo* that the appellant had standing to object to his search of these premises it was not error to overrule the motion. The investigator was dispatched by a private firm at the behest of the fire insurance company. He was not connected with any law enforcement agency nor did he communicate with one prior to conducting his investigation. Therefore the search could not have violated his Fourth Amendment rights.[83]

Governmental action, arising in a private policing context, requires a substantial correlation between public and private behavior. The case of *Gilette v. The State of Texas*,[84] in which the defendant asserted that security officers, spying on prospective customers in a fitting room, violated constitutional protection, is a failed but instructive argument. The court cited *Burdeau v. McDowell* as doctrine, maintaining not only its precedential power, but resisting attempts to expand in this constitutional territory. Similar denials of the state action theory regarding private conduct were also found in New York[85] and New Hampshire.[86] What is striking about these judicial decisions is their simplicity and firm renunciation of legal novelty. The tone could be described as abrupt and impatient over the attempts to unseat well-settled law. The majority of appellate-based decisions treat the argument of state action similarly.

The third and final situation where state action is arguable in the private security industry is when security personnel act in a quasi-police status as when commissioned as special police officers.[87] Professor Stephen Euller, in his article, *Private Security and the Exclusionary Rule*, notes:

> In such cases state action has been recognized when private officers have been formally designated "special police officers." States often commission "special police officers" to patrol retail stores or to perform occasional public law enforcement services such as traffic or crowd control at parties or sports events.[88] Ponder the hiring of the uniformed private security guard at a Job Corps Program, a federally funded retraining facility and program for disadvantaged youth. Job Corps is funded totally by the public in tax dollars and the uniformed security

> guards that work on the premises are there to insure proper behavior of often times some very extremely difficult young adults.

In *State of Tennessee v. Hudson*,[89] the trial court held that the conduct of the security guard was sufficiently tied to government to make it a state action. Since the security guard wore a badge, was in uniform, was referred to as "officer," and worked on a program set up and funded by federal government money being funneled through from the Department of Labor, the trial judge concluded that the security guard's conduct was sufficient to constitute state action. The appellate court reversed the decision, finding that the private security company, contracted at this Job Corps facility was no more a government agency "than any other company or individual with whom the government contracts to supply a product or service of whatever nature." The court further remarked:

> It is common knowledge that both federal and state governments engage in thousand of contracts daily with many organizations of many types whose employees have absolutely no connection with the government whatsoever other than being an employee of a government contractor.[90]

Another case, which shows the delicate line between public and private policing, is *State of Ohio v. McDaniel*.[91] The defendants/appellants sought to demonstrate that the security staff, consisting of about 45 full-time employees at a department store in Franklin County, Ohio, were governmental agents by their commission as *special deputy sheriffs*. Searches made by security employees resulted in the seizure of various incriminating goods. Defendants sought to overturn the seizures based upon Fourth Amendment protections and argued emphatically the state action theory. The court, recognizing that privacy was important to the defendant appellants, attempted to balance the interest of both parties. It found:

> The right to privacy is not absolute and the Constitution prohibits only unreasonable searches. Shoplifting is a serious problem for merchants. Merchants may utilize reasonable means to detect and prevent shoplifting. Where the merchant or his employee has probable or reasonable cause to believe that an apparent customer is in reality a thief planning to shoplift merchandise, the merchant or his employee may utilize reasonable means of surveillance and observation in order to detect and prevent the crime.[92]

The court further rejected the argument that simply being commissioned as special deputies is a sufficient basis for a finding of state action. It concluded:

> From the evidence herein it could only be concluded that Lazarus Security employees at the times in question were engaged in activity within the scope of their employment with Lazarus solely for the benefit of their employer, Lazarus, to detect and prevent thievery of

> Lazarus merchandise. They were acting outside of any public duty they might be authorized to perform as a commissioned special deputy sheriff and only one of the employees could have acted in that respect in any event. To hold in this case that the actions of the Lazarus Security employees constituted state action on their part would not only be contrary to the realities of the situation but would constitute an unwarranted extension of constitutional provisions to apply to the activities of corporations conducted through its employees.[93]

Deputization, a special commission, or other status is an insufficient basis for finding state action. State action requires meaningful participation, significant involvement, and intentional instigation, a series of conducts rarely witnessed.[94] "The exclusionary rule should apply then in cases where government officials directly instigate or supervise searches and seizures committed by private parties for the purpose of acquiring evidence for a criminal prosecution. If courts do not apply the rule of exclusion in these cases, government officials will be permitted to conduct improper searches by employing a private party to commit the physical search."[95] A more provocative argument emerges in *Austin v. Paramount Parks*,[96] where plaintiffs alleged that Kings Dominion Park Police where answerable, in a supervisory sense, to the public office of the local county sheriff. A complicated case introduced the employee manual that listed the chain of command as:

> The Chain of Command and authority for all Kings Dominion Park Police shall be as follows involving official law enforcement:
> a. Sheriff of Hanover County
> b. Lieutenant of Kings Dominion Park Police
> c. Kings Dominion Park Police Sergeant
> d. Kings Dominion Park Police Corporal
> e. Kings Dominion Park Police Officer[97]

The Austin majority rejected the plaintiff's allegation of sufficient public assumption to trigger constitutional protections. The court further held that the Park's Manager of Loss Prevention lacked all authority over the operations of the public force and dismissed the argument with scant reservation.

> Put simply, there was no evidence that Hester, despite his title of Manager of Loss Prevention, in practice exercised any control over the decisions of the special police officer regarding detention and/or arrests of park guests suspected of criminal offenses in this case.... [T]he uncontradicted testimony was to the contrary. In fact, we find no support in the record for any specific policy-making authority given to or exercised by Hester regarding matters of law enforcement.... [W]e have no basis upon which to conclude that Hester exercised final policy-making authority concerning arrests effected by the special police officers of the Park Police Department. Because Austin's position on Paramount's liability ... rests entirely upon her theory that Hester was a "policymaker," we are satisfied that she failed to establish that any deprivation of her federal right was caused by ... Paramount.[98]

Consent to Search

I, _____, having been informed of my Constitutional Right not to have a search made of the premises or vehicle hereafter described without a Search Warrant and of my right to refuse to consent to such a search, hereby authorize _____ and _____, who are Police Officers for the Borough of _____, to conduct a complete search of the premises of vehicle under my control described as _____.

This written permission is given by me voluntarily without threats or promises of any kind being made to me.

Signed_____

Date_____

Location_____

WITNESSES:

_____

Name, Title, Date & Location

_____

Name, Title, Date & Location

Figure 3.6 Consent to search.

As a practical matter, security operatives should not conduct any search until consent has been granted by the detained party. See the examples of consent documents in Figures 3.6[99] and 3.7.[100]

Public Function of Private Security

Proponents of the public function theory would expand and extend the protections of the Fourth Amendment and other aligned constitutional

Consent to Search

I further acknowledge that nothing other than the items listed herein were removed by the investigating _____ Police Officers, and _____.

Signed_____

Date_____

Location_____

WITNESSES:

_____

Name, Title, Date & Location

_____

Name, Title, Date & Location

Figure 3.7 Consent to search—another form.

provisions by alleging the public nature of tasks performed by private security. See Figure 3.8[101] for a portrayal of the many public functions performed by private security. Not only is the occupation alleged to be "public," its multiple tasks and competencies are "public" in design and scope.

The theory of public function was first advocated in *Marsh v. Alabama*.[102] The case involved a company town, which was privately owned, though its services and functions mirrored a typical municipality or city. Services undertaken primarily for the benefit of the general public, and exercising functions traditionally associated with a form of sovereignty, can lead to a public function charge. Advocates of the public function doctrine assertively point out that all police functions are inherently public in nature and design. "Policing is one of the most basic functions of the sovereign when security personnel are hired to protect business premises, arrest, question and search for evidence against criminal suspects. They perform public police functions."[103] In the eyes of Professor William J. O'Donnell,

Functions of Private Security Personnel

Guard & Patrol Services and Personnel

Guard and patrol services include the provision of personnel who perform the following functions, either contractually or internally, at such places and facilities as industrial plants, financial institutions, educational institutions, office buildings, retail establishments, commercial complexes (including hotels and motels), health care facilities, recreation facilities, libraries and museums, residential and housing developments, charitable institutions, transportation vehicles and facilities (public and common carriers) and warehouse and goods distribution depots:

* Prevention and/or detection of intrusion, unauthorized entry or activity, vandalism, or trespass on private property;
* Prevention and/or detection of theft, loss, embezzlement, misappropriation or concealment of merchandise, money, bonds, stocks, notes, or other valuable documents or papers;
* Control, regulation, or direction of the flow or movement of the public, whether by vehicle or otherwise, to assure the protection of property;
* Protection of individuals from bodily harm; and
* Enforcement of rules, regulations, and policies related to crime reduction.

Investigative Services and Personnel

The major services provided by the investigative component of private security may be provided contractually or internally at places and facilities, such as industrial plants, financial institutions, educational institutions, retail establishments, commercial complexes, hotels and motels, and health care facilities. The services are provided for a variety of clients, including insurance companies, law firms, retailers, and individuals. Investigative personnel are primarily concerned with obtaining information with reference to any of the following matters:

* Crime or wrongs committed or threatened;
* The identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation, or character or any person, group of persons, association or organization, society, other group of persons or partnership or corporation;
* Preemployment background checks of personnel applicants;
* The conduct, honesty, efficiency, loyalty, or activities of employees, agents, contractors, and subcontractors;
* Incidents and illicit or illegal activities by persons against the employer or employer's property;
* Retail shoplifting;
* Internal theft by employees or other employee crime;
* The trust or falsity of any statement or representation;
* The whereabouts of missing persons;
* The location or recovery of lost or stolen property;
* The causes and origin of or responsibility for fires, libels or slanders, losses, accidents, damage, or injuries to property;
* The credibility of informants, witnesses, or other persons; and
* The securing of evidence to be used before investigating committees, boards of award or arbitration, or in the trial of civil or criminal cases and the preparation thereof.

Figure 3.8 Functions of private security personnel.

in his article, "Private Security, Privacy in the Fourth Amendment,"[104] courts give far too much credence to the legal status of the party performing the public function rather than the function itself. He notes persuasively:

> On the other hand where status does not correspond with function courts have been too quick to rule out state action. Security guards who have not been deputized, specially commissioned, or otherwise formally charged to protect public interest are routinely equated with private persons by courts despite the fact they are hired to survey, apprehend, detain, and interrogate criminal suspects.[105]

Professor O'Donnell proposes a reorientation to function in place of occupational status. State action, therefore, is evaluated in light of what is done rather than who is doing it.

> This kind of problem exists, of course, largely because legal authorities continue to define state action principally on the basis of status rather than function—a *de jure* as opposed to a *de facto* orientation. As long as this remains the approach, however, the threats to individual privacy rights will increase in proportion to the privatization of policing. A functional approach … subject[s] the greater portion of private security industry to Fourth Amendment coverage.[106]

That security performs an enormous array of public functions which include, but are not limited to, arresting shoplifters, controlling crowds, keeping peace in educational institutions, correctional institutions, providing secure environments in banks, hospitals, and other institutions open to the general public is not a debatable contention. If this is so, does participation in public functions naturally lead to public status? Did the framers of the Constitution intend constitutional coverage to be tied to questions of occupational functionalism?

This seeming overemphasis on the police function as a rationale for employing constitutional protections in the private realm is opening a Pandora's Box. Are toll collectors and maintenance workers next in line for this constitutional scrutiny because they do public things? If this reasoning is adopted, the public function theory could be applied in numerous other environments, including all governmental agencies, social service centers, and welfare offices.

While the comparison is not strictly valid, it does shed some light on the complexity of the public function doctrine. The intellectual and legal obstacles to the adoption of public function doctrine compel the "apparent hostility of the Supreme Court to expansion of any state action doctrines."[107] Despite this, some commentators are optimistic regarding the public function theory.

> The public function analysis is particularly persuasive when applied to cases involving private security protection. The demands of modern

> commerce have created a need for large numbers of private security forces to assist in the protection of persons and property. They engage in activities that are normally reserved to the police. They often have authority to detain suspects, conduct investigations, and make arrests. Their actions can be as intrusive to individual privacy rights as those of the police. Because they are performing a governmental function their activities should be regarded as state action and thus subject to the Fourth Amendment.[108]

This argument disregards the rights of citizens, businesses, and industries to employ a chosen method or technique of private law enforcement to protect their property interests. A universal test or methodology to discern state action remains an impossibility. Certainly state action doctrines provide a vehicle for extending the Fourth Amendment to some private search cases, but to propose that the function controls legal application is a serious error. If function becomes the dominating factor then status becomes irrelevant.

In *People v. Holloway*, a Michigan[109] court emphatically stressed the Fourth Amendment's limits. The facts of the case involve a private security guard surveying a consumer acting in a suspicious manner, and according to the guard, about to shoplift. The guard noticed the bulge in the defendant's pocket and subsequent pat down revealed a .32 caliber pistol and knife. The defendant argued a violation of the Fourth Amendment which the court denied.

> Thus an individual has the right to address any wrongs which may have been committed by private citizens be they security guards or not. They can bring civil actions or file defenders. It is because the cloak of sovereign immunity is wrapped around law enforcement officials that the Fourth Amendment is applied to their actions. There is a growing feeling among the courts of the country that the exclusionary rule has been stretched far beyond its original and very useful purpose.[110]

A dissenting opinion in the *Holloway* case, by Judge Falkman, poetically comments:

> Surely it will be argued that the mere fact of licensing alone does not a public official make. It is true that recitation of a familiar "talismanic formula" … has soothing effect on those who invoke it. Even fervent incantation cannot dispel the reality of what function is being licensed here, that of protection of person or property by an organized peacekeeping force.[111]

As eloquent as the reasoning may be, to uphold the public function argument may be excessive. Public function theorists posit that a private citizen's privacy rights are undermined when the unreasonableness of a search is "made to depend on the identity of the searcher rather than the

activity itself and its infringement on his privacy."[112] This argument was unconvincingly made in *New Hampshire v. Keyser*.[113] The setting included a department store shopper who switched the contents of a $6.99 cooler with two tape decks worth a total of $150.00. The defendant claimed he had no knowledge of how the tape decks got into the box. Upon conviction, the defendant appealed, asserting that his Fourth Amendment rights were violated, not by the members of the local police department, but instead by the security guards. The court noted the issues:

> The question in this case is whether the Fourth Amendment protections extend to the action of the security guards because of their authority, official appearance and police-type function.[114]

Providing security in a retail store environment is an insufficient basis around to the exclusionary rule.[115]

Color of State Law: A Legislative Remedy

When constitutionalism fails, the appellate strategist considers the legislative domain. Borrowing from the civil rights theater, various defendants have asserted civil rights violations, constitutional infractions, and other wrongs by utilizing the "color of state law" standard under the provisions of 42 U.S.C. §1983. Proof or demonstration that a state action caused a personal loss, affront, or indignity under the auspices of color of state law, are legal tactics on the rise. Examples might be arbitrary state licensing boards or bodies that reject applications on racial grounds, or denial or rejection of applicants based on religion or creed. Another claim might be a contrived or intentional plan to single out targeted minority groups in a shoplifting deterrence program.[116]

To claim that security officers or other personnel are acting under color of state law requires objective proof of a racial, religious, or gender motivation, or at least a demonstration that the acts alleged and the injury inflicted were done under the auspices and approval of the state or other governmental authority.

The *United States v. McGreevy*[117] decision provides an illuminating instruction on the color of state law standard. *McGreevy*'s facts consist of a security officer who held two jobs, one at a Federal Express company, and the other as an agent with the Drug Enforcement Administration. In his capacity as a security officer, he had the right to inspect and open packages that were not properly identified or appeared to be mislabeled or mismarked. During a routine investigation, he found a package which rattled, and upon inspection illegal drugs were discovered. The defendant proposed that the employee with dual jobs was acting under color of state as a DEA agent. The court, much to the dismay of the defendant, disregarded his DEA affiliation and reminded the defendant that the opening of

a package occurred under auspices of his Federal Express position. It held categorically:

> Here Petre was not acting under a color of state law when he opened a package. Petre did not hold his Federal Express position because he was a police officer. He carefully separated the two jobs. He knew of no understanding between Federal Express and the DEA for the disposal of contraband.[118]

A well-respected Pennsylvania Superior Court decision, *Commonwealth v. Lacey*,[119] assessed an appellant's claim that a statute governing security guard conduct provided a basis for a color of state law declaration. The retail theft statute provides specifically:

> A peace officer, merchant, or merchant's employee, or an agent under contract with a merchant who has probable cause to believe that retail theft has occurred or is occurring on or about a store or other retail mercantile establishment and has probable cause to believe that a specific person has committed or is committing the retail theft may detain the suspect in a reasonable manner for a reasonable time on or off the premises for all or any of the following purposes: to require the suspect to identify himself, to verify such identification, to determine whether such suspect has in his possession un-purchased merchandise taken from the mercantile establishment, and, if so, to recover such merchandise, to inform a peace officer or to institute criminal proceedings against the suspect, such detention shall not impose civil or criminal liability on the peace officer, merchant, employee or agent so detaining.[120]

The appellant's reasoning rests in the contention that the retail theft statute bestows police powers on private persons thereby recharacterizing a once private domain into the public domain. The Court, neither moved nor inclined to change, refused the theory that a statute implies operation under codes or state law.

To prove color of state law requires proof of a direct relationship between a public official and private security agent. The evidence must demonstrate significant involvement of the private agent acting under a state law and as a result, causing injury. In *Bouye v. Marshall*,[121] a U.S. District Court held, in the rarest of cases, that an off-duty county police officer crossed the line from private to public since he "wore a police sweatshirt and bullet-proof vest, displayed badge, was performing police function, and used police authority to detain and search visitor."[122]

To prove color of state law cases, the courts have attempted to devise objective tests like *The Significant Involvement Test*. In *Byars v. United States*,[123] the Supreme Court held that evidence was inadmissible when the unreasonable search and seizure was performed by state officials. In *Gambino v. United States*,[124] the Supreme Court also employed

The Significant Involvement Test, ruling inadmissible evidence that was seized and acquired by New York State Police in an unjustifiable search. The Court was satisfied that the wrongful arrest, search, and seizure was performed for the benefit and exclusive purpose of federal prosecution, and therefore, "the state officers acting to enforce the federal law were subject to the Fourth Amendment just as if they acted under federal direction."[125] Finding the significant involvement or participation between state and federal agents, however, is very different from deducing that the actions of the private security industry and police are equally in concert.

Another argument bolstering color of state law theory is the *Police Security Nexus* test. "Under the nexus approach to state action analysis, a court considers the facts of the situation, looks for a contact between the private actor and the government, and makes a qualitative judgment as to whether there is enough involvement in a challenged action to say that it was an action of the state."[126]

As in previous attempts to corral in the protection of the Fourth Amendment, liberal constructionists must show either a significant involvement; a private action fostered, authorized, or colored by state authority; or a public/private relationship conspiratorial in design.

The natural procedural ties that develop between private security and public policing give further ammunition to those who propose an expansion of the color of state law theory. Since both public and private law enforcement seek similar ends, are hankering for increased cooperation, and are increasing their overall interaction, some critics call for an end to the immune status accorded private practice.[127] Not unexpectedly, public law enforcement has long been considered the private security industry feeder system for informants and assistance.

> There is a pipeline of trained investigators and security administrators moving from public law enforcement agencies into the private sector. These agencies train the personnel in patrol techniques, investigation, interrogation, arrest, search and seizure, and police administration. Years of experience working with these agencies give security officers a common language, a common method of operation, and common outlook with those who stayed beyond.[128]

Professor Euller, in his article in the *Harvard Civil Rights and Civil Liberties Law Review*, contends that police officers have no sense of changeover or "crossing over to the other side" when they join private security systems.[129]

Consequently, scholarly commentary has emphasized a reexamination of the failure to find no state action in private security activities. Since a close and more marked relationship is emerging with public law enforcement, and since the procedural ramifications of private justice are starting to have a more marked impact on the public justice system, further study is necessary.

CONSTITUTIONAL PROGNOSIS FOR PRIVATE SECURITY

One of the chief reasons claimed for the phenomenal growth of the security industry is its ability to avoid the often complex and convoluted legalities that hamper public police operations. Equally crucial is the security industry's ability to avoid the political machinations that so encumber local, municipal, and federal police departments. Police departments, not security departments, are concerned with statistics, clearance sheets, and the general political issues that emerge in major municipal police departments. "Private agency police appear to be even less conviction-oriented than the public police. They seem to be concerned primarily with the protection of property and personnel."[130]

The hostility toward the expansion of rights into the private security realm has been fairly obvious in appellate case law review. A case in point includes *Sackler v. Sackler*, from the New York Court of Appeals.[131] A wife, appealing a grant of divorce on the basis of adultery, sought to exclude from evidence information acquired by private investigators employed by her husband. Surprisingly, defense counsel relied upon *Mapp v. Ohio*[132] as a basis for its decision, stating cynically:

> The theory seems to run like this: before *Mapp* the law of evidence in this state was the same as to all illegal searches whether governmental or not, that is, all evidence so produced was receivable. Now we are told that … evidence which is the fruit of illegal government incursions is banned … except when under non-governmental auspices. The argument goes too far and proves too much.[133]

The court, citing *Burdeau v. McDowell*[134] and other representative precedents, stated that neither "history, logic, nor law give any support for the idea that uniform treatment should be given to governmental and private searches to the evidence disclosed by such searches."[135] When research divulges such spirited appellate ponderings one sees how the expansionists' reasoning pull at straws. Creative, innovative approaches that afford protection to the general citizenry are always commendable, but to develop various theories of argumentation that fail to withstand legal rigor assures futility for Fourth Amendment applicability in private sector justice. The expansionist camp has to formulate rock-hard, substantive ideas based on the occupational nexus between private and public and criminal procedure. It would be foolhardy to argue a lack of parallels between the private and public police systems, but the similarities are not compelling enough to afford this extraordinary transformation. "Courts and commentators alike should be sensitive to the possibility that the existing powers and controls of private police may require alteration,"[136] but alteration does not require or lead jurors, practitioners, or academics to the conclusion that what is good for public justice is equally necessary in the private world of professional security.

As Eugene Finneran, in his excellent text, *Security Supervision: A Handbook for Supervisors and Managers,* imparts:

> The other side of the controversy believes, as does the author, that it is impossible to separate security from a degree of law enforcement or to separate loss prevention from crime prevention. Even if it were possible to eradicate the joint history of public and private safety and security operations, it would be a mistake to do so. All previous expertise in the protection of assets through crime prevention must be maintained and built upon using this experience as solid base for developing all the skills necessary to become viable risk managers. All professional fields are constantly changing and searching for better methods and procedures for improving performance. Security is no exception.[137]

Clearly, private sector justice cannot infallibly mimic or imitate public sector justice. Its obligation rests principally in drawing from public sector justice the best that it has to offer—namely the public police system's dedication to fundamental fairness and due process. Other public sector traits to emulate include the system's adherence to procedural guidelines, substantive rules and regulations that ensure equity, and an academic and political community of both practitioners and theorists who call to the forefront deficiencies in the American administration of justice. Probably the greatest catalyst in ensuring more adherence to the public justice model will be the security industry's own desire and motivation as it treks down the long path of professionalism.

SUMMARY

A review of case law, statutory materials, and common law principles leads to a fairly strong conclusion that the expansionists' theory of constitutional protection as to the arrest, search, and seizure principles in private security has little intellectual or judicial support. Scholarly materials urge increased constitutional oversight in private sector justice, but jurists and legislators alike have turned a deaf ear. The arguments posed throughout this section have included attempts, disguised in different forms, to show that the task of private sector justice is, at best, a facade of public law enforcement. While there may be cooperation between public and private law enforcement in their fight against crime, and while there is frequently interaction between governmental officials and the security companies providing economically agreed upon services, the public system, as the Constitution intends, is subject to the severest of judicial scrutinies. The Constitution was designed and devised for the protection of the general citizenry from overzealous government regulation, taxation, and oversight. Arguably, the chief basis for the American Revolution was to remove the onerous restrictions and heavy-handed bureaucracy that government had thrust upon the colonists.

CASE EXAMPLES

State of Tennessee v. Gregory D. Hutson, 649 S.W. 2d 6 (1982).

Facts

On April 16, 1981, a security guard for the Knoxville Job Corps responded to an alarm indicating that someone was on the third floor of the Job Corps Center. He pushed the elevator button to go to that floor and found it to be already stopped there. Proceeding up the stairwell, he observed a person entering the elevator, and he watched as it descended to the first floor. When the elevator returned to the third floor, it was necessary for him to open the door with a key. In doing this, he found the defendant, Mr. Hutson, inside the elevator. Hutson was taken to the security office, where he was detained by other personnel. During the interrogation of Mr. Hutson, the security guard and other personnel felt that they had detained the right thief. As a result of this determination, Job Corps officials entered into the room of Mr. Hutson and ordered him to break the lock on his locker in his residential quarters. Once inside the locker, stolen goods related to the third floor thefts were found.

Issue

On a motion to suppress the admission of evidence based upon a constitutional violation of a search performed without a warrant, how should this court rule?

Private Search and Seizure—*United States of America v. Lacey Lee Koenig and Lee Graf*, 856 F.2d 843 (7th Cir. 1988).

Facts

On July 17, 1986, Federal Express Senior Security Specialist Jerry Zito was at the West Palm Federal Express station on what he described as a "routine station visit." While there, he conducted a visual inspection of packages received over the counter and detected an odor of laundry soap or fabric softener emanating from one of the boxes. The shipper of record was fictitious. The officer opened the package. Inside were two transparent plastic bags containing white powder that the DEA office identified as cocaine.

After replacing all but a small sample of the cocaine with cornstarch, the package was resealed. After consulting a DEA agent, the officer returned the package to the West Palm Beach Federal Express office with instructions to perform a controlled delivery. The package was routed

through the Federal Express hub in Memphis, Tennessee. While in Memphis, the package was kept in a Federal Express safe and was opened on two occasions by Federal Express employees to check its contents. The box was once again opened upon its arrival in Peoria, Illinois, on July 19, this time by Illinois State Police and a Federal Express employee. Again the contents tested positive for cocaine. The package was again sealed and then delivered to its intended recipient, one Koenig. A federal search warrant was then obtained and executed on Koenig's apartment, resulting in the seizure of several items including the Federal Express package containing the packets of cornstarch and cocaine samples.

Issue

Have defendants been constitutionally violated by this warrantless search?

Answer

No, Federal Express security personnel opened the package for their own reasons and no evidence was introduced suggesting governmental control of Federal Express employees. The opening of the package and the placement of its contents in plain view of DEA destroyed any privacy interest the package might have initially supported.

DISCUSSION QUESTIONS

1. Constitutional remedies in cases involving private security investigators and detectives will be rare. Why?
2. Relay a fact pattern whereby a private security operative may experience the exclusionary rule.
3. Private security industry's right to arrest is governed by what standard?
4. Which Supreme Court case indicated a reticence or hesitancy to extend constitutional protections to private sector justice?
5. Name five situations or exceptions to the warrant requirement.
6. Under some merchant privilege statutes, even if the merchant is completely incorrect in carrying out an arrest, the merchant remains immune from a false imprisonment or arrest cause of action. Explain.
7. How does private conduct become state action?
8. Can it be argued that private security is continuously involved in public function activities?
9. What is the prognosis for constitutional protections being applied in the private security industry?

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4

Civil Liability of Security Personnel

INTRODUCTION

By all accounts, the past three decades evidence phenomenal growth of the private security sector. A benchmark study, performed by James S. Kakalik and Sorrel Wildhorn for the RAND Corporation in 1972[1] prophetically indicated the influential role security would play in the protection of people and assets. At the same time, the RAND Report harshly criticized the security industry, observing:

> [T]he vast resources and programs of private security were overshadowed by characterizations of the average security guard—under-screened, under-trained, under-supervised and underpaid and in need of licensing and regulation to upgrade the quality of personnel and services.[2]

The Bureau of Labor Statistics portrays a bright future for the security industry. Figure 4.1[3] manifests how the private sector security labor force outnumbers public justice agency employees by a 3-to-1 ratio.

If this is so, the problem of liability, whether criminal or civil, is an increasing security industry concern. The Risk and Insurance Management Society, Inc., lists the following as issues of risk in the marketplace:

1. liability claims
2. workers compensation claims
3. property loss prevention
4. employee and public safety
5. environmental affairs
6. security[4]

The *Hallcrest Report II* paints a grim picture of this escalating liability.

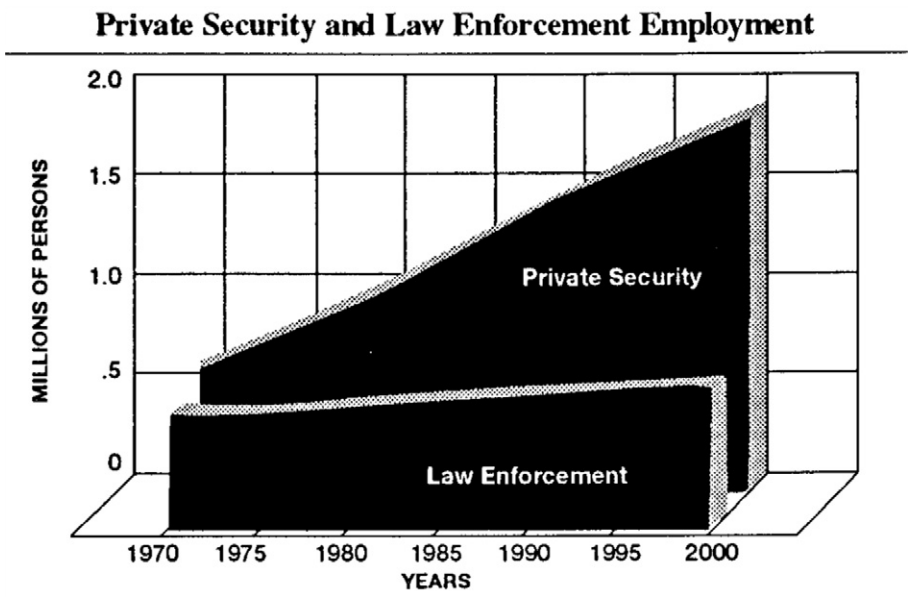

Figure 4.1 Private/public comparison.

> Perhaps the largest indirect cost of economic crime has been the increase in civil litigation and damage awards over the past 20 years. This litigation usually claims inadequate or improperly used security to protect customers, employees, tenants, and the public from crimes and injuries. Most often these cases involve inadequate security at apartments and condominiums; shopping malls, convenience and other retail stores; hotel, motels and restaurants; health care and educational institutional; office buildings; and the premises of other business or governmental facilities. Frequently, private security companies are named as defendants in such cases because they incur 2 basic types of liability: (1) negligence on the part of the security company or its employees and (2) criminal acts committed by the security company or its employees.[5]

Experts are able to predict reliably those locations and circumstances where liability problems are most likely to occur:

- shopping malls, convenience stores, and other retailers
- apartments and condominiums
- hotels, motels, casinos, bars, and restaurants
- health care and educational institutions
- security service and equipment companies

- transportation operators such as common carriers, airports, and rail and bus stations
- governmental and privately-owned office buildings and parking lots
- sports and special event centers[6]

Add to this striking growth in employment the trend toward privatization, and a picture of accentuated responsibility and corresponding liability unfolds for the security industry.

Such dramatic growth in both personnel and role responsibility has been keenly debated. The *Hallcrest Report II* [7] sees nothing but continuous movement toward private sector justice.

> Total private security employment is expected to increase to 1.9 million by the decade's end. The present rate of change in employment from 1980 to 2000 is approximately 193%. The annual rate of growth in employment is anticipated to be about 2.3%, roughly double the rate of employment growth for the national workforce. By 2000 there will be 7 private security workers for each group of 1,000 Americans, an increase of 1 from 1990. Further, by 2000 there will be about 13 private security employees for each group of 1,000 workers in the nation—also an increase of 1 employee from the 1990 figure.[8]

However, private security's enhanced role demands added responsibility and accountability. With responsibility comes potential liability, both civil and criminal in nature. "Because the effects of liability cases are far reaching, potentially affecting all levels . . . the more security personnel know about their responsibilities and exposure to liability, the less chance the company will be crippled with lawsuits."[9] Given the range and diversity of services private security is implementing, including "a whole spectrum of concerns, such as emergency evacuation plans, security procedures, bomb threats, liaisons with law enforcement agencies, electronic security systems, and the selection, training and deployment of personnel within institutions,"[10] liability is an ongoing policy issue. Dennis Walters, in his article *Training—The Key to Avoiding Liability*, notes:

> In the United States, where lawyers occupy a significant portion of the professional class, it is important to keep track of emerging legal trends when you are developing a comprehensive security training program. It is very helpful to know what forms of legal action are appearing that will affect the security industry.[11]

In fact, liability concerns are by nature part of the security game. Stephen C. George, highlights, as one example, liability crowd control as a growing security responsibility.

> Many professional security firms refuse to handle events that draw large crowds. They are often the best people equipped to deal with such situations, but they reject these jobs because of the concern

> over—and the potential for—liability. But if private security won't work these events, and police are reluctant to act, who's left to do the job?[12]

This chapter's discussion involves the civil liability of security personnel.

THE NATURE OF CIVIL LIABILITY

Civil wrongs or causes of action (*torts*) can be gleaned from the following common security scenario:

> Mr. X and his fiancée Ms. Z were shopping in a large department store in the State of Missouri. The evidence indicated that Mr. X left the department store without purchasing a tool. Soon after, Mr. X was accosted by a security officer in a hostile fashion. Mr. X was handcuffed after engaging in a physical altercation with the security guard. Mr. X's face was bleeding, his ribs were bruised and he suffered other injuries. Mr. X was eventually acquitted at trial on all charges brought forth by the department store.[13]

Who bears legal responsibility for these physical injuries? Is the liability civil and/or criminal in scope? Has there been an assault or battery? Was the restraint and confinement of the suspected shoplifter reasonable? Has there been a violation of Mr. X's constitutional or civil rights? How are civil actions distinguished from criminal actions in this situation?[14] Questions such as these are common in day-to-day security operations.

At its core, a civil liability constitutes a civil wrong causing personal harm. Conversely, a crime is a public harm, an action against the society as a whole, and an act that injures the public peace or public good. Crimes are typified as collectively serious and a substantial wrong to society. In civil cases, the injured initiates the claim.

A civil harm is a cause of action that is uniquely personal. An individual who is victimized by an unsafe driver is personally victimized. Crimes, despite their personal harm, do more to influence the common psyche of a neighborhood or family. Crimes injure the world at large. While criminal law is chiefly concerned with protection of society and a restoration of the public good, the basic policy behind tort law is: "to compensate the victim for his loss, to deter future conduct of a similar nature, and to express society's disapproval of the conduct in question."[15] Civil remedies are more concerned with making injured parties economically and physically whole, while criminal remedies are more preoccupied with just desserts—namely punishment of the perpetrator either by fines or incarceration. Tort remedies involve *damages*, while criminal penalties result in incarceration or fines.

Civil causes of action or wrongs are generally called torts. A "crime" broadly describes many types of violations individuals and other entities commit against the society.

The following cause of action may be brought by a person who has been civilly harmed:

- assault
- battery
- abuse of process
- malicious prosecution
- conversion
- deceit defamation
- false imprisonment
- intentional infliction of emotional distress
- invasion of privacy
- negligence
- trespass

Each cause of action requires a proof of its *elements*. "When a party has alleged facts that cover every element of the cause of action, the party has stated a *prima facie* case."[16]

While there is much that distinguishes civil and criminal actions, "the same conduct by a defendant may give rise to both criminal and tort liability."[17] Selection of either remedy does not exclude the other, and in fact, success in the civil arena is generally more plausible since the burden of proof is less rigorous. Remember the evidentiary burden in proof of a crime requires proof *beyond a reasonable doubt*. A successful civil action merely mandates *proof by a preponderance of the evidence* or by *clear and convincing evidence*.

The fact pattern portrayed above gives rise to a series of civil actions, including:[18]

1. Assault:
   - An act
   - Intent to cause harm or apprehension of said harm
   - Apprehension that is imminent
   - Causation
2. Battery:
   - A specific act
   - Intent to cause harmful or offensive conduct
   - Actual harmful or offensive conduct
   - Causation
3. False Imprisonment:
   - An act which confines a plaintiff completely within fixed boundaries
   - Intent to confine plaintiff

- Plaintiff was conscious of his own confinement or was harmed by it
- Causation

4. Intentional Infliction of Emotional Distress:
   - An act that is extremely outrageous
   - Intention to cause severe emotional distress
   - Actual emotional distress is suffered
   - Causation
5. Malicious Prosecution:
   - Initiation of legal proceedings
   - Without probable cause
   - With malice
   - Favorable termination of legal proceedings regarding defendant

Whether the plaintiff or victim can prove the elements is a different story. The chief point is that security companies and their personnel, agents, and contractors must be continuously wary about conduct leading to civil liability. Tortious conduct can be costly. Damages determined by a jurist or a jury can be economically devastating.

> It is difficult to get an exact figure on how many corporate dollars are lost through jury judgments against security personnel and their employers, but the fact that those losses are substantial is indicated by the circumstances of the legal climate as it affects security today. For example, jury awards in the past often amounted to only a few thousand dollars in many cases. Today, awards of $100,000.00 or more are becoming increasingly common. Various industry authorities estimate that at least one suit involving security is filed in the United States every day.[19]

A review of the literature indicates that cumulative damage awards are consistently increasing.[20]

In sum, there are both similarities and differences between tort law and criminal law. Table 4.1 provides a concise overview.

CLASSIFICATION OF CIVIL WRONGS/TORTS

Torts are further divided into three main classifications:

1. Intentional Torts
2. Negligence
3. Strict Liability Torts[21]

Security agencies and personnel must learn to distinguish these three main categories. Security programs, practices, policies, and procedures need constant evaluation to prevent tortious action in any of these three categories. A review of common civil wrongs that regularly influence and affect security practice, with illustrative case examples, follows.

Table 4.1 Crime-Civil Action Comparison

Torts or Civil Wrongs	Crimes
Personal harm	Harm against society
Does not require intentional behavior	Generally requires intentional behavior
Requires proof by a preponderance of evidence	Proof beyond a reasonable doubt
Selection of civil remedy does not exclude a criminal prosecution	Selection of criminal prosecution does not exclude a civil remedy
Results in damage awards generally compensatory and sometimes punitive in nature	Results in fines, imprisonments and orders of restitution

Intentional Torts

Intentional torts are acts which people mean or intend to do, not the result of pure carelessness, accident, or mistake. In civil law, specificity of mind and general intentions are not as rigidly composed. By contrast, criminal law insists on more intentionality with terms like, *premeditation*, *willfully,* and *purposely*. In assessing criminal behavior, the law requires that the person choose consciously a certain act, and not be under duress, coercion, or suffering from any other impediment that influences volition.

Civil intent is a watered-down version of criminal intent. "Evil motive or the desire to cause injury need not be the end goal; intent to cause the actual result is sufficient."[22] In the law of torts, intention can be strictly "without malice or desire to harm but with full knowledge to a substantial certainty that harm would follow."[23] Specific examples of intentional torts commonly applicable in security settings are highlighted below.

Assault

Since security personnel commonly deal with situations requiring detention and restraint, the potential for assault is not surprising. An analysis of any assault requires proof of the following elements:

- An act
- Intent to cause harmful or offensive contact or to cause the apprehension of harmful or offensive contact

- The apprehension must be imminent
- The defendant must cause the apprehension

Noticeably absent from this element list is an absolute requirement of offensive contact or actual touching. In most jurisdictions, an assault is considered to be an incomplete battery. Instead, the act of touching is in its threatened stage, symbolized by its tentativeness and lack of execution. Movement or an act of the defendant toward a prospective victim may consist only of eye movement or a slight jerk of the body. The plaintiff must reasonably anticipate, believe, or have knowledge that this potential action against the body is harmful. The proposed injury is imminent, immediate, or without any significant delay. Consider this factual scenario:

> One evening in February 1976, George I. Kelley entered a Safeway store in southeast Washington, D.C. to shop for groceries. He noticed that an automatic exit door was not working properly and that it was necessary to exert pressure on the door to push it open. According to Kelley's testimony, he completed his shopping and later advised the cashier that he wanted to make a complaint about the broken door. The cashier suggested that Kelley talk to the Assistant Manager, Mr. Wheeler. When Kelley did so, the Assistant Manager responded that the door would be fixed in two to three months and that Kelley was always making trouble for him. Kelley testified that he had never made a complaint to Mr. Wheeler before that night and also stated that the Assistant Manager said to him "boy, if you don't get out of this store I'm going to have you arrested." Kelley responded, "Well call the Police, I want to file a complaint." Holding his bag of groceries, Kelley stood in front of the store to await the police. The Assistant Manager beckoned to a Security Guard, Larry Moore, who was assigned to the store by Seaboard Security Systems, Ltd. At the same time, the Assistant Manager asked someone in the back of the store to call the police. Within a few minutes, Officer Knowles of the Metropolitan Police Department arrived. According to Kelley, Knowles first spoke to the Assistant Manager, who called him over and then approached Kelley and said "the Manager wants you to leave the store." Kelley testified that he was about to respond to the Officer when the Security Guard approached from the rear, and grabbed him around the throat. Simultaneously, the Police Officer stuck his knee into Kelley's chest. The two pushed him to the ground and handcuffed him. Without any resistance from Kelley, the Officer and the Security Guard took Kelley to the back of the store where he stood in handcuffs in view of store customers. After ten or fifteen minutes, a police car arrived and transported him to the precinct where the police charged him with unlawful entry.[24]

Using the elements of an assault or a battery action, does the plaintiff have a reasonable basis for filing a claim against Safeway and its employees? Clearly, a harmful or offensive contact took place but was there a

reasonable apprehension of harm? In upholding the assault and battery determination the court held:

> Kelley alleges that although he offered no resistance, the Seaboard Guard grabbed him from behind, around the throat and pushed him to the ground before handcuffing him. Although witnesses were present each told different versions of the events. We find there was sufficient evidence upon which a jury could properly have found Safeway liable for assault and battery. Accordingly we affirm the jury finding liability on that account.[25]

The plaintiff's claim of assault was correctly struck down when the sole basis for the tort was a forty-five minute detention, in a state with merchant privilege, says *Josey v. Filene's*.[26]

Even the assaults of third parties, bystanders, onlookers, and intermediaries are a security liability according to Charles Sennewald, president of the International Association of Professional Security Consultants. Sennewald highlights the pressing realty:

> Before stores were sued primarily for what they did. Now they are held accountable for acts of third parties against customers, such as muggings or purse snatchings in a store's parking lot.
> This trend requires consultants to assess whether a store provides a reasonable level of security for invitees.
> No matter the trends, the more enlightened retail security executives see the need for periodic outside objective advice. Firms that have failed to stay current, by not tapping into available consulting resources, have the most to lose. And some do![27]

Battery

Closely aligned to any assault charge is the action of battery. A battery requires an actual touching or offensive contact to another person without right, privilege, or justification. The elements in the proof of a battery are:

- A specific act or movement
- The intention to cause the contact or to possess knowledge of the consequences
- Actual physical impairment, pain, or illness to the body
- The conduct must be personally offensive based upon reasonable standards
- Causation between the defendant's act and the actual injury to the plaintiff

As discussed above, both the civil and criminal remedies may encompass these conducts. Criminal codes generally contain assault and

battery provisions, whose elemental standards are strikingly similar, though the burden of proof is far different.

The primary concern in battery analysis is whether the touching or contact is offensive. While the term "offensive" possesses a certain amount of relativity, most courts have held that offensive does not mean "that the contact must be violent or painful."[28] Offensive contact can be touching, tapping, poking, spitting, and even indecent gestures.

Tortious conduct of this type is a serious concern to most security employers since job tasks and occupational requirements often give rise to battery fact patterns.[29] Consider what techniques and methods could withstand a battery action when a security guard seeks to detain an individual. What form of behavior and restraint is necessary to control individual behavior that might be political or demonstrative in nature? Reflect further on the delicate balance that must be maintained between a proprietor's right to protect his or her property interest, and the right of a consumer not to be accused, confronted, or accosted without substantial cause. Creative legal minds easily conjure up a battery case under diverse factual scenarios, "since it is not necessary that the defendant intend to cause specific harmful injury, only that the contact itself was intended."[30] In the area of retail security, such as detention of a shoplifter, any security action has a battery prospect. Security specialists often walk the fine line of professional restraint and excessive force. Courts look to the totality of circumstances when assessing the difference.[31]

False Imprisonment

In order to prove a *prima facie* case of false imprisonment the following elements need demonstration:

- An act that completely confines a plaintiff within fixed boundaries
- An intention to confine
- Defendant is responsible for or the cause of the confinement
- Plaintiff or victim was conscious, aware, and knowledgeable of the confinement or was harmed by it

Industrial and retail settings provide fertile grounds for cases of false imprisonment. Consider the following facts:

> A United Security Guard detained the Plaintiff as she was leaving the store and accused her of taking a gold necklace which she was wearing around her neck. The Plaintiff responded that the necklace had been given to her by her parents.
> The Guard escorted her to the Assistant Manager's Office and told the Assistant Manager that she had witnessed the Plaintiff taking the necklace. The Plaintiff again stated that the necklace was a gift from her parents and expressed a desire to leave so that she could contact

> her Mother who was waiting in the parking lot outside. After the guard procured the necklace, the Assistant Manager accompanied the Plaintiff outside the store to meet her Mother. The latter confirmed the Plaintiff's story as to where the necklace had come from, and all three proceeded back to the store office. There, the Security Guard produced a release form which she said would have to be signed. The Mother refused, and the Assistant Manager informed her that the store's policy was not to prosecute minors. The Mother replied that she intended to prosecute the store whereupon the necklace was returned to her and both the Plaintiff and her Mother were allowed to leave. The Plaintiff also introduced evidence showing that the store did not stock necklaces of the same quality as the one the Plaintiff was wearing when she was detained.[32]

While there may be room for disagreement about the intentions of the security personnel, a close review of the facts reveals fulfillment of this tort's fundamental elements. First, the plaintiff was confined to a specific fixed boundary. Second, it was the intention of the defendant to confine that party. Third, the defendant was clearly responsible for causing the confinement. Lastly, the plaintiff was conscious of it and, in her view, was harmed by it. It is only natural that false imprisonment cases arise in the retail environment. Even good faith efforts to restrain suspected shoplifters are subject to mistakes. As a result, proprietors have been granted, in select jurisdictions, immunity in the erroneous detention of suspected shoplifters under merchant privilege laws. Merchant privilege laws usually provide that a "[p]laintiff may not recover damages against the operator of a mercantile establishment for false arrest where it is established by competent evidence that the Plaintiff had so conducted himself and behaved in such manner as to cause a man of reasonable prudence that such Plaintiff was committing the offense of shoplifting . . . or providing that the manner of such detention or arrest and that the length of time during which Plaintiff was detained was under all of the circumstances reasonable."[33]

A statutory example is shown below:

> (c) Presumptions.—Any person intentionally concealing unpurchased property of any store or other mercantile establishment, either on the premises or outside the premises of such store, shall be prima facie presumed to have so concealed such property with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof within the meaning of subsection (a), and the finding of such unpurchased property concealed, upon the person or among the belongings of such person, shall be prima facie evidence of intentional concealment, and, if such person conceals, or causes to be concealed, such unpurchased property, upon the person or among the belongings of another, such fact shall also be prima facie evidence of intentional concealment on the part of the person so concealing such property.
> (d) Detention.—A peace officer, merchant or merchant's employee or an agent under contract with a merchant, who has probable cause to believe that retail theft has occurred or is occurring on or about a store

> or other retail mercantile establishment and who has probable cause to believe that a specific person has committed or is committing the retail theft may detain the suspect in a reasonable manner for a reasonable time on or off the premises for all or any of the following purposes: to require the suspect to identify himself, to verify such identification, to determine whether such suspect has in his possession unpurchased merchandise taken from the mercantile establishment and, if so, to recover such merchandise, to inform a peace officer, or to institute criminal proceedings against the suspect. Such detention shall not impose civil or criminal liability upon the peace officer, merchant, employee or agent so detaining.[34]

Use of language like *reasonableness*, *prudence,* and *honest belief* indicates the legislative desire to assure protection from illegitimate claims of false imprisonment. Judgments for false imprisonment are not granted unless the plaintiff shows evidence of willful conduct, maliciousness, or wanton disregard.[35] The standard of "reasonableness" is commonly employed by appellate courts in determining civil liability. A Wisconsin case, *Johnson v. K-Mart Enterprises, Inc.*,[36] dismissed an action for false imprisonment after evaluating the total duration of imprisonment consisting of twenty minutes. The gentlemanly demeanor and behavior exhibited by security personnel for the retail store, coupled with a polite and formal apology given upon verification of the facts favorably impressed the court.

> The Appellate Court concurred in the dismissal noting that Wisconsin has a statute protecting merchants from liability where they have probable cause for believing that a person has shoplifted. Under the statute a merchant may detain such a suspect in a reasonable manner and for a reasonable length of time. The Court held that the K-Mart security guard did have probable cause to detain Johnson.[37]

While the facts enunciated above arguably prove the elements, security professionals should be aware that professionalism and courtesy during detention influence judicial reaction. A case in point is *Sarah Robinson v. Wieboldt Store, Inc.*,[38] whose facts can be summarized as follows:

> On November 21, 1977, at about 6:30 p.m., the 66-year old Plaintiff was shopping at the Evanston Wieboldt Store. She purchased a scarf . . . with her credit card. Plaintiff chose to wear the scarf, removed the price tag, and handed it to the sales clerk. The sales clerk did not object when Plaintiff put the scarf around her neck. The clerk handed Plaintiff a copy of the sales receipt, which Plaintiff put in her pocket. The Plaintiff then took the escalator to the 3rd floor of the store.
>
> As Plaintiff stepped off the escalator a security guard grabbed her by the left arm near her shoulder. The guard gave his name and showed his badge. He asked her where she got the scarf and requested her to accompany him to a certain room. She told him she purchased the scarf on the 1st floor and had the receipt in her pocket. During the entire confrontation the guard was holding tightly onto Plaintiff's upper arm.

> Plaintiff, who was black, described the guard as white, weighing about 200 pounds, having dark hair and wearing a dark brown suit. The guard grabbed the receipt from the Plaintiff's hand, continued to hold her upper arm, and Plaintiff struggled to get the receipt back from the guard. Plaintiff testified that she felt very sick, as if her head was blown off and her chest was sinking in. She said she was frightened and that it seemed that the incident lasted forever. The guard took Plaintiff down to the scarf department on the 1st floor. Plaintiff removed the scarf from her neck and noticed a small tag on the corner. This tag gave instructions on the care of the scarf. This was apparently what the security guard had seen before grabbing the Plaintiff. The sales clerk told the guard the Plaintiff had purchased the scarf a short time earlier. The guard told the sales clerk that she had caused Plaintiff a lot of trouble and had embarrassed her. He then walked away without apologizing to the Plaintiff.[39]

By the guard's actions, the plaintiff, for a period of time, was confined to a fixed boundary. Developing a restriction of this sort was the security agent's intention. The cause of the confinement can only be attributed to the security guard. Since the plaintiff was conscious of the confinement and certainly felt harmed by it, a *prima facie* case has been found. The defendant, however, relied upon the statutory defense of a merchant privilege.[40]

Given the facts of *Wieboldt*,[41] can a trier of fact conclude that the security official acted reasonably in this case? Were the actions of the security guard, especially in terms of the force exerted, reasonable in light of the age and stature of the plaintiff? The court held:

> A review of the record reveals Plaintiff's assertions do in fact present a case of false imprisonment. She testified that the security guard grabbed her tightly on her upper arm while they were on the 3rd floor of Defendant's store, restricting her freedom of motion. Even after presenting the guard with a sales receipt she was forced to travel to the 1st floor of the store further restricting her liberty and freedom of locomotion. To claim that Plaintiff could have refused to go to the 1st floor and unilaterally ended the confrontation ignores the realities of the situation.[42]

In a claim based on civil rights violations, the test is "objective reasonableness." "In a civil rights action in which qualified immunity is asserted, the reasonableness of an officer's conduct comes into play both 'as an element of the officer's defense' and 'as an element of the plaintiff's case.'[43] For this reason, many courts have struggled with the application of qualified immunity. On one hand, qualified immunity, as stated above, is immunity from suit. But, on the other hand, in cases in which the facts are disputed, it is improper for a court to resolve factual disputes by weighing evidence and making credibility determinations at the pretrial stage. Accordingly, in many cases parties assert their qualified immunity defense at the close of the presentation of evidence but before the jury, in other

cases, it is not until after the jury has reached a verdict, and still in other cases, the parties assert their defense at every opportunity."[44]

Review the facts of *Lynch v. Hunter Safeguard*.[45]

> Defendant Donald Hunter, a ShopRite security guard, followed Plaintiff out of the store to her car, stopped her, took her keys and refund authorizations, and then escorted her back into the supermarket. Hunter then took Plaintiff to a storage room, restrained her wrists in handcuffs . . . and fastened the handcuffs to a metal stairway. The handcuffs were so tight that they cut Plaintiff's skin, numbed her hands and fingers, and caused them to swell and darken. Plaintiff begged Hunter to allow her to use a bathroom. . . . She finally lost control and urinated on herself. Hunter laughed and then photographed Plaintiff in her wet clothing. Plaintiff repeatedly asked Hunter to allow her to telephone her 69-year-old mother. . . . Hunter ignored Plaintiff's requests. Plaintiff remained shackled to the stairway for three to four hours. . . . Hunter directed other ShopRite employees to search Plaintiff's pocketbook. . . . [and] Plaintiff's car . . . two ShopRite managers, supported and encouraged Hunter's actions. "For a considerable length of time, neither Defendants . . . telephoned the police or told anyone else to telephone the police about Plaintiff's detention, handcuffing or the shoplifting accusation against her."
>
> "Someone from the store" eventually telephoned the Philadelphia Police Department, and Officers. . . . responded to the call. . . Officer John Doe III immediately ordered Hunter to remove the handcuffs. Hunter . . . told the two police officers that Plaintiff had shoplifted items from the supermarket, and asked them to arrest her. . . . Officers John Doe III and Jones-Mahoney placed Plaintiff under arrest. . . .
>
> At the police station, Plaintiff was placed in a "small, filthy, insect-infested cell with five other women, four of whom would not allow Plaintiff to sit down on a bench for several hours. Repeatedly, Plaintiff was inappropriately touched by one of these women." Plaintiff was incarcerated for twelve hours. . . . She was not allowed to telephone her mother and "was not able to drink from the water fountain. . ." After seven hours, she was given food. Plaintiff was charged with Retail Theft . . . but the charge was later dropped.[46]

In this case, while the debate on false imprisonment may be unsolvable, the methods employed will generate juror sympathy.

The security industry is paying dearly in false imprisonment cases. For example:

- Retail customer awarded $20,850.00 in damages in false imprisonment case. Security manager refused to listen to customer's explanation.[47]
- Award of $30,000.00 in punitive damages as well as $20,000.00 in compensatory damages for false imprisonment case upheld after trier believed security personnel were loud, rude, and unpleasant.[48]
- Customer detained for over two hours in security office, searched and questioned, even though he had a receipt which accounted for each

and every item in his possession. Judgment for $85,867.85 plus costs upheld.[49]

The method of detention weighs heavily on the court when determining false imprisonment cases. These factors are commonly judged:

1. If physical force itself is used to cause the restraint;
2. If a threat of force was used to effect the restraining;
3. If the conduct of the retail employee reasonably implied that force would be used to prevent the suspect from leaving the store.[50]

Amazingly, these types of cases can be avoided. As Leo F. Hannon suggests in his article, *Whose Rights Prevail?*, "The bottom line seems to be that you can't beat common sense."[51]

Security professionals should design a system of detention and restraint that does not trigger, by its shortcomings, a false imprisonment action. For example, to confine does not require walls, locks, or other barriers. Since confinement can be the result of an emotional coercion or threat, establish a polite, cordial environment when detaining. Confinement is defensible if performed by an official legally empowered to act. While some protection is afforded in jurisdictions that have merchant privilege statutes, any action taken by private security personnel without that limited privilege will be subject to a false imprisonment claim. Other security professionals urge regularity and professionalism as the preventive steps to thwart off liability suits based on false imprisonment. John Francis' *The Complete Security Officer's Manual* corroborates this suggestion.

> A security officer is expected to be businesslike, alert, and helpful. He should treat people as he would like to be treated. He will more than likely be asked the same questions numerous times. He should remember the person standing in front of him is asking the question for the first time. He will be bombarded with questions all during his shift, and he must realize the people asking these questions have their own personal pride and they are certainly not going to ask for information that is otherwise easily obtainable to them. An officer should be sure when a person approaches him that he attempts to help them. If he cannot help them, because it is against facility rules/regulations, that should be explained. At least leave them with the knowledge that an attempt was made to help them. A simple word or a phrase: "Let me see if I can help you. Here are the rules and they cannot be changed. You will have to check with the person in charge, or call this number to get the assistance you need." Rather than saying, "This can't be done, it's against the rules, and you're not going to do it." Rudeness is no help to a person who needs help. An officer must be courteous. There is a saying that if, "courtesy is contagious, rudeness is epidemic." Security officers are expected to be courteous to people every day. By being rude to one employee in a facility, the word

> is spread throughout the facility that all the security officers are rude and inconsiderate.[52]

In contract guard settings, particularly when the company employing the security service defends itself as an independent contractor, the falsely imprisoned will argue liability on behalf of both the agent and the principal if the latter ratifies the former's conduct. "The liability of a principal for a wrongful restraint or detention by an agent or employee depends on whether the act was authorized or subsequently ratified, or whether the act was within the scope of the agent's or employee's employment or authority."[53]

Infliction of Emotional or Mental Distress

Often coupled with claims of assault, battery, and false imprisonment is the claim of intentional or negligent infliction of emotional or mental distress. Since only the minority of jurisdictions recognizes the negligent aspects of this tort, no further consideration will be given.[54] The majority of American jurisdictions do recognize the tort of intentional infliction of mental distress.[55]

Many require that the tort be strictly *parasitic* in nature, that is, a cause of action resting upon another tort that causes actual physical injury or harm like assault and battery. Critics of the tort have long felt that without an actual physical injury, that can be objectively measured, mental and emotional damages are too speculative to quantify. That position has now become a minority view since most jurisdictions recognize, or at least give some credence to, the soft sciences of psychiatry and psychology.

For the security industry, the individual consumer, employee, or other party who is accosted, humiliated, or embarrassed by a false imprisonment, battery, or assault action will often attempt to collect damages tied to the emotional strain of the event. However, in an effort to provide quality control to mental damages, the elements of this tort are rather rigorous. A successful prosecution of such an action requires the following:

- An act that is deemed extreme or outrageous,
- The intention to cause another severe emotional distress,
- The plaintiff actually suffers severe emotional distress,
- The defendant is the actual cause of that distress.

The general consensus regarding extreme and outrageous conduct is that it be behavior that the ordinary person knows is outrageous. The borders of extreme and outrageous behavior include words of harsh insult, threats, handcuffing, physical abuse, and humiliation.[56]

At best, the term emotional distress is a series of "disagreeable states of mind that fall under the labels of fright, horror, grief, shame, humiliation, embarrassment, worry, etc."[57] The behavior complained of must be so

extreme and outrageous as "to be regarded as atrocious, and utterly intolerable in a civilized community."[58] Furthermore, the emotional distress allegedly suffered must be serious.[59] A mere insult or petty bickering does not qualify.

The private security employee's very position may make seemingly innocent conduct outrageous or extreme.[60] The issue of emotional damages came to the forefront in *Montgomery Ward v. Jesus M. Garza*.[61] In assessing the damages of a plaintiff in a false imprisonment case, the court considered testimony by the plaintiff that he was embarrassed and humiliated.

> His son testified that Garza seemed confused, embarrassed, and frightened. He withdrew from his friends and he changed his eating habits after the incident. A psychiatrist testified that Garza was incapable of overcoming the emotional impact resulting from the false arrest, that Garza's epileptic condition could be aggravated by the event and that psychiatric treatment would be desirable. Garza's personal physician testified that Garza suffered from acute anxiety and depression and stated that he suffered an increased number of epileptic convulsions since his detention. The doctor has had to increase his medication and to add another tranquilizer in an effort to control Garza's attacks. Based on this evidence the Court found that the award of $50,000.00 was "not so excessive that it shocks our sense of justice and the verdict was therefore affirmed."[62]

In an age when psychiatric objectification is readily accepted and the judicial process welcomes the expert testimony of psychologists, it is not surprising that the bulk of tort actions seek emotional damages. The best preventive medicine that security professionals can ingest is to be certain, regardless of the innocence or guilt of the suspect, not to create conditions that could be characterized or described as extreme or outrageous. Just as public police must maintain an aura of decorum and professionalism, it is imperative that private justice personnel minimize the influence of emotion in daily activities. They must treat suspects with the utmost courtesy, and handle cases and investigate facts with dispassionate insight and objectivity.

Malicious Prosecution

Accusations of criminality should never be made lightly, since the ramifications can be costly in both a legal and economic sense. A complaint filed and a case alleged within the private justice system, which has no basis in fact or law, can give rise to the tort of *malicious prosecution*. The elements of this tort include:

- The initiation of legal proceedings,
- Without any probable cause,
- With actual malice,
- Legal proceedings terminate or result in favor of the accused.

Proving the initiation of a charge is quite easy. More difficult is the proof that the same charge had no reasonable basis in fact or law or was devoid of probable cause, and was prompted by actual malice. Probable cause deals with probabilities and not a rigorous, scientific certitude. Probable cause is more than a guess or a hunch, and much richer than a suspicion, though still lacking absolute certainty. If a case is brought forth, with a meritorious contention or argument, then probable cause is a basis.[63]

More challenging in the burden of proof in a malicious prosecution is the showing of malice. Malice is the willful and intentional design to harm another.[64] Malice implies an improper motive—namely, that the initiation of legal action has little to do with a plaintiff's desire to bring the accused or the defendant to justice. Instead, the accused is unduly harassed by the improper filing of civil and criminal actions and victimized by the very processes that have been established to ensure justice. Instead of justice, spite, ill-will, politics, hatred, or other malevolent motive govern the decision to sue. In *Owens v. The Kroeger Co.*,[65] a jury awarded $18,500 in damages in a malicious prosecution action when Mr. Owens was prosecuted for shoplifting 994 worth of potatoes. The exoneration, coupled with aggressive prosecution of Mr. Owens, convinced the trial jury that malice was the retailer's sole motive. The trial judge disagreed and overturned the jury's finding. Some jurisdictions, like Georgia, bar an action for malicious prosecution, even when the defendant is subsequently declared innocent, if a probable cause basis triggered the arrest. In *Arnold v. Eckerd Drugs of Georgia, Inc.*,[66] a store customer was detained and prosecuted for shoplifting based upon probable cause. The court's decision noted:

> With regard to appellant's claim for malicious prosecution, "[t]he overriding question . . . is not whether [she] was guilty, but whether [appellee] had reasonable cause to so believe—whether the circumstances were such as to create in the mind a reasonable belief that there was probable cause for the prosecution." We have held that, under the undisputed evidence, appellee's agent had reasonable grounds to believe appellant to be guilty of shoplifting at the time of her arrest. Appellant produced no evidence that, subsequent to her arrest, appellee acquired further information tending to show that its earlier assessment of the existence of probable cause was erroneous.[67]

In *Butler v. Rio Rancho*,[68] the U.S. District Court reiterated the need to prove the defendant's motivations, especially when the defendant misuses legal processes to accomplish illegal and unlawful ends.

Defamation

The cumulative effect of false imprisonment, intentional infliction of mental distress, assault and battery, and other related torts in security detention

and restraint situations often lead to the tort of defamation. Defamation requires proof of the following elements:

- Defamatory statement by a defendant,
- Statement concerns the plaintiff,
- Publication,
- Demonstration of actual damages,
- Causation.

When private security personnel make the accusation that "you have stolen an article" or "you are under suspicion for shoplifting" the potential for a defamation case exists.[69] An accusation of any criminal behavior may suffice. However, the defamatory remark must be "a statement of fact which in the eyes of at least a substantial and respectable minority of people would tend to harm the reputation of another by lowering him or her in the estimation of those people or by deterring them from associating with him or her."[70] If a security professional makes no accusation, at least in terms of verbal comment, or couches his interchange with the client in neutral, investigative jargon, few problems will arise. Again, common sense demands that security personnel be courteous and noncommittal and that they investigate all the facts necessary to come to an intelligent conclusion concerning the events in question. What is essential to understand is that defamation is not mere insult or "casual insults or epithets . . . because such actions are not regarded as being sufficiently harmful to warrant invocation of the law's processes."[71]

Another issue in the proof of a defamation action relates to the statement's verity. No action in defamation can be upheld if the statement, in fact, is true, and the defendant cannot demonstrate falsehood. The fact that a statement has been made is, of course, important. To whom the statement has been made is also a legal consideration, for the statement must be published or announced to others to be actionable. This is called the requirement of *publication*. "Thus a derogatory statement made by a Defendant solely to the Plaintiff is not actionable unless someone else reads or overhears it."[72] Since many retail and industrial situations involving security personnel are in the public eye, it behooves security practitioners, when they make a claim, to do so discretely. Making accusations at the cash register or in other public settings is not intelligent discretion. "Preparation of and distribution of letter to personnel file and to other officers may constitute publication sufficient to support cause of action for defamation."[73]

Truth defends the defamation as announced in *Nevin v. Citibank*,[74] when a security guard alleged "'a black female was making large purchases with a Citibank Visa card' and that, 'she makes purchases, she puts the merchandise in her vehicle and returns to the store.'"[75] Since these facts were true, the cause of action was dismissed.

Invasion of Privacy

Since much of the activity of private security is clandestine and investigatory in nature, the tortious conduct involving invasion of privacy can sometimes occur. Corporate spying—the practice of using security forms to monitor employee conduct—bears equally on the issue of privacy. A case of alleged spying on prospective union organizers has recently been in the spotlight. "The lawsuit contends K-mart and Confidential Investigative Consultants Inc., the Chicago firm that supplied the spies, violated Illinois' privacy law by gathering information on employees' opinion about unions as well as such seemingly unrelated details as where a worker shopped, an employee's off-duty fishing plans, and a female worker's living arrangement."[76] The case elucidates the fine line between a privacy violation and legitimate corporate oversight.

The use of such spies is widespread in American business and especially common among retailers with razor-thin profit margins, "Employee theft accounted for an estimated $11 billion of the $27 billion in shortages reported by U.S. retailers in 1992. . . . Drug abuse in the other major reason for covert investigations."[77]

The tort of invasion of privacy is a recent legal phenomenon spurred on by modern concerns for civil and constitutional rights.[78] Also supporting this legal remedy are recent efforts "expressed in federal and state statutes, in proposed legislation, and in judicial decisions."[79] The private justice sector's use of investigative technology and intrusive methodologies and practices further supports this legal remedy. When reviewing information gathering and investigative practices, security professionals should keep a few points in mind:

> Do not permit security personnel to use force or verbal intimidation or abuse in investigations of employees and customers; collect and disclose personal information only to the extent necessary; inform the subjects of disclosures to the greatest extent possible; avoid the use of pretext interviews; avoid the use of advanced technology surveillance devices whenever possible; know the standards adhered to by the consumer reporting agencies and other parties with whom you exchange personal information; train your employees in privacy safeguards; periodically review your information practices with appropriate personnel and counsel.[80]

Listed below are the four approaches to an invasion of privacy action with necessary elements:

- *Invasion of privacy*—Intrusion
  1. An act which intrudes into someone's private affairs
  2. The action is highly offensive to a reasonably prudent person
- *Invasion of privacy*—Appropriation
  1. The unauthorized utilization of a Plaintiff's name, trademark, or personality for the defendant's own benefit

- *Invasion of privacy*—Public Disclosure of Private Facts
  1. Actual publicity
  2. Concerning the private life of a plaintiff
  3. Which is highly offensive to a reasonably prudent person.
- *Invasion of privacy*—False Light
  1. Publicity which places plaintiff in a false light and which is highly offensive to a reasonable person.

At the heart of any privacy invasion case is an affront to public sensibility and personal integrity. How far can a media critic or newspaper reporter go on divulging the secret lives of the rich and famous? When, at least in this crazed age, does a public disclosure of a private fact in a private life offend individual and collective sensibilities? Politicians often complain about the intrusive stories concerning their sexual dalliances. Proponents of the disclosure hold that any public figure and his personal, moral, and sexual habits is fair game. Critics say that disclosure is offensive to the average person.

A recent *American Law Reports* annotation, *Investigations and Surveillance, Shadowing and Trailing, As a Violation to the Right to Privacy*,[81] addresses this very topic. Recognizing the increased use of private detective agencies and other investigatory boards, the *Annotation* states,

> Those instances in which the surveillance, shadowing or trailing is conducted in an unreasonable and obtrusive manner, intent on disturbing the sensibility of the ordinary person, without hypersensitive reactions, is usually been held . . . an actual invasion of the right to privacy.[82]

In the business of security, there are many private actions that become publicly disclosed. Think of divorce investigations. "Where the surveillance, shadowing and trailing is conducted in a reasonable manner, it has been held that owing to the social utility of exposing fraudulent claims, because of the fact that some sort of investigation is necessary to uncover fictitious injuries, an unobtrusive investigation, even though inadvertently made apparent to the person being investigated, does not constitute an actual invasion of his privacy."[83]

Drug screening, testing, and related monitoring programs have been challenged on privacy grounds. For the most part, private sector business and other entities are largely free to conduct such tests. The American Management Association recently reported that 63 percent of companies surveyed test for drugs. Some 96 percent will not hire individuals who test positive. SmithKline Beecham Clinical Laboratories reports that 11 percent of 1.9 million people tested produced a positive test. This figure reflects a four-year decline in applicant test-positives.

Reid Psychological Systems continues to see increasing applicant drug use. In a study of more than 17,000 applicants in four major industries,

12 percent admitted to drug use on a written questionnaire.[84] Pinkerton Security and Investigation Services, Inc. and ENDS (Environmental Narcotics Detection Service) have instituted a partnership, whose singular purpose is to screen accurately and efficiently drug testing results. Both alcohol and drug abuse in the workplace remain a substantial problem. The Bureau of Justice Statistics paints a distressing picture of workforce drug usage. A study, which focused on findings from the 1994 and 1997 National Household Survey of Drug Abuse reported that:

- 70 percent of illicit drug users, age 18-49, were employed full-time.
- 1.6 million of full-time workers were illicit drug users.
- 1.6 million of these full-time workers were both illicit drug and heavy alcohol users in the past.[85]

Even emergency room data reflect this grim reality (see Figure 4.2).[86]

ENDS helps employers detect traces of illegal drugs in the workplace. Pinkerton Security & Investigation Services collects test samples; and the Woburn, Massachusetts-based Thermedics analyzes them. Clients receive results within 48 hours.[87]

While most courts uphold the right to conduct such tests, any condemnation that does occur usually relates to the reliability methodology and fairness relating to the test itself. Privacy questions are less compelling than effects to control a major workplace problem. Most American businesses allow a first offense, and upon individual rehabilitation, will reinstate the employee. See the agreement at Figure 4.3.

If employees complain about activities that invade their privacy, formally document their statement. See Figure 4.4.

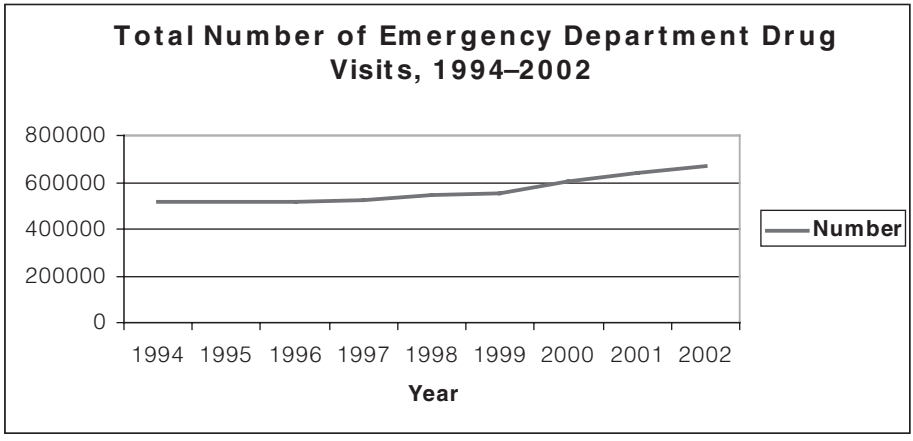

Figure 4.2 Data on substance abuse.

EMPLOYEE REINSTATEMENT AGREEMENT

It is hereby agreed as follows:

1. *Employee's name* recognizes that the Company will conditionally reinstate him/her after he/she successfully completes a rehabilitation program at (*Name and location of rehabilitation program*); provided the following conditions are met: (*List conditions*)

2. If within the next (*Describe time*), (*employee's name*) is unable to perform job duties due to alcohol or drug abuse, fails to continue an alcohol or drug rehabilitation program, or fails to meet the conditions set forth in "1" above, discipline up to and including termination may result.

3. I agree to cooperate in any additional alcohol and drug testing that the Company in its discretion deems appropriate during the (*Time period*) immediately following my reinstatement, or discipline up to and including termination may result.

(Date)

(Employee)

(Union Representative)

(Employer)

Figure 4.3 Employer agreement on substance abuse.

EMPLOYEE PRIVACY COMPLAINT

NAME _____ DATE
DEPARTMENT _____ TITLE _____ SUPERVISOR
DATE COMPLAINT AROSE:
FACTS:

RESOLUTION POSSIBILITIES?

SIGNED: _____

Figure 4.4 Privacy complaint.

Evaluate the fact patterns below to discern whether or not an arguable invasion of privacy has taken place.

- Assume a merchant publicly posts lists of persons whose checks aren't acceptable due to past bounce experience. Could a damage action for $7,500.00 in actual damages as well as $50,000.00 in punitive damages been sustained under an invasion of privacy act?[88]
  Answer: Maybe, but probably not.
- If a merchant posts a sign informing customers of surveillance of fitting rooms, is this action an invasion of privacy?[89]
  Answer: No
- Can a retail department store search the lockers as well as an employee's private personal property for purposes of reducing shoplifting problems? Does such an act constitute an invasion of privacy?[90]
  Answer: No, employers generally can without invasion of privacy liability, though there are exceptions.

Negligence

Negligence encompasses human behavior that inflicts individual harm, injury from mistake or accident, and damages to the individual. To be negligent is to err. To err is simply to be human. Negligence is the stuff of everyday life that people fail to do with due care. Forgetting to engage auto turn signals, failing to file documents such as a tax return, misreading a right of way, or missing an important court date, all typify negligence.

The whole theory of negligence operates from the measure of the average man or woman—the "reasonable person" standard. What should we expect from the average person in his or her dealings with others? Perfection? Infallibility? The reasonable person is an amalgam of human behavior, a predictable player on the world's stage. While mistakes are part of the human equation, the law of negligence is less tolerant of gross and reckless behavior, and it surely divines its rules to fit the type of party under scrutiny. We surely expect more from doctors and lawyers than we do from janitors or construction workers. So in this sense, the average, reasonable person acts reasonably under the circumstances they live and labor under.

How the legal system holds the reasonable person accountable will take a generation of study and analysis. What is certain is that the security industry will be held to its own standard of professional conduct and that injuries that result will be scrutinized in accordance with our expectations of performance and due care owed. On top of this, the industry, like the individual, has a duty to perform an obligation to not harm others. How the average, reasonable, security professional carries out the task will forever be cast and recast. Beyond the Jane and John Doe, the security operative will be held to a normative standard of performance. The measure will still be reasonableness but the setting will change based on education, training,

expertise, and occupation. In the law of negligence, the unreasonable person is needlessly *careless* and even *reckless* and fails to take those precautions necessary to prevent injury to others.

In order to prove a case of negligence, the claimant must demonstrate the following elements:

1. A duty
2. A breach of duty
3. Proximate causation

Hence, the analysis is about due care, duty, and obligation. When breached, negligence emerges. Because of this failure to provide due care, and as a result injury takes places, the defendant in the negligence case is said to be the "proximate" cause of the injury. The line between the negligence and the harm is a straight and piercing one. But these questions are not as facile as they appear.

What is duty, and to whom is it owed? When does the duty arise, and what is the standard in which there must be some level of uniformity and conformity? Duty depends not only on station and occupation, level of expertise, and sophistication of field, but also on the trier of facts who will view the communal context in which the conduct must be evaluated. Negligence never takes the best expert, but instead, the average practitioner as a guide. For an attorney, the same rule applies, that an attorney owes a duty of competent, intelligent, and ethical representation to his client, as other attorneys in his or her same situation would offer. It does not require the highest level of advocacy, only a reasonable level of advocacy. Other examples of duty abound, including a parent to a child, teacher to student, and an engineer to a construction company. What standards of duty should apply in the assessment of security companies and security personnel? Is it not reasonable to expect that security personnel be competent in basic legal applications, or that they generally understand what techniques ensure the protection of people and property? Businesses are besieged by premises liability suits of all sorts that generically allege negligence—failing to provide a safe, secure environment. Even criminal conduct suffered by customers opens the doors to negligence actions.

The results have staggering personal and economic costs for companies and clients. An eight-year study by Liability Consultants Inc. found the average jury verdict for a rape on a business premises to be $1.8 million. For a death, jurors awarded $2.2 million. The Framingham, Massachusetts, security consulting company compiled the survey results from verdicts voluntarily reported by attorneys to a national group of plaintiffs' lawyers.[91]

In negligence law, the question is not only professional competency and obligation that defines the duty owed, but the predictability and foreseeability of the injuries inflicted. In the case of security practice, the issue of duty deals with whether or not an event, an action, or a circumstance was foreseeable in a reasonable sense.

A recent case of a McDonald's restaurant confronts the duty question.[92] Restaurant management used security forces to prevent loitering and other problems in the parking lot and surrounding area. Sweeps of the area were dutifully performed every half hour. Despite this attention, trouble festered in the parking lot and a person was shot. The decedent's family called an expert criminologist who testified as to the paucity of protection.

The scope and extent of duty owed to the patrons of the McDonald's restaurant was the critical legal question in this assessment of negligence. How much safety and security does the proprietor owe the patron? How foreseeable are the events that led up to the wrongful death? Had not the proprietor taken reasonable steps to prevent the harm? Given the fact that the violence which occurred was both sudden and spontaneous in nature, the appeals court struck down the negligence claim:

> We are of the opinion that McDonald's was not negligent in either failing to assist Kelly at the time of the encounter by not providing an armed security guard or by the Assistant Manager's failing to interject himself into the fray rather than call the police.[93]

How could anyone predict such an event? In the language of the law, how could such an event be foreseeable? In negligence law predictability is always probative. Foreseeability, the ability to project and predict, relates to the duty of the security specialist. Here the security firm is unable to know, to see and predict, and thus, could not be held to a standard of duty and obligation it could not discern or foretell. If the criminal conduct was regular and continuous, or if the proprietor had advance notice, the story would be different. Due diligence, due care, and reasonable precaution cannot take place without some level of knowledge.

The interplay between duty and foreseeability is somewhat more obvious in a decision from the Oregon Court of Appeals.[94] The facts include a 76-year-old shopper who exited the J.C. Penney's store at 7:00 P.M. and simply walked to her car in the parking lot. She was accosted, assaulted, and a victim of theft. A jury awarded her a verdict of over $20,000.00. The Oregon Court of Appeals held that the retail establishment is under no affirmative duty to provide security and protection in its parking lot unless it has reason to know of problems or conditions that make visitation troubling or potentially dangerous. In other words, if the retail establishment is put on notice of conditions that may cause harm to others, as was true in these facts, the duty standard is clear. The court held:

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring or about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though

> he has no reason to expect it on the part of any particular individual. If the place or character of his business or his past experiences is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it and to provide a reasonably sufficient number of servants to afford reasonable protection.[95]

If the facts lead a reasonable trier to conclude that harm could occur unless precautions were taken, negligence will be found. Again, an act of negligence is a breach of duty owed to others and a failure to exercise due care. "Judges face the questions of lawsuits where the customer already has been injured by the supposedly unforeseeable danger. The approach tends to exclude accurate predictions about what dangers are foreseeable."[96] Crafting a benchmark of duty and foreseeability is difficult. Some commentators merely suggest that merchants, business and industrial leaders, and other parties take extra preventive precaution to protect against liability.[97] Companies cannot be held to a duty threshold when events are utterly unpredictable.[98] "The Courts have placed a public trust upon store owners, retailers must treat their security measures as public property or risk paying a financial penalty in the event of injury to a member of the public."[99]

Negligence exerts extraordinary economic costs on all facets of the American experience. Clearly damages must be paid by someone. While damages make whole, provide compensation and consequence, and reimburse for loss, the bill for said damages trickles everywhere in the lives of ordinary consumers, from the price of goods to insurance costs. Operationally, the security industry grapples with these liabilities and the effects on the balance sheet are never positive. What security agents and businesses must be even more concerned with are punitive damages, those costs above the consequential damages. Punitive damages punish the negligent party for egregious cases of professional incompetence and severe injury. Stanley Sklar's text, *Shoplifting*, highlights when punitive damages are possible.

> If you are a security guard in either a small or a large store and you stray outside the restrictions of the merchant's privilege, punitive damages may be awarded against you, individually.
> If you are a salesperson or a stock clerk in either a small or a large store and you similarly violate the rules, punitive damages may be awarded against you individually.
> If you are an individual or corporate owner of a store, large or small, and your employee makes a serious error, such as forcibly detaining someone when he could not answer yes to all five of the basic questions, punitive damages may be awarded against you.[100]

The task of the security specialist is avoidance of these and every type of claim based on the theory of negligence. The costs are simply too high. Foresee and foretell, predict and evaluate are professional expectations that security firms and their clients have rightfully come to expect and

demand. Consider third-party criminal conduct carried out in a hotel or motel on an innocent customer. How does the hotel proprietor predict or foresee this event? Certainly, past regular criminal conduct at the facility puts the owner on notice of this criminal propensity.

In an action by a motel patron against a motel to recover for a sexual assault, rape, and robbery that occurred after she opened her motel room door, a verdict in the patron's favor was upheld. The motel owners' negligence as proximate cause of the guest's injuries was supported by evidence that the highway intersection on which the motel was located was a high-crime area, with five armed robberies having occurred in the motel next door.[101]

On the other hand, a hotel proprietor may be aware of no criminal past. In *Satchwell v. LaQuinta Motor Inns, Inc.*,[102] the court retorted the foreseeability claim since "there was no evidence of any significant criminal activity against motel guests within five miles of location of motel, and where guest did not present evidence of reasonable precautions that motel operator should have taken, and did not show how motel had actual or constructive knowledge of any danger to motel guest from third party criminal assaults."[103]

Other settings, like apartment complexes and other facilities with public traffic, cover the question of what is foreseeable in a security context. In *Abraham v. Raso*[104] the Court grants protection based on status. Invitees get more security than trespassers though this principle is not without limitation. "Generally, 'the proprietor of premises to which the public is invited for business purposes of the proprietor owes a duty of reasonable care to those who enter the premises upon that invitation to provide a reasonably safe place to do so that which is within the scope of the invitation.'[105]. . . 'Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.'"[106, 107] Gate attendants at an apartment complex were held not accountable for criminal conduct by third parties since the security service was strictly defined in the contract between the provider and owner. In *Whitehead v. USA-One, Inc.*[108] the court held:

> Company hired to provide gate attendants at apartment complex did not have contractual duty to protect apartment complex tenants from criminal acts by third parties where contract between company and apartment complex owner stated that contract was entered into for mutual benefit of parties and that no benefits, rights, duties or obligations were intended or created by contract as to third parties.[109]

Another locale of heightened interest to the security industry, at least in matters of duty and foreseeability, is the commercial parking lot. Tortious, as well as criminal, conduct are more commonly witnessed in these facilities.

> A landowner has a duty to "take affirmative action to control the wrongful acts of third persons which threaten invitees where the [owner] has

> reasonable cause to anticipate such acts and the probability of injury resulting therefrom."[110] Such affirmative action would seem to mean that the owner or possessor of a parking facility should take reasonable security measures, such as adequate lighting and the presence of security guards, and, if practical, additional measures, such as strategically placed television cameras or alarm systems, warnings, and the availability of escort services.[111]

Discerning past and present criminal incidence rate is crucial to the owner's knowledge of what might occur.

An important matter that should be investigated is the availability of any statistics concerning crime in the neighborhood where the crime occurred and, more specifically, in the parking lot facility itself. Some local police departments have computerized crime records that are kept in accordance with guidelines issued by the U.S. Department of Justice. It may be possible to have the department run a computer check of the parking facility address for up to three years preceding the crime in question.[112]

Factors that bear on the safety of the parking facility and the foreseeability of criminality are below:

- Occurrence of the crime
- Prior episodes of theft, vandalism, or attack
- Attraction of facility to criminals
- Design that makes concealment possible
- Remoteness of facility as inviting attack
- Foreseeability of event
- Duty of landowner to use reasonable care to guard against attack
  —Breach of duty by landowner
  —Causation unbroken by third-party criminal attack
  —Inadequate security at ramp
  —No warning of danger
  —Subsequent remedial events[113]

While the trend has been pro-victim in many jurisdictions, holding most criminal conduct by third parties preventable and foreseeable, there are more cases now challenging this conventional wisdom. To be sure, everywhere and everyplace sees crime. In *Ann M. v. Pacific*, California altered its previous stand of assuming negligence when crimes occurred. Citing random, endemic, universal crime the opinion takes a pro-defendant approach.

Under the more pro-victim standard used in California prior to the recent ruling, evidence of all previous crimes, whether similar or dissimilar, could be considered by a jury as it decided whether a property owner should have known of the danger. Additional factors, such as lighting and other safety features, also could be considered. Courts applying this standard reason that the first victim of a particular kind of crime shouldn't

be denied recourse merely because no analogous crime occurred previously. But with the recent ruling, California's high court is suggesting such an approach is no longer practical. For one thing, the court said, these days almost every property has been the site of all sorts of crimes.[114]

The analysis of negligence and its impact on security practice from a managerial point of view is an exercise worth serious energy. Negligent behavior on the part of lower echelon security personnel can give rise to multiple causes of action, both individually and vicariously. More telling is the negligent behavior of management and policy makers of security companies. Supervision, training, personnel, policy making, and performance standards are the primary responsibility of security managers and the failure to carry out these professional obligations competently is a fertile ground for negligence actions.

Negligence and Security Management

Personnel Practices

The costs of poor personnel practices are astronomical.[115] "Private security companies or businesses which hire their own security forces should exercise great care in choosing their own security employees."[116] The theory of negligent appointment or hiring has been litigated on occasion. Hiring an individual without investigation of background or improper placement of an individual in a position that requires higher levels of expertise than the applicant possesses, is a possible negligence case. In *Easly v. Apollo Detective Agency*[117] the court found a security guard company negligent in the hiring of a security guard entrusted with a pass key for an apartment building. "Such negligence usually consist of hiring, supervising, retaining, or assigning the employee with the knowledge of his unfitness, or failing to use reasonable care to discover the unfitness, and is based upon the negligence of the employer to a third person entirely independent of the liability of the employer under the doctrine of respondeat superior."[118] While on duty the security guard entered, without license or privilege, a tenant's quarters with criminal intent. "The evidence showed that the company did not check any of the prior addresses or personal references listed by the guard on his application, nor did it require the guard to take any intelligence or psychological tests."[119]

A company that appoints or hires an individual should be assured not only of competence, but of personal character too.[120] In *Violence in the Medical Care Setting*, hospital administrators are urged to not only carefully select, but also adequately train all security personnel.

> Pre-employment testing and evaluation, post-employment training and evaluation and adequate supervision corresponding to carefully drafted guidelines and policies are the new protective shields. Failure to take these minimal precautions in the highly explosive medical care

> environment leaves the employee the negligent supervisor and the entity facing liability unnecessarily.[121]

The entire company, its employees and responsible policy makers must deal with the quality of employees. Employees should be enlisted to assure a safe, secure workplace inhabited by safe and secure personnel. "From the mail room to the executive suite, successful security awareness programs leave their mark. Once a luxury, awareness programs are evolving as a necessity to help curb security's high costs. Changing workplace demographics call for awareness training at all employee ranks."[122]

> Like the theory of negligent hiring, the courts also have considered in determining liability under a theory of negligent retention whether the employers knew or should have known in the exercise of ordinary care that their employees had violent tendencies. Some courts have held that allegations supported or established that employers negligently retained employees who raped customers in their homes where the measures implemented by one employer to protect its customers from the predictable risk of criminal activity were not properly administrated, and where another employer could be held negligent in failing to determine an employee's propensity for violence.[123]

Any personnel program must comprehensively examine the background of any prospective employees by the analysis of these variables:

- Identification information
- Records of conviction
- Proof of civil actions and other litigation
- Credit and financial history
- Educational records
- Neighborhood information
- Personal and business references
- Previous and current employment
- Opinions of previous and current employers
- ther financial data[124]

Negligent Retention

When security management knows that present employees are professionally inept but willingly chooses to retain despite the employee flaws, the argument of negligent retention has legitimate merit. Case law and common sense dictate that retention of any troubled employee inevitably leads to larger problems for the firm and the client served.

When security employees engage in misconduct, the company should give notice to the employer, specifying the exact nature of the misdeed. See Figure 4.5.[125]

If wrongful behavior persists, a warning formalizing future consequences for said behavior is warranted. See Figure 4.6.

EMPLOYEE MISCONDUCT NOTICE

DATE:

TO PERSONNEL DEPARTMENT:

Time:
Name of Employee _____ No. _____ Dept. _____

The above-named employee has displayed the following misconduct, and has been warned that this misconduct will be entered on his Personnel Record.
MISCONDUCT (Check where applicable and specify details in section indicated below)

Smoking in Restricted Areas	_____
Leaving Work without Permission	_____
Violation of Safety Rules or Dept. Rules	_____
Refusal to Carry Out Supervisor's Instructions	_____
Irregular Attendance	_____
(Specify No. of absences to date)	
Violation of Eating Regulations	_____
Breakage	_____
Poor Service	_____
General Inefficiency	_____
a) Quality	_____
b) Quantity	_____
c) Accuracy	_____
Discourtesy Toward Guest	_____
Discourtesy Toward Fellow Employee	_____

_____
(Employee)

_____
(Union Representative)

_____
(Employer)

(Mention other Employee)

Attitude	_____
Carelessness	_____
Other	_____

Specify Misconduct in Detail _____
_____
EMPLOYEE COMMENTS _____
_____
DISCIPLINARY ACTION TAKEN _____

Signature of Supervisor

(Reprimand) (Layoff) (Other)

I acknowledge receipt of this notice

_____
Signature of Employee

Figure 4.5 Employee misconduct notice.

WARNING NOTICE
SECURITY DEPARTMENT

Employee: Department: Date:

Rule(s) Violated: _____

Details of Violation: On _____
Date(s)

Immediate satisfactory improvement must be shown and maintained or further disciplinary action will be taken.

Action to Be Taken: ___Suspension ___Days ___Discharge
___Warning ___Final Warning

Supervisor Sign Here Date Employee Sign Here Date

If Employee Refuses to Sign:
"This is to certify that the employee named in this report was warned by his superior in my presence concerning the subject matter contained therein."
If Employee Refuses to Accept Copy of Form:
"Employee refuses to accept his copy of this warning notice."
Witness: _____Date:_____Supervisor: _____Date:_____

Figure 4.6 Employee misconduct warning.

If all corrective steps are futile, a discipline and/or termination report assures a significant record in the event of challenge based on wrongful termination. Any legal action asserted by a third party for negligence in the handling of personnel can be rebutted by the due diligence these documents memorialize. See Figure 4.7.

Negligent Assignment and Entrustment

It is tragic that a security company does a shoddy job in hiring an individual and then, once put on notice, retains them, but even worse when the continuous assignment or delegation occurs. Here the party foreseeably knows the nature of the employee and realizes the real injury that can only be described as predictable. Negligence resides within these facts and the security firm has no one but itself to blame with this form of advance knowledge. In *Williams v. The Brooklyn District Telephone Company*,[126] the security company was held liable for assigning a guard to a sensitive position that allowed easy access to larcenable items. "Rejecting the company's contention that it was not liable for the guard's theft because his act was outside the course and scope of his employment, the court held that the company was bound to exercise reasonable care in the selection of its guards and therefore could not be permitted to say that it had no responsibility for the unlawful acts of its guards."[127]

Allegations of negligence have even greater credibility when the claimant can demonstrate actual knowledge on the part of security management or administration. To permit or entrust a security officer who has a bona fide alcohol or drug problem is a frequently seen allegation that constitutes a negligent assignment or entrustment case.[128] The U.S Court of Appeals, Fifth Circuit, issued a strongly wording ruling in *Aetna v. Pendelton Detectives*,[129] where a company's substandard performance severely impacted a package delivery company. Indeed, the unprofessional security services caused the firm to fail in its core operations. Security was to assure delivery although the lack of it assured failure. The court objectively listed a series of variables that proved the negligent operation.

> Merchants presented the following evidence of Pendleton's negligent security practices: (1) guards slept on the job; (2) guards watched T.V. on the job; (3) guards drank on the job; (4) guards entertained guests of the opposite sex on the job; (5) guards left the gate to the warehouse open; (6) Pendleton's admission of failing to perform sufficient background checks on its guards; (7) the private investigator's conclusion that night shift employees were responsible for the losses; (8) several of Merchants' night shift employees' confessions to stealing large amounts of food; (9) Pendleton's contractual obligation to provide security from 4 p.m. to 8 a.m. and 24 hours a day on weekends; (10) Merchants' repeated reports of suspected employee theft to Pendleton; (11) the report of a person wearing a Pendleton baseball cap selling Merchants' products from the trunk of his car; and (12) Merchants' security expert's testimony that it was more probable than not that Pendleton's lax security

DISCIPLINE AND TERMINATION FORM

1. Are there written rules or guidelines of conduct? ___Yes ___No
2. When and how are employees informed of employer rules? _____

_____

3. Who is responsible for enforcing these rules?

_____

4. Do persons responsible for enforcing rules have any power when determining the disciplinary penalty imposed once offense has occurred? ___Yes ___No
5. Is there progressive discipline procedures? ___Yes ___No
6. How are managers/supervisors informed of the disciplinary procedure of an employee?

_____

7. How and when are employees made aware of the disciplinary procedure?

_____

8. Are disciplinary decisions made by supervisors reviewed? ___Yes ___No
9. How and when are employees informed of a decision of a disciplinary action?

_____

10. Prior to being disciplined, is an employee given an opportunity to present his/her explanation? ___Yes ___No
11. Are employees given the opportunity to discuss the reasons for disciplinary actions? ___Yes ___No
    If yes, please explain.

_____

12. Are employees allowed to appeal disciplinary actions? ___Yes ___No
    If yes, please explain the appeal procedure.

_____

13. Is an employee who is being investigated, permitted to have a person of his/her choice present at the investigation or negotiation meeting? ___Yes ___No
    If yes, are there exceptions?

_____

14. If an employee receives more than one warning or negative evaluation, are any of the following measures taken to remedy the problem: ___Yes ___ No
    a. Vertical transfer to place the employee in a position more closely suited to his/her abilities? ___Yes ___ No
    b. Lateral transfer to reduce personality conflicts between the employee and supervisor or between the employee and workers? ___Yes ___ No
    c. Additional employee job training? ___Yes ___ No
    d. Other? ___Yes ___ No
15. Who is responsible for the termination process?

_____

16. What is the procedure for documenting disciplinary decisions?

_____

17. Is age or race ever used as a factor in a termination decision? ___Yes ___No
    If yes, explain its use.

_____

18. Is sex ever used as a factor in a termination decision? ___Yes ___No
    If yes, explain its use.

_____

Figure 4.7 Discipline report.

19. Is a terminated employee allowed to appeal to a higher-level manager or panel of officials? ____Yes No
    If yes, please explain the procedure.

_____

20. Are employees given a written notice of termination? ___Yes ___No
21. When are terminated employees given a final paycheck?

_____

22. Are terminated employees eligible for severance pay? ___Yes ___No
23. Are exit interviews conducted? ___Yes ___No
    By whom? _____
24. Are records maintained of all disciplinary actions? ___Yes ___No
25. If yes, what records are maintained and where.

_____

26. Are copies of warnings and terminations placed in the employee's personnel file? ___Yes ___No
27. Do warnings contain the following:
    a. Offense ____Yes ___No
    b. Action necessary for improvement ____Yes ___No
    c. Consequences of failure to improve ____Yes ___No

Figure 4.7 Continued

> practices caused the losses. Merchants argues the above evidence is sufficient to support the jury's verdict.[130]

Few cases as clearly edify the principle of negligent assignment as *Aetna.*

Negligent Supervision

Once hired and assigned, the security managers have a continuing obligation to exercise a duty of due care relative to employee development and performance. A security company is vicariously liable for the actions of its employees, and a lack of supervision creates a presumption of negligence. Wayne Saiat, editorial director for *Security World Magazine*,[131] highlights the severe problem caused by a lack of supervision.

> Although security personnel and their employers can be subjected to legal action for a wide variety of causes, the vast majority of cases involve the action or inaction of security guards. But the suits generally do not name only a guard as a defendant; they will often name the guard's supervisor, the guard company, if one is involved, and the ultimate employer of the guard and the guard's company.[132]

Supervision takes on added importance when complicated by the temptations of technology. In *National Labor Relations Board v. Jay Weingarten*, the court fluently assessed the need for heightened supervision when security machinery is in use.

> There has been a recent growth of sophisticated techniques—such as closed circuit television, undercover security agents and lie detectors—to monitor and investigate the employees' conduct at their place of work. These techniques increase, not only the employees feeling of apprehension but also their need for experienced assistance in dealing with them.[133]

A failure to supervise or manage can be management's failure to hire sufficient personnel, to insufficiently or improperly train secondary managerial employees, or a failure to allot sufficient time and energy to train employees for appropriate tasks.

Negligent Training

The final theory under the negligence umbrella is negligent training. Sophisticated training, hopefully, will upgrade the quality and efficacy of security personnel. Critics have long argued that training presently required or only halfheartedly implemented is artificially imposed. In *Training, The Key to Avoiding Liability*, the essential nature of training is espoused:

> The bottom line then is this: Your security officers must be adequately trained. Moreover, the training they receive must be sufficiently practical to enable them to demonstrate technical and legal competency commensurate with the duties they perform. Classroom theory is fine, but it isn't enough. Academics should be combined with performance exercises so that officers can try out and become confident with the techniques they may be required to use.[134]

The security industry's response to education and training has been less than enthusiastic and often more rhetoric than substance.[135] While some strides are being made, industry foot dragging and a lack of legislative uniformity or standards influence the rigor and intensity of training. Wayne Saiat argues that security malpractice is on the horizon.

> While negligence implies a duty, malpractice implies reliance on the duty. Negligence implies a failure to perform with reasonable care, malpractice implies a failure to perform to a higher standard of care.[136]

Certain professional groups, such as ASIS (American Society for Industrial Security), have called for certification programs, like the Certified Protection Program or "CPP" and the CPO, the Certified Protection Officer. Security liability has given impetus to a host of educational delivery systems on the private sector, particularly what is referred to as "niche" training. Some examples are:

Orleans Regional Security Institute, New Orleans, LA

- Semi-Automatic Pistol Training
- Basic Revolver Handgun Training

- Security Training Course
- CCP Course
- Basic Investigator
- Advanced Investigator
- Psychological Stress Evaluation Training

Sandia National Laboratories, Albuquerque, NM

- Physical Protection Systems Training Course

Bob Bondurant Security Services Division, Phoenix, AZ

- Drivers Training Programs in Antiterrorist/Executive Protection
- Advanced Antiterrorist Driving Course
- Motorcycle Training Course[137]

The ASIS has also posed standards and guidelines for educational programs, which in turn ensure uniform preparedness and skills acquisition, something crucially necessary when defining acceptable or normative standards of professional conduct.[138] There is a growing cadre of security service companies that present in-house training as noted in Chapter 2.

Strict Liability Torts

While intentional torts require a mental decision to act, defendants in cases of strict liability are held accountable regardless of their intentions. The act, in and of itself, is deemed serious enough to cause absolute, unconditional liability. The burden of proof in strict liability cases is less rigorous than its negligence or intentional tort counterparts since the act alone fosters the liability. Certain types of activities, for public policy reasons, qualify by their nature. If an action is inherently dangerous, like explosives or wild animals, a tort claim needs no proof of intentionality. In the case of products, there is a body of strict liability case law. The elements of a strict liability case include:

1. That there be a seller of a product or service
2. That the product is unreasonably dangerous to person and property
3. A user or a consumer suffers physical harm
4. That there be causation

Strict liability law is plainly in its infancy stage when applied to the security industry and its practices. Any ultra hazardous action like the use of ballistics, explosives, underwater gear, and/or injuries caused by wild, undomesticated, and uncontrollable animals would qualify. Outside of the ballistics and explosives area, there has been little litigation in the security

industry.[139] One exception to this general rule is that strict liability may be imposed on security interests that operate by a "certificate of authority" issued by the state or other governmental entity.[140] "This means that such a private security company will be held liable for the acts of its employees regardless of whether the employee's acts were negligent or intentional as long as the acts were committed while the employee was actually on the job." Alarm companies and other electronically sophisticated enterprises do have to consider the defensive or hazardous propensities of their products.[141]

Vicarious Liability

Depending on the nature of a relationship, certain persons will be responsible or legally accountable for another's specific act or form of behavior even if they have not acted, solicited, or conspired in the action. To be responsible through another is to be vicariously responsible. By vicarious liability, the principal—characteristically an employer, a security supervisor, or a management team—having the right to govern, supervise, manipulate, and control the action of employees or agents, can be held accountable for the agent's actions. This legal relationship has sometimes been characterized as a master/servant relationship governed by the doctrine of *respondeat superior* (let the master answer).[142]

> Under the doctrine of respondeat superior, an employer is liable for injuries to the person or property of third persons resulting form the acts of his employee, which, although not directly authorized or ratified by the employer, are incidental to the class of acts which the employee is hired to perform and are within the scope of his employment. Under the doctrine, the law imputes to the employer that act of the employee. Although employers have been held liable under this doctrine for the intentional and criminal acts of their employees under some circumstances, the viability of the doctrine is somewhat limited because intentional and criminal actions generally are not within an employee's scope of employment and usually are not committed at the request of or with the approval of an employer.[143]

"The importance of this determination results from the general rule that a master is liable for the torts of his servants committed within the scope of a servant's employment, whereas the hirer of an independent contractor is ordinarily not liable for the torts of a contractor committed in carrying out work under the contract."[144]

Much of the security industry can be divided into these two classifications: employer/employee and independently contracted services. Contract firms are hired by private companies or corporations to provide security services. The economic and legal advantages in contract services are many, since the company is not responsible for hiring, firing, tax liability,

or any other administrative or procedural matters governing the security force. What type of workplace climate that employer provides bears on the question of liability.[145] In other words, the employer is generally only subject to an employee's misconduct when foreseeable and within the scope of the employee's responsibilities. Couple tortious conduct with poor management, and cases of civil liability are assured. Bruce Harman lays out the types of business climate that indubitably lead to individual and vicarious liability.

- failure to support elementary security and audit procedures
- lack of climate for security and control consciousness
- inept or complacent management without feedback to measure losses
- inadequate implementation of plans and/or personnel and training procedures
- dishonest management[146]

The assumption that the independent contractor status will hold harmless the employer from potential liability under either civil or criminal liability may be premature. By hiring independent contractors, employers hope to "convey all potential liability to the contract security company and to protect the security manager against joinder in a civil action that could arise out of a negligent or wrongful act by the security contractor."[147] However, while generally true, there are numerous exceptions to the rule:

1. Independent contractor status will not be upheld if the employer ratifies specific conduct.
2. Independent contractor status will not shield the employer from intentional torts.
3. Independent contractor status will not relieve the employer from strict liability tortious conduct.
4. Independent contractor status will not provide a defense to the employer if the duty is nondelegable.[148]

The doctrine of *respondeat superior*, the basic principles of agency and the common law standard on master/servant relationship make unlikely an employer's complete insulation and isolation from legal responsibility for the acts of employees or independent contractors. Whether the security operative's action, tortious or not, are within the scope of his or her employment, is a seminal question in the imposition of vicarious liability. In *Sunshine Security & Detective Agency v. Wells Fargo Armored Services Corp.,*[149] a bank security guard robbed his employer. "The employee's tortious actions in conspiring to rob the bank he was hired by the defendant agency to guard, the court said, represented a classic case of an employee acting outside the scope of his employment."[150] Whether the relationship exists "depends on the particular facts of each case."[151]

Case law conservatively construes the definition of an independent contractor. The *American Law Institute* sought to distinguish a servant from an independent contractor by considering the following factors:

a. The extent of control which, by agreement, the master may exercise over the details of the work;
b. Whether or not the one employed is engaged in a distinct occupation or business;
c. The kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
d. The skill required in the particular occupation;
e. Whether the employer or the workman supplies the instrumentalities, tools, and the place for the person doing the work;
f. The length of time for which the person is employed;
g. The method of payment, whether by the time or by the job;
h. Whether or not work is a part of the regular business of the employer;
i. Whether or not the parties believe they are creating the relation of master/servant and;
j. Whether the principal is or is not in business.[152]

In *Safeway Stores v. Kelley*[153] a supermarket chain denied all liability for an abusive arrest process claiming that its guard service contract could only be characterized as an independent contractor relationship. In determining that the independent contractor status could serve as an employer shield, the court determined the following factors to be of particular pertinence:

> The contract was performed at the store; the store could determine which people the guards should investigate; the agency had no specific job or piece of work to perform; the agency rendered continuous service for which the store paid it weekly; and the store could terminate the particular service whenever it chose.[154]

A previously discussed case, *U.S. Shoe v. Jones*,[155] reiterated a common principle regarding the law's willingness to circumvent independent contractor status. In this case, which involved the intentional tort of false imprisonment, the court cited the well-respected *Noble v. Sears Roebuck and Co.* decision.[156]

> Even though hirers of an independent security or protective agency have generally been held not liable for negligent torts of agency personnel, where the hirer did not exercise control over them, hirers have been held liable for the intentional torts that the agency personnel committed, in the scope of the agency's employment against the hirer's invitees.[157]

To summarize, some principle points bear reiteration:

That liability for the tortious or criminal conduct of a security employee will extend to the security employer if the following relationships exist:

- Master/servant governed by the doctrine of *respondeat superior*
- Principal/agent
- Employer/employee
- An independent contractor who commits intentional tortious deeds

Generally, negligent conduct by an independent contractor is not the responsibility of a company procuring security services.[158] Some courts will go to substantial extremes to maintain that status and protect the company utilizing the services of an independent contractor. In *Brien v. 18925 Collins Avenue Corp.*,[159] a guard "supplied to a motel for protective purposes by a security corporation, under agreement with the owner of the motel, shot and killed Plaintiff's decedent whom the officer had stopped for questioning while patrolling the motel property."[160] Curiously deciding that the utilization of firearms was not an inherently dangerous activity, the court affirmed judgment in favor of the motel owner and essentially argued that "an owner is not ordinarily liable for the negligence of an independent contractor employed by him, noting there was nothing pleaded that the owner of the motel was himself in any way negligent. . . ."[161] A reverse judgment was demonstrated in *Ellenburg v. Pinkerton's Inc.,*[162] upholding a civil action for invasion of privacy. The security agency hired to conduct surveillance did so improperly.

Determining whether a security agency is independent largely depends upon who controls the operation. In *Cappo v. Vinson Guard Service Inc.*,[163] a Louisiana court denied independent contractor status in an intentional battery case. Actions by the employer were largely imputed to by the conduct of the restaurant manager who:

1. periodically checked on parking lot as part of his duties;
2. told security agent who to admit and exclude from parking lot;
3. had authority to replace security guard with other personnel; and
4. had exercised his authority over security agent on night of incident by sending security agent home; in addition, trail court noted that security agent's activities during performance of his duties benefited restaurant as well.[164]

There are numerous contrary decisions. In *Liability of Private Citizen or His Employer for Injury or Damage to a Third Person Resulting from Firing of Shots at Fleeing Felon,*[165] Caroll Miller outlines cases that hold security guards, as well as their employers, liable for the negligent operation of firearms, specifically when aimed at fleeing criminals. In *Giant Food v. Scherry,*[166] a security guard created a substantial risk to innocent

bystanders when shooting at a fleeing robber as the bullets shattered a woman's apartment window.

Miscellaneous Issues in Vicarious Liability

Nondelegable Duty

The trend of judicial decision making in the area of vicarious liability has been pro-plaintiff, allowing victims as many "deep pockets" as possible. Asserting that the security services contracted were delegated provide another avenue to hold others vicariously liable.

Nondelegable duty or skill is best understood by analogy, such as the artist or musician hired under a personal service contract or performance contract which recognizes special skills or acumen. A contract between a security company and an employer may also be viewed as a personal service or performance contract that requires special skills and talents and is not conducive to assignment or delegation.[167] A grocery store was liable to a customer for false arrest committed by security guards employed by an independent contractor of the store where the store had a "nondelegable" duty to furnish the customer with a safe place to shop, where the independent contractor was employed exclusively by the store, and where the store provided place in which guards were to work and thus intentionally exposed customers to possible tortious conduct of guards.[168]

Principal's Liability for Punitive Damages

As a general rule punitive damages should not be assessed against principal or master for an agent or servant's tortious acts.[169] While the principal may be liable for compensatory or actual damages, it is unfair to transfer or infuse the malicious, intentional, arbitrary, or capricious mental state of the tortfeaser. Punitive damages are not regularly awarded and are possible only on a more pronounced showing of defendant's irresponsibility. While the master is responsible for the actions of his servant, historically, he has not been responsible for the punitive consequences of his servant's acts.

Punitive damages have been successfully assessed against the principal in the following types of circumstances:

- Punitive damages have been assessed when the principal ratifies the conduct.[170]
- Punitive damages have been assessed when the principal actually authorizes or participates.[171]
- Punitive damages have been assessed against corporations and other business entities.[172]
- Punitive damages have been assessed against governmental bodies.[173]
- Punitive damages have been assessed against common carriers.[174]
- Punitive damages have been assessed against managerial or executive employees of a corporation.[175]

Contractual Limitations

Efforts by companies and agencies to contractually insulate themselves from potential liability resulting from negligent and intentional conduct are not generally successful. Many security firms utilize contractual forms to absolve liability. Limiting liability by contractual provisions is generally on two fronts: first, as relates to the amount of recoverable damages and, second, as to what the conditions, events, or circumstances will trigger in liability.

Susan Fettner, in her article, *Security System Service*, urges counsel for security companies to draft meticulous clauses that will protect their clients. She notes:

> In summary, we have seen that judgments against providers of security services may be had where those services failed to prevent a burglary. Liability, whether in contract or tort, becomes a question of fact. Because the subject of the bargain is the prevention of criminal intrusion or a mitigation of its results, the triers of the facts will be likely to find either a breach of the party's agreement or a causal relationship in the fact patterns presented to them. However, if liability is limited by contract, courts will enforce the limitation.[176]

One must pay close attention to the jurisdictional requirements of the security firm's area of representation and be certain to include legal language and clauses that are not contrary to warranty, mitigation of damages, and general disclaimer laws.

These widely accepted principles will persistently evolve as new facts, conditions, and practices warrant. Consider the case of *Gulf Oil v. Thomas Williams*, from the Texas Court of Appeals. The pertinent facts include:

> When Thomas Williams stopped at a Houston, Texas, Gulf Station for gasoline, he never expected to be mistaken for a robber and be shot by a security guard. Nonetheless, he was, for no apparent reason. Gulf Oil Corporation and Empire Security Agency, Inc. were held liable for $94,719.77 in actual damages and $50,000.00 in punitive damages. It appeared from the evidence presented that Gulf had a written contract with Manpower, Inc. by which Manpower furnished guards for security at Gulf stations. Under this agreement, Gulf paid Manpower certain fees. Empire then agreed with Manpower, under a separate contract, to furnish security guards for Manpower's clients such as Gulf. Empire hired and fired these guards and furnished them to Gulf stations in accordance with this contract with Manpower. Gulf had no contractual agreement whatever with Empire, only with Manpower.
>
> Empire hired Robert Gury as a guard, furnished him with his uniform and weapon, provided him training and instruction and paid him for the work. Empire assigned him to provide security for Gulf.[177]

Evidence at trial, and that on appeal, posits a contradictory stance on the control of a gun-toting assailant. Gulf Oil Corporation failed to convince the majority panel of the court that ruled that companies exercise "joint control" when the "evidence was sufficient to sustain the joint liability."[178] The court assessed damages against both companies. In this sense, the case is a hybrid. Neither side supposedly exercised total control, though Gulf would dispute those facts. Commentary provided by Judge Federal indicates that the case is perplexing and certainly not illustrative.

> Suffice it to say here that each fact situation must be evaluated on its own merits, and when it appears that both security company and the retailer exercised joint control over the guard, then the courts will rule that both are liable for the guard's misconduct.[179]

REMEDIES UNDER THE CIVIL RIGHTS ACT: 42 U.S.C. § 1983

The provisions of 42 U.S.C. § 1983 outline remedies available to certain individuals under civil rights violations. Initially, a review of this statute is in order:

> *42 U.S.C. § 1983*: Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or any 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 in law, suit in equity or other proper proceeding for redress.[180]

The historical underpinnings of 42 U.S.C. § 1983 hoped to halt racial discrimination and prevent and eliminate slavery. Originally entitled "The Ku Klux Klan Act of 1871," the legislation was enacted to increase the power of the federal government relative to state's rights. "The Act of 1871 was passed by Congress to provide civil rights protection against inaction and the toleration of private lawlessness. While the act was intended to remedy the deficiencies of the southern states, there is little indication that Congress sought any way to impair the states' political independence."[181]

Like all law, the original legislative intent is sometimes bypassed as the enactment seeks to find its niche in the legal culture. The Act has certainly had a curious legislative history since the time of the Civil War Reconstruction. The statute's chief complexity rests in its vague language, especially the term "under color of state law."[182] It was not until 1961 that the Supreme Court, in *Monroe v. Pape*,[183] held that public police officers abusing their discretion and authority, face possible liability under the provisions of the Act. After *Pape*, the floodgates of litigation opened.

Wayne W. Schmidt, director for The Americans for Effective Law Enforcement, writes in his article, *Recent Developments in Police Civil Liability*,[184]

> During the five-year period, the number of civil suits rose from a projected 1,741 in 1967 to 3,894 in 1971. Reliable estimates indicated that by 1975, the number of suits alleging police misconduct exceeded 6,000 per year. Because an average of 111 hours is consumed in defending a typical suit along with 97 hours of investigation, such increases have had a dramatic affect on the ability of many law enforcement agencies to adequately defend themselves.[185]

By 1971, the Supreme Court, in *Bivens v. Six Unknown Federal Narcotics Agents*,[186] interpreted the provisions of 42 U.S.C. § 1983 to include a violation of constitutional rights as a basis for a civil remedy. Since much of police conduct is subject to constitutional oversight, defendants frequently claim their Fourth Amendment rights "as the result of an alleged unlawful arrest or search; the Fifth Amendment as the result of an alleged improperly obtained confession or deprivation of liberty or property without due process; the Sixth Amendment for violations of the right to counsel; or the Eighth Amendment as the result of the incarceration of a plaintiff claiming to have been subjected to cruel and unusual punishment."[187]

An actual claim under 42 U.S.C. § 1983, must demonstrate two seminal issues: (1) that a defendant (state or other governmental entity) deprives plaintiff of some right or privilege guaranteed by the Constitution or the laws of the United States; and (2) that the deprivation asserted was caused or effected under color of that law.[188] Examples of state conduct under color of state law by public affiliates are: false imprisonment, false arrest, abuse of process, assaults and batteries, malicious prosecutions, illegal searches and seizures, and other claims.[189] Tortious conduct including negligence has also been successfully argued. Noted earlier, supervisory responsibility in the areas of negligent hiring, assignment, retention and entrustment, supervision, and training may also prompt a cause of action under § 1983.[190]

> Specifically, a plaintiff must show three elements to succeed on a state-created danger claim. First, the Plaintiff must demonstrate that the state actor took affirmative actions that "either create or increase the risk that an individual will be exposed to private acts of violence."[191] Second, the Plaintiff must show that the state actor created a "special danger," which can be done through a showing that the state's actions placed the specific victim at risk, as opposed to placing the general public at risk.[192] Third, the state actor must have known, or clearly should have known, that his actions "specifically endangered an individual."[193]

Vicarious liability, with its companion principles of *respondeat superior*, is not as easily established.[194] Standing in a civil rights action is

generally only granted when the person asserting the claim has been personally aggrieved.

> First the *respondeat superior* doctrine imposes liability on an employer or master because he draws direct, usually economic, benefit from the efforts of his employees while maintaining that power to hire, control and dismiss offenders. Such is not the case in public employment. There is generally thought to be no master/servant relationship between supervisors and subordinates. They are seen as different grades of employees in the service of the public, thus negating any application of traditional vicarious liability.[195]

The burden of proof in this type of case is quite substantial. In order to be successful, an affirmative link must be demonstrated between the supervisory activity and that of his or her employees.[196] Finding the affirmative link between the supervisory behavior and the act which results in discrimination is the crux of the burden. If public police were ordered by their superiors to strip search all shoplifters, in full view of the public, supervisory accountability would be found. "Beyond such clear acts of malfeasance or misdeeds, finding accountability becomes much more complex."[197] In *Grant v. John Hancock*,[198] the U.S. District Court indicated the difficulty since there must be:

> Assessment of totality of circumstances, in which courts must consider both nature and circumstances of guard's conduct and relationship of the conduct to performance of his official duties; key determinant is whether actor, at time in question, proposes to act in official capacity or to exercise official responsibilities pursuant to state law.[199]

The legal ramifications of affirmative action must give the security industry reason for pause. Any discriminatory practices in hiring and firing practices of security firms may lend itself to a civil rights remedy under the various federal provisions enacted over the last three decades. An interesting trend has been the civil action based upon the federal Employee Polygraph Protection Act.[200] Security specialists are often asked to conduct internal investigations in the corporate sector to discern intentional and willful discriminatory trends. See Figure 4.8.

"Private" Applications of § 1983

It is well settled that public police functions fall under the aegis and descriptive language of 42 U.S.C. § 1983. But can the statutory protection be extended to the private justice sector? In reviewing the statute, could it be argued that the economic influences and occupational roles of private security and the obligations of private policing fall under 42 U.S.C. § 1983? Is a security guard who detains a suspected shoplifter, and who is exercising

JOB DESCRIPTIONS, ASSIGNMENTS, PROMOTIONS, AND TRANSFERS AUDIT FORM

1. Are written job descriptions maintained?
   ___Yes ___No
   If yes, explain how employees are informed of their obligations and duties.

_____

2. Are there any job categories which contain criteria relating to a person's physical attributes?
   ___Yes ___No
3. Are females excluded from any job classifications because of state protective legislation regarding hours worked, work type, or weight-lifting restrictions?
   ___Yes ___No
   If yes, list classifications:

_____

4. Describe the employer's policy for accommodating employees who can not work specified days or hours.

_____

5. Are there any jobs which employees over age 40 are unable to perform?
   ___Yes ___No
   If yes, list and explain.

_____

6. Is there a minimum age for employment?
   ___Yes ___No
   If yes, what age? _____
7. What benefits are given employees on basis of seniority?

_____

8 . How is seniority determined?

_____

   Is age or sex used in determining seniority?
   ___Yes ___No
   If yes, explain.

_____

9. When determining job task and transfers, are the following factors considered?
   a. Age
   b. Sex
   c. Race/Ethnic origin
   d Handicap
   e. Union membership
   If yes to any factor, explain.

_____

Are records made of this?
   ___Yes ___No
   If yes, at what location are they kept?

_____

Figure 4.8 Job performance/job description.

10. Has employment in any job been based on:
    a. Race
    b. Sex
    c. Age
    d. Handicap
11. Is a seniority system presently maintained which is based on service during the period when certain jobs or departments were segregated?
    ___Yes ___No
12. Are employees permitted to transfer into jobs or departments from which they were formerly excluded?
    ___Yes ___No
13. Are job vacancies advertised or announced to current employees?
    ___Yes ___No
    If yes, are records kept of who applies?
    ___Yes ___No
14. Are records kept reflecting the reasonings of denial or award of a job to a current employee?
    ___Yes ___No
    If yes, describe:

_____

15. How does the employer evaluate whether an employee is permitted to move into another position?

_____

16. Are any of the following factors used in determining whether an employee can move to another job?
    a. Race
    b. Sex
    c. Age
    d. Handicap
    If yes, explain its use.

_____

17. Are any jobs or departments limited to persons of one sex?
    ___Yes ___No
18. Are supervisors required to submit written decisions and reasons when employees are passed over for promotions?
    ___Yes ___No
19. Are employees promoted or transferred between facilities?
    ___Yes ___No
    If yes, how often? _____
20. For each job category, describe the training programs used, indicating any employee participation prerequisites.

_____

_____

_____

Figure 4.8 Continued

21. Describe the employee evaluating process.

_____
_____
_____

If a form is used, attach.

22. How frequently are evaluations conducted?

_____

23. Are evaluations reviewed by someone other than the preparer?
___Yes ___No

24. Describe evaluating performance review with employees.

_____

25. Describe the training that supervisors receive regarding employee evaluations.

_____
_____

Figure 4.8 Continued

authority granted by regulatory bodies and licensure agencies, and is empowered and protected by legislation such as a merchants privilege statute, acting under the *color of state law*? Although some claimants have persuaded courts in the affirmative that private police action may be under color of state law,[201] these decisions are rare.[202] "Moreover, some courts have dismissed § 1983 actions based on arguments and facts virtually indistinguishable from those previously asserted with success by other 1983 plaintiffs in the same court. Thus, neither plaintiffs nor defendants can predict the character and extent of state involvement necessary to establish the Section 1983 liability of private police officers."[203]

State Regulations as Providing Color of State Law

State regulation in the security industry has been amply documented.[204] The National Advisory Committee's *Report of the Task Force on Private Security* recommends implementation of a state board system as shown in Figure 4.9.[205]

State involvement, such as licensure, which sets certain educational requirements, reviews past personal history and criminal records, and regulates by an administrative process is a definite governmental regimen. For a further demonstration of a clear state involvement, review Figure 4.10.[206]

This heightened call for quality control and the maximization of standards is largely the result of the security industry's own inability to regulate itself. Dr. Milton Cox, in his article, *Guards on Guard Training*, calls for a "city or preferably a state regulatory agency to be appointed. This agency should have the authority and responsibility to formulate private security training standards, accredit training schools, approve training curricula, certify instructors for the private security industry, and enforce established

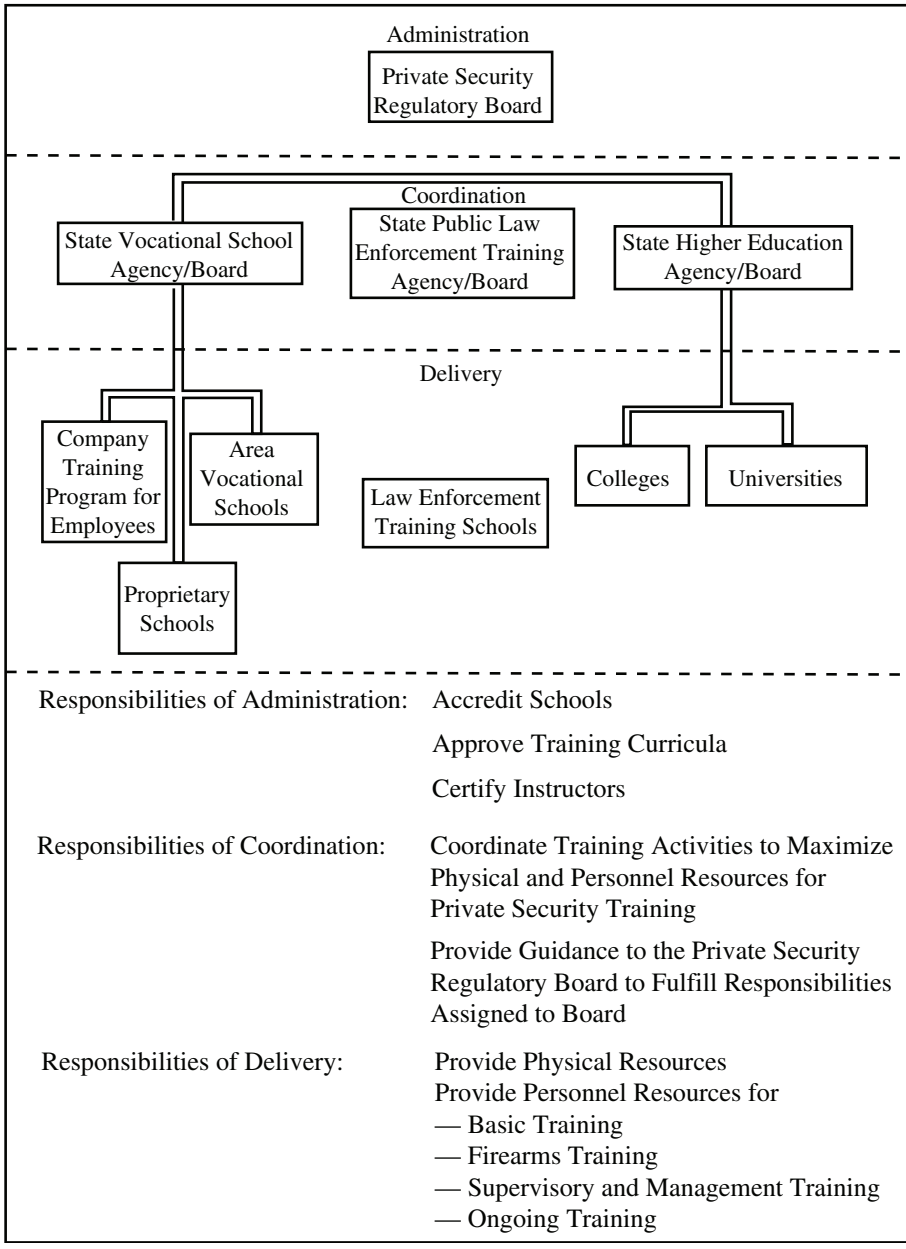

Figure 4.9 State board oversight.

State Regulatory Boards

Standard 9.1: State Regulation
Regulation of the private security industry should be performed at the State level with consideration for uniformity and reciprocity among all States.

Standard 9.2: Regulatory Board for Private Security
State level of regulation should be through a regulatory board and staff responsible for the regulation of private security activities within that State. This board should have sufficient personnel to perform adequately and promptly their tasks of screening and investigating.

Standard 9.3: State Regulatory Board Membership
The State regulatory board should include, as a minimum, representatives of licensed security service businesses, businesses using proprietary security, local police departments, and consumers of security services; members of the general public; and individuals who are registered with the board and presently employed in the private security field.

Standard 9.4: Regulatory Board Hearing Procedure
The State regulatory board should establish a hearing procedure for consideration and resolution of the complaints of applicants, licensees, registrants, consumers, and the public. To assist in the implementation of this role, the board should be granted the means necessary to require appearance of witnesses and production of documents.

Standard 9.5: Regulatory Board Funding
The State regulatory board should be funded by nonconfiscatory license and registration fees and such general revenue funds as may be necessary for the effective operation of the board.

Standard 9.6: Regulatory Board Access to Criminal Record Information
The State regulatory board should be granted statutory authority for access to all criminal history record information so that it can conduct the necessary criminal history record check of all applicants for licenses and registration.

Figure 4.10 State requirements.

standards for private security personnel."[207] If this is so, an act of regulation by public authorities may be a suitable private application to § 1983.

The Public Function Theory

As pointed out earlier, many of the occupational tasks of private security parallel or mimic public police functions. By analogy, the Supreme Court has held that certain seemingly private activities may be better characterized as quasi-public functions. Characteristic examples include the determination that a company town is really a municipality[208] and that the majority of services and operational qualities of a private park and shopping center serve the public sector more than the private interests.[209] Under the public function theory, the private entity has many public

attributes, such as being open to the public and having public facilities or public restrooms despite its acclaimed private nature.[210]

If segregated private clubs are subject to public control and thus characterized "public," if parks and entertainment facilities are public because they are open to the general public, if publicly utilized shopping places are forced to grant free speech rights, it is hardly farfetched, by both analogy and implication, to transfer constitutional rights to private sector justice. The argument has been posed relative to state universities.[211] This position is urged by proponents of federal expansionism. "The police function, then, with its special powers and privilege is a discretionary monopoly of government, the employment of which is particularly subject to the limitations imposed on government by the Constitution."[212] This is exactly the challenge made by *People v. Zelinski*,[213] a California decision imposing constitutional protections on private security operatives. Put another way, a public act prompts public scrutiny. On another front, the decision of *Maryland v. Collins*,[214] from Maryland's Court of Appeals exhibits sympathy for this argument in the matter of bail agents and private bondsman.

The Nexus Theory

Admittedly a nebulous standard, the nexus theory was born in the confusion of the public function analysis. In discerning the nexus theory, jurists and jurors look for evidence manifesting state interest, state support, or state solicitation in an improper activity. The benchmark ruling under the nexus theory is *Burton v. The Wilmington Parking Authority*.[215] A parking authority owned by private interests serves a public function, namely providing parking facilities to individuals and businesses. In this case, the parking authority's policies and procedures discriminated against minorities. The burden of proof in the nexus argument rests upon the plaintiffs' ability to show sufficient "points of contact between the governmental entity and the action of the defendant."[216] The nexus theory of state action does not require a § 1983 claimant to convince the court that the defendant's conduct traditionally was performed by the state or other governmental authority. Indeed, the state need not be involved at all in the improper activity. In the case of a parking authority, a sufficient nexus was shown.

Security employees of private parcel carriers are frequently claimed *de facto* agents of the government. In *U.S. v. Koenig*,[217] a Federal Express carrier discovered a suspicious package, opened it, and discovered drugs later identified as cocaine. The DEA instructed Federal Express to deliver the package to its labeled location. The DEA then obtained a search warrant to seize the box at the delivery location. In rejecting a sufficient nexus between the public and private sector, the court remarked:

> We affirm the district court's finding that Koenig failed to prove the conditions she concedes are necessary to convert the actions of a

> private employee into an action of a governmental agent: Although the DEA may have known of Federal Express's security search policy, it is clear that Federal Express acted for its own private, business purposes. We note, however, that the factors Koenig identified are not independently sufficient to convert a private search into a governmental search. The effect such a transformation, a defendant must prove some exercise of governmental power over the private entity, such that the private entity may be said to have acted on behalf of the government rather than for its own, private purposes.[218]

Similarly, in *State v. Jensen*,[219] an Oregon Court of Appeals resolved this flawed contention. "On April 2, 1986, defendant was observed entering a fitting room in the store's ready to wear department by two security agents. The door to the fitting room had slats, through which one agent watched defendant remove her own pants, try on a pair of the store's pants, remove those, fold them and place them in the diaper bag. Both agents then followed defendant and her companion out of the store, where they detained defendant and took the merchandise from her companion. Defendant was thereupon released and arrested later at the store's request."[220]

Defense efforts to extend traditional constitutional protections were summarily dispensed:

> It is axiomatic that the provision is a limit on government authority of private persons acting on their behalf.[221] However, the provision does apply when private persons act at the behest of the state or under the mantel of its authority.[222] The determinative factor is "the extent of the official involvement in the total enterprise."[223, 224]

Continuing this line of reasoning is *Tin Man Lee v. State of Texas*,[225] where a "patted down" defendant objected to the fruits of a negligent security guard. The Texas Court of Appeals, relying on *Burdeau*, maintains the precedent.

> Appellant's argument refers only to provisions of the law that restrict searches and seizures by police officers or other governmental officials. In the instant case, Torres was not a police officer; he was employed as a private security guard for the Fantasia Club. Therefore, under the circumstances presented, the officers in this case were justified in conduction the search of appellant.[226]

A plaintiff employing the nexus theory, however, must reveal to the court evidence of state support of the wrongful conduct. Some specific examples of sufficient points of contact or other evidence manifesting a sufficient tie between the state and the illegal activity include these factors:

- A joint venture
- Cooperation in the activity
- An alliance in policy and planning
- Tacit encouragement

- Act in concert or conspiracy with the illegal activity
- The existence of a certificate of authority, state license, or other charter
- The encouragement argument
- The authorization and approval argument
- A grant of power

Advocates who urged the applicability of § 1983 to private policing pose as further argument recent studies that find a melding of private and public police concerns.[227] Both scholarly and practitioner argument is uniform on this score, urging less competition between public and private interests and, instead, a sharing of resources, skills, and capacities.

The Police Moonlighter: A Merging of Public and Private Functions

Many occupational activities in private security and public law enforcement blur their once-distinct lines. Examples include a private security officer who has been granted a special commission license or privilege by the state to perform clearly delineated activities. Certain jurisdictions designate individuals as "special policeman" or use other terminology to grant private security personnel public arrest privileges and rights.[228] This type of state involvement may meet the burden of 42 U.S.C. § 1983's *color of state law* standard. The fundamental premise behind the legislation is that the claimant must amply demonstrate an affirmative link between the private officer's conduct and the state or other governmental authority that involves itself directly or indirectly in the conduct.[229]

A classic merger of public and private interest occurs when public police officers moonlight within the security industry.[230] *The Hallcrest Report II* sees significant dual occupational roles in the private sector:

> These surveys revealed that 81% of the law enforcement administrators indicated that their department's regulations permit officers to moonlight in private security, while 19% prohibited or severely restricted private security moonlighting. Law enforcement administrators estimated that about 20% of their personnel have regular outside security employment to supplement their police salaries. Nationally, the Hallcrest researchers estimated that at least 150,000 local enforcement officers in the U.S. are regularly engaged in off-duty employment in private security. The three most common methods of obtaining off-duty officers for security work, in rank order, are: (1) the officer is hired and paid directly by the business, (2) the department contracts with the business firm, invoices for the officer's off-duty work, and pays the officer, and (3) off-duty security work is coordinated through a police union or association.[231]

Consider these inherent occupational and ethical dilemmas in moonlighting.

1. Who is liable for a tortfeasor's behavior if the individual is off duty from public policing and working in a private security interest? How does the answer gel with a jurisdiction that requires police to be on call 24 hours per day?
2. What influence does moonlighting have upon the efficacy and productivity of police officers?
3. What potential conflict of interest exists?
4. Should an arrest, search, or seizure by a private security officer, working part-time while maintaining full-time public police employment, adhere to the rigorous standards of the Fourth, Fifth, and Fourteenth Amendments of the U.S. Constitution?
5. Which standard of constitutional protection should be accorded an appellant in a criminal case who has been victimized by a law enforcement person with both private and public connections?
6. How many hours per week should a publicly employed law enforcement officer be permitted to work in the private security industry?
7. Should a publicly employed police officer be permitted to operate as a private investigator, unrestrained by traditional constitutional protections granted in the public sector?

Others have argued that moonlighting suffers from inherent conflicts and is saddled with legal liability problems. Consider these troublesome policy concerns:

- Training (enforcement orientation versus confrontation avoidance)
- Impaired effectiveness (double-duty, overworked, etc.)
- Legal liability
- Conflict of interest
- Guns[232]

Another factor courts weigh is the level of the economic relationship. Is there a contract for private services? Does the proprietor want public officers to act privately or publicly? In *Otani v. City and County of Hawaii*,[233] the federal district court evaluated the question this way:

> Plaintiff is correct in his assertion that "[a] private party may be liable under § 1983 if he was a willful participant in joint action with state agents."[234] However, "[a] claim of conspiracy or action in concert requires the allegation of 'facts showing particularly what a defendant or defendants did to carry the conspiracy into effect, whether such acts fit within the framework of the conspiracy alleged, and whether such acts, in the ordinary course of events, would proximately cause injury to the plaintiff.'"[235]
>
> As the court explained, "it is possible that [the officer's] actions could have caused Plaintiff to be subjected to a deprivation of her civil rights while Safeway's actions did not; the Court merely holds that, whatever

> Safeway did, it did under color of state law."[236] To hold Safeway liable for the officer's actions, the Plaintiff had to produce some evidence that Safeway "caused her to be subjected to a deprivation of her constitutional rights through its hiring and training policies, or the lack thereof."[237]
> . . . The court finds this case distinguishable from the *Groom* case in the first instance because Officer Fragiao was not hired to police the construction site. Pursuant to its contract with the State, Haitsuka was required to hire a police officer to direct traffic at its construction site.[238]

There are no easy solutions to the practice of moonlighting, both from an economic as well as legal point of view. However, suspects of criminal behavior may be offered a menu of potential causes of action against an officer who is both publicly and privately employed. In *Faust v. Mendoza*,[239] a police officer was caught in an ethical dilemma representing two employers. The facts consisted of the following:

> At 10 PM on February 9, 1975 during Mardi Gras celebration in the French Quarter of New Orleans, Louisiana, a couple who had been enjoying the festivities and drinking all day stopped at the ice cream parlor in the Royal Sonesta Hotel. Apparently the man, John Faust, rested his head on the parlor's counter and ignored requests that he move. At this point, Officer John Mendoza entered to wait the 45 minutes until 11 PM when he was to begin work as a security guard for the parlor. He was to work until 3 AM in his police uniform at the parlor after completing 11 AM to 11 PM shift on police assignment controlling crowds around the Mardi Gras parades. After Mendoza approached Faust, testimony on what followed conflicts greatly. Although particular details are unclear, it appears that Mendoza struck both Faust and his female companion . . . Ingrid Pillar, with a billyclub, smashed the ice cream parlor window (either accidentally or by throwing him against it) and arrested Faust and Pillar for assault upon a police officer.[240]

The court held the police officer accountable. When these dual roles coalesce, some courts suspect a public law enforcement officer's intentional bypass of the more demanding public standards. In *Bauman v. State of Indiana*,[241] the court grappled with a suspect's right to Miranda warnings before a security officer could custodially interrogate. That security guard also happened to be an off-duty police officer. In affirming the convictions, the court did not accept the argument that Miranda rights were necessary because of the guard's public police officer status. The court was perfectly satisfied with the differentiation of occupational roles, holding that the security guard "was not acting in his capacity as a police officer at the time, but rather in his capacity as a private citizen security officer."[242] In *Leach v. Penn-Mar Merchants Assoc.*, a county police officer, simultaneously employed as a security guard, made while on security duty an arrest at a traffic accident. The court construed his traffic altercation to be a public police function distinguishable from his security work. Other cases

dealing with the differentiation of authority and the public/private status of law enforcement include the *City of Grand Rapids v. Frederick Impens*[243] and *Cinestate Inc. v. Robert T. Farrell, Administrator*.[244]

SUMMARY

The chapter's main trust regarding torts has been civil rights, damages, and remedies. On the nature of civil liability in general and its three main classes: intentional tort, negligence, and strict liability. Specific causes of action were covered, including:

- Assault
- Battery
- False Imprisonment
- Infliction of Emotional or Mental Distress
- Malicious Prosecution
- Defamation
- Invasion of Privacy
- Negligence
- Negligence and Security Management
- Strict Liability Torts

Other areas of interest dealt with vicarious inability, nondelegable duty, and the civil remedies provided by 42 U.S.C. § 1983. Also relevant to this discussion is the continual interplay between private and public security functions. In some respects, the distinctions presently drawn between private and public policing are academic. As increased funding and resources are placed in the private sector, there is a strong likelihood of increased regulatory oversight, causing heightened legal liabilities on the part of security personnel, agencies, and companies.

CASE EXAMPLES

False Imprisonment—*Pamela Sue Peak, by her father and next friend, Francis Wilber Peak v. W.T. Grant Company*, 386 S.W. 685.

Facts

A security officer saw a female customer acting suspiciously and holding tightly to a purse. The officer grabbed hold of her arm. The customer continued to scream and the officer reacted by covering her mouth. He dragged her by the arm across the store to a big safe located near the stairway to the basement offices. According to one witness, the officer was slapping her and knocking her into several counters as he dragged her along toward the basement steps. Until this time neither of the officers had identified

themselves. They were not in any type of uniform. The officers had detained the wrong person.

Would the security company and its employees be liable for the false imprisonment?

Answer

When an employee of a corporation is authorized to arrest and detain shoplifters, and in endeavoring to do so mistakenly arrests and detains an innocent person, the security corporation is liable for false imprisonment.

Malicious Prosecution—*Arnold v. Eckerd Drugs of Georgia, Inc.*, 358 S.E.2d 632 (Ga. App. 1987).

Facts

After making purchases in a drug store, Mrs. Arnold attempted to leave the premises. The store had posted notice of its utilization of an anti-shoplifting device. As she approached the anti-shoplifting device, the alarm sounded. Mrs. Arnold claimed she had mistakenly put a pen in her pocket and had then forgotten to pay for it. The store manager had observed appellant's behavior after the anti-shoplifting alarm had sounded. Mrs. Arnold was arrested and charged with shoplifting, notwithstanding her after-the-fact explanation that she had simply forgotten about the pen. After a jury acquitted Mrs. Arnold of shoplifting, she brought a civil action for malicious prosecution.

Does probable cause negate a claim for malicious prosecution?

Answer

If there was probable cause to believe that Mrs. Arnold was shoplifting, the drug store cannot be held civilly liable for requiring that a jury in a criminal proceeding determine the credibility of her explanation.

Premises Security—*Opal Frederick, v. TPG Hospitality, Inc., Et Al.*, 56 F. Supp. 2d 76 (United States District Court for the District of Columbia 1999).

Facts

On October 21, 1994, Mr. John Frederick and his wife Opal were visiting Washington D.C., and they checked into the EconoLodge on New York Avenue for the night. In the very early morning hours of October 22, 1994, Mr. Frederick passed through the lobby on his way out to the garage.

He spoke with the security guard on duty, Mr. Henry Gilmore, who was sitting in the lobby. Mr. Frederick then proceeded outside to the garage. When he got to his car, there was a light shining from underneath the car, and when he bent down to look under the car he was struck in the face and robbed. Mr. Frederick suffered massive facial trauma from the attack and recently has passed away.

Plaintiffs have provided evidence that two elderly patrons of the EconoLodge were attacked in the EconoLodge garage approximately six months before Mr. Frederick was attacked. The plaintiffs contend that the EconoLodge is located in a high crime area and that a number of other attacks had taken place in the vicinity in the months prior to the attack on Mr. Frederick. Finally, it is established that the guards worked long shifts at the hotel; on the morning Mr. Frederick was attacked, Mr. Gilmore was nearing the end of a 14-hour shift.

Was the hotel negligent?

Answer

No, all Plaintiff's arguments were dismissed.

Vicarious Liability—*Shaffer v. Wells Fargo Guard Services, Etc.*, (1988 Fla App D3) 528 So. 2d 389, 13 FLW 562.

Facts

A guard service company was hired to protect bank assets and assist in transportation. The security firm's contract lists explicitly this obligation. What if a bank employee was injured by third-party conduct? Under what theory would the case succeed or fail? Would the security firm be liable?

Answer

No, since it could not be fairly said that the guard service company contemplated protecting bank employees from hazards totally unconnected to activities or the business of the bank.

Negligence and Foreseeability—*Rosabel Brown v. J.C. Penney Company, Inc.*, 667 P. 2d. 1047 (1983).

Facts

Plaintiff and her husband, while shopping at a mall, were seriously accosted by assailants in the parking lot. The plaintiffs attempted to show

that their injuries should have been foreseen in this particular public parking. They did so by producing a computer printout from the local police department that listed the criminal incidence rate. Plaintiff sued shopping center on a theory of negligence.

Issue

Should defendants reasonably have anticipated that careless or criminal conduct on the part of third persons would likely endanger the safety of business invitees?

Negligence and the Environment—*Ruth Nicoletti v. Westcor, Incorporated,* 639 P. 2d. 330 (1982).

Facts

Plaintiff was employed by a department store that required all employees to park at a temporary facility during the holiday season. As a result of this parking location, plaintiff and some other employees chose to take another direct route to the special parking lot. This shortcut took plaintiff through a highly shrubbed area, causing her to become tangled and to severely injure herself.

Issue

Could defendant company have foreseen these injuries?

State Action Theory—*Nicole Anderson v. Randall Park Mall Corporation*, 571 F. Supp. 1173 (1983).

Facts

A young woman attending a movie with friends at a mall was asked by security guards to quit speaking too loudly. As a result of a continuing disturbance, this young woman was among many others asked by security guards to leave the shopping mall. She was told that the mall was private property, that she was loitering, and that she would be arrested if she refused. Her refusal to leave the mall resulted in an arrest where she spent a short period of time in custody before being released. As a result of this 15-minute detention, she sued the Randall Park Mall Corporation on a claim that her civil rights were violated by its employees, the private security guards.

Issue

Are a private citizen's civil rights violated when deprived of a right to remain in a shopping mall? Does this fact pattern qualify for an action under 42 U.S.C. § 1983?

DISCUSSION QUESTIONS

1. Compare and contrast the nature of a civil wrong with a criminal act.
2. Which type of tort category would the private security industry most often come in contact with?
3. In a jurisdiction with a merchant privilege protection, what would be the defense in a false imprisonment or false arrest case?
4. What causes of action must employers be concerned about in hiring, retaining, disciplining, and terminating personnel?
5. Businesses often feel that the hiring of security companies as independent contractors will shield them from potential liability. Is this belief generally dependable?
6. Name the types of remedies which exist under 42 U.S.C. § 1983.
7. Does moonlighting gives greater strength to a plaintiff's or claimant's argument that civil rights have been violated under 42 U.S.C. § 1983? Explain.

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5

Criminal Liability of Security Personnel

INTRODUCTION: THE PROBLEM OF CRIMINAL LIABILITY

Just discussed were the varied civil liability problems that are commonplace in security administration. Needless to say, the burden of liability is a foremost policy and planning concern for the security industry. As the privatization of criminal justice function continues, corresponding civil as well criminal liability questions will remain and even accelerate. Security professionals engage the public in so many settings and circumstances that criminal conduct will be witnessed.

Can the security industry, as well as its individual personnel, suffer criminal liability? Can security personnel, in both a personal and professional capacity, commit crimes? Are security corporations, businesses, and industrial concerns capable of criminal infraction or can these entities be held criminally liable for the conduct of employees? Are there other criminal concerns, either substantive or procedural, that the security industry should be vigilant about? While the content of the chapter will glance at procedural issues raised in Chapter 3, its main thrust shall be on criminal codification and analysis of criminal definition.

Criminal Liability under the Federal Civil Rights Acts

While the majority of litigation and actions under 42 U.S.C. § 1983 have been, and continue to be, civil in design and scope, Congress has enacted legislation that attaches criminal liability for persons or other legal entities acting under *color of state law,* ordinance, or regulation who are:

a. Willfully depriving any inhabitant of a state of any right, privilege or immunity protected by the Constitution or the Laws of the United States, or

b. Willfully subjecting any inhabitant to a different punishment or penalty because such an inhabitant is an alien because of his race or color, then as prescribed for the punishment of citizen[1]

While criminal liability can be grounded within the statutory framework, advocates of this liability must still pass the statutory and judicial threshold question, that is, whether or not the processes and functions of private justice can be arguably performed under "color of state law." As discussed previously, either the state action or the color of state law advocacy requires evidential proof of private action metamorphosing into a public duty or function or of governmental authorities depriving a citizen of certain constitutional rights. The U.S. Supreme Court argued in *Evans v. Newton*[2] that:

> Conduct that is formally "private" may become so entwined with governmental policies or so impregnated with governmental character as to become subject to the constitutional limitations placed upon state action … when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies and instrumentalities of the State and subject to its Constitutional limitations.[3]

Contemporary judicial reasoning has yet to reach the point where private security practices are synonymous with public activities. This judicial reticence has precipitated often scathing criticisms by practitioners and academics. The *Hofstra Law Review,* when assessing the constitutional ramifications of merchant detention statutes concludes:

> By judicial decision and statute a "super police" has been created. The merchant detective has the same privileges as public law enforcement agents without the same restraints to neutralize the effect of a violation of constitutionally protected rights. The merchant detective is treated as a private citizen for purposes of defining his constitutional liabilities and yet he is granted tort immunity as though he were a public law enforcement agent.[4]

While this argument may have intellectual support, it generally disregards the practical realities of operating retail or other commercial establishments. Retail establishments and industrial concerns—whose chief justice function is asset protection—would find most public policing protections incompatible with their fundamental mission.

Criminal liability can also be imposed under the federal Civil Rights Act if, and when, a victim of illegal state action shows that the injurious action was the product of a conspiracy. The relevant provision as to conspiracy states:

a. A conspiracy by two or more persons;
b. For the purposes of injuring, oppressing, threatening or intimidating any citizen in the free exercise or enjoyment or past exercise of any

> right or privilege secured to him by the Constitution or laws of the United States.[5]

Various factual scenarios illustrate this statutory application:

- public police and private security personnel are engaged in a joint venture, cooperative effort, or alliance;
- public police solicit, request, entice, or encourage the activity of private law enforcement interests, knowing full well their activity is not legally sound;
- state officials, administrative heads, and agency policy makers hire, contract, or otherwise utilize the services of a private entity they know will make possible constitutional violations.

In sum, the pressing crossover question in the world of private security still remains whether or not private justice agents can be held to public scrutiny.

Criminal Liability and the Regulatory Process

A repetitive theme originating with the *RAND Study*,[6] through the National Advisory Committee on Criminal Justice Standards and Goals, to the recent *Hallcrest Report II,* is the need for regulations, standards, education and training, and qualifications criteria for the security industry.[7] The National Advisory Committee on Criminal Justice Standards and Goals, citing the enormous power wielded by the private security industry, urges, through the adoption of a National Code of Ethics, professional guidelines. See Figure 5.1.

The National Advisory Committee further relates:

> Incidents of excessive force, false arrests and detainment, illegal search and seizure, impersonation of a public officer, trespass, invasion of privacy, and dishonest or unethical business practices not only undermine confidence and trust in the private security industry, but also infringe upon individual rights.[8]

In short, the Commission recognizes that part of the security professional's measure has to be the avoidance of every criteria of crime and criminality. The regulatory and administrative processes involving licensure infer a police power to punish infractions of the promulgated standards.

A recent Arizona case, *Landi v. Arkules,*[9] delivers some eloquent thoughts on why licensing and regulation are crucial policy considerations. In declaring a New York security firm's contracts illegal due to a lack of compliance, the court related firmly:

> The statute imposes specific duties on licensees with respect to the confidentiality and accuracy of information and the disclosure of

Code of Ethics for Private Security Management

As managers of private security functions and employees, we pledge:

I. To recognize that our principal responsibilities are, in the service of our organizations and clients, to protect life and property as well as to prevent and reduce crime against our business, industry, or other organizations and institutions; and in the public interest, to uphold the law and to respect the constitutional rights of all persons.

II. To be guided by a sense of integrity, honor, justice and morality in the conduct of business; in all personnel matters; in relationships with government agencies, clients, and employers; and in responsibilities to the general public.

III. To strive faithfully to render security services of the highest quality and to work continuously to improve our knowledge and skills and thereby improve the overall effectiveness of private security.

IV. To uphold the trust of our employers, our clients, and the public by performing our functions within the law, not ordering or condoning violations of law, and ensuring that our security personnel conduct their assigned duties lawfully and with proper regard for the rights of others.

V. To respect the reputation and practice of others in private security, but to expose to the proper authorities any conduct that is unethical or unlawful.

VI. To apply uniform and equitable standards of employment in recruiting and selecting personnel regardless of race, creed, color, sex, or age, and in providing salaries commensurate with job responsibilities and with training, education, and experience.

VII. To cooperate with recognized and responsible law enforcement and other criminal justice agencies; to comply with security licensing and registration laws and other statutory requirements that pertain to our business.

VIII. To respect and protect the confidential and privileged information of employers and clients beyond the term of our employment, except where their interests are contrary to law or to this Code of Ethics.

IX. To maintain a professional posture in all business relationships with employers and clients, with others in the private security field, and with members of other professions; and to insist that our personnel adhere to the highest standards of professional conduct.

X. To encourage the professional advancement of our personnel by assisting them to acquire appropriate security knowledge, education, and training.

Figure 5.1 Ethical code for managers.

> investigative reports to the client.[10] A license may be suspended or revoked for a wide range of misconduct, including acts of dishonesty or fraud, aiding the violation of court order, or soliciting business for an attorney.[11]
>
> The Legislature's concern for the protection of the public from unscrupulous and unqualified investigators is apparent. This concern for the public's protection precludes enforcement of an unlicensed investigator's fee contract.[12] The courts will not participate in a party's circumvention of the legislative goal by enforcing a fee contract to provide regulated services without a license.[13]

Hence, security professionals may incur criminal liability for failure to adhere to regulatory guidelines. States have not been shy about this sort

of regulation. A California statute prohibiting the licensure of any investigator or armed guard who has a criminal conviction in the last 10 years was upheld.[14] A Connecticut statute for criminal conviction was deemed overly broad.[15]

As states and other governmental entities legislate standards of conduct and requirements criteria in the field of private security, the industry itself has not been averse to challenging the legitimacy of the regulations. Antagonists to the regulatory process urge a more privatized, free-market view and balk at efforts to impose criminal or civil liability for failure to meet or exceed statutory guidelines.[16] Some fascinating legal arguments have been forged by those challenging the right of government to regulate the security industry. The argument that state law preempts any local control of the security industry has failed on multiple grounds.[17] Other advocates attack regulation by alleged defects in due process.[18] Litigation has successfully challenged the regulatory process when ordinances, administrative rules, regulations, or other laws do not provide adequate notice, are discriminatory in design, or have other constitutional defects.[19] A legal action revoking an investigator's license was overturned despite a general investigator's criminal conviction since he merely pled *nolo contendere* rather than "guilty."[20] A plea in this manner is no admission, the court concluded, and thus failed the evidentiary burden of actual criminal commission. Other challenges to the validity and enforceability of the regulatory process in private security include the argument that such statutory oversight violates equal protection of law,[21] or that the regulatory process is an illegal and unfounded exercise of police power,[22] or an unlawful delegation of power.[23] As a general observation, these challenges are largely ineffective.[24]

Given the minimal intrusion inflicted upon the security industry by governmental entities, and the industry's own professional call for improvement of standards, litigation challenging the regulatory process should be used only in exceptional circumstances. The repercussions and ramifications for failure to adhere to the minimal regulatory standards are varied, ranging from fines, revocation, and suspension to actual imprisonment.

In *State v. Guardsmark*,[25] the court rejected the security defendant's contention that denial of licenses tended to be an arbitrary exercise. The court, accepting the statute's stringent licensure requirements and recognizing the need for rigorous investigation of applicants and testing found no basis to challenge.[26] In *Guardsmark*, the crime cited under Illinois law was, "engaging in business as a detective agency without a license."[27] Similarly, *State v. Bennett*[28] held the defendant liable in a prosecution for "acting as a detective without first having obtained a license."[29]

The fact that a security person, business, or industrial concern is initially licensed and granted a certificate of authority to operate does not ensure absolute tenure. Governmental control and administrative review of

security personnel and agencies are ongoing processes. Revocation of a license or a certificate to operate has been regularly upheld in appellate reasoning. In *Taylor v. Bureau of Private Investigators and Adjustors*,[30] suspension of legal authority and license to operate as a private detective was upheld since the evidence clearly sustained a finding that the investigators perpetrated an unlawful entry into a domicile. The private detective's assertion that the regulation was constitutionally void because of its vagueness was rejected outright.[31]

License to operate or perform the duties indigenous to the security industry has also been revoked or suspended due to acts committed that involved moral turpitude. In *Otash v. Bureau of Private Investigators and Adjustors*,[32] the court tackled the definition of moral turpitude and explained that it could be best described as a conduct that was contrary to justice, honesty, and morality. Inclusive within the term would be fraudulent behavior with which the investigator was charged.[33] In *ABC Security Service, Inc. v. Miller*,[34] a plea of *nolo contendere* to a tax evasion charge was held as sufficient basis for revocation and suspension.[35] An opposite conclusion was reached in *Kelly v. Tulsa*,[36] in which an offense of public drunkenness was found generally not to be an act of moral turpitude that would result in a denial of application, loss, suspension, or revocation of licensing rights.

In summary, it behooves the security industry to stick to the letter of regulatory process. Failure to do so can result in actual criminal convictions or a temporary or permanent intrusion on the right to operate.

Criminal Acts

Both corporations and individuals in the security industry may be convicted of actual criminal code violations. This liability can attach either in an individual or vicarious sense. Most jurisdictions, however, do impose a higher burden of proof in a case of vicarious liability since "the prosecution must prove that the employer knowingly and intentionally aided, advised or encouraged the employee's criminal conduct."[37]

> Other legal issues make difficult a prosecution against corporations for criminal behavior.
> How can a corporation formulate specific or general intent, the *mens rea* necessary for a criminal conviction?
> In violent acts of criminality such as rape, murder or robbery, to whom or on whose authority within the corporate structure would the responsibility lie?

In the evolving analysis of corporate crime, a trend toward corporate responsibility has emerged.[38] Does a corporate officer and director who has actual knowledge of criminal behavior on the part of subordinates

within the corporation bear some level of responsibility? Is a corporation responsible, as principal, for the acts of its agents both civilly and criminally? "Where those who control a corporation's actions engage in unlawful course of conduct in their capacity as officers in order to benefit the corporation, the corporation, as well as the officers, may be held criminally responsible on the presumption that it authorized the illegal acts."[39]

Criminal charges are regularly brought forth and eventual liability sometimes imposed for failure to uphold the rules and regulatory standards promulgated by government agencies, such as:

- Occupational Health and Safety Act (OSHA)
- The Food and Drug Administration (FDA)
- National Labor Relations Board (NLRB)
- Environmental Protection Act (EPA)
- Homeland Security Administration
- National Transportation Safety Board

Other common corporate areas of criminality in business crime include securities fraud, antitrust activity, bank fraud, tax evasion, violations against the Racketeer Influenced and Corrupt Organizations Act (RICO), and acts involving bribery, international travel, and business practices.[40] Finding corporations criminally responsible for particular actions is not the insurmountable task it once was.

Individually, criminal culpability can always be imposed. The nature and functions of security practice delivers a ripe ground for violations of the criminal law. Listed below are individual criminal acts that frequently crop up in security practice.

Assault[41]

a. A security officer can easily create an apprehension of bodily harm in a detention case.[42]
b. A security officer, in a crowd control situation, threatens, by a gesture, a private citizen.[43]
c. Industrial security agent, protecting the physical perimeter, unjustly accosts a person with license and privilege to be on the premises.[44]

Battery[45]

a. Security officer in a retail detention case offensively touches a suspected shoplifter.[46]
b. Security officer uses excessive force in the restraint of an unruly participant in a demonstration.[47]
c. Security officer utilizes excessive force to affect an arrest in an industrial location.[48]

False Arrest or Imprisonment[49]

a. Security officer, in a jurisdiction with no merchant's privilege, arrests without probable cause, and motivated by malice toward a particular suspect who is eventually acquitted.
b. Security officer restrains and detains a suspected shoplifter without probable cause.
c. Security officer restrains and detains a suspected intruder on an industrial premises and does so in an abusive and physically harmful manner.

Unlawful Use of Weapons

a. A security officer is not properly trained in the usage of weapons.
b. A security officer does not possess a license.
c. A security officer inappropriately utilizes weaponry best described as excessive force.

Theft[50]

a. Security personnel steal, take by deception, fraud, or through simple unlawful acquisition property from their place of employment.
b. Security personnel aid and abet outside individuals in conducting an inside theft.

Manslaughter[51]

a. Security officer negligently drives an auto which in turn kills either a pursued suspect or an innocent bystander.
b. The security officer handles his or her weaponry in a grossly negligent way, thereby causing a fatality.
c. The security officer reacts with excessive force in a property protection case causing the death of the suspect or an innocent bystander.
d. Security officer in hot pursuit shoots a fleeing felon and injures an innocent bystander.[52]

Murder[53]

a. A security officer kills another without proper investigation and with an extraordinary and wanton disregard of human life.

Misprision

a. Security officer fails to report crimes or take actions necessary to prevent it.
b. Security personnel purposely conceal a major capital offense.

Compounding

a. Security officer makes a deal with a suspect in a theft or other criminal case for an agreement not to pursue the investigation.
b. Security officer decides not to cooperate, for internal or economic reasons, with the prosecutorial staff assigned to the case.

Solicitation[54]

a. Security officers or investigators entice, encourage, or solicit others to perform criminal acts.
b. The security officer or private investigator encourages, solicits, or induces another to commit an illegal act for the purpose of acquiring a specific piece of evidence.
c. Security investigator devises a plan which will ensnare a criminal; however such tactics or plan may be construed as a case of entrapment.[55]

Criminal Conspiracy[56]

a. The security agent, investigator, or officer enters into an agreement with one or more individuals for the purposes of committing a criminal act such as internal theft.
b. Security officer engages in conduct or in concert with other business entities which seek to illegally eavesdrop and investigate the personal backgrounds of prospective job applicants.
c. The security company, in concert with other business interests, perform polygraph examination on prospective applicants in direct violation of state law.
d. The security professional performs an overt act toward the commission of any crime which assists the principle perpetrator in effecting a successful criminal plan.[57]

The range and extent of individual security crime is only limited by the roles, tasks, and duties undertaken by the industry's participants.

DEFENSES TO CRIMINAL ACTS: SELF-HELP

Personal Self-Defense

Much activity in the security industry is geared toward the protection of persons and property.[58] As a result of this orientation, security professionals must understand defense tactics. Protection of self is an a priori security consideration. If one unreasonably responds in a protection situation, criminal liability can result. In protection of person cases, "the obvious

human instinct to meet physical aggression with counter force" must be balanced with "desirability in a civilized society … of encouraging the resolution of disputes through peaceful means."[59] Since the preservation instinct is strong, conduct delineations regarding reasonable and justifiable force are critical policy questions. The *Hallcrest Report I*[60] fully delved into practitioner perception regarding the appropriate use of force as outlined in Table 5.1.[61]

Use of Force in Self-Protection

Imperative in any security training curriculum is the topic of excessive force and self-protection. The American Law Institute's *Model Penal Code*, in its proposed 1962 official draft, sets out a well-respected statutory design.[62]

1. *Use of Force Justifiable for Protection of the Person.* Subject to the provision of this Section and of Section 3.09 the use of force upon or toward another person is justifiable when the actor believes

Table 5.1 Force Data

Use of Force Reported by Private Security Employees

	(N=110) Proprietary	(N=78) Contractual Guard	Alarm
Incidence of Use			
In self-defense	54%	13%	53%
Evict a trespasser	39%	15%	12%
Deal with vandalism	18%	10%	44%
Prevent an assault	39%	8%	27%
Carry out a lawful search	37%	6%	31%
Detain someone	47%	12%	50%
Arrest someone	56%	4%	46%
Expectations of Use		**(Guard & Alarm)**	
Protect yourself	96%	92%	
Protect company property	43%	28%	
Detain someone	40%	18%	
Arrest someone	51%	9%	
Search someone		6%	

that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

2. *Limitations on Justifying Necessity for Use of Force.*
   a. The use of force is not justifiable under this Section:
      (i) to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful. . . .
   b. The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:
      (i) the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or
      (ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto, or by complying with a demand that he abstain from any action which he has no duty to take, except that:
         (1) the actor is not obliged to retreat from his dwelling or his place of work unless he was the initial aggressor . . .
         (2) a public officer justified in using force in the performance of his duties, or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape is not obliged to desist from efforts to perform such duty, effect such arrest or prevent such escape.[63]

This statutory guideline places explicit restrictions on the use of force.[64] It compels the employer of force to think about its potential ramifications and limitations. First, force is not a permissible activity against law enforcement officers, though a few states except extraordinary situations. Force is only tolerated in environments of heightened necessity or immediate need, when a victim of physical harm can objectively point to real and immediate bodily harm. Force is only to be employed in situations where a reasonably prudent person believes that he or she could suffer serious bodily harm, death, kidnapping, or a sexual assault. "The requirement that the defendant be operating under the reasonable belief that he is in imminent danger of death, great bodily harm, or some felony, involve two elements: (1) the defendant in fact must have acted out of an honest, bona fide belief that he was in imminent danger, and (2) the belief must be reasonable in light of the facts as they appeared to him."[65]

In the area of security practice, violent aggression by suspects can be met by some level of proportionate response. Indeed, a slingshot should not be met with a rapid-fire weapon. The potential for abuse and

disproportionate reaction exists in security settings. *The Hallcrest Report I* notes, "one inescapable fact is that firearms tend to be used when they are carried."[66] The *Report* further explains that firearms' training, proper care, and usage thereof in the security industry are often abysmal and frighteningly inadequate exercises.

Consider the following fact patterns:

- A security investigator catches a thief in the act. The thief reaches into his side pocket. Before he could remove the object, the security official fired a weapon, inflicting a fatal injury. Would this be a case of excessive force in the protection of self?
- Security officer comes upon a crime scene and sees a juvenile, with stolen goods in hand, riding his bike from the scene of a crime. As the juvenile accelerates his bicycle, he directs the path of the bike toward the security officer. The officer, in order to protect his life, even though he has an easy retreat and an opportunity to move in another direction, inflicts a fatal injury on the juvenile. Is this a case of excessive force?

Plainly, the latter case demonstrates the *Model Penal Code's* demand that the force exerted by a defender be proportionate to that being exhibited by the aggressor. In the last fact pattern above, no weaponry is employed.

More troubling is the former fact pattern, a modern legal dilemma for police officers each day of their professional lives. In these cases, judgment calls are common and are gauged by an officer's belief.

Protection of Other Persons

Another typical task in the security industry is the protection of other persons. Persons of social importance such as entertainers, politicians, business executives, religious leaders, and other highly public and visible individual personalities rely heavily on the expertise of the security industry. What level of protective action is permissible in the protection of other persons?[67] The *Model Penal Code* provides, again, some general statutory guidance:

> (1) Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable to protect a third person when:
>
> (a) the actor would be justified under 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and
>
> (b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and
>
> (c) the actor believes that his intervention is necessary for the protection of the other person.[68]

This statutory scheme provides for a transferal of authority in the protection of self. One who is entrusted with the task, particularly those professionals in the public or private justice system, may exert such force as is proportionate, reasonable, and necessary as the party entrusting this authority would be capable of. What the defender believes is also crucial. However, belief should not be governed by hypersensitivity and delusion, and it must be the product of a reasoned, well-defined justification. There should be "a threat, actual or apparent to the use of deadly force against the defender. The threat must have been unlawful and immediate. The defender must have believed that he was in imminent peril of death or serious bodily harm and that his response was necessary to save himself. These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances."[69] "In addition, one acting in defense of another, when in the dwelling or workplace of the other, is no more obliged to retreat than he would be if he were in his own dwelling or workplace."[70]

The issue of self-defense for both the public and private justice system has never been more poignant. The Case Western Reserve University School of Law, in its publication, *Private Police Training Manual*,[71] admonishes the public and private sector to prepare for a further influx of this type of activity. The training in the area of self-defense takes on added significance because:

1. Confrontations between the police and the public are far more frequent.
2. Violence against officers has increased greatly.
3. Public clamor has been toward nonlethal weapons in the hands of police.
4. Police study groups are researching alternatives to violence.[72]

Certainly, as community pressure increases and civil and criminal litigation continues its influence on police and security planning, the role of self-defense of the person and the parameters, obligations, and standards of self-defense will become increasingly relevant.

The role of self-defense is further influenced by the evolution of defense technology and occupational hardware. Review the list below as only a partial example of defensive equipment available to public and private police systems.

1. Revolvers
2. Shotguns
3. Rifles
4. Machine Guns
5. Flair Guns
6. Armored Vehicles
7. Helmets

8. Bullet Proof Vests
9. Combat Shields
10. Tear Gas
11. Grenade Launchers
12. Batons
13. Water Cannon
14. Military Vehicles

Such an arsenal is bound to generate "defense" questions for industry planners and leaders.

Defense of Property

The value placed on personal property versus human life is markedly distinguishable. Most American jurisdictions, as well as traditional common law themes, have always placed a heavy burden on those seeking to employ force in the protection of personal property. The *Model Penal Code* confirms that tradition.

The Use of Force for the Protection of Property[73]

1. *Use of Force Justifiable for the Protection of Property.* Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:
   a. to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property, provided that such land or movable property is, or is believed by the actor to be, in his possession or in the possession of another person for whose protection he acts; or
   b. to effect an entry or reentry upon land or to retake tangible movable property, provided that the actor believes that he or the person by whose authority he acts or a person from whom he or such other persons derives title was unlawfully dispossessed … provided further, that:
      (i) the force is used immediately or on fresh pursuit after such dispossession; or
      (ii) the actor believed that the person against whom the force is used has no claim of right to the possession of the property and, in the case of land, the circumstances, as the actor believes them to be, are of such urgency that it would be an exceptional hardship to postpone the entry or reentry until a court order is obtained.[74]

Common sense dictates that the degree of force permissible is dependent on the totality of circumstances. Factual situations which

include entry into one's domicile or residence, of course, heighten the right to exert force.[75] Simple thefts or property disputes of tangible property such as a television, a garden tool, or some other item do not justify the exertion of life-threatening force. On its face, the statute insists that if a party desires to resolve a property dispute without the assistance of public law enforcement, he or she must do so immediately, hotly pursuing the item in question.

"The use of deadly force in defense of property is justifiable if there has been an entry into the actor's dwelling which the actor neither believes nor has reason to believe is lawful, and the actor neither believes nor has reason to believe can be terminated by force less than deadly force. Otherwise, the use of deadly force in defense of property is not justifiable unless the actor believes either that the person against whom the deadly force is used is trying to dispossess him of his dwelling without a claim of right, or that deadly force is necessary to prevent a commission of a felony in the dwelling."[76] The most confused cases occur when a dwelling place is involved. Numerous jurisdictions have grappled with the crosscurrents that occur in this area. Recent history indicates a movement toward favoring the owner of a domicile in the protection of his own property.[77] In *State v. Miller*, a North Carolina Court held:

> When a trespasser enters upon a man's premises, makes an assault upon his dwelling, an attempt to force an entrance into a house in a manner such as would lead a reasonably prudent man to believe that the intruder intends to commit a felony or inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally prevent the entry, even by the taking of the life of the intruder.[78]

Applying these general standards, which of the following fact patterns signify an excessive use of force?

Fact Pattern 1:

A security officer, responsible for the protection of a warehouse, is responding to an alarm. As he approaches the point of detection, he is confronted with a man, middle-aged, who is attempting to pilfer some gold ingots from the storage container. The security official professionally and respectfully requests that the thief halt and return the object of the theft. Thief disregards the request, and the security officer inflicts two fatal bullet wounds.

Fact Pattern 2:

A security officer in a retail establishment confronts a shoplifter. Shoplifter alights from the store; officer gives pursuit. After a scuffle in the parking lot the suspect pulls a switchblade and threatens to seriously harm the officer. The officer pulls his weapon and fires two projectiles into the suspect's leg which cause a serious, but not critical, injury.

The initial fact pattern outlined is the best case for an excessive force charge, and the reason is twofold: first, the utilization of excessive force did not have a basis in fact or a belief which would lead the security officer to conclude that he or she was in imminent danger of harm; secondly, the force exerted was in the protection of assets or personal property, something the law does not favor. Alternatively, protection of the gold ingots was the responsibility of the security officer. His fault is not in his intention but his methodology.

The factual scenario outlined in the shoplifting case is a regular happenstance. The force exerted was reasonable in light of the weaponry employed by the shoplifter. While the weapons chosen were not strictly identical, their similar capacity to kill supports the officer's reasonable judgment.

PROCEDURAL QUESTIONS

Criminal procedure questions as to the arrest, search, and seizure processes are fully covered in Chapter 3. However, the abject absence of any procedural codes, or even a suggested industry standard is a source of constant concern for the security industry. Critics of the private security industry have vociferously argued that its secondary status or minor league position, when compared to public police, will remain a constant reality until the industry itself adopts well-defined procedural guidelines. The National Advisory Committee on Criminal Justice Standards and Goals calls for research and corresponding guidelines in these procedural areas:

1. General private security functions:
    a. arrests
    b. detentions
    c. use of force (including firearms)
    d. impersonation of and confusion of public law enforcement officers and
    e. directing and controlling traffic.
2. Specific investigatory functions:
    a. search and seizure of private property
    b. wire tapping, bugging, and other forms of surveillance
    c. access of private security personnel to public law enforcement information and procedures for the safeguarding of the information
    d. obtaining information from private citizens and the safeguarding of information and
    e. interrogation.[79]

The National Advisory Committee and other authoritative bodies see an aligned benefit to the adoption of procedural regularity: a substantial

reduction in the industry's rate of criminal and civil liability. In time, a more enlightened, professional industry will make fewer mistakes. *The Hallcrest Report I* observes,

> There are some overwhelming public safety issues which justify public concern for adequate controls on private security. The serious consequences of errors in judgment or incompetence demand controls which insure the client and the general public of adequate safeguards. If government is to allow private security a larger role in providing some traditional police services, then it needs to insure that sufficient training and appropriate performance standards exist for the participating security programs—both proprietary and contractual.[80]

While policy makers, theoreticians, and academics debate strenuously for a change in the status quo, judicial reasoning has yet to bridge the gap between the private and public security interest. On occasion, courts do, though with caution and trepidation, find an actionable state case by traditional and innovative procedural interpretations of the *color of law* standard. Examples of some recent jurisprudence are topically covered below.

Private Security and *Miranda* Warnings

Constitutional protections apply to governmental action only. Extending warnings prior to custodial interrogation in private security settings has generally not been required though the climate for change alters according to abuses.[81] There have been cracks in this solid wall of immunity. A series of reports involving Cumberland Farm convenience stores, in Boston, allege an array of abuses by security guards who charged employees with theft. "Almost without exception, employees said they were subjected to the same procedure. Each was taken to a backroom, seated on an overturned milk crate, accused of theft and threatened with public humiliation or prosecution if they did not sign a confession of guilt. This process continued for years, but the accused individuals failed to take significant action because they did not know that other employees were similarly treated."[82] A host of Cumberland employees brought a class action against the employer.[83] So extensive were the alleged abuses that certain legal commentators, like Joan E. Marshall, made impassioned pleas in the *Dickinson Law Review* for extending *Miranda* protection to the private sector.

> Despite historical reasons for allowing merchants to practice so-called self-help in the protection of their property, the example of employee abuse by Cumberland Farms shows the need for new legislation to prevent the Fifth Amendment from becoming an anachronism. While some civil action may lie for harassment, the employee who is essentially robbed of his cash, his job, and his reputation is unlikely to feel

> vindicated even if victorious. Allowing evidence obtained in backroom interrogations to be turned over to the State for prosecution directly contradicts the Fifth Amendment guarantee that coerced confessions cannot and will not be used against an individual in a court of law.
> Clearly, courts will exclude confessions if they were not, "voluntarily" given following "reasonable" efforts by private security. Not all merchants, however, are interested in prosecuting their employees. Testimony from former Cumberland Farms' employees shows that there is a great deal of money to be gained by threatening employees. Private security guards in uniform carry visible authority. The courts and legislatures must recognize that this authority may be abused, particularly given the minimal restrictions placed in private security guards.[84]

The authority for the plea has limited precedential support. In *Williams v. United States*,[85] the Court found that a private detective who held a special police officer's card and badge granted, authorized, and licensed by the state and who was accompanied by a city police officer in obtaining evidence, was acting under color of state law.[86] The decision, though chronologically pre-*Miranda*, set some persuasive authority for *Tarnef v. State*.[87] In *Tarnef*, a private investigator, working under the direction of local police, was required to advise defendant of his constitutional rights before eliciting a statement. Cases in which private security are acting in consort with, under the authority of, or at the encouragement or enticement of the public sector forge the nexus necessary for *Miranda* rights.[88]

Cases involving moonlighting police officers and off-duty deputy sheriffs have held that *Miranda* rights are generally not required.[89] The California Supreme Court in a retail setting, held the *Miranda* rights inapplicable under the following reasoning:

1. Store detectives do not enjoy the psychological advantage of official authority when they confront a suspected shoplifter.
2. Store detectives believe that they must act with greater circumspection to avoid costly civil suits than do police officers. Thus, the compelling atmosphere inherent in custodial interrogation is diminished.
3. Store detectives may only detain those who shoplift in their presence, limiting any motivation they might otherwise have to vigorously seek confessions.
4. If a store detective engages in psychological or physical abuse or provides improper inducements, any resulting statements by a defendant would be involuntary and an exclusionary remedy would be available.[90]

Consequently, the California Court concluded that the traditional standards governing admissibility of voluntary statements were sufficient to protect the suspect's Fifth Amendment rights when confronted by a store

detective, so it was not necessary to extend the greater protections established in *Miranda*.[91]

Some security companies and interrogator's employ *Miranda*-type documents to ensure future admissibility in the event of subsequent challenge. A *Voluntary Statement* is at Figure 5.2.[92]

The form memorializes a knowing and volitional statement. A second suggestion is allow the person giving the statement to write out, in his or her hand, the substance of their statement. When public police are involved, either as investigators or participants, use Figure 5.3.[93]

For a curious ruling, covering a bevy of legal problems, including the sufficiency of probable cause determinations in private police action, see *Abraham v. Raso*[94] where the court remarks:

> This Court recognizes that N.J.S.A. 2C:3-7 provides in pertinent part that the use of deadly force is justifiable where the officer reasonably

VOLUNTARY STATEMENT

Date:_____ Time: _____

Location: _____

I, _____, am ___ years of age and my address is

_____

_____

_____

I have been advised and duly warned by_____of my Right to the advice of counsel before making any statement, and that I do not have to make any statement at all, nor incriminate myself in any manner.

I hereby, expressly, waive my Right to the advice of counsel and voluntarily make the following statement to the aforesaid person, knowing that any statement I make may be used against me in the trial or trials for the offense or offenses concerning which the following statement is herein made.

I declare that the following statement is made of my own free will, without promise of hope or regard, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency, by any person or persons whomsoever.

I have this statement consisting of ____ page(s), and I affirm to the trust and accuracy of the facts contained therein. This statement was completed at ___.m., on the __day of _____, 20__.

Signature of Person Giving Voluntary Statement
Witness

Figure 5.2 Voluntary statement.

WAIVER OF RIGHTS

1. I,_____, have voluntarily requested to speak with _____of the _____Security Department.
2. I am aware that criminal charges are currently pending against me in_____ County where I am charged with_____.
3. In addition, I am presently represented by_____, Esq., as to these pending charges. Nonetheless, I have specifically requested to speak to these Security Officers without the presence of my attorney. The Security Officers have advised me of my absolute right to consult with my attorney prior to any conversation that I have with them. I also understand that prior to any conversation with the security officers I may consult with any counsel of my own choosing, or if I cannot afford or otherwise obtain a lawyer, a lawyer will be appointed for me.
4. Furthermore, the Security Officers have advised me of my Constitutional Rights against self-incrimination and I understand the following:
   ____I have the right to remain silent.
   ____Anything I say can and will be used against me in a Court of Law.
   ____I have the right to be represented by an attorney.
   ____If I cannot afford an attorney, and want one, one will be appointed for me without charge.
   ____I have the right to discontinue my statement at any time in order to retain counsel, consult with counsel, or for any other reason.
5. Knowing my right to counsel and understanding that anything I say can and will be used against me, I hereby waive my right to counsel and I waive the right to remain silent, and I freely and voluntarily elect to speak with the_____Security Officers.
6. I also acknowledge that no promises, threats or inducements of any kind whatsoever have been made to me by any law enforcement officer or any other person in order to encourage me to make this statement. And I have signed below in order to further verify my voluntary and knowing acceptance of this waiver of my rights.

_____ Signed:
Security Officer/Witness Dated: _____19____

_____ Time:____Hrs.

Figure 5.3 Waiver of rights.

believes that the crime for which the arrest is being made was homicide, kidnapping, certain enumerated sex offenses, arson, robbery, burglary of a dwelling, or an attempt to commit one of these crimes, and where the officer believes that there is an imminent threat of deadly force to a third party or that the use of such force is necessary to prevent an escape. It is unclear to this Court, however, that this statutory provision defines the entire universe of situations in which an officer is

privileged to use deadly force in the sense that the use of such force will not expose her to civil liability.[95]

SUMMARY

This chapter advises the security professional and practitioner on potential criminal liabilities. While the majority of liability problems are civil in scope and design, criminal charges can be and are lodged against security personnel, agencies, businesses, and industrial concerns.

Individuals and corporations can be held criminally liable for specific conduct. Also, the regulatory processes imposed at the state and local levels can, if not adhered to, result in criminal penalties. Loss of license, revocation and suspension, criminal conviction, and any other remedy legislated are acceptable means of enforcement. Arguments asserting due process violations or a failure of equal protection are not judicially favored. If the industry is ever to attain professional status or equal footing with its public counterparts, it will have to stress higher standards and higher levels of procedural conduct.

The chapter also gave a schematic outline of the types of criminal behavior most frequently brought forth in a security setting and provided factual patterns for evaluation. Criminal defenses most often seen in the security sector were analyzed including self-defense and defense of others. Finally, some discussion was provided on the requirement of *Miranda* warnings, a procedural requirement firmly entrenched in the public sector, but as of yet, unless a sufficient nexus is shown between public and private functions, not a requirement in private security interrogation.

CASE EXAMPLES

Third-Party Crimes

Facts

A 40-year old individual was shot during a robbery while waiting for an elevator in a city-owned building where he maintained residence. Injuries resulted in paralysis and substantial loss of earnings. Plaintiff alleged that the defendant's failure to maintain locks and lighting in the lobby and failure to provide adequate security personnel caused the injury.

Issue

Should a plaintiff be able to collect money damages from a municipality or other governmental entities for failure to provide protection against third-party criminal acts?

Miranda Rights—*Tarnef v. State*, 512 P. 2d. 923 (1973).

Facts

A private arson investigator working at the behest of local police and who had promised to turn all evidence acquired, both testimonial and tangible, over to public law enforcement, vigorously interrogated a defendant. Without any regard for constitutional guidelines, the investigator eventually acquired a great deal of information that was incriminating and subsequently turned it over to the local police.

Issue

Is a private security officer, working at the request and on behalf of public law enforcement, required to advise a defendant of his or her *Miranda* rights?

DISCUSSION QUESTIONS

1. What criminal penalties can result from failure to follow the regulatory and licensing processes?
2. What level of due process is required for the imposition of penalties or the termination of licensure by governmental authority?
3. Name four common circumstances in which a security officer might be criminally liable.
4. Discuss, in depth, the standards outlining the right to use force in self-protection.
5. In the protection of property, force is not a favored exercise. Explain.
6. Defendants in criminal cases initiated by the private security industry, have few procedural rights. Explain.
7. Are *Miranda* rights required in cases that involve private security?

NOTES

1. 18 U.S.C. §242 et seq.; s*ee also* Center for Criminal Justice, Private Police Training Manual (1985); del Carmen and Carter, *An Overview of Civil and Criminal Liabilities of Police Officers*, 52 Pol. Chief 46 (1985); *see generally* M. S. Vaughn and L. F. Coomers, *Police Civil Liability under Section 1983: When Do Police Officers Act under Color of Law?* 23 J. Crim. Justice 395-415 (1995).
2. 382 U.S. 296, (1966).
3. 382 U.S. 299, (1966).
4. Note, *Shoplifting Law: Constitutional Ramifications of Merchant Detention*, 1 Hofstra L. Rev. 295, 310 (1973).
5. 18 U.S.C. §24132-2412 (1985).
6. James S. Kakalik and Sorrel Wildhorn, Private Police in the United States: Findings and Recommendations (1971).

7. Private Security, Report of the Task Force on Private Security National Advisory Committee on Criminal Justice Standards and Goals (1976). *See also* William C. Cunningham, John J. Strauchs, and Clifford W. VanMeter, Private Security Trends 1970 to 2000: The Hallcrest Report 322 (1990).
8. Private Security, Report of the Task Force on Private Security National Advisory Committee on Criminal Justice Standards and Goals 121 (1976); *see also* H. E. Barrineau, *Civil Liability in Criminal Justice* 2d ed (1994); Katheryn K. Russell, The Color of Crime (1998).
9. 835 P.2d 458 (Ariz. App. 1992).
10. A.R.S. § 32-2425.
11. A.R.S. § 32-2427.
12. *Shorten v. Milbank*, 170 Misc. 905, 11 N.Y.S.2d 387 (1939), *aff'd* 256 App. Div. 1069, 12 N.Y.S.2d 583 (1939).
13. *Landi v. Arkules*, 835 P.2d 458, 467 (Ariz. App. 1992).
14. *Schanuel v. Anderson*, (1982, SD Ill) 546 F. Supp. 519, *Aff'd* (CA7 Ill) 708 F.2d 316.
15. *Smith v. Fussenich* (1977, DC Conn.) 440 F. Supp. 1077.
16. *See generally Regulation of Private Detectives*, Private Investigations and Security Agencies, 86 ALR 3d 691; Jeff Maahs and Craig Hemmens, *Train in Vain: A Statutory Analysis of Security Guard Training Requirements* 22 Internat'l J. Comp. & Applied Crim. Justice 91-101 (1998); *Courses and Seminars*, Internat'l Security Rev., (Nov/Dec 1997) at 12.
17. *See Stewart v. County of San Mateo*, 246 Cal. App. 2d 273, 54 Cal. Rptr. 599 (1966).
18. *State v. Zittel*, 77 Wash. 2d 366, 462 P.2d 944 (1969); *N.C. Assoc. of Licensed Detectives v. Morgan*, 17 NC App. 701, 195 S.E.2d 357 (1973); *Norwood v. Ward*, 46 F.2d 312, *aff'd*. 283 U.S. 800, 75 L. Ed. 1422, 52 S. Ct. 494 (1930).
19. *See generally People v. Ro'Mar*, 559 P. 2d 710, 86 ALR 3d 687 (1977); *Martin v. Conlisk*, 347 F. Supp. 262, (DC Ill. 1972); *In Wackenhut Corp. v. Calero*, 362 F. Supp. 715 (DC Puerto Rico 1973).
20. 86 A.L.R. 829 (Supp. p.49).
21. *See ABC Security Service, Inc. v. Miller*, 514 S.W. 2d 521 (1974); *For contra: Schulman v. Kelly*, 54 NJ 364, 255 A. 2d 250 (1969).
22. *State v. Guardsmark*, 190 N.W. 2d 397 (1971).
23. *In Re Application of Hitchcock*, 34 Cal. App. 111, 166 P. 849 (1917); *In Re Berardi*, 23 NJ 485, 129 A. 2d 705, 63 ALR 2d 769 (1957).
24. *See Regulation of Private Detectives*, Private Investigations and Security Agencies, 86 ALR 3d 761.
25. 190 N.W. 2d 397 (1971).
26. *Regulation of Private Detectives*, Private Investigations and Security Agencies, 86 ALR 3d 761.
27. *State v. Guardsmark*, 190 N.W. 2d 397 (1971).
28. 102 Mo. 356, 14 S.W. 565 (1890).
29. *State v. Bennett*, 102 Mo. 356, 14 S.W. 565 (1890).
30. 128 Cal. App. 2d 219, 275 P. 2d 579 (1954).
31. 128 Cal. App. 2d 219, 275 P. 2d 579 (1954); *See also Donkin v. Director of Professional and Vocational Standards*, 240 Cal. App. 2d 193, 49 Cal Rptr. 495 (1966).
32. 230 Cal. App. 2d 568, 41 Cal. Rptr. 263 (1964). *See also Agency for Investigation and Detection, Inc. v. Department of State*, 19 NY 2d 764, 279 NYS 2d 522, 266 NE 2d 310 (1965).

33. 230 Cal. App. 2d 568, 41 Cal. Rptr. 263 (1964).
34. 514 S.W.2d 521 (1974).
35. *In Re Berardi*, 23 NJ 485, 129 A. 2d, 705 63 ALR 2d 767 (1957); s*ee also People v. King*, 388 Misc. 2d 665, 238 NYS 2d 697, 194 N.E. 2d 131 (1963).
36. 569 P. 2d 455 (1977).
37. Schnabalk, *The Legal Basis of Liability, Part II*, 27 Sec. Mgmt. 29 (Jan. 1983).
38. *See W.T. Grant Co. v. Superior*, 23 Cap. App. 3d 284 (1972); *N.Y. Central and Hudson Railroad v. U.S.*, 212 U.S. 481 (1908); *People v. Canadian Fur Trappers Corp.*, 248 N.Y. 157, 161 N.E. 455 (1928); *see generally Shirley* Baccus-Lobel, *Criminal Law* 52 SMU L. Rev. 881, 910-11 (1999); R. V. del Carmen, *An Overview of Civil and Criminal Liabilities of Police Officers and Departments* 9 Am J. Crim. L. 33 (1981); R. V. del Carmen, *Civil and Criminal Liabilities of Police Officers* in T. Barker and D. L. Carter (eds.), Police Deviance (1994); R. V. del Carmen and V. E. Kappeler, *Municipal and Police Agencies as Defendants: Liability for Official Policy and Custom* 10 Am J. Police 1-17 (1991).
39. Arthur J. Bilek, John C. Klotter, and R. Keegan Federal, Legal Aspects of Private Security 144 (1980).
40. Schnabalk, *The Legal Basis of Liability, Part II*, 27 Sec. Mgmt. 29 (Jan. 1983).
41. *See* Charles P. Nemeth, Criminal Law 183-187 (2004); Roger T. Weitkamp, *Crimes and Offenses*, 16 Ga. St. U. L. Rev. 72, 73 (1999); Gloria F. Taft and Valeree R. Gordon, *Criminal Law (Legislative Survey—North Carolina),* 21 Campbell L. Rev. 353, 353 (Sp. 1999); Keith D. Harries, Serious Violence: Patterns of Homicide and Assault in America (1990).
42. For a representative statute *see:* Ga. Code Ann. § 16-5-20(2) (2001).
43. *See* Model Penal Code § 211.1© (Proposed Official Draft 1962).
44. S*ee* Ga. Code Ann. § 16-5-20(1) (2001); Model Penal Code § 211.1(a) (Proposed Official Draft 1962).
45. Also called "assault and battery" or "aggravated assault" in some jurisdictions.
46. *See State v. Humphries*, 21 Wash. App. 405, 586 P.2d 130 (1978).
47. *See* Model Penal Code §211.1(2) (Proposed Official Draft 1962).
48. *See* Model Penal Code §211.1(2) (Proposed Official Draft 1962).
49. *See* Charles P. Nemeth, Criminal Law 178-179 (2004). *See also* Neb. Rev. Stat. § 38-314 (2001); Model Penal Code § 212.3 (Proposed Official Draft 1962); 18 Pa. Cons. Stat. Ann. § 2903 (2001); Colo. Rev. Stat § 18-3-303 (2001).
50. *See* Charles P. Nemeth, Criminal Law 254-263 (2004); Roger T. Weitkamp, *Crimes and Offenses*, 16 Ga. St. U. L. Rev. 72, 73 (1999); Gloria F. Taft and Valeree R. Gordon, *Criminal Law (Legislative Survey—North Carolina),* 21 Campbell L. Rev. 353, 353 (Sp. 1999); James Gibson, *How Much Should Mind Matter? Mens Read in Theft and Fraud Sentencing*, 10 Fed. Sentencing Rep. 136, 137 (Nov-Dec 1997).
51. *See* Charles P. Nemeth, Criminal Law 128-132 (2004); *see also* Pamela K. Lattimore and Cynthia A. Nahabedian, The Nature of Homicide: Trends and Changes (1997); Marvin E. Wolfgang, Patterns in Criminal Homicide (1975).
52. Jeremy Horder, Provocation and Responsibility (1992); Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 Mod. L. Rev. 467 (1988); Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. Crim. L. & Criminology 421 (1982); Finbarr McAuley, *Anticipating the Past: The Defense of Provocation in Irish Law*, 50 Mod. L. Rev. 133 (1987); Andrew von Hirsch and Nils Jareborg, Provocation and Culpability in Responsibility, Character, and the Emotions 241 (Ferdinand Schoeman ed., 1987).

53. *See* Charles P. Nemeth, Criminal Law 115-128 (2004); *see also:* 2 Francis Wharton, Wharton's Criminal Law (Charles E. Torcia ed., 15th ed. 1993); Shirley Baccus-Lobel, *Criminal Law* 52 SMU L. Rev. 881, 910-11 (1999); John Rockwell Snowden, *Second Degree Murder, Malice, and Manslaughter in Nebraska: New Juice for an Old Cup*, 76 Neb. L. Rev. 399, 410 (1997).
54. *See* Charles P. Nemeth, Criminal Law 377, 378-379 (2004); *see also* William L. Clark and William L. Marshall, *A Treatise on the Law of Crime* (6th ed 1958); *People v. Burt*, 45 Cal.2d 311, 288 P.2d 503 (1955).
55. *Ex parte Moore*, 70 Cal. App. 483, 356 U.S. 369 (1952).
56. *See* Charles P. Nemeth, Criminal Law 377, 385-391 (2004); J. F. McSorley, Portable guide to federal conspiracy law: Developing Strategies for criminal and civil cases (1996).
57. *See* Arthur J. Bilek, John C. Klotter, and R. Keegan Federal, Legal Aspects of Private Security 152 (1980); *Sears v. U.S.*, 343 F 2d 139 (5th Cir. 1965); *State v. St Christopher,* 232 40 N.W. 2d 798 (1975).
58. National Institute of Justice, Crime and Protection in America, A Study of Private Security and Law Enforcement Resources and Relationships (1985). *See* Charles P. Nemeth, Criminal Law 389-407 (2004); s*ee* Russell L. Christopher, *Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights . . . ?* 85 J. Crim. L. & Criminology 295 (1994); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse,* 84 Colum. L. Rev. 1897 (1984); George P. Fletcher, *The Right and the Reasonable*, 98 Harv. L. Rev. 949 (1985); 2 Paul H. Robinson, Criminal Law Defenses, §3-3, Model Codifications, app. A (1984).
59. George E. Dix and Michael M. Sharlot, Basic Criminal Law Cases and Materials 527 (1980).
60. William C. Cunningham and Todd H. Taylor, The Hallcrest Report, Private Security and Police in America 92 (1985).
61. Site Surveys of Security Employees, Baltimore County, Maryland and Multnomah County (Portland), Oregon metropolitan areas. Hallcrest Systems, Inc., 1982. Stoneham, MA: Butterworth–Heinemann.
62. The American Law Institute, Model Penal Code §3.04 (1962).
63. The American Law Institute, Model Penal Code §3.04 (1 & 2) (1962).
64. For more information on the subject *see:* Charles P. Nemeth, Criminal Law 401-407 (2004); *see also* Russell L. Christopher, *Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights . . . ?* 85 J. Crim. L. & Criminology 295 (1994); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse,* 84 Colum. L. Rev. 1897 (1984); George P. Fletcher, *The Right and the Reasonable*, 98 Harv. L. Rev. 949 (1985); 2 Paul H. Robinson, Criminal Law Defenses, §3-3, Model Codifications, app. A (1984).
65. Summary of Pennsylvania Jurisprudence 2d, Criminal Law §7.19.
66. William C. Cunningham and Todd H. Taylor, The Hallcrest Report, Private Security and Police in America 94 (1985).
67. *See* Charles P. Nemeth, Criminal Law 407-408 (2004); *see* Russell L. Christopher, *Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights . . . ?* 85 J. Crim. L. & Criminology 295 (1994); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse,* 84 Colum. L. Rev. 1897 (1984); George P. Fletcher, *The Right and the Reasonable*, 98 Harv. L. Rev. 949 (1985); 2 Paul H. Robinson, Criminal Law Defenses, §3-3, Model Codifications, app. A (1984).

68. The American Law Institute, Model Penal Code §3.05(1) (1962).
69. *U.S. v. Peterson*, 483 F. 2d 1222, 1223 (1973); *see also State v. Goodseal*, 186 Neb. 359, 183 N.W. 2d 258 (1971); *Commonwealth v. Martin*, 369 Mass. 640, 341 N.E. 885 (1976); *Commonwealth v. Monico*, 373 Mass. 298, 366 N.E. 2d 1241 (1977).
70. Summary of Pennsylvania Jurisprudence 2d, Criminal Law 7:26.
71. Center For Criminal Justice, Private Police Training Manual 200 (1985).
72. Center For Criminal Justice, Private Police Training Manual 200 (1985).
73. The American Law Institute, Model Penal Code §3.06 (1962).
74. The American Law Institute, Model Penal Code §3.06 (1) (1962).
75. *See* Charles P. Nemeth, Criminal Law 408-409 (2004); *see* Russell L. Christopher, *Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights . . . ?* 85 J. Crim. L. & Criminology 295 (1994); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse,* 84 Colum. L. Rev. 1897 (1984); George P. Fletcher, *The Right and the Reasonable*, 98 Harv. L. Rev. 949 (1985); 2 Paul H. Robinson, Criminal Law Defenses, §3-3, Model Codifications, app. A (1984).
76. Summ. Pa. Jur. 2d, Criminal Law § 7:36.
77. The State of New Jersey recently expanded the right of the homeowner to protect his or her interests with deadly force.
78. *State v. Miller*, 267 N.C. 409, 411, 148 S.E. 2d 279, 281 (1966); *see also Law v. State*, 21 Md. App. 13, 318 A. 2d 859 (1974); *People v. Givens*, 26 Ill. 2d 371, 186 N.E. 2d 255 (1962).
79. Private Security, Report of the Task Force on Private Security National Advisory Committee on Criminal Justice Standards and Goals 127 (1976); *see also:* Will Aitchison, *The Rights of Law Enforcement Officer* 4th ed. (2000); R.V. Del Carmen *Criminal Procedure For Law Enforcement Personnel* 5th ed. (2001); R. V. del Carmen and V. E. Kappeler, *Municipal and Police Agencies as Defendants: Liability for Official Policy and Custom* 10 Am J. Police 1-17 (1991); S. M. Ryals, Discovery and Proof In Police Misconduct Cases (1995).
80. William C. Cunningham and Todd H. Taylor, The Hallcrest Report, Private Security and Police in America 264 (1985).
81. *People v. Oxnell*, 166 N.W. 2d 279 (1968); *see also:* Will Aitchison, *The Rights of Law Enforcement Officer* 4th ed. (2000); R.V. Del Carmen *Criminal Procedure For Law Enforcement Personnel* 5th ed. (2001); R. V. del Carmen and V. E. Kappeler, *Municipal and Police Agencies as Defendants: Liability for Official Policy and Custom* 10 Am J. Police 1-17 (1991); S. M. Ryals, Discovery and Proof In Police Misconduct Cases (1995).
82. Joan E. Marshall, *The At-Will Employee and Coerced Confessions of Theft: Extending Fifth Amendment Protection to Private Security Guard Abuse* 96 Dickinson L. Rev. 37, 40 (1991).
83. *Curly v. Cumberland Farms, Inc.*, 13 F.R.D. 77 (D. N.J. 1991).
84. Joan E. Marshall, *The At-Will Employee and Coerced Confessions of Theft: Extending Fifth Amendment Protection to Private Security Guard Abuse* 96 Dickinson L. Rev. 37, 57 (1991); *see also* Will Aitchison, *The Rights of Law Enforcement Officer* 4th ed. (2000); R.V. Del Carmen Criminal Procedure for Law Enforcement Personnel 5th ed. (2001); R. V. del Carmen and V. E. Kappeler, *Municipal and Police Agencies as Defendants: Liability for Official Policy and Custom* 10 Am J. Police 1-17 (1991); S. M. Ryals, Discovery and Proof in Police Misconduct Cases (1995).

85. 341 U.S. 97 (1951)
86. *Williams v. U.S.*, 341 U.S. 97 (1951); *City of Grand Rapids v. Impens*, 327 N.W. 2d 278 (1982).
87. 512 P. 2d 923 (1973).
88. *See Griffin v. Maryland*, 378 U.S. 130 (1964); *People v. Jones*, 393 N.W. 2d 443, 25 CRL 2384 (1979).
89. *See People v. Faulkner*, 90 Mich. App. 520, 282 N.W. 2d 377 (1979).
90. R. Keegan Federal and Jennifer L. Fogleman, Avoiding Liability in Retail Security, A Casebook 168-169 (1986), citing and quoting *Metigoruk v. Anchorage*, 655 P. 2d 1317 (1982).
91. Substantial authority concurs with the judgment of both the California and Alaska Supreme Courts regarding *Miranda* rights though given the Cumberland case, opinion may shift. *See Jelks v. State*, 411 So. 2d 844 (1982); *Bowman v. State of Indiana*, 468 N.E. 2d 1064 (1984).
92. Courtesy of the Mt. Lebanon Police Department, Pennsylvania.
93. Courtesy of the Mt. Lebanon Police Department, Pennsylvania.
94. 15 F.Supp.2d 433 (N.J. 1998).
95. *Abraham v. Raso,* 15 F.Supp.2d 433, 450 n.14 (N.J. 1998).

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6

The Enforcement of Laws and the Interpretation of Evidence

INTRODUCTION: PRIVATE SECURITY'S ROLE IN ENFORCING THE LAW

Private security is an indispensable cog in the American machinery of justice. Previous commentary outlines the Herculean contributions made by the industry in the protection of social and economic order. Even private security's harshest, most strident critics realize that without the services of private security, a gaping, colossal protection vacuum would exist in the delivery of justice and related services. Public policing alone simply cannot fend off the escalating criminality or solely assure the integrity of communities.

It is common knowledge that the security industry performs numerous functions, from crowd control to physical perimeter protection in public and private installations, and deterrent and preventative activities regarding shoplifting and other corporate crime. But precisely which laws, statutes, or specific violations is the industry chiefly concerned with? Which criminal statutes do private security interests chiefly interpret? To answer these and other related inquiries, a summary of relevant criminal violations, an assessment of criminal liability, and an evidentiary overview follows.

DEFINING CRIMINAL LIABILITY

Before private security operatives can intelligently detect or enforce criminal behavior, they must have some basic understanding of what constitutes a criminal act. All crimes basically consist of two elements:

1. The criminal act: *actus reus*
2. The mental intent: *mens rea*

The Criminal Act (*Actus Reus*)

Naturally, criminal liability cannot occur without a deed, an act, an offense, or an omission of specifically enumerated conduct. Merely thinking about crimes, with rare exceptions, is not criminally punishable. Thoughts, no matter how bizarre or perverted, are not punishable unless put into effect. Thus, in order to be found guilty of theft, an individual has to take some steps toward the unlawful taking of another's property. He or she may think obsessively about the desire to be in possession, but until some overt act or course of conduct is chosen, there is no *actus reus*.[1]

A criminal act must be a voluntary act. The law does not hold accountable those individuals who are incapacitated or operating against their will, by either duress or coercion, or suffering from related or corollary disease or mental defect that substantially impacts the mental faculty.[2] The American Law Institute's *Model Penal Code*, in its proposed 1962 draft, defines the nature of a voluntary act for criminal liability purposes.

> *Requirement of Voluntary Act; Admission as Basis of Liability; Possession Is an Act.*
> (1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.
> (2) The following are not voluntary acts within the meaning of this Section.
> (a) a reflex or convulsion;
> (b) a bodily movement during unconsciousness or sleep;
> (c) conduct during hypnosis or resulting from hypnotic suggestion;
> (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.
> (3) Liability for the commission of an offense may not be based on an omission unaccompanied by action unless;
> (a) the omission is expressly made sufficient by the law defining the offense; or
> (b) the duty to perform the omitted act is otherwise imposed by law.[3]

In sum, criminal liability does not attach unless the prosecution can demonstrate an act that is voluntary and not the result of unintentional, accidental, or nonvolitional circumstances. Acts by omission, that is, a failure to act when the law so dictates, such as the case of a parent who neglects his child, or fails to save the child when in peril, are also within the definition of *actus reus*.[4]

An incident report form, like Figure 6.1,[5] aids the security investigator in determining the nature of the act.

INCIDENT REPORT

For Administration:

	Return for:		Visitor
	More Information		Other
	Follow-Up Report		
	Reviewed	DATE	
	Date		
	Forwarded to		

LAST NAME	FIRST NAME	M.I.	AGE	SEX

ADDRESS	CITY	STATE	SINGLE	MARRIED
			DIVORCED	WIDOWED

PHONE	OCCUPATION

NATURE OF OCCURRENCE

WHAT HAPPENED?

HOW DID IT HAPPEN?

WHY DID IT HAPPEN?

WHO REPORTED INCIDENT?

REMEDIAL MEASURES TAKEN

INVESTIGATION

Figure 6.1 Incident report.

PHYSICAL FINDINGS	
COMMENTS	
PERTINENT COMMENTS MADE BY PERSON INVOLVED	
COMMENTS MADE BY PERSON REPORTING	
HOW COULD THIS SITUATION HAVE BEEN PREVENTED?	
WITNESSES	
NAME OR SIGNATURE OF WITNESS	NAME OR SIGNATURE OF WITNESS
NAME OR SIGNATURE OF WITNESS	NAME OR SIGNATURE OF WITNESS
FINAL DISPOSITION	
SIGNATURES	
SIGNATURE OF PERSON IN CHARGE	SIGNATURE OF EXAMINING DOCTOR
SIGNATURE OF DIR. OF NURSING SERVICE	SIGNATURE OF ADMINISTRATOR

Figure 6.1 Continued

The Criminal Mind (*Mens Rea*)

Determining the state of one's mind, the *mens rea*, is a much more complicated exercise than the proof of a criminal act. It has long been a major tenet of American jurisprudence that persons not in control of their mind, nor fully functional in mental state, are less likely to be criminally

responsible. Subjectively or objectively appraising what is in a person's mind is an elusive undertaking. How do we know what a person is thinking at the time of offense? While most scholars and academics concede that there is such a thing as *mens rea*, it is, nevertheless, very subjective and difficult to prove.[6] That defendants intend the consequences of certain action is clear. How exactly and at what level they do is harder to quantify.

Consider the various descriptive adjectives and adverbs that are utilized to describe a person's state of mind:

- Felonious intent
- Criminal intent
- Malice aforethought
- Premeditated
- Guilty knowledge
- Fraudulent intent
- Willful with scienter
- With guilty knowledge
- Maliciously
- Viciously
- Intentionally
- With gross disregard
- With depraved heart
- With an evil purpose
- Wantonly
- Lawfully
- Without justification
- With a corrupted mind
- Criminally negligent
- With disregard for human life
- With depraved indifference
- With moral turpitude
- Without justification
- Overtly
- With mischievous intent[7]

Admittedly, these terms can never fully describe the actor's mind but, at best, infer from a conduct's level of intentionality. In a sense, the *mens rea* codifications attempt to categorize malefactors and their respective mental states. Diverse descriptive states of culpability have been encompassed in the *Model Penal Code.* Some portions are reproduced below:

> *General Requirements of Culpability*.
> (1) *Minimum Requirements of Culpability.* Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently as the law may require, with respect to each material element of the offense.

(2) *Kinds of Culpability Defined.*

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct . . .

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances . . .

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involved the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or he knows such circumstances exist; and

(ii) if the element involves the result of his conduct he is aware that it is practically certain that his conduct will cause such a result.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct . . . .

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.[8]

Security professionals should be vigilant in their assessment of facts and conditions at a crime scene because conduct can be explained in more than one way. Instead of always assuming a crime, look for secondary explanations, such as mistake of fact or law regarding a right to property; inadvertent entry rather than an unlawful trespass; an act of self-defense rather than an offensive touching. Security investigators and officers must not assume that the act is coupled with a criminal mind. Neither the act nor the mind alone will suffice since "criminal liability is predicated upon a union of act and intent or criminal negligence."[9]

CLASSIFICATION OF OFFENSES AND RELATED PENALTIES

Statutory guidelines also characterize criminal behavior into various classifications or types. Those classifications generally include:

- Felony[10]
- Misdemeanor[11]

- Summary offense[12]
- Treason[13] and other infamous crimes

The security industry's concern will be the detection and apprehension of misdemeanants and felons whose crimes comprise the basic menu of criminal charges including: assault, battery, theft and related property offenses, sexual offenses, intimidation and harassment, and white collar crime including forgery, credit card fraud, and the like. Treason and other infamous crimes emerge in cases of international terrorism and homeland security. The entire airspace industry is dependent upon personnel not only trained in security issues, but also the criminal law issues that surround breaches of security at airport facilities. Summary offenses generally consist of public order violations, including failure to pay parking tickets, creating a temporary obstruction in a public place, public intoxication, or other offenses of a less serious nature that are rarely punishable by a term of imprisonment,[14] but are regularly witnessed by the security professional, like lower-level shoplifting.

At common law, the designation of an act as a felony constituted an extremely serious offense. Penal and correctional response to felony behavior included the death penalty and forfeiture of all lands, goods, and other personal property. Generally, a felony was any capital offense, namely murder, manslaughter, rape, sodomy, robbery, larceny, arson, burglary, mayhem, and other violent conduct.[15] An alternative way of defining a felony was the *severity* of its corresponding punishment. Felony was defined "to mean offenses for which the offender, on conviction, may be punished by death or imprisonment in the state prison or penitentiary; but in the absence of such statute the word is used to designate such serious offenses as were formally punishable by death, or by forfeiture of the lands or goods of the offender."[16] In other words, a crime could be a felony or a misdemeanor not because of its severity or subsequent impact but due to the term of incarceration. Modern criminal analysis shows a confused and perplexing legislative decision making on the nature of a felony and a misdemeanor. The President's Commission on Law Enforcement and Administration of Justice, in its *Task Force Report on the Courts,*[17] relates:

> A study of the Oregon Penal Code revealed that 1,413 criminal statutes contained a total of 466 different types and lengths of sentences. The absence of legislative attention to the whole range of penalties may also be demonstrated by comparisons between certain offenses. A recent study of the Colorado Statutes disclosed that a person convicted of a first degree murder must serve ten (10) years before becoming eligible for parole, while a person convicted of a lesser degree of the same offense must serve at least fifteen (15) years; destruction of a house with fire is punishable by a maximum twenty (20) years imprisonment, but destruction of a house with explosives carries a ten (10) year maximum. In California, an offender who breaks into an automobile to steal the contents of the glove compartment is subject to a fifteen (15) year

> maximum sentence but if he stole the car itself, he would face a maximum ten (10) year term.
> Although each offense must be defined in a separate statutory provision, the number and variety of sentencing distinctions which result when legislatures prescribe a separate penalty for each offense are among the main causes of the anarchy in sentencing that is so widely deplored.[18]

In defining the term misdemeanor, legislatures and jurists use a process of elimination holding that an offense not deemed a felony is, deductively, a misdemeanor. Usually misdemeanors are offenses punishable by less than a year's incarceration. The popular perception that misdemeanors are not serious offenses may be a faulty impression. Criminal codes surprise even the most seasoned justice practitioner, who frequently finds little logic in an offense's definition, resulting classification, and corresponding punishment. For examples of this confusion, review selected state code provisions on "sexual offenses."[19]

SPECIFIC TYPES OF CRIMES AND OFFENSES

Offenses against the Person

Felonious Homicide

The security industry cannot avoid the ravages of criminal homicide. Criminal acts of homicide are being recorded due to the installation, maintenance, and operational oversight of electronic surveillance systems and other technological equipment utilized to protect the internal and external premises of businesses. As the public sector continues to transfer and privatize many of its traditionally public police functions, such as in the area of courtroom and prison security, violent acts of homicide are unfortunately replayed. Airport terrorism, failed executive protection programs, and attempted or actual homicides on armored car money carriers are other distressing examples of criminal homicide. This subsection will deal only with felonious acts of homicide, and the security professional is reminded that nonculpable homicide occurs in cases of self-defense, necessity in time of war, or by legal right, authority, or privilege.[20] Criminal homicide is defined by the *Model Penal Code* as follows:

> *Criminal Homicide*
> (1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.
> (2) Criminal homicide is murder, manslaughter or negligent homicide.[21]

The *Model Penal Code*, after this general legislative introduction, precisely defines each type of homicide.

Murder

A charge of murder will be upheld when,

> (a) it is committed purposely or knowingly; or
> (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape, deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.[22]

The statute, as suggested, requires a high level of mental faculty. While the law of criminal intent varies, most major capital offenses require what is known as *specific intent*.[23] Specific intent can be loosely described as premeditation or a mind possessive of malice aforethought. In other words, the criminal actor wants, desires, wishes, knows, and realizes the ramifications and repercussions of his or her activity. Although the law does not require an intelligent or an esoteric thinker, there is a clear, lucid mindset operating. The level of mind required for a charge of murder was clearly discerned in a Michigan case, *People v. Moran*.[24]

> Malice aforethought is the intention to kill, actual or implied, under circumstances which do not constitute excuse or justification or mitigate the degree of the offense of manslaughter. The intent to kill may be implied where the actor actually intends to inflict great bodily harm or the natural tendency of his behavior is to cause death or great bodily harm.[25]

Despite the legal attempts to objectify mental intentions, there will always be subjective underpinnings. The security practitioner must gauge conduct in light of all circumstances. He or she must ask him or herself whether the facts of a given case lead a reasonable person to the conclusion that the person not only knew what they were doing but also strongly desired to follow through.

Manslaughter

Most jurisdictions further gradate felonious homicide into another central category: *voluntary or involuntary manslaughter*.[26] While specific intent is always required for a charge of murder, actions and conduct that are not as intellectually precise and not as free from influential mitigating factors and other issues sometimes qualify for a less rigorous mental state, that of *general intent*.[27] This is not to say that jurisdictions do not have a specific intent requirement for a manslaughter charge. But on the whole, a charge of manslaughter, whether voluntary or involuntary, has a significantly

smaller burden of proof regarding the actor's objective state of mind. A sample statute is reproduced below.

> 2503. *Voluntary Manslaughter*
> (a) General rule—A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
> (1) the individual killed; or
> (2) another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed.[28]
>
> 2504. *Involuntary Manslaughter*
> (a) General rule—A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person.[29]

Compared to the murder statute, the language of the voluntary manslaughter provision permits an evaluation of various mitigating circumstances including: provocation, intense and emotional passion, and sudden and impetuous events.[30] In involuntary cases, the issue of gross negligence is appropriately weighed. In these cases, the court instructs the jury on the negligent nature of the act that causes harm. The defendant need not specifically intend the commission of any crime but could have or should have known the consequences. These are acts, mistaken and accidental in nature, unresponsive to others. Cases of automobile manslaughter or the mishandling of weapons while in a drunken stupor are good examples. In security settings, manslaughter is a more common event, particularly since practitioners are often called upon in hostile crowd control situations, in the maintenance of order at special events, and related activities.

Felony Murder Rule

Whether the jurisdiction has a *felony murder rule* in operation is another security concern. As outlined in the Code Section 210.1(a) above on Criminal Homicide, a charge of murder is appropriate when any individual dies during the commission of any major capital felony.[31] Coconspirators, accomplices, or other individuals, even though they did not pull the trigger, plan the murder, or personally wish or desire for the death of another can be felony murderers. The felony murder rule has been the subject of severe legal challenges in recent years. "There has been a discernible but not universal trend towards limiting the felony murder doctrine … the trend seems to be related to increasing skepticism as the extent to which the felony murder rule in fact serves a legitimate function or at least as to whether it serves its function or functions at an acceptable cost."[32] The most heated debate occurs when two or more persons are

engaged in a theft, robbery, or burglary, obviously less serious offenses than murder or manslaughter, and someone dies by accident or negligence.[33] However, the strict liability nature of the felony murder rule forces criminals to think of the possible potential ramifications of their behavior, which surely includes the death of the participants and bystanders, during the commission of a felonious act.

Assault

Aside from theft actions, no other crime is as regularly witnessed as assault and battery. In Chapter 4, there is a thorough analysis of the civil context and nature of an assault action. At common law, assault and battery were separate offenses, the former being a threat to touch or harm and the latter being the actual offensive touching. Most all jurisdictions have merged, at least in a criminal context, assault and battery, yet still classify the act by severity and degree. The *Model Penal Code* proposed draft poses the following:

> *Assault*
> (1) *Simple Assault.* A person is guilty of assault if he:
> (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
> (b) negligently causes bodily injury to another with a deadly weapon; or
> (c) attempts by physical menace to put another in fear of imminent serious bodily harm.
> (2) *Aggravated Assault.* A person is guilty of aggravated assault if he:
> (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
> (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.[34]

In the life of a security operative, a myriad of human circumstances will encompass assault activity. In their efforts to control crowds, secure buildings and installations, apprehend or detain a disgruntled employee, break up disputants in commercial establishments, and handle unruly and disgruntled shoppers in retail establishments, the agents of security enterprises will see it all.

Assault can be an extremely serious offense, particularly under the "aggravated" provision.[35] In fact, some jurisdictions have adopted *reckless endangerment*,[36] a new statutory design that describes even more severe conduct. See the example below:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.[37]

Also of concern to the security professional is the legislative reaction to domestic and international terrorism. It behooves security policy makers and planners to educate themselves as well as their staff on these criminal acts and corresponding statutes:

- Terrorist threats
- Use of tear gas or other noxious substances
- Harassment
- Ethnic intimidation[38]

Any injuries alleged can be recorded in the Personal Injury Report shown in Figure 6.2.[39]

Kidnapping and False Imprisonment

Kidnapping and false imprisonment actions are relevant to the security industry because of their executive protection and counterterrorism roles. Kidnapping consists of the unlawful confinement or restraint of a victim, with an accompanying movement or transportation, for a purpose of ransom, political benefit, or other motivation, including the desire to inflict harm. Statutorily, the *Model Penal Code* requires proof of these elements:

> *Kidnapping*
> A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:
> (a) to hold for ransom or reward, or as a shield or hostage; or
> (b) to facilitate commission of any felony or flight thereafter; or
> (c) to inflict bodily injury on or to terrorize the victim or another; or
> (d) to interfere with the performance of any government or political function.[40]

Legal scholars and practitioners have contested the transportation or "carrying away" requirement. Modern interpretation, which is generally rather liberal, rejects the view of geographic transfer that is from one locale to another, and adopts the "any movement" standard as being sufficient.[41] Contemporary jurisprudence also has looked far beyond the money element as being the typical motivation or rationale for a kidnapping case. The Lindbergh baby kidnapping had much to do with fostering this image.

Security professionals who detain or restrict the movements of a consumer in retail settings, not protected by merchants' privilege or other statutory immunity may be criminally liable for false imprisonment. False imprisonment is both a civil and criminal action. A sample definition is reproduced below:

PERSONAL INJURY REPORT FORM Director Security/Safety				
SECTION 1: (TO BE COMPLETED BY PERSON INJURED)				
A.	Name	Age	Sex	S.S.#
	Address		Phone	
B.	Dept. in Which Employed			
	If Student Employee:	On Duty	Off Duty	
C.	Date and Time of Accident			
D.	Place of Accident			
	What Were You Doing?			
	How Accident Occurred:			
E.	Witnesses			
	Dept. or Address		Tele. No.	
F.	Injury Received			
	Treatment Received			
	By Whom: (Name)			
G.	Where (Address)		Tele. No.	
	Person Injured Signature		Date	

Figure 6.2 Personal injury report

False Imprisonment
A person commits a misdemeanor if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.[42]

Any security-based investigation, whereby a suspect's freedom to move is abridged, rightly or wrongly, can give rise to the claim of false imprisonment. Kelley V. Rea, a principal in the security firm Legal and Security Services, Ltd., highlights this ongoing risk.

SECTION 2: (TO BE COMPLETED BY IMMEDIATE SUPERVISOR)					
	Do You Agree with Above Information?			Yes	No
	If "No" — Your Statement on Reverse Side				
	Did Employee Lose Time ?	Yes	No	How Much	
	Dates Absent Due to Accident			Days	Hrs
	Was There Any Unsafe Act ?			Yes	No
If Yes Explain					
Any Unsafe Condition				Yes	No
If Yes Explain					
Recommendation					
Signature of Supervisor			Date		

Figure 6.2 Continued

> We also continue to read a surprising number of cases, arising out of investigations, with allegations of false imprisonment and infliction of emotional distress. Where a person is held against his or her will or where that person is subjected to "outrageous" conduct, such charges may arise. Conducting an "interview" that lasts more than an hour and giving the person interviewed the impression that he or she is not free to leave may trigger a charge of false imprisonment. Long, tough, threatening questioning, particularly if physical threats are made or physical force used, will often lead to infliction of emotional distress allegations.[43]

The litigiousness of making an accusation or claim should at least prompt a cautious approach on the security claim operative. In cases of criminal conduct, it may be sound to completely turn over the case to public law enforcement.

Sexual Offenses

Those entrusted with the task of ensuring safe business and industrial environments now must consider the ramifications of illegal sexual interaction between employers and employees and the increasing sexual victimization of guests, invitees, or licensees on the premises. The investigation and identification of sexual misconduct in the workplace is a major security responsibility. The tragic violence of rape and aggravated sexual assault will, can, and does occur in any social, commercial, or business setting.[44] The *Model Penal Code*'s sample statute is outlined below.

Rape and Related Offenses

(1) *Rape.* A male who has sexual intercourse with a female not his wife is guilty of rape if:
   (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or
   (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants, or other means for the purpose of preventing resistance; or
   (c) the female is unconscious; or
   (d) the female is less than ten (10) years old.[45]

Proponents of rape law reform have been successful in creating sexual offense legislation that is gender neutral, that does not require a traditional vaginal and penal contact, and does not weigh the substantiality of victim resistance.[46] In business and commercial settings, cases of indecent assault or indecent exposure are not atypical. A representative statute from Pennsylvania covers the standard language:

Indecent assault. A person who has indecent contact with another not his spouse, or causes such other to have indecent contact with him is guilty of indecent assault, a misdemeanor of the second degree, if:
1. He does so without the consent of the other person;
2. He knows that the other person suffers from a mental disease which renders him or her incapable of appraising the nature of his or her conduct;
3. He knows that the other person is unaware that an indecent contact is being committed.[47]

Indecent exposure. A person commits a misdemeanor of the second degree if, for the purpose of arousing or gratifying sexual desire of himself or any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.[48]

Security companies charged with these types of investigations must memorialize complaints in document form. See Figure 6.3.[49]

Cases of sexual harassment are unfortunately recurring phenomena for security advisors and consultants. To ferret out the rues from the legitimate cases of sexual harassment employ the evaluation checklist shown in Figure 6.4.[50]

Offenses against Property

No other area of criminality will affect private security personnel more than crimes involving personal property. Since a critical concern of the private security sector is asset protection, this type of criminality must be dealt with aggressively.[51]

SEXUAL HARASSMENT COMPLAINT FORM

Name

Position

Department

Shift

Immediate Supervisor

Describe the sexual harassment incident.

Who was responsible for the sexual harassment?

List any witnesses to the sexual harassment incident.

Where did the sexual harassment take place?

Identify the date(s) and time(s) that the sexual harassment occurred.

Employee Date

Figure 6.3 Sexual offense documentation.

Client background, demeanor, and attitude

* Does the client appear to be telling the truth?
* Does the client relate her story with fervor and outrage?
* Does the client seem to be telling the truth when the story is approached from different angles?
* Will the client withstand a thorough background investigation?
* Has the client been responsive and truthful in disclosing personal facts?
* Has the client discussed any negative aspects of the case?
* Has the client fully discussed the nature of the sexual or other type of relationship with the person who committed the acts of sexual harassment?
* What kind of family support does the client have during litigation?
* Does the client's family or spouse encourage or discourage the pursuit of this litigation?
* Will the client pursue the litigation despite lack of support from her family or spouse?
* What impact, if any, would the litigation have on the relationship between the client and her family or spouse? Can that relationship withstand intense scrutiny?
* Has the client's accounting of the sexual harassment remained consistent throughout the initial interview and interviews?

Client motives

* What are the motives behind the clients desire to pursue the litigation?
* Is the client seeking revenge?
* Are the client's motives for bringing the matter to litigation sincere and believable?

Client's work record and job performance

* Obtain to the extent possible all relevant information as to the nature of the employment, duties, and functions of the client; attendance records; and work performance.
* Is there a legitimate nondiscriminatory reason that can be advanced by the employer?
* Are there any job evaluations that have been given to the client? If so, by whom?
* What was the relationship between the client and the person who gave the evaluations prior to any of the alleged incidents in question?
* What was the relationship between the client and the person who gave the evaluations after to any of the alleged incidents in question?
* Did the client complain to the employer about the alleged sexual harassment? If so, how many complaints were made, and to whom?
* How were these complaints or grievances handled and resolved?
* What observations or impressions can the client offer as to the resolution of prior grievances?
* Have there been any threats as to job security or the like been made to the client in respect to this litigation? If so, have the proper authorities been notified and has the matter been documented?
* What kind of additional documentation does the client have to support the claim of sexual harassment?
* Did the client make a diary while the incidents of sexual harassment were occurring?
* What are the employer's policies regarding the alleged incidents of sexual harassment?
* Is there a union agreement which may have a bearing on the facts of the case?
* Is there a personnel handbook or other company document which may be construed as a contract? If so, what did the employer promise to do when grievances as to sexual harassment were raised?

Figure 6.4 Sexual harrassment checklist.

Number of potential witnesses

* To the extent possible, verify the experiences of each of the alleged witnesses to ensure the absence of a vindictive motive for agreeing to help the client.
* What kind of cooperation or support from either present or past employees does the client offer?
* Have there been other incidents experienced by other employees similar to that suffered by the client? If so, who were the participants, where are they presently employed, and what (if any) similarities exist?

Other factors and considerations

* What are the statute of limitations or time restrictions involved in the case?
* Is there a requirement that state or federal administrative procedures be exhausted as a prerequisite to litigation?
* Were any unemployment insurance or compensation hearings held? If so, what was the disposition?
* Did the employer give any particular reasons for the cause of the employee's unemployment?
* Was the unemployment compensation hearing taped?
* Were the witnesses under oath?
* Were there any inconsistent statements made by witnesses at the unemployment insurance or compensation hearing?

Figure 6.4 Continued

Arson

Industrial and business concerns have a grave interest in the protection of their assets and real property from arsonists.[52] Around-the-clock security systems, surveillance systems, and electronic technology have done much to aid private enterprise in the protection of its interests.

Arson, as defined in the *Model Penal Code,* includes the following provisions:

> (1) *Arson.* A person is guilty of arson, a felony of the second degree, if he starts a fire or causes an explosion with the purpose of:
> (a) destroying a building or occupied structure of another; or
> (b) destroying or damaging any property, whether his own or another's, to collect insurance for such loss.[53]

Judicial interpretation of arson statutes has been primarily concerned with either the definition of a "structure" or in the proof an actual burning or physical fire damage. *Structure* has been broadly defined as any physical plant, warehouse, or accommodation that permits the carrying on of business or the temporary residents of persons, a domicile, and even ships, trailers, sleeping cars, airplanes, and other movable vehicles or structures.[54] Any burning, substantial smoke discoloration and damage, charring, the existence of alligator burn patterns, destruction and damage

caused as the results of explosives, detonation devices, and ruination by substantial heat meets the arson criteria. Total destruction or annihilation is not required.[55] Most jurisdictions have also adopted related offenses:

- Reckless burning or exploding
- Causing or risking a catastrophe
- Failure to prevent a catastrophe
- Criminal mischief
- Injuring or tampering with fire apparatus, hydrants, etc.
- Unauthorized use or opening of a fire hydrant
- Institutional vandalism[56]

Proving a case of arson can be made easier with Figure 6.5.[57]

Burglary

Of major interest to the security industry is the crime of burglary, a crime whose felonious intent requires an illegal entry into a domicile or other structure for the purpose of committing any felony therein. Clark and Marshall's *Treatise on Crimes*,[58] provides the common law definition of the crime of burglary:

1. The premises must be the dwelling house of another . . .
2. There must be a breaking of some part of the house itself. The breaking must be constructive, as well as actual.
3. There must be an entry. The slightest entry of a hand or even an instrument suffices.
4. The breaking and entering must both be at night; but need not be on the same night.
5. There must be an intent to commit a felony in the house and such intent must accompany both the breaking and entry. The intended felony need not be committed.[59]

Statutory modification of these elements has been quite common. A definition of a dwelling house has been liberally construed and includes: a chicken coop, a cow stable, a hog house, a barn, a smoke house, a mill house, and any other area or any other building or occupied structure.[60] The term "breaking" does not require an actual destruction of property, merely the breaking of a plane or point of entrance into the occupied structure.[61] Additionally, most jurisdictions have reassessed the nighttime determination and made the requirement nonmandatory, though make the time of the intrusion applicable to the gradation of the offense.[62]

Security operatives should, as in all other forms of criminality, take steps to prevent burglaries. See the checklist at Figure 6.6.[63]

TOTAL FIRE INSPECTION REPORT

NAME OF ASSURED: INSPECTION DATE:
ADDRESS: LOSS DATE:
INSURANCE COMPANY & POLICY NUMBER:

SALVAGE EXAMINED AT: (Location) _____
YR. & MAKE OF VEHICLE _____ VIN _____

1. EXTERIOR
   a. Body metal sagged or warped? _____ Where? _____
   b. Glass melted or fused? _____ Where? _____
   c. Any evidence of collision? _____ Where? _____
   d. Have tires and/or wheels been changed? _____ Which ones? _____
   e. Tires burned? _____ Which ones? _____
      Condition _____
   f. Spare in trunk? _____ Condition _____
   g. Exterior mirrors or other accessories missing?_____
      Which ones? _____
   h. Excessive wear in suspension linkage? _____
   i. Any additional observations? _____
      _____

2. INTERIOR
   a. Doors open? _____ Which ones? _____
   b. Windows down? _____ Which ones? _____
   c. Upholstery and trim burned? _____ Extent _____
   d. Floor mats burned? _____ Extent _____
   e. Any evidence of an accelerant? * _____
      Any accelerant container?_____
   f. Any tension left in seat springs? _____
   g. Any evidence of personal property burning? _____
   h. Vehicle equipped with: Radio? _____Missing? _____
      Air conditioning? _____Missing? _____
      Any other accessories? _____Any missing? _____
      Tools? _____Any missing? _____
   i. Ignition key anywhere in evidence? _____

      * Place a sample of charred or unburned upholstery in an airtight container and leave for a few days. If a petroleum product is in the material it may produce an odor when opened. Also a small amount of earth from the scene similarly placed in a container may produce an odor if any flammable liquid overflowed onto the ground.

   j. Any additional observations? _____
      _____

3. MECHANICAL CONDITION

   a. Hood up or down during the fire?_____
   b. Condition of drive belts? _____
      _____

Figure 6.5 Arson checklist.

Wiring? _____
Motor mounts? _____

c. Radiator melted? _____ Full? _____
d. Engine grease deposits? _____ Evidence of burning? _____
Start motor if possible. Run for five (5) or ten (10) minutes.
Are there any cracks or breaks on block or head(s)? _____
Any unusual noises? _____
If not possible to start motor, secure the services of a reliable mechanic. Remove oil pan and head(s). Check all parts for wear or breaks. When serious mechanical defects are discovered, obtain a brief statement from mechanic and have it witnessed, incorporating a description of defects and if, in his opinion, they occurred prior to the fire.
e. Clutch, transmission, drive shaft, rear axle assembly: Jack up rear of car with motor running or, if not running, test running gear.
Evidence of wear or breakage: Clutch ? _____ Transmission? _____
Drive shaft split or bent? _____ Rear axle & housing worm? _____
Broken? _____
Any defects found should be included in the mechanic's statement.
f. Any additional observations? _____

4. FUEL SYSTEM
a. Start with fuel tank. Where was gas tank cap during fire? _____
b. Drain plug: Tampered with? _____ If in tank, is it right? _____
c. Gasoline: Burned from tank? _____ If not, how much in tank? _____
d. Fuel lines & connections: (trace to pump and carburetor)
Evidence of tampering? _____ Where? _____
How? _____ Before or after fire? _____
e. Fuel pump: Gasoline in sediment bowl? _____ Bowl broken? _____
Removed? _____ Melted? _____
Air filter in place? _____ Missing? _____
f. Any additional observations? _____
_____

5. ELECTRICAL SYSTEM
a. Start inspection at battery and follow through. Battery: In place? _____
If damaged, where burned?_____ Clamp tight? _____
Cable shorted out? _____ How? _____
b. Wiring: Any shorts? _____ Disconnections?_____
c. Switches: (on or off) Ignition: _____ Lights? _____
d. Spark plugs: Conditions? _____ Any wires disconnected? _____
e. Distributor: In working condition? _____ Burned or melted? _____
f. Any additional observations? _____
_____

GENERAL REMARKS:

Figure 6.5 Continued

Be aware that burglary is not necessarily motivated by a property offense. Appellate decisions continually instruct that burglary's requirement of entry be spurred on by an intent to commit any felony.[64] The benchmark question then becomes: what was the intent of the accused at the precise time of his actual breaking and entry?[65]

Name:_____ Address: _____

BURGLARY PREVENTION CHECKLIST

PREVENTION TIPS	OK	NEEDED	RECOMMEND REPLACEMENT
Doors:			
Strong Pintumbler Locks:			
Front door			
Back door			
Side door			
Basement door			
Chain Latch:			
Front door			
Back door			
Side door			
Basement door			
Heavy-Duty Door Hinges:			
Front door			
Back door			
Side door			
Basement door			
Peephole:			
Front door			
Back door			
Doors with Windows:			
Need key to open inside and out			
Mailbox/Mail Slot in Door			
Garage Door Pintumbler Lock			
Windows:			
All Windows with Pintumblers			
Bar or Strip of Wood (patio door)			
Bars or Grill Works:			
"Out-of-the way windows"			
Garage Windows			
Basement Windows			
Keys:			
Change tumblers when you move in or if keys are lost			
Don't give out duplicate keys			
Keep home and automobile keys separate			
Don't put name and address on keys			
Keep house key hidden outside			

Figure 6.6 Burglary checklist.

PREVENTION TIPS	OK	NEEDED	RECOMMEND REPLACEMENT
Valuables:			
Serial Numbers, TV, Radio, etc. (List)	_____	_____	_____
Bank Deposit Box	_____	_____	_____
Cash (large amounts)	_____	_____	_____
Jewelry	_____	_____	_____
Bonds (negotiable)	_____	_____	_____
Under Lock and Key:			
Checkbooks	_____	_____	_____
Credit cards	_____	_____	_____
List of serial numbers	_____	_____	_____
Lights:			
Outside:			
Front	_____	_____	_____
Rear	_____	_____	_____
Side	_____	_____	_____
Inside:			
Automatic timer device	_____	_____	_____
Light and radio	_____	_____	_____
Small door light	_____	_____	_____
Front	_____	_____	_____
Rear	_____	_____	_____

The following are important reminders to help keep you being the next victim of a burglar.

A. Keep all doors and windows locked at all times.
B. When home alone leave lights on in other rooms.
C. Always close the curtains and draw the shades after dark.
D. Always use your chain latch every time you answer the door.
E. Require identification from repairmen and utility company representatives.
F. Don't let anyone in unless you are sure they are who they say.
G. Be alert for strangers who loiter in hallways, elevators, and laundry rooms.
H. Make note of license tag numbers of suspicious autos you notice in your neighborhood.
I. Stop delivery of mail, milk, and newspapers when you are going away.
J. Arrange to have your grass cut or the snow shoveled when you are away.
K. If you are a woman and live alone, use initials on mailbox, door, and in phone book.
L. Let the police know when you will be going out of town.
M. Most important, always call the police whenever you see or hear anything suspicious in your neighborhood.

OPERATION IDENTIFICATION

Operation Identification is available at your local police station in the District of Columbia, at no cost to you.

1. Borrow an ENGRAVER from the police station.
2. Engrave your SOCIAL SECURITY NUMBER on your property (TV, Radio, etc.).
3. Return the engraver to the police station and pick up warning stickers.
4. Place the WARNING STICKERS on doors and/or windows.

Inspecting Officer_____ District _____
Date_____

Figure 6.6 Continued

A related act that has applicability to the security environment is criminal trespass.[66]

> Trespass
> (1) *Buildings and occupied structures.* A person commits an offense if, knowing he is not licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof. An offense under this Subsection is a misdemeanor if it is committed in a dwelling at night. Otherwise, it is a petty misdemeanor.[67]

To minimize burglary and trespass activity adopt the policy considerations shown in Figure 6.7[68] when conducting a facility review.

Robbery

The unlawful acquisition or taking of property by forceful means constitutes a robbery.[69] In retail and commercial establishments, security officers and personnel are frequently endangered by the activities of felons. Robbery is more than a property crime since it is coupled with a violent thrust. The exact provisions of a general robbery statute include those outlined in the *Model Penal Code* provision.

> (1) *Robbery Defined.* A person is guilty of robbery if, in the course of committing a theft, he:
> (a) inflicts serious bodily injury upon another; or
> (b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or
> (c) commits or threatens immediately to commit any felony of the first or second degree.
> An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.[70]

Distinguishing robbery from a larceny or a theft offense is not a difficult task since both judicial interpretation and statutory definitions insist upon a finding of force, violence, or a physical threat of imminent harm. Robbery can be accomplished by threats only if the threats are of death or of great bodily injury to the victim, a member of the victim's family or some other relative of the victim, or someone in the victim's presence. Threats to damage property will not suffice, with the possible exception of a threat to destroy a dwelling house.[71] Considerations relevant to a finding of guilt in a robbery case include whether or not the victim was actually threatened with immediate harm; whether the force or violence exerted created substantial fear or simple apprehension in the robbery victim;[72] and whether the statutory guidelines demand that the victim be present when the unlawful taking occurs.[73]

	Hazardous Conditions Requiring Special Attention
	Poorly lit areas.
	Wet floors, holes or defects in floor covering.
	Improper storage of flammable or sensitive materials; flammable liquids left uncovered; oily, flammable rags stored in open or improper containers.
	High voltage or electrical transformers not locked.
	Fire fighting equipment out of order.
	Broken windows.
	Inadequate clearance between sprinkler heads and stored material (18"-24").
	Objects left on shelves or window sills that may fall off.
	Use of boxes or chairs in place of ladders; damaged ladders, poor housekeeping, unsightly rubbish conditions, use of special equipment or machines without authorization, material piled in a dangerous manner, cigarettes not properly extinguished (extinguish those found/look for evidence of smoking in NO SMOKING AREAS); other conditions peculiar to this location:
	Is the perimeter secure and in sound condition?
	Is the fire protection equipment in proper working order and accessible?
	Are the P.I.V.s (Post Indicator Valves) in the OPEN position?
	Does the gauge on the RISER indicate the proper pressure?
	Are EXIT SIGNS, FIRE LIGHTS, and EMERGENCY LIGHTS working properly?
	Are flammable materials properly stored?
	Are aisles and pathways clear of obstructions and/or safety hazards?
	Are all doors and windows properly secured?
	Is there excess trash accumulation?
	Have all small appliances been turned off?
	Are there any leaks?
	Are there any strange noises?
	Are personnel loitering in the parking lot?
	Are all parking lot and roadway lights working properly?
	Are there any vehicles leaking fuel in the parking lot?
	Have the readings on all gauges required to check been recorded?
	Have alarms and sensitive areas been checked at the start of the shift?
	Are all the clients' vehicles secured?
	Have the names of employees that have entered the facility been recorded?
	Is all lawn sprinkler equipment working properly?
	Has the patrol vehicle been checked prior to the start of the shift?
	Does the Detex clock display the correct time?
	Have reports been made on all unusual or out of the ordinary incidents that occurred during the shift?
	Have all the clients' keys been accounted for?
	Be prepared to provide the relief officer with a complete briefing.
	Are general and special orders up-to-date?
	Is a copy of the emergency contact list available?
	Have all Sign-In Logs and Registrars been closed out at midnight?
	Have there been any accidents or employee complaints?
	Has all equipment that has been taken out of the facility been documented?
	Have any malfunctions or shortages of equipment been reported?
	Has the flag been raised and lowered in the proper manner?
	Are telephones working properly?

Figure 6.7 Facility review.

Theft or Larceny

No other area of proscribed behavior affects the security practice as much as in the crime of theft or as it was once known at common law, *larceny.*[74] Shoplifting is a form of larceny and has become retail security's central concern as it seeks to devise loss prevention strategies.[75] Stock pilferage, fraudulent accounting and record-keeping systems, embezzling of corporate funds, and theft of benefits and services are all criminal behaviors that significantly influence the profitable nature of business and industry. Larceny consists of:

- A taking that is unlawful
- A carrying away or movement thereafter of personal property
- Property of which the taker is not in rightful ownership or possession
- With a *mens rea* that is felonious

Outlined in Table 6.1[76] are the requisite elements needed for a successful charge of larceny.

Historical argument on what exactly could be the subject of a larceny is quite prolific, from disputes about whether rabbits and fish are

Table 6.1 Larceny Elements

Elements of Larceny				
I. Trespassory Taking § 12.06	II. Asportation § 12.05	III. Personal Goods § 12.01	IV. Of Another § 12.01	V. Felonious Intent § 12.04
A. Trespass de bonis asportatis is the type of taking required — at least under such circumstances as amount technically to a trespass. B. From actual or constructive possession of owner. C. Without owner's consent. D. The taking may be by means of nonhuman agency, innocent human agent or by hands of the thief or thieves. E. Taking by violence from the person of another transforms this offense into robbery.	F. Some carrying away of the property. G. There is sufficient asportation if the property (III) be entirely removed from the place it occupied so that it comes under the dominion and control of the trespasser though only for an instant.	H. Personal property only; real property excluded. I. Must be: (1) Thing which is recognized in law as being property and the subject of ownership. (2) Of some value, though slight value to owner will suffice.	J. Special property in another is sufficient even against a general owner. (1) Mere possession is enough as against others than the owner. See § 12.03.	K. Animus furandi must exist both in the taking (I) and the carrying away (II). (1) Intent to deprive the owner permanently of his property in the good, or of their value or part of their value, viz., an intent to steal. (2) There must be a fraudulent intent, and not a mistake or bona fide claim of right. L. There is minority authority requiring that the taking shall be lucri causa—for the sake of gain.

larcenable, or whether vegetables, land, or the skins of deer could be the subject of theft.[77] In contemporary legal parlance, literally any type of property is potentially larcenable. Maryland nebulously defines a property as:

> (h) "Property" means anything of value, including but not limited to:
> (1) Real estate;
> (2) Money;
> (3) Commercial instruments;
> (4) Admission or transportation ticket;
> (5) Written instruments representing or embodying rights concerning anything of value, or services, or anything otherwise of value to the owner;
> (6) Things growing on or affixed to, or found on land, or part of or affixed to any building;
> (7) Electricity, gas, and water;
> (8) Birds, animals, and fish which ordinarily are kept in a state of confinement;
> (9) Food and drink;
> (10) Sample cultures, microorganisms, specimens;
> (11) Records, recordings, documents, blueprints, drawings, maps, and whole or part copies, descriptions, photographs, phototypes or models . . .
> (12) Financial instruments, information, electronically produced data, computer software, and programs.[78]

Larceny is merely a crime against one's right to possess property. When compared to robbery, it is, of course, a nonviolent exercise. The *Model Penal Code*'s provision on theft is fairly straightforward:

> *Theft by Unlawful Taking or Disposition.*
> (1) *Moveable Property.* A person is guilty of theft if he takes, or exercises unlawful control over, moveable property of another with purpose to deprive him thereof.
> (2) *Immovable Property.* A person is guilty of theft if he unlawfully transfers immovable property of another or any interest therein with the purpose to benefit himself or another not entitled thereto.[79]

Security professionals should formally record any allegations of lost or stolen property in a report format. See Figure 6.8.[80]

Commentators at the American Law Institute regard the consolidation of the many theft acts or practices as a legal necessity. As a result, "the general definition of *theft* consolidates into a single offense a number of heretofore distinct property crimes, including larceny, embezzlement, obtaining by false pretense, cheat, extortion and all other involuntary transfers of wealth except those explicitly excluded by provisions of this article."[81]

REPORT OF LOST/STOLEN PROPERTY

1. Date and Time Loss Reported _____

2. By whom _____ Extension _____

3. Describe Property _____

_____

4. Estimated Value _____

5. Property is (check one) _____ Personal _____ Company

6. Loss occurred (note time last seen and time loss noticed)

_____

REMARKS
(List any known serial numbers, identifying marks, contents,
special circumstances, etc.)

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Figure 6.8 Lost/stolen property report.

Therefore, security personnel must be concerned about the closely aligned theft provisions and correctly evaluate the facts to see the applicability of certain offenses. A summary review follows:

Theft by Deception[82]*/False Pretenses*

Be aware of individuals who are best described as "flim-flam" artists who create false impressions and deceive others into giving up their rightful possession of property.[83] In the case of false pretense, the criminal actor deceptively attains ownership in a deed, a stock certificate, auto title, or other form of property interest evidenced by a legal document.

Theft by Extortion[84]

Certainly, property can be illegally acquired by making future threats of bodily injury or even by words disclosing private matters or secrets which will cause serious injury to a party.[85] Public officials, refusing to cooperate in an official capacity, or by their offices causing harm or injury without justification, can also be found guilty of theft by extortion.

Theft of Property Lost, Mislaid, or Delivered by Mistake[86]

Security personnel must be particularly concerned about employees in retail establishments or other business concerns who have access to lost and found property departments.

Receiving Stolen Property[87]

One often-discovered activity, especially in retail circles, is the internal network of illegal goods and services flowing either from employee to employee or to third-party outsiders.

Theft of Services[88]

Cable companies, electric utilities, hotel and motel and other residential facilities, rental car companies, entertainment facilities, and telephone companies, as well as any other provider of services in the economy have a right to exert this form of criminal complaint.

Retail Theft[89]

Considering the rampant onslaught of shoplifting cases in the judicial system and the legislative lobbying for a specialized statutory framework from which business and commercial interests could operate from, many jurisdictions have adopted specialized retail theft statutes. Reproduced below is a representative example.

> (a) Offense defined—a person is guilty of retail theft if he:
>
> (1) takes possession of, carries away, transfers or causes to be carried away or transferred any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving

the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof;

(2) alters, transfers or removes any label, price tag marking, indicia of value or any other markings which aid in determining the value affixed to any merchandise displayed, held, stored or offered for sale in a store or other retail mercantile establishment and attempts to purchase such merchandise personally or in consort with another at less than the full retail value with the intention of depriving the merchant of the full retail value of said merchandise;

(3) transfers any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment from the container in or on which the same shall be displayed to any other container with intent to deprive the merchant of all or some part of the full retail value thereof or

(4) under-rings with the intention of depriving the merchant of the full value of the merchandise[90]

The economic impact of retail theft is incredibly high.[91] Economic crime impacts society in many indirect ways, such as:

BUSINESS:

- increased costs of insurance and security protection;
- costs of internal audit activities to detect crime;
- cost of investigation and prosecution of suspects measured in terms of lost time of security and management personnel;
- reduced profits;
- increased selling prices and weakened competitive standing;
- loss of productivity;
- loss of business reputation;
- deterioration in quality of service;
- threats to the survival of small business.[92]

LOCAL GOVERNMENT

- costs of investigation and prosecution of suspects;
- increased costs of prosecuting sophisticated (e.g., embezzlement) and technology-related (e.g., computer) crime;
- costs of correctional programs to deal with economic crime offenders;
- cost of crime prevention programs;
- cost of crime reporting and mandated security programs;
- loss of tax revenue (e.g., loss of sales tax, untaxed income of perpetrator, and tax deductions allowed business for crime-related losses).[93]

THE PUBLIC

- increased costs of consumer goods and services to offset crime losses;
- loss of investor equity;
- increased taxes;
- reduced employment due to business failures.[94]

Employ the shoplifting checklist shown in Figure 6.9 when conducting an investigation.[95]

The appearance of shoplifters has given way to some creative programs of civil recovery. The retailer, instead of formally prosecuting the shoplifter, bills his or her to recover the proceeds of the theft.

> Thirty-eight states now permit civil recovery, according to R. Reed Hayes Jr., president, L P Specialists, Winter Park, Fla. Hayes, a pioneer in civil recovery, has watched the technique blossom after its 1973 Nevada start.
>
> Typically, the business gives notice to a person by mail, asking for payment for money owed. If the person neglects a certain number of notices, civil action is taken. More often, the person pays the money owed in one lump sum or in payments.[96]

An example of a firm that specializes in the tactics of civil recovery is L P Specialists, Inc., Retail Security Services, Inc. of 4571 Lake Howell Road, Suite 236, Winter Park, Florida 32791; (407) 671-8226; (800) 366-5774; Fax (407) 671-8249.

SHOPLIFTING INVESTIGATION CHECKLIST

1. How credible is my information?
2. Where did the information come from?
3. Is the information firsthand or hearsay?
4. What other evidence supports the allegation?
5. Who are the alleged culprits or suspects?
6. What method was adopted to commit the shoplifting?
7. When was the shoplifting perpetrated?
8. Where was the shoplifting committed?
9. What assets/specific personal property were taken?
10. What is the extent, dollar value, and amount of the loss?
11. What was the motivation of the perpetrator or perpetrators?
12. What was the motivation or the reason my source, informant or other aiding parties reported the event?
13. Are my sources credible and nonbiased?
14. Will the source be capable of testifying if necessary?

Figure 6.9 Shoplifting checklist.

Related Property Offenses: Fraudulent Behavior

The old saying that "where there is a will there is a way" is generally applicable to criminals and the behavior they can contrive and invent. If property cannot be taken outright, then the devious felon will invent a new technique, a new design to fraudulently acquire some property or interest.[97] The problems with fraud seem insurmountable, but some are banding together to do something about it. The National Insurance Crime Bureau is one such entity. "Launched early this year, the new agency—a merger of the National Automobile Theft Bureau and the Insurance Crime Prevention Institute—employs a national network of 165 investigators who help law enforcement prosecute insurance fraud perpetrators."[98] For information call 1-800-TEL-NICB.

Another resource center on fraud detection to contact is:

National Fraud Information Center/National Consumer's League
Fraud hotline—1-800-876-7060 or online complaint at:
www.fraud.org
1701 K Street, N.W., Suite 1200
Washington, D.C. 20006
phone: (202) 835-3323
fax: (202) 835-0747
www.nclnet.org

In the case of insurance fraud contact:

Coalition against Insurance Fraud
1012 14th Street, NW, Suite 200
Washington, DC 20005
phone: 202-393-7330
fax: 202-393-7329
info@InsuranceFraud.org
www.insurancefraud.org/

The criminal charges summarized below should be included in any policy making or strategic planning regarding the reduction or deterrence of criminality.

Forgery

Individuals who create false documentation, false writings, or forged stamps, seals, trademarks, or other symbols of value, right, privilege, or identification can be found guilty of forgery.[99]

A common example of criminal forgery involves tampering with wills, deeds, contracts, commercial instruments, negotiable bonds, securities, or any other writing which influences, executes, authenticates, or issues something of monetary value. To constitute forgery, a fraudulent

intent is always essential. There must not only be a false making of an instrument, but it must be with intent to defraud.[100]

Simulating Objects of Antiquity or Rarity

Security officials given the responsibility of protecting museum collections, art centers, or other nonprofit institutions dedicated to articles of antiquity or rarity should always be aware of possible reproduction or simulation of their employer's collections.[101]

Fraudulent Destruction, Removal, or Concealment of Recordable Instruments or Their Tampering[102]

Internal security, particularly in the area of personnel, payroll, and administrative matters, should give substantial thought to the preventative security measures that are presently in place or should be implemented.

Bad Check and Credit Card Violations[103]

The seemingly endless stream of fraudulent and bounced checks received by commercial establishments in the United States is mind-boggling. Policy makers in the security industry should consider more visible prosecution of culprits in this area. A representative statute is included below:

A person is guilty of obtaining property or services by a bad check when:
(a)(1) As a drawer or representative drawer, he obtains property or services by issuing a check knowing that he or his principal, as the case may be, has insufficient funds with the drawee to cover it and other outstanding checks;
(2) He intends or believes at the time of utterance that payment will be refused by the drawee upon presentation; and
(3) Payment is refused by the drawee upon presentation.[104]

Offenses against Public Order and Decency

Maintenance of public order is a public police function that has been increasingly transferred to the private sector.[105] Not surprisingly, security personnel have recently come up against many of the troubled and volatile conditions experienced by the police in the mid-1960s, namely, riotous situations, disorderly persons, extreme disorderly conduct, harassment, public drunkenness, and other obstructive activities. A statute that illustrates riot is below.

Riot

A person is guilty of riot, a felony of the third degree, if he participates with two or more others in the course of disorderly conduct:

(1) with intent to commit or facilitate the commission of a felony or misdemeanor;

(2) with intent to prevent or coerce official action; or
(3) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.[106]

Pennsylvania and other jurisdictions have drafted aligned provisions dealing with similar situations such as:

- Resisting arrest[107]
- Obstructing highways[108]
- Conduct on public buildings and grounds[109]
- Failure to disperse upon official order[110]

Handling the disruptive, the loud, and the fighters requires a charge of disorderly conduct.

Disorderly Conduct[111]

(a) Offense defined—A person is guilty of disorderly conduct, if, with intent to cause public inconvenience, annoyance, or alarm or recklessly creating a risk thereof, he:
(1) engages in fighting or threatening or in violent or tumultuous behavior;
(2) makes unreasonable noise;
(3) uses obscene language, or makes an obscene gesture; or
(4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose to the actor.[112]

What is the likelihood of being arrested for using obscene language?

Public Drunkenness

A person is guilty of an offense if he appears in any public place manifestly under the influence of alcohol to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.[113] Ohio law defines voluntary intoxication in more specific terms stating that a violation of the disorderly conduct statute for public intoxication will only occur if the person is engaging in conduct "likely to be offensive or to cause inconvenience, annoyance, or alarm to persons of ordinary sensibilities."[114]

Other Public Order Provisions

Loitering,[115] obstruction of highways and other public places,[116] disrupting lawful meetings or processions,[117] desecration of venerated objects,[118] and vagrancy[119] are related public offenses of interest to the security professional.

When one considers the homeless figures on the nation's streets, does *vagrancy* seem an enforceable statute? Ponder Wisconsin's vagrancy language:

> Any of the following are vagrants and are guilty of a Class C misdemeanor:
> (1) A person, with the physical ability to work, who is without lawful means of support and does not seek employment; or
> (2) A prostitute who loiters on the streets or in a place where intoxicating liquors are sold, or a person who, in public, solicits another to commit a crime against sexual morality; or
> (3) A person known to be a professional gambler or known as a frequenter of gambling places or who derives part of his support from begging or as a fortune teller or similar imposter.[120]

Can you see why constitutional protectionists and civil libertarians dislike this language? By nature, statutes like these are ambiguous and difficult to define. Is it better that vagrants and other undesirables simply lie on the streets? Or doesn't it make sense to round up the displaced for social service processing? Tension exists between those who urge decriminalization of the homeless or vagrancy statutes and those who see the loitering as a nuisance and trespass. As the public police system further transfers public order functions, private security will have to increasingly deal with these sorts of social pathology.

EVIDENCE AND PROOF

Detecting crime and implementing steps that halt its spread are major vocational issues for the security profession. To do so, the security industry must process criminals with procedural and evidentiary rigor. While not held accountable under the public police standard, it is salient for security specialists to carry out task and mission with professional demeanor. Unfortunately, private security has sometimes "taken the law into its own hands," attempting to perform criminal investigations that will generate questions of admissibility. Far too often, private security has displayed scant care about the implications of evidence collection.

To be certain, private security has always taken an active interest in the collection and preservation of evidence since it is so often on the front lines of first response. That same interest must extend to eventual trial or other litigation. As a result, security personnel need to have some understanding and recognition of evidentiary principles.

The Chain of Custody

Evidence acquired at the scene of a crime or other location which the prosecution seeks to admit will always be challenged on *chain of custody*

theory.[121] Evidence that is acquired in any investigation should be properly tagged and packaged with precautions to thoroughly preserve content and structural integrity.[122] In other words, the defense will raise the question whether the evidence, as acquired on the date of the investigation, compares in composition and nature as on date offered for admission. Any change, corruption, or other alternation imputes a faulty and flawed chain. The evidence will be suspect and likely denied admission. Evidence that lacks a chronological tag or documentary history will be challenged. John Waltz, in his text, *Criminal Evidence*, reminds practitioners that:

> Tracing an unbroken chain of custody can hold crucial to the effective use of a firearm's identification evidence. This does not mean, however, that changes in the conditions of firearm's evidence or the passage of a substantial period of time between the shooting and the recovery of the firearm's evidence will foreclose admissibility at trial ... Of course it is important that, to the extent possible, all law enforcement agencies provide for the safe storage of vital evidence prior to trial. Police departments are well advised to maintain a locked evidence room manned by an officer who keeps detailed records not only of its contents but of the disposition of items of evidence and the names of persons entering the room for any purposes.[123]

The image of a chain is most appropriate since any break in a series of links on a chain results in the chain's destruction. By analogy, real evidence with a checkered history, whether as to location or packaging, loses its credibility. For this reason, the proponent of real evidence must establish that the condition of the real evidence being offered has remained basically unchanged since the date of acquisition, and that it has neither been tampered with nor suffered any damage. Opposing counsel challenging the quality and integrity of real evidence, might argue that the evidence is contaminated or lacks a reliable historical record assuring its pristine and untouched condition.[124]

A security department would be well advised to heed the same advice—that chronological tracking is essential upon initial acquisition of evidence and that a cooperative plan for transference of evidentiary matter to police departments be instituted.

Evidence tags are inexpensive, reliable ways of tracing an evidence chain. An evidence log is equally helpful. See Figure 6.10 for an example.

Destruction or even partial corruption of evidence is an act with enormous legal and ethical complications for the security practitioner. Documents and other items of evidence are often essential to establish a sound defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed.[125] Destruction may also trigger constitutional violation when the agent who ruined the evidence did so with malice, fraud, or other intentional purpose. Whether by case law or statute, destroying evidence in all circumstances is a prohibited act.[126]

Prosecutor's Office

Evidence Log

Victim: Page ____ of _____

File/Investigation #:

Crimes:

Authority:

Date:

Item Number	Description of Items	Where Found	Found by Whom	Date & Time	Turned over to & Date (Lab #)

Figure 6.10 Evidence log.

The Admission of Business Records

Normal operational procedures in a security company, whether proprietary or contractual in nature, require the keeping of extensive records. Those records are, for the most part, inherently hearsay, and therefore inadmissible unless, of course, the actual author of the record who observed the event is present to testify. As is so often the case, especially in large corporate enterprises, record keeping is so voluminous and broad-based that it is difficult to tie authorship to any given document. The *Federal Rules of Evidence* fully recognize that business records themselves, while admittedly hearsay, are admissible. Federal Rule 803(6) provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.[127]

Records, in order to be regularly admissible, must be regularly kept. A presumption exists in the law that regularly kept records, automatically filled-in forms, and other autonomic exercises decrease the likelihood of deception and fraud in authorship. For the most part, security record keeping, like surveillance reports, warehouse bills of lading, visitors' logs, shoplifting reports, and investigative task sheets, are robotic business records[128] that will be admitted despite their hearsay content.

Thus, business records will not be admitted in any subsequent litigation unless:

- The record was made at or near the time of the occurrence.
- It was the regular practice of the business to make such records.
- There are not indications of untrustworthiness in the record.
- The information in the record was made by, or with information from, a knowledgeable person.
- The record was made and kept in the normal course of a business.[129]

Real and Demonstrative Evidence

As the name implies, real or physical evidence is directly related to the facts, issues, and probative evidentiary problems in the case

in hand.[130] Real evidence is the actual product, not a reproduction or a copy. It may be the actual weapon, forged check or deed, or other physical matter.

> As the trier of fact looks for the truth, what form of evidence is most convincing during its deliberations? Is the testimony of expert or lay witnesses regarding what they think, what they see, and what they interpret the facts to be more persuasive than the introduction of the actual, real handgun used in a crime? Is the testimony of the plaintiff in a civil negligence case regarding experienced pain and suffering more useful to the trier of fact than an exhibition of actual injuries inflicted in the plaintiff's body?[131]

Demonstrative evidence is an illustration of the real.[132] Its admissibility and utility depends upon these criteria:

> Does a particular chart or photograph aid the trier of fact in discerning the truth? Does it simplify complex problems? Does it aid the supervising security company's overall presentation? Is it persuasive? Does the demonstration appeal to multiple senses?[133]

Common forms of demonstrative evidence include the following:

- Maps
- Models
- Photographs
- Videotapes
  - – Animation Graphics
  - – Experiments and Simulations
- Movies
- Charts
- Graphs
- Reproductions
- Scale Models
- Multiple Views
- Cast Models
- Sound Recordings
- Artistic Reproductions
- X-Rays
- Thermographs
- Spectrograms
- Medical Test Results
- Chemical Analysis[134]

Security personnel are increasingly relying upon animation and other graphics portrayals to reconstruct a case during the investigative phase.

Some of the more commonly used providers in the area are:

The Association of Medical Illustrators
1819 Peach Tree Street NE, Suite 560
Atlanta, Georgia 30309
404-350-7900
(information on medical illustrators in your area)

Jacob Lade III's Forensic Exhibits
421 Asheburn Road
Elkins Park, Pennsylvania 19117
215-635-1527
(statistical data in graphic form)

Reeves Associates
1824 Fourth Street, Suite C
Berkeley, California 94710
(forensic illustrators)

Bio-Legal Arts
5520 East Second Street, Suite E
Long Beach, California 90803
213-434-7491
(technical illustrations of mechanical or electronic devises)

ARCCA Incorporated
700 Second Street Pike
Richboro, Pennsylvania 18954
215-233-8396
(illustrations and charts of crash simulations)

Lay Witnesses

As private security performs its investigatory functions, it must rely upon evidence provided by witnesses. The measure of competency is largely determined by whether the witness is lay or expert. A wise practice is to evaluate lay witnesses in the field since these very individuals, who are providing crucial information, may be the best foundation upon which a case rests. If they are incompetent in the field, they will clearly be incompetent on the stand.[135]

Lay competency is generally defined by Rule 602 of the *Federal Rules of Evidence*, as:

(1) The witness has the capacity to actually perceive, record and recollect impressions of fact (physical and mental capacity);

(2) The witness in fact did perceive, record and recollect impressions having a tendency to establish a fact of consequence in the litigation (personal knowledge);
(3) The witness be capable of understanding the obligation to tell the trust (oath or affirmation);
(4) The witness possess the capacity to express himself understandably where necessary with the aid of an interpreter.[136]

Competency does not require genius but the capacity to perceive, record, and recollect impressions of fact as influenced by a wide assortment of social and biogenic factors. Consider some of the following characteristics of any potential lay witness:

- What is their present age level?
- Do they have any personal habits that would indicate their powers of recollection and thought retention would be influenced by chemical or drug usage?
- From an observational point of view, do these individuals appear intellectually ordered?
- Would a street person, bag lady, or heroin abuser be a witness who could withstand the competency standard?
- Did they have any personal knowledge of the events or is their viewpoint strictly the product of hearsay?[137]

Certain witnesses, such as children, a spouse, a coconspirator who has been granted immunity, or a person who has been judged insane will have credibility concerns.[138] Lack of credibility, however, does not disallow a witness from taking the stand. Security practitioners should evaluate the levels of sincerity and credibility of any witness they interview during the investigative process. Employing simple human relations skills will often permit the security professional to judge the quality and credibility of any witness. When evaluating a witness, utilize the following checklist at Figure 6.11.[139]

The security officer needs to evaluate and weigh not only the physical and real evidence he collects, but also the testimony from interested as well as disinterested witnesses. The security officer needs to make human observations and human judgments for his own good. The industry clearly does not need to expend enormous amounts of energy on disgruntled individuals, abhorrent characters, and courtroom groupies whose sole purpose in life is to meddle in the affairs of others.[140]

A popular notion is that expert testimony dominates in sheer testimonial volume in the typical criminal or civil action. This perception is the result of many factors such as media coverage of flamboyant witnesses and other avant-garde litigation. However, the bulk of testimony given in any criminal or civil action is fundamentally "lay" in nature. An expert is also entitled to give an opinion, but only in the context of his expertise,

Witness Competency Checklist

____ Duty to tell truth: witness must understand the duty to tell the truth.
- ____ Is witness too young or too mentally incompetent to understand the difference between the truth and a lie?
- ____ Does the witness have a prior conviction for perjury or criminal act based on dishonesty? (Federal Rules do not bar witness per se, but this factor can be used for impeachment.)

____ Ability to perceive: witness must have the ability to perceive the incident which is the subject matter of his testimony.
- ____ Does witness have a handicap that would impair the ability to perceive, such as poor eyesight or lack of hearing?
- ____ Did conditions such as darkness, fog, distance, noise level prevent the witness from perceiving?
- ____ Was witness attentive or inattentive?

____ Ability to remember: witness must be able to remember what she perceived.
- ____ Does witness have a medical or psychological handicap such as Alzheimer's disease, brain damage, schizophrenia, or other mental disorder that would prevent witness from remembering?
- ____ Does witness remember other events accurately? Test with questions about physical setting, time frame, or historical information.
- ____ Was witness distracted?
- ____ Does witness have a problem remembering other information such as schoolwork, names, faces?

____ Ability to communicate: witness must be able to communicate to the jury.

____ Personal knowledge: witness cannot testify unless she has personal knowledge of the subject of her testimony. Rule 602.
- ____ Was witness present during the event? Did witness actually see, hear, feel, smell or touch?
- ____ Is witness relying on perceptions or relying on hearsay?
- ____ An expert may testify on facts of which she has no personal knowledge but which has been disclosed to the expert at or before the hearing under Rule 703.

Figure 6.11 Witness checklist.

though a foundational test will have to be met before such testimony is proffered. In the case of a lay witness, foundational requirements must be laid as follows:

- The witness's testimony is based upon his or her own unique perception.
- The court is convinced that the testimony of the lay witness is helpful in arriving at the truth.

- The witness does in actuality have an opinion.
- The witness is capable and competent to testify as to that opinion.
- Without the testimony the trier of fact, namely the judge and jury would not have the best case presented.
- The witness is giving lay testimony rather than expert testimony.
- No opinion as to a rule or an interpretation of law will be permitted.[141]

Expert Witnesses

Experts, on the other hand, must be qualified to testify in their areas of expertise. Rule 703 of the *Federal Rules of Evidence*[142] requires that an expert's opinion rest upon facts, data, or other information that he or she has actually seen or heard or has been communicated to the expert. Rule 704[143] permits the expert witness to attest to the ultimate issue of fact, though at one point in history the *ultimate issue doctrine* withheld that right. By *ultimate issue*, the expert is giving his or her assessment on the fundamental guilt or innocence of the defendant or the truth or falsity of a given issue at trial.[144]

Security companies must learn to develop collegial and longstanding relationships with experts in the fields of mutual interests, which include engineers, who specialize in the design of technology and equipment employed in security practice; in criminology and police practice; in storage and maintenance of hazardous materials; in the design of security systems for business and industry; and numerous other areas where the experience and sophisticated knowledge of science, business, industry, and crime prevention and deterrence intermix.

The occasion may arise whereby the security company needs the assistance of an expert and insists that the self-acclaimed expert prove his or her qualifications. The court will certainly demand that the proclaimed expert meet or exceed the following standardized qualifications:

- The witness has specialized training in the field of his expertise.
- The witness has acquired advanced degrees from educational institutions.
- The witness has practiced in the field for a substantial period of time.
- The witness taught courses in a particular field.
- The witness has published books or articles in the particular field.
- The witness belongs to professional societies or organizations in a particular field.
- The witness has previously testified and been qualified as an expert before a court or administrative body on a particular subject to which he is being asked to render an opinion.[145]

Practical Exercise: Cross-Examination

Security operatives are frequently cross-examined on the witness stand.[146] How would you respond to the following queries:

1. "Your name and occupation, please?"
2. "So, you're a real live Pinkerton Detective. And who do you represent in this case?"
3. "In other words, you're being paid to testify for ABC Insurance Company against my client, isn't that correct?"
4. "Exactly how long did you conduct your spying in Mr. Smith's home and how long did you *actually observe* my client engaged in activity during this time?"
5. "So, for two (2) days you were paid to observe Mr. Smith for only a half hour. The insurance company must have been disappointed."
6. "You describe in your report the home of Mr. Smith and state that its approximate value is $65,000. Are you qualified to make such a statement?"
7. "Just how far away were you when you took these movies of Mr. Smith and don't you consider taking these movies without his permission a shameful invasion of Mr. Smith's right to privacy?"
8. "You state in your report that Mr. Smith exhibited no sign of discomfort or pain while moving about. Do you have a medical background that qualifies you to judge whether or not Mr. Smith was experiencing pain?"
9. "I understand that your presence in Mr. Smith's neighborhood created a great deal of anxiety among his neighbors, that they were concerned for the safety of their children with a stranger parked for two (2) days in their neighborhood with out of state license plates. Do you think you have a right to frighten innocent people while you are spying on my client for this big insurance company?"
10. "Do you get a percentage of any money the insurance company may save—Never mind. No further questions."[147]

There has been a proliferation of experts and consulting services in the security industry itself. Review a recent classified section of any industry magazine and you will find a plethora of ads for expert witness and consulting services.

Assuring the integrity of these or any other proposed expert is a problem, for the security industry and all other areas of expertise[148] a new organization, International Association of Professional Security Consultants at 13819 Walsingham Road, Suite 350, Largo, Florida 24644; (813) 596-6696; Fax (813) 596-6696 is a member organization dedicated to assuring competency among its security experts.

Use the following expert witness questionnaire when determining the qualifications of an expert. See Figure 6.12.[149]

EXPERT WITNESS QUESTIONNAIRE

Name: _____

Address: _____

_____

Phone: _____

Business or Occupation: _____

Length of time in business/occupation: _____

Name of Organization: _____

Positions Held: _____

Prior Positions: _____

Education: _____

Under Graduate: _____

Graduate: _____

Post Graduate: _____

Training: _____

Types of Courses: _____

_____

Licenses/Certifications: _____

_____

Professional Associations and Organizations: _____

_____

Academic Background: _____

_____

_____

Expert Witness Experience: _____

_____

Specializations: _____

_____

_____

Figure 6.12 Expert witness questionnaire.

A contract for the expert services of a security specialist lays out the professional expectations. See Figure 6.13.

A Potpourri of Evidentiary Principles

Burden of Proof

In criminal cases the standard is beyond a reasonable doubt; in civil cases the standard is beyond a preponderance of the evidence, or by clear and convincing evidence.[150]

Questions of Law versus Questions of Fact

A trial judge saddled with the question of law must decide the applicability of a case decision, statute, or other regulation. A question of fact is an interpretation of events left best to the jury or a judge evaluating the case before it.

The Basic Types of Evidence

Direct Evidence

A type of evidence which "proves a fact proposition directly rather than by inferential process."[151]

Indirect or Circumstantial Evidence

Circumstantial evidence relies on the inference that can be deduced from a fact pattern presented. The bulk of evidence is circumstantial.[152]

Three Forms of Evidence

All evidence is further subcategorized into the following forms.

Testimonial Evidence

Evidence provided by oral testimony under oath or affirmation or, on occasion, by sworn pretrial written deposition or interrogatory.[153]

Tangible Evidence

As discussed previously, tangible evidence is either the real evidence the actual agency utilized in the criminal activity or, otherwise, demonstrative evidence which is an illustrative tool in the form of a visual design, reproduction, diagram, or anatomical model.[154]

(Date)

(Name)
(Address)

RE: *Tammy Yeager v. Linda McConnell*
_____ County Common Pleas Court Case No. _____

Dear Mr._____:

This letter will confirm our conference of October 1, 1993, in connection with retaining your services as a security expert. As discussed, please evaluate this case to determine the following:

(1) the pre-skid speed of the Yeager's vehicle;

(2) to compare the time from Ms. Yeager's first reaction to the McConnell vehicle as a hazard to the interval of time that the McConnell vehicle was on Route 79 before impact; and

(3) whether the presence of a guardrail on the south edge of Route 79 could have lessened the severity of the impact and resulting injuries.

I am enclosing a check for $1,500.00 representing your retainer for work on this case. It is my understanding that, should the work be completed or stopped for any reason before using up the amount of the retainer, the balance will be refunded. It is my further understanding that your normal fee schedule for this type of work is as follows:

Preparation Time.....$50.00/hour
(Includes: background review, site visit, field work, engineering analysis, reports, meetings, depositions, travel time)

Court Time.....$450.00/eight-hour day or part thereof
All Expenses (Includes air fare, tolls, lodging, meals, mileage, film, prints, aerial photography, etc.)

Under separate cover, I am forwarding a packet of background materials on this case for your review. You may feel free to contact my client, Ms. Tammy Yeager, at (412) 555-5387 if you need any information directly from her. I would ask that you not prepare a written report of your findings until I request it at a later date. Please note that the trial of this case has been scheduled for May 15, 1994.

Mr. Todd Aloia is the paralegal in my office who will be assisting me on this case. Please feel free to contact either of us if you have questions. If the terms outlined above comport your understanding of your engagement on this case, please so indicate by signing the enclosed copy of this letter and return it to me in the envelope provided.

Very truly yours,
Attorney

Figure 6.13 Letter from security expert to client.

Judicially Noticed Evidence

Evidence which is generally and commonly known by the community at large and which is scientifically acceptable in most circles can be judicially noticed. The fact that the sun rises during a twenty-four hour cycle, at least in North America, is a judicially noticed fact.[155]

SUMMARY

This chapter's coverage commenced with a review of criminal liability. The thesis of the presentation was that the security industry must have a clear understanding of the acts and mental states requisite to criminal liability to investigate activities within its domain. Even more pertinent is this chapter's refined analysis of criminal charges and actions. Criminal law is primarily codified, but in the focused, occupational realm of private security, certain actions more commonly occur: property crimes such as theft and its parallel and companion charges; offenses against the person such as murder, manslaughter, kidnapping, false imprisonment, and sexual offenses; and offenses against the public order and public domain. Property offenses naturally receive the bulk of attention since asset protection is the proclaimed vocational priority of private security.

Equally essential to professional growth and understanding is the selective overview of evidentiary principles which affect the investigative practice of the private security industry. Evaluating the quality of witnesses, their competency and credibility, leads to better results. Heeding the foundational and evidentiary requirements of evidence, whether real, testimonial, or expert in design makes the security operative more efficient. Assuring the quality of the evidence, and devising and designing chain of custody policies and procedures throughout all levels of the investigative and administrative framework ensures evidence integrity.

CASE EXAMPLES

Third-Party Criminal Acts—*Hatt v. Hammond*, NO. 236637 (Pima County Superior Court, Tuscon, Arizona, October 20, 1987)

Facts

A 66-year-old retired man and his wife were assaulted at gunpoint by three men in their hotel room. Plaintiffs sued the hotel for failing to provide adequate security. At the time of the incident, the hotel was sponsoring a precious gem show. The hotel was accused of being negligent in failing to provide additional security with this expensive property. The claim of

inadequate security was also based on the fact that the plaintiffs' room was located in a building that was detached from the hotel lobby and had six unguarded, unlocked exterior doors.

Issue

Is the hotel liable for failure to provide sufficient security?

Third-Party Criminal Acts

Facts

Upon returning to her apartment unit at 11 P.M., a 21-year-old woman locked the sliding glass door, pulled the drapes, and immediately went to bed. Two hours later she was awakened by an individual who, with brutal force, caused her to perform sexual acts against her will. She brought suit against the owners and managers of the building complex, alleging that they had knowledge that other specific criminal acts had taken place within the complex and that they had negligently failed to take reasonable steps to protect their tenants. Plaintiff further alleged that the defendants failed to warn tenants of these prior crimes, thus denying tenants the opportunity to take increased self-protective measures.

Issue

Is this apartment complex negligent for the criminal acts of a third party?

DISCUSSION QUESTIONS

1. What two major elements are necessary for the finding of criminal liability?
2. Research your jurisdiction's manslaughter statutes. What language is utilized to describe the mental state?
3. How does one distinguish between the gradations and levels of differing criminal acts?
4. Give a fact pattern that would involve a private security agent or investigator that applies the felony murder rule.
5. What types of criminal activity would most commonly occur in American business and industry, and require the investigative services of private security forces?
6. Why should the private security industry be concerned about "public offenses" or conduct involving the social order?

7. Name three evidentiary rules that are relevant to the private security industry.

NOTES

1. *See* Restatement of Torts §2.05 (1934); William L. Clark and William L. Marshall, A Treatise on the Law of Crimes 200 (1967); *see also* John E. Douglas and Mark Olshaker, The Anatomy of Motive (1999); Leo Katz, Bad Acts and Guilty Minds: Conundrums of the Criminal Law (1987).
2. *See* Charles P. Nemeth, Criminal Law 84 (2004); *see also* Stanton E. Samenow, Inside the Criminal Mind (1984); Lawrence Taylor, Born to Crime: The Genetic Causes of Criminal Behavior (1984).
3. American Law Institute Model Penal Code §2.01 (1-3) (1962).
4. *See* Charles P. Nemeth, Criminal Law 77-83 (2004).
5. Edward T. Guy, John J. Merrigan, Jr., and John A. Wanat, Forms for Safety and Security Management 138 (1981).
6. George E. Dix and Michael M. Sharlot, Basic Criminal Law, Cases and Materials 151 (1980); *see also* Steven J. Rossen and Wilton S. Sogg, Smith's Review of Criminal Law (1985); Charles P. Nemeth, Criminal Law 87 et seq. (2004); Katherine R. Tromble, *Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation*, 52 Vand. L. Rev. 521, 522 (Mar. 1999); *Note: Mens Rea in Federal Criminal Law*, 111 Harv. L. Rev. 2402 (June 1998).
7. *See generally* Katherine R. Tromble, *Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation*, 52 Vand. L. Rev. 521, 522 (Mar. 1999); *Note: Mens Rea in Federal Criminal Law*, 111 Harv. L. Rev. 2402 (June 1998); John E. Douglas and Mark Olshaker, The Anatomy of Motive (1999); Richard Rhodes, Why They Kill: The Discoveries of a Maverick Criminologist (1999); Leo Katz, Bad Acts and Guilty Minds: Conundrums of the Criminal Law (1987); Remington and Relstad, *Mental Element in Crimes—A Legislative Problem*, Wisc. L. Rev. 644 (1952); Rollin M. Perkins, *A Rationale of Mens Rea*, 52 Harv. L. Rev. 905 (1935); Cowan, *A Critique of the Moralistic Conception of Criminal Law*, 97 U. Pa. L. Rev. 502 (1949); *Dennis v. U.S.*, 341 U.S. 494, 71 S. Ct. 857, 96 L. Ed. 1137 (1951).
8. Model Penal Code §2.02 (1 & 2) (1962). *See also* Del. Code Ann. Tit. 11, § 231 (2001); Mo. Rev. Stat. §562.016 (2001); Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231, 2232 (June 1993).
9. William L. Clark and William L. Marshall, A Treatise on the Law of Crimes 270 (1967).
10. *See* Charles P. Nemeth, Criminal Law 53-55 (2004); John E. Douglas, Crime Classification Manual (1997); Gould Publications, *Dictionary of Criminal Justice Terms* (1990); 4 Sir William Blackstone, Commentaries 5 (1941); William L. Clark and William L. Marshall, A Treatise on the Law of Crimes §§2.01-2.04 (6th ed. 1958); Michael J. Pastor Note: A Tragedy and a Crime?: Amadou Diallo, *Specific Intent, and the Federal Prosecution of Civil Rights Violations*, 6 N.Y.U. J. Legis. & Pub. Pol'y 171 (2002); Adam Candeub, *Consciousness & Culpability* 54 Ala. L. Rev. 113 (Fall, 2002).
11. *See* Charles P. Nemeth, Criminal Law 55-56 (2004).
12. *See* Charles P. Nemeth, Criminal Law 56 (2004).

13. *See generally* 2 Frederic Pollock, Sr. and Fredrick W. Maitland, History of English Law (1903); 4 Blackstone Commentaries; William L. Clark and William L. Marshall, A Treatise on the Law of Crimes 108-115 (1967); Center for Criminal Justice, Private Police Training Manual 34 (1985); Charles P. Nemeth, Criminal Law 50-53 (2004).
14. There are exceptions to this including Pennsylvania. *See* 18 Pa. Stat. Ann. §§1105.
15. *See* 4 Blackstone Commentaries 205.
16. *Bannon v. U.S.*, 156 U.S. 464, 467, 15 S.Ct. 467, 39 L. Ed. 494 (1894).
17. Task Force on Administration on Justice, The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (1967).
18. Task Force on Administration on Justice, The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 15 (1967).
19. As an example *see* New York's misdemeanor classification of *Sexual Misconduct*, at §§130.20. Critics claim it is nothing more than an actual Aggravated Sexual Assault.
20. *See generally* Rollin M. Perkins, *The Law of Homicide*, 36 J. Crim. L. C. & PS 25 (1946); Weechsler and Michael, *A Rationale of the Law of Homicide*, 37 Colum. L. Rev. 701 (1937); *see:* Charles P. Nemeth, Criminal Law 115 et seq. (2004) .
21. Model Penal Code §210.1 (1962).
22. Model Penal Code §210.2 (1962).
23. *See* Charles P. Nemeth, Criminal Law 93-97 (2004); *People v. Erikson*, No. 25854 (Ca.Super.Ct. 1997); Edward Imwinkelried, *Evidence Pedagogy in the Age of Statutes* 41 J. Legal Educ. 227 (1991).
24. *People v. Morris*, 31 Mich. App. 301, 310-318, 187 N.W. 2d 434, 438-43 (1971).
25. *People v. Morris*, 31 Mich. App. 301, 310-318, 187 N.W. 2d 434, 438-43 (1971).
26. *See* Charles P. Nemeth, Criminal Law 128-135 (2004); Kenneth W. Simons, *Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character"? Examining the Requisite Connection Between Mens Rea and Actus Reus*, 6 Buff. Crim. L. R. 219 (2002); Guyora Binder, *The Rhetoric of Motive and Intent*, 6 Buff. Crim. L. R. 1 (2002).
27. *See* Charles P. Nemeth, Criminal Law 97-99 (2004); Guyora Binder, *The Rhetoric of Motive and Intent*, 6 Buff. Crim. L. R. 1 (2002).
28. 18 Pa. C.S.A. §2503 (a).
29. 18 Pa. C.S.A. §2504 (a).
30. *See* Charles P. Nemeth, Criminal Law 128-129 (2004); Kenneth W. Simons, *Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character"? Examining the Requisite Connection Between Mens Rea and Actus Reus*, 6 Buff. Crim. L. R. 219 (2002); Guyora Binder, *The Rhetoric of Motive and Intent*, 6 Buff. Crim. L. R. 1 (2002).
31. *See* Charles P. Nemeth, Criminal Law 135-144 (2004); Dana K. Cole, *Expanding Felony-Murder in Ohio: Felony-Murder or Murder-Felony?* 63 Ohio St. L.J. 15 (2002); Rudolph J. Gerber, The Felony Murder Rule: Conundrum Without Principle, 31 Ariz. St. L.J. 763 (Fall, 1999); Guyora Binder, The Model Penal Code Revisited: Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation, 4 Buff. Crim. L. R. 399 (2000).

32. George E. Dix and Michael M. Sharlot, Basic Criminal Law, Cases and Materials 470 (1980).
33. *See* Charles P. Nemeth, Criminal Law 137 (2004).
34. Model Penal Code §211.1 (1962).
35. *See* Charles P. Nemeth, Criminal Law 185 (2004).
36. Model Penal Code §211.2 (1962).
37. 18 Pa. C.S. §302(b)(3).
38. *See* 18 Pa. Stat. Ann. §2705; 2706; 2708; 2709-2710.
39. Edward T. Guy, John J. Merrigan, Jr., and John A. Wanat, Forms for Safety and Security Management 187 (1981).
40. Model Penal Code §212.1 (1962).
41. *See State v. Williams*, 111 Ariz. 222, 526 P. 2d 1244 (1974); *People v. Caudillo*, 21 Cal. 3d 56, 146 Cal. Rptr. 859, 580 P. 2d 274 (1978); *see also* Richard Sanders, "Double Offense" Problems in Kidnapping and False Imprisonment Cases, 77 Fla. Bar J. (December, 2003) at 10.
42. Model Penal Code §212.3 (1962).
43. Kelley V. Rea, *The Legal Risks of Conducting a Security-Initiated Investigation*, 28 Sec. 23 (1991); *see also* Richard A. Bales and Jeffrey A. McCormick, Workplace Investigations in Ohio, 30 Cap. U.L. Rev. 29 (2002).
44. *See* Charles P. Nemeth, Criminal Law 205 et seq. (2004); Henry L. Chambers, Jr., (Un)Welcome Conduct and the Sexually Hostile Environment, 53 Ala. L. Rev. 733 (Spring, 2002); Niloofar Nejat-Bina, Employers as Vigilant Chaperones Armed with Dating Waivers: The Intersection of Unwelcomeness and Employer Liability in Hostile Work Environment Sexual Harassment Law, 20 Berkeley J. Emp. & Lab. L. 325 (1999).
45. Model Penal Code §213.1 (1962).
46. *See* Charles P. Nemeth, *Judicial Doubt or Distrust: Court Ordered Psychiatric Examination of Rape Victims*, 12 Hum. Rights 1 (1984); David P. Bryden, Forum on the Law of Rape: Redefining Rape 3 Buff. Crim. L. R. 317 (2000).
47. 18 Pa. C.S.A. §3126 (1)-(3).
48. 18 Pa. C.S.A. §3127.
49. A Manager's Guide to Employee Privacy, Kurt A. Decker
50. 33 Am. Jur. Trials, p. 286-289.
51. *See* William C. Cunningham and Todd H. Taylor, The Hallcrest Report, Private Security and Private Police in America (1985).
52. *See* Charles P. Nemeth, Criminal Law 310 (2004).
53. Model Penal Code §220.1 (1962).
54. Model Penal Code §220.1 (1962); *see* Charles P. Nemeth, Criminal Law 315-319 (2004).
55. *See* George E. Dix and Michael M. Sharlot, Basic Criminal Law, Cases and Materials §410 (1980).
56. *See* 18 Pa. C.S.A. §§3301-3307.
57. Charles P. Nemeth, Private Security and the Investigative Process 267-268 (2000).
58. William L. Clark and William L. Marshall, A Treatise on the Law of Crimes (1967).
59. William L. Clark and William L. Marshall, A Treatise on the Law of Crimes 984 (1967).
60. William L. Clark and William L. Marshall, A Treatise on the Law of Crimes 986-987 (1967).

61. *See* Charles P. Nemeth, Criminal Law 298-302 (2004).
62. *See* McKinney's Consol. Laws of New York, Ann. 39 §§140 (1980); *see* Charles P. Nemeth, Criminal Law 302 (2004).
63. Charles P. Nemeth, Private Security and the Investigative Process 246-247 (2000).
64. *See* Coates, *Criminal Intent in Burglary*, 2 N.C.L. Rev. 110 (1924); *see also: Champlin v. State*, 84, Wis. 2d 621, 267 N.W. 2d 295 (1978); *State v. Ortiz*, 92 N.M. 166, 584 P. 2d 1306 (1978).
65. William L. Clark and William L. Marshall, A Treatise on the Law of Crimes 1007 (1967).
66. *See* Charles P. Nemeth, Criminal Law 307-310 (2004).
67. Model Penal Code §221.2 (1) (1962).
68. John Francis, *Security Officer Manual* (1992).
69. *See* Charles P. Nemeth, Criminal Law 168-172 (2004).
70. Model Penal Code §222.1 (1) (1962).
71. Wayne R. Lafave and Austin W. Scott, Sr., Criminal Law 698-699 (1972); *see also People v. Woods*, 41 N.Y. 2d 279, 392 N.Y.S. 2d 400, 360 N.E. 2d 1082 (1977); *Commonwealth v. Mays*, 248 Pa. Super. 318, 375 A. 2d 116 (1977).
72. Wayne R. Lafave and Austin W. Scott, Jr., Criminal Law 200 (1972).
73. *See People v. Beebe*, 70 Mich. App. 154, 245 N.W. 2d 547 (1976).
74. *See* Charles P. Nemeth, Criminal Law 253 et seq. (2004).
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116. 18 Pa. C.S.A. §5507.
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7

Public and Private Law Enforcement: A Blueprint for Cooperation

INTRODUCTION: THE RELATIONSHIP BETWEEN THE PUBLIC AND PRIVATE SECTORS

The interplay between public and private law enforcement and the modern delivery of public safety from privatized interest continues unabated. Despite the differences in legal powers, employers, and total mission, private security officers and public police have many similarities.[1]

The historical legacy that characterizes the relationship between the public and private justice systems is less than positive. In 1976, the Private Security Advisory Council, through the U.S. Department of Justice, delivered an insightful critique on the barriers to full and unbridled cooperation between the public and private law enforcement systems. Struggling with role definition and resource deployment, the relationship has been an uneasy but steady one. The Council stressed the need to clarify role definitions and end the absurd and oft-practiced negative stereotyping.[2] The Council cited various areas of conflict and ranked them in order of importance.

1. Lack of mutual respect
2. Lack of communication
3. Lack of cooperation
4. Lack of security enforcement knowledge of private security
5. Perceived competition
6. Lack of standards
7. Perceived corruption[3]

Put another way, each side operates from a series of perceptions, some accurate, others not. For the most part, the caricatures inhibit full cooperation. *The Hallcrest Report I*[4] decisively addresses this issue. In characterizing the police role as inclined toward crime detection, prevention, and

control, security will always be to some extent the public police's antagonist. Private police give less attention to apprehension, crime detection, prevention, and technology than do their public counterparts. Comparatively, private security addresses similar subject matter but still dwells intently on the protection of assets, immediate deterrence, and commercial enforcement. Table 7.1 provides a graphic illustration of the major distinctions between these two entities.

Table 7.2 and Figure 7.1 further edify these occupational distinctions.

A cursory assessment of these figures shows fundamental agreement on the protection of lives and property. Departure occurs in the upper classifications of law enforcement since the thrust of any public police department must be for the eventual arrest and prosecution of suspects. In contrast, the private justice function is still concerned with preventive activities in the area of crime loss, fire prevention, and other order-maintenance functions. In the security manager rankings, criminal investigation and arrest and prosecution show up in the lower rankings. This prioritization, in and of itself, is a telling distinction, though it should not be viewed as justification

Table 7.1 Comparative Missions of Public/Private Sectors[5]

SECURITY MANAGER RANKINGS OF PRIVATE SECURITY FUNCTIONS *(Rank Ordered)*	
PROPRIETARY MANAGERS	CONTRACTUAL MANAGERS
1. Protection of lives and property	1. Protection of lives and property
2. Crime prevention	2. Crime prevention
3. Loss prevention	3. Loss prevention
4. Fire prevention	4. Fire prevention
5. Access control	5. Access control
6. Crime investigation	6. Order maintenance
7. Employee identification	7. Employee identification
8. Order maintenance	8. Crime reporting
9. Arrest/prosecution	9. Arrest/prosecution
10. Accident prevention	10. Information security
11. Crime reporting	11. Crime investigation
12. Information security	12. Accident prevention
13. Traffic control	13. Traffic control

Table 7.2 Executive Ratings of Law Enforcement Functions[6]

LAW ENFORCMENT EXECUTIVE RATINGS OF LAW ENFORCEMENT FUNCTION *(Rank Ordered)*
1. Protection of lives and property
2. Arrest and prosecution of criminals
3. Investigation of criminal incidents
4. Maintaining public order
5. Crime prevention
6. Community relations
7. General assistance to the public
8. Traffic enforcement
9. Traffic control

for a sharp division. If anything, both public and private law enforcement share a generic goal—namely, the general enforcement of laws. As Bill Struedal points out in his article, *Giving the Police a Sense of Security*,[8]

> Our goal, usually not shared by police and security is law enforcement . . . if we accept the premise that police and security have the same goals, then why don't we work together on a regular basis? There are differences; nobody can deny that . . . there are many other gaps between the two forces, but none is insurmountable with good training and dialogue.[9]

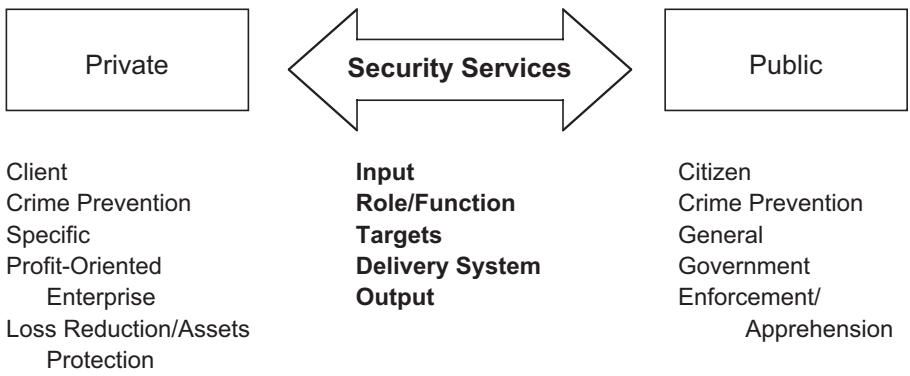

Figure 7.1 Security manager rankings.[7]

The similarities between function, duty, and obligation is very apparent when the tasks of investigation are considered. The skills of the private sector are essentially identical to the public. Review Figure 7.2 to see the diverse opportunities shared and borne by both the private and public sectors.

Given the equal occupational capacity of both the private and public sectors to engage in these many activities, cooperation rather than division appears a wiser tactic. Surely, the concerns of private sector justice increasingly mirror that of the public model. Security's threats and concerns are charted at Table 7.3.[11]

Employee theft, property crime, and access controls are the top concerns of security professionals. Computer and information security concerns continue to increase as the most important security-related concerns.

Another recurring stumbling block, at least perceptually, is public law enforcement's attitude of superiority. Table 7.4[12] indicates that traditional law enforcement takes a dim view of the contribution of proprietary and contractual security when compared to its own role.

In appraising the findings of this perceptual study, the *Hallcrest II* authors suggest:

> Here again, law enforcement executives gave markedly lower ratings than did the private security managers. They agreed, however, on the areas that deserved the highest and lowest ratings. Thus, both the law enforcement executives and the security managers felt that private security was relatively effective in reducing the dollar loss of crime, and relatively ineffective in apprehending larger numbers of criminals. This ranking is consistent with the preventive orientation of private security, which is more concerned with loss control than with arrest and prosecution for crimes. Consistent, too, is the finding that proprietary security managers gave themselves highest marks for maintaining order.[13]

Unfortunately, slight differences in approach and methodology have increased the chasm between these camps. To the detriment of all, these petty differences continue to the present.[14] John Driscoll, in his article *Public and Private Security Forces Unite in Dallas*, asserts "this negative approach prevents the two similar entities from realizing their commonalities and capitalizing upon mutual cooperation."[15] Driscoll recounts the "Dallas Experiment" that stresses interaction between the parties in sharing "criminal information bulletins, recruit[ing] class training blocks, field training officer and security officer meetings, and additional joint information seminars."[16]

The elitist attitude taken by public law enforcement fosters a polarization between the public and private sectors. Though role conflicts and perceptual views of the public and private sectors are compelling arguments, there are other forceful explanations for the natural tension between these competing interests. In the final analysis, the playing field will be leveled a little more each day by the sheer volume in numbers.[17]

(1) PUBLIC PROSECUTORS AND LAW ENFORCEMENT AGENCIES

(2) LAWYERS

(3) PATENT ATTORNEYS

(4) PUBLISHERS

(5) BANKS

(6) INSURANCE COMPANIES AND SELF-INSURERS

(7) RAILWAY, BUS AND AIRLINES COMPANIES

(8) MOTOR FREIGHT, WAREHOUSE AND FREIGHT TERMINAL COMPANIES

(9) STORES

(10) MANUFACTURING AND WHOLESALE DISTRIBUTING COMPANIES

(11) HOTELS

(12) CHARACTER INVESTIGATIONS

(13) SURVEILLANCE

(14) PLANT AND STORE SURVEILLANCE

(15) UNDERCOVER INVESTIGATIONS

Figure 7.2 Types of private security practice.[10]

Table 7.3 2001 Security Industry Concerns

SECURITY 2001 PROFILE: **SECURITY THREATS, CONCERNS**			
2001	**1999**	**1998**	**1997**
1. Property Crime	1. Employee Theft	1. Employee Theft	1. Employee Theft
2. Employee Theft	2. Property Crime	2. Property Crime	2. Property Crime
3. Violent Crime	3. Access/Egress	3. Access/Egress	3. Fire/Safety*
4. Computer Sec	4. Computer Sec	4. Violence**	4. Access/Egress
5. Access/Egress	5. Parking Sec	5. Computer Sec	5. Computer Sec
6. Parking Sec	6. Violent Crime	6. Parking Sec	6. Work Violence
7. White Collar	7. Burglary	7. Burglary	7. Violent Crime

** Fire and life safety concerns broken out as a separate question since 1998.*
*** Workplace violence broken out as a category under life safety concerns since 1998. On security side, workplace violence and violent crime combine together this year into one category called violent crime.*

Table 7.4 Private Security Contributions to Crime Prevention and Control

PRIVATE SECURITY CONTRIBUTIONS TO CRIME PREVENTION AND CONTROL *Ratings by Law Enforcement and* *Private Security Managers*			
	Law Enforcement	Proprietary Security	Contractual Security
Overall contribution	2.2	1.5	1.2
Reduction in volume of crime	2.4	1.7	1.5
Reduction in direct dollar crime loss	2.2	1.6	1.5
Number of criminal suspects apprehended	2.6	1.9	2.0
Order maintenance	2.4	1.4	1.7
SCALE: 1=very effective 2=somewhat effective 3=not effective			

Public Interest versus Private Concerns

Public law enforcement is and has always been saddled with the needs of the public good. Few private security companies have to be concerned with domestic disputes, the transportation of the deceased, stray animals, or protection of the homeless and other downtrodden individuals.[18] The Private Security Advisory Council characterized police work as a public interest function. Public police have "a wide range of responsibilities to protect essentially public concerns and their efforts are closely tied to statutorily mandated duties and the criminal justice system."[19]

The Advisory Council further relates that the police are burdened with constitutional limitations and must interpret and implement certain guidelines in the performance of their law enforcement duties. Additionally, public policing is further restrained by public budgeting and financing processes. Police management policies and an administrative hierarchy within most major police departments must evaluate and allocate their resources according to the needs and demands presently operating within their community structure.[20]

Norman Spain and Gary Elkin, in their article, *Private and Public Security: There Is a Difference*, relate with precision:

> One of the traditional functions of the public police is to deter crime. In reality, their ability to do this is drastically limited. The primary reasons are that the police have little authority to change the conditions that foster crime and they have no authority to decide who will reside in their jurisdiction, whom they will police.
> Private security forces, on the other hand, may alter—at times drastically—the environment in which they operate. They can have walls and fences erected, doors sealed, windows screened, lights put up, and intrusion detectors installed. They can often play a decisive role in determining whom they have to monitor—who is to be an employee of the company—by conducting background investigations of potential employees.[21]

Such a supposition is difficult to dispute, since private security is primarily concerned with the private concerns of private property assets and particular individuals. "Individuals and privately funded organizations and businesses undertake measures to provide protection for the perceived security needs which involve their private interests, not in the public domain. Private security is an option exercised to provide an additional or increased level of protection than that afforded by public law enforcement which must respond to the larger concerns of the public."[22]

Moral or Egalitarian Purpose

Entrance into the vocation of public law enforcement is considered by most a moral and social commitment. This career distinction is not

applied to individuals who commit their lives to the service of private security. But is such a viewpoint fair and rational? Is not the protection of assets, governmental facilities, communities, business interests, or private proprietary holdings a noble endeavor? If private security was not involved, what would be the state of American industry and its physical plants, the security of courthouses and judicial centers, transportation facilities, and neighborhood associations? By what standards are these judgments of moral superiority or social importance designed? Critics and theoreticians who scathingly condemn the nature of private justice often forget the historical contribution private security has provided. Long before the establishment of a formal, publicly funded police department in pre- and post-colonial America, private security interests were the only entities providing protection for individual persons, assets, and business interests. Remember that the nature of a system of town watches, the "hue and cry," calling for posses and community cooperation, constables, and part-time sheriffs could hardly be characterized as public in design.[23]

In evaluating the moral contribution of private law enforcement, reflect upon a contemporary society without private security protection. Who would protect the majority of federal installations? Who would protect the majority of American museums? What force or body would ensure safety and protection in the college and university environment? What other bodies would provide adequate crowd control at entertainment events? What cost would society incur to ensure a public police officer in each bank? Should taxpayers' money be spent in the transportation of money and other negotiable instruments? What police department would provide adequate security for American corporations? How far could city budgets be stretched to provide a secured environment for its multiple retail establishments if security services were absent?

When these queries are explored, public law enforcement's tendency to preach from a high moral pedestal is not as convincing. Richard Kobetz and H. H. Antony Cooper, in their article, *Two Armies: One Flag*,[24] cogently state:

> It is no exaggeration to aver that without the aid of those presently engaged in the various tasks of private security, the resources of public law enforcement would have to be expanded far beyond the limits that the taxpayer could afford and would pay. Even those who do not contribute directly to the cost of providing private security services benefit to some notable extent from their existence. Private security is not a public luxury. It represents a substantial contribution to the general security of the community. In their impact on the community public and private law enforcement are one and indivisible.[25]

A Caste System of Professionalism

Private security has long been an underclass when compared to public law enforcement. Differences in orientation, training, requirements, and social

status accorded these positions have a great deal to do with the class or status differentiation. While much time and energy has been expended in the professionalization of public law enforcement,[26] negative stereotypes, justified or not, still exist concerning private security personnel. "The most powerful trend is the continued growth of the private security industry, both in real terms and relative to law enforcement." In 1987, the director of the U.S. Justice Department's National Institute of Justice (NIJ) wrote that "cooperation becomes increasingly essential with the growth of the private security industry." In policing, "resources to meet the increasing demand have dwindled. In most major cities, police personnel have declined, and the number of police employees per 1,000 population dropped 10 percent between 1975 and 1985. Shrinking tax revenues throughout the country and outright taxpayer revolts . . . have curtailed growth in government. Police, like other public administrators, have become familiar with cutback management."[27] The Private Advisory Council expounds that these attitudes "are based on incorrect assumptions that private security personnel perform the same job duties as patrol officers and investigators in law enforcement, and that a broad generalization can be made about the nature and personnel of all components of proprietary and contractual security—guards, private patrol services, private investigators, armored car guards and armed couriers, and alarm response runners and installers. Certainly, the security industry and private justice practitioners must concede there is a distinction between the level of training and qualifications for certification. The security industry has been its own worst enemy in this area by failing to promote high level, sophisticated standards of educational requirements."[28] In response to the call for increased state and local regulation of the private security force, Richard Lukins, in his article *Security Training for the Guard Force*, castigates the industry for its lack of action.

> This trend has not caught the affected components of the private security industry—the guard services and proprietary security managers—completely by surprise but it does not appear that they were totally prepared either. And certainly no one can say that our industry has established an imposing record of self-regulation.[29]

Lukins further relates that the present impression of a security guard as not more than "half a cop" will be deleterious to future professionalism in the security industry.[30] The quest for professionalism requires more than rhetoric. As outlined in Chapter 2, on regulation, licensing, and qualifications, the road to professionalism is filled with impediments. Those impediments—a lack of educational discipline or cogent body of knowledge, an accepted code of ethics, a prestige or status consensus on occupational roles, or a seal of social and governmental legitimacy—are all attainable goals.[31] To get beyond the characterization that a private security practitioner is nothing more than a play policeman, the industry will have to aggressively implement the standards of professionalism.

On the other hand, much of that judgment is the result of prejudice and stereotype. "Private security is aware of this status differential imposed by many law enforcement personnel and deeply resent it since they feel that law enforcement neither understands nor empathizes with their crime prevention role. This in turn leads to a lower level of esteem by private security for law enforcement personnel."[32] These types of petty bickering and hate mongering hardly results in professionalism in either camp. Constructive suggestions regarding increased standards and performance objectives are more in order. Certification programs such as that offered by the ASIS and its Certified Protection Professional programs make a real contribution to substantive professionalism. The CPP program's chief objectives are:

1. To raise the professional standing of the field and to improve the practice of security management by giving special recognition to those security practitioners who, by passing examinations and fulfilling prescribed standards of performance, conduct, and education, have demonstrated a high level of competence and ethical fitness.
2. To identify sources of professional knowledge of the principles and practices of security and loss prevention, related disciplines, and laws governing and affecting the practice of security.
3. To encourage security professionals to carry out a continuing program of professional development.[33]

Attaining professionalism is not an empty-headed exercise. Howard C. Shook, former president of the IACP, remarks that the private security sector has "proven its worth and can defend itself from detractors rather easily."[34] Harold Peterson, in his work *Private Security v. Public Law Enforcement*,[35] calls for a natural respect between the public and private sectors and highlights the unique and extremely sophisticated expertise exhibited by the private justice system. He warns the traditionalist in law enforcement:

> There are those in both the community and law enforcement who believe that the public police alone are responsible for crime reduction. If, as a chief, you think like this, I'm afraid that your agency will fail the public you serve.[36]

A Failure to Communicate and Cooperate

Predictably, a lack of respect between the public and private sector, leads to a lack of communication. The Private Security Advisory Council remarks brilliantly:

> Since many law enforcement personnel perceive themselves as having a higher degree of status than private security, and do not properly

> appreciate the role of private security in crime prevention, there will be a tendency to avoid communication with private security personnel. One might expect that private security would communicate freely with law enforcement as a perceived higher status group. But the intensity of feelings expressed by private security and the ambiguity of their relationship with law enforcement . . . would seem to indicate an uncertainty as to the equality of status with law enforcement. Private security, then, would generally tend to avoid communication with law enforcement; without effective communication cooperation cannot be imposed.[37]

Like squabbling relatives, this state of interaction is counterproductive, but easily correctable. So many of the perceptions, viewpoints, and preconceived notions about the role of private security in public law enforcement that each party possesses are highly biased and unscientific. For example, it is ludicrous to argue that the training and educational requirements for all public law enforcement positions is markedly higher. Some major police departments, such as the city of Philadelphia, with a metropolitan area of more than 6 million people, historically require no more than an eighth-grade education for admission into the police department. While this may be an exception to the general requirement of a high school diploma, it is folly for public police personnel to perceive their educational requirements as always being more rigorous. Of course, there has been a strong tendency toward higher educational requirements with a recent flurry of legislative activity concerning the regulation, licensing, and education mandated for private security.[38] The perception that only public policing has erudite training is fundamentally flawed.

Another rationale often espoused by the public sector, that justifies its lack of communication, is functional separation. Some see no benefits to communication because of distinct occupational roles. The perception that private security protects only those interests that are strictly private is incorrect. Consider Table 7.5,[39] charting the public functions performed by the private justice sector.

Those asserting a limited public role for private security, inaccurately portray the industry.

Private security personnel have willingly taken on, been legislatively granted, or freely pursued these traditionally public functions:

- Community protection and services
- Public housing protection
- Parking authority control and security
- Enforcement of motor vehicle laws
- Natural resource activities
- Waterways and port services
- Air and rail protection
- Animal control
- Court security
- Governmental office security

- Private prisons
- Code violation inspectors
- Special event security
- Governmental investigations

The call for cooperation and professional interchange is earnest and well-grounded. Professional associations and groups such as the American Society for Industrial Security have formulated liaison committees. Additionally, The International Association of Chiefs of Police has emphasized the unique capacities of the security industry, stating that it should be viewed as a complement to public law enforcement.[40]

There can be little dispute that privatization of public services or contracting out of government responsibility to private employers is a major trend. Not unexpectedly, much of this activity has been viewed with distrust and apprehension, particularly from those authorities that intend to ensure the vested interest of police. The *Hallcrest Report I* notes that this type of bickering and failure to communicate borders on the inane. The interest of the public will be better served through "constructive dialogue and creative planning by law enforcement and private security to facilitate contracting out of certain noncrime activities."[41] The report further notes that energy, time, and resources are being wasted in this debate and "could be better utilized in identifying areas for contracting out and developing tightly prescribed contract specifications of performance."[42]

The momentum of privatization makes public reticence to private sector justice even more unjustified. "But the trick to privatization is not only lowering costs, but also maintaining quality of service—particularly when the service in question is security."[43]

The transference of public obligation to private interest is a trend likely to continue. See Table 7.6.[44]

A failure to communicate is a nonsensical policy that can only hinder the social order. Public law enforcement, in its own ignorance of the processes and functions of private law enforcement, simply chooses to disregard the reality of its professional counterpart. In the same vein, private security, particularly through its own internal decision making, management, and personnel practices, has done little to dissuade its reputation that it is a business first and a business last. As one commentator states,

> Many problems are constant and intractable while the barriers remain; solutions become possible only as they fall away. Familiar roles are exchanged for others less accustomed. The experience is designed expressly to give practical insight into the domain and responsibility of others. It is a sobering feeling to have once in a while the privilege of walking a mile in someone else's moccasins. It is hoped that these shared experiences may be carried over into the day-to-day realities of professional life and provide a positive inspiration for cooperation and understanding.[45]

Table 7.5 Private Provision of Protection Services: State Examples

STATE	JURISDICTION	TYPE OF SERVICE
Alaska	Anchorage	Parking meter enforcement Parking meter collection Parking lot security
Arizona	State	Parking lot enforcement
	Flagstaff	School crossing guards
	Maricopa County	Building security
	Phoenix	Crowd control
California	Federal	U.S. Department of Energy facility security
	Hawthorns	Traffic control during peak hours
	Los Angeles	Patrol streets surrounding private university Traffic and security for special events
	Los Angeles County	Building security Park security
	Norwalk	Park security
	San Diego	Housing project security Park security
	San Francisco	Building security
	Santa Barbara	Airport security Prison transport
Colorado	Denver	Building security
	Fort Collins	Building security
Connecticut	Hartford	Sports arena security
Florida	Dade County	Courts, building security
	Fort Lauderdale	Airport, building security
	Pensacola	Airport security
	St. Petersburg	Park security
Hawaii	State	Parking lot enforcement
Idaho	State	Regional medical center security
	Idaho Falls	School crossing guards
Kentucky	Lexington	Housing project security
Massachusetts	Boston	Hospital, courts, library security—city Library security—federal
Nevada	Federal	Nuclear test site security
New Jersey	Sport Authority	Sports arena security
New York	State	Response to burglar alarms in state office
	Buffalo	County security—federal
	New York City	Security compounds for towed cars Shelter security Human Resources Administration security Building security Locate cars with outstanding tickets Arrests for retail store theft Management training; police Campus security

Continued

Table 7.5 Private Provision of Protection Services: State Examples—*Cont'd*

Pennsylvania	State	Unemployment offices security Welfare offices security
	Philadelphia	Parking enforcement
	Pittsburgh	Court security—federal Patrol city park High school stadium security School crossing guards Transfer of prisoners
Texas	Dallas/Fort Worth	Airport security including baggage checking
	Houston	Building security
Utah	State	Building security Training for transit police
Washington	Seattle	Building security
	Tacoma	Sports arena security
Washington, D.C.	District of Columbia Federal	Planning and management Building security

Failure of both the public and private justice systems to communicate and cooperate is a staggering loss of human and professional resources. The Private Security Advisory Council revealed an exceptionally low level of interaction between the public and private sectors. Its more salient findings included the following:

1. Less than one-half had conducted a survey to find out how many and what types of private security agencies operated in their areas;
2. Only one-third of the agencies stated that they had an office or officer to provide liaison with private security;
3. Only 25 percent of the agencies had policies or procedures for defining working roles of law enforcement in private security;
4. Only 25 percent had policies covering interchange of information with private security;
5. Less than 20 percent had procedures for cooperative actions with private security.[46]

The lack of cooperation and communication is a mutual deficit shown in Table 7.7.[47]

Both law enforcement and the private security industry have a moral and legal obligation to open channels of communication and to cooperate professionally. To maintain the current relationship is debilitating to efforts to reduce criminality. The continued practice of turf protection, stereotyping, and prejudicial analysis benefits no one. As Kobetz and Cooper related,

> As soon as the essential unity of a mission is perceived and accepted, the special difficulties of responsibility and approach can be studied in detail. For too long, the other side—our common antisocial enemy—has seen matters in terms of "them versus us," is it not time that we, the

Table 7.6 Transfer of Responsibilities

POSSIBILITY OF TRANSFERRING RESPONSIBILITY TO PRIVATE SECURITY			
Activity	**Law Enforcement Executives**	**Proprietary Security Managers**	**Contract Security Managers**
Responding to burglar alarms	57%	69%	68%
Preliminary investigations	40%	88%	68%
Completing incident reports			
a) victim declines prosecution; for insurance purposes only	68%	87%	66%
b) misdemeanors	45%	81%	63%
Supplemental case reports	38%	78%	63%
Transporting citizen arrests	35%	32%	38%

Table 7.7 Private Security Perceptions of Law Enforcement

Private Security Perceptions of Law Enforcement Cooperation on Criminal Incidents/Assistance Calls		
DEGREE OF LAW ENFORCEMENT COOPERATION	SECURITY MANAGERS PROPRIETARY	CONTRACT
Don't cooperate	2%	7%
Cooperate reluctantly	23%	33%
Cooperate fully	71%	34%
Interfere with private security investigation	2%	4%
Withhold needed information	9%	15%
LAW ENFORCEMENT RESPONSE TO ASSISTANCE REQUESTS	SECURITY EMPLOYEES PROPRIETARY	CONTRACT
Respond promptly	59%	35%
Respond slowly	3%	10%
Depends on situation	32%	36%
Have never called police	6%	19%
LAW ENFORCEMENT SUPPORT FOR SECURITY EMPLOYEE DECISIONS		
Support decisions	75%	52%
Do not support	1%	4%
Sometimes support	11%	23%
N/R	13%	22%

public and the private providers of security, truly end this and in a practical and professional fashion begin to think of "us versus them"?[48]

POSITIVE PROGRAMS ON INTERACTION AND COOPERATION

What needs to be accomplished is the forging of a solid professional alliance. "While healthy competition and fraternal camaraderie are still in the distant future, the likelihood that more and more local police departments will recognize the hidden wealth that lies in police private security relations seems closer than ever . . . ."[49] In order to accomplish the objective of mutual cooperation and communication, certain goals, objectives, and responsibilities have to be met. Daniel E. McElory, in his article *A Professional Alliance*,[50] holds the following to be essential,

- Recognize certain prescribed standards of performance, education and high level of professional competence of individuals entering the field or presently employed in the industry.
- Encourage the use of sound practices, principles of security and loss prevention.
- Promote mutual respect, cooperation, and communication between both sectors as well as increasing the knowledge of each other's functions.
- Speak in a unified voice on issues that promote the industry at large.
- Stress and promote programs designed for increasing professional development at all levels of employment.
- Work to establish liaisons wherever possible that will serve to benefit the entire industry.
- Pursue a program of true professionalism in thought, word, and deed.[51]

The previous discussion of the failure of the public and private sectors to interact and cooperate properly does not reflect the successful strategies adopted by private and public interests. Success stories, while not a majority, will hopefully increase over the next decade.

College and Municipal Police Forces

The cooperation exhibited between city or municipal police and college and university security forces is a long-standing example. William Bess and Galen Ash, respective Directors of Campus Safety at Bowling Green State University and the Bowling Green Police Department, feel confident that they have mastered the art of interaction, by identifying the essential elements in the recipe for successful cooperation:

1. Mutual assistance agreement
2. Support from the courts

3. Shared training programs
4. Efficient communications (technical)
5. Ongoing administrative working relations
6. Police/advisory committee participation
7. Shared crime prevention programs
8. Cooperative investigations and sharing of information
9. College educational programs
10. Informal daily contacts.[52]

Both parties indicate that rhetoric is easy, but activities that are planned and concerted are the elixir for a malignant or distrustful state of affairs. So crucial is the interaction between public and private security functions, especially between college and university departments and the city or municipalities in which they are located, that the National Association of College and University Business Officers, in its operation manual, stresses the need for continuing interplay.

> The security department must be largely self-sufficient, but able to work harmoniously with other institutional departments. It should also maintain effective liaison with other law enforcement agencies, the courts, the prosecuting agencies and the press. It is also advisable that the local chief of police be informed of public functions to be held at the institution, so that he may be prepared to assist if necessary.[53]

The influence of private sector policing on college campuses is simply remarkable. With the implementation of new federal legislation on the reporting of the campus crime rate, under The Student Right to Know and Campus Security Act, private sector justice computes the crime data. The International Association of Campus Law Enforcement Administration (IACLEA) has been a major implementer of the new policy. While the reporting requirements are administratively cumbersome, the "law has, however, delivered some good. Besides placating many victims' rights groups, it directs attention towards campus security with real and positive impact. As prospective students focus more on crime statistics as criteria for choosing a college, campuses will tend to beef up on-site security programs, by specifying integrated access control, communications and monitoring systems in dormitories, classrooms, parking lots and other facilities."[54]

Local police departments, as well as state entities, are increasingly relying on this information.

Transit and Municipal Police Forces

A program that evidences the tremendous rewards of positive interaction between public law enforcement and private security is presently operating between the transit police department in Los Angeles and the City of

Los Angeles and five surrounding counties.[55] Coupling a massive metropolitan area with a highly visible bus and transit service, provides opportune laboratory conditions to test public/private cooperation. So sophisticated is the interaction between the private transit police and the surrounding City of Los Angeles and counties that a grant of $375,000.00 was awarded from Los Angeles County for the purposes of "hiring off-duty local police officers to work on a part-time basis."[56] Benefits of the program have been many and include a massive infusion of manpower which has resulted in a decline of violent criminality in transit locations.[57] The intangible and indirect benefits of interaction and cooperation seem to be held in the highest regard. Harry Buzz, then assistant chief of the Transit Police Department has written:

> The indirect benefits include development of working relationships between members of our local enforcement agencies. The part-time officers have gained respect for the professionalism of our department which they take back to their own agency. They have become more sensitized to transit crime and can, while working with their primary agency, handle unique transit related problems with confidence.
>
> Transit police officers have benefited from the exposure to highly trained and experienced officers of other agencies. Also, since transit police officers patrol most streets in Los Angeles County, especially the high crime areas, they are frequently called upon to provide backup to local jurisdictions. This is particularly true in the city of Los Angeles where LAPD is operating with extremely limited personnel resources. On many of these occasions, the officer being assisted has worked part time for our department and the other officers know each other.[58]

Aside from these remarkable benefits, the transit-LAPD experiment has dramatically increased the public's perception of safety. That, of course, is the greatest benefit of any policing process whether it be public or private.

While in many cases interaction and cooperation between public and private law enforcement is impeded by an atmosphere of distrust and elitism, these examples indicate the capacity to change and to benefit from mutual dedication.

Private Security Industry and Law Enforcement Agencies

Another successful enterprise that has been forged between public and private security forces is between the City of Amarillo, Texas and a private security company by the name of Allstate Security Industries Inc.[59] The president of Allstate, as well as the chief of the Amarillo Police Department recognize that mutual cooperation benefits both departments. Commencing in August 1981, both entities devised a program whereby Allstate Security would begin responding to all alarm calls. In reviewing the findings of an internal study, the department revealed that "this procedure relieved the police department of the time consuming responsibility of

answering an average of 8 alarms per day and saved the Department approximately 3,428 man hours, or the equivalent of adding 1¾ men per year to their police department. All of this was at no cost to the taxpayers."[60]

The results of such mutual cooperation are advantageous from an economic as well as a human point of view. As Allstate continues to pursue alarm calls, such a policy frees up other public officers to perform other functions. It also reduces the stress level in the entire department and builds or affirms goodwill between the department, the security company, and the public at large. Given the success of this relationship, the program of mutual cooperation was expanded to include a neighborhood patrol program and a canine program. Current internal studies of these activities indicate a positive outcome.[61]

In the early 1980s, Washington State embarked on an ambitious joint endeavor between the public and private sector entitled the Washington Law Enforcement Executive Forum (WLEEF). "Membership is composed of 26 individuals equally divided between the private sector and law enforcement executives, including sheriffs, chiefs, the state patrol chief, and special agents in charge of the Seattle offices of the FBI and Secret Service, as well as representation from the state attorney general's office. Close relationship and open communication exist between the WLEEF and the Washington Association of Sheriffs and Police Chiefs."[62]

Some of the more significant activities engaged in are:

- funding a statewide loan executive program to enhance management of local police agencies;
- providing support for the *Law Enforcement Executive Journal*, the nation's first law enforcement/business publication;
- support computer crime control legislation;
- funding and developing a state-wide toll-free hotline for reporting drunk drivers;
- sponsoring legislation for regulation and training of private security personnel;
- promoting a Business Watch program to prevent crimes against businesses; and
- creating an Economic Crime Task Force

(1) to assess the nature and extent of white-collar crime in the state,
(2) to develop strategies to reduce such crime,
(3) to promote appropriate legislative initiatives and revisions, and
(4) to collect and disseminate information on economic crime.[63]

More recently, WLEEF has been an active participant in the state's 1991 legislation on the regulation and licensing of the private security industry. This joint endeavor produced a variety of positive results including:

1. The philosophical and operational "gap" between public law enforcement and private security is not nearly as wide as often imagined.

2. Competitive security companies can work well together for legitimate common causes, such as training.
3. A high-quality training program can be put together in a short four-hour block.
4. Good communication between government and the security industry can go a long way toward making a licensing law workable and meaningful.
5. There are a lot of community resources available for training.[64]

Information regarding the program can be obtained from:
William Cottringer, Washington State Security Council, 6632 S. 191st Place, E-107, Kent, Washington 98032; (206) 872-2450; fax: (206) 872-1403.[65]

In the final analysis, mutual cooperation and respect and goal orientation toward professionalism all lead to safer communities. James A. Kirkley, then director of the Department of Public Safety at the Claremont Colleges in Claremont, California,[66] critiques the traditional separation of authority and power:

> It is now time for a total community effort. The high percentage of non-crime calls for service, the percentage of non-observable crimes, and the fiscal constraints placed upon you, make it ludicrous to expect the public police alone to be responsible for reducing crimes.
> Teamwork has long been recognized as an essential ingredient in winning. It is used in all sports, war, business, and even in police work . . . .
> The time has come for the public sector and the private sector in law enforcement to work as a team.[67]

The consensus building for continual interaction and cooperation between the public and private sector has come of age.

RECOMMENDATIONS

National Advisory Committee on Criminal Justice

The National Advisory Committee on Criminal Justice Standards and Goals, in its 1976 *Report of The Task Force on Private Security*,[68] presses for significant interaction. Some particularly prophetic language affirmed:

> Over the past decade, the resources devoted to both public law enforcement and the private security industry have increased as the awareness of the need for greater crime prevention and control has grown. National leaders have called upon every private citizen, institution, and business to join their efforts with the criminal justice system to prevent crime. Although a closer cooperation between the private security and public law enforcement spheres offers a special opportunity for

improved crime prevention, the relationship has often been ignored, overlooked or restrained.

Recently, however, the potential of that meaningful working relationship between law enforcement and private security has been recognized.

Theoretical concerns aside, practical, pragmatic considerations force an interaction policy. As this work has delved into the complex legal, social, and other policy questions involved in the legal aspects of security, one striking observation occurs—that for all the clamor about public and private functions, there is really very little difference between the two entities.

The National Advisory Committee enunciated specific standards and goals, harkening for cooperation, mutual respect, and regular interaction. Its more salient recommendations encompass:

Goal 6.1: Interaction Policies
Effective interaction between the private security industry and law enforcement agencies is imperative for successful crime prevention and depends to a large extent on published clear and understandable policies developed by their administrators. Policies should be developed to serve as guides for modification by appropriate agencies.[69]

Goal 6.2: Survey and Liaison with Private Security
Law enforcement agencies should conduct a survey and maintain a current roster of those security industry components operating in the agencies' jurisdictions, and designate at least one staff officer to serve as liaison with them.[70]

Goal 6.3: Policy and Procedures
For law enforcement agencies and the private security industry to most effectively work within the same jurisdiction, policies and procedures should be developed covering:
(a) the delineation of working roles of law enforcement officers and private security personnel;
(b) the continuous prompt and reasonable interchange of information; and
(c) cooperative actions between law enforcement agencies and the private security industry.[71]

Goal 6.4: Multi-Level Law Enforcement Training in Private Security
There should be a multi-level training program for public law enforcement officials, including but not limited to:
1. Role and mission of the private security industry;
2. Legal status and types of services provided by private service companies;
3. Interchange of information, crime reporting, and cooperative actions with the industry; and
4. Orientation in technical and operational procedures.[72]

Goal 6.5: Mistaken Identity of Private Security Personnel
Title, terms, verbal representations, and visual items that cause the public to mistake private security personnel for law enforcement officers should be eliminated; security employers should ensure that their personnel and equipment are easily distinguishable from public law enforcement personnel and equipment.[73]

Goal 6.6: State Regulation of Private Security, Uniforms, Equipment and Job Titles
Each state should develop regulations covering use and wear of private security uniforms, equipment, company names and personnel titles that do not conflict with those in use by law enforcement agencies within the state.[74]

Goal 6.7: Law Enforcement Personnel Secondary Employment
Law enforcement administrators should insure that secondary employment of public law enforcement personnel in the private security industry does not create a conflict of interest and that public resources are not used for private purposes.[75]

Goal 6.8: Law Enforcement Officer Employment as a Security Manager
No law enforcement officer should be a principal or a manager of a private security operation where such an association creates a conflict of interest.[76]

Goal 6.9: Private Investigatory Work
Law enforcement officers should be strictly forbidden from performing any investigatory work.[77]

The National Advisory Committee approaches the dilemma on multiple fronts. First, in order to ensure a cooperative environment between public and private sectors, it harkens for continuous and regular interaction, calls for the creation of a liaison officer and other committees to facilitate the interchange between public and private factions. The committee also urges the elimination of all conflict of interest situations, especially as relates to moonlighting and industrial involvement where either an actual or perceived conflict might exist. Finally, the committee, while insisting upon mutual respect and emulation of each other's tasks and duties, reminds the private sector that it cannot be copycat police officers and should not hold itself out, whether by uniform, badge, or other representation, as operating under the authority of the state or municipality where it is located. Such actions foster potential abuse and cause confusion in the public eye.

The Hallcrest Report

The Hallcrest Report I accepts the fact that private security has "got its head together and found its purpose in life." Its recommendations now

insist on a more proactive and participatory role in the elimination, prevention, and detection of criminality in society. Some of the following recommendations attest to this philosophical direction:

- Private security should be involved in community crime prevention.[78]
- Private security should be participants in the development of an Economic Crime Institute.[79]
- Private security should be required, through its associations, to develop crime loss reporting data and information.[80]
- Private industrial security firms should formulate employee awareness programs and specific corporate policies on business, business ethics, and crime.[81]
- Private security concerns should be involved in strategic planning, alternative policing arrangements, and in the transfer of selected police activities to the private sector.[82]
- Private security should provide the resources necessary to design a *Private Security Resource Institute*.[83]
- Private security should establish standard industrial classifications.[84]
- Private security should have total access to criminal histories.[85]
- Private security should be permitted to achieve an identity through uniforms and appropriate advertising.[86]
- Private security should develop the capacity to transfer its technology to the public sector.[87]
- Private security should support efforts to standardize qualifications, educational training, and certification.[88]
- Private security should provide educational opportunities for public law enforcement officials.[89]
- Private security should establish a task force of police and private security personnel for various purposes.[90]

As propounded above, these recommendations call for a more active involvement in crime prevention, deterrence, and apprehension than traditionally has been expected. Private security, as an industry, can no longer expect to be insulated from either the government's regulatory process or public scrutiny. As the role of private security expands, both legally and socially, new responsibilities and obligations must be tackled. Given the high rate of public dissatisfaction over the performance of the public police systems, private police should view increased demands as a sign of confidence. The world's overall complexity makes it likely that security is here to stay and flourish. "The world has shrunk and most industries now face global competition. Businesses are not only concerned with the ethics and mores of a domestic environment, but must now deal with the values of a dynamic world market. Vast new technologies in communications have placed enormous pressures on businesses to protect their data and the assets that pass through these technologies."[91] Public policing, with its numerous restrictions and difficulties, can only envy the private police process.

SUMMARY

This chapter pragmatically examines the current cooperative programs between public and private law enforcement. While efforts to stress the commonality of interest between private and public justice are ongoing, there are still glaring differences regarding legal authority, rights, and obligations. There have been judicial and social efforts to extend constitutional protections to private justice. While numerous attempts have been made to color the activities of private policing as a state action or a governmental exercise, which in turn affords more significant constitutional protections to the aggrieved suspect, no permanent bridge has yet been built. Private security, for all of its shortcomings, still has the upper hand procedurally when compared to the restraints of public policing.

Much of the chapter was concerned with the distinct, yet complementary functional approaches to crime prevention, deterrence, and policy interests of the public and private sectors, requirements in training and other qualifications, and a critical review of stereotypic and prejudicial perceptions of both law enforcement interests. In the final analysis, the preponderance of the evidence demonstrates that the public/private division is more an exercise in human prejudice than in logic or knowledge. Public/private cooperation would be an intelligent exercise of combined resources to combat criminality in American society. Examples of the cooperation between college and municipal police departments, private transit police forces and other private/public joint ventures were covered. While these examples are not scientifically probative, they are illustrative success stories.

Finally, recommendations from the National Committee on Criminal Justice Standards and Goals as well as the recent findings of *The Hallcrest Report I* were covered in depth. The private security industry's involvement in public justice activities, tasks, and obligations signals increased responsibility for the industry and demands it to be a major contributor and policy maker in the elimination of crime.

DISCUSSION QUESTIONS

1. Give three suggestions on how private police and public law enforcement could interact on a more positive basis.
2. Do police and private security have any commonality of interests?
3. Should private security be more attuned and dedicated to moral or egalitarian purposes?
4. In your jurisdiction, are there any examples of mutual cooperation between public and private law enforcement?
5. What are some drawbacks of having the state or local police exercising regulatory oversight over the private security industry?

6. Pose three suggestions for equalizing the status of public and private law enforcement.
7. Would it be feasible for state or other governmental regulators to require the security industry to donate time assisting public law enforcement in public order and/or public safety activities?

NOTES

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8

Selected Case Readings

INTRODUCTION

The following cases have been properly labeled "benchmark" precedent in the world of private security. Use them as reference points and as catalyst for further discussion. The cases emphasize the legal nuances of private sector justice, and even more compellingly tell the story of privatization and its apparent invincibility. Since *Burdeau v. McDowell*, the kingpin of private security cases, decided in 1921, the courts at both the state and federal levels have consistently ruled on this well-settled area of law. While activists on many fronts wish constitutional extension to private-sector operations, the reticence of jurists, even in the age of judicial activism, is quite remarkable. To be sure, the courts have been dependable and even more predictable. That sort of uniformity is rare and a reflection of how high the stakes are in the law of private security.

AETNA CASUALTY & SURETY COMPANY V. PENDLETON DETECTIVES OF MISSISSIPPI, INC.

182 F.3d 376, (5th Cir. 1999).

Before Garwood, Duhe, and Benavides, circuit judges.

Opinion:

John M. Duhe, Jr., circuit judge:

Aetna Casualty & Surety Company ("Aetna") sued Pendleton Detectives of Mississippi, Inc. ("Pendleton") for recovery of the amount of claims it paid for losses to its insured, The Merchants Company, Inc. ("Merchants"), resulting from Pendleton's negligence or breach of contract. The jury awarded Aetna $174,000 in damages. Subsequently, the district court granted Pendleton's Motion for Judgment as a Matter of Law and entered judgment for Pendleton. Aetna appeals arguing the district court erred, because Aetna presented sufficient evidence to sustain the jury's verdict. We agree, and reverse the district court's judgment and reinstate the jury's verdict.

Background

In August 1993, Pendleton contracted with Merchants to provide security for Merchants' Jackson, Mississippi distribution warehouse facility. Merchants quickly determined that it was unsatisfied with Pendleton's service. Merchants complained that the gate was left open at times, guards arrived at work intoxicated, made personal phone calls, and entertained members of the opposite sex while on duty. In early 1995, Merchants determined through its inventories an unusually high amount of loss from its warehouse. Merchants suspected nightshift employee theft was responsible for the increased losses. Merchants fired its nightshift manager and notified Pendleton, but the problem only grew worse. After Merchants notified Pendleton again of the problem, it hired a private investigator posing as an employee to investigate the problem. The private investigator concluded employee theft was responsible for the losses. Additionally, several nightshift employees, while taking lie detector tests administered by a hired expert, admitted stealing large amounts of food from the warehouse. After receiving Merchants' complaints, Robert H. Pendleton, chairman of the board of Pendleton, sent Merchants a memo acknowledging that the guards' performance was below what was expected.

On January 31, 1996, Merchants submitted a claim of $430,266.68 for losses resulting from theft at its Jackson, Mississippi warehouse. After settling the claim, Aetna sued to recover the amount as Merchants' legal subrogee and contractual assignee. Although the jury awarded $174,000 in damages to Aetna, the district court granted Pendleton's Motion for Judgment as a Matter of Law and entered a judgment for Pendleton on May 8, 1998. Merchants appeals.

Discussion

We review the district court's grant of a motion for judgment as a matter of law de novo, applying the same standard it used. *See Hill v. International Paper Co.*, 121 F.3d 168, 170 (5th Cir. 1997). A court may grant a judgment as a matter of law if after a party has been fully heard by the jury on an issue, "there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue." Fed. R. Civ. P. 50; *Conkling v. Turner*, 18 F.3d 1285, 1300 (5th Cir. 1994). A court should view the entire record in the light most favorable to the nonmovant, drawing all factual inferences in favor of the nonmoving party, and "leaving credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts to the jury." Conkling, 18 F.3d at 1300 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)).

The district court based its ruling on Merchants' failure to introduce conclusive evidence that the thefts occurred while Pendleton guards were on duty. Although Pendleton's security expert, Robert Vause, testified that it was more likely than not that the theft occurred because of Pendleton's substandard service, the district court disregarded his testimony because his belief was based on the lax security environment created by Pendleton employees at Merchants' warehouse.

Merchants contends that it presented sufficient evidence to support the jury's verdict, while Pendleton asserts that Merchants did not prove its employees proximately caused Merchants' losses. Specifically, Pendleton argues Merchants failed to present direct evidence that Pendleton guards were on duty when the thefts occurred. While admitting that its security services were substandard, Pendleton contends that Merchants' restrictions on its security service caused the losses rather than Pendleton's substandard services.

To prove negligence, "a plaintiff must prove by a preponderance of the evidence each element of negligence: duty, breach of duty, proximate causation, and injury." *Lovett v. Bradford*, 676 So. 2d 893, 896 (Miss. 1996). Circumstantial evidence is sufficient to prove proximate cause under Mississippi law. See *K-Mart, Corp. v. Hardy*, 735 So. 2d 975, 1999 Miss. LEXIS 102, 1999 WL 145306, at *5 (Miss. 1999). "Negligence may be established by circumstantial evidence in the absence of testimony by

eyewitnesses provided the circumstances are such as to take the case out of the realm of conjecture and place it within the field of legitimate inference." Id. (quoting *Downs v. Choo*, 656 So. 2d 84, 90 (Miss. 1995)); see *Davis v. Flippen*, 260 So. 2d 847, 848 (Miss. 1972). ("when the case turns on circumstantial evidence it should rarely be taken from the jury.")

Merchants presented the following evidence of Pendleton's negligent security practices: (1) guards slept on the job; (2) guards watched T.V. on the job; (3) guards drank on the job; (4) guards entertained guests of the opposite sex on the job; (5) guards left the gate to the warehouse open; (6) Pendleton's admission of failing to perform sufficient background checks on its guards; (7) the private investigator's conclusion that nightshift employees were responsible for the losses; (8) several of Merchants' nightshift employees' confessions to stealing large amounts of food; (9) Pendleton's contractual obligation to provide security from 4 P.M. to 8 A.M. and 24 hours a day on weekends; (10) Merchants' repeated reports of suspected employee theft to Pendleton; (11) the report of a person wearing a Pendleton baseball cap selling Merchants' products from the trunk of his car; and (12) Merchants' security expert's testimony that it was more probable than not that Pendleton's lax security practices caused the losses. Merchants argues the above evidence is sufficient to support the jury's verdict.

Pendleton argues that Merchants' restrictions on its security service caused the losses, and that, because of the limited nature of the security service Merchants requested, the loss would have occurred even had Pendleton performed its duties perfectly. Pendleton contends the following restrictions placed upon its service by Merchants prevented it from deterring the losses: (1) Pendleton was not allowed to go inside Merchants' warehouse; (2) Pendleton was not allowed to inspect the inside of trucks or employee vehicles leaving the facility; (3) Pendleton did not provide 24 hour a day protection 7 days a week; and (4) the Pendleton security officer's view of the employee parking lot was obstructed for a short period of time every hour while he conducted rounds of the premises.

At trial, Pendleton theorized that Merchant's former night shipping manager was involved in a large-scale scheme to steal food by colluding with truck drivers to falsify shipping documents and send sealed trucks full of food to nonexistent locations. Pendleton contended that because its guards lacked the authority to search sealed trucks as they left the gates of Merchants' facility, it was unable to prevent the losses Merchants suffered. However, Pendleton did not offer evidence that Merchants accused its truck drivers of stealing or that it ever suspected or investigated any occurrences of falsified shipping documents. Moreover, Merchants' evidence established that the substantial losses from theft continued long after Merchants fired the night shipping manager.

Merchants' evidence at trial sufficiently supports the jury's inference of causation between Pendleton's lax security practices and the losses Merchants suffered. The Security Instructions developed by Pendleton exclusively for Merchants expressly stated that the mission of Pendleton's

post was "to maintain security of the property and prevent fires, theft, etc. during all hours." The Security Instructions required that Merchants' employees enter the facility only through a gate located next to the guard house and that Pendleton guards be stationed at the guard house during their entire shift except during the brief period of their rounds. These instructions also authorized Pendleton's guards to stop Merchants' employees and inspect any packages or bundles they were carrying, and mandated that Pendleton guards keep a "close check on the employee parking area to deter outsiders, or *other employees*, from tampering with or damaging employee vehicles." (emphasis added). Additionally, while the guards' view of the employee parking lot was obstructed for a short period of time every hour during the rounds of the premises, the guards were to perform these rounds randomly rather than at a set time of day and were supposed to lock the gate while away, requiring employees to wait until the guard's return to exit the facility, thereby reducing the likelihood of employee theft during this brief absence.

The period of loss claimed by Merchants extended from October 1994 to December 1995. During this period Merchants employed up to 90 night-shift employees, and Pendleton was required to conduct nearly 1,000 shifts of security services. The jury's award of $174,000 to Aetna, an amount substantially smaller than the $430,266.68 Aetna demanded, evidences the jury's implicit conclusion that Pendleton caused at least some of Merchants' losses. The jury obviously concluded that while the night shipping manager Merchants fired in July 1995 caused some of the losses, Pendleton's substandard security practices also caused $174,000 of the losses Merchants suffered.

Based on the above evidence, a reasonable juror could not only have concluded that Pendleton's poor security practices allowed Merchants' nightshift employees to steal with impunity, but that in fact Pendleton's security officers were also involved in the theft from Merchants themselves. For the above reasons, we reverse the district court's decision and reinstate the jury's verdict.

REVERSED and jury verdict REINSTATED

ARTHUR LETOURNEAU ET AL. V. THE DEPARTMENT OF REGISTRATION AND EDUCATION ET AL.,

212 Ill. App. 3d 717; 571 N.E.2d 783 (1991).

Justice White delivered the opinion of the court. Cerda, P. J., and Rizzi, J., concur.

Defendants appeal from a judgment entered by the circuit court of Cook County that reversed the revocation of plaintiffs' licenses to practice. We affirm the judgment of the circuit court.

Defendants are the Department of Registration and Education (the Department), now known as the Department of Professional Regulation; Gary L. Clayton (the Director), who was Director of Registration and Education at the pertinent times; the Illinois Private Detective, Private Alarm, and Private Security Board (the Board); and the Board's chairman, and five other members.

One plaintiff is Arthur Letourneau, to whom the record sometimes refers as Arthur LeTourneau. The other plaintiffs are the detective division, the security division, and the alarm division of Investigations International (the company). Of the four licenses and certificates revoked, two licenses (as a private detective and a private security contractor) were issued in Letourneau's name, and two certificates (as a private detective agency and as a private security contractor agency) were issued to Letourneau in the names of the company's detective division and security division, respectively. For convenience when referring collectively in this opinion to plaintiffs' licenses and certificates, the general term "licenses" is used.

A certificate as a private alarm contractor agency, issued in the name of the company's alarm division, and a license as a private alarm contractor, issued in Letourneau's name, were neither revoked nor involved in the disciplinary proceedings, but as licensees the holders thereof have joined as plaintiffs.

The central issue is whether revocation of plaintiffs' licenses was contrary to the manifest weight of the evidence, unsupported by substantial evidence, or arbitrary and unreasonable.

I. Statutory Background and Procedural History

Under the Private Detective, Private Alarm, and Private Security Act of 1983 (Ill. Rev. Stat. 1985, ch. 111, par. 2651 *et seq.*) (the Act or the present Act), a licensee is subject to disciplinary sanctions for enumerated violations. (Ill. Rev. Stat. 1985, ch. 111, par. 2672(a).) A range of sanctions,

including license revocation, is provided. Ill. Rev. Stat. 1985, ch. 111, par. 2675. In this cause, the department filed formal charges seeking disciplinary action against Letourneau and the company as respondents. The charges named Letourneau and the company's detective and security divisions as holders of the licenses in question. The charges alleged three substantive acts or omissions, said to constitute violations of the Act or of its precursor statute (the 1933 Act) (Ill. Rev. Stat. 1983, ch. 111, par. 2601 *et seq.*) (repealed eff. Jan. 5, 1984)[1] and therefore to constitute grounds for license revocation or suspension under section 22 of the Act (Ill. Rev. Stat. 1985, ch. 111, par. 2672). The alleged violations were:

(a) Failure by the company since 1979 to register its employees with the department, in violation of section 10b(4) of the 1933 Act and section 15(c) of the present Act (Ill. Rev. Stat. 1983, ch. 111, par. 2622(4); Ill. Rev. Stat. 1985, ch. 111, par. 2665(c)).
(b) Practice by the company as "a detective" while its "license" was nonrenewed from 1977 to October 1983, said to be in violation of section 3 of the 1933 Act (Ill. Rev. Stat. 1983, ch. 111, par. 2603).[2]
(c) Practice by Ernest Rizzo since 1979 as a detective for the company despite a 1978 revocation of his detective license, in violation of sections 16(b) and (f) of the 1933 Act and sections 22(a)(3), (a)(14), (a)(15), and (a)(19) of the present Act (Ill. Rev. Stat. 1983, ch. 111, pars. 2628(b), (f); Ill. Rev. Stat. 1985, ch. 111, pars. 2672(a)(3), (a)(14), (a)(15), (a)(19)).

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[1]Plaintiffs received their licenses under the present Act by derivation from previous licensure under the 1933 Act. (See Ill. Rev. Stat. 1985, ch. 111, par. 2656.) Plaintiffs have made no issue of whether derivative licenses may be revoked on account of any breached present obligation of derivative licensees not to have violated the 1933 Act, even though nonderivative licensees arguably have no such present obligation. Thus, we may deem any such issue waived. Supreme Court Rules 341(e)(7), (f) (113 Ill. 2d Rules 341(e)(7), (f)). But compare Ill. Rev. Stat. 1985, ch. 1, pars. 1001, 1101, 1103 (unless contradicted by terms of particular statute, general rule is that identical new statutory provisions continue old ones and that new law is not construed as repealing old law for purposes of offenses or claims under old) with Ill. Rev. Stat. 1985, ch. 111, par. 2656 (derivative licensees have "same rights and obligations" as nonderivative licensees).

[2]If the *company* was operating without a certificate of authority as a detective *agency*, the operation violated section 3a of the 1933 Act (Ill. Rev. Stat. 1983, ch. 111, par. 2604) rather than section 3. However, the director's eventual finding of fact was that both Letourneau and the company had practiced without licensure as a private detective and a detective agency, respectively—which in Letourneau's case did violate section 3. The director's conclusion of law was merely that Letourneau violated section 3, the company going unmentioned.

Because plaintiffs have made no issue of variances between the formal charges and the findings of fact and conclusions of law, the question may be deemed waived. But see *Bruce v. Department of Registration & Education* (1963), 26 Ill. 2d 612, 620, 187 N.E.2d 711, 715-16 (respondent entitled to notice of charges that must be met); *Jim M'Lady Olds, Inc. v. Secretary of State* (1987), 162 Ill. App. 3d 959, 961-62, 516 N.E.2d 346, 347-48 (same).

Under the version of the Act applicable to this cause, it was a continuing requirement for agency certification such as here that the agencies each have a full-time Illinois-licensed private detective or private security contractor in charge and that each such person reside in Illinois. (Ill. Rev. Stat. 1985, ch. 111, pars. 2664(d), (f).) "Residency" meant having established an actual domicile in Illinois for at least one year. (Ill. Rev. Stat. 1985, ch. 111, par. 2652(m).) The 1933 Act contained similar requirements for detective agencies. (Ill. Rev. Stat. 1983, ch. 111, pars. 2601, 2621.) The present Act has now been amended to repeal the requirement that a licensee in charge reside in Illinois. See Pub. Act 85—981, art. III, § 5, eff. Jan. 1, 1988 (amending Ill. Rev. Stat. 1985, ch. 111, pars. 2664(d) through (f)).

During several sessions between January and July 1986, a hearing officer received testimony from 11 witnesses and admitted 75 exhibits into evidence. Attending from time to time and sometimes participating in the proceedings were several members of the board. On January 22, 1987, the board made and submitted its written findings of fact, conclusions of law, and recommendation that the licenses at issue be revoked. See Ill. Rev. Stat. 1985, ch. 111, par. 2674(d).

The board's factual findings were that:

> Letourneau had been a Florida resident since at least 1980 and, while holding the licenses at issue, had falsely reported to the Department since 1980 that he was an Illinois resident.
> Letourneau and the company had practiced as a detective and detective agency from October 1977 to October 13, 1983, and from January 4, 1984, to January 7, 1985, without a license and without registering employees.
> Letourneau and the company had since at least 1980 allowed Ernest Rizzo to practice as a detective without a license or supervision.
> Letourneau and the company had practiced as a security contractor and security contractor agency from January 4, 1984, to January 7, 1985, without registering employees.

The board's legal conclusion was that Letourneau had violated the sections of the present Act and of the 1933 Act that he and the company were charged with violating.

Letourneau filed a motion for rehearing, but the director denied it. Adopting the board's findings of fact, conclusions of law, and recommendation, he then ordered that licenses at issue be revoked.

On April 28, 1987, Letourneau filed his complaint for administrative review in the circuit court of Cook County, seeking to have the director's revocation orders vacated. After briefing and argument, the court entered an order on August 10, 1988, reversing the department's revocation decision.

The trial judge stated that he was reversing the revocation orders because the findings of fact were without substantial foundation in the evidence. Specifically, the judge found that there was no evidence to support the director's finding that Letourneau had been a Florida resident

since 1980 and that there was evidence that Letourneau had been an Illinois resident at the times in question. The judge also found that there was no evidence to support the director's finding that Letourneau had allowed Rizzo to practice as an unlicensed private detective and that the department's evidence in general was not strong enough to support the result of revocation. At a hearing on defendants' motion for reconsideration, the judge again stated that there was insufficient evidence to support the director's findings of fact and conclusions of law. Accordingly, he denied the motion for reconsideration, and this appeal followed. This opinion will refer to matters of evidence as required for discussion of the issues.

II. Analysis

A. Standard for Reviewing Findings of Fact

In reviewing the factual determinations made by the director, this court is limited to ascertaining whether his decision accorded with the manifest weight of the evidence and was supported by substantial evidence. *Massa v. Department of Registration & Education* (1987), 116 Ill. 2d 376, 385, 507 N.E.2d 814, 818; *Bruce v. Department of Registration & Education* (1963), 26 Ill. 2d 612, 622, 187 N.E.2d 711, 717; *Irving's Pharmacy v. Department of Registration & Education* (1979), 75 Ill. App. 3d 652, 658, 394 N.E.2d 627, 632.

The findings and conclusions of an administrative agency regarding questions of fact are to be considered *prima facie* true and correct. (Ill. Rev. Stat. 1989, ch. 110, par. 3-110; *Murdy v. Edgar* (1984), 103 Ill. 2d 384, 391, 469 N.E.2d 1085, 1088.) However, this does not mean that a court should automatically approve an agency decision merely because the agency heard witnesses and made findings. *Viera v. Illinois Racing Board* (1978), 65 Ill. App. 3d 94, 99, 382 N.E.2d 462, 466.

B. Letourneau's Residency

Defendants appear to regard Letourneau's residency as being relevant for two reasons, either of which might support disciplinary action.

First, as the sole individual to whom the company's agency licenses were issued, Letourneau (or some person employed by him) was required to be in charge of agency operations as a full-time, individually licensed Illinois resident, and failure to comply would violate the law. (See Ill. Rev. Stat. 1985, ch. 111, pars. 2664(d), (f); Ill. Rev. Stat. 1983, ch. 111, par. 2621.) Letourneau employed no such person; the question is whether Letourneau himself met the requirement. Second, Letourneau was required to avoid fraud or material deception in connection with licensure and to report his correct address and practice location to the department (Ill. Rev. Stat. 1985,

ch. 111, pars. 2671(a), 2672(a)(1); Ill. Rev. Stat. 1983, ch. 111, pars. 2616, 2628(a)); according to defendants, failure to report a Florida residence would violate the law. However, though the department's briefs discuss such residency questions at length, its formal charges never clearly specified violation of either of these residency-related requirements. The only formal charge that even arguably might be read as pertaining to one or both of them was the charge that Rizzo had unlawfully practiced as a detective for the company.

Despite any deficiencies in the formal charges, one of the director's findings of fact was that Letourneau had been a Florida resident who falsely reported Illinois residency—thereby presumably violating the requirements that he report his correct address and avoid fraud or material deception (see Ill. Rev. Stat. 1985, ch. 111, pars. 2671(a), 2672(a)(1)). And one of the director's conclusions of law was that Letourneau had permitted his license to be used by an unlicensed person in order to operate without Letourneau's supervision or control (see Ill. Rev. Stat. 1985, ch. 111, par. 2672(a)(15))—which comes close to saying that Letourneau violated the requirement that he keep a full-time, Illinois-licensed individual who resides in Illinois in charge of his agencies (see Ill. Rev. Stat. 1985, ch. 111, pars. 2664(d), (f)).

The implication of defendants' treatment of the residency question is that Letourneau's nonresidency, failure to report a correct address, failure to keep a full-time licensed resident in charge, and facilitation of Rizzo's unlicensed practice are actually all of a piece in common sense, and all unlawful under one statutory section or another. For the additional reason that plaintiffs make no issue of any incongruity in formal charges, findings of fact, and conclusions of law, Letourneau's alleged nonresidency is treated in this opinion as if it had been duly framed as a violation from the outset.

Defendants point to testimony by Letourneau's business partner and two alleged former employees (who testified under grants of immunity) that they never saw Letourneau in Illinois during the period in question. Defendants also point to evidence that departmental investigators were never able to find Letourneau at his Illinois addresses, that the company maintained a Florida office, and that Florida had issued detective licenses to an Arthur Letourneau. From this, defendants argue that they were entitled to use their expertise regarding normal conduct of a licensee in order to infer that Letourneau was not an Illinois resident.

Though Ernest Rizzo (whom, according to the formal charges, Letourneau had helped to engage in unlicensed practice) testified that he had known Letourneau for 20 years and that Letourneau was an Illinois resident, defendants argue that they were entitled to judge Rizzo's credibility adversely because of his failure to explain adequately a number of past actions and statements suggestive of unlicensed practice. In addition, defendants point to the testimony of one witness, a longtime Letourneau acquaintance, that he had dined with Letourneau in Florida in 1983 and that Letourneau, in the witness' words, had then "indicated" that he was a Florida resident.

Documentary evidence in the form of mail and utility bills shows Illinois addresses for Letourneau, but defendants argue that the addresses were actually Rizzo's. As a fact from which an adverse inference can be drawn, defendants point to Letourneau's refusal to answer questions at the administrative hearing on grounds of potential self-incrimination after the Department's counsel had referred to the possibility of criminal charges. Accordingly, defendants contend that the finding of Letourneau's nonresidency in Illinois was not against the manifest weight of the evidence.

In reply, besides referring to evidence already noted, plaintiffs point to other evidence that Letourneau was an Illinois resident. The department's investigator testified that he saw a license on the wall at an address previously stated by Letourneau to be his own. The department's investigators testified that mailboxes bearing Letourneau's name and containing mail addressed to him existed at addresses given by Letourneau. Responses in Letourneau's name were received by the department, after it had sent mail to Letourneau at his Illinois address, though defendants contend that the responses either did not bear Letourneau's personal signature at all or bore discrepant personal signatures. Letourneau also appeared before Illinois notaries public. In the circuit court, the trial judge referred to the need for "facts established by evidence, . . . evidence that is understood in law as being evidence." He continued:

> This is not a case which turns on the weight of the evidence or the credibility of the witnesses, quite frankly.
> This is a case which must be reversed I believe because the findings are without substantial foundation in the evidence. A case by the state cannot be made from inferences, from presumptions, or from suspicions, or from indirect evidence. They have to be made by evidence that's credible, and sufficiently strong to warrant the result that is reached. There is no strong evidence here to support the result of revocation of Letourneau's license.

After referring to the department's grant of immunity to its witnesses, the trial judge remarked:

> The only basis for the conclusion that Mr. Letourneau resides in Florida is that one witness had dinner with Mr. Letourneau once in Florida in 1983 I believe, and yet the charge is that he lived there since 1980. That same witness said I hadn't seen him around, and I had dinner with him in '83. The fact that that witness had not seen Letourneau in Illinois does not mean that Letourneau resided in Florida during all of that hiatus.

The trial judge acknowledged the evidence of Florida detective licenses in the name of an Arthur Letourneau but stated:

> I am not sure that this Mr. Letourneau is the only Arthur Leto[ur]neau in the USA, and there was no attempt to demonstrate the Arthur

> Letourneau in Florida is the Arthur Letourneau that we are talking about here in Illinois.
> So there clearly is no evidence to support the finding . . . that Letourneau has lived in Florida since 1980.

The judge then referred to evidence that Letourneau had received mail in his Illinois mailbox, was paying utility bills in Illinois, had registered his automobile in Illinois, and had responded to department notices mailed to Illinois. The judge also cited Rizzo's testimony that Letourneau lived in Illinois:

> Clearly the department is free to ignore Mr. Rizzo's testimony, but I find it incredible that they would ignore that testimony and accept testimony from someone who said he had dinner with Mr. Letourneau in Florida and give greater weight to the latter while giving no weight to the former.

Defendants were entitled to draw reasonable inferences from the evidence. (*Raymond Concrete Pile Co. v. Industrial Comm'n* (1967), 37 Ill. 2d 512, 517, 229 N.E.2d 673, 676.) In an administrative proceeding, defendants could also, in conjunction with other evidence, draw an inference adverse to Letourneau from his refusal to testify on grounds of potential self-incrimination. (*Giampa v. Illinois Civil Service Comm'n* (1980), 89 Ill. App. 3d 606, 613-14, 411 N.E.2d 1110, 1116.) If the issue is merely one of conflicting testimony and a witness' credibility, the administrative agency's determination should be sustained. (*Keen v. Police Board* (1979), 73 Ill. App. 3d 65, 70-71, 391 N.E.2d 190, 195.) An administrative agency may properly base its decision on circumstantial evidence. *Ritenour v. Police Board* (1977), 53 Ill. App. 3d 877, 882-83, 369 N.E.2d 135, 139.

In finding "no" evidence of Letourneau's nonresidency, the trial judge overlooked testimony that, in what may have been admissions against interest (see Cox v. Daley (1981), 93 Ill. App. 3d 593, 596-97, 417 N.E.2d 745, 748), Letourneau had said in about 1979 that he planned to move to Florida and had "indicated" in 1983 that he was now a Florida resident. In any event, the department presented what it contends was circumstantial evidence of Letourneau's Florida residency: the Florida licenses, inability to find him in Illinois, accumulation of several weeks' worth of mail in a mailbox, identity between Letourneau's claimed Illinois addresses and Rizzo's addresses, irregularities in Letourneau's purported signature on answers to mail sent to him at Illinois addresses, and the adverse inference from Letourneau's refusal to testify on the question of his residency.

Although the trial judge erred in concluding that there was no evidence that Letourneau had lived in Florida since 1980, the question remains whether the evidence offered by the department sufficiently supported the director's decision so that the decision can be said not to have been against the manifest weight of the evidence.

Defendants have not cited and we have not found any requirement that one must be a Florida resident in order to be licensed as a detective in

that state, so the mere fact of Florida licensure would carry relatively little weight even if plaintiff were shown to have been the Florida licensee.

The Act did not expressly require the person in charge of a private detective agency always to remain within Illinois; all it required was that the person in charge be a resident of this State and be a "full-time Illinois licensed private detective." (See Ill. Rev. Stat. 1985, ch. 111, par. 2664(d).) Assuming that Letourneau did spend some time in Florida, such a fact is not substantial evidence that he thereby gave up Illinois residency, that while he was in Florida his Illinois agency operations actively continued without him, or that he was thereby prevented from being as much a "full-time Illinois licensed" individual as any other licensee who took vacations or went on trips out of state. The fact that departmental investigators failed to find Letourneau but found his mail in the mailbox is evidence that he was absent; it falls short of being substantial evidence that he was nonresident.

Assuming that any connection between Rizzo and Letourneau was lawful, a coincidence between Letourneau's Illinois addresses and Rizzo's is of little probative value. Any relationship between Letourneau and Rizzo in the nature of business association, friendship, or employment (unless of a type prohibited by the Act) is substantial evidence neither of Letourneau's nonresidency nor of his facilitation of unlicensed practice by Rizzo.

Letourneau would ordinarily have had a right to appoint someone his agent for signing documents; thus, purported irregularities in his signature are not substantial evidence of nonresidency. Because Letourneau's refusal to testify can lead to an adverse inference only in conjunction with other evidence (*Giampa*, 89 Ill. App. 3d 606, 411 N.E.2d 1110), the lack of other substantial evidence impairs the probative value of his refusal. And, given the other evidentiary shortcomings, a naked assertion of departmental expertise in judging licensees' conduct amounts to *ipse dixit*.

If the department had produced substantial evidence on the residency issue and it were simply a matter of weighing that evidence against Letourneau's or of judging the credibility of witnesses, the presumption of correctness in the director's findings would prevail over mere disagreements by plaintiffs or even by this court. However, as did the circuit court, we believe that no substantial evidence supported the director's finding of Letourneau's Florida residency and false statements of Illinois residency.

Still, the matter does not end here. The parties agree that the most serious charge against Letourneau was that he permitted the use of his agency certificates by Rizzo in order for Rizzo to engage in unlicensed practice. Thus, we must address the sufficiency of the director's findings on that issue.

C. Rizzo's Activities

Defendants point to considerable evidence as proving that Letourneau permitted Rizzo to use Letourneau's licenses and thus to operate without being licensed himself.

Repeated coincidences were demonstrated between Rizzo's address and those of Letourneau and the company. Letourneau, accompanied by Rizzo, had once attempted to obtain an agency certificate in the name of Ernest D. Rizzo, Ltd. In addition, Rizzo had contacted the department in behalf of Letourneau to discuss an agency name change and what kind of work Rizzo (whose license had been revoked) could now permissibly do for the company. Insurance procured by Letourneau was carried in Rizzo's name until corrected after departmental rejection. Checks payable to Rizzo had been deposited to the company's account. Rizzo signed purchase papers as owner of cars purchased by the company.

Raymond Rocke, testifying under a grant of immunity, said he had performed security work for the company under Rizzo as "boss." Though Rizzo testified that the witness was working without authority and was discharged by Letourneau, the testimony was impeached by Letourneau's certification to the department that the witness had been an employee after the "discharge." Rizzo also attempted to explain such matters as his deposition testimony that he was employed by the company, a magazine account of investigations he supposedly was conducting as a company subcontractor without being licensed, and a telephone directory advertisement for the company that carried Rizzo's name. Defendants argue that the credibility of Rizzo's explanations was simply judged adversely.

In addition, Letourneau refused to answer questions about Ed Rossi, whom he had listed as an employee and whose name the department contended was an alias for Rizzo. Rizzo matched the age and physical description of Rossi, and his social security number was a slightly transposed version of Rossi's. Rizzo acknowledged having used the name Ed Ross.

But plaintiffs respond that no witness, not even Rocke, testified to personal knowledge that since 1980 Rizzo had actually engaged in activities legally constituting practice as a private detective. One witness testified to Rizzo's having told him that Rizzo planned to be an employee but not a principal of a company to be formed by Letourneau. Rizzo himself denied having practiced as a detective in Illinois since 1978 or 1979.

Defendants contend that, despite Rizzo's denial of practicing as a detective, he admitted that he had investigated Rocke, ascertained the address and business of another person, conducted electronic sweeps to discover surveillance devices, and conducted "investigations for pay" on cases for Letourneau's attorney. However, these contentions by defendants lack force, because none of the described activity, unless it is part of a paid investigation, legally constituted practice as a private detective—except possibly, of course, for the very conduct of "investigations for pay." (See Ill. Rev. Stat. 1985, ch. 111, par. 2652(h).) As for the latter conduct, the most to which Rizzo's testimony admitted was serving a subpoena and checking for wiretaps at the attorney's request, apparently for pay in both cases. Neither serving a subpoena nor checking for a wiretap, even for pay, was itself necessarily practice as a private detective; it would only have been so if part of a paid investigation made to obtain information regarding several

subjects specified by statute. (See Ill. Rev. Stat. 1985, ch. 111, par. 2652(h).) There was no testimony that Rizzo's admitted activity was part of any such statutorily specified investigation, much less that it was performed by use of Letourneau's licenses.

The director was entitled to judge the credibility of witnesses and to draw inferences from the evidence. However, the evidence offered to prove Rizzo's unlicensed practice did not constitute the substantial evidence required by law on what was admittedly the most serious charge against Letourneau. Thus, the circuit court correctly rejected the director's finding that Letourneau had permitted Rizzo to practice without a license by using Letourneau's licenses.

D. Other Disputed Factual Points

Defendants extensively discuss their contention that the director's findings regarding practice on inactive licenses and regarding nonregistration of employees should not have been reversed by the circuit court. Plaintiffs reply at length. Yet, the circuit court never "reversed" the Director's findings on these issues.

The circuit court's order as drafted by plaintiffs' counsel did read that "the Court, having found no evidence to support *the findings* entered by the Department, orders that the Decision of the Department revoking the licenses of Arthur Letourneau be and is hereby reversed." (Emphasis added.) However, the transcript reveals that the court focused entirely on the lack of substantial evidence for the findings on residency and on allowing Rizzo's unlicensed practice. Because of that lack, the court declared that "the decision by the department therefore is arbitrary and constitutes an abuse of the department's discretion. For all of these reasons the decision is reversed."

It is evident that the circuit court based reversal on the residency and Rizzo issues and on no other. We need not consider the director's findings and conclusions on other issues if his reversible findings on the residency and Rizzo issues were so central as to render his revocation decision an abuse of discretion.

E. License Revocation

An agency's exercise of discretion may be set aside if it was arbitrary or unreasonable or clearly violated the rule of law. (*Commonwealth Edison Co. v. Illinois Commerce Comm'n* (1988), 180 Ill. App. 3d 899, 907, 536 N.E.2d 724, 729.) The courts will not reweigh the evidence but will determine whether the final administrative decision just and reasonable in light of the evidence presented. *Davern v. Civil Service Comm'n* (1970), 47 Ill. 2d 469, 471, 269 N.E.2d 713, 714; *Sircher v. Police Board* (1978), 65 Ill. App. 3d 19, 20-21, 382 N.E.2d 325, 327.

The applicable rule, as phrased by many authorities, is that courts may not interfere with an administrative agency's discretionary authority unless it is exercised arbitrarily or capriciously or unless the administrative decision is against the manifest weight of the evidence. (E.g., *Massa v. Department of Registration & Education* (1987), 116 Ill. 2d 376, 388, 507 N.E.2d 814, 819; *Murdy v. Edgar* (1984), 103 Ill. 2d 384, 391, 469 N.E.2d 1085, 1088; *People ex rel. Stephens v. Collins* (1966), 35 Ill. 2d 499, 501, 221 N.E.2d 254, 255.) In terms of that formulation of the rule, it has been said that, when determining whether an administrative decision is contrary to the manifest weight of the evidence, a court should consider the severity of the sanction imposed. *Cartwright v. Illinois Civil Service Comm'n* (1980), 80 Ill. App. 3d 787, 793, 400 N.E.2d 581, 586; *Kelsey-Hayes Co. v. Howlett* (1978), 64 Ill. App. 3d 14, 17, 380 N.E.2d 999, 1002. Contra *Epstein v. Civil Service Comm'n* (1977), 47 Ill. App. 3d 81, 84, 361 N.E.2d 782, 785.

An alternative formulation of the rule is that, when judging whether an agency sanction is arbitrary or unreasonable, manifest weight of the evidence is not the applicable standard of review, because the reasonableness of the sanction, not the correctness of the agency's findings or reasoning, is the issue. E.g., *Brown v. Civil Service Comm'n* (1985), 133 Ill. App. 3d 35, 39, 478 N.E.2d 541, 544.

In any event, however, courts will not hesitate to grant relief from an adverse agency decision if that decision is not supported in the record by sufficient evidence. (*Basketfield v. Police Board* (1974), 56 Ill. 2d 351, 359, 307 N.E.2d 371, 375; *Feliciano v. Illinois Racing Board* (1982), 110 Ill. App. 3d 997, 1003, 443 N.E.2d 261, 266.) Thus, a court may reverse an order for imposing an unwarranted sanction. See *Feliciano*, 110 Ill. App. 3d at 1005, 443 N.E.2d at 267; *Cartwright*, 80 Ill. App. 3d at 793-94, 400 N.E.2d at 586.

On the questions of Letourneau's residency and Rizzo's activities, which clearly were the most important to the department and the director, the director's findings were unsupported by substantial evidence. We believe that the director's decision to revoke plaintiffs' licenses, based as it was primarily on such unsupported findings, represented an arbitrary and unwarranted sanction.

Accordingly, we affirm the judgment of the circuit court, which reversed the director's revocation of plaintiffs' licenses.

Affirmed.

CERDA, P. J., and RIZZI, J., concur.

STEPHANIE P. AUSTIN V. PARAMOUNT PARKS, INC.,

195 F.3d 715 (4th Cir. 1999).

Before WIDENER and TRAXLER, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Judge

Traxler wrote the opinion, in which Judge Widener and Senior Judge Butzner joined.

Paramount Parks, Inc. ("Paramount") operates an amusement park in Hanover County, Virginia known as "Paramount's Kings Dominion" ("Kings Dominion" or "the park"). While visiting Kings Dominion in May 1994, Stephanie P. Austin ("Austin") was positively identified by two of Kings Dominion's employees as a woman who had passed a bad check at the park less than one week earlier. After questioning Austin for several hours, a special police officer of the Kings Dominion Park Police Department caused a warrant to be issued for Austin's arrest on a charge of grand larceny. The same officer thereafter caused a second warrant to be issued, this time for Austin's arrest on charges of forgery and uttering a forged writing. The Commonwealth's Attorney's Office, with the assistance of the arresting officer, actively prepared the case against Austin over the next nine months. The charges were dismissed before trial, however, once the Commonwealth's Attorney's Office realized that one of the employees who had identified Austin as having passed the bad check in question had later identified another park guest in connection with the same offense.

Austin subsequently brought this civil action against Paramount, asserting a variety of claims arising from her arrests and prosecution on the preceding charges. At trial, the jury returned general verdicts for Austin on her claim under 42 U.S.C.A. § 1983 (West Supp. 1998) and on several claims under Virginia law, and awarded her compensatory and punitive damages. The district court ultimately entered judgment in favor of Austin, denied Paramount's motion for judgment as a matter of law, and awarded Austin attorney's fees and expenses under 42 U.S.C.A. § 1988 (West Supp. 1998) upon finding her to be a prevailing party on the § 1983 claim. This appeal followed.

We conclude that Paramount was entitled to judgment as a matter of law on Austin's § 1983 claim because Austin failed to establish that any deprivation of her federal rights was caused by an official policy or custom of Paramount. We further conclude that Virginia law compels judgment as a matter of law in favor of Paramount on Austin's state-law claims because Virginia law shields a private employer from liability when a special police

officer takes an action in compliance with a public duty to enforce the law. Accordingly, we reverse the denial of Paramount's motion for judgment as a matter of law, vacate the judgment in favor of Austin, vacate the award of attorney's fees and expenses, and remand with instructions that judgment as a matter of law be entered in favor of Paramount.

I.

The Loss Prevention Department at Kings Dominion ("Loss Prevention") is responsible for providing safety to park guests and employees, preserving park assets, and enforcing Virginia law and park rules and regulations. The security operations group of Loss Prevention consists of special police officers associated with the Kings Dominion Park Police Department, and seasonal uniformed security officers. Unlike the uniformed security officers, the special police officers are sworn conservators of the peace who are authorized to carry firearms, make arrests, and perform the same functions that law enforcement officers in the Commonwealth of Virginia perform. The special police officers derive this authority from an appointment order issued annually, on Paramount's application, by the judges of the Circuit Court of Hanover County under Va. Code Ann. § 19.2-13 (Michie Supp. 1999).[3]

The Sheriff of Hanover County had supervisory authority over the special police officers of the Park Police Department that was expressly acknowledged in both the Circuit Court's appointment order and the Park Police Department's Policy and Procedure Manual ("Manual") in force at the time of the events in question. Specifically, the appointment order provided that the special police officers "work only under the control and direction of the Sheriff of Hanover County." This directive was reiterated in the Manual, which provided that the Park Police Department "has direct affiliation with the Hanover County Sheriff's Department and is under the direction of the Sheriff of Hanover County." The Manual further provided: The Chain of Command and authority for all Kings Dominion Park Police shall be as follows involving official law enforcement:

a. Sheriff of Hanover County
b. Lieutenant of Kings Dominion Park Police
c. Kings Dominion Park Police Sergeant

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[3]Va. Code Ann. § 19.2-13(A) provides in relevant part: Upon the application of any corporation authorized to do business in the Commonwealth or the owner, proprietor or authorized custodian of any place within the Commonwealth and the showing of a necessity for the security of property or the peace, the circuit court of any county or city, in its discretion, may appoint one or more special conservators of the peace who shall serve as such for such length of time as the court may designate, but not exceeding four years under any one appointment. The order of appointment may provide that a special conservator of the peace shall have all the powers, functions, duties, responsibilities and authority of any other conservator of the peace within such geographical limitations as the court may deem appropriate, whenever such special conservator of the peace is engaged in the performance of his duties as such.

d. Kings Dominion Park Police Corporal
e. Kings Dominion Park Police Officer

Although the Park Police Department fell under Loss Prevention in the organizational structure at Kings Dominion, the testimony at trial established that the special police officers performed their law enforcement duties without interference from park management. Chancellor L. Hester ("Hester"), who served as Manager of Loss Prevention at the time of the events in question, provided uncontradicted testimony that his role in matters of law enforcement was limited to ensuring that guests suspected of committing crimes at the park were treated courteously and professionally. As to decisions pertaining to law enforcement, however, Hester testified that he "let the police officers do the work," knowing that those officers received assistance and direction from the Hanover County Sheriff's Department and the Commonwealth's Attorney's Office. The annual training that the special police officers received reflected this division. Hester provided instruction on interpersonal skills, while the Sheriff's Department and the Commonwealth's Attorney's Office taught law enforcement classes on such topics as the laws of arrest, the conducting of interviews, self-defense, and searches and seizures.

The principal events giving rise to the present litigation occurred at Kings Dominion on May 15, 1994, when a guest arrived at the park's Season Pass office and submitted a check for $360 under the name of "Donita Morgan." Japata Taylor ("Taylor"), a park cashier, accepted the check and proceeded to retrieve $ 360 worth of Kings Dominion currency, known as "Scooby dollars," which guests use to purchase merchandise for sale within the park. Meanwhile, a guest at the next window submitted a check under the name of "Catherine May" to Joshua Stone ("Stone"), another park cashier. Because the Season Pass office did not have enough Scooby dollars to cash the two checks, Taylor and Stone contacted their supervisor, Deborah Samuel ("Samuel"). Samuel then had a chance to observe "Donita Morgan" and "Catherine May" after obtaining a sufficient amount of Scooby dollars from the park's Cash Control office.

Several days later, Loss Prevention learned that both the "Donita Morgan" check accepted by Taylor and the "Catherine May" check accepted by Stone were fraudulent. In fact, numerous fraudulent checks under these and other names had been passed at Kings Dominion during the May 14-15 weekend. Loss Prevention suspected that a group of individuals were operating an illegal check-cashing scheme at the park using fraudulent identification cards and fraudulent checks,[4] and provided the park's cashiers with a memorandum listing various names under which bad checks had already been passed, including "Catherine May."

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[4]The fraudulent checks were used to obtain Scooby dollars, which in turn were used to purchase park merchandise. The merchandise would then be returned for a refund in cash.

The cashiers were directed to immediately inform Loss Prevention should a guest submit a check under a listed name.

Sergeant Cindy Gatewood ("Gatewood") of the Park Police Department supervised the investigation into the apparent check-cashing scheme. On the morning of Saturday, May 21, 1994, six days after Taylor and Stone had accepted the "Donita Morgan" check and the "Catherine May" check, respectively, Gatewood obtained verbal descriptions of the suspects from Samuel, Taylor, and Stone. According to Gatewood's testimony at trial, Samuel described "Donita Morgan" as a "middle-aged black woman with twisted hair." Taylor described the suspect as "a black female, five foot five, five foot six, average build, twisted hair braids, sunglasses." After obtaining verbal statements, Gatewood asked each of the three employees to prepare written statements. In her written statement, Taylor described "Donita Morgan" as a woman who had braided hair and wore Chanel sunglasses. Samuel, in her written statement, described her as "a middle-aged black woman with glasses, long twisted braids, and a lot of children."

Austin, an African American woman who at the time was a twenty-three-year-old student at the University of Maryland, was among the more than 20,000 guests of Kings Dominion on Saturday, May 21. That evening, Taylor saw Austin in the park and identified her as the "Donita Morgan" suspect from the previous weekend. Taylor alerted Loss Prevention accordingly. Officer Michael Drummer ("Drummer") of the Park Police Department subsequently approached Austin and escorted her to the Loss Prevention office. After being contacted at home and apprised of the situation, Gatewood arranged for Investigator Robert Schwartz ("Schwartz") of the Hanover County Sheriff's Department to meet her at the Loss Prevention office. In the interim, Samuel went to the Loss Prevention office and, like Taylor, identified Austin as the "Donita Morgan" suspect from the previous weekend.

After arriving at the Loss Prevention office, Schwartz advised Austin of her Miranda rights. He and Gatewood then informed Austin that two employees had positively identified her as having passed a fraudulent "Donita Morgan" check at the Season Pass office on May 15, 1994, and questioned Austin for several hours as to her whereabouts on that date. According to Gatewood's testimony at trial, Austin stated that she was at a banquet at the University of Maryland on May 15, 1994, but Austin refused to provide any information which would allow that statement to be verified. Consistent with his role as Manager of Loss Prevention, Hester occasionally appeared for several minutes to observe the questioning. Hester testified at trial that his purpose in doing so "was to make sure that our folks were handling their duties properly, that the police were in the process of moving this situation forward, and that the people involved in it were being handled professionally and properly."

Based primarily upon the accounts of Taylor and Samuel, whom Gatewood described at trial as "more than a hundred percent sure that Miss Austin was the one who had written a check to them," Gatewood

decided to arrest Austin. Before doing so, however, Gatewood contacted Seward M. McGhee ("McGhee") of the Commonwealth's Attorney's Office, who advised Gatewood that Austin could be charged only with grand larceny until the bank had processed and returned the bad "Donita Morgan" check at issue. Schwartz thereafter transported Austin to the Hanover County Magistrate's office, where Gatewood caused a warrant to be issued for Austin's arrest on a charge of grand larceny in violation of Va. Code Ann. § 18.2-95 (Michie Supp. 1999).[5]

On the following day, Sunday, May 22, 1994, a significant development occurred with respect to the investigation into the checkcashing scheme at Kings Dominion. Specifically, a guest named Annette Williams arrived at the Season Pass office and submitted a check under the name of "Catherine May." The park cashier who accepted the check recognized "Catherine May" from the memorandum distributed in connection with the scheme and immediately contacted Loss Prevention. Simultaneously, a guest named Tonya Williams submitted a check at the Season Pass office under the name of "Demetry Gordon."

Gatewood subsequently arrived at the Season Pass office in response to the cashier's call. When Gatewood asked Annette Williams to come to the Loss Prevention office, Tonya Williams became visibly agitated. Gatewood described the situation at trial in the following manner: "a friend of [Annette Williams] got very verbal and upset and said she didn't understand why I was taking her friend away, so I invited her to come to the office with me." During this encounter, Samuel saw Tonya Williams, an African-American woman who had braided hair, and identified her as the woman who had submitted the "Donita Morgan" check to Taylor one week earlier.

Gatewood subsequently brought Annette Williams and Tonya Williams to the Loss Prevention office for questioning. During the questioning, the women maintained their respective false identities as Catherine May and Demetry Gordon. Later that day, after Annette Williams and Tonya Williams had left the park, Gatewood discovered their actual identities when a guest named Gladys Ann Williams was brought to the Loss Prevention office after submitting a fraudulent check at the Season Pass office under the name of "Michelle Lockhart." In a detailed confession,

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[5] While Schwartz transported Austin, Gatewood proceeded to the Hanover County Magistrate's Office with Octavia Marie Eaton ("Eaton"), whom Stone and Taylor had identified as the "Catherine May" suspect from the previous weekend. Eaton was ultimately brought to trial on charges of grand larceny, forgery, and uttering forged checks, but the trial court dismissed the charges on the basis that Eaton's guilt could not be established beyond a reasonable doubt. Eaton subsequently brought a civil action against Paramount, asserting various claims under Virginia law. The United States District Court for the Eastern District of Virginia entered summary judgment in favor of Paramount, however, holding that no genuine issue of fact existed as to whether Gatewood had probable cause to believe that Eaton had committed the offenses in question. On appeal, this court agreed and affirmed. See *Eaton v. Paramount Parks, Inc.*, 141 F.3d 1158, 1998 WL 163833 (4th Cir. 1998) (per curiam) (unpublished).

Gladys Ann Williams confirmed the existence of a check-cashing scheme, provided the names and aliases of the other participants in the scheme, and provided information concerning the source from whom they had obtained fraudulent identification cards and fraudulent checks.

That evening, Samuel alerted Hester at Loss Prevention that she had recognized Tonya Williams as the woman who had submitted the "Donita Morgan" check to Taylor on May 15, 1994. Hester's unrefuted testimony indicates that he personally informed Gatewood of this development later that evening. Samuel's observation, along with written statements filed by other park employees, led Gatewood and Hester to conclude that Tonya Williams was one of several women who had passed bad checks at the park under the name of "Donita Morgan." When asked at trial whether she specifically informed McGhee that Samuel had identified Tonya Williams as "Donita Morgan," Gatewood responded that "I'm not sure if I told him those exact words, but he was advised that there was more than one Donita Morgan." Ultimately, Gatewood testified, McGhee advised her that "there's more than one person, you have your witnesses, and we're going to go forward with the case, if there's a scheme, and bust the scheme."

Gatewood thereafter caused a warrant to be issued for Austin's arrest on charges of forgery and uttering a forged writing in violation of Va. Code Ann. § 18.2-172 (Michie 1996). According to Gatewood's uncontradicted testimony at trial, she did so only after consulting McGhee once the "Donita Morgan" checks from May 15, 1994, had been processed by the bank and returned to Kings Dominion. Specifically, Gatewood testified that McGhee "told me when the checks came in, I was to give him a call. I did, and he advised me to go get the warrants." Gatewood subsequently informed Hester that she spoke to McGhee and that she intended to bring additional charges against Austin. In this regard, Hester testified at trial that Gatewood "indicated to me somewhere in that period of time, I don't remember the exact date or anything, that [McGhee] and she had had a conversation, and the charges were being amended, yes, sir, I was aware of that." Gatewood did not serve Austin with the second arrest warrant until July 14, 1994, when Austin returned to the Hanover County Magistrate's Office for a preliminary hearing on the charge of grand larceny. Austin was not further detained and was allowed to remain out on her original bond.

In January 1995, a Hanover County general district court conducted a preliminary hearing on the charges pending against Austin. Based primarily upon Gatewood's testimony, the court found probable cause to certify the charges for trial. In so doing, the court indicated that it would have dismissed the charges had Austin presented any evidence supporting her alibi: "if I would have had any evidence at all that there was a banquet on May the 15th and if, in fact, [Austin] could have come in here and presented that [she] attended a banquet on May the 15th, then there would be no question in my mind." Although a Hanover County grand jury subsequently indicted Austin on the charges, the matter did not proceed to trial. Rather, in April 1995, McGhee had the charges dismissed. McGhee did so

apparently upon learning that Samuel, only one day after identifying Austin as having passed the "Donita Morgan" check to Taylor on May 15, 1994, identified Tonya Williams in connection with the same offense.

II.

Austin initiated the present litigation by filing a civil action in Maryland state court, naming Paramount as the only defendant. Following Paramount's removal of the action to the district court, Austin filed an eight-count second amended complaint, counts one through five of which contained claims arising under Virginia law for false arrest, false imprisonment, malicious prosecution, assault and battery, and negligence, respectively. Counts six through eight, on the other hand, contained claims arising under federal law.[6] With respect to her § 1983 claim asserted in count six, Austin alleged primarily that she suffered a deprivation of her federal constitutional rights as a result of Paramount's policy of causing individuals suspected of passing bad checks at Kings Dominion to be detained, arrested, and prosecuted, even without probable cause, to deter other park guests from engaging in such conduct. Austin also alleged that Paramount failed to exercise due care in the hiring, retention, training, and supervision of employees who participated in the investigation, detention, and arrest of individuals suspected of passing bad checks at Kings Dominion, and that such failure manifested a conscious disregard for Austin's rights. These latter allegations essentially reiterated the allegations supporting Austin's state-law negligence claim asserted in count five.

B.

Paramount next maintains that it was entitled to judgment as a matter of law on Austin's § 1983 claim either because Paramount was not a state actor or because Austin failed to establish that an official policy or custom of Paramount caused a deprivation of her federal rights. We review de novo a district court's denial of a Rule 50(b) motion for judgment as a matter of law, viewing the evidence in the light most favorable to the prevailing party and drawing all reasonable inferences in her favor. See *Konkel v. Bob Evans Farms Inc.*, 165 F.3d 275, 279 (4th Cir.), cert. denied,145 L. Ed. 2d 155, 1999 U.S. LEXIS 5882, 120 S. Ct. 184 (U.S. 1999).

Section 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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.

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[6] Before trial, Paramount moved for summary judgment on each count asserted in Austin's second amended complaint. The district court granted the motion solely with respect to counts seven and eight. Austin does not challenge that ruling on appeal.

42 U.S.C.A. § 1983. To prevail against Paramount on her § 1983 claim, Austin had the burden to establish that she was "deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 985, 143 L. Ed. 2d 130 (1999). Paramount does not dispute that Austin's rights under the Fourth and Fourteenth Amendments were violated when Gatewood effected the July 14, 1994 arrest without probable cause. However, Paramount does dispute that it was a state actor for purposes of § 1983 merely because it employed Gatewood as a special police officer.

The question of whether Paramount was a state actor is a thorny one, but one which we need not decide here because Austin's clear failure to show that an official policy or custom of Paramount was the moving force behind Austin's July 14, 1994 arrest negates the necessity of addressing the issue. For purposes of our review we will assume, without holding, that Paramount was a state actor and proceed to consider Paramount's challenge to Austin's assertion that Paramount had an official policy or custom justifying the imposition of liability under § 1983.

Our analysis begins with general principles of municipal liability. In *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), the Supreme Court held that municipalities and other local governmental bodies constitute "persons" within the meaning of § 1983, see id. at 688-89. The Court, however, has consistently refused to impose § 1983 liability upon a municipality under a theory of respondeat superior. See *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 403, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997). Rather, under Monell and its progeny, a municipality is subject to § 1983 liability only when "it causes such a deprivation through an official policy or custom." *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999) (emphasis added). We have determined that "municipal policy may be found in written ordinances and regulations, in certain affirmative decisions of individual policy-making officials, or in certain omissions on the part of policy-making officials that manifest deliberate indifference to the rights of citizens." Id. (internal citations omitted). Municipal custom, on the other hand, may arise when a particular practice "is so persistent and widespread and so permanent and well settled as to constitute a custom or usage with the force of law." Id. (internal quotation marks omitted).

We have recognized, as has the Second Circuit, that the principles of § 1983 municipal liability articulated in Monell and its progeny apply equally to a private corporation that employs special police officers. Specifically, a private corporation is not liable under § 1983 for torts committed by special police officers when such liability is predicated solely upon a theory of respondeat superior. See *Powell v. Shopco Laurel Co.*, 678 F.2d 504 (4th Cir. 1982); *Rojas v. Alexander's Dep't Store, Inc.*, 924 F.2d 406 (2d Cir. 1990); see also *Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972, 975-76 (8th Cir. 1993) (concluding that private corporation is not subject to § 1983 liability under theory of respondeat superior regarding acts of

private security guard employed by corporation); *Iskander v. Village of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982) (same). Rather, a private corporation is liable under § 1983 only when an official policy or custom of the corporation causes the alleged deprivation of federal rights. See *Rojas*, 924 F.2d at 408; *Sanders*, 984 F.2d at 976; *Iskander*, 690 F.2d at 128.

In her second amended complaint, Austin primarily alleged in support of her § 1983 claim that she suffered a deprivation of her federal constitutional rights as a result of Paramount's policy of causing individuals suspected of passing bad checks at Kings Dominion to be detained, arrested, and prosecuted, even without probable cause, to deter other park guests from engaging in such conduct. At trial, however, Austin was unable to present any evidence to substantiate those allegations. Rather, Austin's evidence focused on her alternative theory of § 1983 liability, also alleged in the second amended complaint, that Paramount failed to exercise due care in training employees who participated in the investigation, detention, and arrest of individuals suspected of passing bad checks at Kings Dominion, and that such failure manifested a conscious disregard for Austin's rights. Indeed, the district court, in denying Paramount's motion for judgment as a matter of law on the § 1983 claim at the close of Austin's evidence, relied solely upon this theory:

> I think there's evidence from which [Austin] can argue in this case that really it was a pretty patchy situation at [Kings Dominion], that they really didn't have any clear-cut training program to educate their personnel on dealing with customers who are suspected of passing bad checks. They did something, but arguably it was pretty patchy, and it seems to me it could be argued that it was deliberately indifferent.

On appeal, however, Austin has abandoned the preceding theory of § 1983 liability, obviously because the general verdict in favor of Paramount on the negligence claim contained in count five and the adverse interrogatory answers on the § 1983 claim showed that the jury rejected Austin's claim of inadequate training. Now, Austin presents a theory of § 1983 liability that resembles the reasoning offered by the district court in disposing of Paramount's Rule 49(b) motion and is purportedly reconcilable with the jury's verdict. Specifically, Austin argues that Hester was a policy-maker who acquiesced in Gatewood's intention to effect the July 14, 1994 arrest of Austin on charges of forgery and uttering a forged writing, and who thereby subjected Paramount to liability. We find this claim untenable.

1.

The Supreme Court has recognized that, under appropriate circumstances, a municipality may incur § 1983 liability for a single decision of a policy-making official. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986) (plurality opinion) (holding county liable under § 1983 when county prosecutor instructed sheriff's deputies to forcibly enter plaintiff's place of business to serve capiases upon third

parties); Carter, 164 F.3d at 218 ("Municipal policy may be found . . . in certain affirmative decisions of individual policy making officials, or in certain omissions on the part of policy-making officials that manifest deliberate indifference to the rights of citizens.") (internal citations omitted). In determining whether an individual constitutes a "policy-making official" in this sense, courts inquire whether the individual speaks "with final policy-making authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 105 L. Ed. 2d 598, 109 S. Ct. 2702 (1989); see Pembaur, 475 U.S. at 481 ("Municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered."). Whether the individual in question exercises such authority "is not a question of fact in the usual sense." *City of St. Louis v. Praprotnik,* 485 U.S. 112, 124, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988). Rather, the inquiry "is dependent upon an analysis of state law," *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 786, 138 L. Ed. 2d 1, 117 S. Ct. 1734 (1997), requiring review of "the relevant legal materials, including state and local positive law, as well as custom or usage having the force of law." Jett, 491 U.S. at 737 (internal quotation marks omitted). A district court's determination of whether an individual exercises final policy-making authority in a particular area is reviewed de novo. See *Scala v. City of Winter Park*, 116 F.3d 1396, 1399 (11th Cir. 1997); *Gillette v. Delmore*, 979 F.2d 1342, 1349 (9th Cir. 1992).

The foregoing principles of § 1983 "policy-maker" liability were articulated in the context of suits brought against municipalities and other local government defendants. Nevertheless, these principles are equally applicable to a private corporation acting under color of state law when an employee exercises final policy-making authority concerning an action that allegedly causes a deprivation of federal rights. See *Howell v. Evans*, 922 F.2d 712, 724-25, vacated after settlement, 931 F.2d 711 (11th Cir. 1991) (assessing whether prison medical director employed by private corporation exercised final policy-making authority for employer concerning equipment and staff procurement). In the present appeal, Austin asserts that Paramount's liability under § 1983 derives from Hester's single decision to acquiesce in Gatewood's intention to effect Austin's July 14, 1994 arrest on charges of forgery and uttering a forged writing. Accordingly, the relevant "policy-maker" inquiry is whether Hester, as a matter of state and local positive law, or custom or usage having the force of law, see Jett, 491 U.S. at 737, exercised final policy-making authority concerning arrests effected by the special police officers of the Park Police Department.[7] We are satisfied that he did not.

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[7]At trial, the district court instructed the jury that Hester was "a policy maker of defendant Paramount Parks, Inc.," but failed to specify the area in which Hester purportedly exercised final policy making authority for Paramount.

First, nothing in the positive law of the Commonwealth of Virginia or of Hanover County granted Hester any policy-making authority concerning arrests effected by the special police officers. In particular, nothing in the Virginia statute authorizing the appointment of special police officers granted a private corporation or any of its employees authority over the law enforcement functions performed by those officers. See Va. Code Ann. § 19.2-13(A). Moreover, nothing in the appointment order issued by the Circuit Court of Hanover County granted any authority over the special police officers' law enforcement functions to any of Paramount's employees, including the Manager of Loss Prevention. Indeed, the appointment order explicitly mandated that those officers "work only under the control and direction of the Sheriff of Hanover County."

Second, nothing in the written policies of Paramount or of Kings Dominion granted Hester any policy-making authority over arrests effected by the special police officers. The Park Police Department's Policy and Procedure Manual provided that the Park Police Department "has direct affiliation with the Hanover County Sheriff's Department and is under the direction of the Sheriff of Hanover County." The Manual further provided: The Chain of Command and authority for all Kings Dominion Park Police shall be as follows involving official law enforcement:

a. Sheriff of Hanover County
b. Lieutenant of Kings Dominion Park Police
c. Kings Dominion Park Police Sergeant
d. Kings Dominion Park Police Corporal
e. Kings Dominion Park Police Officer

Aside from effectively illustrating the final authority of the Sheriff of Hanover County over the special police officers, the preceding list conspicuously omitted any reference to the Manager of Loss Prevention.

Third, even viewing the evidence at trial in the light most favorable to Austin and drawing all reasonable inferences in her favor, we cannot conclude that Hester had any policy-making authority concerning arrests effected by the special police officers as a matter of custom or usage having the force of law. See Jett, 491 U.S. at 737. At trial, Austin presented no evidence that Hester had ever directed a special police officer to effect an arrest or that he had ever prevented the same. Moreover, there was no evidence that the special police officers routinely consulted Hester or obtained his approval concerning impending arrests. Nor was there any evidence that Gatewood consulted Hester or obtained his approval concerning the two arrests in the present litigation. Rather, Gatewood's testimony regarding the events preceding those arrests demonstrates that she consulted only McGhee of the Commonwealth's Attorney's Office. Furthermore, when asked whether he knew that Gatewood planned to bring additional charges against Austin, Hester testified that "[Gatewood] indicated to me somewhere in that period of time . . . that [McGhee] and she

had had a conversation, and the charges were being amended, yes, sir, I was aware of that." Although certainly suggesting that Gatewood kept Hester informed as to the status of Austin's case, this testimony in no way indicates that Gatewood attempted either to consult with Hester or to obtain his approval regarding her decision to bring additional charges against Austin. Put simply, there was no evidence that Hester, despite his title of Manager of Loss Prevention, in practice exercised any control over the decisions of the special police officers regarding detention and/or arrests of park guests suspected of criminal offenses in this case or any other case. Indeed, the uncontradicted testimony was to the contrary. In fact, we find no support in the record for any specific policy-making authority given to or exercised by Hester regarding matters of law enforcement. The questions simply were not asked, nor was evidence ever produced in this regard.

In light of the foregoing analysis, we have no basis upon which to conclude that Hester exercised final policy-making authority concerning arrests effected by the special police officers of the Park Police Department. Because Austin's position on Paramount's liability under § 1983 rests entirely upon her theory that Hester was a "policy maker," we are satisfied that she failed to establish that any deprivation of her federal rights was caused by an official policy or custom of Paramount. Accordingly, we conclude that Paramount was entitled to judgment as a matter of law on Austin's § 1983 claim.[8]

2.

Because Paramount was entitled to judgment as a matter of law on Austin's § 1983 claim, Austin cannot be considered a prevailing party on that claim for purposes of § 1988. We therefore vacate the district court's award of attorney's fees and expenses. Accordingly, we need not address the issue presented in Austin's cross-appeal, which pertains solely to the district court's calculation of that award.

C.

Lastly, we turn to the issue of whether Paramount is entitled to judgment as a matter of law on Austin's state-law claims for false arrest (July 14, 1994) and malicious prosecution. Again, we review de novo the district court's denial of Paramount's Rule 50(b) motion for judgment as a matter of law, viewing the evidence in the light most favorable to Austin and drawing all reasonable inferences in her favor. See Konkel, 165 F.3d at 279.

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[8]It is worth remembering that the jury found Austin's July 14, 1994 arrest was not effected pursuant to a policy, custom, or practice of Paramount, notwithstanding the district court's instruction that Hester was a "policy maker" of Paramount. The net result in this case is that there was neither a legal nor a factual basis to find Paramount liable under § 1983 based upon a policy.

The Virginia Supreme Court has established that a private employer may not be held liable under a theory of respondeat superior for torts committed by a special police officer when he or she acts as a public officer, as opposed to an agent, servant, or employee of the employer. See *Norfolk & W. Ry. Co. v. Haun*, 167 Va. 157, 187 S.E. 481, 482 (Va. 1936); *Glenmar Cinestate, Inc. v. Farrell*, 223 Va. 728, 292 S.E.2d 366, 369-70 (Va. 1982). The court elaborated upon this key distinction in *Glenmar*: Moreover, we held in *N. & W. Ry. Co. v. Haun*, 167 Va. 157, 187 S.E. 481 (1936), that a special police officer appointed by public authority, but employed and paid by a private party, does not subject his employer to liability for his torts when the acts complained of are performed in carrying out his duty as a public officer. The test is: in what capacity was the officer acting at the time he committed the acts for which the complaint is made? If he is engaged in the performance of a public duty such as the enforcement of the general laws, his employer incurs no vicarious liability for his acts, even though the employer directed him to perform the duty. On the other hand, if he was engaged in the protection of the employer's property, ejecting trespassers or enforcing rules and regulations promulgated by the employer, it becomes a jury question as to whether he was acting as a public officer or as an agent, servant, or employee.

292 S.E.2d at 369-70.

In the present litigation, the only viable factual predicate for Austin's claims for false arrest (July 14, 1994) and malicious prosecution is that Gatewood lacked probable cause to effect the July 14, 1994 arrest and further lacked probable cause to assist with the prosecution of the pertinent charges.[9] It is without question, however, that Gatewood effected Austin's arrest and assisted with the prosecution in the course of performing her public duty to enforce the Commonwealth of Virginia's law against forgery and uttering a forged writing. See Va. Code Ann. § 18.2-172. Accordingly, under *Glenmar*, the issue of whether Gatewood acted in her capacity as a public officer was not one for the jury's resolution.

Because Austin presented no evidence that Gatewood acted other than in her capacity as a public officer in effecting Austin's July 14, 1994 arrest and assisting with the prosecution, Paramount cannot be held vicariously liable with respect to Austin's claims for false arrest (July 14, 1994) and malicious prosecution. See *Glenmar*, 292 S.E.2d at 369 ("If [the officer was] engaged in the performance of a public duty such as the enforcement of the general laws, his employer incurs no vicarious liability for his

[9]In light of our analysis in part III.B., we are satisfied that there is no basis for the jury's finding that Austin's July 14, 1994 arrest was based upon Hester's actions. Indeed, the record is devoid of any evidence that Hester participated in or approved the decision to effect that arrest or that he could have prevented that arrest upon learning of Gatewood's intention to bring additional charges.

acts. . . . "). We conclude, therefore, that Paramount was entitled to judgment as a matter of law on both claims.[10]

IV.

In summary, we conclude that Paramount was entitled to judgment as a matter of law on Austin's § 1983 claim because Austin failed to establish that any deprivation of her federal rights was caused by an official policy or custom of Paramount. We further conclude that, because Gatewood was engaged in the performance of her public duty to enforce Virginia law when she effected Austin's July 14, 1994 arrest and assisted with the prosecution, Paramount was entitled to judgment as a matter of law on Austin's claims for false arrest (July 14, 1994) and malicious prosecution. Accordingly, we reverse the denial of Paramount's Rule 50(b) motion for judgment as a matter of law, vacate the judgment in favor of Austin, vacate the award of attorney's fees and expenses, and remand with instructions that judgment as a matter of law be entered in favor of Paramount.

VACATED AND REMANDED

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[10]Although certain individuals may have been liable for their acts in regard to Austin's arrest and prosecution, Austin did not join them as defendants in the present litigation. Rather, Austin chose to bring suit only against Paramount.

BEVERLY JEAN WHITEHEAD, ET AL. V. USA-ONE, INC.,

595 SO. 2D 867 (ALA. SUP. 1992).

Maddox, Almon, Shores, Houston, and Steagall, JJ., concur.

Opinion: per curiam.

Beverly Jean Whitehead, Carla Prewett, and Blair Marques were all tenants at Sharpsburg Manor apartments in Birmingham in 1988. In April and May of that year, a man broke into each of their apartments and sexually assaulted them. On June 11, 1988, the same man who had previously assaulted Whitehead broke into Whitehead's apartment again and raped her. Alfred Zene was apprehended that evening, and he later pleaded guilty to second degree burglary for the June 11 break-in; he was sentenced to 25 years in prison.

Whitehead, Prewett, and Marques all sued USA-One, Inc., the company hired to provide gate attendants at Sharpsburg Manor; Rime, Inc., the owner of Sharpsburg Manor; and Regal Development Company, the manager of the apartment complex, alleging negligence, wantonness, and breach of contract. They also sued Zene, alleging assault. Whitehead, Prewett, and Marques reached a pro tanto settlement with Rime and Regal Development Company, and the trial court entered a summary judgment for USA-One and made that judgment final pursuant to Rule 54(b), A.R.Civ.P.

Whitehead, Prewett, and Marques appeal from that judgment, arguing that USA-One voluntarily assumed a duty to protect them from the criminal acts of a third party. They rely on *Gardner v. Vinson Guard Service, Inc.*, 538 So.2d 13 (Ala. 1988), in support of that argument.

In *Gardner*, Vinson Guard Service had an oral contract with Van's Photo, Inc., to provide security guards at one of its facilities. Specifically, Vinson Guard Service was to "provide protection for vehicles in the parking lot of Van's Photo and to protect employees traveling to and from their vehicles" and to "patrol the perimeter around the facility and to make their presence evident." 538 So.2d at 14. A Van's Photo employee arrived for work one morning after a burglary had occurred and was told by the security guard on duty that it was safe to go in the building because the burglar had fled. Approximately 15 minutes after the employee went inside, she was attacked by a second burglar. In reversing the summary judgment for Vinson Guard Service on the plaintiff's negligence claim, this Court held that there was a jury question as to whether Vinson Guard Service had assumed a duty to protect the Van's Photo employees while they were inside the building. We also held that, although a breach of

contract cause of action might exist for a third-party beneficiary, no such cause of action existed in that case.

We find no evidence here that USA-One had a contractual duty to protect Whitehead, Prewett, and Marques or that it assumed a duty to protect them. The contract between Rime and Shelby Securities, Inc., USA-One's predecessor in interest, states at paragraph nine: "It is expressly understood and agreed that this contract is entered into solely for the mutual benefit of the parties herein and that no benefits, rights, duties, or obligations are intended or created by this contract as to third parties not a signatory hereto."

Although USA-One's duties were not expressly stated in the contract, Dorothy Holland, the manager of Sharpsburg Manor, and Barrell Lamar Walker, a former employee of USA-One, described in their depositions the extent of USA-One's responsibilities. Walker said that the gate attendants primarily checked cars entering and exiting the complex, that they kept daily logs, and that they made periodic "rounds" of the premises. Holland said that the attendants served as an after-hours answering service, i.e., that they had the telephone numbers of the maintenance person and the manager on duty in case a resident called the gate with a problem the attendant could not handle. Holland stated more specifically regarding the attendants' duties:

"Q. All right. Other than answering—filling an answering service, did [USA-One]—did you have an understanding that they were supposed to provide anything else?
"A. Yes.
"Q. What was that?
"A. They make rounds of all the public areas. This means they check the swimming pools to make sure at the proper time that people are out of the pools. Some of them are 9:00, some are 10:00, the pools. And they check the maintenance shop doors. They check the pump house doors. They walk through breezeways. They walk around buildings, they do all sorts of things.
"Q. How many—you call them guards, don't you?
"A. No, we call them gate attendants.
"Q. All right. How many gate attendants were on duty each night?
"A. Until—well, they fluctuated. They had different hours at different times. Depending upon the nights we had the heaviest traffic, they would—there would be one, two persons up to say, midnight. And then after midnight, to 5:00 in the morning, there would be one who rode. They wouldn't stay in the gate house at all, he rode around and made checks more frequently.
"Q. Midnight to—
"A. 5:00. Daylight, whatever time it is.
"Q. And what would happen at 5:00?
"A. He would leave.
"Q. Would you have any gate attendants whatsoever after 5:00 in the morning?
"A. After 5:00, no.

"Q. And the first gate attendant to show up would be at 2:00, or what time?
"A. Gate attendant?
"Q. Yes.
"A. When the office closed.
"Q. At 5:00.
"A. Yes. And we closed at 5:30. They would come a little before that time to get information and pick up the keys and this sort of thing.
"Q. Did you make inquiries about their whereabouts after the first Whitehead incident?
"A. Did I make—
"Q. Did you ask these gate attendants where they were during the night of the first Whitehead incident?
"A. Yes.
"Q. What did they tell you?
"A. They were there. They were making—or a person was.
"Q. One person was making rounds?
"A. Yes.
"Q. And the other person—
"A. They report back to the attendant.
"Q. Pardon me?
"A. They report back to their station, and are there periodically.
"Q. So, both were making rounds, reporting back to their station periodically, right? Is that what they told you?
"A. This is what their duties were each night until a certain hour of night, and it depends on the—we have to look at the guard reports to see.

"...

"Q. And now, what did you do after this Marques incident with regard to security force? Did you talk to the gate attendants? Did you talk to them, personally, at all?
"A. Uh-huh (positive response).
"Q. All right. Were any changes made?
"A. They were—just what they're permitted to do. You know, they cannot make an arrest.
"Q. Right.
"A. And they just made rounds more frequently, rode around more frequently, rode on the street areas and inside the complex itself. And the police did, too, at all times. They were there day and night.
"Q. In what way did the gate attendants follow your suggestions about more frequent patrolling?
"A. Yes, they did [sic]. In fact, I would check on it at times to make sure they were doing that. I called the gate house to see if they were there, and asked if they made rounds.
"Q. Did they—did they continue to use two people during the hours that you've earlier testified about, 12:00 to 5:00?
"A. It seems that we made some changes in some of the hours, but I can't remember exactly what they were. But they still went off duty at 5:00 or 5:30 in the morning, because it was daylight at that time.

"Q. I just want to get a bearing on like, more frequently is—they began patrolling more frequently. How long did they do that? They just spent more time in the car and less time in the gate?
"A. No. We asked them to walk. Drive to an area, get out and walk around, and—they used to do a lot of that, anyway. We just asked them to do it more frequently.
"Q. Did you ever have any complaints prior to any of these incidents about the gate attendants?
"A. Complaints, like?
"Q. Like they weren't doing their job?
"A. Spasmodically. Not as a usual thing.
"Q. All right.
"A. They're only there for limited times, and they're only there for limited services to perform.
"Q. After the first Whitehead incident, when you understood that the fellow—the assailant had said 'they're waiting for me in the car outside,' did you check with the guards to determine whether they had identified the license tag numbers or cars entering and exiting that evening?
"A. Well, now, we don't offer security-type security. They can—people like this watch and wait until there is no one around to appear. He could be at one end of the complex, and far away from that. You can't be everywhere at the same time, no way."

(Emphasis added.)

As opposed to the duties of the security company in *Gardner v. Vinson Guard Service*, supra, it is clear both from the contract here as well as from the deposition testimony of Walker and Holland that the employees of USA-One were at Sharpsburg Manor for the benefit of Rime. We are unpersuaded by the plaintiffs' reliance on *Nail v. Jefferson County Truck Growers Ass'n, Inc.*, 542 So.2d 1208 (Ala. 1988), to show that USA-One voluntarily assumed a duty to protect them.

Nail involved a shootout between competing produce retailers at the Jefferson County Farmers' Market over leased space at the market. The retailers sued the owner and manager of the market, alleging a negligent failure to prevent injuries caused by the intentional tort of a third person. The trial court entered a judgment notwithstanding the verdict, for the owner and manager of the market, and the retailers appealed, arguing that the market had voluntarily assumed a duty to protect them because, three days before the shootout, the market had hired a third security guard to patrol the area where the violence occurred. On the day of the shooting, however, only two guards were present, because one guard was sick. The retailers produced evidence that a replacement guard was usually called in when a guard was absent and that, on the day in question, the market did not provide a replacement guard even though it had knowledge of the "growing rancor" between the retailers. In reversing the J.N.O.V. with regard to one of the retailers, this Court stated, "The hostility in this case

fermented over a period of several weeks before the shootout, and Market was apprised of the growing animosity. We hold that evidence was sufficient for the jury reasonably to conclude violence in Shed One was foreseeable." 542 So.2d at 1212.

Here, the fact that the gate attendants patrolled the grounds of Sharpsburg Manor "more frequently" after the second assault is insufficient to establish that USA-One undertook to protect the residents of the apartment complex. We hold, therefore, that the summary judgment for USA-One was correct, and it is due to be affirmed.

AFFIRMED.

Maddox, Almon, Shores, Houston, and Steagall, JJ., concur.

BURDEAU V. MCDOWELL,

256 U.S. 465; 41 S. Ct. 574; 65 L. Ed. 1048 (1921).
Argued April 11, 12, 1921

June 1, 1921

Appeal from an order of the District Court requiring that certain books and papers be impounded with the clerk and ultimately returned to the appellee, and enjoining officers of the Department of Justice from using them, or evidence derived through them, in criminal proceedings against him. The facts are stated in the opinion, *post*, 470.

COUNSEL: *The Solicitor General* for appellant:

It was not shown that any book, paper, or other document which was the private property of appellee was delivered to or was ever in the possession of appellant.

It is difficult to see how it can be said, with any show of reason, that there was any stealing of books and papers in this case. Certainly there was no invasion of appellee's right of privacy. Everything that was taken into possession was found in the office of the company itself, with the exception of a few papers which were in the private office of appellee, but which it is admitted related to the business of the company, and were, therefore, such papers as the company was entitled to have delivered to it. They were, in fact, delivered to its auditor by appellee's representative.

If the employee has left papers of his own commingled with those of the company, he certainly cannot be said to be the sole judge of whether a particular paper is his or belongs to the company. He has brought about a condition under which the company has the right to inspect everything in the office before allowing anything to be removed. The inspection, therefore, is entirely lawful, and any information of crime or other matters which may be thus acquired is lawfully acquired and may properly be used. In the present case, appellee's representative was allowed to be present and make a list or take copies of all papers examined. A paper furnishing evidence of crookedness in the conduct of the company's affairs certainly relates to a matter in which the company is interested; and if the unfaithful employee has left it in the company's files, or in the company's office, there is no principle of law under which he can lawfully claim the right to have it returned to him. He has parted with the private possession of it, and his surrender of possession has not been brought about by any invasion of his constitutional rights.

Even if it could be said that the company or its representatives stole these papers from the appellee, this would not preclude their use in evidence if they should thereafter come to the hands of the federal authorities. The court found, as the evidence clearly required, that no department of the Federal Government had anything whatever to do with the taking of these papers and that no federal official had any knowledge that an investigation of any kind was being made, nor did such knowledge come to any federal official until several months later. It would scarcely be insisted by anyone that, if the Government should discover that someone has stolen from another a paper which shows that the latter has committed a crime, the thief could not be called as a witness to testify to what he has discovered. If the paper were still in his possession, he could be subpoenaed to attend and produce the paper. The same thing is accomplished when the Government, instead of issuing a subpoena duces tecum, takes the paper and holds it as evidence. The rightful owner, while it is being so held, is no more entitled to its return than one who has been arrested for carrying a pistol is entitled to have the pistol returned to him pending a trial.

It must always be remembered that "a party is privileged from producing the evidence but not from its production." *Johnson v. United States*, 228 U.S. 457, 458.

Moreover, the Fourth Amendment protects only against searches and seizures which are made under governmental authority, real or assumed, or under color of such authority. If papers have been seized, even though wrongfully, by one not acting under color of authority, and they afterwards come to the possession of the Government, they may be properly used in evidence. *Weeks v. United States*, 232 U.S. 383; *Gouled v. United States*, 255 U.S. 298; *Boyd v. United States*, 116 U.S. 616; *Adams v. New York*, 192 U.S. 585; *Johnson v. United States, supra*; *Perlman v. United States*, 247 U.S. 7.

Mr. E. Lowry Humes, with whom *Mr. A. M. Imbrie* and *Mr. Rody P. Marshall* were on the brief, for appellee:

The issue in this proceeding was the title and right of possession of certain private papers alleged to have been stolen. The right to private property can be as effectually asserted against the Government as it can against an individual, and the Government has no greater right to stolen property than the private citizen. The receiver of stolen goods has no right superior to the right of the thief and the officer or agent of the Government who receives stolen goods is in no better position to retain the fruits and advantages of the crime than the humble private citizen. *Boyd v. United States*, 116 U.S. 616, 624; *Weeks v. United States*, 232 U.S. 383, 398. The right which the appellee asserted was a right which the court had jurisdiction to recognize and preserve.

The courts of the United States are open to the citizen for the enforcement of his legal and constitutional rights, and the right to private

property may be asserted as a mere legal right or it may be asserted under the guarantees of the Constitution.

Abuses of individuals involving the deprivation of the right to the possession, use and enjoyment of private property are adequately redressed by the assertion of the legal rights of the individual in either courts of law or equity. The resort to the limitations of the Constitution may be necessary to curb the excesses of the Government.

In the case at bar there can be no question but that replevin would lie against both the thief and the receiver of the stolen goods to recover the private property of the appellee. But the legal remedy by replevin would have been inadequate as the injury could not be measured in damages. It was necessary to resort to the equitable powers of the court. The fact that the appellant happened to be an officer or employee of the Government provided no immunity to him that could prevent the owner of private property from asserting his legal rights in either a court of law or of equity. Quite to the contrary, the very fact that he was an officer of the court, enlarged rather than diminished the authority of the court to exercise control over and deal with the stolen papers which had come into his possession as such officer of the court.

In this case the proceeding is properly a much more summary proceeding than in a case against a stranger to the court where the formality and difficulty of securing jurisdiction over both the person and the property might be involved.

The right of a court of equity to order and decree the return of private property and papers is well recognized, as is illustrated by the following cases. *McGowin v. Remington*, 12 Pa. St. 56; *Dock v. Dock*, 180 Pa. St. 14; *Pressed Steel Car Co. v. Standard Steel Car Co.*, 210 Pa. St. 464.

This is an independent proceeding having for its purpose the recovery of property in equity. The law side of the court provided no adequate remedy. The court in adjudicating the case properly found that the papers had been stolen; that they were private and personal papers of the appellee, and that they were in the hands of an officer of the court, and that the owner was entitled to their return. Up to this point no constitutional question is involved. It is, however, respectfully submitted that had the court below refused under the evidence and the facts in this case to order the return of the books and papers, and dismissed the proceeding, and if subsequently a criminal proceeding had been instituted against the appellee and the stolen books and papers been admitted in evidence over objection, then appellee would have been denied the constitutional right guaranteed him under the Fifth Amendment to the Constitution in that he would have been "compelled in" a "criminal case to be a witness against himself." If this conclusion is not correct then a means has been found by which private prosecutors and complainants and those personally interested in the prosecution and persecution of alleged offenders can, by the mere acquiescence of the Government, deprive citizens of the United States of the constitutional rights guaranteed to them by both the Fourth and Fifth Amendments.

JUDGES: McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis, Clarke

OPINION BY: DAY

OPINION: MR. JUSTICE DAY delivered the opinion of the court.

J. C. McDowell, hereinafter called the petitioner, filed a petition in the United States District Court for the Western District of Pennsylvania asking for an order for the return to him of certain books, papers, memoranda, correspondence and other data in the possession of Joseph A. Burdeau, appellant herein, Special Assistant to the Attorney General of the United States.

In the petition it is stated that Burdeau and his associates intended to present to the grand jury in and for the Western District of Pennsylvania a charge against petitioner of an alleged violation of § 215 of the Criminal Code of the United States in the fraudulent use of the mails; that it was the intention of Burdeau and his associates, including certain post-office inspectors cooperating with him, to present to the grand jury certain private books, papers, memoranda, etc., which were the private property of the petitioner; that the papers had been in the possession and exclusive control of the petitioner in the Farmers Bank Building in Pittsburgh. It is alleged that during the spring and summer of 1920 these papers were unlawfully seized and stolen from petitioner by certain persons participating in and furthering the proposed investigation so to be made by the grand jury, under the direction and control of Burdeau as special assistant to the Attorney General, and that such books, papers, memoranda, etc., were being held in the possession and control of Burdeau and his assistants; that in the taking of the personal private books and papers the person who purloined and stole the same drilled the petitioner's private safes, broke the locks upon his private desk, and broke into and abstracted from the files in his offices his private papers; that the possession of the books, papers, etc., by Burdeau and his assistants was unlawful and in violation of the legal and constitutional rights of the petitioner. It is charged that the presentation to the grand jury of the same, or any secondary or other evidence secured through or by them, would work a deprivation of petitioner's constitutional rights secured to him by the Fourth and Fifth Amendments to the Constitution of the United States.

An answer was filed claiming the right to hold and use the papers. A hearing was had before the District Judge, who made an order requiring the delivery of the papers to the clerk of the court, together with all copies memoranda and data taken therefrom, which the court found had been stolen from the offices of the petitioner at rooms numbered 1320 and 1321 in the Farmers Bank Building in the City of Pittsburgh. The order further provided that upon delivery of the books, papers, etc., to the clerk of the court the same should be sealed and impounded for the period of ten days, at the end of which period they should be delivered to the petitioner or his

attorney unless an appeal were taken from the order of the court, in which event, the books, papers, etc., should be impounded until the determination of the appeal. An order was made restraining Burdeau, Special Assistant Attorney General, the Department of Justice, its officers and agents, and the United States Attorney from presenting to the United States Commissioner, the grand jury or any judicial tribunal, any of the books, papers, memoranda, letters, copies of letters, correspondence, etc., or any evidence of any nature whatsoever secured by or coming into their possession as a result of the knowledge obtained from the inspection of such books, papers, memoranda, etc.

In his opinion the District Judge stated that it was the intention of the Department of Justice, through Burdeau and his assistants, to present the books, papers, etc., to the grand jury with a view to having the petitioner indicted for the alleged violation of § 215 of the Criminal Code of the United States, and the court held that the evidence offered by the petitioner showed that the papers had been stolen from him, and that he was entitled to the return of the same. In this connection the District Judge stated that it did not appear that Burdeau, or any official or agent of the United States, or any of the Departments, had anything to do with the search of the petitioner's safe, files, and desk, or the abstraction therefrom of any of the writings referred to in the petition, and added that "the order made in this case is not made because of any unlawful act on the part of anybody representing the United States or any of its Departments but solely upon the ground that the Government should not use stolen property for any purpose after demand made for its return." Expressing his views, at the close of the testimony, the judge said that there had been a gross violation of the Fourth and Fifth Amendments to the Federal Constitution; that the Government had not been a party to any illegal seizure; that those Amendments, in the understanding of the court, were passed for the benefit of the States against action by the United States, forbidden by those Amendments, and that the court was satisfied that the papers were illegally and wrongfully taken from the possession of the petitioner, and were then in the hands of the Government.

So far as is necessary for our consideration certain facts from the record may be stated. Henry L. Doherty & Company of New York were operating managers of the Cities Service Company, which company is a holding company, having control of various oil and gas companies. Petitioner was a director in the Cities Service Company and a director in the Quapaw Gas Company, a subsidiary company, and occupied an office room in the building owned by the Farmers Bank of Pittsburgh. The rooms were leased by the Quapaw Cas Company. McDowell occupied one room for his private office. He was employed by Doherty & Company as the head of the natural gas division of the Cities Service Company. Doherty & Company discharged McDowell for alleged unlawful and fraudulent conduct in the course of the business. An officer of Doherty & Company and the Cities Service Company went to Pittsburgh in March, 1920, with

authority of the president of the Quapaw Gas Company to take possession of the company's office. He took possession of room 1320; that room and the adjoining room had McDowell's name on the door. At various times papers were taken from the safe and desk in the rooms, and the rooms were placed in charge of detectives. A large quantity of papers were taken and shipped to the auditor of the Cities Service Company at 60 Wall Street, New York, which was the office of that company, Doherty & Company and the Quapaw Gas Company. The secretary of McDowell testified that room 1320 was his private office; that practically all the furniture in both rooms belonged to him; that there was a large safe belonging to the Farmers Bank and a small safe belonging to McDowell; that on March 23, 1920, a representative of the company and a detective came to the offices; that the detective was placed in charge of room 1320; that the large safe was opened with a view to selecting papers belonging to the company, and that the representative of the company took private papers of McDowell's also. While the rooms were in charge of detectives both safes were blown open. In the small safe nothing of consequence was found, but in the large safe papers belonging to McDowell were found. The desk was forced open, and all the papers taken from it. The papers were placed in cases, and shipped to Doherty & Company, 60 Wall Street, New York.

In June, 1920, following, Doherty & Company, after communication with the Department of Justice, turned over a letter, found in McDowell's desk to the Department's representative. Burdeau admitted at the hearing that as the representative of the United States in the Department of Justice he had papers which he assumed were taken from the office of McDowell. The communication to the Attorney General stated that McDowell had violated the laws of the United States in the use of the mail in the transmission of various letters to parties who owned the properties which were sold by or offered to the Cities Service Company; that some of such letters, or copies of them taken from McDowell's file, were in the possession of the Cities Service Company, that the Company also had in its possession portions of a diary of McDowell in which he had jotted down the commissions which he had received from a number of the transactions, and other data which, it is stated, would be useful in the investigation of the matter before the grand jury and subsequent prosecution should an indictment be returned.

We do not question the authority of the court to control the disposition of the papers, and come directly to the contention that the constitutional rights of the petitioner were violated by their seizure, and that having subsequently come into the possession of the prosecuting officers of the Government, he was entitled to their return. The Amendments involved are the Fourth and Fifth, protecting a citizen against unreasonable searches and seizures, and compulsory testimony against himself. An extended consideration of the origin and purposes of these Amendments would be superfluous in view of the fact that this court has had occasion to deal with those subjects in a series of cases. *Boyd v. United States*,

116 U.S. 616; *Adams v. New York*, 192 U.S. 585; *Weeks v. United States*, 232 U.S. 383; *Johnson v. United States*, 228 U.S. 457; *Perlman v. United States*, 247 U.S. 7; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385; and *Gouled v. United States*, 255 U.S. 298.

The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. A portion of the property so taken and held was turned over to the prosecuting officers of the Federal Government. We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned.

The Fifth Amendment, as its terms import is intended to secure the citizen from compulsory testimony against himself. It protects from extorted confessions, or examinations in court proceedings by compulsory methods.

The exact question to be decided here is: May the Government retain incriminating papers, coming to it in the manner described, with a view to their use in a subsequent investigation by a grand jury where such papers will be part of the evidence against the accused, and may be used against him upon trial should an indictment be returned?

We know of no constitutional principle which requires the Government to surrender the papers under such circumstances. Had it learned that such incriminatory papers, tending to show a violation of federal law, were in the hands of a person other than the accused, it having had no part in wrongfully obtaining them, we know of no reason why a subpoena might not issue for the production of the papers as evidence. Such production would require no unreasonable search or seizure, nor would it amount to compelling the accused to testify against himself.

The papers having come into the possession of the Government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the Government,

may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character.

It follows that the District Court erred in making the order appealed from, and the same is *Reversed*.

DISSENT BY: BRANDEIS

DISSENT: MR. JUSTICE BRANDEIS dissenting, with whom MR. JUSTICE HOLMES concurs.

Plaintiff's private papers were stolen. The thief, to further his own ends, delivered them to the law officer of the United States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so?

That the court would restore the papers to plaintiff if they were still in the thief's possession is not questioned. That it has power to control the disposition of these stolen papers, although they have passed into the possession of the law officer, is also not questioned. But it is said that no provision of the Constitution requires their surrender and that the papers could have been subpoenaed. This may be true. Still I cannot believe that action of a public official is necessarily lawful, because it does not violate constitutional prohibitions and because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.

STATE OF MINNESOTA V. JEFFREY SCOTT BUSWELL,

449 N.W.2d 471 (Minn. App. 1989).

Parker, Presiding Judge, Crippen, Judge, and Bowen, *Judge. Bowen, Judge, dissenting.

OPINION BY: CRIPPEN

Appellants contend their fourth amendment rights were violated by security agent searches at the gateway to Brainerd International Raceway. The trial court concluded the policing activity was private. We reverse and remand.

FACTS

Each appellant was charged with possession of controlled substances. After a consolidated omnibus hearing, the trial court determined that the evidence seized was the product of a private search and denied appellants' motions to suppress the evidence. Appellants waived their rights to a jury trial and were found guilty as charged by the trial court.

Appellant Dale Jay Schmidt was stopped in his borrowed pickup camper by Bruce Gately, a private security agency employee outside the entrance to Brainerd International Raceway on August 18, 1988. Gately asked Schmidt to unlock the back door of the camper portion of his vehicle so Gately could see if any persons were attempting to enter the race without paying the admission fee. After Schmidt unlocked the back door, Gately looked into the rear of the camper, entered it, opened a closet and discovered a small, green tackle box which contained cocaine. Gately then handcuffed Schmidt and his passenger to a fence pending the arrival of law enforcement officials.

Appellants Jeffrey Scott Buswell and Gary Lee Schwartzman were also stopped by Gately upon their arrival at the racetrack on August 18. While searching their converted bus, Gately discovered contraband inside a closet and a closet drawer. Subsequently, Buswell and Schwartzman were handcuffed to a fence and law enforcement officials were summoned. More contraband was found after the bus was seized and searched, and cocaine was discovered on appellants after they were taken into custody.

In each instance, the searches were conducted by a private security guard employed by North Country Security. North Country Security is owned by Keith Emerson, a Brainerd police officer and a special deputy for the Crow Wing County Sheriff's office.

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*Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

Emerson contracted with the Brainerd raceway to provide security at the track, which is located on private property about six miles outside Brainerd, in Crow Wing County. He was responsible for hiring security guards and managing the security arrangements. For the weekend at issue, Emerson employed 127 guards, seven of whom were police officers.

In May of 1988, prior to the racing season, Emerson conferred with the Crow Wing County Sheriff and a local Bureau of Criminal Apprehension agent to determine the procedures that would be employed when his security guards seized contraband or uncovered other illegal activity. It was agreed that if any circumstances encountered by Brainerd security guards seemed to warrant an arrest, Emerson would be called first. After reviewing the situation, he would then decide whether to call in law enforcement officers. Arrangements were made for Emerson to contact Dave Bjerja, a Crow Wing County deputy sheriff and a special BCA agent, when someone was held for further police action.

At approximately 6:00 A.M. on the day of the searches, Emerson convened a meeting with his employees to discuss security arrangements for the weekend's races. At this meeting, Emerson told his employees that vehicles were to be searched for nonpaying persons. Emerson testified, however, that there was also a standing rule that vehicles are checked on a random basis for contraband.

ISSUE

Did the searches conducted by private security personnel at the entrance to Brainerd International Raceway constitute public police action, governed by Fourth Amendment limitations?

Analysis

Appellants contend the random searches at issue were not private activity and should have been subject to the constraints set forth by the Fourth and Fourteenth Amendments. They argue that there was sufficient evidence of public action to implicate the constitutional prohibitions against unreasonable and warrantless searches and that evidence obtained was illegally seized and should have been suppressed.

It is well-settled that the Fourth Amendment applies only to governmental action. *Burdeau v. McDowell*, 256 U.S. 465, 475, 65 L. Ed. 1048, 41 S. Ct. 574 (1921). This rule of law has been followed in Minnesota. *See State v. Kumpula*, 355 N.W.2d 697, 701 (Minn. 1984); *State v. Hodges*, 287 N.W.2d 413, 416 (Minn. 1979). The difficulty often arises, however, as it does here, in determining when governmental action occurs. There is no single authority directly bearing on this issue.

The public-private classification is made with awareness that constitutional rights of the citizen must be protected. We are to liberally construe those constitutional provisions which provide for the security of person and property. *See Coolidge v. New Hampshire*, 403 U.S. 443, 453-54, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). Courts have recognized the dangers in creating a simplistic division between private and public sectors when interpreting the Fourth Amendment.

> To err on the side of a restrictive interpretation of the Fourth Amendment would be to sanction the possibility of widespread abuse of the privacy rights of individuals by private security guards.
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> * * * *
>
> Ill-trained in the subtleties of the law of search and seizure, private security guards are more likely than public law-enforcement officials to conduct illegal searches and seizures. In addition, private security guards have accoutrements of office that tend to radiate an air of authority not possessed by other private individuals. Of particular importance are the uniform and badge, both regulated by the state.

People v. Holloway, 82 Mich. App. 629, 267 N.W.2d 454, 459 (1978) (Kaufman, Judge, concurring).

The Supreme Court formulated the following standard in *Coolidge*:

> The test . . . is whether [the private citizen], in light of all the circumstances of the case, must be regarded as having acted as an "instrument" or agent of the state.

Coolidge, 403 U.S. at 487. The Court recently reiterated this position and stated that the Fourth Amendment does not apply to a private search or seizure *unless* the private party acted as an instrument or agent of the government. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 1411, 103 L. Ed. 2d 639 (1989).

Case law identifies several determinants of public involvement. Our consideration of these factors leads us to the conclusion that the searches in the present case were public. As these factors are examined here, we review the record with respect for the additional rule of law that appellants have the burden to show by a preponderance of evidence that the security searches here were not private in nature. *United States v. Feffer*, 831 F.2d 734, 739 (7th Cir. 1987).

1. Official Police Involvement.

Whether a private party should be considered an agent or instrument of the government for purposes of the Fourth Amendment turns initially on the

degree of the government's participation in the private party's activities. *Skinner*, U.S. at , 109 S. Ct. at 1411. "The fact that the government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one." *Id*. Governmental participation may be found where the government does something more than adopt a passive position toward underlying private conduct. *Id*.

Before a private party's actions can be attributed to the government, some degree of government instigation must be shown. *United States v. Luciow*, 518 F.2d 298, 300 (8th Cir. 1975). This may be in the form of governmental direction, authorization, or knowledge of the illegality. *Id*. The Fourth Amendment may apply if the government participates in a search or encourages a private party to conduct a search. *Gundlach v. Janing*, 536 F.2d 754, 755 (8th Cir. 1976).

A search is not private in nature if it has been ordered or requested by a government official. 1 W. LaFave, Search and Seizure § 1.8(b), at 178 (2d ed. 1987). Similarly, governmental involvement has been found to exist when private security guards act pursuant to customary procedures agreed to in advance by the police. *See Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 559 (8th Cir. 1989); *El Fundi v. Deroche*, 625 F.2d 195, 196 (8th Cir. 1980).

In the instant case, a meeting occurred where public officials and private security personnel reached an understanding regarding arrest procedures to be utilized upon the discovery of contraband by the private guards. Although this meeting dealt with the aftermath of searches, and not the manner of searching, the meeting produced a standing arrangement for contacts by the supervising security agent with police during the hours of operation, and a police officer was designated on call to assist with arrests. Emerson testified he was to be the intermediary between the security person conducting the search and the police; as he explained: "They wanted a law enforcement officer making the phone calls which would be for two reasons. One, I am in charge of security and I am a licensed officer."

2. Service of Public Policing Function.

Regardless of direct police involvement, systematic use of random contraband searches serves the general public interest and may reflect pursuit of criminal convictions as well as protection of private interests. *Marsh v. Alabama*, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946), supplies the basis for concluding that private investigators and police may be subject to the Fourth Amendment where they are with some regularity engaged in the "public function" of law enforcement. *Id*. at 506. *See* 1 W. LaFave, § 1.8(d) at 200. *See also Feffer*, 831 F.2d at 739 (private purpose to assist police considered along with government acquiescence in conduct).

Private security guards may share with police an interest in public prosecutions premised on the results of a private search. Here, as already

pointed out, the interest of the police was demonstrated in the prior meetings between Emerson and law enforcement officials regarding the procedures to be used. Where some presearch contact between the private party conducting the search and a potentially interested government official is shown, influence may be inferred. 1 W. LaFave, § 1.8(e) at 211 n. 151. The security guards were clearly aiming at discovery of contraband and public prosecution of offenses thus discovered. This was so notwithstanding any private interest in controlling drug-induced misconduct. Emerson testified that vehicles were to be checked on a random basis for contraband.

In addition, private security personnel were utilized here to police a major public activity. Private security guards have been increasingly used as supplements for police protection and perform functions similar to licensed police officers. Here, Emerson employed approximately 127 guards, seven of whom were police officers, for the weekend races at the Brainerd raceway overseeing approximately 78,000 spectators.

Finally, the police-like clothing, equipment, and procedures gave North Country Security personnel the appearance of public authorities. *See Holloway*, 82 Mich. App. at , 267 N.W.2d at 459-60. They wore grey uniforms with badges. Gately carried handcuffs and a gun. Emerson acknowledged that the security guards might look like police officers to the average person. Combined with the use of the police arrest process (handcuffing appellants to fences, conducting body searches), the role of these private security agents extended to a police function, not merely affording private protection.

3. Boundaries of Reasonable Private Policing.

When intrusion goes beyond a reasonable and legitimate means for protecting private property, the practice suggests a need for constitutional protection of individual liberty. *Commonwealth v. Leone*, 386 Mass. 329, 435 N.E.2d 1036, 1041 (1982). The public does not reasonably anticipate, we conclude, a private prerogative for random searches, a regular part of admission to a public event, which are more intrusive than permitted for police authorities. We have examined, in this regard, the nature of the intrusion in the circumstances of this case.

Gately's searches of appellants' vehicles were evidently conducted without consent. Appellants were not given the option of being searched or leaving the raceway. Moreover, Gately exceeded the announced scope of the searches. Although appellants were told that he was only looking for persons trying to enter the race without paying, Gately searched areas of appellants' vehicles which could not possibly have hidden a person. He also testified that the purpose of the searches was to look for contraband as well as trespassers.

4. Police Personnel.

Finally, the identity of private security employees as off-duty policemen is an additional factor to be weighed. *See Williams v. United States*, 341 U.S. 97, 99, 95 L. Ed. 774, 71 S. Ct. 576 (1951) (special police officer who operated a detective agency acted under color of law, and not as a private person, when he used brutal methods to obtain confessions from alleged thieves after being hired by a privately-owned company). Such officers are formally affiliated with the government and usually given authority beyond that of an ordinary citizen. Thus, they may be treated as state agents and subject to the constraints of the Fourth Amendment. *Leone*, 386 Mass. at . . . 435 N.E.2d at 1040 (1982) (comparing public and "purely private" searches).

Emerson, a long-time licensed police officer and special deputy, directed and authorized the searches and instructed security personnel. As a result, private actions became entwined with governmental policies. *See Evans v. Newton*, 382 U.S. 296, 299, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966). Emerson cannot escape Fourth Amendment limitations by directing a third party to perform a search he could not otherwise conduct himself. *See United States v. West*, 453 F.2d 1351, 1356 (3rd Cir. 1972).

In sum, we observe a combination of factors requiring the conclusion that the activity of private security personnel in this case took on a public character. There was significant official police involvement as indicated by the presearch meetings between Emerson and law enforcement officials. North Country Security agents were engaged in the "public function" of law enforcement. Emerson, as well as a number of the security agents, were licensed police officers. Finally, the searches involved a significant degree of intrusion.

Decision

Because the trial court concluded the search was private, it did not address evidence and argument on the Fourth Amendment issue. On remand, the trial court must weigh the issues for unreasonableness in the search activity, including consent for the scope of the search and the question of whether any contraband was found in the agent's plain view.

Reversed and remanded.

DISSENT BY: BOWEN

DISSENT: BOWEN, Judge (dissenting).

I respectfully dissent. The record before us and before the trial court does not support the majority's conclusion, even applying the majority's criteria, that the searches here were public rather than private.

I agree with the majority that the test, enunciated in *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971), and most recently reiterated by the Supreme Court in *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 109 S. Ct. 1402, 1411, 103 L. Ed. 2d 639 (1989), is whether the private citizen who conducted the search and seizure acted as an instrument or agent of the government. I part company with the majority, however, on the issue of whether the application of their criteria, or any other criteria recognized by case law, establishes that either Gately or his boss, Emerson, acted here as an instrument or agent of Crow Wing County or the State of Minnesota.

The meeting between Emerson and law enforcement personnel, discussing procedures to be followed upon discovery of contraband, was not initiated by the BCA or by the county sheriff; rather, it was held to inform Emerson how to contact a law enforcement officer to take over after Emerson or one of his employees discovered contraband and made a citizen's arrest on the BIR property. The law enforcement personnel attending the meeting gave no instructions as to how searches or arrests were to be made. They did, however, insist that one individual, Emerson, call them in, rather than be subjected to the prospect of being called by any of 60 security guards. On the law enforcement side, one deputy sheriff, Dave Bjerga, was assigned as the individual to be called by Emerson. Bjerga, however, was not standing by awaiting calls, but went on performing his regular duties. (In fact, when he was called by Emerson about the searches and arrests here, he was on his way to Long Prairie on another case.) The meeting was the result of Emerson's legitimate concern, on behalf of his private employer, about the logistics of promptly turning over citizen's arrestees to a peace officer, both to comply with statutory requirements and to avoid liability for false arrest. The meeting did not constitute the government instigation or participation required to make these "public" searches. *See* 1 W. LaFave, Search and Seizure § 1.8(b), at 178 (2d ed. 1987).

BIR had an obvious legitimate interest in avoiding open drug use or drug-induced behavior on its property, something which could jeopardize its continuation in business. BIR initiated entrance-gate vehicle searches to insure that no one entered without having paid for admission, as well as to keep order. The record is devoid of any evidence that BIR's primary purpose was the assistance of public authorities in the prosecution of persons for drug violations.

Admittedly, Gately's searches would not have passed Fourth Amendment muster had they been public searches. However, I can find no authority for assuming a nexus between the unreasonableness of a search and its public or private nature. The fact that Gately engaged in conduct forbidden to a police officer does not make his searches public.

Finally, the fact that seven of Emerson's 127 employees were moonlighting policemen from other jurisdictions does not bring this case within *Williams v. United States*, 341 U.S. 97, 95 L. Ed. 774, 71 S. Ct. 576 (1951).

These security guards are not formally affiliated with the government and have no authority beyond that of an ordinary citizen. We cannot treat them as state agents on the record before us. In referring to Emerson as "a long-time licensed police officer and special deputy," the majority fails to note that Emerson was a Brainerd police officer, that the BIR is not located in the City of Brainerd, and that Emerson had no authority as a special deputy to make arrests. Neither Emerson nor Gately could lawfully conduct a search or make an arrest *except as a private citizen*. Nor did either of them hold himself out as a police officer in making the searches and arrests in question.

I find nothing in the majority's reasoning, or in this record, to convince me that Emerson's and Gately's conduct was government-instigated, or that the state or county participated therein. I believe the searches were private searches, not covered by the Fourth Amendment; I would affirm the judgments of conviction.

KELLEY ET AL. V. BAKER PROTECTIVE SERVICES, INC.,

198 Ga. App. 378; 401 S.E.2d 585 (1991).

Sognier, Chief Judge. McMurray, P. J., and Carley, J., concur.

OPINION BY: SOGNIER

Forrest Kelley and Janet Kelley brought a wrongful death suit against Baker Protective Services, Inc. and its predecessor, Burns International Investigation Services, Inc., for the negligent hiring and retention of an employee, David Scott Goza, an unarmed security guard involved in the murder of Mark Stephen Kelley, the plaintiffs' son. The trial court granted the defendants' motion for summary judgment, and the Kelleys appeal.

We affirm. The record establishes that Goza, who began working for appellee Burns International Investigation Services, Inc. (hereinafter "appellee") in November 1986, was the sole security guard at the Hormel Plant in Tucker, Georgia on January 19, 1987. Goza allowed appellants' decedent and three other men (none of them Hormel employees) to enter the plant premises, apparently to conduct a drug deal. Two of the men then murdered appellants' decedent and the fourth man. Goza did not participate in the murders but did assist in the disposal of the bodies. It is uncontroverted that a background investigation performed on Goza by appellee and various State agencies revealed that Goza had no convictions for any crimes or any record of criminal activity or dangerous propensities, or that any accusations of criminal activities or violent behavior had been made against Goza. Appellants' own investigation into Goza's background uncovered only a traffic warning ticket. Although appellants place great emphasis on evidence in the record indicating that Goza's training as an unarmed security guard did not comport with O.C.G.A. § 43-38-7.1 (a) (training of unarmed private security guards) and the rules and regulations promulgated by the Georgia Board of Private Detective and Security Agencies pursuant to O.C.G.A. § 43-38-4 (d) (3), in his deposition Goza acknowledged that he knew, without being so instructed by anyone at appellee, that he was not supposed to participate in illegal drug transactions or in murdering anyone while on his job.

"'For [appellee] to be negligent in hiring and retaining any employee with violent and criminal propensities, it would be necessary that [appellee] knew or should have known of those dangerous propensities alleged to have resulted in [appellants' decedent's death.] (Cits.) The record contains absolutely no evidence which would authorize a finding that appellee knew or should have known that [Goza] was violently or criminally prone. [Cit.]" *Southern Bell Tel. &c. Co. v. Sharara*, 167 Ga. App. 665, 666 (307 S.E.2d 129) (1983). See also *Big Brother/Big Sister &c. v. Terrell*,

183 Ga. App. 496, 497 (1) (359 S.E.2d 241) (1987); *Edwards v. Robinson-Humphrey Co.*, 164 Ga. App. 876, 880 (298 S.E.2d 600) (1982). The submission of evidence by appellee that it did not know of Goza's criminal propensities after investigating his criminal and employment record and the absence of any evidence controverting appellee's evidence or indicating that appellee should have known of Goza's criminal propensities entitled appellee to summary judgment. *Southern Bell*, supra at 667 (1).

We are not persuaded by appellants' arguments that the trial court's judgment was erroneous. First, we do not agree with appellants that the training Goza was required by statute and agency regulations to receive was designed to uncover the trainee's latent character defects for purposes of placing the employer on notice that the trainee possessed violent or criminal propensities. Thus, appellee's failure to provide that training does not avail appellants. Next, in view of Goza's testimony that he was totally aware that illegal drug transactions and murder were not part of his employment with appellee, we cannot agree with appellants that appellee, in its training, was negligent in failing to state these prohibitions to Goza explicitly. Finally, we cannot agree that a question for jury resolution was created by appellants' supposition, unsupported by any evidence in the record, that Goza would not have allowed the men onto the Hormel plant premises where the murder of their son occurred had appellee informed Goza during his training that participating in drug deals and murder was not appropriate while he was on the job. Appellants having failed to counter appellee's evidence by setting forth specific facts showing that there is a genuine issue for trial, the trial court did not err by granting summary judgment in favor of appellee. O.C.G.A. § 9-11-56 (e).

Judgment affirmed.

LEROY ROSS V. TEXAS ONE,

796 S.W.2d 206 (Tx. App. 1990).

Justices Whitham, Gordon Rowe, and Baker. Opinion By Justice Gordon Rowe.

OPINION BY: ROWE

ROWE, Justice. Leroy Ross appeals from rendition of a summary judgment in favor of Texas One Partnership, doing business as Ewing Estates Apartments. Ross suffered injuries incurred when a security guard patrolling the Ewing Estates Apartments shot Ross with a shotgun. Ross sued James Neal, individually and doing business as Neal Security Company; Johnny Thompson, the security guard; and Texas One Partnership, the owner of the apartments. Texas One moved for summary judgment, contending that it could not be held liable as a matter of law because the security company was an independent contractor. The trial court granted summary judgment in favor of Texas One and severed that action from the rest of the case. In eight points of error, Ross asserts that the trial court erred in granting the summary judgment. We affirm the trial court's judgment.

Summary judgment is proper if the summary judgment record shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c). The purpose of summary judgment is the elimination of patently unmeritorious claims or untenable defenses; it is not intended to deprive litigants of their right to a full hearing on the merits of any real issue of fact. *Gulbenkian v. Penn,* 151 Tex. 412, 416, 252 S.W.2d 929, 931 (1952). In reviewing the propriety of a summary judgment, we are bound by these standards: (1) the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts must be resolved in its favor. *Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546, 548-49 (Tex. 1985).

In the seventh point of error, Ross contends that the summary judgment was erroneously granted because a material fact issue existed as to whether the security company acted as an agent of Texas One. In its motion for summary judgment, Texas One asserted, among other things, that the security company was an independent contractor. The general rule is that an owner of premises is not liable for harm arising out of activity conducted by, and under the control of, an independent contractor.

See Exxon Corp. v. Quinn, 726 S.W.2d 17, 19 (Tex. 1987); *Abalos v. Oil Dev. Co. of Texas,* 544 S.W.2d 627, 631 (Tex. 1976). The doctrine of respondeat superior is not applicable in such a situation. *Phillips Pipe Line Co. v. McKown,* 580 S.W.2d 435, 438 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

An agency relationship cannot be presumed to exist. *Johnson v. Owens,* 629 S.W.2d 873, 875 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.). Although the question of agency is generally one of fact, *Horne v. Charter Nat'l Ins. Co.,* 614 S.W.2d 182, 184 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.), the question of whether a principal-agent relationship exists under established facts is a question of law for the court. *Norton v. Martin,* 703 S.W.2d 267, 272 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.). Thus, the existence of an agency relationship can be a question of law to be determined by the agreement between, and the words and conduct of, the parties. *See Mercedes-Benz of North America, Inc. v. Dickenson,* 720 S.W.2d 844, 858 (Tex. App.—Fort Worth 1986, no writ). In other words, if the facts are uncontroverted or otherwise established, the existence of an agency relationship is a pure question of law. *See American Int'l Trading Corp. v. Petroleos Mexicanos,* 835 F.2d 536, 539 (5th Cir. 1987) (applying Texas law). Proof of agency requires a showing that the alleged principal has the right to assign the agent's task and the right to control the means and details of the process to be used to accomplish the task. *Johnson v. Owens,* 629 S.W.2d at 875.

On the other hand, an independent contractor is one who, in the pursuit of an independent business, undertakes a specific job for another person, using his own means and methods, without submitting himself to the other's control regarding details of the job. *Pitchfork Land and Cattle Co. v. King,* 162 Tex. 331, 338, 346 S.W.2d 598, 602-03 (1961). Thus, the primary test used to decide whether a party is an independent contractor involves determination as to which of the parties to the relationship possesses the "right of control" over the details of the work. *See Newspapers, Inc. v. Love,* 380 S.W.2d 582, 590 (Tex. 1964). Factors used to determine whether one is an independent contractor include: (1) the independent nature of the contractor's business; (2) his obligation to supply necessary tools, supplies, and materials; (3) his right to control the progress of the work except as to final results; (4) the time for which he is employed; and (5) the method by which he is paid, whether by the time or by the job. *Pitchfork,* 346 S.W.2d at 603. When the controlling facts are undisputed and only one reasonable conclusion can be inferred from those facts, the question of whether a party is an independent contractor is a question of law. *Id.*

A contract between the parties which establishes an independent contractor relationship is determinative of the parties' relationship in the absence of extrinsic evidence indicating that the contract was a subterfuge or that the hiring party exercised control in a manner inconsistent with the contractual provisions. *See Newspapers, Inc.,* 380 S.W.2d at 590, 592. The contract between Texas One and the security company specified certain tasks to be undertaken by the security company, but it did not grant to

Texas One the right to control the methods and details involved in accomplishing those tasks. The contract provided that the security company would be self-employed and responsible for all insurance.

Ross emphasizes the fact that the contract specified several tasks to be accomplished, as opposed to the one "specific piece of work" referred to in the *Pitchfork* case. *See Pitchfork,* 346 S.W.2d at 602. This distinction has little or no bearing on the question of whether the security company was an independent contractor. We find no authority suggesting that an independent contractor relationship is confined only to cases in which the contractor undertakes only one task. Ross notes that the contract contemplated that the security company would provide services for an indefinite period of time. Although the period of employment is a factor to be considered, *Pitchfork,* 346 S.W.2d at 603, it is certainly not determinative, since the primary test involves the right of control. We note that the contract granted to both Texas One and the security company the right to terminate the contract upon thirty days' written notice. Ross relies on the fact that the security company was to be paid at regular intervals rather than for any discrete job. The method of payment may be considered, *id.,* but it is not a controlling factor in relation to the ultimate "right of control" test.

We conclude that the contract, viewed alone, established an independent contractor relationship between Texas One and the security company. The contract did not provide that Texas One would possess the right to control the manner and means to be used in accomplishing the tasks assigned to the security company. The contract merely specified some of the tasks to be undertaken. It expressly provided that the security company would be self-employed.

The question remains as to whether the contract was a sham designed to conceal the true relationship between the parties. Establishing that the contract was such a subterfuge requires evidence that Texas One actually exercised control over the details of the work performed by the security company. *See Newspapers, Inc.,* 380 S.W.2d at 590, 592. The summary judgment proof included excerpts from the deposition of James Neal, the owner of the security company. Neal testified that he and another man that he hired as a supervisor were responsible for supervising the security guards employed by the security company. He stated that he had established certain rules and regulations governing the conduct of his security guards. Neal said that he was not an employee of the Ewing Estates Apartments (Texas One), and he stated that his security company provided services to Texas One as an independent contractor. He testified that his company was hired to provide security services using his expertise as he saw fit. Neal said that he used his own means and methods in performing the security services for the Ewing Estates Apartments. This deposition testimony was uncontroverted.

Ross suggests that this testimony was not competent summary judgment evidence because it came from an interested witness. According to the applicable rule, uncontroverted testimonial evidence of an interested

witness can provide a basis for summary judgment if the evidence is clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies, and it could have been readily controverted. *See* Tex. R. Civ. P. 166a(c). We note that, although Neal was an interested witness, we do not see that it was necessarily in his interest to testify to facts that would support the elimination of a fellow defendant. In any event, Ross does not explain how the requirements of rule 166a(c) were not satisfied. In our view, Neal's testimony was clear, positive, direct, otherwise credible, and free from contradictions and inconsistencies. His testimony was consistent with the provisions of the contract between Texas One and the security company. Neal was not the only person who could have testified about the right of control and the nature of the relationship between Texas One and the security company. Under these circumstances, we conclude that Neal's testimony was subject to being readily controverted. *See Kimble v. Aetna Cas. & Sur. Co.,* 767 S.W.2d 846, 848-49 (Tex. App.—Amarillo 1989, writ denied); *Fitzgerald v. Caterpillar Tractor Co.,* 683 S.W.2d 162, 164 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). Neal's deposition testimony was competent summary judgment evidence as authorized by rule 166a(c).

Applying the primary "right of control" test, Neal's uncontradicted testimony indicates that the security company was an independent contractor. Other factors that can be considered support this determination. Neal stated that his company performed security work for a number of other customers besides Texas One. This certainly indicates that the security company was a business independent of Texas One. Neal testified that his company supplied the necessary tools and materials used by the security guards (badges, flashlights, guns, ammunition, handcuffs, etc.).

Ross argues that some of the tasks delineated in the contract between Texas One and the security company raise reasonable inferences that the security company personnel received directions from Texas One. Ross notes that the contract provided that the security personnel would show apartments and pass out notices. However, we view the contractual provisions as merely designating some of the tasks to be accomplished. The fact that additional information would have to be conveyed to the security company personnel before the tasks could be carried out does not imply that Texas One would exercise control over the details of the assigned jobs. Specifying the apartments to be shown or the types of notices to be distributed would involve description of the tasks to be accomplished, as opposed to direction as to the manner and means of accomplishment. There was no evidence indicating, for example, that the security personnel were required to follow a script or checklist when showing apartments. Neal testified that the security guards received training arranged by the security company. There was no evidence that Texas One provided any training to the security company personnel.

Based on the evidence and reasonable inferences, we determine that the security company was an independent contractor as a matter of law. We overrule the seventh point of error.

In his first point of error, Ross contends that the trial court erred in granting summary judgment because his petition gave fair notice of an alleged intentional tort, an issue which was not addressed by Texas One's motion for summary judgment. Of course, when allegations in a plaintiff's petition are not controverted by a defendant's summary judgment motion or proof, the granting of summary judgment in favor of the defendant is improper. *See Pollard v. Missouri Pac. R.R.,* 759 S.W.2d 670, 671 (Tex. 1988).

Assuming for the moment that Texas One would be liable for an *intentional* tort committed by the security company, we nevertheless conclude that Ross's first point of error lacks merit. His petition simply did not allege an intentional tort. The petition describes the alleged shooting incident and then alleges numerous specific acts and omissions, including the shooting itself, which were described as constituting negligence or gross negligence. One of the listed acts of negligence or gross negligence was "willfully discharging a firearm at the Plaintiff with the malicious intent to cause bodily harm and/or death." In a paragraph requesting exemplary damages, Ross alleged "acts and/or omissions of wanton, willful and malicious misconduct." Read in context, the allegations now asserted to be allegations of intentional conduct were in fact allegations of gross negligence. Ross suggests that shooting someone with a gun may be presumed to be intentional. We reject this contention because of the obvious possibility that any given shooting may well have been negligent as opposed to intentional.

Ross relies on the rule that a petition will be construed liberally in favor of the pleader when there are no special exceptions. *See Roark v. Allen,* 633 S.W.2d 804, 809 (Tex. 1982). That rule does not help Ross because his petition contained no fair indication that an intentional tort was being alleged. To be sufficient, a petition must provide fair and adequate notice of the facts upon which the pleader's claim is based, and the opposing party must be supplied with information sufficient to enable him to prepare a defense. *Id.* at 810. Ross's petition specifically alleged both negligence and gross negligence, whereas allegations of intentional conduct were conspicuously absent. Allegations of wantonness, willfulness, and malice were raised in the context of charges of gross negligence and a request for exemplary damages. Ross suggests that Texas One could have specially excepted to the petition to seek clarification. This argument is without merit. We are aware of no authority indicating that a defendant must specially except because a plaintiff has wholly failed to plead an alternative cause of action. Our judicial system rests upon the foundation of adversary presentation, *Fikes v. Ports,* 373 S.W.2d 806, 808 (Tex. Civ. App.—Fort Worth 1963, writ ref'd n.r.e.), and one party is under no obligation to help his adversary plead an unpleaded cause of action. We overrule the first point of error.

We now address the question of whether the summary judgment was warranted in view of the exceptions to the general rule that an owner of premises is not liable for harm caused by the activity of an independent contractor. Ross argues in his second point of error that the summary judgment

was erroneously granted because a material fact issue existed as to the personal character of the premises owner's duties owed to the public when taking measures to protect its property. In support of this point of error, Ross relies on *Dupree v. Piggly Wiggly Shop Rite Foods, Inc.,* 542 S.W.2d 882 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e). In that case, the court of appeals held that a grocery chain was liable for an incident of false imprisonment perpetrated by employees of an independent contractor. *Id.* at 890.

There is a crucial distinction between that case and the case before us: the fact that the court was dealing with a case involving an intentional tort, false imprisonment. The court considered an exception to the general rule that an owner of premises is not liable for the conduct of an independent contractor. The court described the exception in this manner:

> [B]ecause of the "personal character" of duties owed to the public by one adopting measures to protect his property, owners and operators of enterprises cannot, by securing special personnel through an independent contractor for the purposes of protecting property, obtain immunity from liability for at least the intentional torts of the protecting agency or its employees.

Id. at 888; *see* Annotation, *Liability of One Contracting for Private Police or Security Service for Acts of Personnel Supplied,* 38 A.L.R.3d 1332, 1339 (1971). The court then analyzed what it described as the leading case adopting this exception, a case involving the intentional tort of false arrest. *See Adams v. F. W. Woolworth Co.,* 144 Misc. 27, 257 N.Y.S. 776 (N.Y. Sup. Ct. 1932). The court quoted extensively from the New York case, including the following:

> This is not the case of a contractor doing his work negligently. Where negligence is the sole basis of the liability, the doctrine of respondeat superior has been held inapplicable to independent contracts. Negligence does not enter into the tort of false arrest. The act itself, if not justified under statute . . . is tortious, irrespective of negligence.

Dupree, 542 S.W.2d at 889. The court cited a number of other cases from other jurisdictions and stated:

> The weight of the above authorities seems to be that one may not employ or contract with a special agency or detective firm to ferret out the irregularities of its customers or employees and then escape liability for the malicious prosecution or false arrest on the ground that the agency and or its employees are independent contractors . . . . Such cases adopting this policy have been founded on the principle that he who expects to derive advantage from an act which is done by another for him, must answer for any *intentional* injury which a third party may sustain from it.

Id. (emphasis added). The *Dupree* court adopted the exception as stated above, and the language used by the court demonstrates that it viewed the

exception as applying to *intentional* torts. The court stated its holding in this way:

> We hold that Piggly Wiggly by securing through the guise of an independent contractor, security guards to protect its property by various means, cannot obtain immunity from liability for false imprisonment which such store owner would not be equally entitled to if such owner itself directly selected and paid the agents expressly retaining the power of control and removal. When a store owner undertakes these functions its duties are *personal* and nonassignable and where the company arranges for and accepts the service, it will not be permitted to say that the relationship of master and servant as far as responsibility is concerned, does not exist. Negligence does not enter into the tort of false imprisonment. The act itself is tortious irrespective of negligence.

Id. at 890 (emphasis in original). Although the court made some abstract statements about nondelegable duty cases involving only negligence, *see id.,* it is clear that the court's holding was based on the fact that the tortious act was intentional.[11] Because the case before us does not involve an intentional tort, *Dupree* is inapplicable. We therefore overrule Ross's second point of error.

In the third point of error, Ross maintains that the trial court erred in granting summary judgment because a material fact issue existed as to the inherently dangerous activity performed by the security company. There is an exception to the general rule of a hiring party's nonliability for harm caused by an independent contractor. One who hires an independent contractor is liable for injuries caused by the contractor's failure to exercise due care in performing work which is inherently dangerous. *Loyd v. Herrington,* 143 Tex. 135, 138, 182 S.W.2d 1003, 1004 (1944); *Gragg v. Allen,* 481 S.W.2d 452, 454 (Tex. Civ. App.—Waco 1972, writ dism'd w.o.j.). The theory underlying this kind of liablility is that one who engages a contractor to do inherently dangerous work remains subject to an absolute, nondelegable duty to see that the work is performed with that degree of care which is appropriate to the circumstances. *Loyd,* 182 S.W.2d at 1004.

The Texas case most closely analogous to this case is *Gessell v. Traweek,* 628 S.W.2d 479 (Tex. App.—Texarkana 1982, writ ref'd n.r.e.). In *Gessell,* a house owned by Elmer Gessell was occupied by his daughter and son-in-law, Betsy and T. W. Larkin. One evening, T. W. Larkin went outside the house to investigate a noise. When he saw a pickup truck speeding away, he shot at the truck, and one of the occupants of the truck was injured. The injured plaintiff argued that T. W. Larkin was an independent contractor hired by Gessell to protect the house and the premises and that the work to be performed was inherently dangerous. *Id.* at 481. The court

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[11]Although some of the court's language suggests that the independent contractor relationship was a subterfuge, the court did not specifically consider the propriety of the jury finding that the security company was an independent contractor.

of appeals quoted two relevant sections of the Restatement (Second) of Torts. Those provisions state:

> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

RESTATEMENT (SECOND) OF TORTs § 416 (1965).

> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Id. § 427. The court of appeals then stated that "these sections have no application where the negligence of the contractor creates a new risk not inherent in the work itself." *Gessell,* 628 S.W.2d at 482. The court held as a matter of law that the work of caring for and protecting the property was not inherently dangerous. *See id.* at 482.

Ross argues that the present case is significantly different from the Gessell case. He notes that there was summary judgment evidence that Texas One discussed the use of firearms with the security company. The contract between Texas One and the security company listed the duties of the security company, and those duties included stopping vandalism and drug traffic. Texas One knew that security company personnel were carrying weapons and provided an office on the premises for storage of those weapons. Based on these facts and "reasonable inferences" associated therewith, Ross argues that there was a factual issue as to whether the work undertaken by the security company was inherently dangerous. Specifically, Ross contends that a fact finder could reasonably infer that confrontations would take place between the armed guards and third parties.

At least one Texas court has noted, however, that it has been held that the protection of one's property with firearms does not, in and of itself, constitute an inherently dangerous activity. *See Dupree,* 542 S.W.2d at 888 (citing *Brien v. 18925 Collins Avenue Corp.,* 233 So. 2d 847 (Fla. Dist. Ct. App. 1970), and 38 A.L.R.3d 1332, 1340). In the cited Florida case, the plaintiff appealed from a summary judgment granted in favor of the premises owner. *Brien,* 233 So. 2d at 847-48. The appellate court held as a matter of law that an owner of real property who hires an independent contractor security company to protect his property is not liable for harm allegedly caused by the negligent discharge of a firearm by an employee of the security company. *Id.* at 849. The court reasoned that lawful activity

involving the use of firearms is not inherently dangerous activity. *Id.* The court's holding is consistent with the previously discussed *Gessell* case.

We conclude that owners of premises should be able to hire independent contractors for purposes of providing armed security and protection of their property without being exposed to automatic liability for the negligent discharge of firearms by employees of the independent contractor. We do not consider it particularly uncommon that protection of property may involve stopping vandalism or drug trafficking. In any event, the summary judgment record contains no indication that the incident involved in this case was related to vandalism or drug trafficking. We follow *Brien* and hold as a matter of law that the work undertaken by the security company in this case was not inherently dangerous work. The alleged negligent act of discharging the shotgun was not a risk inherent in the work contracted for. *See Gessell,* 628 S.W.2d at 482. We overrule the third point of error.

In his fourth point of error, Ross contends that the summary judgment was erroneous because a material fact issue existed as to whether the activities complained of were contemplated by the contract or in furtherance of the premises owner's business. This point of error is without merit because the "exceptions" to the general rule of nonliability allegedly relied on by Ross simply do not exist, and Ross's reliance on certain cases is misplaced. He states that a party who hires an independent contractor may be found liable for the contractor's activities that are reasonably contemplated by the contract. He cites *Texas Compensation Insurance Co. v. Matthews,* 504 S.W.2d 545, 549 (Tex. Civ. App.—Dallas 1973), *rev'd,* 519 S.W.2d 630 (Tex. 1974), for this proposition. We note initially that Ross failed to inform this Court that the cited case was reversed. Secondly, the case does not state the proposition asserted by Ross. This Court in *Matthews* held that the acts of an independent contractor are the acts of the hiring party to the extent that they are *required* by the contract. 504 S.W.2d at 549. The Court also based its decision on the rule that when work required by a contract is *necessarily* dangerous, the premises owner and the contractor have a duty to take precautions against the danger. *Id.* The other case cited by Ross in support of his nonexistent "exception" states that an employer may be held liable for injuries which might reasonably have been contemplated by the parties *and* which result directly from *inherently dangerous* work. *See Loyd,* 182 S.W.2d at 1004.

Ross states the other "exception" to the rule of nonliability in this manner: a party who hires an independent contractor may be found liable for the contractor's activities that are in furtherance of the hiring party's business and/or part of the contractor's duties as *agent* of the hiring party. Of course, if a contractor is in fact an agent of the hiring party, there is no need to resort to an exception to the general rule of nonliability for the acts of *independent contractors.* In any event, we have already determined that the security company was not an agent of Texas One. We conclude that Ross is apparently attempting to suggest that the security company was

in fact Texas One's agent, since the cases he cites in support of his second "exception" involve questions as to whether there was an agency relationship. *See Moore's, Inc. v. Garcia,* 604 S.W.2d 261, 264 (Tex. Civ. App.—Corpus Christi 1980, writ refd n.r.e.); *Patrick v. Miss New Mexico-USA Universe Pageant,* 490 F. Supp. 833, 839 (W.D. Tex. 1980). We find no merit in the fourth point and overrule it.

In the fifth point of error, Ross contends that the trial court erred in granting summary judgment because a material fact issue existed as to whether Texas One used reasonable care in keeping the premises under its control in a safe condition. In arguing this point of error, Ross relies on a number of premises defect cases. However, the present case is not such a case; it is a case involving injury caused by activity conducted on the premises. *See Redinger v. Living, Inc.,* 689 S.W.2d 415, 417 (Tex. 1985). Ross also invokes cases holding that a premises owner may be liable for the acts of an independent contractor if the owner has the right to control, or exercises actual control over, the contractor's acts. *See Pollard,* 759 S.W.2d at 671; *Redinger,* 689 S.W.2d at 418. *Redinger* states that a premises owner may be liable for harm caused by an independent contractor even if the owner retains only some control over the contractor, albeit not the degree of control which would subject him to liability as a master. The owner's role must involve more than a general right to order work to start or stop, to inspect progress, or to receive reports. *Redinger,* 689 S.W.2d at 418.

We have previously discussed the questions of right of control and exercise of control in connection with the seventh point of error. The summary judgment record simply does not indicate that any material fact issues existed regarding control. Both *Pollard* and *Redinger* are readily distinguishable from this case. Ross's reliance on *Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546 (Tex. 1985), is also misplaced because *Nixon* was a premises defect case, and the asserted negligence per se was committed by the premises owner. As noted, the present case is not a premises defect case, and it involves the acts of an independent contractor. We overrule the fifth point of error.

Ross maintains in his sixth point of error that the summary judgment was erroneous because a material fact issue existed as to whether Texas One was negligent in hiring the security company. An employer has a duty to use ordinary care in employing an independent contractor. *Smith v. Baptist Memorial Hosp. Sys.,* 720 S.W.2d 618, 627 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.). One who hires an independent contractor may be held responsible for the contractor's acts if the employer knew or should have known that the contractor was incompetent and a third party is injured because of that incompetency. *Texas American Bank v. Boggess,* 673 S.W.2d 398, 400 (Tex. App.—Fort Worth 1984, writ dism'd by agr.). Thus, one who hires an independent contractor has a duty of ordinary care and reasonable inquiry.

The summary judgment record shows that while the contract between Texas One and the security company was being negotiated, Neal provided

to Texas One documentation showing that the security company was licensed by the State of Texas. The record also contains affidavits indicating that Texas One contacted two references regarding the security company. Both references provided favorable reports about the security company. This evidence is uncontroverted. In the absence of controverting evidence or other evidence concerning the duty of reasonable inquiry, we find no basis for Ross's assertion that a material fact issue existed as to whether Texas One knew or should have known that the security company was incompetent when hired. We overrule the sixth point of error.

In the eighth point of error, Ross argues that the trial court erred in granting summary judgment because Texas One's operative pleading did not provide a basis for the summary judgment. Although the record before us does not indicate that Texas One's first amended answer (raising the issues dealt with in the motion for summary judgment) had been separately filed, the answer was attached to Texas One's motion for summary judgment. Moreover, we find no indication that Ross raised this alleged error at the trial court level. Had Ross objected to the alleged defect in pleadings, the defect could have been easily cured. *See Jones v. McSpedden,* 560 S.W.2d 177, 179-80 (Tex. Civ. App.—Dallas 1977, no writ). Because the error now raised on appeal was not brought to the attention of the trial court, any error was waived. *See* Tex. R. App. P. 52(a); Tex. R. Civ. P. 90, 166a(c). We overrule the eighth point of error.

We affirm the judgment of the trial court.

MARTA RIVAS AND ALBERTO RIVAS V. NATIONWIDE PERSONAL SECURITY CORPORATION,

559 So. 2d 668, 15 Fla. L. Weekly D 871 (Fl. App. 1990).

JUDGES: Hubbart and Cope and Goderich, JJ.

OPINION BY: PER CURIAM

This is an appeal by the plaintiffs Marta and Alberto Rivas from a final judgment entered in an action for personal injuries arising out of an assault and battery committed by the defendant Arthur Hinton while he was employed at a supermarket for the defendant Nationwide Personal Security Corporation. The jury returned a verdict of $25,000 in compensatory damages and zero dollars in punitive damages against both defendants on the plaintiff Marta Rivas' claim—as well as a verdict of zero dollars against both defendants on the plaintiff Alberto Rivas' claim. The trial court thereafter granted the defendant Nationwide Personal Security Corporation's renewed motion for directed verdict on the plaintiff Marta Rivas' claim. We affirm in part and reverse in part.

First, the plaintiffs are not entitled, as urged, to a new trial based on (1) the trial court's unobjected-to comments during voir dire of the jury, and (2) the trial court's refusal to allow two of the plaintiffs' witnesses to testify through an interpreter. The trial court's comments were in no way improper and fall far short of constituting a fundamental error. *See Lusk v. State,* 446 So.2d 1038, 1042 (Fla.), *cert. denied,* 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984); *Little v. Bankers Nat'l Life Ins. Co.,* 369 So.2d 637, 638 (Fla. 3d DCA 1979); *cf. Whitenight v. International Patrol & Detective Agency, Inc.,* 483 So.2d 473 (Fla. 3d DCA), *rev. denied,* 492 So.2d 1333 (Fla. 1986). Moreover, there is no showing that the trial court abused its discretion in refusing an interpreter, as requested, inasmuch as the two witnesses in question testified satisfactorily in English; indeed, there is no indication in this record that their testimony was in any way garbled or incomplete. *Bolender v. State,* 422 So.2d 833, 836-37 (Fla. 1982), *cert. denied,* 461 U.S. 939, 103 S. Ct. 2111, 77 L. Ed. 2d 315 (1983). This being so, (1) the final judgment entered upon the jury verdict as to the defendant Arthur Hinton on both plaintiffs' claims is affirmed, and (2) the final judgment entered in favor of the defendant Nationwide Security Corporation on the plaintiff Alberto Rivas' claim is affirmed.

Second, the trial court, however, committed reversible error in directing a verdict in favor of the defendant Nationwide Personal Security Corporation on the plaintiff Marta Rivas' claim. Contrary to the trial court's determination, we conclude that on this record a jury question was presented as to whether the assault and battery sued upon was committed by

the defendant Arthur Hinton within the scope of his employment with the defendant Nationwide Personal Security Corporation. The defendant Hinton was on the job in the supermarket when he became embroiled in a job dispute with the supermarket manager; the plaintiff Marta Rivas, a supermarket cashier, screamed for help when Hinton began choking the manager; Hinton then struck Marta Rivas to silence her and thus diffuse a disruptive situation in the store. In our view, the jury was entitled to conclude, as it did by special interrogatory verdict, that the assault and battery sued upon arose out of a job dispute and was therefore within the scope of Hinton's employment with Nationwide Personal Security Corporation. *Gonpere Corp. v. Rebull,* 440 So.2d 1307 (Fla. 3d DCA 1983); *Parsons v. Weinstein Enter., Inc.,* 387 So.2d 1044 (Fla. 3d DCA 1980); *Lay v. Roux Laboratories, Inc.,* 379 So.2d 451 (Fla. 1st DCA 1980); *Williams v. Florida Realty & Management Co.,* 272 So.2d 176 (Fla. 3d DCA 1973); *Forster v. Red Top Sedan Serv., Inc.,* 257 So.2d 95 (Fla. 3d DCA 1972); *Sixty-Six, Inc. v. Finley,* 224 So.2d 381 (Fla. 3d DCA 1969); *Columbia by the Sea, Inc. v. Petty,* 157 So.2d 190 (Fla. 2d DCA 1963). This being so, the final judgment entered upon the directed verdict in favor of the defendant Nationwide Personal Security Corporation on the plaintiff Marta Rivas' claim is reversed, and the cause is remanded to the trial court with directions to enter judgment in favor of the plaintiff Marta Rivas based on the jury verdict previously returned.

Affirmed in part; reversed in part and remanded.

N.C. PRIVATE PROTECTIVE SERVICES BOARD V. GRAY, INC., D/B/A SUPERIOR SECURITY,

87 N.C. App. 143; 360 S.E.2d 135 (1987).

JUDGES: Jack Cozort, Judge. Judges Charles L. Becton and John C. Martin concur.

OPINION BY: COZORT

Gray, Inc., formerly d/b/a Superior Security, is a guard and patrol company that was, at all times relevant to this appeal, licensed by the North Carolina Private Protective Services Board (the Board). On 26 August 1985 Gray was notified by letter from the Board that a hearing was scheduled for 4 October 1985 to look into allegations that Gray had failed to register unarmed guards and armed guards in accordance with Chapter 74C of the North Carolina General Statutes and regulations adopted pursuant to those statutes. The hearing was rescheduled for 18 December 1985. On 18 December 1985 the Board and Gray entered into a stipulation agreement which stated, among other things, that, in 1983, Gray employed six armed guards and twenty-two unarmed guards which were not registered with the Board; and, in 1984, Gray employed twenty-seven armed guards and twenty unarmed guards which were not registered with the Board. Gray and the Board had agreed to all terms of a settlement except for a $2,000.00 "reimbursement" to which Gray objected. On 21 March 1986 the Board issued its final agency decision which, among other things, assessed a civil penalty of $2,000.00 and an order for Gray to submit $1,071.36 in back registration fees and interest for the unregistered guards.

On 28 April 1986 Gray petitioned for judicial review asking that the $2,000.00 assessment be reversed and the matter remanded to the Board for entry of a modified decision. On 17 November 1986, Superior Court Judge Donald L. Smith granted the relief requested by Gray and remanded the case to the Board, ordering that the $2,000.00 civil penalty be stricken, and that the Board reconsider "its final agency decision in light of *State, ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E. 2d 161 (1968)." The Board appeals. We reverse.

The trial court did not state its reasons for modifying the decision of the agency, as is required under the last sentence of N.C. Gen. Stat. § 150A-51 (1983), which provides: "If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification."[12]

[12]The 1985 rewrite of the Administrative Procedure Act (APA) contains no such requirement. *See* N.C. Gen. Stat. § 150B-51 (1985). The new APA applies to contested cases commenced *on or after* 1 January 1986.

By the trial court's reference to *Lanier, id.*, and by the briefs submitted by the Board and Gray, it is evident that the trial court based its decision on a legal conclusion that the authority of the Board to assess a civil penalty, under N.C. Gen. Stat. § 74C-17(c), violated Art. IV. § 3 of the North Carolina Constitution. That section provides:

> The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice.

In *Lanier*, our Supreme Court was called upon to consider the constitutionality of statutes which empowered the Commissioner of Insurance to assess a civil penalty of up to $25,000.00, in addition to, or in lieu of, license revocation, against those found in violation of certain insurance laws. In an opinion by Justice Lake, the court found the statute to be in violation of Art. IV, § 3:

> The power to revoke a license granted to an insurance agent by the Commissioner, pursuant to chapter 58 of the General Statutes, is "reasonably necessary" to the effective policing of the activities of such agents so as to protect the public from fraud and imposition, one of the purposes for which the Department of Insurance was established. The power to hold hearings and determine facts relating to the conduct of such agent is "reasonably necessary" to the effective and just exercise of the power to grant and revoke such license. The grant of such judicial power to the Commissioner for that purpose is clearly within the authority conferred upon the Legislature by Art. IV, § 3, of the Constitution.

We find, however, no reasonable necessity for conferring upon the Commissioner the judicial power to impose upon an agent a monetary penalty, varying, in the Commissioner's discretion, from a nominal sum to $25,000 for each violation.

Whether a judicial power is "reasonably necessary as an incident to the accomplishment of a purpose for which" an administrative office or agency was created must be determined in each instance in the light of the purpose for which the agency was established and in the light of the nature and extent of the judicial power undertaken to be conferred. We have before us only the attempted grant to the Commissioner of Insurance of the judicial power to impose upon an insurance agent, for one or more of the violations of law specified in G.S. 58-44.6, a penalty, varying in the Commissioner's discretion from a nominal sum to $25,000. We hold such power cannot be granted to him under Art. IV, § 3, of the Constitution of North Carolina.

Lanier, Comr. of Insurance v. Vines, 274 N.C. at 497, 164 S.E. 2d at 167-68. Our review of *Lanier* leads us to the conclusion that the trial court below erred in its apparent conclusion that N.C. Gen. Stat. § 74C-17(c) violated Art. IV, § 3 of the N.C. Constitution. We note initially that the trial

court's action in striking the penalty in its entirety and remanding the cause to the Board to "reconsider its final agency decision in light of... *Lanier*... and proceed as *otherwise* is provided or required by Chapter 74C of the General Statutes of North Carolina" (emphasis supplied) is subject to being interpreted as a conclusion by the trial court that *Lanier* stands for the proposition that administrative agencies are constitutionally barred from assessing civil penalties. We do not find *Lanier* to mean that all administrative civil penalties are *per se* in violation of the State Constitution, and we so hold. Rather, the granting of the judicial power to assess a civil penalty must be "reasonably necessary" to the purposes for which the agency was created and with appropriate guidelines for the exercise of the discretion.

Viewing the case at bar in light of Justice Lake's guidelines from *Lanier*, we hold that the authority of the Board under N.C. Gen. Stat. § 74C-17(c) to assess a civil penalty of up to $2,000.00 in lieu of revocation or suspension of a license is not an unconstitutional attempt to confer a judicial power on a state agency. This case is readily distinguishable from the situation in *Lanier*. In *Lanier*, the Commissioner could assess a fine from a nominal amount up to $25,000.00 for each violation, in his discretion, and in addition to license revocation or suspension. Under N.C. Gen. Stat. § 74C-17(c), the civil penalty is limited to $2,000.00, must be in lieu of license revocation or suspension, and the Board has been given statutory guidance in determining the amount of the penalty: "In determining the amount of any penalty, the Board shall consider the degree and extent of the harm caused by the violation." N.C. Gen. Stat. § 74C-17(c) (1985). We find the provision authorizing civil penalties to be reasonably necessary to the Board in fulfilling its duties to require that those who hold themselves out as providing private protective services to citizens must meet high standards of training and professionalism. The Board's decision was not in violation of any constitutional provisions, and the trial court erred in concluding to the contrary.

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[13]The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions; or
(2) In excess of the statutory authority or jurisdiction of the agency; or
(3) Made upon unlawful procedure; or
(4) Affected by other error of law; or
(5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or
(6) Arbitrary or capricious.

If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification. N.C. Gen. Stat. § 150A-51 (1983).

We have reviewed the Board's decision under the other five standards set out in N.C. Gen. Stat. § 150A-51 (1983),[13] and we find the decision of the agency should be affirmed. The decision of the Superior Court modifying the Board's decision is reversed, and the matter is remanded to the Superior Court for entry of an order affirming the decision of the Board.

Reversed and remanded.

ANDREW J. NEUENS V. CITY OF COLUMBUS,

169 F. Supp. 2d 780 (S.D. Ohio, 2001).

JUDGES: ALGENON L. MARBLEY, UNITED STATES DISTRICT COURT.

OPINION BY: ALGENON L. MARBLEY

OPINION AND ORDER

I. Introduction

This matter is before the Court on all of the Defendants' Motions for Summary Judgment. Defendant City of Columbus, which also filed a Motion for Summary Judgment, has been dismissed as a party by stipulation. Jurisdiction lies under 42 U.S.C. § 1983. A hearing on the Motions for Summary Judgment was held on October 12, 2001.

For the following reasons, the Court hereby GRANTS summary judgment as to the state claim for intentional infliction of emotional distress, and DENIES summary judgment as to the federal claim under 42 U.S.C. § 1983 and the state claim for negligence.

II. FACTS

Because this case comes before the Court on the Defendants' Motions for Summary Judgment, the Court views the facts in the light most favorable to the Plaintiff.

On the evening of December 25, 1998, the Plaintiff, Andrew Neuens, went out with two friends, Nate Faught and Chad Spinosi. The men went first to a neighborhood establishment, then to a dance club. Subsequently, they decided to go to the Waffle House restaurant to eat. They arrived at the Waffle House at 3385 E. Dublin-Granville Road at approximately 2:00 A.M., the morning of December 26, 1998.

According to the Plaintiff, the Waffle House restaurant is fairly small. The outer door leads into a small foyer or hallway, and an inner door opens from that foyer into the restaurant. Inside, the cash registers are directly across from the doorway. To the right of the registers is a jukebox, behind which are three of the restaurant's booths.

When the Plaintiff and his companions entered the Waffle House, they seated themselves in the first booth nearest the door, behind the jukebox. The Plaintiff sat alone on the side of the booth that allowed him to face the door and cash registers. Mr. Faught and Mr. Spinosi sat across from

him, facing the other booths. Upon entering the restaurant, the men noticed a security guard, Defendant John Padgett, by the door.

Soon after the Plaintiff and his friends began to eat the food they had ordered, a group of people consisting of Defendants Bridges, Parker, and Kincaid, along with another man and two women ("Defendant group"), entered the restaurant. Prior to entering the Waffle House, the Defendant group had been at a bowling alley. While there, some members of the group, including Defendant Parker, engaged in a fight, which Defendant Bridges, who is a police officer, took no action to prevent, stop, or report. According to the Plaintiff, the Defendant group began creating problems as soon as they entered the Waffle House by acting "loud, drunk, and obnoxious." Defendant Bridges acknowledged that at least two members of his group were visibly inebriated, and that he himself had probably consumed alcohol that night, as well. When they came in, the Defendant group seated itself at the third booth behind the jukebox.

According to the Plaintiff, the Defendant group continued to harass the Plaintiff and his companions even after they sat down at their booth. Specifically, Defendant Kincaid yelled expletives toward them. Although neither the Plaintiff nor his friends had ever met anyone in the Defendant group prior to that encounter, apparently some members of the Defendant group mistook the Plaintiff and his friends for the people with whom they had fought at the bowling alley earlier that evening.

As the Plaintiff, Mr. Faught, and Mr. Spinosi finished their meals, the tension between the two groups grew. Margaret Tracy, the waitress for both tables, believed that the tension was escalating to the point that it would ultimately lead to violence. According to Waffle House policy as printed in the Waffle House employee handbook, if an employee sees a situation in the restaurant that she believes will imminently turn to violence, she has a duty to report that situation to a manager. Despite this Waffle House rule, Ms. Tracy did not report the situation that she observed between the Plaintiff and the Defendants to her manager. According to her deposition testimony, however, Ms. Tracy did inform the security guard, Defendant Padgett, that she was concerned that a fight would soon erupt.[14]

When the Plaintiff and his companions finished eating their meal, Defendant Padgett approached their table and advised them to leave the restaurant. Subsequently, Mr. Spinosi got out of the booth, and turned to walk out of the restaurant. According to the Plaintiff, as soon as Mr. Spinosi got up, the Defendant group also got up, passed the Plaintiff's table, and moved toward the exit. Before Mr. Spinosi reached the outer door, but after he had gone through the inner door, Defendant Parker pushed him from

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[14]Defendant Padgett claims that although Ms. Tracy did speak to him, their conversation concerned clearing a table for customers, not the impending violence. He claims that he was never made aware of the situation, and had no knowledge of the potential for violence. For the present purposes, however, the Court must assume that Ms. Tracy did, in fact, warn Defendant Padgett about the situation.

behind. As Mr. Spinosi turned around, he was then punched twice in the face, first by Defendant Parker, and then by Defendant Kincaid.

The Plaintiff stood up from his table after the Defendant group had already passed by. As he approached the cash register, he heard a commotion behind him, and turned to see what was happening. The next thing the Plaintiff remembers is waking up in the hospital hours later. The Plaintiff subsequently learned that Defendant Parker, after punching Mr. Spinosi, walked toward the register and punched the Plaintiff from behind, knocking him to the floor, unconscious. Apparently, Defendant Parker then kicked the Plaintiff in the head. Defendant Officer Bridges admits seeing Defendant Parker standing near the Plaintiff, but denies seeing Defendant Parker punch or kick him. Nonetheless, at that point, Defendant Bridges grabbed Defendant Parker and pulled him out of the restaurant. The Defendant group then departed the Waffle House in two separate vehicles.

It is unclear whether Defendant Padgett tried physically to restrain Defendants Kincaid and Parker during this incident. Mr. Faught testified during his deposition that the security guard did nothing other than caution the other members of the Defendant group not to get involved. After the Defendant group left, however, Defendant Padgett radioed his employer, Defendant Smith Detective & Security, Inc. ("SDSI" or "Smith Security") for backup. After contacting his employer, a Smith Security supervisor and a uniformed Columbus police officer arrived at the Waffle House within four minutes.

As a result of this incident, the Plaintiff was taken to a hospital, where he was treated for injuries to his eye, severe lacerations to his eyebrows and lips, and a concussion, along with other minor injuries. On December 23, 1999, the Plaintiff filed a Complaint against Defendants City of Columbus, Ohio, Officer Bridges, Ernest Parker, Josh Kincaid, John Padgett, Smith Detective & Security, Inc., and J. Thomas & Co., Inc. (d/b/a Waffle House). The Complaint raised federal claims against the City of Columbus and Officer Bridges for violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985. The Complaint additionally raised state claims against the Defendants for assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence.

III. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S.

Ct. 2548 (1986); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.,* 12 F.3d 1382, 1388-89 (6th Cir. 1993). The nonmoving party must then present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.*, 8 F.3d 335, 340 (6th Cir. 1993) (citation omitted). "Summary judgment will not lie if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (finding summary judgment appropriate when the evidence could not lead a trier of fact to find for the nonmoving party).

In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). In responding to a motion for summary judgment, however, the nonmoving party "may not rest upon its mere allegations . . . but . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *see Celotex*, 477 U.S. at 324; *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994). Furthermore, the existence of a mere scintilla of evidence in support of the nonmoving party's position will not be sufficient; there must be evidence on which the jury could reasonably find for the nonmoving party. *Anderson*, 477 U.S. at 251; *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995).

IV. Discussion

A. Federal Claims

The Plaintiff's First Amended Complaint asserted federal claims under 42 U.S.C. §§ 1983 and 1985 against the City of Columbus and Defendant Officer Bridges. On June 25, 2001, a Stipulation was entered dismissing the City of Columbus as a party. At the hearing on the Motions for Summary Judgment, the Plaintiff acknowledged that he is no longer pursuing his claim under § 1985. Therefore, the only remaining federal claim is the § 1983 claim brought against Defendant Bridges. Specifically, the Plaintiff asserts that Defendant Bridges violated his right to substantive due process, protected by the Fourteenth Amendment to the United States Constitution. Defendant Officer Bridges has asserted the affirmative defense of qualified immunity against this claim.

1. 42 U.S.C. § 1983

The Plaintiff has alleged that Defendant Bridges infringed the Plaintiff's constitutional rights in violation of 42 U.S.C. § 1983.[15] To succeed on a § 1983 claim, the plaintiff must show that (1) a person acting under color

of law (2) deprived him of his rights secured by the United State Constitution or its laws. *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 995 (6th Cir. 1994). At oral argument on the Motions for Summary Judgment, Defendant Bridges conceded that he was acting under color of law at the time of this incident. Therefore, the Court addresses only the issue of whether Defendant Bridges deprived the Plaintiff of his substantive due process rights under the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment does not impose upon the state an affirmative duty to protect its citizens against private acts of violence; rather, the amendment only limits the state's ability to take affirmative action that denies an individual of life, liberty, or property without due process. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). Nonetheless, the state may be liable for private acts when the state acts in some way to increase the danger to individuals from those private acts. *Id.* at 201 ("While the State may have been aware of the dangers that [the plaintiff] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."). The Sixth Circuit has relied on *DeShaney* to establish a state-created danger theory of substantive due process liability. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998); *Gazette v. City of Pontiac*, 41 F.3d 1061, 1065 (6th Cir. 1994) ("In *DeShaney*, the Supreme Court . . . stated that a duty to protect can arise in a noncustodial setting if the state does anything to render an individual *more vulnerable* to danger.").

Specifically, a plaintiff must show three elements to succeed on a state-created danger claim. First, the Plaintiff must demonstrate that the state actor took affirmative actions that "either create or increase the risk that an individual will be exposed to private acts of violence." *Kallstrom*, 136 F.3d at 1066 (citing *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 913 (6th Cir. 1995)). Second, the Plaintiff must show that the state actor created a "special danger," which can be done through a showing that the state's actions placed the specific victim at risk, as opposed to placing the general public at risk. *Id.* (explaining that this element is necessary to distinguish actions giving rise to liability from actions that the state takes every day that can potentially increase any person's risk of harm, such as releasing someone from police custody). Third, the state actor must have known, or clearly should have known, that his actions "specifically endangered an individual." *Id.* (citations omitted).

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[15]The relevant portion of that statute reads:
Every person who, under color of any statute, 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.

The affirmative action requirement of the state-created danger claim arises out of *DeShaney*'s holding that the state generally is under no obligation to protect citizens from the private acts of others. Although it is true that the state cannot be liable when it has done nothing to increase the risk of harm to an individual, the converse is also true. Thus, "if the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Kallstrom*, 136 F.3d at 1066 (quoting *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)). Accordingly, state actors have been found liable for violating an individual's right to substantive due process when they have affirmatively placed that individual in a position of increased risk of harm. *See Kallstrom*, 136 F.3d at 1066 (finding that the city's affirmative act of giving personal information regarding officers and their families to defense counsel for a violent gang that the officers helped to prosecute placed the officers in serious risk of harm); *Davis v. Brady*, 143 F.3d 1021, 1023-25 (6th Cir. 1998) (concluding that officers placed the plaintiff in greater harm than he would have been if they had not acted at all when they abandoned the plaintiff, while he was inebriated, on an unfamiliar highway, and was subsequently hit by a car); *Stemler v. City of Florence*, 126 F.3d 856, 868-69 (6th Cir. 1997) (stating that officers did not merely fail to protect the victim, but increased her risk of harm when they took her out of her friend's car and physically placed her in the truck of her intoxicated boyfriend, who subsequently crashed into a guardrail, killing the victim). Furthermore, state actors have been found liable when they have deliberately decided *not* to act in a certain way, such that their *inaction* increased the risk of harm to a particular individual. *See Culberson v. Doan*, 125 F. Supp. 2d 252 (S.D. 2000); *Sheets v. Mullins*, 109 F. Supp. 2d 879 (S.D. Ohio 2000); *Smith v. City of Elyria*, 857 F. Supp. 1203 (N.D. Ohio 1994).

In *Culberson*, the police chief was alerted to the fact that the body of the decedent whose murder was being investigated was probably located in a certain pond. *Culberson*, 125 F. Supp. 2d at 268. Although the police chief was alerted to this fact in the presence of the suspected killer, a man who was a good friend of the police chief, he nonetheless determined not to secure the decedent's body, and to postpone searching the pond until the next day, despite the risk that the evidence could be tampered with or the body removed. *Id.* The next day, when the pond was drained, no body was found, but there were footprints on the bottom of the pond and muddy prints coming out of the water, indicating that someone could have recently removed something from the pond. *Id.* at 269. The court determined that these facts presented a genuine issue of material fact as to whether the police chief made the plaintiffs more vulnerable to the danger that their daughter's body would be removed from the pond. *Id.* Thus, the court determined that the plaintiffs raised a genuine issue of material fact when the defendant's alleged affirmative

action was a "deliberate choice" not to act in such a way as to prevent the ultimate harm.[16]

In *Sheets*, the plaintiff called the police, seeking help to retrieve her daughter from the father, Roger Montgomery, who had custody of the daughter and who had assaulted and threatened the plaintiff with a gun and a knife, and threatened to kill their daughter. *Sheets*, 109 F. Supp. 2d at 882. The officer, however, (1) told the plaintiff that she would have to go to court to try to get custody of the child, rather than try to get her daughter back herself; (2) stopped looking for Montgomery after not finding him at his home, even though the plaintiff had already said he was elsewhere; and (3) failed to indicate to officers who took over his shift that Montgomery had threatened to kill the child over whom he had physical custody. *Id.* Furthermore, when Montgomery called the officer, with whom he was close friends, a couple days later, the officer failed to try to ascertain his location. *Id.* at 883. Four days after the plaintiff made her initial complaints, Montgomery killed the child and himself. *Id.* Based on these facts, the court found that the plaintiff had raised a genuine issue of material fact as to whether the officer increased the danger to the baby who was killed. *Id.* at 890. Thus, the court in *Sheets*, like the court in *Culberson*, looked to the officer's decisions not to act in such a way that could have prevented the crime to conclude that the plaintiff posed a genuine issue as to whether the officer's actions increased the risk of harm to the minor child.

In *Smith*, the plaintiffs alleged that officers who were called out to a woman's home when she sought to have her ex-husband removed therefrom refused to remove him and merely told the woman to initiate eviction proceedings if she wanted him out. *Smith*, 857 F. Supp. at 1206. Furthermore, the officers told the ex-husband that if his ex-wife continued to throw his belongings out of the house, he could bring them back in. *Id.* Subsequently, the ex-husband stabbed and killed the woman. *Id.* at 1207. The court found that "the facts here support a claim that the police officers' *affirmative* acts created or increased the danger to [the decedent]. The police officers did not merely fail to perform their duties; they told [the ex-husband] that he did not have to leave, and advised him to go back if [his ex-wife] tried to throw him out." *Id.* at 1210. Thus, the court found that the plaintiffs had presented sufficient evidence to prevent summary judgment on their substantive due process claim, on the ground that the private actor may have used the "apparent authority" given to him by the officers to remain in his ex-wife's home, where he later killed her. *Id.* (finding that the

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[16] Arguably, the *Culberson* decision is distinguishable because the court in that case relied on the fact that the decedent's body had been taken into the "functional custody" of the police chief once he started to search around the pond to find a state-created danger. *Culberson*, 125 F. Supp. 2d at 269. Here, however, Defendant Bridges had neither physical nor functional custody over the Plaintiff. Nonetheless, the Court finds *Culberson* instructive to the extent that the court in that case found the police chief's decision not to act may have increased the Plaintiff's vulnerability to the harm of losing the decedent's body.

plaintiffs raised a genuine issue of material fact as to whether the police officers "affirmatively increased the danger to [the decedent] while limiting her ability to help herself and [making] her more vulnerable to attack").

Here, as in the above cited cases, the Plaintiff has presented sufficient evidence to raise a genuine issue of material fact as to whether Defendant Officer Bridges' actions on the night of the altercation increased the Plaintiff's vulnerability to harm, giving rise to liability under the state-created danger theory. Specifically, a reasonable trier of fact could conclude that, although Defendant Bridges took no part in either the planning or commission of this assault,[17] he made a deliberate decision not to prevent his friends from acting as they did, either at the Waffle House or earlier at the bowling alley. A reasonable trier of fact could conclude that this purposeful decision by Defendant Bridges, evidenced by his failure to prevent, intervene in, or report the altercations, caused Defendants Parker and Kincaid to feel more bold in their assault on the Plaintiff. A trier of fact might conclude that, were it not for the presence and tacit approval of their friend, the police officer, Defendants Parker and Kincaid would not have acted toward the Plaintiff as they did. Like the ex-husband in *Smith*, Defendants Parker and Kincaid may have used the apparent authority given to them by Defendant Bridges to attack, assault and batter the Plaintiff. Thus, Defendant Bridges' affirmative decision could be found to be the affirmative act that formed the basis of a substantive due process violation because that decision created an atmosphere of increased danger to the Plaintiff.

In addition to the affirmative act requirement, the Plaintiff must show that the Defendant's actions created a "special danger" that placed the Plaintiff specifically at risk. *Sheets*, 109 F. Supp. 2d at 889. This Court finds that the Plaintiff has presented sufficient evidence for a reasonable trier of fact to conclude that Defendant Bridges's failure to act under the circumstances created a danger specifically to the Plaintiff and his companions. As alleged herein, the evidence gives no indication that any one else in the restaurant, let alone in the general public, would have been endangered by Defendant Bridges' actions.

Finally, the Plaintiff must show that the Defendant knew or should have known that his actions would result in harm to the Plaintiff, the specific individual who was ultimately harmed. *See Duvall v. Ford*, 1999 U.S. App. LEXIS 15161, No. 98-5777, 1999 WL 486531, at *3 (6th Cir. July 1, 1999) (determining that the defendants' conduct of releasing a prisoner into a work release program with minimal supervision without first checking his criminal background was too attenuated from the ultimate harm resulted after the prisoner escaped from that program for the defendants to have known that their actions would cause harm to the victim); *Gazette*, 41 F.3d at 1066-67 (concluding that there could be no substantive due process

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[17]The Plaintiff has, in fact, presented his theory that Defendant Bridges helped plan the actions of Defendants Parker and Kincaid and was intending to act as their "back-up." The Plaintiff, however, has not presented sufficient evidence to support this theory as a basis for defeating the Defendant's Motion for Summary Judgment.

violation because the defendant police officers' failure to aggressively investigate a missing person's report was too remote from the ultimate harm of the victim's death for them to have known that such harm could result from their actions). A reasonable trier of fact could conclude that, under the circumstances, Defendant Bridges knew or should have known that his failure to prevent his friends from acting as they did would result in harm specifically to the Plaintiff.

Based on the foregoing, the Court finds that the Plaintiff has presented sufficient evidence to raise genuine issues of material fact as to whether Defendant Bridges infringed the Plaintiff's right to substantive due process under a state-created danger theory of liability. The Court, therefore, DENIES the Defendant's Motion for Summary Judgment on the Plaintiff's § 1983 claim.

2. Qualified Immunity

Government officials sued in their individual capacities are entitled to seek qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). Qualified immunity extends to individuals performing discretionary functions unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* A right is "clearly established" if "[a] reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). This means only that the unlawfulness of the act must have been apparent in light of preexisting law, even if the precise action at issue was not previously held to be unlawful. *Id.* at 640.

At the time of this incident, it was clearly established within the Sixth Circuit that an individual has a right to be free from state-created danger. *Kallstrom*, 136 F.3d at 1066; *Gazette*, 41 F.3d at 1065 (citing *DeShaney* for the proposition that there may be a duty to protect when the state leaves an individual more vulnerable to danger than he would have been had the state actor not intervened at all). The Sixth Circuit and district courts within the circuit had clearly recognized that a state actor can be liable if he acts so as to significantly increase the risk of danger to an individual from a third party. *See* discussion *supra* Part IV.A.1. Based on the state of the case law in December 1998, the Court finds that a reasonable person in Defendant Bridges's position would have known that a state actor could be liable under § 1983 for taking actions that increase an individual's vulnerability to harm from third parties. Therefore, Defendant Bridges is not entitled to the affirmative defense of qualified immunity.

B. State Law Claims[18]

The Plaintiff has raised numerous state law claims against each of the Defendants. First, the Plaintiff asserted claims of assault and battery against Defendants Parker, Kincaid, and Bridges. He subsequently voluntarily

dismissed that claim as against Defendant Bridges, and Defendants Parker and Kincaid have not filed motions for summary judgment. Second, the Plaintiff asserted a claim of intentional infliction of emotional distress against Defendants Parker, Kincaid, and Bridges. Only Defendant Bridges has filed a Motion for Summary Judgment on that claim. Third, the Plaintiff asserted claims of negligence against Defendants J. Thomas & Co. ("Waffle House"), SDSI, and John Padgett. Each of those Defendants has filed a Motion for Summary Judgment. Therefore, for the purpose of ruling on the Defendants' Motions for Summary Judgment, the Court will discuss only the Plaintiff's claims of intentional infliction of emotional distress and negligence.

1. Intentional Infliction of Emotional Distress

The Plaintiff's First Amended Complaint alleged a cause of action for intentional infliction of emotional distress against Defendants Bridges, Kincaid, and Parker. Only Defendant Bridges has moved for summary judgment with respect to this claim.

In order to prove a claim of intentional infliction of emotional distress, the plaintiff must show that the defendant intentionally or recklessly caused him serious emotional distress by extreme and outrageous conduct. *McNeil v. Case W. Reserve Univ.*, 105 Ohio App. 3d 588, 664 N.E.2d 973, 975 (Ohio 1995) (citing *Yeager v. Local Union 20*, 6 Ohio St. 3d 369, 453 N.E.2d 666 (Ohio 1983)). The behavior complained of must go beyond the intentionally tortious or even the criminal. *Yeager*, 453 N.E.2d at 671. Rather, the conduct must be so extreme and outrageous as "'to be regarded as atrocious, and utterly intolerable in a civilized community.'" 453 N.E.2d at 671 (quoting Rest. 2d of Torts § 46, cmt. d (1965)). Furthermore, the emotional distress allegedly suffered must be serious. *Id.* In order to defeat a Motion for Summary Judgment on a claim of intentional infliction of emotional distress, the plaintiff must present evidence sufficient to create a genuine issue of material fact as to the defendant's behavior and the severity of the injury suffered. *McNeil*, 664 N.E.2d at 975-76; *see Uebelacker v. Cincom Systems, Inc.*, 48 Ohio App. 3d 268, 549 N.E.2d 1210, 1220 (Ohio Ct. App. 1988) (finding that the plaintiff raised a genuine issue of material fact as to his emotional distress when he submitted along with his pleadings an affidavit from his wife detailing the various symptoms of his distress).

The Court finds that the Plaintiff has not presented sufficient evidence to create a genuine issue of material fact on his claim of intentional infliction of emotional distress. First, even when viewed in the light most favorable to the Plaintiff, Defendant Bridges' actions, while possibly negligent or even reckless, do not rise to the level of extreme or outrageous

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[18]On July 2, 2001, a Stipulation of Voluntary Dismissal was entered as to the Plaintiff's claims under state law for negligent infliction of emotional distress as to all Defendants and as to the claim for assault and battery against Defendant Bridges. Those claims were dismissed with prejudice.

conduct, as that standard has been interpreted by the case law. *See Retterer v. Whirlpool Corp.*, 111 Ohio App. 3d 847, 677 N.E.2d 417, 421-23 (Ohio Ct. App. 1996) (upholding the lower court's grant of summary judgment for the defendants on a claim of intentional infliction of emotional distress where, among other things, the defendants, the plaintiff's supervisors at work, repeatedly called him into their office under threat of termination and then restrained him by his wrists as they "poked" and "tickled" him on his chest and stomach so that he would "jump and flop"); *McNeil*, 664 N.E.2d at 976 (finding no extreme or outrageous conduct by the employer when an employee continuously harassed and threatened to assault a fellow employee).

Even if a trier of fact finds that the Defendant did make a conscious decision to allow his friends to commit assault and battery upon the Plaintiff and then help them flee, those actions without more are not extreme and outrageous. Second, although the Plaintiff has alleged that he has suffered emotional distress to the point of not being able to perform normal daily functions or work for some period of time, this bare allegation without any evidentiary support is insufficient to defeat the Defendant's Motion for Summary Judgment. *See Hockenberry v. Village of Carrollton*, 110 F. Supp. 2d 597, 605 (N.D. Ohio 2000) (granting summary judgment for the defendant where the plaintiff failed to provide any specific evidence that would support his allegation that he and his family suffered serious emotional distress).

Therefore, the Court hereby GRANTS summary judgment in favor of Defendant Bridges on the Plaintiff's claim of intentional infliction of emotional distress.

2. Negligence[19]

The Plaintiff has asserted claims of negligence against the Waffle House, SDSI, John Padgett, and Officer Bridges.

In order to assert a successful claim of negligence under Ohio law, a plaintiff must show that (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; and (3) as a result of that breach, the defendant proximately caused actual loss or damage to the plaintiff. *Mussivand v. David*, 45 Ohio St. 3d 314, 544 N.E.2d 265, 270 (Ohio 1989); *Deeds v. Am. Sec.*, 39 Ohio App. 3d 31, 528 N.E.2d 1308, 1311 (Ohio Ct. App. 1987).

a. Officer Bridges

The Plaintiff states in his Memorandum Contra Defendant Bridges' Motion for Summary Judgment that he asserted a state law claim of negligence against Defendant Bridges. In the First Amended Complaint, however, the

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[19]The Plaintiff has alleged a separate count of "*respondeat superior*" against SDSI. This should really be included in the negligence claim, as it merely supplies one theory upon which Defendant SDSI can be found negligent.

Plaintiff raised allegations of negligence only as to Defendants Waffle House, SDSI, and Padgett. The Plaintiff has not subsequently amended his Complaint to add a claim of negligence against Defendant Bridges.

Under the Federal Rules of Civil Procedure, "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing [**30] that the pleader is entitled to relief." FED. R. CIV. P. 8(a). Furthermore, a plaintiff may not use a summary judgment motion to raise a claim that he failed to state in his complaint. *Lombard v. MCI Telecomm. Corp.*, 13 F. Supp. 2d 621, 626 (N.D. Ohio 1998) (citations omitted). Although usually this rule applies to prevent a plaintiff from asserting additional claims in his own motion for summary judgment, it applies equally here, where the Plaintiff is attempting to use the Defendant's Motion for Summary Judgment to state a claim that he omitted from his Complaint.

Based on the above rules, the Court finds that the Plaintiff has not adequately set forth a claim of negligence against Defendant Bridges in his Complaint, and he cannot now use the Defendant's Motion for Summary Judgment to do so. Defendant Bridges' Motion for Summary Judgment on the Plaintiff's alleged negligence claim is GRANTED.

b. Waffle House

The Plaintiff alleges that the Waffle House is negligent because it had a duty to provide a safe, secure, and reasonable environment to Waffle House patrons, and breached that duty when it allowed the Defendants to strike him.

As the owner of the premises on which this incident occurred, the Waffle House owed the Plaintiff, an invitee, a duty of ordinary care. *Newton v. Penn. Iron & Coal, Inc.*, 85 Ohio App. 3d 353, 619 N.E.2d 1081, 1083 (Ohio Ct. App. 1993) (recognizing the common law rule that landowners owe a duty of ordinary care to invitees, people whom the landowner invites onto his land for his own benefit). Where the premises owner does not, and in the exercise of ordinary care could not, know of a danger that causes injury to the invitee, the owner is not liable for the injury. *Howard v. Rogers*, 19 Ohio St. 2d 42, 249 N.E.2d 804, 807 (Ohio 1969). Such knowledge of a danger depends on the foreseeability of the harm. *Daily v. K-Mart Corp.*, 9 Ohio Misc. 2d 1, 458 N.E.2d 471, 474 (Ohio Com. Pl. 1981). Foreseeability of the harm may arise from prior incidents of a similar nature on the premises. *Townsley v. Cincinnati Gardens, Inc.*, 39 Ohio App. 2d 5, 314 N.E.2d 409, 411 (Ohio Ct. App. 1974). Ohio courts, however, have ruled that a totality of the circumstances approach is the preferable method for determining whether the ultimate harm was foreseeable. *Reitz v. May Co. Dept. Stores*, 66 Ohio App. 3d 188, 583 N.E.2d 1071, 1074 (Ohio Ct. App. 1990). Under either approach, the ultimate harm may be generally foreseeable, based on the type of activity that could be expected to occur on the premises at any time, specifically foreseeable due to the particular circumstances leading up to the harm. See 583 N.E.2d at

1075 (discussing Rest. 2d of Torts § 344, which provides that if the premises owner, based on his past experience or knowledge of his business, "should reasonably anticipate careless or criminal conduct on the part of third persons, either generally *or at some particular time*, he may be under a duty to take precautions against it") (emphasis added).

The Court believes that the Plaintiff has presented sufficient evidence to raise a genuine issue of material fact as to whether the harm that the Plaintiff incurred was foreseeable to the Waffle House. The Plaintiff has presented evidence that, under the totality of the circumstances approach, this particular incident was foreseeable based on the behavior of the Defendants and their interactions with the Plaintiff and his companions throughout their time at the Waffle House on this particular night. Additionally, the Plaintiff has presented some evidentiary support for his claim that, not only was the incident foreseeable, but it was actually foreseen by at least one Waffle House employee.

The Court finds, based on the above, that a reasonable trier of fact could find that the harm to the Plaintiff was foreseeable to the Waffle House. Furthermore, a trier of fact drawing such a conclusion could also find that the Waffle House breached its duty of ordinary care when it failed to prevent this foreseeable harm. Therefore, the Court DENIES Defendant Waffle House's Motion for Summary Judgment as to the Plaintiff's claim of negligence.

c. SDSI and John Padgett

SDSI has a contract with the Waffle House to provide security for the restaurant. Under the contract, SDSI assigns one of its employee security guards to work in the restaurant. On the night in question, SDSI employee John Padgett was the security guard at the Waffle House.

The Plaintiff alleges that SDSI and Security Officer John Padgett were negligent because they breached their duty to provide a safe, secure, and reasonable environment to Waffle House patrons. The claim against SDSI is premised on a *respondeat superior* theory of liability for the Security Officer's negligence, as well as claims of negligent hiring, retention, and supervision of Defendant Padgett. As to the *respondeat superior* theory, the Plaintiff alleges that because the security officer acted negligently while acting as an employee of SDSI, within the scope of his employment, SDSI can be liable for his negligence. *See Cooper v. Grace Baptist Church of Columbus, Ohio, Inc.*, 81 Ohio App. 3d 728, 612 N.E.2d 357, 362 (Ohio Ct. App. 1992) (asserting that for *respondeat superior* to apply, the employee must be liable for a tort committed in the scope of his employment). The Plaintiff bases his allegation of Defendant Padgett's negligence on his failure to prevent the harm to the Plaintiff, particularly in light of the fact that, according to the Plaintiff, a Waffle House waitress had notified him that a fight was probably going to ensue.

Ohio law imposes no heightened duty to prevent a third party from harming another absent a special relationship between the would-be

rescuer and the victim. *Gelbman v. Second Nat'l Bank of Warren*, 9 Ohio St. 3d 77, 458 N.E.2d 1262, 1263 (Ohio 1984) (citing Rest. 2d of Torts §§ 314, 315). In the case of private security guards, an increased duty to protect individuals from harm by third parties will be imposed only when such a duty is specified in the guard's contract. *Eagle v. Mathews-Click-Bauman, Inc.*, 104 Ohio App. 3d 792, 663 N.E.2d 399, 402 (Ohio Ct. App. 1995). In the absence of such a contractual duty, private security officers may be held liable in negligence only for failure to exercise ordinary care. *Id.*

The Court believes that the Plaintiff has presented sufficient evidence to raise a genuine issue of material fact as to whether Defendant Padgett breached a duty to exercise ordinary care. Although Defendants SDSI and Padgett have asserted that the contract between SDSI and Waffle House specifies that guards are hired only to protect the Company's property, and therefore have no heightened duty under Ohio law to protect customers from harm by third parties, the Plaintiff has presented evidence that, in practice, the guards had additional duties that were not specifically written into the terms of the contract. Both the Waffle House and SDSI have acknowledged that the manager at the Waffle House would tell Defendant Padgett what he was supposed to do each night he reported for work. On the night in question, the manager told Padgett, among other things, to prevent any "rowdiness," and help provide "crowd control." Although Defendant Padgett has claimed that his instructions from the Waffle House manager pertained only to his duty to protect the Company's property, a question of fact remains as to whether such instructions really go beyond the protection of property, and extend to the protection of customers.

The Court finds that a reasonable trier of fact could conclude that the manager's instructions to Defendant Padgett did, in fact, relate to persons and not just property. As such, under *Eagle v. Mathews-Click-Bauman*, Defendant Padgett would be subject to a heightened standard of care, which the trier of fact may find he breached by failing to prevent the harm to the Plaintiff. The Court also finds, however, that a reasonable trier of fact could conclude that the manager's instructions really did not extend Defendant Padgett's duties beyond the protection of property. Were the trier of fact to so find, it could nonetheless conclude that Defendant Padgett breached his duty of ordinary care under the circumstances. Under either standard, the Court believes that if a breach by Defendant Padgett were found, the trier of fact could further conclude that SDSI is liable for Defendant Padgett's breach under a *respondeat superior* theory of liability. Therefore, the Court DENIES summary judgment to Defendants SDSI and Padgett on the Plaintiff's claim of negligence.

V. Conclusion

Based on the foregoing, the Court DENIES summary judgment as to the 42 U.S.C. § 1983 claim and the negligence claims, and GRANTS summary judgment as to the claim of intentional infliction of emotional distress.

IT IS SO ORDERED.

ALGENON L. MARBLEY

UNITED STATES DISTRICT COURT

Dated: October 31, 2001

BARRY WALKER V. MAY DEPARTMENT STORES CO.

83 F. Supp. 2d 525 (E.D. Pa. 2000).

JUDGES: J. CURTIS JOYNER, J.

MEMORANDUM AND ORDER
JOYNER, J.

JANUARY 24, 2000

This case has been brought before the Court on motion of the defendants for summary judgment. For the reasons which follow, the motion shall be granted in part and denied in part.

Statement of Facts

On January 3, 1997, the plaintiff, Barry Walker, was observed via closed circuit television in the Strawbridge's department store in Center City Philadelphia by defendant Kim Stone, a store detective. In Ms. Stone's opinion, Mr. Walker, whom she had apprehended less than a week before for shoplifting, was acting suspiciously and she believed he may have again taken store merchandise without paying for it. Using the store security department's radio system, Ms. Stone directed uniformed guard Robert Bryant, who was in the vicinity of Mr. Walker, to follow him and try to "spook him" into dropping the shopping bag that he was carrying.

By the time that Mr. Bryant could locate the plaintiff, he was already out of the Strawbridge's store and in the Gallery mall, walking toward the Food Court area. Mr. Bryant began to follow Mr. Walker, but was soon passed by Anthony Battle, a plainclothes store detective, who caught up to the plaintiff and stopped him outside of the McDonald's Restaurant. According to the plaintiff, Mr. Battle pushed him toward the wall of the McDonald's, grabbed him by the arm and asked him what he had in the bag. According to Mr. Battle and Mr. Bryant, however, Mr. Battle put his arm around the plaintiff's shoulders and asked him what was in the bag. The plaintiff produced a receipt for three of the items that he was carrying from the nearby Ross store and since Mr. Bryant's search of the remaining contents of the bag revealed no tags or other marks identifying them as Strawbridge's merchandise, the items were returned to the plaintiff and he was released, with apologies from Mr. Bryant.

Mr. Walker followed Messrs. Bryant and Battle back into the Strawbridge's store to complain of the treatment that he had received and to get their names. Neither man would identify themselves but Mr. Battle introduced the plaintiff to Anthony Robinson, one of the security managers

on duty, who in turn, listened to his complaint and gave him the phone number and name of his supervisor, Philip Bonafiglia. Mr. Walker contends that he tried to reach Mr. Bonafiglia on several occasions, but was unsuccessful. Plaintiff thereafter filed this lawsuit against Strawbridges and its employees, alleging negligence, "intentional actions," and "discrimination." Discovery in this matter having now been completed, Defendants move for summary judgment in their favor as a matter of law.

Standards Governing Summary Judgment Motions

The standards for determining whether summary judgment is properly entered in cases pending before the district courts are governed by Fed.R.Civ.P. 56. Subsection (c) of that rule states, in pertinent part,

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

In this way, a Motion for Summary Judgment requires the court to look beyond the bare allegations of the pleadings to determine if they have sufficient factual support to warrant their consideration at trial. *Liberty Lobby, Inc. v. Dow Jones & Co.*, 267 U.S. App. D.C. 337, 838 F.2d 1287 (D.C. Cir. 1988), cert. denied, 488 U.S. 825, 109 S. Ct. 75, 102 L. Ed. 2d 51 (1988). See Also: *Aries Realty, Inc. v. AGS Columbia Associates*, 751 F. Supp. 444 (S.D. N.Y. 1990).

As a general rule, the party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In considering a summary judgment motion, the court must view the facts in the light most favorable to the party opposing the motion and all reasonable inferences from the facts must be drawn in favor of that party as well. *U.S. v. Kensington Hospital*, 760 F. Supp. 1120 (E.D. Pa. 1991); *Schillachi v. Flying Dutchman Motorcycle Club*, 751 F. Supp. 1169 (E.D. Pa. 1990).

When, however, "a Motion for Summary Judgment is made and supported [by affidavits or otherwise], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate may be entered against [it]." Fed.R.Civ.P. 56(e).

A material fact has been defined as one which might affect the outcome of the suit under relevant substantive law. *Boykin v. Bloomsburg University of Pennsylvania*, 893 F. Supp. 378, 393 (M.D.Pa. 1995) citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute about a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id., citing *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510.

Discussion

A. Immunity from Civil Liability under Pennsylvania's Retail Theft Statute, 18 Pa.C.S. § 3929.

Defendants first argue that they are entitled to summary judgment in their favor on all counts of the complaint because they are effectively immune under the Pennsylvania Retail Theft Statute, 18 Pa.C.S. § 3929. Specifically, that statute provides in relevant part:

> (c) Presumptions.—Any person intentionally concealing unpurchased property of any store or other mercantile establishment, either on the premises or outside the premises of such store, shall be prima facie presumed to have so concealed such property with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof within the meaning of subsection (a), and the finding of such unpurchased property concealed, upon the person or among the belongings of such person, shall be prima facie evidence of intentional concealment, and, if such person conceals, or causes to be concealed, such unpurchased property, upon the person or among the belongings of another, such fact shall also be prima facie evidence of intentional concealment on the part of the person so concealing such property.
>
> (d) Detention.—A peace officer, merchant or merchant's employee or an agent under contract with a merchant, who has probable cause to believe that retail theft has occurred or is occurring on or about a store or other retail mercantile establishment and who has probable cause to believe that a specific person has committed or is committing the retail theft may detain the suspect in a reasonable manner for a reasonable time on or off the premises for all or any of the following purposes: to require the suspect to identify himself, to verify such identification, to determine whether such suspect has in his possession unpurchased merchandise taken from the mercantile establishment and, if so, to recover such merchandise, to inform a peace officer, or to institute criminal proceedings against the suspect. Such detention shall not impose civil or criminal liability upon the peace officer, merchant, employee or agent so detaining.

It should be noted that store employees who stop, detain and search individuals who they reasonably suspect of retail theft do not act under

color of state authority and hence it is not necessary to first apply for or obtain a search warrant. *Commonwealth v. Lacy*, 324 Pa. Super. 379, 471 A.2d 888, 890 (1984); *Commonwealth v. Martin*, 300 Pa. Super. 497, 446 A.2d 965, 968 (1982). However, since the Retail Theft Statute does require that probable cause have existed to justify a stop and to trigger a shopkeeper's immunity, the threshold issue with which we are now faced is whether or not Mr. Bryant and Mr. Battle had the requisite probable cause to stop and detain Mr. Walker.

Probable cause has been said to be a fluid concept turning on the assessment of probabilities in particular factual contexts not readily or even usefully reduced to a neat set of legal rules. *Illinois v. Gates*, 462 U.S. 213, 232, 103 S. Ct. 2317, 2329, 76 L. Ed. 2d 527 (1983). Probable cause is determined by the totality of the circumstances based upon a practical, common-sense decision whether, given all the facts presented, including the veracity and basis of knowledge of any persons supplying hearsay information, there is a fair probability that a crime has been or is being committed by the suspect or that contraband or evidence of a crime will be found in a particular place. See*: Illinois v. Gates*, 462 U.S. at 238, 103 S. Ct. at 2332; *Sharrar v. Felsing*, 128 F.3d 810, 817-818 (3rd Cir. 1997); *Commonwealth v. Banks*, 540 Pa. 453, 454, 658 A.2d 752, 753 (1995). Probable cause thus means more than mere suspicion but does not require the police to have evidence sufficient to prove guilt beyond a reasonable doubt. *Cronin v. West Whiteland Township*, 994 F. Supp. 595 (E.D.Pa. 1998). It should further be noted that the appropriate inquiry for application of the "shopkeeper privilege" focuses only on whether the merchant or his agent had probable cause at the moment he decided to detain the plaintiff. *Doe v. Dendrinos*, 1997 U.S. Dist. LEXIS 2052 (E.D.Pa. 1997). In this case, the totality of the circumstances reflect that the plaintiff was stopped because (1) Kim Stone observed him as a previously known shoplifter in the store one week after he had previously been detained and questioned for shoplifting; (2) Ms. Stone believed he may have been carrying a shopping bag full of Strawbridge's merchandise and she directed store guard Robert Bryant to follow him and try to scare him into dropping the bag; (3) Store Detective Anthony Battle also heard the radio transmission from Stone to Bryant and decided to assist Bryant. When Battle saw the plaintiff turn around and look over his shoulder, he recognized him from his earlier shoplifting incident one week previously and made the decision to stop the plaintiff when he caught up to him outside the McDonald's Restaurant. Given that it appears that the plaintiff may have been stopped solely because he had been caught shoplifting one week before and was carrying a shopping bag, we cannot find that there is no material issue of fact as to whether these circumstances, without more, constituted sufficient probable cause to believe that the plaintiff was again shoplifting on the day at issue so as to trigger the "shopkeeper's immunity" under the Retail Theft Statute. Defendant's Motion for Summary Judgment on this basis must therefore be denied.

B. Entitlement to Summary Judgment on Punitive Damages

Defendants next assert that since there is no evidence in this case to support a claim for punitive damages, they are likewise entitled to judgment in their favor as a matter of law on plaintiff's punitive damages claims. We agree.

In order to impose punitive damages, the wrongful conduct must be outrageous and conduct is said to be outrageous when it is "malicious, wanton, reckless, willful or oppressive." *Rizzo v. Haines*, 520 Pa. 484, 506, 555 A.2d 58, 69 (1989); *Trotman v. Mecchella*, 421 Pa. Super. 620, 618 A.2d 982, 985 (1992). Such conduct must show the actor's evil motive or reckless indifference to the rights of others. *Trotman v. Mecchella*, 618 A.2d at 985, citing *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984) and *Hess v. Hess*, 397 Pa. Super. 395, 399, 580 A.2d 357, 359 (1990). In assessing punitives, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant. *Feld v. Merriam*, 485 A.2d at 748. See Also: *Polselli v. Nationwide Mutual Fire Insurance Co.*, 23 F.3d 747, 751 (3rd Cir. 1994).

In applying these principles to the case at hand, we first observe that despite having captioned two counts of his complaint as seeking damages for "Intentional Acts," virtually plaintiff's entire complaint alleges nothing more than negligence on the part of the defendants. This, coupled with the complete lack of any evidence that any of the defendants acted other than negligently, let alone recklessly, maliciously, willfully or oppressively or with an evil motive, warrants the entry of judgment in defendants' favor as a matter of law. Summary judgment shall therefore be entered in favor of all of the defendants with respect to plaintiff's claims for punitive damages.

C. Summary Judgment as to Defendant Anthony Robinson

Finally, Defendants assert that summary judgment is properly entered with regard to defendant Robinson, as there is no evidence that he played any role in the plaintiff's stop and detention. Again, we agree.

A careful review of the entire record in this case reflects that Mr. Robinson in no way participated in the stop or the decision to stop and detain Mr. Walker for suspected shoplifting on January 3, 1997. To the contrary, Mr. Robinson's only contact with the plaintiff occurred *after* he followed Messrs. Bryant and Battle back into the store after he had been detained and searched. At that time, Mr. Battle introduced Mr. Robinson to the plaintiff as a supervisor who would hear his complaints about how Mr. Bryant and Mr. Battle had treated him. Mr. Robinson did nothing more than listen to the plaintiff's complaints and give him the name and telephone number of *his* supervisor. We thus find that there is no basis upon which Mr. Robinson could be held liable to Mr. Walker and we therefore

shall enter judgment in favor of this defendant as a matter of law as to all of the plaintiff's claims against him.[20]

An order follows.

Order

AND NOW, this 24th day of January, 2000, upon consideration of Defendants' Motions for Summary Judgment and Plaintiff's Response thereto, it is hereby ORDERED that the Motions are GRANTED in PART and DENIED in PART and Judgment is entered in favor of all Defendants on Plaintiff's claims for punitive damages and in favor of Defendant Anthony Robinson on all Counts of the Plaintiff's Complaint.

BY THE COURT:

J. CURTIS JOYNER, J.

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[20]Plaintiff argues that Mr. Robinson should be held responsible for Strawbridge's alleged failure to properly train its employees with regard to stopping and detaining individuals for suspected shoplifting. We note, however, that this is not a § 1983 action whereby liability may be imposed upon a policy-making official for the failure to train its police-employees and even if it were there has been no showing of deliberate indifference to the need for more or better training or supervision or that plaintiff's purported injuries resulted from a custom, policy or practice on the part of the defendants. See, e.g., *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989); *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Likewise, there is no evidence that Mr. Robinson is a "policy maker."

KYONG WOOD AND SHEILA COPELAND V. THE CITY OF TOPEKA

Case No. 01-4016-SAC (Kansas 2003).

JUDGES: Sam A. Crow, U.S. District Senior Judge.

OPINION BY: Sam A. Crow

Memorandum and Order

This case comes before the court on the motion of the Kroger Co., d.b.a. Dillon Stores Division ("Dillons"), and American Sentry Security System, Inc., ("Sentry") to dismiss the case. Defendant City of Topeka has previously been dismissed as a party. *See* Dk. 56. Plaintiffs represent that after the City's dismissal, plaintiff Sheila Copeland is no longer a plaintiff in the case, as "she has no claims against defendants Dillons or Sentry." (Dk. 53, p. 2).[21]

Plaintiff brings 42 U.S.C. § 1983 and supplemental state law claims against Dillons and Sentry based upon an incident in which she was detained at a Dillons store due to suspicion of shoplifting and/or destruction of property. Defendants move to dismiss the case, alleging that it fails to state a claim for relief, pursuant to Fed. R.Civ.P. 12(b)(6).[22] Specifically, defendants allege that plaintiff has failed to properly plead state action, or action under color of law, as is required for all § 1983 cases.

Before examining the merits of the motions, the court addresses plaintiff's objection that defendants failed to follow the local rules regarding the manner in which motions and supporting memoranda are to be filed. D.Kan. R. 7.1 states, in pertinent part, that motions in civil cases "shall be accompanied by a brief or memorandum . . . ." This rule contemplates that a motion and its supporting memorandum shall be filed as two separate pleadings, not as one, as both defendants have done.

The court believes that the violation apparently flows from defense counsels' lack of familiarity with the rules, rather than from blatant disregard for their requirements. Accordingly, the court shall permit the pleadings to remain as they are, but advises counsel for defendants that they shall not be excused from any future lack of compliance with the court's rules. The court thus examines the merits of the motions to dismiss.

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[21]The court need not decide the status of plaintiff Sheila Copeland, Kyong Wood's daughter, given the court's decision herein on the motions to dismiss the case. For convenience, the court will refer herein to Kyong Wood as "plaintiff."

[22]Sentry's motion/memorandum neither incorporates Dillons' motion, which expressly relies upon the stated rule, nor cites to Rule 12(b)(6). Nonetheless, the court finds that Sentry's motion is appropriately brought pursuant to that rule.

12(b)(6) Standards

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)), or unless an issue of law is dispositive, *Neitzke v. Williams*, 490 U.S. 319, 326, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989). "The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993); *see Hospice of Metro Denver, Inc. v. Group Health Ins. of Oklahoma*, 944 F.2d 752, 753 (10th Cir. 1991).

The Tenth Circuit has observed that the federal rules "erect a powerful presumption against rejecting pleadings for failure to state a claim." *Maez v. Mountain States Tel. and Tel., Inc.*, 54 F.3d 1488, 1496 (10th Cir. 1995) (quoting *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986)). A court judges the sufficiency of the complaint accepting as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), 1219, and drawing all reasonable inferences from those facts in favor of the plaintiff. *Witt v. Roadway Express*, 136 F.3d 1424, 1428 (10th Cir.), *cert. denied*, 525 U.S. 881, 142 L. Ed. 2d 154, 119 S. Ct. 188 (1998); *see Southern Disposal, Inc. v. Texas Waste Management*, 161 F.3d 1259, 1262 (10th Cir. 1998). It is not the court's function "to weigh potential evidence that the parties might present at trial." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). The court construes the allegations in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991).

These deferential rules, however, do not allow the court to assume that a plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983) (footnote omitted). Dismissal is a harsh remedy to be used cautiously so as to promote the liberal rules of pleading while protecting the interests of justice. *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 (10th Cir. 1989).

§ 1983 Requirements

Defendants claim that plaintiff has failed to allege that they, as private security guards and/or store employees, acted under color of law, as is required for all § 1983 claims.

It is well established that private actors are not usually subject to liability under § 1983.

Plaintiffs alleging a violation of § 1983 must demonstrate they have been deprived of a right "secured by the Constitution and the laws of the United States," and that the defendants deprived them of this right acting under color of law. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) (citations omitted). "Thus, the only proper defendants in a Section 1983 claim are those who represent [the state] in some capacity, whether they act in accordance with their authority or misuse it." *See Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) (citations and quotations omitted). However, a defendant need not be an officer of the state in order to act under color of state law for purposes of § 1983. (citation omitted). Rather, courts have applied four separate tests to determine whether a private party acted under color of law in causing an alleged deprivation of federal rights: (1) the nexus test; (2) the symbiotic relation test; (3) the joint action test; and (4) the traditional public powers test or public functions test. *See Gallagher*, 49 F.3d at 1447.

Sigmon v. Community Care HMO, Inc., 234 F.3d 1121, 1125 (10th Cir. 2000)

Plaintiff states that the gravamen of her argument is not that the defendants conspired with the City of Topeka officers to violate her civil rights, but that they engaged in other acts sufficient to meet the requirements of the joint action test. *Compare Anaya v. Crossroads Managed Care Systems*, 195 F.3d 584, 596 (10th Cir. 1999) ("a requirement of the joint action charge . . . is that both public and private actors share a common, unconstitutional goal."); *Hunt v. Bennett*, 17 F.3d 1263, 1268 (10th Cir. 1994) (§ 1983 pleadings must specifically present facts tending to show agreement and concerted action).

Defendants allege that none of the acts they engaged in are sufficient, under any of the four tests noted above, to meet plaintiff's burden to plead state action. Defendants rely primarily upon the general rule that "an individual does not act under color of law merely by reporting an alleged crime to police officers who take action thereon." *Benavidez v. Gunnell*, 722 F.2d 615, 618 (10th Cir. 1983). Nor does the making of a citizen's arrest constitute acting under color of law for § 1983 purposes. *See Carey v. Continental Airlines*, 823 F.2d 1402, 1404 (10th Cir. 1987); *Lee v. Town of Estes Park*, 820 F.2d 1112, 1114-15 (10th Cir. 1987); *see also, Cruz v. Donnelly*, 727 F.2d 79 (3d Cir. 1984) (finding no acts under color of law where a shopkeeper called the police to search a suspected shoplifter, but the police found nothing); *see generally Sarner v. Luce*, 129 F.3d 131, [published in full-text format at 1997 U.S. App. LEXIS 29814], 1997 WL 687449, *1 (10th Cir. 1997) (finding plaintiff failed to plead overt or significant action by the other defendants such that defendant was a state actor).

These same principles apply to merchants, as the Tenth Circuit has stated:

> Generally, merchants are not considered to be acting under color of law for purposes of 1983 when they detain a person suspected of shoplifting or other crimes, call the police, or make a citizen's arrest. *See Gramenos v. Jewel Cos.*, 797 F.2d 432, 435-36 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028, 95 L. Ed. 2d 525, 107 S. Ct. 1952 (1987); *Cruz v. Donnelly*, 727 F.2d 79, 81 (3d Cir. 1984); *White v. Scrivner Corp.*, 594 F.2d 140, 142-43 (5th Cir. 1979); *Hurt v. G.C. Murphy Co.*, 624 F. Supp. 512, 514 (S.D. W. Va.), *aff'd*, 800 F.2d 260 (4th Cir. 1986); *cf. Flagg Bros. v. Brooks*, 436 U.S. 149, 165-66, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978) (holding that state enacted provisions which permit self-help do not automatically convert private action into state action); *Carey*, 823 F.2d. at 1404 (holding that complaint to police and citizen's arrest by Continental Airlines employee does not constitute state action).

Jones v. Wal-Mart Stores, Inc., 33 F.3d 62, [published in full-text format at 1994 U.S. App. LEXIS 19139], 1994 WL 387887, *3 (10th Cir. 1994) (Table).

Analysis

The court has reviewed plaintiff's complaint to determine whether it sufficiently alleges facts showing the defendants acted under the color of law as required by 42 U.S.C. § 1983. Two paragraphs of plaintiff's § 1983 claim refer generally to state action. Paragraph 2 states:

> Defendants used their powers under color of state law to direct and control the City police department for purposes that were adverse to plaintiffs . . . and were detrimental to the public welfare and safety.

Paragraph 8 states:

> Defendants the Kroger Co., d.b.a. Dillons, and Sentry wrongfully invoked the police power of the City of Topeka. The City of Topeka, by and through its police officers, wrongfully acceded to the request and participated in the unlawful actions of the other defendants.

These conclusory allegations fall far short of meeting the pleading requirements in § 1983 cases. *See Fries v. Helsper*, 146 F.3d 452, 458 (7th Cir.), *cert. denied*, 525 U.S. 930, 142 L. Ed. 2d 278, 119 S. Ct. 337 (1998) ("Mere allegations of joint action or a conspiracy do not demonstrate that the defendants acted under color of state law and are not sufficient to survive a motion to dismiss").

The factual allegations of plaintiff's complaint, incorporated by reference, include the following allegations of acts by defendants, prior to the

arrival of the City of Topeka police officers: "A Dillons security guard supplied by Sentry came up behind [plaintiff] in the parking lot and without notice or warning grabbed her hand, removing her car keys"; "one or more employees of Dillons wrongfully detained and falsely imprisoned plaintiff"; "the guard then directed [plaintiff] to go back into the store where the security guard was joined by another guard"; the "security guards refused to allow [plaintiff] to call her husband or get a glass of water that she had requested"; the security guards did not respond to her when she asked if she was being charged; and "Dillons security guards together pulled her arms behind her in a forceful and painful manner, and placed handcuffs on her forcibly pushed (sic) her backward causing her to strike a railing in the room, [injuring her]." Dk 1, p. 3.

City of Topeka police officers then arrived, having been called by one or more Dillons employees. The following allegations relate to acts thereafter: "The police officers declined to take plaintiff's complaint" that she had been "physically injured by the treatment of Dillons security guards"; one of the officers called her residence and stated that plaintiff had been arrested for shoplifting; and when plaintiff asked one or more of the City officers to loosen her handcuffs, "at first the officer declined, telling her that if she didn't move her hands, the cuffs would not be so tight." Dk. 1, p. 4. Plaintiff's daughter then arrived, demanded that plaintiff's handcuffs be removed, and was removed from the detention room by one of the police officers who told her that her mother was going to be charged with criminal damage to property. The remaining relevant allegation is that "together the security guards and Topeka police watched a video on multiple occasions that purported to record the action of [plaintiff.] Thereafter, the officers removed the cuffs from [plaintiff] and allowed her and Sheila Copeland to leave." Dk. 1, p. 4. No charges were filed against plaintiff or her daughter.

Nothing in plaintiff's complaint sufficiently alleges that defendants, or either of them, engaged in acts under color of state law. Instead, the seizure and subsequent treatment of plaintiff at Dillons cannot be fairly attributed to the City of Topeka under [*13] any of the tests for state action. For a merchant or its security officers to call the police when they suspect shoplifting or destruction of property is insufficient to constitute state action. No acts allegedly taken by officers of the City of Topeka at the scene reveal prior collusion with defendants, or compliance with any requests by the defendants, or either of them, let alone the requisite joint action. Plaintiff's assertion that defendants "directed and controlled" the City police department is conclusory and unsupported by the facts alleged in the complaint. No allegations in the complaint support a conclusion that plaintiff's treatment resulted from any concerted action, prearranged plan, customary procedure, or policy that substituted the judgment of a private party for that of the police, or allowed a private party to exercise state power. *See Carey*, 823 F.2d at 1404. Thus even if everything alleged in the complaint is true, plaintiff fails to state a claim under § 1983.

State Law Claims

Plaintiff's complaint includes state law claims of false arrest and imprisonment, assault and battery, and outrage and/or negligent infliction of emotional distress. Over these claims, this court has no original jurisdiction.

Having dismissed the federal claims over which this court has original jurisdiction, the court in the exercise of its statutory discretion declines to assume supplemental jurisdiction over the plaintiff's state law claims against the defendants. 28 U.S.C. § 1367 (c)(3); *see Tonkovich v. Kansas Bd. of Regents*, 254 F.3d 941, 945 (10th Cir. 2001). The plaintiff advances no substantial reasons for exercising such jurisdiction. "Given the relative lack of pretrial proceedings—including a total absence of discovery—considerations of 'judicial economy, convenience, fairness' do not favor 'retaining jurisdiction.'" *Tonkovich*, 254 F.3d at 945 (quoting in part *Anglemyer v. Hamilton County Hosp.*, 58 F.3d 533, 541 (10th Cir. 1995)). At this juncture, the most common response is to dismiss the state law claims without prejudice. *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1237 (10th Cir. 1997).

Plaintiff requests that the state law claims "should be remanded to state court for trial" so that she will not lose her remedies for defendant's behavior. Given the state's savings statute, *see* K.S.A. § 60-518, plaintiff's fear of losing her state law remedies is unfounded. The court finds no unique circumstances justifying its exercise of supplemental jurisdiction.

IT IS THEREFORE ORDERED that Dillons' motion to dismiss (Dk. 42), and Sentry's motion to dismiss (Dk. 37) are granted.

IT IS FURTHER ORDERED that the court declines to exercise supplemental jurisdiction over the remaining state law claims and dismisses the same without prejudice.

Dated this 23rd day of May, 2003, Topeka, Kansas.

Sam A. Crow, U.S. District Senior Judge

THE PEOPLE V. VIRGINIA ALVINIA ZELINSKI,

24 Cal. 3d 357; 594 P.2d 1000 (1979).

Opinion by Manuel, J., with Tobriner, Mosk, Richardson, and Newman, JJ., concurring. Bird, C. J., concurred in the result. Separate dissenting opinion by Clark, J.

Virginia Zelinski was charged with unlawful possession of a controlled substance, heroin (Health & Saf. Code, § 11350). A motion to suppress evidence pursuant to Penal Code section 1538.5 was denied. She entered a plea of guilty and appeals. (Pen. Code, § 1538.5, subd. (m).) We reverse.

On March 21, 1976, Bruce Moore, a store detective employed by Zody's Department Store, observed defendant place a blouse into her purse. Moore alerted Ann O'Connor, another Zody detective, and the two thereafter observed defendant select a pair of sandals, which she put on her feet, and a hat, which she put on her head. Defendant also took a straw bag into which she placed her purse. Defendant then selected and paid for a pair of blue shoes and left the store.

Detectives Moore and O'Connor stopped defendant outside the store. Moore placed defendant under arrest for violation of Penal Code section 484 (theft) and asked her to accompany him and detective O'Connor into the store. Defendant was taken by O'Connor to the security office where Pat Forrest, another female store detective, conducted a routine "cursory search in case of weapons" on the person of defendant.

Moore testified that he reentered the security office when the search of defendant's person was completed, opened defendant's purse to retrieve the blouse taken from Zody's, and removed the blouse and a pill vial that lay on top of the blouse.[23] Moore examined the vial, removed a balloon from the bottle, examined the fine powdery substance contained in the balloon,[24] and set the vial and balloon on the security office desk to await the police who had been called.

Detective O'Connor, who testified to the search of defendant's person by Forrest,[25] was initially confused as to whether the pill vial containing the balloon had been taken from the defendant's purse or from her brassiere. On cross-examination, O'Connor was certain that she saw Forrest taking it from defendant's brassiere. According to O'Connor, the pill bottle was placed on the security office desk where detective Moore

[23]There is some evidence that Moore commenced search of the purse prior to the search of defendant's person by Forrest.
[24]Moore, who had worked in undercover narcotics operations with the police and private agencies, suspected the substance was heroin.
[25]Forrest did not testify.

shortly thereafter opened it and examined the powdery substance in the balloon. Later the police took custody of the vial and defendant was thereafter charged with unlawful possession of heroin.

(1a) (2a) Defendant's appeal involves two questions—(1) whether store detectives Moore, O'Connor, and Forrest exceeded the permissible scope of search incident to the arrest, and (2) if they did, whether the evidence thus obtained should be excluded as violative of defendant's rights under federal or state Constitutions. We have concluded that the narcotics evidence was obtained by unlawful search and that the constitutional prohibition against unreasonable search and seizure affords protection against the unlawful intrusive conduct of these private security personnel.

(3) Store detectives and security guards are retained primarily to protect their employer's interest in property. They have no more powers to enforce the law than other private persons. (See *Private Police in California: A Legislative Proposal* (1975) 5 Golden Gate L. Rev. 115, 129-134; cf. *Stapleton v. Superior Court* (1968) 70 Cal.2d 97, 100-101, fn. 3 [73 Cal. Rptr. 575, 447 P.2d 967].) Like all private persons, security employees can arrest or detain an offender (Pen. Code, § 837) and search for weapons (Pen. Code, § 846) before taking the offender to a magistrate or delivering him to a peace officer (Pen. Code, §§ 847, 849).[26] Store personnel Moore and O'Connor were acting under this statutory authority when they arrested defendant and took her into custody for leaving the store with stolen merchandise.

(4) Merchants have traditionally had the right to restrain and detain shoplifters. At the time of the incident at Zody's, merchants were protected from civil liability for false arrest or false imprisonment in their reasonable efforts to detain shoplifters by a common law privilege that permitted detention for a reasonable time for investigation in a reasonable manner of any person whom the merchant had probable cause to believe had unlawfully taken or attempted to take merchandise from the premises. (*Collyer v. S.H. Kress & Co.* (1936) 5 Cal.2d 175 [54 P.2d 20].) That privilege

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[26]Insofar as applicable to private persons, the statutes provide: Section 837: "A private person may arrest another: 1. For a public offense committed or attempted in his presence. [para.] 2. When the person arrested has committed a felony, although not in his presence. [para.] 3. When a felony has been in fact committed and he has reasonable cause for believing the person arrested to have committed it."
Section 846: "Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken."
Section 847: "A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer. . . ."
Section 849: "(a) When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate."

has since been enacted into statute as subdivision (e) of Penal Code section 490.5.[27]

Thus, pursuant to the Penal Code or the civil common law privilege, store personnel Moore and O'Connor had authority to arrest or detain defendant. The question remains, however, whether they exceeded their authority in their subsequent search for and seizure of evidence.

(5) The permissible scope of search incident to a citizen's arrest is set out in *People v. Sandoval* (1966) 65 Cal.2d 303, 311, footnote 5 [54 Cal. Rptr. 123, 419 P.2d 187]: "A citizen effecting such an arrest is authorized only to 'take from the person arrested all offensive weapons which he may have about his person' (Pen. Code, § 846), not to conduct a search for contraband 'incidental' to the arrest, or to seize such contraband upon recovering it. [Citation.] We reject the suggestion of *People v. Alvarado* (1962) 208 Cal. App. 2d 629, 631 [25 Cal. Rptr. 437], that the search of one private individual or his premises by another is lawful simply because 'incidental' to a lawful citizen's arrest." (See also *People v. Cheatham* (1968) 263 Cal. App. 2d 458, 462, fn. 2 [69 Cal. Rptr. 679]; *People v. Sjosten* (1968) 262 Cal. App. 2d 539 [68 Cal. Rptr. 832]; *People v. Martin* (1964) 225 Cal. App. 2d 91, 94 [36 Cal. Rptr. 924].)[28] The rationale behind the rule is that, absent statutory authorization, private citizens are not and should not be permitted to take property from other private citizens.[29]

(6) The limits of the merchant's authority to search is now expressly stated in Penal Code section 490.5. Paragraph of subdivision (e) provides that "During the period of detention any items which a merchant has reasonable cause to believe are unlawfully taken from his premises *and* which are in plain view may be examined by the merchant for the purposes of ascertaining the ownership thereof." (Italics added.) Neither the statute nor the privilege which it codified purport to give to the merchant or his employees the authority to search.

(1b) In the present case, instead of holding defendant and her handbag until the arrival of a peace officer who may have been authorized to

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[27]Subdivision (e) became effective on January 1, 1977. The Legislature made clear that the provisions of subdivision (e) of Section 490.5 "do not constitute a change in, but are declaratory of, the existing law, and such provisions shall not be interpreted to amend or modify Sections 837, 847, and 849 of the Penal Code." (Stats. 1976, ch. 1131, § 3, p. 5049.)

[28]In *People* v. *Bush* (1974) 37 Cal. App. 3d 952 [112 Cal. Rptr. 770], seizure of a baggie of marijuana by an offduty policeman who effected an arrest was upheld as a seizure of contraband in plain view. Because the officer in *Bush* was acting outside of his jurisdiction, the court was compelled to treat the arrest as a citizen's arrest. Insofar as *Bush* suggests that the permissible scope of search incident to a citizen's arrest goes beyond the right to disarm the offender, as provided in Penal Code section 846, it is disapproved.

[29]Contrast the extensive decisional law which has expanded the scope of permissible search by a police officer as an incident to arrest despite lack of statutory authorization. (See *Chimel v. California* (1969) 395 U.S. 752 [23 L. Ed. 2d 685, 89 S. Ct. 2034]; *Preston v. U.S.* (1964) 376 U.S. 364, 367 [11 L. Ed. 2d 777, 780, 84 S. Ct. 881]; *People v. Superior Court (Kiefer)* (1970) 3 Cal. 3d 807, 813 [91 Cal. Rptr. 729, 478 P.2d 449, 45 A.L.R.3d 559]; *People v. Norman* (1975) 14 Cal. 3d 929 [123 Cal. Rptr. 109, 538 P.2d 237].)

search, the employees instituted a search to recover goods that were not in plain view. Such intrusion into defendant's person and effects was not authorized as incident to a citizen's arrest pursuant to section 837 of the Penal Code (*Sandoval, supra*, 65 Cal.2d at p. 311, fn. 5), or pursuant to the merchant's privilege subsequently codified in subdivision (e) of section 490.5. It was unnecessary to achieve the employees' reasonable concerns of assuring that defendant carried no weapons[30] and of preventing loss of store property. As a matter of law, therefore, the fruits of that search were illegally obtained.

(2b) The People contend that the evidence is nevertheless admissible because the search and seizure were made by private persons. They urge that *Burdeau v. McDowell* (1921) 256 U.S. 465 [65 L. Ed. 1048, 41 S. Ct. 574, 13 A.L.R. 1159], holding that Fourth Amendment proscriptions against unreasonable searches and seizures do not apply to private conduct, is still good law and controlling. (See *People v. Randazzo* (1963) 220 Cal. App. 2d 768, 770-775 [34 Cal. Rptr. 65]; *People v. Superior Court (Smith)* (1969) 70 Cal.2d 123, 128-129 [74 Cal. Rptr. 294, 449 P.2d 230], ["... acquisition of property by a private citizen from another person cannot be deemed reasonable or unreasonable ..."]; cf. *Stapleton v. Superior Court, supra*, 70 Cal.2d at p. 00, fn. 2.) Defendant contends, on the other hand, that only by applying the exclusionary rule to all searches conducted by store detectives and other private security personnel can freedoms embodied in the Fourth Amendment of the federal Constitution and article I, section 13 of the state Constitution be protected from the abuses and dangers inherent in the growth of private security activities.

More than a decade ago we expressed concern that searches by private security forces can involve a "particularly serious threat to privacy" (*Stapleton, supra*, 70 Cal.2d at pp. 100-101, fn. 3); in *Stapleton* and later in *Dyas v. Superior Court* (1974) 11 Cal. 3d 628, 633 [114 Cal. Rptr. 114, 522 P.2d 674], we left open the question whether searches by such private individuals should be held subject to the constitutional proscriptions. We now address the problem.

Article I, section 13 of the California Constitution provides in part that: "The right of the people to be secure in their persons, houses, papers

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[30]The record discloses no specific facts or circumstances which warranted a search for weapons. According to detective Moore, a "cursory" and routine search for weapons was made because weapons had been found on other occasions. We express no opinion as to the validity of a routine search for weapons after a petty theft (see *People v. Brisendine* (1975) 13 Cal. 3d 528, 536-538 [119 Cal. Rptr. 315, 531 P.2d 1099]), and the People do not rely upon the weapons search as justification for seizure of the narcotics. But, even if we concede the right to search for weapons, the detectives were not justified in seizing and examining the contents of an opaque bottle in the course of such a limited search. (*Brisendine, supra*, 13 Cal. 3d at p. 543.) A container of pills carried on an individual's person or in his immediate effects does not ordinarily feel like a weapon (*People v. Mosher* (1969) 1 Cal. 3d 379, 394 [82 Cal. Rptr. 379, 461 P.2d 659]), and the person conducting the search is not entitled to engage in "fanciful speculation" as to what the item might be (*People v. Collins* (1970) 1 Cal. 3d 658, 663 [83 Cal. Rptr. 179, 463 P.2d 403]).

and effects against unreasonable seizures and searches may not be violated . . . ." Although the constitutional provision contains no language indicating that the "security" protected by the provision is limited to security from governmental searches or seizures, California cases have generally interpreted this provision as primarily intended as a protection of the people against such governmentally initiated or governmentally directed intrusions. The exclusionary rule, fashioned to implement the rights secured by the constitutional provision, has therefore been applied to exclude evidence illegally obtained by private citizens only where it served the purpose of the exclusionary rule in restraining abuses by the police of their statutory powers. (*Stapleton v. Superior Court, supra*, 70 Cal.2d 97; *People v. Cahan* (1955) 44 Cal.2d 434 [282 P.2d 905, 50 A.L.R.2d 513]; *Mapp v. Ohio* (1961) 367 U.S. 643 [6 L. Ed. 2d 1081, 81 S. Ct. 1684, 84 A.L.R.2d 933]; cf. *People v. Payne* (1969) 1 Cal. App. 3d 361 [81 Cal. Rptr. 635]; *People v. Randazzo, supra*, 220 Cal. App. 2d 768; *People v. Cheatham, supra*, 263 Cal. App. 2d 458, 461-462; cf. *People v. Millard* (1971) 15 Cal. App. 3d 759, 761-762 [93 Cal. Rptr. 402]; *People v. Superior Court (Smith), supra*, 70 Cal.2d 123; *People v. Mangiefico* (1972) 25 Cal. App. 3d 1041, 1947-1048 [102 Cal. Rptr. 449].

We have recognized that private security personnel, like police, have the authority to detain suspects, conduct investigations, and make arrests. They are not police, however, and we have refused to accord them the special privileges and protections enjoyed by official police officers. (See *People v. Corey* (1978) 21 Cal. 3d 738 [147 Cal. Rptr. 639, 581 P.2d 644].) We have excluded the fruits of their illegal investigations only when they were acting in concert with the police or when the police were standing silently by. (*Stapleton, supra*, 70 Cal.2d at p. 103.) We are mindful, however, of the increasing reliance placed upon private security personnel by local law enforcement authorities for the prevention of crime and enforcement of the criminal law and the increasing threat to privacy rights posed thereby. Since *Stapleton* was decided, the private security industry has grown tremendously, and, from all indications, the number of private security personnel continues to increase today. A recent report prepared by the Private Security Advisory Council to the United States Department of Justice describes this phenomenon in the following terms:

> A vast army of workers are employed in local, state and federal government to prevent crime and to deal with criminal activity. Generally thought of as the country's major crime prevention force are the more than 40,000 public law enforcement agencies with their 475,000 employees. While they constitute the . . . most visible component of the criminal justice system, another group has been fast rising in both numbers and responsibility in the area of crime prevention. With a rate of increase exceeding even that of the public police, the private security sector has become the largest single group in the country engaged in the prevention of crime. (Private Security Adv. Coun. to U.S. Dept. of Justice, LEAA, Report on the Regulation of Private Security Services (1976) p. 1.)

Realistically, therefore, we recognize that in our state today illegal conduct of privately employed security personnel poses a threat to privacy rights of Californians that is comparable to that which may be posed by the unlawful conduct of police officers. (See generally, *Private Police in California—A Legislative Proposal, supra*, 5 Golden Gate L. Rev. 115; Bassiouni, Citizen's Arrest: The Law of Arrest, Search and Seizure for Private Citizens and Private Police (1977) p. 72.) Moreover, the application of the exclusionary rule can be expected to have a deterrent effect on such unlawful search and seizure practices since private security personnel, unlike ordinary private citizens, may regularly perform such quasi-law enforcement activities in the course of their employment. (See "Seizures by Private Parties: Exclusion in Criminal Cases" (1967) 19 *Stan. L. Rev.* 608, 614-615.)

In the instant case, however, we need not, and do not, decide whether the constitutional constraints of article I, section 13, apply to all of the varied activities of private security personnel, for here the store security forces did not act in a purely private capacity but rather were fulfilling a public function in bringing violators of the law to public justice. For reasons hereinafter expressed, we conclude that under such circumstances, i.e., when private security personnel conduct an illegal search or seizure while engaged in a statutorily authorized citizen's arrest and detention of a person in aid of law enforcement authorities, the constitutional proscriptions of article I, section 13 are applicable.

Although past cases have not applied the constitutional restrictions to purely private searches, we have recognized that some minimal official participation or encouragement may bring private action within the constitutional constraints on state action. (*Stapleton v. Superior Court, supra*, 70 Cal.2d 97, 101.) (7) As noted by the United States Supreme Court in *United States v. Price* (1965) 383 U.S. 787 [16 L. Ed. 2d 267, 86 S. Ct. 1152], a person does not need to be an officer of the state to act under color of law and therefore be responsible, along with such officers, for actions prohibited to state officials when such actions are engaged in under color of law. (*Id.*, p. 794, and fn. 7 thereunder [16 L. Ed. 2d at p. 272]; cf. *Burton v. Wilminton Pkg. Auth.* (1961) 365 U.S. 715, 725 [6 L. Ed. 2d 45, 52, 81 S. Ct. 856]; *Weeks v. U.S.* (1914) 232 U.S. 383, 398 [58 L. Ed. 652, 657, 34 S. Ct. 341]; *Marsh v. Alabama* (1946) 326 U.S. 501 [90 L. Ed. 265, 66 S. Ct. 276].)

(2c) In the instant case, the store employees arrested defendant pursuant to the authorization contained in Penal Code section 837, and the search which yielded the narcotics was conducted incident to that arrest. Their acts, engaged in pursuant to the statute, were not those of a private citizen acting in a purely private capacity. Although the search exceeded lawful authority, it was nevertheless an integral part of the exercise of sovereignty allowed by the state to private citizens. In arresting the offender, the store employees were utilizing the coercive power[31] of the state to further a state interest. Had the security guards sought only the vindication of the merchant's private interests they would have simply exercised self-help and demanded the return of the stolen merchandise.

Upon satisfaction of the merchant's interests, the offender would have been released. By holding defendant for criminal process and searching her, they went beyond their employer's private interests.

(8) (See fn. 10.) Persons so acting should be subject to the constitutional proscriptions that secure an individual's right to privacy, for their actions are taken pursuant to statutory authority to promote a state interest in bringing offenders to public accounting.[32] Unrestrained, such action would subvert state authority in defiance of its established limits. It would destroy the protection those carefully defined limits were intended to afford to everyone, the guilty and innocent alike. It would afford *de facto* authorizations for searches and seizures incident to arrests or detentions made by private individuals that even peace officers are not authorized to make. Accordingly, we hold that in any case where private security personnel assert the power of the state to make an arrest or to detain another person for transfer to custody of the state, the state involvement is sufficient for the court to enforce the proper exercise of that power (cf. *People v. Haydel* (1974) 12 Cal. 3d 190, 194 [115 Cal. Rptr. 394, 524 P.2d 866]) by excluding the fruits of illegal abuse thereof. We hold that exclusion of the illegally seized evidence is required by article I, section 13 of the California Constitution.

The judgment (order granting probation) is reversed.

DISSENT BY: CLARK

DISSENT: CLARK, J. I dissent for the reasons expressed in my dissenting opinion in *Dyas v. Superior Court* (1974) 11 Cal. 3d 628, 637-638 [114 Cal. Rptr. 114, 522 P.2d 674]. The judgment should be affirmed.

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[31]See Kelsen, *General Theory of Law and State* (Harvard University Press, 1949) pages 18-20, 50-51.

[32]We distinguish action taken pursuant to statutory authority which promotes a state interest (here, enforcement of the penal laws) from action taken pursuant to statute which merely establishes the procedure for regulation of private interests. (See, for example, *Garfinkle v. Superior Court* (1978) 21 Cal. 3d 268 [146 Cal. Rptr. 208, 578 P.2d 925].) Thus, when a merchant exercises his common law privilege (now embodied in Pen. Code, § 490.5), to detain a person suspected of taking merchandise, the merchant is exercising a purely private and self-interested right to protect his property. His conduct does not assume the color of law until he formally arrests the suspected thief, as any citizen is empowered to do (Pen. Code, § 837), or, alternatively, continues the detention for delivery of the suspect to a peace officer who may arrest. Detention and search of a shoplifter, followed by release by the merchant, brings into play no state interest that concerns us here.

Appendix 1

Florida Department of State—Division of Licensing

CHAPTER 493, FLORIDA STATUTES
PRIVATE INVESTIGATIVE, PRIVATE SECURITY, AND REPOSSESSION SERVICES Ch.493
TENTATIVE COMPILATION PENDING FINAL COMPILATION IN FLORIDA STATUTES
BY DIVISION OF STATUTORY REVISION
PRIVATE INVESTIGATIVE, PRIVATE SECURITY AND REPOSESSION SERVICES
PART I GENERAL PROVISIONS (ss. 493.6100-493.6126)
PART II PRIVATE INVESTIGATIVE SERVICES (ss. 493.6201-493.6203)
PART III PRIVATE SECURITY SERVICES (ss. 493.6301-493.6306)
PART IV REPOSESSION SERVICES (ss. 493.6401-493.6406)

PART I

GENERAL PROVISIONS

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493.6100 Legislative intent.—The Legislature recognizes that the private security, investigative, and recovery industries are rapidly expanding fields that require regulation to ensure that the interests of the public will be adequately served and protected. The Legislature recognizes that untrained persons, unlicensed persons or businesses, or persons who are not of good moral character engaged in the private security, investigative, and recovery industries are a threat to the welfare of the public if placed in positions of trust. Regulation of licensed and unlicensed persons and businesses engaged in these fields is therefore deemed necessary.

History.— ss. 2, 11, ch. 90-364; s. 4, ch. 91-429; s. 1, ch. 94-172.

493.6101 Definitions.—

(1) "Department" means the Department of State.

(2) "Person" means any individual, firm, company, agency, organization, partnership, or corporation.

(3) "Licensee" means any person licensed under this chapter.

(4) The personal pronoun "he" implies the impersonal pronoun "it."

(5) "Principal officer" means an individual who holds the office of president, vice president, secretary, or treasurer in a corporation.

(6) "Advertising" means the submission of bids, contracting, or making known by any public notice or solicitation of business, directly or indirectly, that services regulated under this chapter are available for consideration.

(7) "Good moral character" means a personal history of honesty, fairness, and respect for the rights and property of others and for the laws of this state and nation.

(8) "Conviction" means an adjudication of guilt by a federal or state court resulting from plea or trial, regardless of whether imposition of sentence was suspended.

(9) "Unarmed" means that no firearm shall be carried by the licensee while providing services regulated by this chapter.

(10) "Branch office" means each additional location of an agency where business is actively conducted which advertises as performing or is engaged in the business authorized by the license.

(11) "Sponsor" means any Class "C," Class "MA," or Class "M" licensee who supervises and maintains under his direction and control a Class "CC" intern; or any Class "E" or Class "MR" licensee who supervises and maintains under his direction and control a Class "EE" intern.

(12) "Intern" means an individual who studies as a trainee or apprentice under the direction and control of a designated sponsoring licensee.

(13) "Manager" means any licensee who directs the activities of licensees at any agency or branch office. The manager shall be assigned to and shall primarily operate from the agency or branch office location for which he has been designated as manager.

(14) "Firearm instructor" means any Class "K" licensee who provides classroom or range instruction to applicants for a Class "G" license.

(15) "Private investigative agency" means any person who, for consideration, advertises as providing or is engaged in the business of furnishing private investigations.

(16) "Private investigator" means any individual who, for consideration, advertises as providing or performs private investigation. This does not include an informant who, on a one-time or limited basis, as a result of a unique expertise, ability, vocation, or special access and who, under the direction and control of a Class "C" licensee or a Class "MA" licensee, provides information or services that would otherwise be included in the definition of private investigation.

(17)"Private investigation" means bodyguard services or the investigation by a person or persons for the purpose of obtaining information with reference to any of the following matters:

(a) Crime or wrongs done or threatened against the United States or any state or territory of the United States, when operating under express written authority of the governmental official responsible for authorizing such investigation.

(b) The identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation, or character of any society, person, or group of persons.

(c) The credibility of witnesses or other persons.

(d) The whereabouts of missing persons, owners of abandoned property or escheated property, or heirs to estates.

(e) The location or recovery of lost or stolen property.

(f) The causes and origin of, or responsibility for, fires, libels, slanders, losses, accidents, damage, or injuries to real or personal property.

(g) The business of securing evidence to be used before investigating committees or boards of award or arbitration or in the trial of civil or criminal cases and the preparation therefor.

(18) "Security agency" means any person who, for consideration, advertises as providing or is engaged in the business of furnishing security services, armored car services, or transporting prisoners. This includes any person who utilizes dogs and individuals to provide security services.

(19) "Security officer" means any individual who, for consideration, advertises as providing or performs bodyguard services or otherwise guards persons or property; attempts to prevent theft or unlawful taking of goods, wares, and merchandise; or attempts to prevent the misappropriation or concealment of goods, wares or merchandise, money, bonds, stocks, choses in action, notes, or other documents, papers, and articles of value or procurement of the return thereof. The term also includes armored car personnel and those personnel engaged in the transportation of prisoners.

(20) "Recovery agency" means any person who, for consideration, advertises as providing or is engaged in the business of performing repossessions.

(21) "Recovery agent" means any individual who, for consideration, advertises as providing or performs repossessions.

(22) "Repossession" means the recovery of a motor vehicle as defined under s. 320.01(1), or mobile home as defined in s. 320.01(2), or motorboat as defined under s. 327.02, by an individual who is authorized by the legal owner, lienholder, or lessor to recover, or to collect money payment in lieu of recovery of, that which has been sold or leased under a security agreement that contains a repossession clause. A repossession is complete when a licensed recovery agent is in control, custody, and possession of such motor vehicle, mobile home, or motorboat.

History.— ss. 2, 11, ch. 90-364; s. 4, ch. 91-429; s. 10, ch. 94-241; s. 5, ch. 96-407.

493.6102 Inapplicability of parts I through IV of this chapter.—This chapter shall not apply to:

(1) Any individual who is an "officer" as defined in s. 943.10(14) or is a law enforcement officer of the United States Government, while such local, state, or federal officer is engaged in his official duties or when performing off-duty activities, not including repossession services, approved by his superiors.

(2) Any insurance investigator or adjuster licensed by a state or federal licensing authority when such person is providing services or expert advice within the scope of his license.

(3) Any individual solely, exclusively, and regularly employed as an unarmed investigator or recovery agent in connection with the business of his employer, when there exists an employer-employee relationship.

(4) Any unarmed individual engaged in security services who is employed exclusively to work on the premises of his employer, or in connection with the business of his employer, when there exists an employer-employee relationship.

(5) Any person or bureau whose business is exclusively the furnishing of information concerning the business and financial standing and credit responsibility of persons or the financial habits and financial responsibility of applicants for insurance, indemnity bonds, or commercial credit.

(6) Any attorney in the regular practice of his profession.

(7) Any bank or bank holding company, credit union, or small loan company operating pursuant to chapters 516 and 520; any consumer credit reporting agency regulated under 15 U.S.C.css. 1681 et seq.; or any collection agency not engaged in repossessions or to any permanent employee thereof.

(8) Any person who holds a professional license under the laws of this state when such person is providing services or expert advice in the profession or occupation in which that person is so licensed.

(9) Any security agency or private investigative agency, and employees thereof, performing contractual security or investigative services solely and exclusively for any agency of the United States.

(10) Any person duly authorized by the laws of this state to operate a central burglar or fire alarm business. However, such persons are not exempt to the extent they perform services requiring licensure or registration under this chapter.

(11) Any person or company retained by a food service establishment to independently evaluate the food service establishment including quality of food, service, and facility. However, such persons are not exempt to the extent they investigate or are retained to investigate criminal or suspected criminal behavior on the part of the food service establishment employees.

(12) Any person who is a school crossing guard employed by a third party hired by a

city or county and trained in accordance with s. 234.302.

(13) Any individual employed as a security officer by a religious institution as defined in s. 199.183(2)(a) to provide security on the institution property, and who does not carry a firearm in the course of his duties.

History.— ss. 2, 11, ch. 90-364; s. 16, ch. 91-248; s. 4, ch. 91-429; s. 2, ch. 94-172; s. 6, ch. 96-407.

493.6103 Authority to make rules.—The department shall adopt rules necessary to administer this chapter. However, no rule shall be adopted that unreasonably restricts competition or the availability of services requiring licensure pursuant to this chapter or that unnecessarily increases the cost of such services without a corresponding or equivalent public benefit.

History.— ss. 2, 11, ch. 90-364; s. 4, ch. 91-429.

493.6104 Advisory council.—

(1) The department shall designate an advisory council, known as the Private Investigation, Recovery, and Security Advisory Council, to be composed of 11 members. One member must be an active law enforcement officer, certified under the Florida Criminal Justice Standards and Training Commission, representing a statewide law enforcement agency or statewide association of law enforcement agencies. One member must be the owner or operator of a business that regularly contracts with Class "A," Class "B," or Class "R" agencies. Nine members must be geographically distributed, insofar as possible, and must be licensed pursuant to this chapter. Two members must be from the security profession, one of whom represents an agency that employs 20 security guards or fewer; two members must be from the private investigative profession, one of whom represents an agency that employs five investigators or fewer; one member shall be from the repossession profession; and the remaining four members may be drawn from any of the professions regulated under this chapter.

(2) Council members shall be appointed by the Secretary of State for a 4-year term. In the event of an appointment to fill an unexpired term, the appointment shall be for no longer than the remainder of the unexpired term. No member may serve more than two full consecutive terms. Members may be removed by the Secretary of State for cause. Cause shall include, but is not limited to, absences from two consecutive meetings.

(3) Members shall elect a chairperson annually. No member may serve as chairperson more than twice.

(4) The council shall meet at least 4 times yearly upon the call of the chairperson, at the request of a majority of the membership, or at the request of the department. Notice of council meetings and the agenda shall be published in the Florida Administrative Weekly at least 14 days prior to such meeting.

(5) The council shall advise the department and make recommendations relative to the regulation of the security, investigative, and recovery industries.

(6) Council members shall serve without pay; however, state per diem and travel allowances may be claimed for attendance at officially called meetings as provided by s. 112.061.

(7) A quorum of six members shall be necessary for a meeting to convene or continue. All official action taken by the council shall be by simple majority of those members present. Members may not participate or vote by proxy. Meetings shall be recorded, and minutes of the meetings shall be maintained by the department.

(8) The director of the Division of Licensing or his designee shall serve, in a nonvoting capacity, as secretary to the council. The Division of Licensing shall provide all administrative and legal support required by the council in the conduct of its official business.

History.— ss. 2, 11, ch. 90-364; s. 4, ch. 91-429; s. 3, ch. 94-172.

493.6105 Initial application for license.—

(1) Each individual, partner, or principal officer in a corporation, shall file with the department a complete application accompanied by an application fee not to exceed $60, except that the applicant for a Class "D" or Class "G" license shall not be required to submit an application fee. The application fee shall not be refundable.

(a) The application submitted by any individual, partner, or corporate officer shall be approved by the department prior to that individual, partner, or corporate officer assuming his duties.

(b) Individuals who invest in the ownership of a licensed agency, but do not participate in, direct, or control the operations of the agency shall not be required to file an application.

(2) Each application shall be signed by the individual under oath and shall be notarized.

(3) The application shall contain the following information concerning the individual signing same:

(a) His name and any aliases.

(b) His age and date of birth.

(c) His place of birth.

(d) His social security number or alien registration number, whichever is applicable.

(e) His present residence address and his residence addresses within the 5 years immediately preceding the submission of the application.

(f) His occupations held presently and within the 5 years immediately preceding the submission of the application.

(g) A statement of all convictions.

(h) A statement whether he has ever been adjudicated incompetent under chapter 744.

(i) A statement whether he has ever been committed to a mental institution under chapter 394.

(j) A full set of fingerprints on a card provided by the department and a fingerprint fee to be established by rule of the department based upon costs determined by state and federal agency charges and department processing costs. An applicant who has, within the immediately preceding 6 months, submitted a fingerprint card and fee for licensing purposes under this chapter shall not be required to submit another fingerprint card or fee.

(k) A personal inquiry waiver which allows the department to conduct necessary investigations to satisfy the requirements of this chapter.

(l) Such further facts as may be required by the department to show that the individual signing the application is of good moral character and qualified by experience and training to satisfy the requirements of this chapter.

(4) In addition to the application requirements outlined in subsection (3), the applicant for a Class "C," Class "CC," Class "E," Class "EE," or Class "G" license shall submit two color photographs taken within the 6 months immediately preceding the submission of the application, which meet specifications prescribed by rule of the department. All other applicants shall submit one photograph taken within the 6 months immediately preceding the submission of the application.

(5) In addition to the application requirements outlined under subsection (3), the applicant for a Class "C," Class "E," Class "M," Class "MA," Class "MB," or Class "MR" license shall include a statement on a form provided by the department of the experience which he believes will qualify him for such license.

(6) In addition to the requirements outlined in subsection (3), an applicant for a Class "G" license shall satisfy minimum training criteria for firearms established by rule of the department, which training criteria shall include, but is not limited to, 24 hours of range and classroom training taught and administered by a firearms instructor who has been licensed by the department; however, no more than 8 hours of such training shall consist of range training. The department shall, effective October 1, 1992, increase the minimum number of hours of firearms training required for Class "G" licensure by 4 hours, and shall subsequently increase the training requirement by 4 hours every 2 years, up to a maximum requirement of 48 hours. If the applicant can show proof that he is an active law enforcement officer currently certified under the Criminal Justice Standards and Training Commission, or if the applicant submits one of the certificates specified in paragraph (7)(a), the department may waive the firearms training requirement referenced above.

(7) In addition to the requirements under subsection (3), an applicant for a Class "K" license shall:

(a) Submit one of the following certificates:

1. The Florida Criminal Justice Standards and Training Commission Firearms Instructor's Certificate.
2. The National Rifle Association Police Firearms Instructor's Certificate.
3. The National Rifle Association Security Firearms Instructor's Certificate.
4. A Firearms Instructor's Certificate from a federal, state, county, or municipal police academy in this state recognized as such by the Criminal Justice Standards and Training Commission or by the Department of Education.

(b) Pay the fee for and pass an examination administered by the department which shall be based upon, but is not necessarily limited to, a firearms instruction manual provided by the department.

(8) In addition to the application requirements for individuals, partners, or officers outlined under subsection (3), the application for an agency license shall contain the following information:

(a) The proposed name under which the agency intends to operate.

(b) The street address, mailing address, and telephone numbers of the principal location at which business is to be conducted in this state.

(c) The street address, mailing address, and telephone numbers of all branch offices within this state.

(d) The names and titles of all partners or, in the case of a corporation, the names and titles of its principal officers.

(9) Upon submission of a complete application, a Class "CC," Class "C," Class "D," Class "EE," Class "E," Class "M," Class "MA," Class "MB," or Class "MR" applicant

may commence employment or appropriate duties for a licensed agency or branch office. However, the Class "C" or Class "E" applicant must work under the direction and control of a sponsoring licensee while his application is being processed. If the department denies application for licensure, the employment of the applicant must be terminated immediately, unless he performs only unregulated duties.

History.— ss. 2, 11, ch. 90-364; s. 1, ch. 91-248; s. 4, ch. 91-429; s. 1, ch. 93-49.

493.6106 License requirements; posting.—

(1) Each individual licensed by the department must:

(a) Be at least 18 years of age.

(b) Be of good moral character.

(c) Not have been adjudicated incapacitated under s. 744.331 or a similar statute in another state, unless his capacity has been judicially restored; not have been involuntarily placed in a treatment facility for the mentally ill under chapter 394 or a similar statute in any other state, unless his competency has been judicially restored; and not have been diagnosed as having an incapacitating mental illness, unless a psychologist or psychiatrist licensed in this state certifies that he does not currently suffer from the mental illness.

(d) Not be a chronic and habitual user of alcoholic beverages to the extent that his normal faculties are impaired; not have been committed under chapter 397, former chapter 396, or a similar law in any other state; not have been found to be a habitual offender under s. 856.011(3) or a similar law in any other state; and not have had two or more convictions under s. 316.193 or a similar law in any other state within the 3-year period immediately preceding the date the application was filed, unless he establishes that he is not currently impaired and has successfully completed a rehabilitation course.

(e) Not have been committed for controlled substance abuse or have been found guilty of a crime under chapter 893 or a similar law relating to controlled substances in any other state within a 3-year period immediately preceding the date the application was filed, unless he establishes that he is not currently abusing any controlled substance and has successfully completed a rehabilitation course.

(f) Be a citizen or legal resident alien of the United States or have been granted authorization to seek employment in this country by the United States Immigration and Naturalization Service.

(2) Each agency shall have a minimum of one physical location within this state from which the normal business of the agency is conducted, and this location shall be considered the primary office for that agency in this state.

(a) If an agency desires to change the physical location of the business, as it appears on the agency license, the department must be notified within 10 days of the change, and, except upon renewal, the fee prescribed in s. 493.6107 must be submitted for each license requiring revision. Each license requiring revision must be returned with such notification.

(b) The Class "A," Class "B," or Class "R" license and any branch office or school license shall at all times be posted in a conspicuous place at the licensed physical location in this state where the business is conducted.

(c) Each Class "A," Class "B," Class "R," branch office, or school licensee shall display, in a place that is in clear and unobstructed public view, a notice on a form prescribed by the department stating that the business operating at this location is licensed and regulated by the Department of State and that any questions or complaints should be directed to the department.

(d) A minimum of one properly licensed manager shall be designated for each agency and branch office location.

(3) Each Class "C," Class "CC," Class "D," Class "DI," Class "E," Class "EE," Class "G," Class "K," Class "M," Class "MA," Class "MB," Class "MR," or Class "RI" licensee shall notify the division in writing within 10 days of a change in his residence or mailing address.

History.—ss. 2, 11, ch. 90-364; s. 2, ch. 91-248; s. 4, ch. 91-429; s. 2, ch. 93-49; s. 4, ch. 94-172.

493.6107 Fees.—

(1) The department shall establish by rule examination and biennial license fees which shall not exceed the following:

(a) Class "M" license—manager Class "AB" agency: $75.

(b) Class "G" license—statewide firearm license: $150.

(c) Class "K" license—firearms instructor: $100.

(d) Fee for the examination for firearms instructor: $75.

(2) The department may establish by rule a fee for the replacement or revision of a license which fee shall not exceed $30.

(3) The fees set forth in this section must be paid by certified check or money order or, at the discretion of the department, by agency check at the time the application is approved, except that the applicant for a Class "G" or Class "M" license must pay the license fee at the time the application is

made. If a license is revoked or denied or if the application is withdrawn, the license fee shall not be refunded.

(4) The department may prorate license fees.

(5) Payment of any license fee provided for under this chapter authorizes the licensee to practice his profession anywhere in this state without obtaining any additional license, permit, registration, or identification card, any municipal or county ordinance or resolution to the contrary notwithstanding. However, an agency may be required to obtain a city and county occupational license in each city and county where the agency maintains a physical office.

History.—ss. 2, 11, ch. 90-364; s. 3, ch. 91-248; s. 4, ch. 91-429; s. 5, ch. 94-172.

493.6108 Investigation of applicants by Department of State.—

(1) Except as otherwise provided, prior to the issuance of a license under this chapter, the department shall make an investigation of the applicant for a license. The investigation shall include:

(a) 1. An examination of fingerprint records and police records. When a criminal history analysis of any applicant under this chapter is performed by means of fingerprint card identification, the time limitations prescribed by s. 120.60(1) shall be tolled during the time the applicant's fingerprint card is under review by the Department of Law Enforcement or the United States Department of Justice, Federal Bureau of Investigation.

2. If a legible set of fingerprints, as determined by the Department of Law Enforcement or the Federal Bureau of Investigation, cannot be obtained after two attempts, the Department of State may determine the applicant's eligibility based upon a criminal history record check under the applicant's name conducted by the Department of Law Enforcement and the Federal Bureau of Investigation. A set of fingerprints taken by a law enforcement agency and a written statement signed by the fingerprint technician or a licensed physician stating that there is a physical condition that precludes obtaining a legible set of fingerprints or that the fingerprints taken are the best that can be obtained is sufficient to meet this requirement.

(b) An inquiry to determine if the applicant has been adjudicated incompetent under chapter 744 or has been committed to a mental institution under chapter 394.

(c) Such other investigation of the individual as the department may deem necessary.

(2) In addition to subsection (1), the department shall make an investigation of the general physical fitness of the Class "G" applicant to bear a weapon or firearm. Determination of physical fitness shall be certified by a physician currently licensed pursuant to chapter 458 or chapter 459 or authorized to act as a licensed physician by a federal agency or department. Such certification shall be submitted on a form provided by the department.

(3) The department shall also investigate the mental history and current mental and emotional fitness of any Class "G" applicant, and shall deny a Class "G" license to anyone who has a history of mental illness or drug or alcohol abuse.

History.—ss. 2, 11, ch. 90-364; s. 4, ch. 91-429; s. 3, ch. 93-49; s. 6, ch. 94-172; s. 230, ch. 96-410.

493.6109 Reciprocity.—

(1) The department may adopt rules for:

(a) Entering into reciprocal agreements with other states or territories of the United States for the purpose of licensing persons to perform activities regulated under this chapter who are currently licensed to perform similar services in the other states or territories; or

(b) Allowing a person who is licensed in another state or territory to perform similar services in this state, on a temporary and limited basis, without the need for licensure in state.

(2) The rules authorized in subsection (1) may be promulgated only if:

(a) The other state or territory has requirements which are substantially similar to or greater than those established in this chapter.

(b) The applicant has engaged in licensed activities for at least 1 year in the other state or territory with no disciplinary action against him.

(c) The Secretary of State or other appropriate authority of the other state or territory agrees to accept service of process for those licensees who are operating in this state on a temporary basis.

History.—ss. 2, 11, ch. 90-364; s. 4, ch. 91-429.

493.6110 Licensee's insurance.—No agency license shall be issued unless the applicant first files with the department a certification of insurance evidencing coverage as delineated below. The coverage shall provide the department as an additional insured for the purpose of receiving all notices of modification or cancellation of such insurance. Coverage shall be written by an insurance company which is lawfully engaged to provide insurance coverage in Florida.

Coverage shall provide for a combined single-limit policy in the amount of at least $300,000, which policy shall include comprehensive general liability coverage for death, bodily injury, property damage, and personal injury coverage including false arrest, detention or imprisonment, malicious prosecution, libel, slander, defamation of character, and violation of the right of privacy. Coverage shall insure for the liability of all employees licensed by the department while acting in the course of their employment.

(1) The licensed agency shall notify the department of any claim against such insurance.

(2) The licensed agency shall notify the department immediately upon cancellation of the insurance policy, whether such cancellation was initiated by the insurance company or the insured agency.

(3) The agency license shall be automatically suspended upon the date of cancellation unless evidence of insurance is provided to the department prior to the effective date of cancellation.

History.—ss. 2, 11, ch. 90-364; s. 4, ch. 91-248; s. 4, ch. 91-429.

493.6111 License; contents; identification card.—

(1) All licenses issued pursuant to this chapter shall be on a form prescribed by the department and shall include the licensee's name, license number, expiration date of the license, and any other information the department deems necessary. Class "C," Class "CC," Class "D," Class "E," Class "EE," Class "M," Class "MA," Class "MB," Class "MR," and Class "G" licenses shall be in the possession of individual licensees while on duty.

(2) Licenses shall be valid for a period of 2 years.

(3) The department shall, upon complete application and payment of the appropriate fees, issue a separate license to each branch office for which application is made.

(4) Notwithstanding the existence of a valid Florida corporate registration, no agency licensee may conduct activities regulated under this chapter under any fictitious name without prior written authorization from the department to use that name in the conduct of activities regulated under this chapter. The department may not authorize the use of a name which is so similar to that of a public officer or agency, or of that used by another licensee, that the public may be confused or misled thereby. The authorization for the use of a fictitious name shall require, as a condition precedent to the use of such name, the filing of a certificate of engaging in business under a fictitious name under s. 865.09. No licensee shall be permitted to conduct business under more than one name except as separately licensed nor shall the license be valid to protect any licensee who is engaged in the business under any name other than that specified in the license. An agency desiring to change its licensed name shall notify the department and, except upon renewal, pay a fee not to exceed $30 for each license requiring revision including those of all licensed employees except Class "D" or Class "G" licensees. Upon the return of such licenses to the department, revised licenses shall be provided.

(5) It shall be the duty of every agency to furnish all of its partners, principal corporate officers, and all licensed employees an identification card. The card shall specify at least the name and license number, if appropriate, of the holder of the card and the name and license number of the agency and shall be signed by a representative of the agency and by the holder of the card.

(a) Each individual to whom a license and identification card have been issued shall be responsible for the safekeeping thereof and shall not loan, or let or allow any other individual to use or display, the license or card.

(b) The identification card shall be in the possession of each partner, principal corporate officer, or licensed employee while on duty.

(c) Upon denial, suspension, or revocation of a license, or upon termination of a business association with the licensed agency, it shall be the duty of each partner, principal corporate officer, manager, or licensed employee to return the identification card to the issuing agency.

(6) A licensed agency must include its agency license number in any advertisement in any print medium or directory, and must include its agency license number in any written bid or offer to provide services.

History.—ss. 2, 11, ch. 90-364; s. 5, ch. 91-248; s. 4, ch. 91-429; s. 4, ch. 93-49.

493.6112 Notification to Department of State of changes of partner or officer or employees.—

(1) After filing the application, unless the department declines to issue the license or revokes it after issuance, an agency or school shall, within 5 working days of the withdrawal, removal, replacement, or addition of any or all partners or officers, notify and file with the department complete applications for such individuals. The agency's or school's good standing under this chapter shall be contingent upon the

department's approval of any new partner or officer.

(2) Each agency or school shall, upon the employment or termination of employment of a licensee, report such employment or termination immediately to the department and, in the case of a termination, report the reason or reasons therefor. The report shall be on a form prescribed by the department.

History.—ss. 2, 11, ch. 90-364; s. 4, ch. 91-429.

493.6113 Renewal application for licensure.—

(1) A license granted under the provisions of this chapter shall be renewed biennially by the department.

(2) No less than 90 days prior to the expiration date of the license, the department shall mail a written notice to the last known residence address for individual licensees and to the last known agency address for agencies.

(3) Each licensee shall be responsible for renewing his license on or before its expiration by filing with the department an application for renewal accompanied by payment of the prescribed license fee.

(a) Each Class "A," Class "B," or Class "R" licensee shall additionally submit on a form prescribed by the department a certification of insurance which evidences that the licensee maintains coverage as required under s. 493.6110.

(b) Each Class "G" licensee shall additionally submit proof that he has received during each year of the license period a minimum of 4 hours of firearms recertification training taught by a Class "K" licensee and has complied with such other health and training requirements which the department may adopt by rule. If proof of a minimum of 4 hours of annual firearms recertification training cannot be provided, the renewal applicant shall complete the minimum number of hours of range and classroom training required at the time of initial licensure.

(c) Each Class "DS" or Class "RS" licensee shall additionally submit the current curriculum, examination, and list of instructors.

(4) A licensee who fails to file a renewal application on or before its expiration must renew his license by fulfilling the applicable requirements of subsection (3) and by paying a late fee equal to the amount of the license fee.

(5) No license shall be renewed 3 months or more after its expiration date. The applicant shall submit a new, complete application and the respective fees.

(6) A renewal applicant shall not perform any activity regulated by this chapter between the date of expiration and the date of renewal of his license.

History.—ss. 2, 11, ch. 90-364; s. 6, ch. 91-248; s. 4, ch. 91-429; s. 43, ch. 95-144.

493.6114 Cancellation or inactivation of license.—

(1) In the event the licensee desires to cancel his license, he shall notify the department in writing and return his license to the department within 10 days of the date of cancellation.

(2) The department, at the written request of the licensee, may place his license in inactive status. A license may remain inactive for a period of 3 years, at the end of which time, if the license has not been renewed, it shall be automatically canceled. If the license expires during the inactive period, the licensee shall be required to pay license fees and, if applicable, show proof of insurance or proof of firearms training before the license can be made active. No late fees shall apply when a license is in inactive status.

History.—ss. 2, 11, ch. 90-364; s. 4, ch. 91-429.

493.6115 Weapons and firearms.—

(1) The provisions of this section shall apply to all licensees in addition to the other provisions of this chapter.

(2) Only Class "C," Class "CC," Class "D," Class "M," Class "MA," or Class "MB" licensees are permitted to bear a firearm and any such licensee who bears a firearm shall also have a Class "G" license.

(3) No employee shall carry or be furnished a weapon or firearm unless the carrying of a weapon or firearm is required by his duties, nor shall an employee carry a weapon or firearm except in connection with those duties. When carried pursuant to this subsection, the weapon or firearm shall be encased in view at all times except as provided in subsection (4).

(4) A Class "C" or Class "CC" licensee 21 years of age or older who has also been issued a Class "G" license may carry, in the performance of his duties, a concealed firearm. A Class "D" licensee 21 years of age or older who has also been issued a Class "G" license may carry a concealed firearm in the performance of his duties under the conditions specified in s. 493.6305(2). The Class "G" license shall clearly indicate such authority. The authority of any such licensee to carry a concealed firearm shall be valid throughout the state, in any location, while performing services within the scope of the license.

(5) The Class "G" license shall remain in effect only during the period the applicant is employed as a Class "C," Class "CC," Class "D," Class "MA," Class "MB," or Class "M" licensee.

(6) Unless otherwise approved by the department, the only firearm a Class "CC," Class "D," Class "M," or Class "MB" licensee who has been issued a Class "G" license may carry is a .38 or .357 caliber revolver with factory .38 caliber ammunition only. In addition to any other firearm approved by the department, a Class "C" and Class "MA" licensee who has been issued a Class "G" license may carry a .38 caliber revolver; or a .380 caliber or 9 millimeter semiautomatic pistol; or a .357 caliber revolver with .38 caliber ammunition only. No licensee may carry more than two firearms upon his person when performing his duties. A licensee may only carry a firearm of the specific type and caliber with which he is qualified pursuant to the firearms training referenced in subsection (8) or s. 493.6113 (3)(b).

(7) Any person who provides classroom and range instruction to applicants for Class "G" licensure shall have a Class "K" license.

(8) A Class "G" licensee must satisfy the minimum training criteria established by rule of the department, which criteria must include, but need not be limited to, 28 hours of range and classroom training taught and administered by a Class "K" licensee; however, no more than 8 hours of such training shall consist of range training. If the applicant can show proof that he is an active law enforcement officer currently certified under the Criminal Justice Standards and Training Commission, or if the applicant submits one of the certifications specified under s. 493.6105(7)(a), the department may waive the foregoing firearms training requirements.

(9) Whenever a Class "G" licensee discharges his firearm in the course of his duties, he and the agency by which he is employed shall, within 5 working days, submit to the department an explanation describing the nature of the incident, the necessity for using the firearm, and a copy of any report prepared by a law enforcement agency. The department may revoke or suspend the Class "G" licensee's license and the licensed agency's agency license if this requirement is not met.

(10) The department may promulgate rules to establish minimum standards to issue licenses for weapons other than firearms.

(11) The department may establish rules to require periodic classroom training for firearms instructors to provide updated information relative to curriculum or other training requirements provided by statute or rule.

(12) The department may issue a temporary Class "G" license, on a case-by-case basis, if:

(a) The agency or employer has certified that the applicant has been determined to be mentally and emotionally stable by either:

1. A validated written psychological test taken within the previous 12-month period.
2. An evaluation by a psychiatrist or psychologist licensed in this state or by the Federal Government made within the previous 12-month period.
3. Presentation of a DD form 214, issued within the previous 12-month period, which establishes the absence of emotional or mental instability at the time of discharge from military service.

(b) The applicant has submitted a complete application for a Class "G" license, with a notation that he is seeking a temporary Class "G" license.

(c) The applicant has completed all Class "G" minimum training requirements as specified in this section.

(d) The applicant has received approval from the department subsequent to its conduct of a criminal history record check as authorized in s. 493.6121(6).

(13) In addition to other fees, the department may charge a fee, not to exceed $25, for processing a Class "G" license application as a temporary Class "G" license request.

(14) Upon issuance of the temporary Class "G" license, the licensee is subject to all of the requirements imposed upon Class "G" licensees.

(15) The temporary Class "G" license is valid until the Class "G" license is issued or denied. If the department denies the Class "G" license, any temporary Class "G" license issued to that individual is void, and the individual shall be removed from armed duties immediately.

(16) If the criminal history record check program referenced in s. 493.6121(6) is inoperable, the department may issue a temporary "G" license on a case-by-case basis, provided that the applicant has met all statutory requirements for the issuance of a temporary "G" license as specified in subsection (12), excepting the criminal history record check stipulated there; provided, that the department requires that the licensed employer of the applicant conduct a criminal history record check of the applicant pursuant to standards set forth in rule by the department, and provide to the department an affidavit containing such information and statements as required by the department, including a statement that the criminal history record check did not indicate the existence of any criminal history that would prohibit licensure. Failure to

properly conduct such a check, or knowingly providing incorrect or misleading information or statements in the affidavit shall constitute grounds for disciplinary action against the licensed agency, including revocation of license.

(17) No person is exempt from the requirements of this section by virtue of holding a concealed weapon or concealed firearm license issued pursuant to s. 790.06.

History.—ss. 2, 11, ch. 90-364; s. 7, ch. 91-248; s. 4, ch. 91-429; s. 7, ch. 94-172.

493.6116 Sponsorship of interns.—

(1) Only licensees may sponsor interns. A Class "C," Class "M," or Class "MA" licensee may sponsor a Class "CC" private investigator intern; a Class "E" or Class "MR" licensee may sponsor a Class "EE" recovery agent intern.

(2) An internship may not commence until the sponsor has submitted to the department the notice of intent to sponsor. Such notice shall be on a form provided by the department.

(3) Internship is intended to serve as a learning process. Sponsors shall assume a training status by providing direction and control of interns. Sponsors shall only sponsor interns whose place of business is within a 50-mile distance of the sponsor's place of business and shall not allow interns to operate independently of such direction and control, or require interns to perform activities which do not enhance the intern's qualification for licensure.

(4) No sponsor may sponsor more than six interns at the same time.

(5) A sponsor shall certify a biannual progress report on each intern and shall certify completion or termination of an internship to the department within 15 days after such completion or termination. The report must be made on a form provided by the department and must include at a minimum:

(a) The inclusive dates of the internship.

(b) A narrative part explaining the primary duties, types of experiences gained, and the scope of training received.

(c) An evaluation of the performance of the intern and a recommendation regarding future licensure.

History.—ss. 2, 11, ch. 90-364; s. 4, ch. 91-429; s. 8, ch. 94-172; s. 68, ch. 95-144.

493.6117 Division of Licensing Trust Fund.—There is created within the Division of Licensing of the department a Division of Licensing Trust Fund. All moneys required to be paid under this chapter shall be collected by the department and deposited in the trust fund. The Division of Licensing Trust Fund shall be subject to the service charge imposed pursuant to chapter 215. The Legislature shall appropriate from the fund such amounts as it deems necessary for the purpose of administering the provisions of this chapter. The unencumbered balance in the trust fund at the beginning of the year shall not exceed $100,000, and any excess shall be transferred to the General Revenue Fund unallocated.

History.—ss. 2, 11, ch. 90-364; s. 4, ch. 91-429.

493.6118 Grounds for disciplinary action.—

(1) The following constitute grounds for which disciplinary action specified in subsection(2) may be taken by the department against any licensee, agency, or applicant regulated by this chapter, or any unlicensed person engaged in activities regulated under this chapter.

(a) Fraud or willful misrepresentation in applying for or obtaining a license.

(b) Use of any fictitious or assumed name by an agency unless the agency has department approval and qualifies under s. 865.09.

(c) Conviction of a crime that directly relates to the business for which the license is held or sought, regardless of whether imposition of sentence was suspended. A conviction based on a plea of nolo contendere creates a rebuttable presumption of guilt to the underlying criminal charges, and the department shall allow the individual being disciplined or denied an application for a license to present any mitigating evidence relevant to the reason for, and the circumstances surrounding, his plea.

(d) A false statement by the licensee that any individual is or has been in his employ.

(e) A finding that the licensee or any employee is guilty of willful betrayal of a professional secret or any unauthorized release of information acquired as a result of activities regulated under this chapter.

(f) Proof that the applicant or licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of the activities regulated under this chapter.

(g) Conducting activities regulated under this chapter without a license or with a revoked or suspended license.

(h) Failure of the licensee to maintain in full force and effect the general liability insurance coverage required by s. 493.6110.

(i) Impersonating, or permitting or aiding and abetting an employee to impersonate, a law enforcement officer or an employee of the state, the United States, or any political subdivision thereof by identifying himself as a federal, state, county, or municipal law enforcement officer or official representative, by wearing a uniform or presenting or

displaying a badge or credentials that would cause a reasonable person to believe that he is a law enforcement officer or that he has official authority, by displaying any flashing or warning vehicular lights other than amber colored, or by committing any act that is intended to falsely convey official status.

(j) Commission of an act of violence or the use of force on any person except in the lawful protection of one's self or another from physical harm.

(k) Knowingly violating, advising, encouraging, or assisting the violation of any statute, court order, capias, warrant, injunction, or cease and desist order, in the course of business regulated under this chapter.

(l) Soliciting business for an attorney in return for compensation.

(m) Transferring or attempting to transfer a license issued pursuant to this chapter.

(n) Employing or contracting with any unlicensed or improperly licensed person or agency to conduct activities regulated under this chapter, or performing any act that assists, aids, or abets a person or business entity in engaging in unlicensed activity, when the licensure status was known or could have been ascertained by reasonable inquiry.

(o) Failure or refusal to cooperate with or refusal of access to an authorized representative of the department engaged in an official investigation pursuant to this chapter.

(p) Failure of any partner, principal corporate officer, or licensee to have his identification card in his possession while on duty.

(q) Failure of any licensee to have his license in his possession while on duty, as specified in s. 493.6111(1).

(r) Failure or refusal by a sponsor to certify a biannual written report on an intern or to certify completion or termination of an internship to the department within 15 working days.

(s) Failure to report to the department any person whom the licensee knows to be in violation of this chapter or the rules of the department.

(t) Violating any provision of this chapter.

(u) In addition to the grounds for disciplinary action prescribed in paragraphs (a)-(t), Class "R" recovery agencies, Class "E" recovery agents, and Class "EE" recovery agent interns are prohibited from committing the following acts:

1. Recovering a motor vehicle, mobile home, or motorboat that has been sold under a conditional sales agreement or under the terms of a chattel mortgage beforeauthorization has been received from the legal owner or mortgagee.
2. Charging for expenses not actually incurred in connection with the recovery, transportation, storage, or disposal of a motor vehicle, mobile home, motorboat, or personal property.
3. Using any motor vehicle, mobile home, or motorboat that has been repossessed, or using personal property obtained in a repossession, for the personal benefit of a licensee or an officer, director, partner, manager, or employee of a licensee.
4. Selling a motor vehicle, mobile home, or motorboat recovered under the provisions of this chapter, except with written authorization from the legal owner or the mortgagee thereof.
5. Failing to notify the police or sheriff's department of the jurisdiction in which the repossessed property is recovered within 2 hours after recovery.
6. Failing to remit moneys, collected in lieu of recovery of a motor vehicle, mobile home, or motorboat, to the client within 10 working days.
7. Failing to deliver to the client a negotiable instrument that is payable to the client, within 10 working days after receipt of such instrument.
8. Falsifying, altering, or failing to maintain any required inventory or records regarding disposal of personal property contained in or on a recovered motor vehicle, mobile home, or motorboat pursuant to s. 493.6404(1).
9. Carrying any weapon or firearm when he is on private property and performing duties under his license whether or not he is licensed pursuant to s. 790.06.
10. Soliciting from the legal owner the recovery of property subject to repossession after such property has been seen or located on public or private property if the amount charged or requested for such recovery is more than the amount normally charged for such a recovery.
11. Wearing, presenting, or displaying a badge in the course of repossessing a motor vehicle, mobile home, or motorboat.

(2) When the department finds any violation of subsection (1), it may do one or more of the following:

(a) Deny an application for the issuance or renewal of a license.

(b) Issue a reprimand.
(c) Impose an administrative fine not to exceed $1,000 for every count or separate offense.
(d) Place the licensee on probation for a period of time and subject to such conditions as the department may specify.
(e) Suspend or revoke a license.
(3) The department may deny an application for licensure citing lack of good moral character only if the finding by the department of lack of good moral character is supported by clear and convincing evidence. In such cases, the department shall furnish the applicant a statement containing the findings of the department, a complete record of the evidence upon which the determination was based, and a notice of the rights of the applicant to an administrative hearing and subsequent appeal.
(4) Notwithstanding the provisions of paragraph (1)(c) and subsection (2), if the applicant or licensee has been convicted of a felony in any state or of a crime against the United States which is designated as a felony, or convicted of an offense in any other state, territory, or country punishable by imprisonment for a term exceeding 1 year, the department shall deny the application or revoke the license unless and until civil rights have been restored by the State of Florida or by a state acceptable to Florida and a period of 10 years has expired since final release from supervision. Additionally, a Class "G" applicant who has been so convicted shall also have had the specific right to possess, carry, or use a firearm restored by the State of Florida. A conviction based on a plea of nolo contendere shall create a rebuttable presumption of guilt to the underlying criminal charges, and the department shall allow the person being disciplined or denied an application for a license to present any mitigating evidence relevant to the reason for, and the circumstances surrounding, his plea. The department shall deny the application of any applicant who is currently serving a suspended sentence on a felony charge, or is on probation on a felony charge. The grounds for discipline or denial cited in this subsection shall be applied to any disqualifying criminal history regardless of the date of commission of the underlying criminal charge. Such provision shall be applied retroactively and prospectively.
(5) Upon revocation or suspension of a license, the licensee shall forthwith return the license which was suspended or revoked.
(6) The agency license and the approval or license of each officer, partner, or owner of the agency are automatically suspended upon entry of a final order imposing an administrative fine against the agency, until the fine is paid, if 30 calendar days have elapsed since the entry of the final order. All owners and corporate or agency officers or partners are jointly and severally liable for agency fines. Neither the agency license or the approval or license of any officer, partner, or owner of the agency may be renewed, nor may an application be approved if the owner, licensee, or applicant is liable for an outstanding administrative fine imposed under this chapter. An individual's approval or license becomes automatically suspended if a fine imposed against the individual or his agency is not paid within 30 days after the date of the final order, and remains suspended until the fine is paid. Notwithstanding the provisions of this subsection, an individual's approval or license may not be suspended nor may an application be denied when the licensee or the applicant has an appeal from a final order pending in any appellate court.
(7) An applicant or licensee shall be ineligible to reapply for the same class of license for a period of 1 year following final agency action resulting in the denial or revocation of a license applied for or issued under this chapter. This time restriction shall not apply to administrative denials wherein the basis for denial was:
(a) An inadvertent error or omission on the application;
(b) The experience documented by the department was insufficient at the time of application;
(c) The department was unable to complete the criminal background investigation due to insufficient information from the Department of Law Enforcement, the Federal Bureau of Investigation, or any other applicable law enforcement agency; or
(d) Failure to submit required fees.

History.—ss. 2, 11, ch. 90-364; s. 8, ch. 91-248; s. 4, ch. 91-429; s. 5, ch. 93-49; s. 9, ch. 94-172.

493.6119 Divulging investigative information; false reports prohibited.—
(1) Except as otherwise provided by this chapter or other law, no licensee, or any employee of a licensee or licensed agency shall divulge or release to anyone other than his client or employer the contents of an investigative file acquired in the course of licensed investigative activity. However, the prohibition of this section shall not apply when the client for whom the information was acquired, or his lawful representative, has alleged a violation of this chapter by the licensee, licensed agency, or any employee, or when the prior written consent of the client to divulge or release such information has been obtained.

(2) Nothing in this section shall be construed to deny access to any business or operational records, except as specified in subsection (1), by an authorized representative of the department engaged in an official investigation, inspection, or inquiry pursuant to the regulatory duty and investigative authority of this chapter.

(3) Any licensee or employee of a licensee or licensed agency who, in reliance on subsection (1), denies access to an investigative file to an authorized representative of the department shall state such denial in writing within 2 working days of the request for access. Such statement of denial shall include the following:

(a) That the information requested was obtained by a licensed private investigator on behalf of a client; and

(b) That the client has been advised of the request and has denied permission to grant access; or

(c) That the present whereabouts of the client is unknown or attempts to contact the client have been unsuccessful but, in the opinion of the person denying access, review of the investigative file under conditions specified by the department would be contrary to the interests of the client; or

(d) That the requested investigative file will be provided pursuant to a subpoena issued by the department.

(4) No licensee or any employer or employee of a licensee or licensed agency shall willfully make a false statement or report to his client or employer or an authorized representative of the department concerning information acquired in the course of activities regulated by this chapter.

History.—ss. 2, 11, ch. 90-364; s. 4, ch. 91-429.

493.6120 Violations; penalty.—

(1) Any person who violates any provision of this chapter except s. 493.6405 commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) Any person who is convicted of any violation of this chapter shall not be eligible for licensure for a period of 5 years.

(3) Any person who violates or disregards any cease and desist order issued by the department commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. In addition, the department may seek the imposition of a civil penalty not to exceed $5,000.

(4) Any person who was an owner, officer, partner, or manager of a licensed agency at the time of any activity that is the basis for revocation of the agency or branch office license and who knew or should have known of the activity, shall have his personal licenses or approval suspended for 3 years and may not have any financial interest in or be employed in any capacity by a licensed agency during the period of suspension.

History.—ss. 2, 11, ch. 90-364; s. 4, ch. 91-429; s. 6, ch. 93-49.

493.6121 Enforcement; investigation.—

(1) The department shall have the power to enforce the provisions of this chapter, irrespective of the place or location in which the violation occurred, and, upon the complaint of any person or on its own initiative, to cause to be investigated any suspected violation thereof or to cause to be investigated the business and business methods of any licensed or unlicensed person, agency or employee thereof, or applicant for licensure under this chapter.

(2) In any investigation undertaken by the department, each licensed or unlicensed person, applicant, agency, or employee shall, upon request of the department provide records and shall truthfully respond to questions concerning activities regulated under this chapter. Such records shall be maintained in this state for a period of 2 years at the principal place of business of the licensee, or at any other location within the state for a person whose license has been terminated, canceled, or revoked. Upon request by the department the records must be made available immediately to the department unless the department determines that an extension may be granted.

(3) The department shall have the authority to investigate any licensed or unlicensed person, firm, company, partnership, or corporation when such person, firm, company, partnership, or corporation is advertising as providing or is engaged in performing services which require licensure under this chapter or when a licensee is engaged in activities which do not comply with or are prohibited by this chapter; and the department shall have the authority to issue an order to cease and desist the further conduct of such activities, or seek an injunction, or take other appropriate action pursuant to s. 493.6118(2)(a) or (c).

(4) In the exercise of its enforcement responsibility and in the conduct of any investigation authorized by this chapter, the department shall have the power to subpoena and bring before it any person in the state, require the production of any papers it deems necessary, administer oaths, and take depositions of any persons so subpoenaed. Failure or refusal of any person properly subpoenaed to be examined or to answer any question about his qualifications or the business methods or business practices under investigation or to refuse access to

agency records in accordance with s. 493.6119 shall be grounds for revocation, suspension, or other disciplinary action. The testimony of witnesses in any such proceeding shall be under oath before the department or its agents.

(5) In order to carry out the duties of the department prescribed in this chapter, designated employees of the Division of Licensing of the Department of State may obtain access to the information in criminal justice information systems and to criminal justice information as defined in s. 943.045, on such terms and conditions as are reasonably calculated to provide necessary information and protect the confidentiality of the information. Such criminal justice information submitted to the division is confidential and exempt from the provisions of s. 119.07(1).

(6) The department shall be provided access to the program that is operated by the Department of Law Enforcement, pursuant to s. 790.065, for providing criminal history record information to licensed gun dealers, manufacturers, and exporters. The department may make inquiries, and shall receive responses in the same fashion as provided under s. 790.065. The department shall be responsible for payment to the Department of Law Enforcement of the same fees as charged to others afforded access to the program.

(7) The Department of Legal Affairs shall represent the Department of State in judicial proceedings seeking enforcement of this chapter, or upon an action by any party seeking redress against the department, and shall coordinate with the department in the conduct of any investigations incident to its legal responsibility.

(8) Any investigation conducted by the department pursuant to this chapter is exempt from s. 119.07(1) until:

(a) The investigation of the complaint has been concluded and determination has been made by the department as to whether probable cause exists;

(b) The case is closed prior to a determination by the department as to whether probable cause exists; or

(c) The subject of the investigation waives his privilege of confidentiality.

History.—ss. 2, 11, ch. 90-364; s. 17, ch. 91-248; s. 4, ch. 91-429; s. 5, ch. 92-183; s. 2, ch. 93-197; s. 10, ch. 94-172; s. 69, ch. 95-144; s. 326, ch. 96-406.

493.6122 Information about licensees; confidentiality.—The residence telephone number and residence address of any Class "C," Class "CC," Class "E," or Class "EE" licensee maintained by the department is confidential and exempt from the provisions of s. 119.07(1), except that the department may provide this information to local, state, or federal law enforcement agencies. When the residence telephone number or residence address of such licensee is, or appears to be, the business telephone number or business address, this information shall be public record.

History.—ss. 2, 11, ch. 90-364; s. 18, ch. 91-248; s. 4, ch. 91-429; s. 327, ch. 96-406.

493.6123 Publication to industry.—

(1) The department shall have the authority to periodically, through the publication of a newsletter, advise its licensees of information that the department or the advisory council determines is of interest to the industry. Additionally, this newsletter shall contain the name and locality of any licensed or unlicensed person or agency against which the department has filed a final order relative to an administrative complaint and shall contain the final disposition. This newsletter shall be published not less than two or more than four times annually.

(2) The department shall develop and make available to each Class "C," Class "D," and Class "E" licensee and all interns a pamphlet detailing in plain language the legal authority, rights, and obligations of his class of licensure. Within the pamphlet, the department should endeavor to present situations that the licensee may be expected to commonly encounter in the course of doing business pursuant to his specific license, and provide to the licensee information on his legal options, authority, limits to authority, and obligations. The department shall supplement this with citations to statutes and legal decisions, as well as a selected bibliography that would direct the licensee to materials the study of which would enhance his professionalism. The department shall provide a single copy of the appropriate pamphlet without charge to each individual to whom a license is issued, but may charge for additional copies to recover its publication costs. The pamphlet shall be updated every 2 years as necessary to reflect rule or statutory changes, or court decisions. Intervening changes to the regulatory situation shall be noticed in the industry newsletter issued pursuant to subsection (1).

History.—ss. 2, 11, ch. 90-364; s. 4, ch. 91-429.

493.6124 Use of state seal; prohibited.—No person or licensee shall use any facsimile reproduction or pictorial portion of the Great Seal of the State of Florida on any badge, credentials, identification card, or other means of identification used in connection with any activities regulated under this chapter.

History.—ss. 2, 11, ch. 90-364; s. 4, ch. 91-429.

493.6125 Maintenance of information concerning administrative complaints and disciplinary actions.—The department shall maintain statistics and relevant information, by profession, for private investigators, recovery agents, and private security officers which details:

(1) The number of complaints received and investigated.

(2) The number of complaints initiated and investigated by the department.

(3) The disposition of each complaint.

(4) The number of administrative complaints filed by the department.

(5) The disposition of all administrative complaints.

(6) A description of all disciplinary actions taken by profession.

History.—ss. 2, 11, ch. 90-364; s. 4, ch. 91-429; s. 19, ch. 94-172; s. 49, ch. 95-196.

***Note.—**Section 55, ch. 95-196, provides that "[n]othing in this act shall be construed to authorize a state agency to discontinue the collection and maintenance of information contained in any required report repealed or modified by this act, unless the state agency is specifically authorized to discontinue such collection and maintenance pursuant to this act or another section of law."

493.6126 Saving clauses.—

(1) No judicial or administrative proceeding pending on October 1, 1990, shall be abated as a result of the repeal and reenactment of this chapter.

(2) All licenses valid on October 1, 1990, shall remain in full force and effect until expiration or revocation by the department. Henceforth, all licenses shall be applied for and renewed in accordance with this chapter.

History.—ss. 2, 11, ch. 90-364; s. 4, ch. 91-429.

493.6201 Classes of licenses.—

(1) Any person, firm, company, partnership, or corporation which engages in business as a private investigative agency shall have a Class "A" license. A Class "A" license is valid for only one location.

(2) Each branch office of a Class "A" agency shall have a Class "AA" license. Where a person, firm, company, partnership, or corporation holds both a Class "A" and Class "B" license, each additional or branch office shall have a Class "AB" license.

(3) Any individual who performs the services of a manager for a:

(a) Class "A" private investigative agency or Class "AA" branch office shall have a Class "MA" license. A Class "C" or Class "M" licensee may be designated as the manager, in which case the Class "MA" license is not required.

(b) Class "A" and "B" agency or a Class "AB" branch office shall have a Class "M" license.

(4) Class "C" or Class "CC" licensees shall own or be an employee of a Class "A" agency, a Class "A" and Class "B" agency, or a branch office. This does not include those who are exempt under s. 493.6102, but who possess a Class "C" license solely for the purpose of holding a Class "G" license.

(5) Any individual who performs the services of a private investigator shall have a Class "C" license.

(6) Any individual who performs private investigative work as an intern under the direction and control of a designated, sponsoring Class "C" licensee or a designated, sponsoring Class "MA" or Class "M" licensee must have a Class "CC" license.

(7) Only Class "M," Class "MA," Class "C," or Class "CC" licensees are permitted to bear a firearm, and any such licensee who bears a firearm shall also have a Class "G" license.

History.—ss. 3, 11, ch. 90-364; s. 4, ch. 91-429; s. 11, ch. 94-172; s. 70, ch. 95-144.

493.6202 Fees.—

(1) The department shall establish by rule examination and biennial license fees, which shall not exceed the following:

(a) Class "A" license—private investigative agency: $450.

(b) Class "AA" or "AB" license—branch office: $125.

(c) Class "MA" license—private investigative agency manager: $75.

(d) Class "C" license—private investigator: $75.

(e) Class "CC" license—private investigator intern: $60.

(2) The department may establish by rule a fee for the replacement or revision of a license, which fee shall not exceed $30.

(3) The fees set forth in this section must be paid by certified check or money order or, at the discretion of the department, by agency check at the time the application is approved, except that the applicant for a Class "G," Class "C," Class "CC," Class "M," or Class "MA" license must pay the license fee at the time the application is made. If a license is revoked or denied or if the application is withdrawn, the license fee shall not be refunded.

History.—ss. 3, 11, ch. 90-364; s. 4, ch. 91-429; s. 12, ch. 94-172.

493.6203 License requirements.—In addition to the license requirements set forth elsewhere in this chapter, each individual or agency shall comply with the following additional requirements:

(1) Each agency or branch office shall designate a minimum of one appropriately licensed individual to act as manager,

directing the activities of the Class "C" or Class "CC" employees.

(2) An applicant for a Class "MA" license shall have 2 years of lawfully gained, verifiable, full-time experience, or training in:

(a) Private investigative work or related fields of work that provided equivalent experience or training;

(b) Work as a Class "CC" licensed intern;

(c) Any combination of paragraphs (a) and (b);

(d) Experience described in paragraph (a) for 1 year and experience described in paragraph (e) for 1 year;

(e) No more than 1 year using:

1. College coursework related to criminal justice, criminology, or law enforcement administration; or
2. Successfully completed law enforcement-related training received from any federal, state, county, or municipal agency; or

(f) Experience described in paragraph (a) for 1 year and work in a managerial or supervisory capacity for 1 year.

(3) An applicant for a Class "M" license shall qualify for licensure as a Class "MA" manager as outlined under subsection (2) and as a Class "MB" manager as outlined under s. 493.6303(2).

(4) An applicant for a Class "C" license shall have 2 years of lawfully gained, verifiable, full-time experience, or training in one, or a combination of more than one, of the following:

(a) Private investigative work or related fields of work that provided equivalent experience or training.

(b) College coursework related to criminal justice, criminology, or law enforcement administration, or successful completion of any law enforcement-related training received from any federal, state, county, or municipal agency, except that no more than 1 year may be used from this category.

(c) Work as a Class "CC" licensed intern.

(5) A Class "CC" licensee shall serve an internship under the direction and control of a designated sponsor, who is a Class "C," Class "MA," or Class "M" licensee.

(6) In addition to any other requirement, an applicant for a Class "G" license shall satisfy the firearms training set forth in s. 493.6115.

History.—ss. 3, 11, ch. 90-364; s. 9, ch. 91-248; s. 4, ch. 91-429.

493.6301 Classes of licenses.—

(1) Any person, firm, company, partnership, or corporation which engages in business as a security agency shall have a Class "B" license. A Class "B" license is valid for only one location.

(2) Each branch office of a Class "B" agency shall have a Class "BB" license. Where a person, firm, company, partnership, or corporation holds both a Class "A" and Class "B" license, each branch office shall have a Class "AB" license.

(3) Any individual who performs the services of a manager for a:

(a) Class "B" security agency or Class "BB" branch office shall have a Class "MB" license. A Class "M" licensee may be designated as the manager, in which case the Class "MB" license is not required.

(b) Class "A" and Class "B" agency or a Class "AB" branch office shall have a Class "M" license.

(4) A Class "D" licensee shall own or be an employee of a Class "B" security agency or branch office. This does not include those individuals who are exempt under s. 493.6102(4) but who possess a Class "D" license solely for the purpose of holding a Class "G" license.

(5) Any individual who performs the services of a security officer shall have a Class "D" license.

(6) Only Class "M," Class "MB," or Class "D" licensees are permitted to bear a firearm, and any such licensee who bears a firearm shall also have a Class "G" license.

(7) Any person who operates a security officer school or training facility must have a Class "DS" license.

(8) Any individual who teaches or instructs at a Class "DS" security officer school or training facility must have a Class "DI" license.

History.—ss. 4, 11, ch. 90-364; s. 10, ch. 91-248; s. 4, ch. 91-429; s. 13, ch. 94-172; s. 71, ch. 95-144; s. 7, ch. 96-407.

493.6302 Fees.—

(1) The department shall establish by rule biennial license fees, which shall not exceed the following:

(a) Class "B" license—security agency: $450.

(b) Class "BB" or Class "AB" license—branch office: $125.

(c) Class "MB" license—security agency manager: $75.

(d) Class "D" license—security officer: $45.

(e) Class "DS" license—security officer school or training facility: $60.

(f) Class "DI" license—security officer school or training facility instructor: $60.

(2) The department may establish by rule a fee for the replacement or revision of a license, which fee shall not exceed $30.

(3) The fees set forth in this section must be paid by certified check or money order or, at the discretion of the department, by agency check at the time the application is approved,

except that the applicant for a Class "D," Class "G," Class "M," or Class "MB" license must pay the license fee at the time the application is made. If a license is revoked or denied or if the application is withdrawn, the license fee shall not be refunded.

History.—ss. 4, 11, ch. 90-364; s. 4, ch. 91-429; s. 14, ch. 94-172.

493.6303 License requirements.—In addition to the license requirements set forth elsewhere in this chapter, each individual or agency shall comply with the following additional requirements:

(1) Each agency or branch office shall designate a minimum of one appropriately licensed individual to act as manager, directing the activities of the Class "D" employees.

(2) An applicant for a Class "MB" license shall have 2 years of lawfully gained, verifiable, full-time experience, or training in:

(a) Security work or related fields of work that provided equivalent experience or training;

(b) Experience described in paragraph (a) for 1 year and experience described in paragraph (c) for 1 year;

(c) No more than 1 year using:

1. Either college coursework related to criminal justice, criminology, or law enforcement administration; or
2. Successfully completed law enforcement-related training received from any federal, state, county, or municipal agency; or

(d) Experience described in paragraph (a) for 1 year and work in a managerial or supervisory capacity for 1 year.

(3) An applicant for a Class "M" license shall qualify for licensure as a Class "MA" manager as outlined under s. 493.6203(2) and as a Class "MB" manager as outlined under subsection (2).

(4)

(a) Effective October 1, 1994, an applicant for a Class "D" license must have completed a minimum of 40 hours of professional training at a school or training facility licensed by the department. The department shall by rule establish the general content of the training.

(b) An applicant may fulfill the training requirement prescribed in paragraph (a) by submitting proof of:

1. Successful completion of 40 hours of training before initial application for a class "D" license; or
2. Successful completion of 24 hours of training before initial application for, and 16 hours of training upon the first application for renewal of, a Class "D" license. However, individuals licensed before October 1, 1994, need not complete additional training hours in order to renew their licenses.

Any person whose license has been revoked or whose license has been expired for 1 year or longer is considered, upon reapplication for a license, an initial applicant and must submit proof of successful completion of 40 hours of professional training at a school or training facility licensed by the department.

(5) An applicant for a Class "G" license shall satisfy the firearms training outlined in s. 493.6115.

History.—ss. 4, 11, ch. 90-364; s. 11, ch. 91-248; s. 4, ch. 91-429; s. 15, ch. 94-172.

493.6304 Security officer school or training facility.—

(1) Any school, training facility, or instructor who offers the training outlined in s. 493.6303(4) for Class "D" applicants shall, before licensure of such school, training facility, or instructor, file with the department an application accompanied by an application fee in an amount to be determined by rule, not to exceed $60. The fee shall not be refundable.

(2) The application shall be signed and notarized and shall contain, at a minimum, the following information:

(a) The name and address of the school or training facility and, if the applicant is an individual, his name, address, and social security or alien registration number.

(b) The street address of the place at which the training is to be conducted.

(c) A copy of the training curriculum and final examination to be administered.

(3) The department shall adopt rules establishing the criteria for approval of schools, training facilities, and instructors.

History.—ss. 4, 11, ch. 90-364; s. 4, ch. 91-429.

493.6305 Uniforms, required wear; exceptions.—

(1) Class "D" licensees shall perform duties regulated under this chapter in a uniform which bears at least one patch or emblem visible at all times clearly identifying the employing agency.

(2) Class "D" licensees may perform duties regulated under this chapter in nonuniform status on a limited special assignment basis, and only when duty circumstances or special requirements of the client necessitate such dress.

(3) Class "D" licensees who are also Class "G" licensees and who are performing limited, special assignment duties may carry their authorized firearm concealed in the conduct of such duties.

History.—ss. 4, 11, ch. 90-364; s. 12, ch. 91-248; s. 4, ch. 91-429.

493.6306 Proprietary security officers.— [Repealed by s. 8, ch. 96-407.]

493.6401 Classes of licenses.—

(1) Any person, firm, company, partnership, or corporation which engages in business as a recovery agency shall have a Class "R" license. A Class "R" license is valid for only one location.

(2) Each branch office of a Class "R" agency shall have a Class "RR" license.

(3) Any individual who performs the services of a manager for a Class "R" recovery agency or a Class "RR" branch office must have a Class "MR" license. A Class "E" licensee may be designated as the manager, in which case the Class "MR" license is not required.

(4) Any individual who performs the services of a recovery agent must have a Class "E" license.

(5) Any individual who performs repossession as an intern under the direction and control of a designated, sponsoring Class "E" licensee or a designated, sponsoring Class "MR" licensee shall have a Class "EE" license.

(6) Class "E" or Class "EE" licensees shall own or be an employee of a Class "R" agency or branch office.

(7) Any person who operates a repossessor school or training facility shall have a Class "RS" license.

(8) Any individual who teaches or instructs at a Class "RS" repossessor school or training facility shall have a Class "RI" license.

History.—ss. 5, 11, ch. 90-364; s. 14, ch. 91-248; s. 4, ch. 91-429; s. 7, ch. 93-49.

493.6402 Fees.—

(1) The department shall establish by rule biennial license fees which shall not exceed the following:

(a) Class "R" license—recovery agency: $450.

(b) Class "RR" license—branch office: $125.

(c) Class "MR" license—recovery agency manager: $75.

(d) Class "E" license—recovery agent: $75.

(e) Class "EE" license—recovery agent intern: $60.

(f) Class "RS" license—repossessor school or training facility: $60.

(g) Class "RI" license—repossessor school or training facility instructor: $60.

(2) The department may establish by rule a fee for the replacement or revision of a license, which fee shall not exceed $30.

(3) The fees set forth in this section must be paid by certified check or money order, or, at the discretion of the department, by agency check at the time the application is approved, except that the applicant for a Class "E," Class "EE," or Class "MR" license must pay the license fee at the time the application is made. If a license is revoked or denied, or if an application is withdrawn, the license fee shall not be refunded.

History.—ss. 5, 11, ch. 90-364; s. 4, ch. 91-429; s. 17, ch. 94-172.

493.6403 License requirements.—

(1) In addition to the license requirements set forth in this chapter, each individual or agency shall comply with the following additional requirements:

(a) Each agency or branch office must designate a minimum of one appropriately licensed individual to act as manager, directing the activities of the Class "E" or Class "EE" employees. A Class "E" licensee may be designated to act as manager of a Class "R" agency or branch office in which case the Class "MR" license is not required.

(b) An applicant for Class "MR" license shall have at least 1 year of lawfully gained, verifiable, full-time experience as a Class "E" licensee performing repossessions of motor vehicles, mobile homes, or motorboats.

(c) An applicant for a Class "E" license shall have at least 1 year of lawfully gained, verifiable, full-time experience in one, or a combination of more than one, of the following:

1. Repossession of motor vehicles as defined in s. 320.01(1), mobile homes as defined in s. 320.01(2), or motorboats as defined in s. 327.02.
2. Work as a Class "EE" licensed intern.

(2) Beginning October 1, 1994, an applicant for a Class "E" or a Class "EE" license must have completed a minimum of 40 hours of professional training at a school or training facility licensed by the department. The department shall by rule establish the general content for the training.

History.—ss. 5, 11, ch. 90-364; s. 15, ch. 91-248; s. 4, ch. 91-429; s. 8, ch. 93-49; s. 18, ch. 94-172; s. 11, ch. 94-241.

493.6404 Property inventory; vehicle license identification numbers.—

(1) If personal effects or other property not covered by a security agreement are contained in or on a recovered vehicle, mobile home, or motorboat at the time it is recovered, a complete and accurate inventory shall be made of such personal effects or property. The date and time the inventory is made shall be indicated, and it shall be signed by the Class "E" or Class "EE" licensee who obtained the personal property. The inventory of the personal property and the records regarding any disposal of personal property shall be maintained for a

period of 2 years in the permanent records of the licensed agency and shall be made available, upon demand, to an authorized representative of the department engaged in an official investigation.

(2) Within 5 working days after the date of a repossession, the Class "E" or Class "EE" licensee shall give written notification to the debtor of the whereabouts of personal effects or other property inventoried pursuant to this section. At least 45 days prior to disposing of such personal effects or other property the Class "E" or Class "EE" licensee shall, by certified mail, notify the debtor of the intent to dispose of said property. Should the debtor, or his lawful designee, appear to retrieve the personal property, prior to the date on which the Class "E" or Class "EE" licensee is allowed to dispose of the property, the licensee shall surrender the personal property to that individual upon payment of any reasonably incurred expenses for inventory and storage. If personal property is not claimed within 45 days of the notice of intent to dispose, the licensee may dispose of the personal property at his discretion, except that illegal items or contraband shall be surrendered to a law enforcement agency, and the licensee shall retain a receipt or other proof of surrender as part of the inventory and disposal records he maintains.

(3) Vehicles used for the purpose of repossession by a Class "E" or Class "EE" licensee must be identified during repossession by the license number of the Class "R" agency only, local ordinances to the contrary notwithstanding. These vehicles are not "wreckers" as defined in s. 713.78. The license number must be displayed on both sides of the vehicle and must appear in lettering no less than 4 inches tall and in a color contrasting from that of the background.

History.—ss. 5, 11, ch. 90-364; s. 4, ch. 91-429; s. 9, ch. 93-49.

493.6405 Sale of motor vehicle, mobile home, or motorboat by a licensee; penalty.—

(1) A Class "E" or Class "EE" licensee shall obtain, prior to sale, written authorization and a negotiable title from the owner or lienholder to sell any repossessed motor vehicle, mobile home, or motorboat.

(2) A Class "E" or Class "EE" licensee shall send the net proceeds from the sale of such repossessed motor vehicle, mobile home, or motorboat to the owner or lienholder, within 20 working days after the licensee executes the documents which permit the transfer of legal ownership to the purchaser.

(3) A person who violates a provision of this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—ss. 5, 11, ch. 90-364; s. 4, ch. 91-429.

493.6406 Repossession services school or training facility.—

(1) Any school, training facility, or instructor who offers the training outlined in s. 493.6403(2) for Class "EE" applicants shall, before licensure of such school, training facility, or instructor, file with the department an application accompanied by an application fee in an amount to be determined by rule, not to exceed $60. The fee shall not be refundable.

(2) The application shall be signed and notarized and shall contain, at a minimum, the following information:

(a) The name and address of the school or training facility and, if the applicant is an individual, his name, address, and social security or alien registration number.

(b) The street address of the place at which the training is to be conducted.

(c) A copy of the training curriculum and final examination to be administered.

(3) The department shall adopt rules establishing the criteria for approval of schools, training facilities, and instructors.

History.—ss. 5, 11, ch. 90-364; s. 4, ch. 91-429.

Appendix 2

Private Security Professional Associations and Groups

Academy of Security Educators & Trainers (ASET)
A.S.E.T.
P.O. Box 802
Berryville, VA 22611
(540) 554-2540
Fax: (540) 554-2558
www.personalprotection.com

Airport Security Council
JFK International Airport
Box 30705
Jamaica, NY 11430

American Bankers Association
ABA-Member Relations
1120 Connecticut Avenue, N.W.
Washington, DC 20036
1-800-BANKERS
www.aba.com

American Polygraph Association
APA National Office
P.O. Box 8037
Chattanooga, TN 37414-0037
1-800-APA-8037
(423) 892-3992
Fax: (423) 894-5435
www.polygraph.org

American Risk & Insurance Association
716 Providence Rd.
Malvern, PA 19355
(610) 640-1997
Fax: (610) 725-1007
www.aria.org

The American Safe Deposit Association
P.O. Box 519
Franklin, IN 46131
(317) 738-4432
Fax: (317) 738-5267
www.tasda.com

American Society for Amusement Park Security
One Cedar Point Drive
Sandusky, OH 44870-5259

American Society for Law Enforcement Training (ASLET)
121 N. Court Street
Frederick, MD 21701
(301) 668-9466
Fax: (301) 668-9482
www.aslet.org

AOPA Air Safety Foundation
421 Aviation Way
Frederick, MD 21701
(301) 695-2000
Fax: (301) 695-2375
www.aopa.org/asf/

The Associated Locksmiths of America, Inc.
3003 Live Oak Street
Dallas, TX 75204
(214) 827-1701
Fax: (214) 827-1810
www.aloa.org

Association of Contingency Planners
7004 South 13th Street
Oak Creek, WI 53154
(800) 445-4227 ext. 116
www.acp-international.com

The Association of Management Consulting Firms
380 Lexington Avenue, Suite 1700
New York, NY 10168
(212) 551-7887
Fax: (212) 551-7934
www.amcf.org

Association of Medical Illustrators
5475 Mark Dabling Blvd., Suite 108
Colorado Springs, CO 80918
(719) 598-8622
Fax: (719) 599-3075
www.ami.org

Automatic Fire Alarm Association
P.O. Box 951807
Lake Mary, FL 32795-1807
(407) 322-6288
www.afaa.org

Aviation Crime Prevention Institute
226 N. Nova Road
Ormond Beach, FL 32174
(800)969-5473
Fax: (386) 615-3378
www.acpi.org

Bank Administration Institute
One North Franklin, Suite 1000
Chicago, IL 60606-3421
(800) 224-9889 or (312) 683-2464
Fax: (800) 375-5543 or (312) 683-2373
www.bai.org

Board of Certified Safety Professionals
208 Burwash Avenue
Savoy, IL 61874-9571
(217) 359-9263
Fax: (217) 359-0055
www.bcsp.org

Computer Crime Research Center
Box 8010
Zaporozhye 95
Ukraine, 69095
+38 (061) 2621 472
Fax: +38 (061) 2629 063
www.crime-research.org

Information System Security Association, Inc.
Technical Enterprises, Inc.
7044 S. 13th Street
Oak Creek, WI 53154
(414) 768-8000 (800) 370-ISSA
Fax: (414) 768-8001
www.issa.org

Institute of Internal Auditors
247 Maitland Avenue
Altamonte Springs, FL 32701-4201
(407) 937-1100
Fax (407) 937-1101
www.theiia.org

International Association of Bomb Technicians & Investigators
P.O. Box 160
Goldvein, VA 22720-0160
(540) 752-4533
Fax: (540) 752-2796
www.iabti.org

International Association of Campus Law Enforcement Administrators
342 N. Main Street
Hartford, CT 06117-2507
(860) 586-7517
Fax: (860) 586-7550
www.iaclea.org

International Association of Computer Investigative Specialists
P.O. Box 140,
Donahue, IA 52746-0140
(877) 890-6130
www.cops.org

International Association of Financial Crimes Investigators
873 Embarcadero Drive, Suite 5
El Dorado Hills, CA 95762
(916) 939-5000
Fax: (916) 939-0395
www.iafci.org

International Association of Health Care Security & Safety
PO Box 5038
Glendale Heights IL 60139
(888) 353-0990
Fax: (630) 871-9938
www.iahss.org

International Association of Professional Security Consultants
525 SW 5th Street, Suite A,
Des Moines, IA 50309-4501
(515) 282-8192
Fax: (515) 282-9117
www.iapsc.org

International Association of Security and Investigative Regulators
P.O. Box 93
Waterloo, IA 50704
(888) 35-IASIR or (888) 354-2747
Fax: (319) 232-1488
www.iasir.org

International Bodyguard Association
IBA W. North America
PO Box 675344
Rancho Santa Fe, CA 92067-5344
(206) 719-2617
Fax: (858) 395-7293
www.ibausa.netfirms.com

International Council of Shopping Centers
1221 Avenue of the Americas, 41st Floor
New York, NY 10020-1099
(646) 728-3800
Fax: (212) 589-5555
www.icsc.org

International Foundation for Protection Officers
P.O. Box 771329
Naples, FL 34107-1329
(239) 430-0534
Fax: (239) 430-0533
www.ifpo.org

International Foundation for Protection Officers
P.O. Box 1588
206 Stockton Avenue
Okotoks, Alberta, Canada T1S 1B5
(403) 938-6351
Fax: (403) 938-8819

International Guards Union of America
Route 8, Box 32-14
Amarillo, TX 79118-9427
(806) 622-2424
Fax: (806) 622-3500
www.amaonline.com/igua/

International Organization for Black Security Executives
P.O. Box 4436
Upper Marlboro, MD 20775
(888) 884-6273
Fax: (301) 352-7807
www.iobse.com

International Professional Security Association
Northumberland House, 11
The Pavement, Popes Lane
Ealing, London England
W5 4NG
+44 (0)20 8832 7417
Fax: +44 (0)20 8832 7418
www.ipsa.org.uk

Jewelers Security Alliance
6 East 45th Street
New York, NY 10017
(800) 537-0067
Fax: (212) 808-9168
www.jewelerssecurity.org

National Association of Investigative Specialists
P.O. Box 33244
Austin, TX 78764
(512) 719-3595
Fax: (512) 719-3594
www.pimall.com/nais/nais.j.html

National Association of Legal Investigators
H. Ellis Armistead & Assoc. Inc.
1159 Delaware St.
Denver, CO 80204
(303) 825-2373
Fax: (303) 825-2374
www.nalionline.org

National Association of Security Personnel
P.O. Box 160
Mississauga, Ontario
L4T 3B6
Tel/Fax: (905)521-8802
nasp.ca/index.htm

National Burglar & Fire Alarm Association
8380 Colesville Road, Suite 750
Silver Spring, MD 20910
(301) 585-1855
Fax: (301) 585-1866
www.alarm.org

National Center for Computer Crime Data
1222 17th Avenue
Santa Cruz, CA 95062
(408) 475-4457
Fax: (408) 475-5336

National Council of Investigation & Security Services
7501 Sparrows Point Blvd.
Baltimore, MD 21219-1927
(800) 445-8408
Fax: (410) 388-9746
www.nciss.com

National Crime Prevention Institute
Justice Administration
University of Louisville
Louisville, KY 40292
(502) 852-6987 or 1-800-334-8635, ext 6987
Fax: (502) 852-6990

National Criminal Justice Reference Service
P.O. Box 6000
Rockville, MD 20849-6000
(800) 851-3420
(301) 519-5500
Fax: (301) 519-5212
www.ncjrs.org

National Fire Protection Association
1 Batterymarch Park
Quincy, MA 02169-7471
(617) 770-3000
Fax: (617) 770-0700
www.nfpa.org

National Fire Sprinkler Association
P.O. Box 1000
Patterson, NY 12563
(845) 878-4200 ext. 113
Fax: (845) 878-4215

National Property Management Association
1102 Pinehurst Rd.
Dunedin, FL 34698
(727) 736-3788
Fax: (727) 736-6707
www.npma.org

National Safety Council
1121 Spring Lake Drive
Itasca, IL 60143-3201
(630) 285-1121
Fax: (630) 285-1315
www.nsc.org

The Professional Investigators and Security Association (PISA)
P.O. Box 1836
Vienna, VA 22180
(703) 818-0552
Fax: (703) 818-0551
www.pisa.gen.va.us

Security Associates Institute
105 Cecil Street
06-01 The Octagon
Singapore 069534
+65 6827 9673
Fax: +65 6827 9601
sainstitute.org

Security Industry Association
635 Slaters Lane, Suite 110
Alexandria, VA 22314
(703) 683-2075 or (866) 817-8888
Fax: (703) 683-2469
www.siaonline.org

Security Industry Authority
PO Box 9
Newcastle Upon Tyne
England
NE82 6YX
+44 08702 430 100
Fax: +44 08702 430 125
www.the-sia.org.uk

Security Sales & Integration, Bobit Publishing, Inc.
21061 S. Western Ave.
Torrance, CA 90505
(310) 533-2400
Fax: (310) 533-2502
www.securitysales.com

United Security Professionals Association, Inc.
8329 Lusk Road
Concrete WA 98237
(800) 683-8772
www.uspa-inc.com

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Appendix 3

Select State Licensing Forms for Security Professionals

The exhibits that follow are included in this appendix to demonstrate the diverse licensing requirements and practices for security professionals across the country. While some standardization is evident, much variation still exists.

SECURITIES AND BUSINESS REGULATION
2 Martin Luther King, Jr. Drive, S.E.
Ste 802, West Tower
Atlanta, Georgia 30334
(404) 656-3079
http://www.sos.state.ga.us/securities/

CATHY COX
Secretary of State

H. WAYNE HOWELL
Director

ISSUER'S BOND

Georgia Securities Act of 1973, as amended
OCGA 10-5-6(b)(1)

KNOW ALL MEN BY THESE PRESENTS:

That we, _____
(Name)

a _____
(corporation, partnership, limited liability company, individual or other)

organized under the laws of the State of: _____

AS PRINCIPAL, and _____

a corporation organized and existing under the laws of the State of _____, and authorized to do business in the State of Georgia, AS SURETY, are hereby held and firmly bound unto the State of Georgia, for the use and benefit of all interested persons injured by any breach of the conditions of this obligation, in the sum of Twenty-Five Thousand ($25,000) Dollars lawful money of the United States of America, for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated this _____ day of _____ 200 _____

THE CONDITIONS OF THE ABOVE OBLIGATION ARE SUCH THAT:

WHEREAS, the above-mentioned principal has made application for the registration of certain securities under the provisions of the Georgia Securities Act of 1973, as amended, representing by said application and by these presents, that all the statements set forth in said application to the Commissioner of Securities of Georgia, and that all of the written evidence or other probative matter filed with said Commissioner in connection with such application, are true; and obligating itself and its agents to faithful compliance with all provisions of the Georgia Securities Act of 1973, as now or hereafter amended, and any and all regulations and orders issued or hereafter to be issued by the Commissioner of Securities.

NOW, THEREFORE, if said principal shall in all things, well and truly perform, fulfill, comply with and observe all and singular the above named conditions, representations and obligations, then this obligation shall be null and void; otherwise to be and remain in full force and effect; provided, however, that the aggregate liabilities recoverable against such bonds shall not exceed the sum of Twenty-Five Thousand ($25,000.00) Dollars regardless of the number of claimants and shall not be construed as individual liability.

IN WITNESS WHEREOF, said principal, acting by and through its duly authorized officers, has hereunto set its hand and seal, and the said surety has caused these presents to be signed by its duly authorized officers and its corporate seal to be hereto affixed

This _____ day of _____ 200 _____

ATTEST:
(SEAL)

_____
Principal

Secretary _____

BY: _____
Name and Official Position

COUNTERSIGNED:
(SEAL)

BY: _____
Surety

Resident Agent of Georgia _____ BY: _____
Name and Official Position

Address of Resident Agent: _____

Approved this _____ day of _____ 200 _____

Commissioner of Securities of Georgia _____

NOTE: Resolutions authorizing the execution of this bond should be attached. If this bond has been subscribed to/by an "Attorney in Fact," there must be attached a "Power of Attorney".

Form 9 Rev. 8/2002

Exhibit 1 Issuer's bond.

STATE OF NEW HAMPSHIRE
DEPARTMENT OF SAFETY
DIVISION OF STATE POLICE

☐ APPLICATION for:
PRIVATE DETECTIVE EMPLOYEE
or
SECURITY GUARD EMPLOYEE
(Check Correct Box)

PART 1: FOR ALL LICENSE APPLICANTS

A) Answer all required questions. Failure to do so will hold up the processing of your application.
B) False answers will result in a denial of a license.
C) Type or print all information.
D) Fee of $5.00 plus a $15.00 administrative fee for background check pursuant to RSA 106-F:8III and SAF-C 2205-02.

1) Name of Agency you are going to be employed by:					
2) Address of Agency:					
3) Name of Applicant			4) Maiden Name:		
5) Present Address: Street		City		State	Zip Code
6) Date of Birth	7) Age	8) Place of Birth	9) Soc. Sec. No.	10) Sex	11) Height
12) Weight	13) Hair	14) Eyes	15) Scars, marks, tattoos		
16) Driver's Lic. Number and State			17) Citizenship: (If naturalized, Location and Date) ☐ U.S. ☐ Other: List Court, City, State and Year		
18) Previous Employment (company name and address)					

19) List three (3) persons, unrelated to you, of whom an inquiry can be made as to your character, integrity, reputation. Give the full name and legal address as these persons will be sent questionnaires. Failure to respond to the questionnaires will hold up this application for a license.

1. Full Name — Address (street, city , state, zip-code)
2. Full Name — Address (street, city, state, zip-code)
3. Full Name — Address (street, city, state, zip-code)

20) List any special schools or courses taken to qualify you for the type of license sought.

21) Have you had any experience for the type of license sought?

22) Have you ever applied for a Detective or Security license in N.H. before? If yes, give date of application.

DSSP 247 (Rev.11/02)

Exhibit 2 New Hampshire application.

Continued

23) Have you ever been arrested for or convicted of a crime that has not been annulled by a court? (Except traffic violations)	YES _____ NO _____	If YES, explain fully in block 28.
24) Have you ever been treated for mental illness or an emotional disorder or confined to an institution?	YES _____ NO _____	If YES, explain fully in block 28.
25) Are you or have you ever been a user of drugs or narcotics? (Except under the direction of a doctor)	YES _____ NO _____	If YES, explain fully in block 28.
26) Has any license (detective or guard) applied for or issued to you or a partnership or corporation which you were a member ever been denied, revoked or suspended in this or any other state or territory?	YES _____ NO _____	If YES, explain fully in block 28.
27) Military service and type of discharge:		
28) If "YES" on questions 23 – 26, please explain here:		

PART 2 – FOR ARMED LICENSE APPLICANTS ONLY:

If you intend to carry a firearm while employed, complete the following; (NOTE – a pistol permit does not allow the carrying of a firearm while employed as a security guard or detective. In addition, an ARMED license must obtained by completing an approved firearms course given by a certified firearms instructor).

29) N.H. pistol permit number, expiration date and location of issuance:

30) Date and location of firearms qualification: (An armed license will not be issued until a complete qualification form has been received and approved)

PART 3 – FOR ALL LICENSE APPLICANTS:

Applicant's Name (please print) _____

Applicant's Signature _____

personally appeared _____ of _____
signer of the foregoing application and made an oath to truth of the matters contained therein before me.

STATE OF NEW HAMPSHIRE

_____ SS

_____
Notary Public / Justice of the Peace

Date of Oath _____

THIS PART COMPLETED BY STATE POLICE

License Fee Paid _____ CASH ☐ CHECK ☐

Fingerprint Fee Paid _____ CASH ☐ CHECK ☐

MAKE CHECKS PAYABLE TO: STATE OF N.H. - TREASURER

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
DIVISION OF LICENSING
Post Office Box 6687 • Tallahassee, FL 32314-6687 • (850) 488-5381
Internet Address: http://licgweb.doacs.state.fl.us/index.html
Chapter 493, Florida Statutes

CHARLES H. BRONSON
COMMISSIONER

AFFIDAVIT OF EXPERIENCE

INSTRUCTIONS: Section 493.6105, FS requires the applicant for a Class "C" Private Investigator license, a Class "E" Recovery Agent license, or a Class "M", "MA", "MB", and "MR" Manager license to "include a statement on a form provided by the department of the experience he or she believes will qualify him or her for such license." Please complete & sign this form in the presense of a Notary and return it with your application.

Fill out this form completely, providing complete and comprehensive details about the duties you performed.

EXPERIENCE WHICH CANNOT BE VERIFIED BY THE DIVISION OF LICENSING OR EXPERIENCE WHICH WAS ACQUIRED UNLAWFULLY WILL NOT BE COUNTED TOWARD THE EXPERIENCE REQUIREMENT OUTLINED UNDER CHAPTER 493, FLORIDA STATUTES.

If military experience is used toward satisfaction of the experience requirement and you have been honorably discharged from military service, a copy of your DD214 must be attached to this completed form.

Name of Applicant _____

Social Security Number _____

Type of license for which you are applying (PLEASE **SELECT ONE**):

- ◯ **Class "C" Private Investigator License**
- ◯ **Class "E" Recovery Agency License**
- ◯ **Class "M" Investigative and Security Agency Manager**
- ◯ **Class "MA" Investigative Agency Manager**
- ◯ **Class "MB" Security Agency Manager**
- ◯ **lass "MR" Recovery Agency Manager**

SECTION I. APPLICANT INFORMATION

NAME OF EMPLOYER	PHONE NUMBER ( )
STREET ADDRESS	CITY, STATE, ZIP
JOB TITLE	DATES OF EMPLOYMENT (FROM MM/YY TO MM/YY)
EXACT DUTIES WHICH RELATE TO THE LICENSE SOUGHT AND PERCENTAGE OF TIME DEVOTED TO THESE DUTIES. **BE SPECIFIC.**	
NAME AND TITLE OF INDIVIDUAL WHO CAN VERIFY EMPLOYMENT	PHONE NUMBER ( )

DACS-160231/03 Formerly LC2E156

Exhibit 3 Florida affidavit of experience.

Continued

NAME OF EMPLOYER	PHONE NUMBER ( )
STREET ADDRESS	CITY, STATE, ZIP
JOB TITLE	DATES OF EMPLOYMENT (FROM MM/YY TO MM/YY)
EXACT DUTIES WHICH RELATE TO THE LICENSE SOUGHT AND PERCENTAGE OF TIME DEVOTED TO THESE DUTIES. **BE SPECIFIC**	
NAME AND TITLE OF INDIVIDUAL WHO CAN VERIFY EMPLOYMENT	PHONE NUMBER ( )

NAME OF EMPLOYER	PHONE NUMBER ( )
STREET ADDRESS	CITY, STATE, ZIP
JOB TITLE	DATES OF EMPLOYMENT (FROM MM/YY TO MM/YY)
EXACT DUTIES WHICH RELATE TO THE LICENSE SOUGHT AND PERCENTAGE OF TIME DEVOTED TO THESE DUTIES. **BE SPECIFIC.**	
NAME AND TITLE OF INDIVIDUAL WHO CAN VERIFY EMPLOYMENT	PHONE NUMBER ( )

SECTION II. NOTARIZATION STATEMENT

I,_____, do hereby swear or affirm that the work experience listed herein accurately reflects my employment history and the job duties I have performed, and that this work experience is related to the license for which I have applied.

_____
Signature of Applicant

STATE OF FLORIDA
COUNTY OF _____

The foregoing application was sworn to (or affirmed) and subscribed before me this_____ day of _____,20____,by:

_____
Print Name of Applicant

_____
NOTARY SIGNATURE

_____
PRINT, TYPE, OR STAMP NAME OF NOTARY

Personally Known _____

or Produced deintification _____

Type of Identification Produced _____

DEPARTMENT OF PUBLIC SAFETY
DIVISION OF STATE POLICE
P.O. Box 2794 Middletown, CT 06457-9294

Application for Private Detective/Security Service License

Check Type of License Desired:

Individual	**Corporate**
☐ Private Detective	☐ Private Detective
☐ Private Detective Fire Investigator	☐ Private Detective Fire Investigator
☐ Security Service	☐ Security Service
☐ Private Detective – Security Service	☐ Private Detective -- Security Service

Applicant is: ☐ Licensee ☐ Corporate Official

Personal information:

Name of Applicant			Social Security #:		
Date of Birth	Place of Birth		Height:	Weight	Sex
Hair Color	Eye Color	Scars/Marks/Tattoos		Complexion	
Firearms Permit No./State			Driver's License No./State		
Home phone			Business phone		
Address					

Prior home addresses for past five years:

From	**To**	**Street/City/Town/State/Zip**

DPS-366-C (Revised 4/03)

1.

Exhibit 4 Application for private detective/security service license—Connecticut.

Continued

Employment history – Start from current job and list for past five years. *(Use additional paper if needed.)*

Statement of Citizenship:

Are you a citizen of the United States? ☐ Yes ☐ No	If naturalized, detail when and where:

Have you ever used any other name(s)? If so, list name(s) used:

Education: (Indicate highest degree received (Attach copy of degree, transcript or GED certificate)

Degree/Diploma	Year Degree Awarded:	Name of College/University
☐ High School ☐ Associate Degree ☐ Baccalaureate Degree ☐ Masters/Doctorate Degree ☐ Other _____		

List any schools or courses which you believe qualifies you for the type of license applied for:
(The commissioner of Public Safety may, at his discretion, substitute up to one year of experience upon proof of satisfactory participation in a course of instruction pertinent to the license applied for. Attach additional sheets of paper as required)

Does the applicant meet the minimum five years of full time investigative experience?
☐ Yes ☐ No If not, does the applicant have ten years of experience as a police officer with a state or organized municipal police department? ☐ Yes ☐ No If "No "
Explain:

Does the applicant meet the minimum five years supervisory private security or police experience? ☐ Yes ☐ No
Explain:

Continued

Criminal and Motor Vehicle Record:
Have you ever been arrested for a criminal offense? ☐ Yes ☐ No If Yes, explain:

Date/Place	Jurisdiction/Court	Charge

Have you ever been arrested on a motor vehicle charge? ☐ Yes ☐ No If Yes, explain:

Date/Place	Jurisdiction/Court	Charge

Military Service: ☐ Yes ☐ No (If "Yes" DD-214 or discharge must be attached)

Military branch or component	Highest Rank Attained	Type of Discharge

Business Information:

Proposed Trade Name*	Address of Home Office
Type Organization ☐ Individual ☐ Corporate	Date & Place of Incorporation *(attach Certificate of Incorporation)*

Connecticut Addresses	Telephone Numbers
Branch Manager's Name:	

* Subject to approval by the commissioner of Public Safety and as it will appear on the license.

Continued

Names, addresses, dates of birth, and proposed titles of all corporate officials:

Are you currently licensed as a private detective/security service in any other state ?
☐ Yes ☐ No If "Yes," Explain:

State	Lic. Number	Type of License	Date License Expires

You must submit the following items with this application. *(Use check boxes to indicate items are attached Incomplete packages will be returned)*

☐ Two photographs (approximately 2" x 3")

☐ Two fingerprint cards (1 green & 1 blue).

☐ Credit bureau report

☐ High school/college/GED/transcript/diploma

☐ Bank or postal money order for $24.00 payable to the F.B.I.

☐ DD-214 or Discharge
(for LICENSEE only, and if appropriate)

☐ Motor vehicle abstract for LICENSEE only, for the past five years. Obtain the extract from the motor vehicle licensing agency in the state of the licensee's residence for the past five years.

☐ Also required are four letters of personal reference, LICENSEE ONLY. These letters of reference must be original letters and must be sent directly from the author to the Special Licensing & Firearms Unit. FORM LETTERS ARE NOT ACCEPTABLE AND WILL BE RETURNED.

Continued

Authorization for Release of Personal Information

All of the information on this application must be verifiable or it will not be considered for licensing. False, misleading or omitted information may be the basis for denial of a license. "Any person who violates any provision shall be fined not more than $5,000.00 or imprisoned for not more than one year or both."

_____
(Signature of Applicant)

STATE OF
SS
_____
Date of Oath

COUNTY OF: _____

PERSONALLY APPEARED: _____

ADDRESS: _____

signer of the foregoing application and made oath of truth of matters contained before me.

_____
Notary Public, Justice of Peace
or Commissioner of Superior Court

STATE OF WASHINGTON Department of **Licensing**

BUSINESS AND PROFESSIONS DIVISION
PUBLIC PROTECTION UNIT
PRIVATE SECURITY GUARD LICENSING
PO BOX 9048
OLYMPIA, WA 98507-9048
(360) 664-6611
FAX (360) 570-7888

APPLICATION FOR LICENSURE AS A

PRIVATE SECURITY GUARD COMPANY/PRINCIPAL

FOR VALIDATION ONLY

Check the type(s) of licensure for which you are applying

- ☐ Unarmed Principal & Company - $250
- ☐ Armed Principal & Company - $280
- ☐ Change of unarmed principal - $65
- ☐ Change of Armed Principal - $95

Make remittance payable to State Treasurer.
Send this application with your remittance to:
Department of Licensing
Public Protection Unit
PO Box 9048
Olympia, WA 98507-9048

001-070-299-0009

Company Information

Company Name		Telephone No. ( )	FAX No. ( )
Washington State Business Address *(Number, Street, and Suite or Room No.)*			
City	State WA	Zip Code	County
Business Mailing Address *(If Different)*			
City	State	Zip Code	County
Type of Business *(Check One)* ☐ Sole owner ☐ Partnership ☐ Corporation ☐ Foreign corp.	No. of Partners *(If Partnership)*		UBI No.
Branch Office Address *(Street, City, State, Zip)*			
Branch Office Address *(Street, City, State, Zip)*			
Branch Office Address *(Street, City, State, Zip)*			

Principal Information

Principal Name *(Last, First, Middle Initial)*		Maiden Name or Aliases	
Home Address *(Number, Street, Apartment No.)*			
City	State	Zip Code	County
Date of Birth	Gender *(Check One)* ☐ Female ☐ Male	Social Sec. No. *(Required per RCW 26.23.150)*	Citizenship Status *(Check One)* US Citizen Resident Alien

Requirement under which you will be qualifying for licensure (Check One)
☐ 3 years' experience as a manager, supervisor, or administrator in the private security business or a related field
☐ Examination - see page 2

Legal Profile

Attach requested documents and a separate explanation sheet for "Yes" answers

Applicant–respond to all questions below. If you answer "yes" to any, attach a separate sheet with explanation.

		Yes	No
1.	Have you ever been found guilty of, or held liable for, fraud, dishonesty, or misrepresentation while performing duties as a private security guard?	☐	☐
2.	Have you ever been found guilty of, or held liable for, incompetence or negligence that resulted in injury to a person or created an unreasonable risk to a person?	☐	☐
3.	Have you ever been found guilty of, or held liable for, releasing information about the property or valuables you were guarding?	☐	☐
4.	Have you ever been convicted of a gross misdemeanor or felony as a juvenile or adult?	☐	☐
5.	Have you ever been convicted of any act involving unethical or immoral behavior?	☐	☐
6.	Have you been licensed as a security guard in any jurisdiction? If "yes," in what jurisdiction? *(Please insert name of state, county, or city _____ and date _____)*	☐	☐
7.	Have you ever had a security guard license suspended, revoked, or restricted? If "yes," in what jurisdiction? *(Please insert name of state, county, or city _____ and date _____)*	☐	☐

If any conviction was dismissed, please enclose copies of the court documents.

PSG-690-001 PSG CO/PRIN APP (R/8/02)FM/W Page 2 of 3

The Department of Licensing has a policy of providing equal access to its services. If you need special accommodation, please call (360) 664-6611 or TTY (360) 664-8885.

Exhibit 5 Instructions for application.

Continued

You must provide proof of your past employment

Please document your experience beginning with your most recent (or current) position. Acceptable forms of proof include: copies of payroll checkstubs showing company name and pay period, copies of your federal tax return for the period(s) listed, certification from the employer verifying your status and time employed. Verfication of license/registration from another state/jurisdiction is acceptable **only** if that state/jurisdiction has requirements that meet or exceed those required by Washington state. Use the enclosed verification form for out-of-state work history.

Start with your most recent (or current) position, then work backward.

Type of Experience *(Manager, Supervisor, Administrator)*	From *(Mo-Da-Yr)*	To *(Mo-Da-Yr)*
Company Name		
Company Address *(Number and Street, City, State, Zip)*		
Type of Experience *(Manager, Supervisor, Administrator)*	From *(Mo-Da-Yr)*	To *(Mo-Da-Yr)*
Company Name		
Company Address *(Number and Street, City, State, Zip)*		
Type of Experience *(Manager, Supervisor, Administrator)*	From *(Mo-Da-Yr)*	To *(Mo-Da-Yr)*
Company Name		
Company Address *(Number and Street, City, State, Zip)*		

If you wish to take the examination for licensure, mark your choice of locations below. Mark your first choice with a **"1"** in the box and your second choice with a **"2"**. Notification of the examination date and place will be mailed 2-3 weeks after receipt of the application.

	Anacortes	1005 Commercial St		Mount Vernon	1920 S 3rd St
	Auburn	3310 Auburn Way N Ste H		Omak	646 Okomo Dr. Ste E
	Bellevue	525 156th Ave SE		Parkland	2502 112th St E Ste 200
	Bellingham	1904 Humboldt St Ste B		Poulsbo	19045 Hwy 305 NE Ste 140
	Bothell	18132 Bothell Way NE Ste B6		Port Angeles	228 1st Street
	Bremerton	4841 Auto Center Way Ste 101		Port Townsend	2300 S Park Ave
	Centralia	2426 Reynolds Ave		Pullman	980 S Grand Ave
	Clarkston	603 3rd St		Puyallup	405 W Stewart St Ste A
	Colville	172 S Wynne St		Renton	1314 Union Ave NE Ste 4
	Everett	5313 Evergreen Way		Seattle - Downtown	380 Union St
	Federal Way	1414 South 324th St Ste 105		Seattle - Greenwood	320 N 85th St
	Ilwaco	208 First St		Spokane East	11530 E Sprague Ave
	Kelso	214 S Kelso Dr Bldg F		Sunnyside	2010 Yakima Valley Hwy
	Kennewick	3311 W Clearwater Ste 110		Tacoma - South	6402 S Yakima Ave Ste C
	Kent	25410 74th Ave S		Tacoma - West	8313 27th St W (University Pl)
	Kirkland	10639 NE 68th		Union Gap	2725 Rudkin Road
	Lynnwood	18023-E Hwy 99 N		Vancouver	1301 NE 136th Ave
	Lacey	645 Woodland Square Lp SE		Walla Walla	145 Jade St
	Marysville	601 Delta Avenue		Wenatchee	325 N Chelan Ste B
	Moses Lake	1007 W Broadway		White Salmon	156 NE Church Ave

I, _____, certify that the information
(print name)
provided in this application is true, complete, and correct to the best of my knowledge. I understand that should I misrepresent or conceal any material fact in my application for principal of a private security guard company, it constitutes grounds for suspension or denial of a license for the company. I understand the department may conduct a complete background investigation regarding my qualifications as outlined in Chapter RCW 18.170.

X _____ _____
Signature of Applicant Date

UPON FILING, THIS APPLICATION BECOMES A PUBLIC RECORD AND IS SUBJECT TO PUBLIC DISCLOSURE PROVISIONS PURSUANT TO RCW 42.17

INITIAL INSTRUCTOR APPLICATION **Form Code: PSS_IA Fee Code: 150** **Application Fee - $100.00** Check or Money Order payable to: Treasurer, Commonwealth of Virginia Or apply online: *www.dcjs.org/privatesecurity/watson.cfm* **Application Fees are Non-Refundable**	**COMMONWEALTH OF VIRGINIA** ***Department of Criminal Justice Services*** **Private Security Services Section** **P.O. Box 10110** **Richmond, VA 23240-9998** ***Phone #: (804) 786-4700; Fax #: (804) 786-6344*** ***Website: www.dcjs.org/privatesecurity*** ***Status Hotline: (804) 786-1132 or 1-877-9STATUS***

1. Applicant Name: _____
   Last Name First Name MI

2. Social Security #: _____ Date of Birth _____
   mm/dd/yy

3. Mailing Address: _____
   Number and Street City/Town State Zip

4. Telephone: Residence _____ Business _____ Fax _____

5. May the Department provide information via an e-mail address? ☐ Yes ☐ No

6. E-Mail Address: _____

7. Are you currently employed by a Private Security Training School? ☐ Yes ☐ No

   If yes, School Name: _____ DCJS ID# 88-_____

8. Have you submitted fingerprints to this Department for a National and State Criminal History Check within the past 12 months?

   ☐ Yes

   ☐ No If No, please complete and submit a Fingerprint application form PSS_FP, a fingerprint card and $50.00 processing fee for a national and state criminal history check or this application cannot be processed.

9. Have you committed any act or omission which resulted in a license, certification or registration being suspended, revoked, not renewed or being otherwise disciplined in any local, state (including Virginia) or national regulatory body?

   ☐ No

   ☐ Yes If yes, attach copies of any correspondence or documentation related to this matter to include the name of the jurisdiction in which it took place, the license number and the name of the business/individual involved. Provide an explanation of the events, including a description of the disciplinary proceeding and the type of sanctions that were imposed.

Exhibit 6 Virginia initial instructor application.

Continued

10. Instruction Category(s) Requested: (Check each that applies)

☐ Private Investigator	☐ Alarm Respondent
☐ Personal Protection Specialist	☐ Central Station Dispatcher
☐ Security Canine Handler	☐ Electronic Security Technician
☐ Security Officer Core Subjects	☐ Electronic Security Sales Representative
☐ Armored Car Personnel	☐ Special Conservator of the Peace
☐ Armed Security Officer Arrest Authority	

11. Firearms Instruction Category(s) Requested (Check each that applies)

☐ Handgun ☐ Shotgun ☐ Advanced Handgun ☐ Special Conservator of the Peace Handgun

12. Do you have documented experience as required to be eligible to be certified to instruct in the selected categories? Required experience: 3 years of management/supervisory or five years of general experience in a private security, law enforcement or related field; or 1 year experience as an instructor/teacher at an accredited educational institution or agency in the subject matter for which certification is requested, or in a related field. (See 6VAC20-171-100 of the Regulations Relating to Private Security Services)

☐ No If No, this application cannot be processed.

☐ Yes If Yes, please attach third party documentation verifying the type and dates of experience. Resumes are not acceptable. This application cannot be processed without the requested documentation.

15. Do you have documentation of successful completion of a general instructor development course w/in 3 years immediately preceding the date of application that meets or exceeds; or completion of instruction development program longer than 3 years prior to date of application and has provided instruction during the 3 years immediately preceding, or has provided instruction in a related field at an institution of higher learning?

☐ No If No, please submit a General Instructor Entry Level Training Enrollment form (Form PSS_GE). *(This form may be downloaded from www.dcjs.org/privatesecurity)*

☐ Yes If Yes, please attach third party documentation verifying the type and dates of experience/training and certificate of training. This application cannot be processed without the requested documentation.

If applying for firearms instructor:

16. Do you have official documentation of successful completion of a firearms instructor school specifically designed for law-enforcement or private security personnel that meets or exceeds standards established by the department within the 3 years immediately preceding the date of the instructor application?

☐ No If No, please submit a Firearms Instructor Entry-Level Training Enrollment form (Form PSS_FE). *(This form may be downloaded www.dcjs.org/privatesecurity)*

☐ Yes If Yes, please attach third party documentation verifying the type and dates of experience/training and certificate of training.This application cannot beprocessed without the requested documentation.

Continued

17. Do you have official documentation of successful qualification, with a minimum range qualification of 85%, with each of the following:

☐ Revolver ☐ Semi-automatic handgun ☐ Shotgun

☐ No If No, this application cannot be processed.

☐ Yes If Yes, please attach third party documentation verifying the type and dates of qualification and a signed range sheet. This application cannot be processed without the requested documentation.

18. Do you understand that you must first be qualified as a general instructor through DCJS before you can be qualified as a firearm instructor?

☐ Yes ☐ No

I, the undersigned, certify that all information contained on this application is true and correct to the best of my knowledge and I have not omitted any pertinent information. I understand that any misrepresentation, falsification or omission of pertinent information may be cause for denial and may result in criminal charges. I understand that I am responsible for maintaining full compliance with Virginia Code Section 9.1.138 through 9.1-150 and the Regulations Relating to Private Security Services 6VAC 20-171.

Applicant's Signature _____ Date: _____
mm/dd/yy

RENEWAL REGISTRATION APPLICATION **Form Code: PSS_RR Fee Code: 111** **Application Fee - $20.00** Check or Money Order payable to: Treasurer, Commonwealth of Virginia Or apply online: www.dcjs.org/privatesecurity/watson.cfm **Application Fees are Non-Refundable**	**COMMONWEALTH OF VIRGINIA** Department of Criminal Justice Services **Private Security Services Section** **P.O. Box 10110** **Richmond, VA 23240-9998** Phone #: (804) 786-4700; Fax #: (804) 786-6344 Website: www.dcjs.org/privatesecurity Status Hotline: (804) 786-1132 or 1-877-9STATUS

1. Applicant Name: _____
   Last Name First Name MI
2. Social Security Number _____ Date of Birth _____
   mm/dd/yy
3. Mailing Address: _____
   Number and Street City/Town State Zip
4. Telephone: Residence _____ Business _____ Fax _____
5. May the Department provide information via an e-mail address? ☐ Yes ☐ No
6. E-Mail Address: _____
7. Are your currently employed by a Private Security Business ☐ Yes ☐ No

If yes, Business Name: _____DCJS ID# 11-_____

8. Has your current registration expired? ☐ Yes* ☐ No

If Yes, you may reinstate your registration providing this application is completed, all renewal requirements are met; and the applicable nonrefundable application fee and additional reinstatement fee of $**10.00** is submitted to the department within 60 days followingt he expiration date of your registration. If 60 days has elapsed, this application cannot be processed and **initial** registration requirements will need to be met.

9. Registration Category(s) Requested: (Check all applicable categories)

☐ Private Investigator	☐ Alarm Respondent
☐ Personal Protection Specialist	☐ Central Station Dispatcher
☐ Security Canine Handler	☐ Electronic Security Technician
☐ Unarmed Security Officer/Courier*	☐ Electronic Security Technician Assistant
☐ Armed Security Officer	☐ Electronic Security Sales Representative
☐ Armored Car Personnel*	

Note: If you carry or have immediate access to a firearm in the performance of your duties, you will need to apply for and be issued a firearms endorsement (Form PSS_RF).

*Unarmed Security Officers must submit a fingerprint application and fingerprint cards if not previously submitted within the past 12 months. Armored Car Personnel are required to submit fingerprints and a fingerprint processing application upon each renewal of their registration. Form PSS _FP.

Exhibit 7 Renewal registration application from Virginia.

Continued

10. Have you completed all required mandated entry-level or in-service training for selected categories?

☐ Yes Course Name: _____ Date Completed: _____ mm/dd/yy

Course Name: _____ Date Completed: _____ mm/dd/yy

Course Name: _____ Date Completed: _____ mm/dd/yy

(if additional space is needed, please attach a separate piece of paper)

☐ No If No, this application cannot be processed until training has been completed, for more information view our website www.dcjs.org/privatesecurity or contact our customer service representatives for training requirements.

11. Have you **been convicted** or **found guilty of a felony or misdemeanor** (not to include minor traffic violations) in Virginia or any other jurisdiction to include military court martial or currently under protective orders within the past two years? ☐ Yes* ☐ No

***If Yes,** please attach a **Private Security Criminal History Supplemental Form** (PSS_CHS) and all requested criminal history documentation. *This form may be found on our website **www.dcjs.org/privatesecurity** under Form Name: PSS_CHS.*

12. Are you currently registered or certified in a private security category in any other state or jurisdiction?

☐ No ☐ Yes _____

Please liststates/jurisdictions–attach additionalpaper if necessary.

13. Have you committed any act or omission which resulted in a license or registration being suspended, revoked, not renewed or being otherwise disciplined in any local, state (including Virginia) or national regulatory body?

☐ No

☐ Yes If yes, attach copies of any correspondence or documentation related to this matter to include the name of the jurisdiction in which it took place, the license number and the name of the business/individual involved. Provide an explanation of the events, including a description of the disciplinary proceeding and the type of sanctions that were imposed.

I, the undersigned, certify that all information contained on this application is true and correct to the best of my knowledge and I have not omitted any pertinent information. I understand that any misrepresentation, falsification or omission of pertinent information may be cause for denial and may result in criminal charges. I understand that I am responsible for maintaining full compliance with Virginia Code Sections 9.1-138 through 9.1-150 and the Regulations Relating to Private Security Services 6 VAC 20-171.

14. Applicant'sS ignature _____ Date: _____ mm/dd/yy

TRAINING SESSION NOTIFICATION FORM **Form Code: PSS_TSN** **Application Fee – No fee.** Must be postmarked or received no less than (7) calendar days prior to the beginning of the training session.	**COMMONWEALTH OF VIRGINIA** ***Department of Criminal Justice Services*** Private Security Services Section **P.O. Box 10110, Richmond, VA 23240-9998** ***Phone #: (804) 786-4700; Fax #: (804) 786-6344*** ***Website: www.dcjs.state.va.us/privatesecurity***

1. School Name: _____ School ID: 88-_____

2. Primary Instructor SSN: _____
Please note: Individual can only be PRIMARY instructor for ONE class per day & time

3. Location of Training: _____
(if different than School) Number and Street City/Town State Zip

4. Range Name: _____ Code: _____

5. Start Date: _____ End Date _____
mm/dd/yy mm/dd/yy

6. Start Time _____ End Time _____
Military Format Military Format

7. Category of Training to be Provided: (**Check only one**)

Entry Level Subjects

☐ 01E Security Officer Core Subjects ☐ 02E Private Investigator ☐ 03E Armored Car Personnel

☐ 04E Security Canine Handler ☐ 05E Armed Security Officer Arrest Authority

☐ 06E Special Conservator of the Peace Core Subjects ☐ 30E Electronic Security Subjects

☐ 32E Personal Protection Specialist ☐ 35E Electronic Security Technician ☐ 38E Central Station Dispatcher

☐ 39E Electronic Security Sales Representative

In Service Subjects

☐ 01I Security Officer Core Subjects ☐ 02E Private Investigator ☐ 03I Armored Car Personnel

☐ 04I Security Canine Handler ☐ 06I Special Conservator of the Peace Core Subjects

☐ 30I Electronic Security Subjects ☐ 32I Personal Protection Specialist ☐ 35I Electronic Security Technician

☐ 38I CentralS tation Dispatcher ☐ 39I Electronic Security Sales Representative

Firearms Training:

☐ 07E Handgun Training ☐ 08E Shotgun Training ☐ 09E Advanced Handgun Training

☐ 07R Handgun Re-Training ☐ 08R ShotgunR e-Training ☐ 09R Advanced Handgun Re-Training

☐ 10E Conservator of the Peace Handgun ☐ 10R Conservator of the Peace Handgun Re-Training

8. Please list all additional instructors providing instruction during this session:

Name: _____ SSN: _____

Name: _____ SSN: _____

School Director _____ Phone: _____
(Please Print)

Training Director Signature _____ Date _____
mm/dd/yy

Exhibit 8 Virginia training session notification form.

GEORGIA STATE BOARD OF PRIVATE DETECTIVE & SECURITY AGENCIES
237 COLISEUM DRIVE
MACON, GA 31217
TELEPHONE: 478.207.1460 FAX: 478.207.1468

INFORMATION SHEET FOR COMPANY LICENSURE

IMPORTANT: **All applications must be reviewed and approved by the Board *prior* to receiving an appointment to take the exam. See Board meeting schedule on our website, www.sos.state.ga.us/plb/detective**
The Board will not consider incomplete applications. Incomplete applications may be returned for completion. Complete applications must be received at least forty-five (45) days *prior* to the exam date. See the Exam Information on our website, www.sos.state.ga.us/plb/detective
*****IMPORTANT:*** **Review the Qualifications for Examination listed below BEFORE MAKING APPLICATION. Ensure that you can qualify for the examination before you make application; otherwise, you risk the loss of the application fee. Application fees are NON-REFUNDABLE.**

QUALIFICATIONS FOR PRIVATE DETECTIVE EXAMINATION *(FROM O.C.G.A.§ 43-38-6)*:

1. **An applicant must be at least eighteen (18) years of age;**
2. **An applicant is a citizen of the United States, or a registered resident alien;**
3. **An applicant is of good moral character;**
4. **An applicant has not been convicted of a felony or any crime involving the illegal use, carrying, or possession of a dangerous weapon or any crime involving moral turpitude(see O.C.G.A. § 43-38-6(4) for board discretion in granting licensure);**
5. **An applicant has not committed an act constituting dishonesty or fraud;**
6. **An applicant has satisfied the board that the company has on staff or has made arrangements with a board-approved training instructor ;**
7. **An applicant must have at least one of the following qualifications:**
   - **A. Two (2) years of full-time experience as a registered private detective employee with a licensed detective company;**
   - **B. Two (2) years of full-time experience in law enforcement with a federal, state, county, or municipal police department;**
   - **C. A four (4)-year degree in criminal justice or a related field from an accredited college or university.**

QUALIFICATIONS FOR PRIVATE SECURITY EXAMINATION *(FROM O.C.G.A.§ 43-38-6)*:

1. **An applicant must be at least eighteen (18) years of age;**
2. **An applicant is a citizen of the United States, or a registered resident alien;**
3. **An applicant is of good moral character;**
4. **An applicant has not been convicted of a felony or any crime involving the illegal use, carrying, or possession of a dangerousw eapon or any crime involving moral turpitude(see O.C.G.A. § 43-38-6(4) for board discretion in granting licensure);**
5. **An applicant has not committed an act constituting dishonesty or fraud;**
6. **An applicant has satisfied the board that the company has on staff or has made arrangements with a board-approved training instructor ;**
7. **An applicant must have at least one of the following qualifications:**
   - **A. Two (2) years of full-time experience as a supervisor or administrator in in-house security operations, or with a licensed security agency;**
   - **B. Two (2) years of full-time experience in law enforcement with a federal, state, county, or municipal police department;**
   - **C. A four (4)-year degree in criminal justice or a related field from an accredited college or university.**

Exhibit 9 Georgia information sheet for company licensure.

Continued

THE APPLICATION PROCESS

Submit a completed application. A completed application consists of the following information:

1. **A company application with each question on the application answered to the best of the applicant's ability.**
2. **The appropriate application fee. See the Fee Schedule in the application package, or on our website, for updated fee information.**
3. **A completed set of fingerprint cards with a processing fee of $24.00 in the form of a certified check or money order payable to the GBI. Submit the cards and fee with the application to the Board office. The Board office will forward the cards to the GBI. *****NOTE*****: If the applying company is a partnership or corporate entity, the fingerprints submitted must be for the designee of the company.**
4. **A 2"X2" frontal view photograph of the applicant.**
   *******NOTE*****: If the applying company is a partnership or corporate entity, the applicant will be the designee of the company.**
5. **An original NOTARIZED letter of experience from the applicant's employer where the two years of experience was obtained. The letter must include the exact dates of full-time employment, and positions and duties held by the applicant. If the experience used to qualify the applicant is from law enforcement, the letter must include P.O.S.T. certification qualifications. The letter must be signed by the personnel department of the company/organization, or by a responsible officer/supervisor of the company/organization, on company letterhead.**
   *******NOTE*****: Certificates, Letters of Commendation, copies of licenses, resumes, self-written letters of experience, and like documents ARE NOT ACCEPTABLE as proof of two years of experience.**
6. **If the applying company is an out-of-state company, submit an original NOTARIZED letter of certification from the state(s) in which the company holds or has held a license. Additionally, the individual making application as the license holder for the company must submit an original NOTARIZED letter of certification from the state(s) in which the individual holds or has held a license or registration.**
7. **If the applying company is a Georgia corporate entity, submit CERTIFIED documentation that the applicant for the company is a corporate officer.**
8. **If applying with a four-year degree in criminal justice or a related field from an accredited college or university, the applicant must submit an original CERTIFIED transcript or letter in a sealed envelope from the institution. The sealed transcript or letter must be submitted with the application.**
   *******NOTE*****: A copy of the transcript or letter will not suffice.**
9. **The applicant must also submit an Application for Employee Registration to obtain a personal registration, IF:**
   i. **Applying for a Private Detective Company license;**
   ii. **Applying for a Private Detective/Security Company license;**
   iii. **Applying for a Security Company license, AND the applicant will be armed.**

   *******NOTE*****: An application for a weapon permit must be submitted with any Application for Employee Registration.**
10. **Surety Bond ($25,000)/Insurance($1 million)/Audited Financial Statement (in excess of $50,000).**
    *******NOTE*****: Bond/Insurance/Financial Statement is not required until successful completion of exam.**

Continued

The application is reviewed by Board office staff. Incomplete applications may be returned for completion and will not go before the Board. Complete applications will be considered by the Board at the next Board meeting.

The applicant for an accepted application will be notified of the date, time, and location of the exam(s) for which the applicant is eligible approximately two weeks prior to the examination date.

EXAMINATIONS

The Board does not provide study material. The very broad nature of the scope of practice makes it difficult to provide study material.
****The Board office staff does not have information on where study material may be obtained.**

The Private Detective examination will consist of questions in the following areas:

- **Legal observation/surveillance**
- **Gun safety and handling**
- **Obtaining and preserving evidence**
- **Interview/interrogation**
- **Client relation/administration**

The Security Company examination will consist of questions in the following areas:

- **Search and seizure**
- **Use of force**
- **Rights of privacy**
- **Carrying arms**
- **Transfer of detainee/offender**
- **Scope of services**
- **Developing service plans/contracts**
- **Liability**

****If you have a disability and may require an accommodation, complete the "Request for Disability Accommodation Guidelines" form and return with your application and acceptable documentation of your disability.**

***

The Examination Section of the Professional Licensing Boards Division will notify all applicants of the exam scores.
Unsuccessful applicants must submit another exam fee with notification to the Board office of their intent to retake the exam(s). Refer to the website for the dates for examinations.

Successful applicants must submit to the Board office the remaining items necessary to complete the application:

1. **Appropriate License Fee.**
2. **Original $25,000 Surety Bond with the company name exactly as it appears on the application, OR**
3. **$1 million ($1,000,000) General Liability Certificate of Insurance, indicating the policy number AND the certificate holder as: Georgia State Board of Private Detective & Security Agencies, 237 Coliseum Drive, Macon, GA 31217, OR**
4. **An audited financial statement showing a net worth in excess of $50,000.00.**
5. **Any other information requested by the Board.**

Continued

Once all the required information and fee has been submitted, processed, reviewed, and determined complete, the license will be issued.

HELPFUL HINTS

- **Review the qualifications before you apply. Ensuring that you qualify for the license you seek to obtain before submitting an application and fee will help prevent the loss of the non-refundable application fee, should you discover later that you are not qualified.**
- **Ensure that the training instructor referenced on the application is certified by the Board. To verify that a prospective instructor is certified by the Board, you can verify licensure on our website by clicking the link entitled "License Verification" and following the instructions.**
- **Review your application thoroughly before you submit it to the Board office. Every question must be answered to the best of your ability. Failure to do so will result in return of your application and delay in Board review.**
- **Review the fingerprint cards before submitting the application. Each block of information must be completed. The fingerprint processing fee of $24.00 must be in the form of certified check or money order, payable to the GBI.**
- **Ensure that the proof of experience is original and notarized by the employer with whom you received the experience. Remember that certificates and letters of commendation will not suffice for proof of experience. Failure to do so may result in return of your application and delay in Board review.**
- **Ensure that the appropriate fee is paid for the application you are submitting.**
- **Ensure that the bond or certificate of insurance indicates your company name exactly as it appears on your application. Also ensure that the certificate of insurance indicates the holder as the Georgia State Board of Private Detective & Security Agencies, 237 Coliseum Drive, Macon, GA 31217. Failure to ensure that this information is accurate will result in return of your application and delay in issuing your license.**
- **If applying as a corporate entity, ensure that the proper corporate documents are submitted that indicate that the designee for the company license is an officer of the corporation.**

All information should be mailed to the Board office by addressing correspondence to:

Georgia State Board of Private Detective & Security Agencies
237 Coliseum Drive
Macon, GA 31217

OFFICE USE ONLY

FINGERPRINT CARDS MAIL DATE: _____	NAME: REGISTRATION NO.:

GEORGIA BOARD OF PRIVATE DETECTIVES
& SECURITY AGENCIES
237 COLISEUM DRIVE
MACON, GA 31217
TELEPHONE 478.207.1460
www.sos.state.ga.us/plb/detective

DO NOT WRITE IN THIS SECTION
RECEIPT # _____
AMOUNT _____
APPLICANT # _____
INITIAL _____ **DATE** _____

APPLICATION FOR EMPLOYEE REGISTRATION

TYPE OF WEAPON APPLIED FOR:

☐ **NO WEAPON** ****THIS DESIGNATION ONLY APPLIES TO PRIVATE DETECTIVE EMPLOYEES**

☐ **EXPOSED** ☐ **SHOTGUN** ** REQUIRES WRITTEN REQUEST FROM EMPLOYER, DETAILING DUTIES

☐ **CONCEALED** ** REQUIRES WRITTEN REQUEST FROM EMPLOYER, DETAILING DUTIES

TYPE OF REGISTRATION APPLIED FOR:

☐ PRIVATE DETECTIVE EMPLOYEE ☐ PRIVATE SECURITY GUARD EMPLOYEE ☐ PRIVATE DETECTIVE/SECURITY EMPLOYEE

☐ IN-HOUSE DETECTIVE EMPLOYEE ☐ IN-HOUSE SECURITY GUARD EMPLOYEE

EMPLOYEE NAME **:**

FIRST MIDDLE LAST

SOCIAL SECURITY NO.*: _____-____-_____

*THIS INFORMATION IS AUTHORIZED TO BE OBTAINED & DISCLOSED TO STATE & FEDERAL AGENCIES PURSUANT TO O.C.G.A. § 19-11-1 & O.C.G.A. § 20-3-295, 42 U.S.C.A. § 551 & 20 U.S.C.A. § 101.

U.S. CITIZEN: _____ YES _____ NO*

*LIST CITIZENSHIP: _____
& SUBMIT A COPY OF REGISTRATION CARD

PLACE OF BIRTH:

_____
CITY STATE OR COUNTRY

AGE: _____
DATE OF BIRTH: _____/_____/_____

GENDER: _____ MALE _____ FEMALE

_____ _____ _____ _____
HEIGHT WEIGHT EYES HAIR

CURRENT RESIDENCE ADDRESS

_____ _____
STREET (INCLUDE APT/LOT #) CITY COUNTY STATE ZIP CODE TELEPHONE NUMBER

COMPANY AFFILIATION

_____ ____
COMPANY NAME

THIS SECTION MUST BE COMPLETED
_____
COMPANY LICENSE NUMBER

_____
ADDRESS (STREET, SUITE #) CITY STATE ZIP CODE

_____
COMPANY TELEPHONE NUMBER

Exhibit 10 Georgia application for employee registration.

Continued

BACKGROUND INVESTIGATION QUESTIONNAIRE

As part of a background investigation to determine your suitability for the issuance of a registration by the Georgia Board of Private Detective & Security Agencies, you are required to answer the following questions. If you answer "Yes" to any questions, give a brief explanation of your answer, including dates and places of arrest(s) &/or conviction(s). Attach additional pages, if necessary. **Convictions will require certified copies of final court dispositions to be included with this application. Failure to provide final dispositions will delay consideration of your application.**

1. Are there currently any charges pending against you for a criminal offense? ☐ YES ☐ NO
   _____

2. Are you under indictment or information in any court for a felony, or any other crime, for which a judge could imprison you for more than one year? ☐ YES ☐ NO
   _____

3. Have you been convicted in any court of a felony, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? ☐ YES ☐ NO
   _____

4. Have you ever entered a plea pursuant to the provisions of the "Georgia First Offender Act", or any other first offender act? **You must respond "Yes", if you pled and completed probation as a First Offender.** _____ ☐ YES ☐ NO

5. Are you a fugitive from justice? _____ ☐ YES ☐ NO

6. Are you an unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance? _____ ☐ YES ☐ NO
   _____

7. Have you ever been adjudicated mentally defective (which includes having been adjudicated incompetent to manage your own affairs), or have you ever been committed to a mental institution? _____ ☐ YES ☐ NO
   _____

8. Have you been discharged from the Armed Forces under dishonorable conditions? ☐ YES ☐ NO
   _____

9. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? ☐ YES ☐ NO
   _____

10. Have you been convicted in any court of a misdemeanor crime of domestic violence? ☐ YES ☐ NO
    _____

11. Have you ever renounced your United States citizenship? ☐ YES ☐ NO
    _____

12. Are you an alien illegally in the United States? _____ ☐ YES ☐ NO

13. Have you, or any company in which you are or were a principal, ever been the subject of an investigation or litigation that was conducted by a federal, state, or local agency? ☐ YES ☐ NO
    _____

Continued

14. Have you ever had a professional license or certification revoked, suspended, or modified for any reason? _____ ☐ YES ☐ NO

15. Have you ever been reprimanded, placed on probation, or otherwise disciplined by a professional licensing or certification body? _____ ☐ YES ☐ NO

16. Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct? ☐ YES ☐ NO

17. Have you ever resigned or been discharged from any position with criminal or administrative charges pending against you? _____ ☐ YES ☐ NO

18. Have you ever been prohibited from doing business with the State of Georgia, the United States Government, or any local or state government? _____ ☐ YES ☐ NO

19. Have you ever been registered with a licensed company as a private detective or security guard employee in this state? If so, list registration number, company, and approximate date of registration: _____ ☐ YES ☐ NO

AFFIDAVIT

I Hereby swear or affirm that the answers to the Background Investigation Questionnaire are true, complete, and correct. I understand that making a false or misleading statement on this form is a crime and may result in criminal prosecution and in my being denied a registration from the Georgia Board of Private Detective & Security Agencies.

STATE OF GEORGIA
COUNTY OF _____ _____
SIGNATURE OF THE APPLICANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS

_____
PRINT NAME

_____ DAY OF _____, _____

_____ _____
NOTARY PUBLIC DATE

MY COMMISSION EXPIRES: _____

Continued

ADDRESS HISTORY

STARTING WITH YOUR CURRENT ADDRESS, LIST YOUR PREVIOUS ADDRESSES FOR THE PAST **FIVE(5)** YEARS. DATES MUST BE PROVIDED, **WITHOUT GAPS**. IF NECESSARY, USE ADDITIONAL PAGES.

DATES FROM	TO	STREET ADDRESS	CITY	STATE	ZIP CODE

EMPLOYMENT HISTORY

STARTING WITH YOUR CURRENT EMPLOYER, LIST YOUR EMPLOYMENT FOR THE PAST **FIVE (5)** YEARS. ALL TIME MUST BE ACCOUNTED FOR, INCLUDING PERIODS OF UNEMPLOYMENT. ALL BLOCKS MUST BE COMPLETED. IF NECESSARY, USE ADDITIONAL PAGES.

DATES FROM	TO	EMPLOYER	POSITION HELD	SUPERVISOR

Continued

AUTHORIZATION FOR BACKGROUND INVESTIGATION

I authorize the Georgia Board of Private Detective & Security Agencies to conduct a background investigation of me to determine my suitability for a registration. I give my consent for full and complete disclosure of all records and information conceming myself to the Board or authorized representatives, whether such records and information are of a public, private, or confidential nature, to include criminal history records.

Full Name Printed	**Sex**	**Race**
Social Security Number		**Date of Birth**
Street Address		**Home Phone Number**
City, State, Zip Code		**Work Phone Number**
Signature		**Date**

ATTACH PHOTO
2 X 3

Continued

ADDITIONAL EXPERIENCE

List any additional experience you have which has not been addressed and which you feel qualifies you for registration under the Private Detective and Security Agencies Act. Attach any documentation necessary as proof of training and/or experience.

_____

_____

_____

_____

_____

AFFIDAVITS

I certify and declare that I am of good moral character and that all information contained in this application is true and correct, to the best of my knowledge. I understand that any willful omission or falsification of pertinent information required in the application is justification for the denial, suspension, or revocation of my registration by the Board.

I also understand that if I have made a false statement on the application, or if I am found to have been convicted of a felony and have not had all of my civil rights restored pursuant to the law, **the Board my suspend my registration without a prior hearing.** I shall be entitled to a hearing after the suspension of my registration.

STATE OF GEORGIA
COUNTY OF _____ _____

_____
SIGNATURE OF THE APPLICANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS

_____
DATE

_____ DAY OF _____, _____

_____
NOTARY PUBLIC
MY COMMISSION EXPIRES: _____

I certify and declare that the above employee has been given the minimum training required under the rules and regulations of the Board, and that the employee is qualified by training to be registered as an employee by the Private Detective and Security Agencies Board. I further certify and declare that a name character background check has been made by my company on the employee, which indicates that the employee has had no felony convictions and has not displayed a disregard for the law.

STATE OF GEORGIA
COUNTY OF _____

_____
SIGNATURE OF THE EMPLOYER

SUBSCRIBED AND SWORN TO BEFORE ME THIS

_____
DATE

_____ DAY OF _____, _____

_____
NOTARY PUBLIC
MY COMMISSION EXPIRES: _____

Continued

GEORGIA BOARD OF PRIVATE DETECTIVES
& SECURITY AGENCIES
237 COLISEUM DRIVE
MACON, GA 31217
TELEPHONE 478.207.1460
www.sos.state.ga.us/plb/detective

DO NOT WRITE IN THIS SECTION
RECEIPT # _____
AMOUNT _____
APPLICANT # _____
INITIAL _____ **DATE** _____

APPLICATION FOR WEAPON PERMIT

TYPE OF WEAPON APPLIED FOR:

☐ **EXPOSED:** ☐ SHOTGUN* * REQUIRES WRITTEN REQUEST FROM EMPLOYER, DETAILING DUTIES

☐ **CONCEALED** ** REQUIRES WRITTEN REQUEST FROM EMPLOYER, DETAILING DUTIES

ALL APPLICATIONS FOR WEAPON PERMIT REQUIRE CERTIFICATION OF RANGE SCORES

EMPLOYEE INFORMATION

EMPLOYEE NAME :

_____
FIRST MIDDLE LAST*

REGISTRATION NO.*

FOR CHANGE APPLICATIONS ONLY

COMPANY AFFILIATION

_____
COMPANY NAME

THIS SECTION MUST BE COMPLETED
_____
COMPANY LICENSE NUMBER

_____ _____ _____ _____
ADDRESS (STREET, SUITE #) CITY STATE ZIP CODE

_____
COMPANY TELEPHONE NUMBER

YOUR JOB TITLE: _____

TRAINING INFORMATION

_____ PLACE & DATE OF CLASSROOM INSTRUCTION	_____ INSTRUCTOR LICENSE NO.
_____ PLACE & DATE OF FIREARMS INSTRUCTION	_____ INSTRUCTOR LICENSE NO.

Continued

BOARD RULE 509-4-.01(1) & (2) WEAPONS. AMENDED.

(1) No person licensed by the board to carry a firearm shall carry any firearm which is not in operable condition and capable of firing live ammunition, and when carrying such a weapon, the licensee shall have on his person live ammunition capable of being fired in the weapon which he carries.

(2) No person licensed orregistered by the board to provide security services shall carry a firearm while performing services for a private security agency or in-house security agency except while providing actual security services or while going directly to and from work (no stop overs allowed en route to or from work). Under no condition will a licensee, registrant or any other employee or agent of a licensee carry any sort of firearm or have anyone accompanying them who is carrying a fire arm while soliciting new or prospective clients.

TRAINING AFFIDAVITS

I have read Board Rule 509-4-.01(1) & (2) and understand my responsibility to abide by the mandates of the rule. If granted a permit, I shall wear the firearm in the manner prescribed by law.

_____ _____
DATE SIGNATURE OF THE APPLICANT

STATE OF GEORGIA
COUNTY OF _____

SUBSCRIBED AND SWORN TO BEFORE ME THIS

_____ DAY OF _____, _____

_____ _____
NOTARY PUBLIC
MY COMMISSION EXPIRES: _____

I declare that the above employee is qualified to carry a firearm by reason of having received classroom instruction in the use of firearms by a board-approved instructor, having received firearm range instruction, and having passed the Standard Practical Pistol Course.

_____ _____
DATE SIGNATURE AND TITLE OF THE EMPLOYER

STATE OF GEORGIA
COUNTY OF _____

SUBSCRIBED AND SWORN TO BEFORE ME THIS

_____ DAY OF _____, _____

_____
NOTARY PUBLIC
MY COMMISSION EXPIRES: _____

Continued

EMPLOYER REQUEST FOR CONCEALED WEAPON PERMIT

This form must be completed by the employer and accompanied by an application for a concealed weapon permit for the referenced employee. A detailed description of the duties of the employee and the need for the employee to carry a concealed weapon must be made, with complete justification in support of the request.

TO: Georgia State Board of Private Detective & SecurityAgencies

FROM: _____
Print Name of License Holder for the Company

_____
Company Name and License Number

RE: Request for Concealed Weapon Permit

I hereby make request for a concealed weapon permit to be issued to _____.
Print Name of Employee

I have detailed below the specific duties that the employee will be assigned, along with complete justification of the necessity of carrying of a weapon in a concealed manner:

_____

_____

_____

_____

_____

_____

_____

_____

I certify and declare that the information presented in this request for a concealed weapon permit is a true description of the actual job duties that are or will be assigned to the above-named employee and a true representation of the facts in support of the necessity for carrying a concealed weapon in the performance of these duties. I understand that any intentional misrepresentation of the facts in support of this application for concealed weapon permit will be grounds for disciplinary action by the Board up to and including revocation of my license.

STATE OF GEORGIA
COUNTY OF _____ _____
SIGNATURE OFTHE LICENSE HOLDER

SUBSCRIBED AND SWORN TO BEFORE ME THIS

_____ DAY OF _____, _____ _____
DATE

_____
NOTARY PUBLIC
MY COMMISSION EXPIRES: _____

STATE OF WASHINGTON Department of **Licensing**

BUSINESS AND PROFESSIONS DIVISION
PRIVATE SECURITY GUARD SECTION
PO BOX 9048
OLYMPIA, WA 98507-9048
(360) 664-6611
FAX (360) 570-7888

APPLICATION FOR LICENSURE AS AN

ARMED PRIVATE SECURITY GUARD

FOR VALIDATION ONLY

New Applicant $30.00 *(In addition to $65.00 Unarmed PSG application fee)*
Transfer/Rehire $30.00 *(In addition to renewal fee, if due)*

Applicants should either already be licensed as an unarmed private security guard OR submit a completed Unarmed Private Security Guard Application and fee with this application.

001-070-299-0011

Please type or print clearly and sign on page 2

Make remittance payable to: State Treasurer
Send this application with your remittance to:
Department of Licensing
PO Box 9048
Olympia, WA 98507-9048

Applicant Information

Last Name	First Name	Middle Name	Date of Birth

Applicant's Residence Address *(street)*

City	State	Zip Code	Home Telephone No.
			( )

☐ U.S. Citizen ☐ Resident Alien	Social Security No. *(per RCW16.23.150)*	Gender ☐ Male ☐ Female

Business Name	Company License No.	Company License Expiration Date

Business Address *(street)*

City	State	Zip Code	County

Business Telephone No.	Fax No.
( )	( )

Firearms Certification Course

RCW 18.170.040(c) requires armed security guards to have a current firearms certificate issued by the Criminal Justice Training Commission (CJTC), telephone (206) 835-7314. After you have completed the firearms training, CJTC will issue a notice that you have completed the training course. An armed license cannot be issued to you until your firearms certificate has been received by the Department of Licensing.

Applicant - respond to all questions below. If you answer "yes" to any, attach a separate sheet with explanation.

		Yes	No
1.	Have you ever been found guilty of fraud, dishonesty, or misrepresentation while performing duties as a private security guard?	☐	☐
2.	Have you ever been found guilty of incompetence or negligence that resulted in injury to a person or created an unreasonable risk to a person?	☐	☐
3.	Have you ever been found guilty of releasing information about the property or valuables you were guarding?	☐	☐
4.	Have you ever been convicted of a gross misdemeanor or felony as a juvenile or adult?	☐	☐
5.	Have you ever been convicted of any act involving unethical or immoral behavior?	☐	☐
6.	Have you been licensed as a security guard in any jurisdiction? If "yes," in what jurisdiction? *(Please insert name of state* _____ *and date* _____*)* Check your Washington State License status at: https://wws2.wa.gov/dol/profquery/licenseesearch.asp	☐	☐
7.	Have you ever had a security guard license suspended, revoked, or restricted? If "yes," in what jurisdiction? *(Please insert name of state* _____ *and date* _____*)*	☐	☐

If any conviction was dismissed, please enclose copies of the court documents.

sign on page 2

The Department of Licensing has a policy of providing equal access to its services. If you need special accommodation, please call (360)664-6611 or TTY (360)664-8885.

Exhibit 11 Washington armed private security guard application.

Continued

As part of the application process, the Department of Licensing conducts background checks for criminal convictions on applicants.
Please provide one clear fingerprint card with this application.

Certification - *Mandatory* Signature

I, _____, certify that the information provided in this application
PRINT APPLICANT'S NAME (FIRST, MIDDLE, LAST)
and any supporting documents, is true, complete, and correct to the best of my knowledge. I understand that should I misrepresent or conceal any material fact(s) in my application for a private security guard license, it constitutes grounds for denial or suspension of a license. I understand that the Department of Licensing may conduct a complete background investigation regarding my application pursuant to Chapter 18.170 RCW.

X_____
SIGNATURE OF APPLICANT

Date _____

Authorization - *Voluntary* Signature

I, _____, **voluntarily** authorize the Department of Licensing to
PRINT APPLICANT NAME (FIRST, MIDDLE, LAST)
release any and all criminal history information so obtained to my employer, or to my prospective employer.

X_____
SIGNATURE OF APPLICANT

Date _____

UPON FILING, THIS APPLICATION BECOMES A PUBLIC RECORD AND IS SUBJECT TO PUBLIC DISCLOSURE PROVISIONS PURSUANT TO RCW 42.17

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