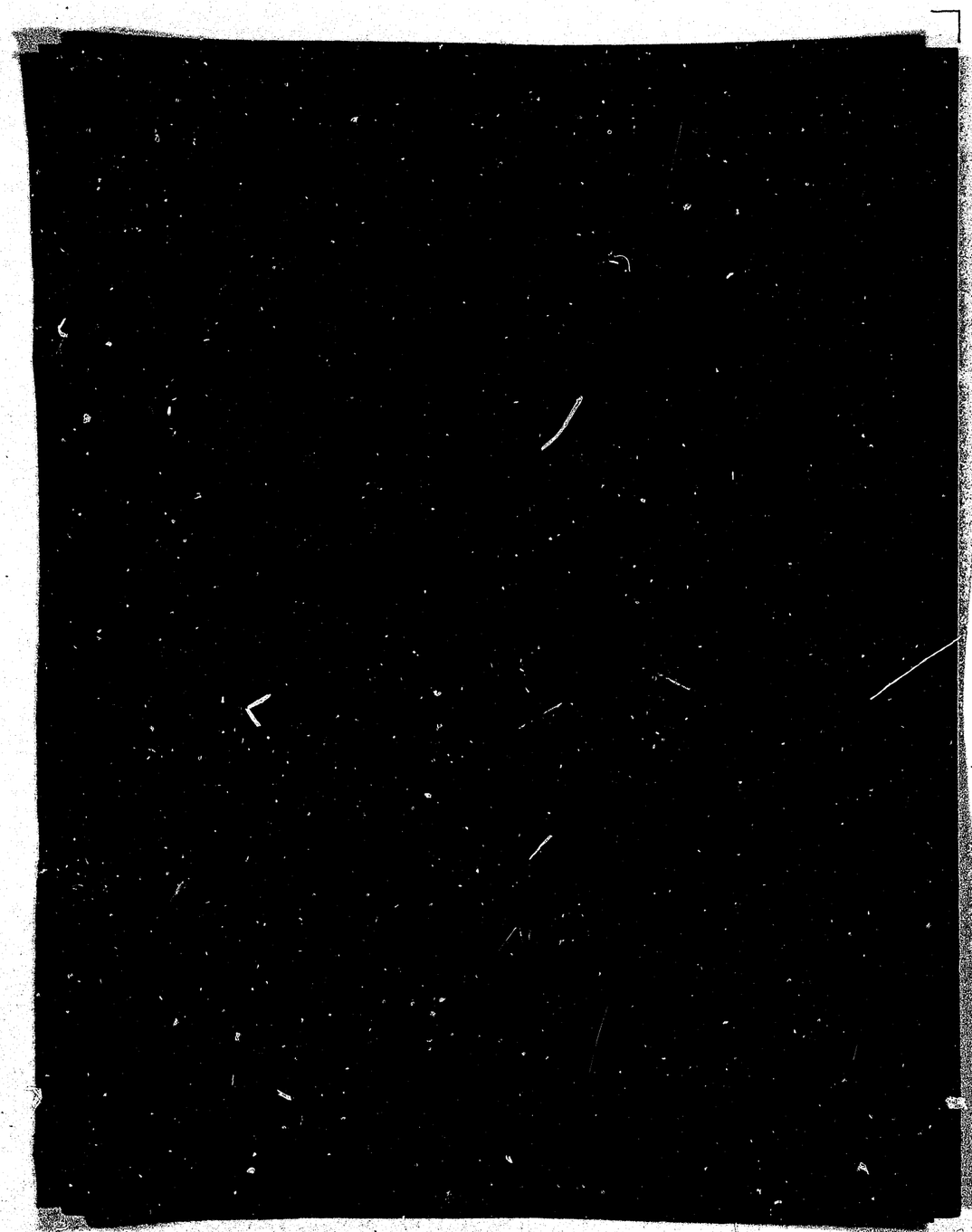

The Law and Private Police Volume IV; R-872/DOJ

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Inquiries concerning this report should be directed to Sorrel Wildhorn at The Rand Corporation.

PREFACE

This report is one of a series of five describing a 16-month study performed by The Rand Corporation under Grant NI-70-057 from the National Institute of Law Enforcement and Criminal Justice (NILECJ), Law Enforcement Assistance Administration of the United States Department of Justice.

The broad purposes of the study are essentially twofold. First, we seek to describe the nature and extent of the private police industry* in the United States, its problems, its present regulation, and how the law impinges on it. And second, we have attempted to evaluate the benefits, costs, and risks to society of current private security and, as specifically requested by the NILECJ, to develop preliminary policy and statutory guidelines for improving its future operations and regulation. The results of the study are intended for use by the private police industry and by the governmental agencies that regulate it, as well as by the general public.

The five reports comprising the study are:

R-869-DOJ *Private Police in the United States: Findings and Recommendations*

This comprehensive summary report draws on information contained in R-870-DOJ, R-871-DOJ, and R-872-DOJ to develop the overall findings and recommendations of the study.

R-870-DOJ *The Private Police Industry: Its Nature and Extent*

This descriptive report covers the nature, size, growth, and operation of the industry and its personnel. It also describes the results of a survey of private security employees.

R-871-DOJ *Current Regulation of Private Police: Regulatory Agency Experience and Views*

Licensing and regulation of the industry in every state and several cities is described. This report also includes extensive data on regulatory agency experience, complaints, disciplinary actions taken, and the views of 42 agencies on needed changes in regulation.

R-872-DOJ *The Law and Private Police*

This report discusses the law as it relates to the private police industry. It includes a general discussion of the sources of legal limitations upon private police activities and personnel and sources of legal powers, and an examination of specific legal problems raised by these activities and by the relationships between the users and providers of private security services. The legal doctrines governing particular security activities are evaluated and recommendations for improvement are offered.

R-873-DOJ *Special-Purpose Public Police*

Descriptive information is presented on certain types of public forces not having general law-enforcing responsibilities. These include reserve police, special-purpose federal forces, special local law-enforcement agencies, and campus police. These data provide a useful context for analyzing the role of private police.

*Throughout this study we have used the term *private police* to include all privately employed guards, investigators, patrolmen, alarm and armored-car personnel, and any other personnel performing similar functions.

CONTENTS

I. INTRODUCTION

Private police perform a variety of law-enforcement and investigative functions. Patrolling the suburbs, protecting merchants from shoplifters, maintaining the security and peace of various types of buildings, gathering information, and investigating crimes are only a few examples. How these various functions are performed presents a host of legal problems. This report discusses such legal problems: Chapter II outlines the general legal problems that inhere in all of these activities. The remaining chapters deal with special, but significant, problems which flow from private police activities.

Chapter III deals with legal problems arising from investigatory activities such as searching private property, electronic eavesdropping and other forms of surveillance, access of private police to public police records, and gathering information on private citizens from third parties.

Chapter IV deals with legal problems arising from law-enforcement and protection functions such as arrest, detention, search, interrogation, and use of force.

Chapter V deals with legal problems arising in four other areas: the impersonation of and confusion with public police, with particular emphasis on the wearing of uniforms and badges; the use of firearms; directing and controlling traffic; and the legal relationships between the users and providers of private security services.

II. GENERAL DISCUSSION OF LEGAL PROBLEMS

A. GENERAL SOURCES OF POWERS AND LIMITATIONS

State "Tort" Law

General Description

The primary source of restrictions and powers for the investigative and law-enforcement activities of private security personnel is the "tort" law of the various states—whether derived from court-developed "common law" or from state legislation. Such tort law governs the activities of all the citizenry and allows an injured party to bring a lawsuit to enjoin the activity and recover for the damages caused by the "tortious" conduct. Tort law is basically remedial law. Its emphasis is upon the post-injury state in which an injured party attempts to recover damages in a court of law for his injury. It restrains private activity primarily by instilling a fear of a subsequent lawsuit upon the actor.

The following are the primary torts which are relevant to various law-enforcement and investigative activities of private security personnel:

1. Battery—intentionally causing the harmful or offensive touching of another person.
2. Assault—intentionally causing the apprehension or fear of a harmful or offensive touching.
3. Infliction of Mental Distress—intentionally causing mental or emotional distress in another person.
4. False Imprisonment—intentionally confining or restricting the movement or freedom of another person.
5. Malicious Prosecution—groundlessly instituting criminal proceedings against another person.
6. Trespass to Land—unauthorized entering upon the property of another.
7. Trespass to Personal Property—unauthorized taking or damaging of another's goods.
8. Negligence—causing injury to persons or property by taking an unreasonable risk or by failing to use reasonable care.
9. Defamation (Slander and Libel)—injuring the reputation of another by publicly uttering untrue statements.
10. Invasion of Privacy—intruding upon another's physical solitude; disclosing private information about another; publicly placing another in a false light.

In short, any arguably wrongful conduct of private security personnel can be the subject of a tort lawsuit. From their inherent common-law power, the courts are free to develop remedies to fit novel types of injuries to persons despite the absence of prior case-law precedents.

Just as tort law protects against certain interferences with another person's life, property, or reputation, it simultaneously provides several categories of defenses, privileges, and immunities designed to protect a person from incurring such liability. For example, an action based upon intentional interference with another's property or person is subject to the following privileges or defenses: self-defense, defense of others, defense of property, crime prevention, citizen's arrest, and in many jurisdictions, detention of suspected shoplifters. Moreover, all intentional torts are subject to the defense that the injured party consented to the interference. A separate set of privileges and defenses exists for invasions of privacy and defamation. Most of these privileges are subject to a reasonableness limitation and will be lost if exercised in an unreasonable manner. As to negligence, there exist such defenses as contributory negligence and assumption of the risk by the injured party. Of course, the defendant can always defeat a negligence claim by showing that he acted reasonably.

Effectiveness

Tort law can often be quite effective as a means for compensating for improper conduct by private security personnel. However, civil damage lawsuits are not always a satisfactory method for remedying wrongs. Litigation is expensive, slow, and requires a lawyer. Thus, it is often inaccessible to a number of people, particularly the poor, and particularly persons without clear-cut claims.

The vicissitudes of tort law mean, moreover, that a legitimate, sound claim may be lost because of such factors as an unsympathetic jury, a poor lawyer, or a biased judge. Finally, there is no assurance that the damages awarded—either by court order or by settlement—have any logical relation to the nature or extent of the injuries actually suffered.

As a means of deterring improper conduct, tort law is often unsatisfactory. While the fear of a potential damage suit may deter some misconduct, the sanction is triggered only after the harm has been done. Given the large sums of money often involved, such a deterrent can be quite effective. However, the threat of damage suits is significantly reduced by the fact that so much of tort law turns upon such vague concepts as "reasonableness," "intent," and "due care." These concepts require that the specific facts and circumstances of the incident control, and thus there is great latitude for judge and jury. Therefore, certain persons may be willing to take actions on the chance that a lawyer can later persuade the decisionmakers that his view of the facts is the proper one. Additionally, the deterrent value of tort recovery can be reduced by insurance or financial inability to satisfy a judgment.

As a means of defining the limitations placed upon private security activities, tort law is, at best, confusing, complicated, and vague. Such standards as "reasonableness" make it difficult to define in advance what conduct in a crisis situation will be acceptable. The confusing patterns of applicable torts, privileges, and defenses mean that neither the guard, his employer, nor his lawyer is likely to be able to determine how a guard should conduct himself in any given situation.[1]

General State and Federal Criminal Laws

Many private security activities are regulated by the general criminal law, which prohibits actions such as murder, battery, manslaughter, and breaking and entering. Generally, the criminal laws are sufficient deterrents to improper activity; moreover, they are probably effective deterrents to such actions as murder and battery. However, the probability that sanctions will be imposed for lesser crimes is fairly low. The current logjam in criminal dockets will certainly deter a prosecutor from filing charges of a petty nature, particularly against persons charged with enforcing the law. Minor offenses frequently go unreported. Thus, the deterrent effect of the criminal law may often be fairly minimal. Moreover, the entire concept of deterrence rests on the assumption of rationality. To the extent that individuals do not correctly calculate the consequences of their actions or do not know the consequences, deterrence does not operate.

General Contract Law

Many aspects of private security activity are controlled by general contract law. For example, the contract between a guard agency and the hiring company will in large part govern the respective liabilities of the two business entities for actions of the guards. In addition, the basic legality of the actions that guards take will often turn on contract law. For example, a union contract may limit the powers of a company, and therefore of its guards, to take certain actions against the company's employees. Finally, contract and tort law often coincide on such questions as the right of a theater owner, and thus his hired guard, to eject a paying customer.

Statutes Specifically Regulating the Business of Private Police

General Description

As indicated in Rand report R-871-DOJ, there are a variety of state and local laws, ordinances, rules, and regulations governing the business of providing private security protection. Generally, this legislation takes the form of licensing or registration statutes, with varying degrees of qualifications required to obtain or retain a license or permit. As a theoretical matter these laws can affect the legal aspects of private security activities in various ways. First, such laws form a barrier to entry by prohibiting the regular performance of private security functions without a license.[2] Second, such laws usually provide for revocation or suspension of a license for the commission of a crime, a dishonest act, or a violation of the licensing regulations.[3] (For example, a license can be revoked for conviction of a felony.) Third, these laws often impose higher standards of care on private security personnel in the performance of certain activities

than are imposed on other citizens performing the same activities. For example, in Florida [4] and in California [5] a private investigator is forbidden to divulge any information acquired from or for a client to persons other than the client. Fourth, most licensing laws impose criminal penalties for violations of specific licensing provisions.[6] Finally, most of the statutes require a surety bond or insurance from the private security agency and in some cases the employees of the agency.[7] The bond is for the benefit of persons injured by the acts of the licensed agent; basically, the bond provides a fund from which an injured party can be compensated regardless of whether the sum can be obtained directly from the wrongdoer.

In addition to such restrictions, a limited number of regulatory laws also grant special powers to private police officials. For example, in some states private guards may be authorized to carry weapons whereas ordinary citizens are not.[8]

While licensing laws, administrative regulations, and other business regulations theoretically have the potential to prevent many problems in advance, to administer more effective remedies, and to provide effective deterrents to improper conduct, the current state of such regulation does not seem to have had such significant or salutory effects.

First, there is no indication that the various current requirements necessary to obtain a license operate to screen out persons who are more likely to abuse the rights of the public. The requirements set by the states are fairly minimal; written tests are usually not required, and many of the state regulatory laws apply only to the master licensee, not to the actual employees performing work in the field. Second, the threat of license revocation or suspension has not seemed to deter improper conduct, because the regulatory agencies have not been capable or willing to take such action. For example, our survey of regulatory agencies indicates an extremely low level of license suspensions, license revocations, or other disciplinary actions by the agencies.[9] The reasons for this ineffective performance vary. Suspension or revocation is often procedurally expensive and clumsy, and thus too difficult for the typical, small, poorly funded agency.[10] Moreover, the agency may often believe that license suspension or revocation is too harsh when the license is for the private security employer as opposed to the particular employee who committed the wrong. In addition, the survey indicates that most regulatory agencies simply do not have adequate sources of information concerning violations or adequate investigative resources to discover violations. The survey also indicates that most regulatory agencies spend what precious time and resources they may have on low-priority violations, such as improper uniform, drunkenness, and failure to perform services properly for a customer.[11]

Third, the bond or insurance requirement is usually so small that it makes little difference that injured parties can obtain damages. Moreover, most bonds do not provide for liability of the surety in cases where the principal would not also be primarily liable for the damages. Thus, the bond only provides a backstop, and a small one at that. Finally, licensing laws contain various gaps in coverage. For example, most laws do not apply to in-house guards, and thus a substantial portion of personnel who might well cause problems are exempt.[12]

Deputization

Deputization is a vague label that generally refers to the method by which private citizens become vested with full police powers in specific instances. For example, when statutes grant arrest powers comparable to those of the public police to a certain class of private security personnel in the jurisdiction, a form of deputization has occurred.[13] Similarly, where a public policeman requests a private citizen to assist in a search or arrest, a form of deputization has occurred,[14] and such a person usually possesses the arrest powers of police officers. Indeed, in terms of protection from liability for false arrest, the aiding citizen may receive more protection than the officer.[15] However, deputization usually indicates the formal method by which federal, state, and city governments grant to specific, named individuals the powers or status of public police—usually for a limited time and in a limited geographic area.

The variety of methods for effecting deputization is great. For example, in Maryland the governor is authorized to appoint "special policemen" [16] with full police powers to work for private businesses, but their powers are limited to the premises or property of the requesting firm.[17] A slightly different approach is taken in North Carolina, where the governor is authorized to appoint "company police" for certain public and private companies, and they are vested with full police arrest powers while on the premises of the employer or contracting firm.[18] Oregon provides for governor-appointed company policemen with full police powers in the railroad and steamboat industries.[19]

Whatever the method, deputization makes the powers of a private security officer much more like those of a public policeman. Moreover, as will be explained later, the constitutional restrictions applicable to public police will probably apply to the deputized private security officer, while the application of such restrictions to the nondeputized private security officer is much more doubtful.[20]

In short, deputization does not confer upon the private policeman all of the public policeman's powers, whether in theory or in fact, but it is likely to make him subject to constitutional restrictions placed upon the public police.

Laws Regulating Specific Private Security Activities

General Description

Particular law-enforcement and investigation activities performed by private citizens have aroused sufficient concern to require specific legislation. Such laws usually set standards and provide remedies beyond those normally provided by general tort common law. For example, there exist federal and state laws regulating such activities as wiretapping, eavesdropping, bugging, electronic surveillance, gathering information on persons, impersonating public officials, buying or possessing lethal weapons, and exhibiting weapons. Many of these laws will be detailed in the second portion of this discussion.

The penalties for violation of such laws range from criminal penalties to civil damage suits by the injured person. The civil damage lawsuits are often encouraged by procedural advantages such as attorney's fees for the prevailing party, shifts in the burden of proof, and minimum damages.

Effectiveness

On the whole, these specific laws seem more likely to deter and remedy improper conduct than general tort law or licensing regulations. These laws usually have more specific and detailed definitions of prohibited conduct, and avoid many of the ambiguities of common law torts. Thus, private police are better able to adjust their conduct before taking action. For example, the Fair Credit Reporting Act provides specific standards and remedies for credit reports, in contrast to the unclear requirements provided by the torts of invasion of privacy and defamation.[21] Such laws also may provide for controls, such as licensing, and the procedural advantages in civil lawsuits provided by such laws are likely to make litigation more accessible and encourage settlements.

However, these laws have not always proved completely effective. For example, in such activities as wiretapping and credit investigation, the problem is not in defining or remedying illegality, but in detecting it. Moreover, there are many areas that are not amenable to detailed regulation of the kind provided by these statutes. Finally, the legislature has often provided less protection in specific laws than the courts had previously provided by tort remedies. Many such statutes are poorly conceived and confusing; others have inadequate enforcement mechanisms; and still others are simply too weak to deal with the problem involved.

Federal Constitution

General Description

It is well recognized that the federal Constitution serves as a major legal limitation upon the powers of the *public* police. This limitation operates in three ways. First, there are federal statutes which render police officials criminally liable for denying others their constitutional or civil rights. (For example, in *Screws v. United States*,[22] a sheriff who killed a prisoner was prosecuted for violating the prisoner's civil and constitutional rights.) Second, evidence gained by unconstitutional methods or in violation of constitutional rights—for example, by illegal searches or illegal arrests, or by coercing confessions —will render the evidence, or the fruits thereof, inadmissible in a state or federal criminal proceeding. This doctrine, known as the Exclusionary Rule,[23] has been developed, amidst controversy, by the judicial decisions of the Supreme Court. Third, a constitutional violation may render the official liable for damages in a suit by the aggrieved party. Such a suit for damages is authorized for misconduct of state officials by the specific statutory provisions of the Civil Rights Act of 1871, 42 U.S.C. Section 1983, and for misconduct of federal officials by a recent Supreme Court decision, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[24] These civil damage lawsuits have often been referred to as "constitutional torts." [25]

The practical effect of these sanctions and remedies is very unclear. As for remedying wrongs or acting as a deterrent, civil rights damage lawsuits

against the public police are not very effective because, like tort damage lawsuits,[26] they are usually unsuccessful. The Exclusionary Rule may have some remedial effect, for the wronged citizen is relieved of criminal liability because of the police misconduct; however, such a remedy may be too little and too late for many injured persons. Moreover, the deterrent effect of the Exclusionary Rule is quite suspect.[27] Finally, criminal prosecutions of police officers are relatively infrequent, given the number of complaints of police abuses, and thus are of minimum deterrent value.[28]

Applicability of Constitutional Restrictions

As a general matter, the Constitution directly vests the citizen with few rights in relation to other private citizens.[29] Most constitutional rights of a citizen relate to government or state action. Breaking and entering into a home by a private citizen may be criminal and tortious, but it is usually not a violation of the homeowner's constitutional rights. On the other hand, breaking and entering into a home by public officials is a violation of Fourth Amendment rights.[30] However, the distinction between government and private activity is not always clear or easy to make. Various kinds of private activity have been held to constitute state action and thus are subject to some kind of constitutional limitation. Usually, the state action question is raised in civil damage cases interpreting 42 U.S.C. Section 1983, which prohibits the deprivation of legal or constitutional rights by someone acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." [31] However, the private action/state action distinction has also been raised in various other contexts—for example, in applying the Exclusionary Rule.[32] Nor is the state action finding in one context necessarily applicable in others.

Nonetheless, the question of whether and when private security activities constitute state action can be given some general consideration. But, in answering this question one must recognize that private security activities occur in various contexts and with different degrees of state involvement: In some jurisdictions a private patrol guard may be commissioned and directed by the city police; in other jurisdictions private patrolmen are completely unregulated by any official body. Thus, this question must be answered by considering private security activity at the various possible levels of state involvement.

When private security personnel are actually hired on a contractual basis by a public authority, some constitutional restrictions would probably apply.[33] When the state deputizes private police, the state action requirement would also probably be satisfied. The price for having the increased power of public police is the imposition of constitutional restrictions upon the individual's exercise of that power. Thus, in *Williams v. United States*,[34] the Supreme Court held that the actions of a private detective were state action for the purposes of the criminal provisions of the Reconstruction Civil Rights Act, because of his commission from the City of Miami, which vested him with special state police powers.

Finally, when private security personnel act in conjunction with public police or officials, state action requirements would probably be satisfied. As stated by the Supreme Court in *United States v. Price:* [35] "To act 'under color of law' does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents."

When private security personnel act on their own or for private employers and are not deputized, the argument for constitutional restrictions becomes more much problematic. There are two possible theories for inferring state action.

First, in those states that license private security personnel, one could argue that such involvement constitutes state action. Such an argument would draw upon *Burton v. Wilmington Parking Authority*,[36] where the Supreme Court held that the state's grant of a lease to a restaurant on state property was sufficient state action to subject the restaurant operator to liability for racial discrimination in the operation of the restaurant. However, in *Weyandt v. Mason's Stores, Inc.*,[37] a federal District Court rejected this argument as applied to private guards. In this case, plaintiff alleged that while shopping she was wrongfully detained, slapped, beaten, harassed, and searched by the manager of the store and a private detective under contract to the store. Plaintiff sued under 42 U.S.C. Section 1983 alleging, in part, that the private detective was acting "under color of law" because he was licensed under the Pennsylvania Private Detective Act. However, the court rejected this argument, mainly on the ground that the Pennsylvania law, unlike the Miami law discussed in *Williams*, above, is not a deputization law and "invests the licensee with no authority of state law." [38]

A second theory would be based on the various Supreme Court cases that have held private activity that constitutes the performance of a "public" function subject to some of the constitutional restrictions imposed on a comparable state activity. For example, in *Marsh v. Alabama*,[39] The Supreme Court held that a state could not "impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town management," [40] because the private town served a "public function" similar to public municipalities. And in *Terry v. Adams*,[4] the Supreme Court held that the electoral activities of the Jaybird Democratic Association—a purely private political club—were state action and thus subject to the requirements of the Fifteenth Amendment prohibition of racial discrimination. This decision rested on various grounds: The Jaybird Party as a practical matter was an integral part of the state electoral process; the state had tolerated such activities, and the existence of the Jaybird Party allowed the state to avoid prior Supreme Court decisions banning racially restrictive primaries.

The "public function" theory could well be found applicable to private security activities. Many private security activities—such as arresting shoplifters and investigating crimes—are quite similar to the functions usually performed by public police. In addition, state and local authorities often cooperate with private security personnel. Furthermore, as in *Terry v. Adams*, allowing private security activities to be free from constitutional restrictions might allow the state to avoid the various Supreme Court decisions, such as *Miranda v. Arizona*,[42] requiring state police to inform a suspect of his basic constitutional rights. Finally, in light of the Supreme Court decision in *Amalgamated Food Employers Union v. Logan Valley Plaza*,[43] this theory would be particularly applicable to those guards who work on private property that has an essentially public nature, such as shopping centers and amusement parks.

In sum, constitutional restrictions are generally not applicable to purely private security activities; state action is required. But depending on the circumstances,[44] such state action may well be found for some private police and for some private police activities.[45]

B. RELATIVE POWERS OF PRIVATE CITIZENS, PRIVATE POLICE, AND PUBLIC POLICE

Private Police Compared to Other Citizens

Unless deputized, private security personnel generally do not possess any powers greater than those of other private citizens. Both usually have equal powers to arrest, recapture chattels, defend themselves, defend others, investigate, and carry firearms. Neither has any greater powers to wiretap, invade another's privacy, utter false statements, or commit assault.

As a practical matter, however, private security personnel are likely to be able to take fuller advantage of their citizen powers. Their experience and training is likely to increase their ability to exercise their powers. Moreover, by training or uniform, they can exercise the most useful tool of private security work—consent or acquiescence of others. Finally, private police are more likely to gain the cooperation of government personnel in gaining access to arrest records and in obtaining weapon permits.

On the other hand, private police may be subject to more legal restrictions than the ordinary citizen. In many states and localities, private security personnel are subject to various regulatory controls; and there exists some likelihood that many private security officers will be subject to some constitutional restrictions.

In short, without deputization, private security agents have no greater legal power than the ordinary citizen—only greater practical powers—and they are clearly subject to more legal restrictions.

If deputized, the private security agent would have more powers than the private citizen but he would in all likelihood be subject to the constitutional restrictions applicable to government officials.

Private Police Compared to Public Police

There are marked legal and practical distinctions between the legal powers and restrictions

applicable to private and those applied to public police.

Unless the private officer is deputized, the arrest and other powers of the public police under state laws are much greater than those of the private police. In addition, the criminal and civil sanctions for illegal conduct are much harder to apply to public than private police. Furthermore, the uniform and status of the public policeman will allow him to obtain much greater cooperation from private citizens.

On the other hand, the public police are also accountable in some fashion to governmental bodies and the citizenry. And while there may be doubts about whether constitutional restrictions apply to private security personnel, there is no doubt that such restrictions apply to the public police. However, as stated before, there is some doubt about the *effectiveness* of current enforcement of such constitutional restrictions upon the public police.

In sum, the nondeputized private security officer theoretically and practically has less power than the public policeman.

C. CONCLUSION

Except for the spotty, inconsistent licensing laws regulating private police, there is no specific body of law governing the activities of private police. Also, there are usually no statutes specifically outlining the powers and limitations of private police. Rather, the law governing private police is drawn from the law which governs other citizens performing similar acts—tort law, specific legislation, and criminal law. And even where private police activities are considered state action and subject to constitutional restrictions, the restrictions then applicable were created mainly for public, not private, police. In short, the law for private police activities is largely derivative. Their powers and restrictions are dependent upon the laws governing law-enforcement, investigative, and policing activities performed by the private citizenry in general, and by the public police.

Therefore, the following chapters relating to specific problem areas draw largely upon the general tort law of various states, upon general statutory law of state and federal governments, and upon federal constitutional law. Insofar as state law is used, there is an emphasis upon California, New York, Florida, and other states where the laws and decisions relating to private police personnel and activities are more developed and accessible.

III. INVESTIGATORY FUNCTIONS

A. SEARCHING PRIVATE PROPERTY

Current Practice

Little information is available concerning practices of private police in searches of private property. It does not appear, from public records, that prosecutions for illegal searches by private police are frequent. However, the nature of the material that is the object of the search might be such as to deter any potential plaintiff from filing charges; the owner of the property may not be aware of the search, or may not realize it was illegal; or the wronged citizen may simply complain without seeking prosecution because he is unaware of how to proceed or because he wishes to avoid the bother and expense. Several of the security employees we surveyed reported having witnessed illegal searches or having been the subject of a complaint or threat of lawsuit for alleged illegal search.

One guard told us he had a supervisor who, he believed, "* * * overstepped his authority often in searching persons and in making illegal arrests. He was threatened several times with lawsuits." Another guard reported being threatened with a lawsuit for "* * * searching handbag and car without search warrant or owner's permission." Again, no action was taken. We suspect that, especially in retail stores, illegal searches of persons prior to arrest are not infrequent. The guard training manuals of the larger security companies do not deal with this problem completely, although they do deal correctly and explicitly with the right of private security guards to search an individual incident to an arrest.[46] Training materials for private investigators were not made available to us, so we cannot comment on the instruction of contract agency investigators.

A general indication of the likelihood of unlawful searches and seizures by private police can be gained from certain responses of private security agents to questions in our survey. In a sample of more than 275 agents questioned, 55 percent thought that limitations on the actions of police officers in the area of searches, seizures, and interrogations did not generally apply to private security personnel.[47]

State Regulations

Generally, only public policemen, acting under a validly issued search warrant or pursuant to an arrest, may search private property without consent. Private police have no greater power to conduct searches and seizures of private property than do private citizens. Illegal search activities of private police would generally come within the rubric of crimes against property, found in most state penal codes.[48]

The special statutes governing private security personnel do not deal directly with the subject of searches and seizures. However, licensing regulations usually provide for the revocation of a license for the commission of certain specified misdemeanors, including illegal entry of a building.[49] For example, the California law provides as follows: [50]

> No licensee, or officer, director, partner, manager, or employee of a licensee, shall enter any private building or portion thereof without the consent of the owner or of the person in legal possession thereof.

Similarly, in New York (where private investigators and guard and patrol agencies must be licensed before doing business), the General Business Law prohibits the licensing of any person who *inter alia* has been convicted of unlawful entry into a building, or who has had a private detective's or investigator's license revoked or application denied by virtue of commission of this and/or other listed offenses.[51] It likewise proscribes the hire of such persons by a licensed agency.[52]

In addition to the above penal sanctions, illegal search is almost always a common-law tort; that is, the law provides for civil remedies and sanctions. The traditional torts that most likely would be involved are trespass and conversion. One who intentionally invades the property of another will be liable in trespass for all damages proximately caused

by his entry.[53] The intentional interference with chattels in possession of another also constitutes a trespass, although the tort of conversion is more readily claimed (interference with the control or possession of a chattel such that enjoyment of it is substantially restricted).[54] Damages for conversion are usually equal to the full value of the property seized or destroyed. In conversion, however, there must be an intentional interference with possession, and in trespass, nominal damages may be recovered even if no injury is inflicted on the property.

One defense to a claim of trespass is the privilege to enter upon the land or property of another to recover goods that were wrongfully taken.[55] Flowing from this limited right is the associated right to search the property for the wrongfully converted chattels in a reasonable manner. It must also be noted that force can be used only if the lawful owner is in fresh pursuit of the wrongfully taken property, and if force is reasonable under the circumstances.[56] This privilege extends only to the recovery of wrongfully taken goods; that is, goods that were stolen or taken by force. It does not apply to the recovery of goods that were peacefully obtained—for example, goods that were purchased, with the buyer subsequently defaulting on a conditional sale contract. Most states, however, have statutes which provide for repossession of personal property by the sheriff upon request of the owner. Such statutes have been under attack, and recently the California Supreme Court declared that the sheriff was not empowered to enter a home to repossess personal property without a warrant, such entry being a violation of the Fourth Amendment and the right of privacy.[57]

Recovery for an illegal search might also be premised on the theory of invasion of privacy. The tort of invasion of privacy is recognized by the majority of the states and, indeed, is explicitly rejected by only four states (Texas, Nebraska, Wisconsin, and Rhode Island).[58] One form of invasion of privacy is intrusion upon an individual's physical solitude, which might take one of many forms. For instance, in *Newcomb Hotel v. Corbett*,[59] the plaintiff, a female, had rented a room. At some point later, a hotel clerk saw her enter the room and, assuming that the room had been rented by a man, suspected immoral activity; he had the hotel detective enter the room with a key to catch the "parties." She was alone and in bed. The court held that this was an unwarranted invasion of privacy and damages were appropriate. In *Ford Motor Co. v. Williams*,[60] the Ford Motor Company suspected the plaintiff of theft. An agent went to his house with several policemen to recover Ford's property. Finding the plaintiff was not at home, the agent entered through a window. This was held to be an invasion of privacy, even though the plaintiff was not home. In *Harms v. Miami Daily News, Inc.*,[61] telephone calls were held to be an invasion of privacy. A recent case of some note is *Pearson v. Dodd*.[62] In that case, employees of Senator Dodd removed files from his office and turned them over to a columnist. The files were published. Noteworthy in this case is the assertion of Judge Skelly Wright that the development of the common law should move in the same direction as that of the Fourth Amendment to protect persons from unauthorized intrusions. "We approve the extension of the tort of invasion of privacy to instances of intrusions, whether by physical trespass or not, into spheres from which an ordinary man in a plaintiff's position could reasonably expect that the particular defendant should be excluded."[63] Such a rationale would seem to apply *a fortiori* to a hired investigator who stole files.

Tort recovery against the established agencies, with clear rules of conduct regarding searches, does not seem to be common,[64] though it is probable that the possibility of tort recovery influences the rules and conduct. No figures are available for other private security organizations. In addition, there may be a factor operating to prevent prosecution of tort actions or the filing of criminal complaints: The likelihood of civil or criminal prosecution may be dependent upon the sensitivity of the information revealed by the search—the more sensitive the material uncovered, the more unwilling the victim will be to have the matter publicized further. That is, the grosser the injury, the less likely will be the remedy. Moreover, in many cases, the aggrieved individual may not know that a search has taken place, and if he does, he may not suspect it is unlawful.

Federal Sanctions and Remedies

The Fourth Amendment of the Constitution secures the right of every citizen to be free from unreasonable searches and seizures. However, this amendment is generally considered to apply only to federal, state, and local officials. There is no federal constitutional provision, or federal legislation, dealing with illegal searches and seizures which is applicable to private individuals. There is, however, legislation and case law that deals with illegal searches by federal and state officials, and there are certain situations in which a private individual might be affected by this legislation. To that extent, federal regulation is relevant; 18 U.S.C. Section 913 provides for a $1,000 fine and/or up to 3 years in prison for false detention or an unlawful search by an individual falsely misrepresenting himself as a federal agent.

Moreover, 18 U.S.C. Section 2234 provides a $1,000 fine or up to 1 year in prison for any federal officer exceeding his authority in the execution of a search warrant. Section 2235 provides the same penalties for the malicious procurement of a search warrant. Section 2236 provides:

> • • • [w]hoever, being an officer, agent or employee of the United States or any department or agency thereof, engaged in the enforcement of any laws of the United States, searches any private dwelling used and occupied as such dwelling without a warrant directing such search, or maliciously and without reasonable cause searches any other building or property without a search warrant, shall be fined for a first offense not more than $1,000. . . .

Exemptions are provided by the Section for those serving arrest warrants, or searching upon reasonable suspicion of a felony having been committed, or upon request.

There is no statutory civil remedy for an illegal search by a federal employee. However, a civil cause of action for damages has just been recognized under the Fourth Amendment, for deprivation of rights by federal officials. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[65] the plaintiff alleged that agents of the Federal Bureau of Narcotics made a warrantless entry of his apartment, searched it, and arrested him on a narcotics charge. He claimed to have suffered humiliation, embarrassment, and mental suffering, and sought $15,000 damages from each of the agents. The District Court dismissed the complaint on the ground, *inter alia*, that it failed to state a cause of action. The Court of Appeals affirmed. The Supreme Court reversed, holding that the complaint stated a federal cause of action under the Fourth Amendment, for which damages are recoverable. It dismissed the argument that any cause of action the plaintiff had must be based upon state law.[66] However, the case was remanded to the Court of Appeals to determine whether these federal agents would be immune from liability by virtue of their official position. As yet there is no indication that the courts might entertain an action against a private security officer, based solely on the Fourth Amendment. To do so, a court must declare the Amendment applicable to private persons or must find the security officer acting as a public officer, as discussed below.

In *Bivens*, the Supreme Court recognized the apparent prosecutorial unwillingness to seek the penal sanctions provided for violations of the Fourth Amendment by public police. Only in an unusual case will a prosecutor be willing to prosecute a criminal case against police with whom he must work in other matters. Thus, as Mr. Justice Brennan notes, citing a study by Ginger & Bell, *Police Misconduct: Plaintiffs' Remedies*,[67] a survey of police violations of the Fourth Amendment disclosed that between 1951 and 1967, only 53 cases went past a motion to dismiss.[68]

Underpinning the Fourth Amendment is the basic right of privacy, including within it freedom from unwarranted governmental intrusions.[69] Until the *Bivens* case, *supra*, this protection as recognized by federal courts was limited largely to application of the Exclusionary Rule. The significance of the impact of the *Bivens* decision to award damages for unlawful searches and seizures on the admission of evidence otherwise excludable remains to be seen. As the rationale of the Exclusionary Rule has been deterrence of official misconduct, *Elkins v. United States, supra*, and as this deterrent has never been clearly traced, the courts may seize more readily upon an award of damages to obtain the same result.[70]

In addition, certain unlawful searches and seizures by public police are covered by the Civil War Reconstruction Act: 18 U.S.C. Section 241 declares that a conspiracy against the federal rights of a U.S. citizen is punishable by a fine of $10,000 or 10 years imprisonment, while 18 U.S.C. Section 242 declares that a deprivation of the rights of a United States citizen, under color of state law, is punishable by a fine of $1,000 or 1 year in prison. Damages may be obtained via civil action pursuant to 42 U.S.C. Section 1983, and 28 U.S.C. Section 1343 (3). The former reads:

> 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 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.

Section 1343 (3) provides for essentially the same relief. It must be noted, however, that these sections provide for remedies against state police only; actions by federal police or agents which violate secured constitutional rights are not reached by these provisions.

The applicability of these statutory provisions to private police depends upon whether the private police can be said to be acting with, or in the authorized role of, state agents at the time of the search, that is, acting under color of state law. Thus, participation by a private detective, who was commissioned by the City of Miami, Florida, as a "special officer," in the brutal beating of individuals to obtain a confession was held to be sufficient to constitute action under color of state law for purposes of the criminal provisions of the Reconstruction Civil Rights Act, 18 U.S.C. Section 242.[71] The apparent authority of the special policeman gave him greater powers than a private individual, and established action under color of law.[72] The same rationale would also seem to apply to applications of Sections 1983 and 1343.

In addition, the searches and seizures of private police who have no special commission may also be deemed state action for purposes of claims under Section 1983, at least in certain circumstances. If private police conduct an unlawful search with state police, then Sections 1983 and 1343 should apply.[73] Moreover, if it can be shown that private police may readily make a false claim of authority by virtue of their state licenses, and badges and uniforms, a general extension of these federal tort remedies to cover such police would be justified. State action could be found to exist because the state is responsible for cloaking the private agent with the deceptive apparatus of authority.

B. WIRETAPPING, BUGGING, AND OTHER FORMS OF SURVEILLANCE

Current Practice

Reliable information on the nature and extent of surveillance activities of private police is even sketchier than that on other, more conventional searches. Occasionally, there are newspaper accounts of charges of electronic surveillance. For example, when a private investigator, hired by Robert Maheu, attempted to find Howard Hughes in the Bahamas, he found himself outspied: [74]

> Agents for Intertel, the New York-based security operation, in charge of keeping snoopers away from Hughes' alleged ninth floor perch on Paradise Island "found out we were there before we could find out Mr. Hughes was there."
>
> How Intertel found out about Robinson and seven other Investigators Inc. agents hired by Robert Maheu to find Hughes was particularly disturbing to the detective.
>
> *"They bugged our rooms,"* he complained. *"They tapped our phones,* opened our mail and had access to any incoming messages we had."
>
> Robinson said he guessed that wasn't totally unfair "because *we had electronic spying devices in use ourselves.*" [Emphasis added.]

But in interviews with detective agencies there was clear indication that electronic surveillance occurs. For example, the head of a leading detective agency in the United States candidly asserted that, in his personal experience, in one out of every hundred debugging and dewiretapping cases his agency accepts, his investigators find a bug or a tap. Furthermore, one state regulatory agency (which wishes to remain anonymous) reports that it believes over half of its licensed detective agencies are in violation of the wiretap laws.

Some impression can be formed from the increase in the sales of surveillance devices and equipment. Between 1958 and 1968, sales of detection and surveillance equipment grew from $27,000,000 to $83,000,000.[75] The increase in technological ability is equally disconcerting.[76] Another indication of potential abuse is the fact that 85 percent of the employees of private police agencies indicated that they thought that wiretapping was not a misdemeanor.[77] The magnitude of the problem in controlling such surveillance is indicated by legislative activity as well.[78]

This entire area might be subsumed under the general heading of "eavesdropping," which has been defined as:

> [T]he surreptitious overhearing, either directly by ear or by means of some mechanical device such as a wiretap, microphone, or amplifier, of the words of another spoken on a private occasion, or the preservation of such words by a tape recorder or similar recording device.[79]

However, due to the increase in technology, there now exists a qualitative distinction between simple visual and/or aural eavesdropping and electronic eavesdropping, utilizing bugs and wiretaps.

Nonelectronic Surveillance

Surveillance generally consists of following an individual and attempting to discover as much as possible about his private affairs, by observing his actions or overhearing his conversations. This type of surveillance is often carried on for insurance companies that desire to determine whether claims against them are genuine, and by investigators specializing in obtaining evidence for divorces. Generally, there are no federal or state laws dealing with this type of surveillance. If it is conducted within reason, it does not give rise to tort liability because such surveillance serves the social utility of exposing false claims and discovering evidence.[80] No liability accrues even if the person being followed realizes he is being followed and is frightened by the surveillance, as long as there is no intent to frighten or harass.[81]

However, if there is an unreasonable invasion of privacy, the subject of the surveillance might recover damages. Such a case involved Ralph Nader. He filed a complaint against General Motors, two private investigators, and two private investigation agencies, alleging that these agencies were eavesdropping and overzealously shadowing him, thereby invading his privacy and intentionally inflicting emotional distress. The New York Court of Appeals held that these actions, if proven, would give rise to a cause of action for invasion of privacy.[82] In *Pinkerton National Detective Agency, Inc. v. Stevens,*[83] the agency was found liable for carrying on an investigation in an unreasonable and obtrusive manner. There, the agents had snooped around the house and peeked in the windows. They had called at the door several times, posing as TV salesmen, and had followed the plaintiff around town very closely. In *Souder v. Pendleton Detectives, Inc.,*[84] the defendants had allegedly watched the plaintiff with binoculars, trespassed onto his property, and peeped into his windows. They argued that since the plaintiff had filed an insurance claim, they were privileged to investigate him. The Court held that defendants' alleged conduct, which included peeping into windows, was illegal and therefore the plaintiff had stated a good cause of action. Perhaps the clearest example of the abuse of surveillance is *Schultz v. Frankfort Marine Accident & Plate Glass Ins. Co.*[85] There, the plaintiff alleged that the defendant's agents shadowed him openly, making no attempt at secrecy. Their day and night shadowing was deliberately made obvious to the public, and his neighbors were told that he was being watched. In addition, they eavesdropped upon his home. The court there ruled that such public surveillance was similar to libel, that is, it damaged the plaintiff's reputation, so that the plaintiff could recover if the facts were proven.

Electronic Surveillance

Electronic surveillance, consisting of wiretaps and bugs, poses a far greater threat to individual privacy and dignity than does non-electronic surveillance. It is probably more prevalent than most people would assume. As Senator Edward Long, who intensively investigated wiretapping and bugging, explained:

> You would be amazed at the different ways you can now be "bugged." There is today a transmitter the size of an aspirin tablet which can help transmit conversation in your room to a listening post up to 10 miles away.
>
> An expert can devise a bug to fit into almost any piece of furniture in your room. And even if you find the bug, you will have no evidence of who put it there. A United States Senator was bugged by a transmitter secretly placed into a lamp which his wife was having fixed at the shop. When experts searched for the transmitter, it was gone.
>
> A leading electronics expert told my Sub-committee last year that wiretapping and bugging in industrial espionage triples every year. He said that new bugging devices are so small and cleverly concealed that it takes search equipment costing over one hundred thousand dollars and an expert with 10 years of field experience to discover them. Ten years ago, the same search for bugs could have been done with equipment costing only one-fourth as much.
>
> In California we found a businessman who had been so frightened by electronic eavesdropping devices which had been concealed in his office, that he is now spending thousands of dollars having his office searched every day, taking his phone apart every morning, and stationing a special guard outside his office 24 hours a day.
>
> He is one of a growing number of men in industry who live in constant fear that what they say is being listened to by their competitors.[86]

Wiretapping and electronic surveillance are activities which are rarely detected, and, as a result, public prosecutions have been infrequent. From 1937—when *Nardone v. United States* [87] interpreted Section 605 of the 1934 Federal Communications Act [88] as applying to wiretaps conducted by federal agents for the purpose of gathering evidence for criminal prosecution, and prohibiting the introduction of evidence from such wiretapping in criminal trials in federal court—until 1969, there were less than 20 federal prosecutions for wiretaps. None of these prosecutions were against state or federal police.[89] Because of the difficulty of discovering the surveillance and establishing damages, private remedies are likewise elusive.

Federal Statutes

Until 1968, Section 605 was the primary federal statutory control on electronic surveillance. In that year, Congress enacted much more inclusive leglisation. The 1968 Omnibus Crime Control Act contains an almost complete prohibition upon interception by wiretap or electronic device of oral communications by persons not parties thereto;[90] 18 U.S.C. Section 2511 broadly prohibits the willful interception or attempted interception of "any wire or oral communication" by use of a wiretap or electronic device, except as provided for in the statute, and further prohibits the disclosure or subsequent use of information thus obtained. The penalties imposed are $10,000 or imprisonment for not more than 5 years, or both. The statute does allow interception if prior consent to the interception has been given by one party,[91] or if the interception is made pursuant to a validly authorized warrant, obtainable only by certain federal and state law-enforcement officers. In addition to the penal sanctions imposed by Section 2511, 18 U.S.C. Section 2520 provides:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall
>
> (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communication, and
>
> (2) be entitled to recover from any such person
>
> (a) actual damages but not less than liquidated damages computed at the rate of $100.00 for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages;
>
> (c) a reasonable attorneys' fee and other litigation costs reasonably incurred.

Thus, eavesdropping and wiretapping are permitted only by public police and only upon probable cause and a warrant.[92] Furthermore, Section 2515 prohibits the divulgence or disclosure of such information or its use in any judicial proceeding within the United States:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Finally, Section 2512 prohibits the manufacture, distribution, possession, and advertising of wire or oral intercepting devices.

There is some question as to the Congressional power to reach purely intrastate interceptions of oral communications. The prohibition of the interception of any wire communication is clearly within Congressional power, as the telephone and telegraph facilities utilized for transmission of such communications form part of an interstate network.[93] Congressional authority to prohibit interception of other communications by electronic devices is more questionable, however. There is some authority for the contention that the fifth clause of the Fourteenth Amendment might support prohibition of such interceptions. That is, the right being protected—the right of privacy—is a right arising under provisions of the Bill of Rights and the Due Process Clause of the Fourteenth Amendment,[94] and Congress has broad powers to protect that right.[95] However, the question is largely academic because Section 2511 (1) (b) prohibits the interception of oral communications by use of any devices which have traveled in interstate commerce, or which are attached to wires, cables, etc., used in wire communication, or which are involved in the transmission of communications by radio or which interfere with such transmission, or if the interception or its attempt occurs within an establishment doing business which affects interstate commerce. These prohibitions are within the power of Congress under the Commerce Clause.[96]

State Statutes

In addition to the blanket prohibition of all private wiretapping and electronic eavesdropping in the Omnibus Crime Control Act, 75 percent of the states prohibit unapproved wiretapping as well.[97] Eighteen states had laws in effect in 1970 authorizing court-approved wiretapping and bugging.[98] Maryland, Massachusetts, Nevada, New York, Oregon, and California specifically prohibit any non-court-ordered electronic eavesdropping without consent of the parties. In Illinois and Pennsylvania, it is also illegal to wiretap or eavesdrop upon a conversation without the consent of all parties to the conversation.[99] At least two states, California and Delaware, make it a crime to divulge communications intercepted by an illegal wiretap.[100]

California has recently enacted a comprehensive statutory scheme for protection against the interception of oral communications.[101] California Penal Code Section 631 provides that any person who taps any telegraph or telephone in any manner, or uses

or communicates any information so received in any way, is punishable by a fine not exceeding $2,500 or by imprisonment in a county jail for 1 year or the state prison for 3 years, or both fine and imprisonment. Section 632 provides that every person who eavesdrops upon a confidential communication by means of any electronic amplifying or recording device, without the consent of *all* parties to the communication, shall be punishable in the same manner as in Section 631. Section 635 provides that every person who manufactures, sells, or possesses any device which is designed or intended for eavesdropping is also punishable in the same manner. In each of these Sections a second offender is punishable by a fine not exceeding $10,000, or imprisonment in the county jail for 1 year or state prison for 5 years, or both fine and imprisonment. Section 637 provides that every person who is not a party to a telegraphic or telephonic communication who discloses the contents of that communication without permission of the person to whom it is addressed is punishable by a fine of $5,000, or imprisonment in a county jail for 1 year or state prison for 5 years. Section 637.2 provides a civil remedy for anyone who has been injured by any of the above violations, including a minimum of $3,000 damages and the right to an injunction.[102] In addition, California also provides for the suspension or revocation of the license of any investigator or private security officer who violates the wiretapping or eavesdropping laws.[103]

The state of Maryland also proscribes wiretapping and eavesdropping by private citizens and requires a warrant of law-enforcement officials. It is a misdemeanor, punishable by $1,000 fine or 90 days in jail, or both, for any individual to intercept any telephonic or telegraphic communication or tamper with equipment to do so.[104] It is also unlawful for any person to use any electronic device or other equipment to overhear or record any part of a private conversation without the knowledge or consent of the parties.[105] Any person who does so is subject to a fine of $500 or imprisonment for 1 year, or both.[106] Maryland law also requires every person possessing any eavesdropping or wiretapping device to register that device with the superintendent of the state police. It is unlawful to manufacture, sell, loan, or possess any such device if it is not registered, and a violation of this section is a misdemeanor punishable as above.[107]

The State of New York permits law-enforcement officers to wiretap, without consent of the parties, if they have a court order.[108] Only law-enforcement officers can acquire warrants, and it is a felony, even for a law-enforcement officer, to wiretap or eavesdrop without a court order or the consent of a party to the conversation.[109] New York law also provides that no license shall be issued to any person who has been convicted in New York, or any other state, of a felony,[110] and proscribes the employing of any such person by a detective agency.[111] Licenses can also be revoked for the commission of felonies.[112] Therefore, as in California, there is direct statutory authority for revocation of the license of a private security officer who violates the state or federal wiretap laws. The New York laws were passed at the urging of the Joint Legislative Committee to Study Illegal Interception of Communications in 1956 and 1957. Their investigation disclosed several flagrant examples of wiretapping of individuals by private investigators. In one of these cases, a business executive hired an investigator to examine his telephone to determine whether it had been tapped. The investigator, with the aid of a telephone repairman, determined that it had been tapped, and that it had also been bugged to act as a microphone. A later investigation disclosed that the telephone company repairman who determined that the telephone was tapped was the individual who, 6 months earlier, had installed the tap on that telephone.[113]

It remains to be seen how effective the statutory controls will be in regulating and restraining wiretapping and electronic surveillance by private parties and private police. The Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, chaired by John L. McClellan, is presently preparing to hold hearings to determine how the provisions of the federal eavesdropping law have been implemented. Included in these hearings will be an assessment of what impact they have had on private investigators. That Committee is presently requesting information from states on the effect that a violation of federal and state laws regarding surveillance would have upon an investigator's standing, and whether any licenses have been refused or suspended because of the unlawful use of such equipment. When gathered, that information should provide detailed indications of the prevalency of prosecutions or sanctions for illegal wiretapping.

As yet, there have been no prosecutions of record

for private violations of the Omnibus Crime Control Act. For example, the state of California has responded:

> This office is unaware of any Private Investigator license which has been suspended, revoked, or denied as a result of unlawful use of electronic surveillance devices since 1965. We are aware of at least one instance where an individual who had been convicted of wiretapping did not undertake to seek a license in the knowledge that he would be denied, so it may be presumed that others of whom we are unaware have been so dissuaded.
>
> Our files do record the revocation of a Private Investigator's license in 1963 because of a conviction of a violation of Sec. 653 (h) of the California Penal Code involving the installation of a concealed Dictograph in a private residence without the permission of the occupant. California law, both before and after the enactment of 1967, requires the consent of all parties to the recording of conversations.[114]

This may be, of course, some indication of the effectiveness of state agencies in detecting violations of the surveillance laws, and in catching the culprits. However, the law in the area seems to be very comprehensive at this date, and no extension seems necessary to deal with electronic surveillance by private individuals. What is required, if anything, is better methods of detection.[115]

Common-Law Tort Recovery for Invasion of Privacy

Illegal eavesdropping by a wiretap or electronic devices is an invasion of privacy, and civil recovery is provided for in virtually all states. For example, in *LeCrone v. Ohio Bell Telephone Co.*,[116] a husband wished to overhear the telephone conversations of his wife from whom he was separated. He had the telephone company install an extension of her telephone line in his apartment. The Ohio courts ruled that the installation of the extension was not an invasion of privacy, but the husband's listening to her conversations was an invasion of her privacy and the telephone company was liable to her for making this invasion possible.

The installation of electronic eavesdropping devices, bugs, is also an invasion of privacy for which civil recovery is provided. For example, in *McDaniel v. Atlanta Coca Cola Bottling Co.*,[117] the plaintiff sued the Coca Cola Company for injuries which she said resulted from a foreign body in a bottle of Coke. While the plaintiff was in the hospital the defendant paid an agent to put a listening device and transmitter in her hospital room and to eavesdrop upon her conversations from the room above. The agent heard and recorded intimate conversations between the plaintiff and her husband, nurses, and friends. This, she said, caused her great embarrassment, and the Georgia court allowed recovery for this invasion of her privacy.

In the case of both wiretapping and eavesdropping, invasion of privacy is established even though the information obtained is never published to any other party.[118] In *Hamberger v. Eastman*,[119] the plaintiffs complained that their landlord had installed a listening device in their bedroom which transmitted their private conversations to a recorder in the landlord's room. Accepting, for the sake of argument, the landlord's claim that he had never listened to any of their conversations, the New Hampshire court still declared this to be a compensable invasion of privacy.[120]

The availability of common-law civil recovery for illegal wiretapping and eavesdropping seems a useful adjunct to the criminal and civil sanctions against its use by private investigators. For states that do not provide for civil recovery by statute, such as California,[121] this tort remedy provides for compensation for those people who have been frightened, humiliated, or embarrassed by such invasions. These remedies also provide some greater assurance that available sanctions will in fact be applied to individuals who violate eavesdropping and wiretapping laws. Whatever the propensity of government officials to enforce these rules, private individuals are likely to be so angered by such invasions that they may seek action. On the other hand, as noted above in the discussion of tort remedies for searches, wiretapping and electronic eavesdropping may result in discovery of information which is extremely embarrassing. An individual whose privacy has been invaded may be deterred from seeking civil redress by the fear that this information might be made public in a civil suit. In addition, there is the ever-prevalent problem of detecting wiretaps and eavesdropping devices. If skillfully placed, their detection can be virtually impossible.[122]

Exclusion of Evidence Illegally Seized by Private Security Personnel

Much of the matter seized in illegal searches and much of the information obtained by eavesdropping is potential evidence in criminal or civil trials or administrative hearings. Whether this material should be excluded when the illegal search or surveillance is conducted by public police, in order to discourage these types of actions, is a current and much debated question. The primary basis for excluding such evidence is the Fourth Amendment.[123] The present solution is exclusion of such evidence from criminal trials[124] but not from civil proceedings.[125] Whether the Exclusionary Rule should be applied to matter which was gathered by private police, in either criminal or civil proceedings, is a question which, as of now, has received many different and inconsistent answers.

With the exception of certain sections of electronic-eavesdropping statutes, the Exclusionary Rule is court-created and court-enforced. Though there are some variations, federal courts have drawn a distinction between public law-enforcement officers and private individuals, declaring the Exclusionary Rule applicable only to material obtained by public police. The landmark case which sets out this distinction is *Burdeau v. McDowell*.[126]

The fruits of an unlawful search by a private individual may be excluded, however, if a law-enforcement officer participated in or encouraged the search. For example, in *Corngold v. U.S.*,[127] an airline agent was encouraged by a customs official to conduct a search. The court declared that the search was made for the purpose of enforcing a federal statute, at the prodding of a federal agent, and therefore the evidence was excludable under the Fourth Amendment.[128] But application of the Exclusionary Rule will depend upon the particular facts of the search. For example, in *Gold v. U.S.*,[129] FBI agents told the manager of an airlines carrier that they believed the waybill description of a package was inaccurate and that the address of the shipper was false. Since they did not indicate what they thought the contents of the package to be or ask that the package be opened and inspected, evidence obtained upon the manager's opening of the package was not excludable under the Fourth Amendment. State courts will also exclude evidence seized by private individuals if there was participation by law-enforcement officers.[130]

There are also recent state cases which suggest that the Exclusionary Rule might be applied to some private searches. In *Stapleton v. Superior Court*,[131] tear-gas canisters found in the trunk of the defendant's car by private credit card agents—who were participating with state police in a search of defendant's premises—were excluded as the fruits of an unreasonable search by virtue of the "official participation in the planning and implementation of the overall operation."[132] Although the issue of whether a purely private unreasonable search falls within the Fourth Amendment's protection was thus avoided, it was questioned whether search activities conducted by private investigatory organizations are in fact so private. As the California Supreme Court stated, "Searches by such well financed and highly trained organizations involve a particularly serious threat to privacy. California statutes, moreover, blur the lines between public and private law enforcement."[133] "Searches and seizures to assist criminal prosecutions may be such an inherently governmental task as to fall under the rationale of *Marsh v. Alabama* (1946) 326 U.S. 501 [90 L. Ed. 265, 66 S. Ct. 276]. The application of the Exclusionary Rule to such 'private' searches is more likely to deter unlawful searches than it would in other cases."[134]

This reasoning would seem to be particularly applicable to private security personnel who are appointed as special patrolmen. For example, in the City of New York, the police commissioner has the power to appoint such patrolmen. "These men are neither police officers nor peace officers, but while acting in the performance of their duties they possess all the powers, perform the duties, and are subject to the orders, rules and regulations of the Department in the same manner as regular patrolmen."[135] There would seem to be no question that, at least while performing the duties for which they were appointed special patrolmen, these men are performing a public function and their actions could be viewed as actions of public law-enforcement officers.[136]

Some states have ruled directly that evidence illegally taken by a private individual may be excluded. For example, in *Level v. Swincicki*,[137] the Michigan Supreme Court ruled that a blood sample obtained by a private person from an unconscious defendant was inadmissible in a criminal trial. In *Williams v. Williams*,[138] letters taken from a woman's car by a private individual were held inadmissible in a divorce action. These cases are remarkable not only because they apply the Exclusionary Rule to searches by private individuals, but also because the proceedings involved were, in some cases, civil.[139]

If the *Burdeau* limitation on the Exclusionary Rule is to weaken at any point, it seems likely to weaken first in cases involving illegal seizures of evidence by private police. Such police are often quasipublic officials or agents, being cloaked with the authority of the state by virtue of their licenses, badges, uniforms, and other apparatus, and

in many cases the purpose of the search is directed toward a conviction or a judicial proceeding.[140] Some evidence of this trend is to be found in the language of the *Stapleton* decision [141] and in the fact that deterrence of such misconduct is more likely, the more conviction-oriented the search.

The U.S. Supreme Court has declared that wiretapping and electronic eavesdropping constitute a search within the meaning of the Fourth Amendment.[142] Thus, evidence seized by illegal electronic surveillance is subject to the same constitutional restrictions as is evidence obtained in an unconstitutional search. It might seem, since electronic surveillance is a form of search, and evidence obtained by illegal electronic surveillance is considered excludable, that rules for the exclusion of such evidence would be the same as those pertaining to illegal searches, maintaining the distinction between searches by private individuals and searches by public law-enforcement officers, and between criminal and civil proceedings. However, quite inconsistently, the rules are substantially different. Rather than being court-ordered, they are primarily based upon statute and do not apply the distinctions discussed above. For example, the federal law makes illegal the interception and disclosure of wire or oral communications; [143] it then provides that no evidence derived from any wire or oral communication may be received in any trial, hearing, or other proceeding before any governmental body of the United States, a state, or a city if the disclosure of that information would be in violation of the federal law.[144] This apparently provides a total Exclusionary Rule for all evidence obtained by virtue of any illegal wiretap or eavesdropping by a private person or a public officer, in any proceeding, whether civil or criminal.

The state statutes that deal with electronic surveillance have taken similar positions. Several states declare that evidence obtained from an illegal wiretap or eavesdrop is inadmissible in any proceeding, civil or criminal, whatever the source of the wiretap.[145] Other states specifically exclude evidence resulting from illegal wiretaps but do not specifically exclude evidence resulting from an illegal eavesdrop.[146] Delaware makes it a crime to divulge or testify concerning communications intercepted via wiretap.[147] Twice, in 1956 and 1957, the New York legislature passed a law which would have excluded evidence obtained by illegal electronic surveillance from all judicial proceedings. Both times this law was vetoed by the governor. The third time, in 1957, the law was passed, excluding evidence obtained in illegal electronic surveillance from civil proceedings only. This the governor signed into law.[148]

The Supreme Court of Montana has ruled that evidence obtained by a private person eavesdropping on a telephone conversation by an extension must be excluded from a criminal trial.[149] It refused to accept what it labeled the "fictional" distinction between classes of persons who were required to obey the Constitution.[150]

The differences in treatment of evidence illegally seized in a traditional search and evidence acquired by illegal electronic surveillance is, at once, puzzling and enlightening. The Fourth Amendment Exclusionary Rule has never been particularly popular in this country. Recently, several justices of the United States Supreme Court have questioned its viability. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[151] Chief Justice Burger detailed the shortcomings of the Exclusionary Rule. He reiterated shortcomings originally expressed in *Irvine v. California:*

> Rejection of the evidence does nothing to punish the wrongdoing official, while it may, and likely will, release the wrongdoing defendant. It deprives society of the remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.[152]

He characterized the Exclusionary Rule as a "Supression Doctrine" and called it an "anomalous and ineffective mechanism with which to regulate law enforcement." [153] The viability of the Exclusionary Rule as applied to the Fourth Amendment was also questioned by Justices Black and Blackmun in *Coolidge v. New Hampshire*.[154]

Of perhaps more interest is the apparent inconsistency in the Omnibus Crime Control and Safe Streets Act of 1968. In that Act, Congress enacted into law its bitter opposition to previous rulings of the U.S. Supreme Court excluding certain evidence from criminal trial. In *Miranda v. Arizona*,[155] the U.S. Supreme Court declared that confessions of criminal defendants would not be admissible against them unless they were given certain warnings by police officers regarding their right to counsel and their right not to answer questions or give information. The confession was to be excluded regardless of whether or not the state could show that the confession was voluntary. In Title II of the Crime Control Act, Congress added Section 3501 to Title XVIII of the United States Code. It provided:

> In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given.

Whether or not a particular defendant knew the nature of the offense with which he was charged or knew that he was not required to make the statement or had been advised of his right to counsel are circumstances to be taken into account by the judge in determining the voluntariness of a confession, but they are not controlling. Thus, Congress has seen fit to challenge directly the Exclusionary Ruling of the United States Supreme Court on confessions.

In *United States v. Wade*,[156] and *Gilbert v. California*,[157] the U.S. Supreme Court declared that an individual has a right to counsel at any lineup. If counsel is not offered or provided, evidence of any identification at that lineup is inadmissible at trial. In addition, if it can be shown that such an illegal lineup has tainted or affected the identification of that person, he may not be identified at the trial. Again, in Title II of the Crime Control Act, Congress added Section 3502 to Title XVIII of the United States Code. It provides:

> The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under Article III of the Constitution of the United States.

This too, is a challenge to that Exclusionary Ruling of the United States.

In Title III of the very same law, Congress enacted the Wiretapping and Electronic Surveillance Section, discussed above. In that Section it specifically provided for exclusion of all evidence obtained by illegal electronic surveillance from all judicial proceedings. Thus, it appears that the attitude of Congress toward exclusion depends not upon the remedy but upon the situations to which the remedy is applied. Perhaps it is felt that electronic surveillance presents such a distinct threat to our culture that it must be combated at any price. Perhaps it evidences Congressional disagreement with those general opponents of an Exclusionary Rule who feel that such a rule has no deterrent effect or is not necessary to preserve the purity of judicial proceedings, which would appear to be the two justifications for such a rule.

More important for present purposes is the trend of all modern statutes to exclude all evidence resulting from illegal wiretaps and surveillance, regardless of whether conducted by public officials or private individuals, from any judicial proceeding, whether civil or criminal. This legislative application of an Exclusionary Rule to evidence illegally seized by private individuals is totally inconsistent with the distinctions drawn by courts in applying the Fourth Amendment Exclusionary Rule. Though it may be argued that the legislature is not bound by the Fourth Amendment and may go further in declaring what evidence may be heard by courts within the legislature's jurisdiction, these rules are, in the last analysis, based upon the same policy considerations. It would seem difficult to argue that exclusion of evidence obtained from illegal wiretaps would have a deterrent effect on private investigators or private security personnel while at the same time arguing that no such deterrent effect would result from excluding evidence that was stolen or obtained through fraud or deceit. Nor can it be concluded that the Exclusionary Rule is more necessary for situations involving electronic surveillance because of a lack of civil remedies. Most laws, such as the Federal Statute and the California Statute, specifically provide for a civil remedy which is more straightforward and simple than the common-law tort remedies that most plaintiffs would have to rely upon to seek redress from a traditional search. For example, the statutes provide for a minimum of damages merely upon the showing of the illegal electronic surveillance.

There has traditionally been an uneasiness among legal scholars about the Exclusionary Rule. This is perhaps best reflected in Judge Cardozo's statement of the doctrine's result: "The criminal is to go free because the constable has blundered." [158] That uneasiness must be increased by the thought that because a private detective blunders, a criminal must go free. However, it must be noted that the question presented is not whether the Exclusionary Rule should be applied in all proceedings to all evidence illegally obtained by any individual. There are several distinct factual situations which might arise, and the decision to apply or not to apply the Exclusionary Rule could take into account the variances in these situations. Application of the Rule should depend upon whether the goals and purposes of the Rule would be served by applying it in any given situation.

For example, a private in-house guard might search an employee or his automobile. Evidence of theft might be obtained. That evidence might have two uses. The employer might turn the evidence over to the local prosecutor and ask that the employee be prosecuted. There the employer has an interest in the employee's prosecution, but society also has an interest in prosecuting theft and deterring such antisocial conduct. Of course, society also has an interest in deterring illegal searches, but excluding the evidence from a criminal prosecution in this particular case is unlikely to have such a deterrent effect. The employer is likely to continue searching employees in order to prevent theft. Criminal or civil remedies against the employer would seem to be more effective. On the other hand, the employer might wish to use the evidence to bring a civil suit against the employee. Over a period of time he may have lost thousands of dollars in goods, and he may feel he can recover from this employee. In this civil suit, application of the Exclusionary Rule might be appropriate. That is, it would serve notice that the employer, and others in his position, cannot profit in court from illegal searches.

It might seem, from the above, that a simple rule could be stated: Material obtained by an illegal search by private individuals, or their employees, may not be used by those individuals in a civil action in which they are directly interested. However, this rule might also be too broad to be desirable. For example, a woman who seeks a divorce might hire an investigator to determine whether her spouse had hidden certain assets to avoid an equitable distribution of property. That investigator might use illegal surveillance or conduct an illegal search, completely without the knowledge or consent of the client. Clearly, the object of this investigation is worthy. To exclude the evidence obtained, if it is determined that assets were hidden, would cause the court to knowingly order a property settlement which was unfair, allowing the hidden assets to be kept by the individual who sought to prevent an effective and equitable court decree. Though such exclusion might seem appropriate where the client had authorized the illegal search or surveillance, the result seems far less just if there was no authorization. Such exclusion would be even more difficult to justify if the client only hired an attorney, and the attorney hired the investigator on his own.

It would seem that in determining whether to apply the Exclusionary Rule, one must at least take into account the amount of control which the party to the suit had over the individual who conducted the illegal search or surveillance. This is consistent with the deterrence rationale behind the application of the Exclusionary Rule to criminal proceedings. There the assumption is that the prosecutor will, in some way, be able to bring pressure to bear upon policemen to change their investigation activities. Perhaps the best resolution would be an equitable remedy available in civil suits, allowing an individual aggrieved by an illegal search to move for exclusion of the evidence resulting from such a search. The judge, acting as a court in equity, would be empowered to take into account the flagrancy of the action involved, the relationship of the person who seeks the use of the evidence to the person who obtained it, and the need for the evidence in reaching a just result in the case at hand. He would then "balance the equities."

Likewise, the same remedy might be available in criminal proceedings. That is, rather than the application of a mechanical Exclusionary Rule, looking for the participation of state agents or other "state action," a motion to suppress evidence might be decided in view of the factors discussed above. Thus, a judge might consider the extent to which the private security guard involved was serving as a public law-enforcement officer at the time the search or surveillance was made and to what extent suppression of such evidence might affect future activities of such persons. He might also consider the extent to which a private policeman is given additional authority by virtue of licensing, or is given more tangible power by virtue of being allowed to wear certain uniforms and badges and carry weapons.

It might be argued that the Exclusionary Rule, applied in this way, would have very little deterrent effect. Unless private security personnel know the situations in which illegally seized evidence will not be usable, they will gamble that a court, in balancing all the relevant factors, will find the evidence admissible, and thus they will proceed to conduct the unlawful search. But the deterrent effect of the Exclusionary Rule, however applied, has always been rather dubious. Nevertheless, there may be identifiable situations in which a significant deterrent effect would be achievable. Such a situation may exist, for example, in relation to evidence gathered pursuant to the direction of an

employer for use against an employee in a civil proceeding. In these situations where a significant deterrent effect could be predicted, courts should not proceed by balancing the equities on an *ad hoc* basis. Rather, they could enunciate bright-line rules so that any possible deterrent effects could be realized.

C. ACCESS OF PRIVATE SECURITY FORCES TO PUBLIC POLICE INFORMATION

Current Practice

It is freely admitted by private security executives that private security firms typically have access to the records of public law-enforcement agencies, even when local policy or legal requirement prohibits release of such records. Private agencies routinely obtain arrest and conviction records (including fingerprints and photographs), primarily for use in preemployment investigations for clients or for the private security firms themselves.[159] A great many employers are interested in the police records (arrests as well as convictions) of their prospective employees. Within the private security industry, arrest records of prospective employees are commonly scrutinized.

There are four principal methods of gaining access to criminal records: by simply requesting records from a friend on the police force; by bribing a policeman; by finding out how the police gain access to their own files and then impersonating a police officer in making telephoned requests for records; or if access cannot be had through any of the above means, by subcontracting the investigation to a firm that does have such access. Perhaps the principal reason for the success of these techniques is that personnel of private security firms are tied to the public police by an interlocking web of friendships, derived frequently from previous service on the public police force by the private police managers. But these techniques also succeed because an officer who reveals arrest records, in the absence of a bribe, violates no statute or ordinance. Internal police department discipline of such an officer is possible in theory but not likely in the absence of public sensitivity to this issue.

While private security agencies primarily seek access to police records in the course of preemployment investigations, such records are also examined in credit and insurance investigations. For example, the "Habits Supplement" to the American Service Bureau's "Special Service Life Report" asks the investigator of an applicant's eligibility for life insurance to determine whether the applicant has had "any *arrests* or trouble with authorities." [160]

Methods of obtaining police records vary, depending upon the law and tradition concerning confidentiality of those records in various localities. A conviction (at least an adult conviction) is a matter of public court record that follows either an admission or a determination of guilt by a jury after a public trial governed by established standards of substantive and procedural due process; hence, both by law and by long tradition, conviction records are available to private persons in virtually every jurisdiction in the United States.[161] However, locating such publicly available information on an individual is not an easy task.

Arrest records pose a different, and much more substantial, problem. An arrest, unlike a conviction, does not represent any formal societal judgment as to the subject's conduct. However, unlike a conviction, an arrest is collected and readily available in public police files. Field decisions by arresting officers are often erroneous, with the result that charges are dismissed for lack of evidence. An arrest may simply be a form of harassment of a minority group, in which case prosecution is never contemplated. The widespread use of arrest records by public and private agencies for purposes other than the administration of criminal justice substantially affects the life opportunities of the millions of individuals who have arrest records. A sampling of New York City area employment agencies by the New York Civil Liberties Union showed that 75 percent of the agencies sampled will not even make a referral when an applicant has an arrest record.[162] Decisions based on arrest records are a particular burden to blacks, who, while comprising 11 percent of the nation's population in 1969, constituted 28 percent of all persons arrested.[163] Because of both the unreliability of arrest records and the often unjust and inordinate influence that such records may have, there may be good reason for requiring their confidentiality.

State Regulations

General Standards

The states have not provided for the confidentiality of arrest records in any consistent or careful fashion. The general rule apparently is to permit the dissemination of arrest records to "interested

persons," which in practice usually includes private security firms. Most states have either freedom-of-information acts or common-law doctrines to the effect that public records—documents prepared by public officials in the performance of their duties—must be open to inspection by the public.[164] Investigators for Project SEARCH concluded that these public records doctrines in many states would make police records available to private individuals.[165]

The California Public Records Act creates a presumption that any record is open to public inspection.[166] The agency which seeks to deny inspection must show "that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interested served by disclosure of the record." [167] Criminal records are maintained in California on a centralized, statewide basis by the Bureau of Criminal Identification and Investigation. The Bureau may disseminate records to law-enforcement officers and to other state agencies when required for the performance of the agency's functions. Dissemination to other persons is forbidden, but no penalty is provided.[168]

The confidential status of records maintained by local law-enforcement agencies is much more ambiguous. The California Attorney General has opined that local police records are not open to public inspection by reason of the public records doctrine (the predecessor of the freedom-of-information act passed in 1968), as a matter of public policy. The same rule was also said to apply to records of the State Bureau of Criminal Identification and Investigation.[169] The Attorney General's opinion is ambiguous in a crucial respect: Does the "confidential" status of police records mean that they are not open to inspection by *any* member of the public, or only, as the Attorney General says at one point in the opinion, that they are not "open to indiscriminate inspection?" That police records are an exception to the public records doctrine does not necessarily mean they are barred to all inspection by private persons; since the dissemination of local police records is not proscribed by statute, it must be concluded that such records in California can be disseminated to "interested" private persons at the discretion of local police chiefs. Passage of the Public Records Act does nothing to change this conclusion.

Just as there is no state statute in California prohibiting the distribution of arrest records maintained by local police forces, there is no ordinance in Los Angeles restricting the dissemination of arrest records. This legislative gap is made all the more peculiar by the fact that there is a Los Angeles ordinance forbidding Police Department employees from revealing the statements, fingerprints, and photographs of convicted felons who must register under the city's convict registration scheme.[170] A police employee who violates this ordinance is guilty of a misdemeanor.[171] Distribution of arrest records to the public not only is not prohibited by ordinance in Los Angeles, it is even mandated in an important class of cases. Los Angeles Municipal Code § 52.42.1 provides that "* * * the Board of Police Commissioners may make available to any person possessing a valid press identification card * * * the record of arrests, criminal charges and dispositions thereof of any person, as contained in the records of the Los Angeles Police Department."

The status of arrest records in California may be summarized as follows: Subject to as yet untested theories of invasion of privacy and denial of due process, law-enforcement agencies in California probably have the discretion to reveal arrest records to "interested" persons. Particular police departments may have internal regulations forbidding dissemination of arrest records to private persons—this apparently is the situation in Los Angeles. But these internal regulations have been largely ineffective in controlling access to arrest records. Private security personnel, in Los Angeles, and elsewhere in the country where arrest records are ostensibly confidential, have little difficulty gaining access to those records.[172]

The situation in New York is very similar to that in California. There are cases stating that police records are an exception to the general public records doctrine.[173] But these cases do not support the proposition that arrest records are fully confidential. All they *hold* is that "the statutes do not require the furnishing of a copy of [police records] to a petitioner without the consent of the police commissioner. * * *" While § 1114 of the New York City Charter makes all records subject to inspection except those of the police and law department, the police are not *required* to keep their records confidential. Again, the New York City Police Department has an internal regulation forbidding its employees to reveal police records to any private persons.[174]

Private security firms in New York City have nevertheless enjoyed ready access to police records.[175] The practices involved have recently been illuminated by a grand jury investigation and the prosecution of several policemen and officials of private security firms. The New York pattern was based on payments to cooperating police officers, who were paid $1 to $2 for furnishing police records on an individual.[176] The private security firms involved in these practices include most of the giants of the private security industry: Wackenhut, Pinkerton's, Burns, and Retail Credit have all been fined for giving unlawful gratuities.[177] The policemen involved have been prosecuted on charges of bribe-receiving (a felony) and receiving unlawful gratuities (a misdemeanor).[178] Had they simply given away the information, they would have been subject to departmental discipline, but it does not appear that they would have committed any crime.

Although arrest records ostensibly are confidential in New York City, there is one very easy, and perfectly legal, way to circumvent this rule: "* * * arrest records unquestionably are disclosed to any employer who obtains a waiver of confidentiality from the job applicant." [179] Such a waiver probably would be effective in most jurisdictions to obtain a prospective employee's police record.[180]

Finally, there is at least one statutory scheme in New York State expressly providing for the release of police records, including records of arrests, to certain private employers. New York General Business Law § 359–e (12) (McKinney's Consol. Laws, C.20, Supp. 1969) provides that all employees of brokerage firms are to be fingerprinted and the fingerprints turned over to the State Attorney General "for appropriate processing," which is performed by the New York State Identification and Intelligence System. As a result of this processing, several hundred employees have been fired, many for a record of arrests without convictions.[181]

Until recently, police in the District of Columbia furnished arrest records to private security firms routinely, upon request, without any violation of law or Police Department regulations. In 1956, the Corporation Counsel of the District of Columbia, interpreting the District's statutorily codified public records doctrine,[182] ruled that all police records, including the department's central criminal files, could be disseminated to "interested persons." This ruling was amplified in 1963, when the Corporation Counsel defined "interested persons" as "Detective Agencies, Credit Associations, and the like." [183] Following the Duncan Report, the Board of Commissioners of the District of Columbia adopted the Report's recommendation that arrest records be released "in a form which reveals only entries relating to offenses which have resulted in convictions or forfeitures of collateral." [184]

The pattern that existed until recently in the District of Columbia seems to be quite common. Mr. William E. Bowman, Chief Security Officer of General Dynamics/Convair, stated in 1965 that most police and sheriff's agencies around the country would provide his company with a rap sheet [185] on any job applicant for an average fee of $2.[186]

A survey of the police departments of several major cities showed that either by local policy or legal requirement, arrest records were not to be released for private purposes in New York City, Los Angeles, San Francisco, Chicago, and Boston.[187] Yet in these cities, "influential employers" were often able to obtain arrest records despite the policy or law.[188] In St. Louis, Baltimore, and Arlington County, Virginia, police records are regularly released for employment purposes, as a matter of official policy.[189]

Though an exhaustive survey has not been made of all states, it appears that most states do not have statutes requiring that arrest records maintained by local police departments be kept confidential. Many states do have statutes similar to that of California, which require that the records maintained by the states' criminal identification bureaus be kept confidential. Some states, unlike California, provide sanctions for the violation of their confidentiality statutes. For example, a Washington statute [190] provides that a civil action can be brought for "any actual damages including injury to reputation" against "any person who willfully violates the provisions" of the Washington statute providing for confidentiality of arrest records.[191] Connecticut provides a fine of not more than $100 to be imposed on "any person who neglects or refuses to comply with the requirements" of the Connecticut statute providing for confidentiality of records possessed by the state bureau of identification.[192] These statutes are by no means universal,[193] and where they exist there often are loopholes. For example, in Washington, any person can obtain a copy of his record from the state bureau of identification by filing a notarized request accompanied by a set of his fingerprints.[194] Under this arrangement it should be easy for employers to obtain complete records on any individual from the state bureau of criminal identification by simply requiring the prospective employee to file a request for his own record.

The FBI possesses the nation's largest central file of police records. For this reason, the restrictions on the FBI's dissemination of records are particularly important. Federal criminal conviction records are "matters of public record." [195] Dissemination of other records is authorized to "officials of the Federal Government, the States, cities, and penal and other institutions." [196] Exchange of records is subject to cancellation if dissemination is made outside the "reviewing department," but as Judge Bazelon found in *Menard v. Mitchell,* it is not clear that this cutoff is mandatory or is ever enforced.[197] Dissemination is not limited to governmental bodies; under a regulation issued by the Attorney General, the FBI is authorized to exchange records with railroad police, national banks, federally insured banks, and savings and loan associations and to provide identification assistance to insurance companies in missing-persons cases.[198] In practice, FBI records, which, of course, are much more complete than local police records, frequently can be obtained by private security agencies through the cooperation of local police.[199]

Private security personnel have very little difficulty obtaining police record information for their clients about members of the general public, and even less difficulty in obtaining such information about their own prospective employees. Frequently, state or municipal licensing schemes relieve private security firms of the job of checking on prospective employees. In Los Angeles, for example, any private patrolman, bank guard, night watchman, "or other persons who wears a uniform while performing any of the duties of his position shall wear a special police officer's badge. * * *" [200] To obtain such a badge, the prospective employee must file an application with the Police Department. On this application the applicant is informed, "To verify your answer on the following question, your fingerprints will be checked against the F.B.I., the California Bureau of Criminal Identification, and the local Police files." He is then asked, "Have you ever been arrested, indicted, held for investigation, fined * * *?"

Many states have statutes authorizing the "expungement" of criminal records after the lapse of a certain period of time and upon certain conditions. Such statutes have been unsuccessful because it often is possible to learn of a conviction or arrest through other than official sources, and total expungement of the morass of records accumulated in a single criminal proceeding may be impossible. Further, most law-enforcement agencies send duplicate copies of arrest records and fingerprints to the FBI in Washington, thus making most expungement statutes futile.

Because state and federal governments have been notably inactive in restricting access to police records, courts have recently begun to examine the dissemination of arrest records and have issued orders restricting this dissemination. This judicial trend has far-reaching implications for the ability of private security firms to continue supplying their clients with arrest data, and perhaps for their ability to obtain such information for their own use in evaluating prospective employees. Perhaps the most important decision to date is *Menard v. Mitchell.* In that case, a young Los Angeles man was arrested and held for two days on suspicion of burglary, and then was released without charge. He sought to have his arrest record expunged from FBI files. He lost in the District Court, but the Appeals Court supported the theory of his suit, while remanding the case for further factual development.[201] If the arrest were unconstitutional, i.e., made without probable cause, and information was not subsequently developed to support the arrest, the court, per Chief Judge Bazelon, strongly implied that the retention of the arrest records, given the adverse consequences that could flow from those records, would be unconstitutional.[202] Even if probable cause existed, relief might still be warranted. Depending on the facts to be developed concerning dissemination of the FBI's records, it might appear that the government was engaged "wittingly or unwittingly * * * in wanton defamation of individuals and groups" and in "devising classifications that lump the innocent with the guilty."

On remand, Judge Gesell recently held that there was probable cause for the arrest, so he did not order Menard's records to be physically destroyed. But he found that the widespread dissemination of FBI arrest records posed a substantial danger to "freedom * * * to work" and raised substantial constitutional questions. To avoid these constitutional difficulties, Judge Gesell construed the statutory provision authorizing the FBI to maintain records [203] as leaving the FBI "without authority to disseminate arrest records outside the Federal Government for employment, licensing or related purposes." The FBI is permitted to disseminate arrest records only to "law enforcing agencies for strictly law enforcement purposes," and to agencies of the federal government for employment purposes within

the limitations upon use that have been prescribed by executive order.[204] Also, the FBI apparently has a duty to insure that the records it disseminates to law-enforcement agencies will not be made available to private persons for employment purposes. Thus limiting the dissemination of FBI arrest records, the court concluded that there was no need to expunge the record of Menard's arrest.[205]

Menard v. Mitchell does not enjoin the FBI to restrict dissemination of all its records. The court's order applies only to Menard; his record can be disseminated only to law-enforcement agencies for law-enforcement purposes or to an agency of the federal government if he applies for employment with such agency. It merely declares the legal restrictions upon the FBI's dissemination of arrest records. With respect to other records maintained by the FBI, the case has the effect of a declaratory judgment, declaring the legal restrictions which must be observed by the FBI in the dissemination of arrest records pursuant to existing statutory authority. If these restrictions are not observed by the FBI, the court in a proper case could enjoin the FBI to obey them.

Several other courts have recently reached results similar to *Menard v. Mitchell.* In *United States v. McLeod,*[206] the court ordered destruction of the arrest *and conviction* records of civil rights workers who were arrested by state officials without probable cause, solely for harassment. In *United States v. Kalish,*[207] the court ignored the probable-cause distinction and held broadly that "when an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records." So long as the Justice Department retains records, the citizen's "privacy and personal dignity" is invaded. Thus, the Attorney General was ordered to destroy all records in his custody or maintained by the FBI which pertained to Kalish, and he was further ordered not to transmit these records to any other government agency or person.

Other courts have recently held that a trial court has ancillary jurisdiction, when it disposes of a case, to order the police records pertaining to that case destroyed. Such an order was issued in *In Re Smith* [208] and approved in *Morrow v. District of Columbia.*[209]

Summary of General Standards

Private security firms traditionally have faced few obstacles in gaining access to police records. Generally, the states do not totally proscribe access to police records by private parties. Most law-enforcement agencies probably are not restricted by any state statute or local ordinance from releasing police records, including arrest records, to "interested" private parties such as private security firms. Internal regulations banning the release of police records have proven in practice to be circumvented easily by the private security industry. Expungement statutes are narrow in their coverage and fail totally to prevent dissemination even of those records covered by the statutes. Federal regulations of the release of federal police records also leave a great many loopholes. Justice Department regulations call for the release of such records to certain private organizations, such as banks, and once FBI records are released to local law-enforcement agencies, they are fair game for private security firms with access to the local agencies' records.

Recent developments, however, may foreshadow an end to the days of easy access to police records. A Federal District Court has held that the FBI may not legally permit its arrest records to be distributed for employment, licensing, or related purposes to private persons or to state agencies other than state law-enforcement agencies.[210]

Other law-enforcement agencies are likely to be challenged with similar suits arguing an invasion of privacy and violation of due process upon the release of records of an arrest without an adjudication of guilt. Injunctions may be obtained against distribution of arrest records to private persons, and expungement orders may become fairly common. Private security firms thus will find it more difficult to obtain police records for their clients. While the files of private security firms already contain police records on many individuals, those firms may have difficulty replenishing their files in view of the legal trend.

Private security firms may even have difficulty obtaining records for their own use in evaluating prospective employees. Already, under *Menard v. Mitchell,* the FBI has been denied authority to release its arrest records to state agencies that license private detectives and security guards. Future cases may challenge the power of state and local law-enforcement agencies to release records to state licensing agencies. Where state statutes do not specifically give state licensing agencies access to arrest records, the result might be the same as

in *Menard v. Mitchell:* a narrow reading of the authority granted by statute in order to avoid constitutional difficulties. But frequently, state statutes do specifically provide that state licensing agencies shall have access to arrest records. Then the constitutional issues of invasion of the right of privacy and violation of due process will have to be faced. It is not at all unlikely that in the next few years some of the courts will hold that the dissemination of arrest records by local and state law-enforcement officials to any agencies other than law-enforcement agencies and for any purposes other than law enforcement is a violation of due process and the right of privacy, at least where the arrest was made without probable cause or the individual arrested was later exonerated on the merits either by police investigation or by trial. In that event, private security firms may be foreclosed in large part from access to the arrest records of prospective employees. Finally, to the extent that trial courts begin to exercise their new-found ancillary jurisdiction to order the destruction of individual arrest records, the sea of available records may begin to dry up.

State Sanctions for Violation of Standards

If standards restricting access to data are as yet undefined, the sanctions for violation of those standards are even less well defined. Police employees may face internal discipline if they violate departmental regulations pertaining to the confidentiality of arrest records; if they sell the information, they may face criminal prosecution. Private security firms who gain access to police records would incur no criminal sanctions in most, if not all, jurisdictions unless they give a bribe to get the information. Unauthorized access to police records might be made grounds for license revocation, but at present this sanction is never invoked.

Private security firms might be held liable for defamation if they reported false information concerning an individual's police record. Under presently prevailing doctrine, however, the possibility of such liability is quite remote. First, the information must have been false.[211] To the extent that police files are accurate, a private security firm would not be guilty of defamation so long as it reported only information contained in such files. Trouble might arise if a firm reported incomplete information which raised an implication of criminal activity that would be dispelled if more complete information (perhaps also available in police files) were reported. Thus a firm might report that an individual had been arrested for embezzlement and fail to report that he had been exonerated. Even here, however, it is not likely under prevailing doctrines that the firm would be found liable for defamation. Reports such as retail credit reports and preemployment investigations have been held qualifiedly privileged when they are limited in distribution to persons such as prospective creditors and employers with an interest in the report.[212] Negligence, even to the extent of recklessness, is not enough to dispel the privilege.[213] There must be a showing that the statement was made with "express malice." [214] Since, in most cases, it would be impossible to show ill will on the part of the private security firm, it would not be possible to recover for false statements or negligent statements raising false implications about an individual's police record.

The doctrine of qualified privilege may be discarded as courts become more sensitive to the private harm that flows from inaccurate or incomplete statements of information contained in police records.

Other theories for private tort recovery are even more doubtful. The tort of invasion of privacy usually requires that the information be more widely communicated than the limited distribution given to the reports of private security firms.[215] And the policy which underlies the doctrine of qualified privilege in defamation should also apply where the allegation is that a narrowly circulated credit or preemployment report contains information about police records which invades one's privacy.

Recent cases such as *United States v. Kalish*, 271 F. Supp. 968 (D.P.R. 1967), which recognize a privacy interest in an individual's arrest record, suggest a basis for a different theory of recovery based on invasion of privacy. The invasion of privacy may be found not in the limited communication of arrest records, but in the divulgement of records which are supposed to be confidential. An individual's privacy interest in his records is violated when a private security firm, through bribery or friendship, gains access to those records. Such a tort would resemble the first of Prosser's four torts of invasion of privacy—intrusion upon the plaintiff's solitude or seclusion.[216]

State law sanctions against the disclosure of police records to private security firms, and against the misuse and misrepresentation of those records, are seriously inadequate. There are no tried-and-tested state sanctions in this area. Legal doctrines such as qualified privilege in the area of defamation stand as substantial barriers to the regulation of the conduct of private security firms. Legal theories under which meaningful sanctions might be imposed are frankly novel.

Federal Statutory Regulation

Title VI of the Consumer Credit Reporting Act [217] imposes important regulations on the use of police records by private security firms. Preemployment reports, credit reports, and insurance investigations prepared by such firms cannot include "records of arrest, indictment, or conviction of crime, which, from date of disposition, release or parole, antedate the report by more than seven years." [218] Private security firms preparing such reports must "follow reasonable procedures to assure maximum possible accuracy of the information." [219] Finally, when a private security firm furnishing reports for employment purposes compiles items of information which are matters of public record and are likely to affect an individual's employment prospects adversely, the firm must either notify the individual that public record information is being reported by it to a specified person or it must "maintain strict procedures designed to insure that such public record information is complete and up to date." [220] If the public record information pertains to arrests, indictments, convictions, or other legal action, the information "shall be considered up to date if the current public record status of the item at the time of the report is reported." [221] This federal regulatory scheme is to be enforced by requiring that an individual be informed when a "consumer reporting agency" such as a private security firm is engaged to investigate him and by giving him access to the information compiled by the investigating firm. The act then imposes civil liability both for willful noncompliance with its provisions [222] and for negligent noncompliance.[223] For willful noncompliance, the plaintiff can recover punitive damages as well as actual damages and attorney's fees, while only the latter two items are recoverable for negligent noncompliance.[224]

One of the most substantial questions raised by the new statute is whether it lessens the requirement of "express malice" as applied to statements made in employment and credit reports. Probably this requirement is replaced by a negligence standard. The Act requires a reporting firm to "follow reasonable procedures to assure maximum possible accuracy" of its information. An individual who is injured by either willful or negligent failure to follow such reasonable procedures is given a cause of action. Thus, recovery for damages resulting from inaccurate reporting of police records should be much easier under the new Act.

It is not clear whether the Act affects the activities of private security firms in obtaining police records to evaluate their own prospective employees. The Act's restrictions apply to "consumer reporting agencies," which are defined as any individual or organization which "regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." [225] It might be argued that, if a firm qualifies as a "consumer reporting agency" because it regularly engages in furnishing reports such as credit and employment reports to third parties, the Act would apply only to reports prepared by the "agency" solely for internal uses. On the other hand, the Act's restrictions may apply only to reports prepared for third-party users.

One other federal statute, Title VII of the Civil Rights Act of 1964,[226] restricts the use that can be made of arrest records and thus dries up the market for the provision of such data by private security firms. Title VII prohibits discrimination in employment on the basis of race, color, sex, religion, or national origin.[227] In *Gregory v. Litton Systems, Inc.*,[228] the court held that the use of arrest records as a factor in determining qualification for employment violated Title VII because it unjustifiably resulted in the employment of fewer blacks. The court reasoned that there is no evidence that arrest records are valid predictors of poor job performance, and that since a larger percentage of the black population than the white population has arrest records, the use of such records is inherently discriminatory.

Federal Constitutional Restrictions

Two questions arise in regard to federal constitutional restrictions upon access to police records. First, is any constitutional right violated by such access? Second, can the actions of private

security firms be considered state action so that they are subject to suit under 42 U.S.C. § 1983 and the Fourteenth Amendment? The Fourteenth Amendment provides that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983, enacted in 1971 to enforce the Fourteenth Amendment, provides that:

> 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 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.

Recent decisions such as *Menard v. Mitchell*[229] and *In Re Smith*[230] suggest that a constitutional right may be violated by the dissemination of police arrest records by private security firms. It can be argued that a government agency that permits the distribution to private persons (such as employers and insurance companies) of its records of individuals arrested without probable cause, released upon a finding of lack of evidence, or acquitted is permitting substantial sanctions to be imposed upon such individuals without any conviction of a crime. This is particularly offensive if the arrest itself was unconstitutional (made without probable cause). However, even if the arrest was constitutional but the government agency developed information indicating the innocence of the arrestee and still allowed the arrest record to be disseminated, with all the harmful consequences, there is a good argument that due process is violated.[231]

The constitutional right of privacy may also be violated by the dissemination of arrest records. The right of privacy is a fundamental personal liberty protected against state invasion by the Fourteenth Amendment. (See *Griswold v. Connecticut*, 381 U.S. 479 (1965).) The core notion of the right of privacy is that there are some aspects of an individual's life which are highly important and personal to him and in which society has no compelling interest. An arrest record reveals information which may be embarrassing and which may cause substantial harm to an individual because of erroneous inferences as to his criminality.

Law-enforcement agencies may have a compelling need for the maintenance of arrest records to aid in the investigation of crimes, but it is harder to show that a private employer has a compelling need for such information. If an individual has been convicted, or perhaps if he has been acquitted as a result of the application of a doctrine such as the Exclusionary Rule which does not go to the merits of the case, the calculus is somewhat altered. Records of conviction are evidence that the individual did commit the act for which he was accused and are probative in varying degrees to certain private decisions, including the decision to hire or fire. And since the convicted individual has been granted a fair procedure for determining his guilt or innocence, he has a lesser claim to the privacy of his record. In this sense, the right-of-privacy argument tends to merge with the due-process argument—an individual may lose his right of privacy in records relating to his criminal conduct only if he was afforded due process in the determination of whether his conduct was criminal.

Suits against police officials for damages resulting from the disclosure of arrest records and for injunctions against such disclosure (at least when the arrest was made without probable cause) might well be successful under § 1983 of the Civil Rights Act of 1871. If it were shown that such an injunction would be impractical to enforce, the plaintiff might obtain an order directing the police department to destroy his records, or all the records of individuals arrested without probable cause.

In order to successfully prosecute a Section 1983 action against a private security firm, it must be shown that the firm's action constituted "state action." State action might be found in the licensing of private security firms by the state. The more extensive the state regulation, the better the argument for state action.[232] It might also be possible to establish state action by showing the quasi-public character of much of the work performed by private security agencies, cf., *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,[233] and the extensive web of informal relationships that exist between such agencies and the police.

If the "state action" argument fails, private security firms might be brought within the scope of an injunction directed against the police as aiders and abettors in the dissemination of records supplied by the police.

Critique and Suggested Standards

In many jurisdictions there are no restrictions upon the dissemination of police records to private persons. Such efforts as are made to regulate access to police records are extremely haphazard both in content and in enforcement.

Three variable elements enter into any determination of the restrictions that should be placed upon the dissemination of police records. The first is the nature of the record. Is it a record of an arrest without probable cause; an arrest followed by an acquittal on the merits; an arrest for a felony or for an harassment charge such as loitering; or an arrest followed by a conviction? Second, what is the intended use of the record? Is it to be used to determine eligibility for employment in a position where embezzlement or pilferage would be relatively easy; employment as a laborer; licensing as a private patrolman; or for investigation of credit? Finally, what is the method contemplated for controlling access to the record and how reliable is it? Is the method to be physical destruction; return of records; criminal penalties for unauthorized dissemination; or the right to inspect and challenge the record proposed to be disseminated?

Some types of records are of much less probative value than others. An arrest made without probable cause where no probable cause is later developed tells almost nothing about an individual. Conviction records are at the opposite end of the spectrum; they are very good evidence that the individual committed the crime with which he was accused. Between these two extremes, the probative value to the private decision to be made will vary with the nature of the information. However, most employers and other private persons make a decision based upon the face of the record, without any consideration of the facts underlying the record or of the probative value of those facts, and without allowing the individual to attempt an explanation or crediting his explanation. For instance, what weight should be given to the following record:

> John Doe, arrested June 1, 1965, at age 22 for indecent exposure. Released June 1, 1965, for insufficient evidence. No other record.

In such a case, it is impossible to ascertain whether John Doe was an exhibitionist, much less whether he still has exhibitionist tendencies.

The use to be made of a record determines the cost of an incorrect decision resulting from insufficient information concerning an individual. If an individual is seeking employment as an armored-car guard, substantial justification exists for inquiring into any police record that he may have concerning armed robbery. There is much less justification for inquiring into a juvenile record of arrest for stealing hubcaps. If the employment sought is that of an assembly-line worker with few opportunities for pilferage, the only relevant records may be those that suggest a high rate of absenteeism. Thus, a record of frequent arrests, followed by dismissals, for being drunk and disorderly or loitering would be an indicator of the employee's lack of reliability.

Once the circumstances in which particular types of records are to be disclosed are determined, a scheme of regulations must be applied that will control access in the desired manner. Certain regulatory schemes, such as prohibitions on the disclosure of records by police department employees, have not been effective; and other solutions such as the physical destruction of records would prevent the use of records for legitimate purposes.

Perhaps the simplest and least costly regulation would be to permit access by private persons to all records of all law-enforcement agencies. Other merits of this proposal are the elimination of secrecy in police records and impartial administration of the law. However, permitting public access to all records fails to recognize any individual right of privacy concerning such records and reinforces the tendency of lay persons to lump together all police records indiscriminately.

The right-of-privacy objection might be overcome by allowing access to an individual's records only if he consented to such disclosure. This type of waiver system has the advantage, however minimal, of allowing the individual to make the decision as to whether the job, or credit, or other goal he is seeking is worth the disclosure of his record. However, waiver systems have not been effective in preventing the discrimination faced by individuals with police records. Discrimination on the basis of arrest records is a great deal like discrimination based on race, sex, religion, or national origin. Where arrest records are freely available, a record is a permanent badge of inferiority leading to predictably adverse reactions by those with the power to distribute economic and social benefits in our society. There is very little empirical basis for the discrimination that is practiced. And an arrest, unlike a conviction, may frequently occur with no voluntary act being made by an individ-

ual. As with race, sex, national origin, and, to a large extent, religion, a person can become branded without taking any affirmative act and there is nothing he can do to erase the brand. Moreover, discrimination on the basis of arrest records is closely related to discrimination on the basis of race, because it inevitably leads to the employment of fewer blacks.

Given the substantial interests that exist in preventing discrimination based on arrest records, a general waiver is inadequate. Most people have to have a job, and increasingly they have to have credit; thus they will be forced to waive the confidentiality of their records and thereby become the victims of discrimination.

The waiver approach has already been rejected, at least implicitly, by some courts. In *Menard v. Mitchell,* the FBI was said to be without authority to release its arrest records except to law-enforcement agencies for law-enforcement purposes; an individual's waiver should be irrelevant under this ruling. Moreover, the courts that have ordered the destruction of an individual's records have determined that waiver is inadequate protection.[234] If due process is denied by the dissemination of arrest records, it should not matter that a particular individual has consented to such dissemination. If the state maintains a system in which the confidentiality of arrest records is waivable, it is allowing penalties to be imposed upon individuals with arrest records, even though the individuals have been convicted of no crime and perhaps were arrested unconstitutionally (without probable cause). The penalties will result because individuals with arrest records will be forced to either reveal their records or suffer the inference that because they are unwilling to waive confidentiality, they have an undesirable record. Though a general waiver system should be rejected, there may be some situations in which waiver is acceptable, as will be discussed below.

The problem of discrimination in employment might be solved by forbidding employers from discriminating on the basis of arrest records. Arrest could simply be added to race, color, sex, religion, and national origin in Title VII of the Civil Rights Act of 1964. Fair employment laws, however, are notoriously difficult to enforce. Discrimination based on arrests may best be prevented by completely denying access to arrest records. A similar method of enforcement does not exist in cases of discrimination on the grounds of something apparent, such as race or sex, or something easily ascertainable, such as religion or national origin.

The denial of all access by private persons to the records of public law-enforcement agencies also would be inexpensive and easy to administer. Such a rule is being considered in the formulation of Project SEARCH, which is developing a national computerized system of criminal-histories retrieval.[235] The Committee of Security and Privacy of Project SEARCH has suggested that "private individuals and agencies in investigatory occupations, including, for example, private investigators, credit bureaus, and industrial security agencies," be excluded from direct terminal access to Project SEARCH.[236]

The disadvantages of an arbitrary Exclusionary Rule are that it encourages secrecy in government and totally prevents the use of criminal records by private persons for legitimate purposes.

Thus, it appears that access to the records of law-enforcement agencies should be regulated on a more highly articulated and less arbitrary basis and should be coordinated with other methods of regulation discussed above—for example, a waiver system could be implemented in conjunction with a general prohibition of discrimination in employment based upon arrest records. Such a system would necessarily be more costly to administer but would strike a more equitable balance between the rights of the individual and the interests of employers and other private decisionmakers in obtaining the information relevant to their decisions.

Conviction records are perhaps the easiest to deal with. A conviction is an indication that there was an underlying criminal act and that the convicted individual has been afforded due process in establishing the nature of his conduct. Moreover, there is a long tradition that conviction is a matter of public record; indeed, notoriety may be one of the most important sanctions imposed by the criminal law. For rehabilitative purposes there should, however, be a possibility of forgiveness. The Fair Credit Reporting Act resolves the competing considerations by forbidding consumer reporting agencies, such as private security firms doing preemployment checks, to report convictions where more than 7 years have elapsed from the date of release or parole, unless the report involves employment at a salary of more than $20,000 per year, more than $50,000 credit, or

more than $50,000 of life insurance. These rules might be taken as a pattern for state statutes regulating the confidentiality of police records. In order to be effective, such statutes should impose substantial criminal penalties, perhaps a $5,000 fine and 6 months in jail, for the disclosure by public employees of confidential conviction records, and also should provide civil remedies for injunctive relief and damages. Moreover, the statutes should apply to employers and private security personnel who obtain such information. Finally, such statutes should be more rigorously enforced than has traditionally been the case for statutes pertaining to the confidentiality of police records.

Records of arrests made without probable cause, and where probable cause is not subsequently developed, should be destroyed or returned to the individual. The probative value of such records is too low and the constitutional problems involved in allowing their use to the detriment of individuals are too great to justify their maintenance. The destruction or return of records is the best method of preventing their disclosure. States should provide by statute for police department administrative procedures to classify arrests, and to destroy or return the records of arrests made without probable cause. Any individual aggrieved by the disposition of his record should be able to seek a court order for the destruction or return of his record.

The most difficult case is that in which an arrest was made with probable cause, but the charge was subsequently dismissed for such reasons as insufficiency of evidence or inability to obtain witnesses who will testify. The record indicates that the arrested individual may have committed a criminal act, although he has never been afforded due process to establish his guilt or innocence. The Fair Credit Reporting Act provides at least minimal protection in such a case by prohibiting the disclosure of arrest records more than 7 years old unless the report concerns a job at a relatively high salary, or a relatively large amount of credit or life insurance. But greater restrictions can be imposed at the state level with minimum costs, while recognizing the legitimate needs of employers and others for information.

States should, by statute, create a state board with authority to determine what records can be disclosed for what purposes and for how long a period after the date of arrest. Records of a single arrest for a minor crime, such as loitering or petty larceny, or records of juvenile arrests, should be fully confidential. Limited access to records of multiple arrests or records of a single arrest for major crimes should be permitted to specified persons or agencies for a specified range of purposes upon the waiver of the arrested individual. Thus, an employer seeking to employ a bank teller, an armored-car guard, a private detective, or a private security guard should be allowed access to records of an applicant's arrest for robbery or embezzlement, upon the waiver of the applicant.

Records of arrests followed by acquittals might be treated in the same way. A record of an acquittal on the merits should be revealed only for a very limited range of purposes and upon a showing that the crime is relevant to the purpose, and any disclosure should contain a complete and accurate summary of the basis for acquittal. The dissemination of such records should be narrowly restricted. For example, an employer interviewing an applicant for a job as a private detective should have access to records showing that the applicant has been arrested for extortion and was acquitted by a hung jury. If the applicant was acquitted because of application of the Exclusionary Rule or on some other procedural ground, his records might be treated in the same way as the records of an individual arrested and released for insufficient evidence.

Under the scheme outlined above, an individual applying for a job classified as sensitive by the state board would be asked to sign a waiver of confidentiality and would be shown a list of the kinds of arrests that would be disclosed if he waived confidentiality in applying for that job. Thus he would see that an arrest without probable cause, or a juvenile arrest, or an arrest for a minor crime would not be reported. Additionally, depending upon the nature of the job, he might see that an arrest for a more serious crime, but one which is largely irrelevant to the position for which he is applying, would not be reported. If the applicant then signed the waiver but had an unreportable record, the employer would receive a notice from the state board that "the applicant has no reportable record." The same notice would be sent to the employer whether the applicant had no record or an unreportable record. All requests for reports would have to be processed through the state board; law-enforcement agencies would

be prohibited from releasing any of their records to private persons and agencies.

Private security firms would not be allowed access to the system for any purpose other than checks upon their own prospective employees. If such firms were allowed any broader access, they would be able to develop files which could be used to frustrate the state's carefully articulated system for controlling access to police records. It would also be necessary to control the use by private security firms of the records they already possess in their files, since the state system might still be frustrated until such files became obsolete. Thus, the federal Fair Credit Reporting Act should be amended to forbid the reporting of police records or any records other than those made available by the state board. This statute, with its notice and disclosure provisions, and civil liability for noncompliance should *effectively seal* the records currently in the hands of private security firms.

Recent court decisions have created great confusion in the law concerning access to police records. The enormous increase in the number of computerized criminal-information retrieval programs and the proposal to create a national linkup of such programs enormously increase the potential for abuse in the reporting of police records to private persons by the private security industry. Therefore, action on proposals such as those described above is particularly timely.

D. GATHERING INFORMATION ON PRIVATE CITIZENS FROM THIRD PARTIES

Current Practice

Private security firms, including consumer credit investigation firms, gather information about individuals from third persons under varied circumstances and for varied purposes. Credit extension involves gathering information from third persons less frequently than do other investigations, such as insurance checks. Credit records often concentrate on financial and legal information; "soft" data of the type that can be gleaned from friends and neighbors are less well-suited to the creditor's needs for fast, inexpensive information.

Insurance companies are probably the biggest single users of reports gathered from third persons. Among other things, insurance companies are concerned about so-called "moral hazards"—homosexuality, extramarital affairs, heavy drinking, and, increasingly, drug use.[237] The giants of insurance investigation are Retail Credit Company and Hooper-Holmes Bureau, but the former is also a giant in the consumer credit field.

Probably the next most frequent reason for questioning third persons is the preemployment check. The rationale for third-person inquiries as given by Retail Credit is that "a person is the product of everything to which he has ever been exposed. Because this is true, his background is an essential factor to consider in hiring." [238] A set of specimen Retail Credit preemployment reports that we examined invariably contained information obtained from third persons, usually under the categories "Employment Record," "Health-Habits," and "Personal Reputation." Sample entries for a fictitious Mr. James Carleton included such information as the following:

> Management and fellow workers [at a former job] were sorry to see him resign.
>
> He uses intoxicants on a moderate and infrequent basis. He has never been known to drink to excess or use drugs.
>
> He is regarded as an individual with high moral standards and good character. • • • [T]he subject spends most of his leisure time with his family; we also learn he is active in the local American Legion Post where he holds the position of Treasurer. Wife's attitude and influence would be considered helpful to subject.[239]

Retail Credit and Hooper-Holmes are also major firms in the preemployment investigation market. Many of the traditional private security firms, however, such as Burns and Pinkerton's, also perform preemployment investigations.

Other, less common situations in which private security firms may make inquiries of third persons include preparation of evidence for divorce cases, missing-persons investigations for insurance companies, and investigations of theft by plant security personnel.

Little is known about the procedures followed by private security firms in gathering information from third persons. Some glimpse of what is involved can, however, be gathered from a description by Frederick King, President of Hooper-Holmes Bureau, of the procedure followed by his company in conducting an insurance investigation of a man suspected of an extramarital affair: [240]

> You go to a neighbor and establish rapport. Then you ask, "What's your opinion of X's home life: how do you think of him as a family man?" This will usually elicit some hint through the expression on their faces or the way they answer. Then you start digging. You press them as far as they go, and if they become recalcitrant, you go somewhere else. If you go to enough people, you get it.

As opposed to extramarital affairs, homosexuality, according to Mr. King, "is one of the most difficult things to determine." Asked whether it is fair simply to report the suspicions of neighbors concerning a matter such as homosexuality, Mr. King responded, "We won't say he's a homosexual. We'll report, for example, that certain people feel he has homosexual tendencies." [241]

Third-person inquiries may sometimes be made under false pretenses; and occasionally the firm conducting the investigation does not realize that the reason which it gives for its investigation is false. An example of this occurred when American Home Products Corporation retained Retail Credit to investigate the personal affairs of a Senate Finance Committee aide who had helped to draft legislation opposed by the company. Retail Credit was told that the subject of its investigation was looking for a new job, and it gave that explanation to the man's friends and neighbors when it interviewed them.[242]

Moreover, it is known that because of time and cost factors in the industry, there is a substantial built-in tendency toward inaccuracy. The typical employment report costs about $25.[243] The investigators who prepare the reports are relatively low-paid employees. Twenty percent of Retail Credit's staff have no college training; 60 percent have had some college training; and only 20 percent have a college degree.[244] Retail Credit investigators average 11½ reports per day.[245] In addition to the time pressure, there is evidence that some agencies impose formal or informal quotas for derogatory information. Witnesses who were former employees of Retail Credit stated to Senate Committee hearings held in 1969 by Senator Proxmire that they had had a quota for numbers of reports prepared daily and proportion of reports containing derogatory information.[246] The president of Retail Credit, however, denied the existence of production quotas or of quotas for producing derogatory information.[247]

An example of the inaccuracy that can result from the pressures on investigative personnel was revealed in hearings before the Senate's Antitrust and Monopoly Subcommittee in 1969 by an employee of the Fredericksburg Credit Bureau, who testified that he was given a bonus over his $575 per month salary if he could average more than a dozen completed investigations per day. In making an automobile insurance investigation, he talked to two merchants who occasionally cooperated with him by giving information. One did not know the subject of the investigation; the other stated that the subject would drink to excess, though he was not known to drive in this condition. Though the investigator knew that the latter informant had never visited the subject in his home and was not a close friend, he checked a box in his report indicating that the subject gets "drunk, stupefied, entirely out of control of his faculties" one or two times a month. According to testimony by the local sheriff and justice of the peace, the investigator's report was completely erroneous.[248]

State Regulations

State regulation of the techniques of private investigators is virtually nonexistent. Many states regulate detective agencies by statute,[249] but the only limitation placed by these statutes upon investigatory techniques is an occasional prohibition of unauthorized entrance into a home; [250] and agencies investigating applicants for credit or insurance are generally exempted.[251]

Since 1968, when public attention began focusing on the abuses of credit reporting, several states have enacted statutes regulating credit reporting. As yet, these statutes are in effect only in a small minority of jurisdictions, and the trend toward such legislation may have been arrested by passage of the federal Fair Credit Reporting Act.

New York and Massachusetts have enacted statutes that are fairly typical of the recent state legislation. The New York statute [252] covers credit reports only in the narrow sense; it does not cover preemployment reports or insurance investigations. The statute requires creditors, upon receipt of a written request therefor, to furnish to an individual who has been denied credit the name of any credit bureau that made a report on the individual. The credit bureau, upon receipt of a written request, is then required to furnish to the individual the contents of any report concerning him that was furnished to the creditor, together with the facts and allegations upon which the report is based. If the inaccuracy of an item is reasonably established, the credit bureau is required to change it and to furnish a corrected report to anyone who has received a copy of the incorrect report during the preceding 6 months. If an item remains in dispute, the credit bureau shall clearly note in any subsequent credit report that the item is disputed. The statute is enforced by providing a civil remedy for damages

and injunctive relief; and a successful plaintiff is entitled to costs and reasonable attorney's fees. The statute also provides that if there is a willful violation of a statute in connection with a report, the creditor and the credit bureau will not be allowed to claim any privilege in defense to an action based on publication or dissemination of information contained in the credit report.

The Massachusetts statute [253] applies to credit reports and employment or preemployment reports, but apparently not to insurance reports. This statute, unlike the New York statute, does not require that the credit or job applicant make a written request for a report. Rather, whenever a credit grantor, employer, or prospective employer refuses credit or employment or terminates employment based in whole or in part on the "credit report," he is required to inform the applicant that he has been the subject of a credit report and to furnish the name and address of the credit bureau that furnished the report. The credit bureau is then required to furnish to the subject the contents and sources of its report. The disappointed applicant may submit a statement or any clarifying data for inclusion in his report, and the credit bureau is required to reexamine its report and to make any appropriate changes therein. The credit bureau is forbidden to report information concerning transactions, other than bankruptcies, occurring more than 7 years prior to the date of its report. The statute is enforced by making a credit bureau liable "in damages for gross negligence in furnishing * * * erroneous credit information or information prohibited to be reported. * * *" There is no provision for costs or attorney's fees.

The basic significance of the New York and Massachusetts statutes to the information-gathering activities of private security firms is the basis they provide for liability for misstatements that are not corrected. In addition, at least the Massachusetts statute prohibits the reporting of information more than 7 years old. There are notable gaps in the statutes' coverage; for example, neither statute covers insurance reports, which are a major source of abuse in the area of information gathering from third persons.

State common-law tort doctrines, such as defamation and invasion of privacy, offer very few restrictions on the activities of private security firms in gathering information from third persons. When a private investigator obtains false and injurious information about an individual from his neighbors and reports it to an insurance company, a creditor, or a prospective employer, the investigator will almost certainly escape liability for defamation. Most American courts have held that the reports of a credit reporting agency to a subscriber whose legitimate business interests are involved, or appear to be involved, are conditionally privileged.[254] The privilege can be lost if the reporting agency releases the report beyond the range of interested subscribers,[255] or if it acts with malice, which most courts have interpreted as actual ill will.[256] A few courts hold that the privilege is lost if the reporting agency acts with a wanton and reckless disregard of the rights of others.[257] And in a few courts, lack of reasonable grounds for believing in the truth of a statement [258] or a failure to exercise due care in making the report [259] will defeat the privilege and expose the reporting agency to liability for defamation.

Thus, for example, a private investigator can generally falsely report to a client that X is having an extramarital affair. As long as the investigator has no actual ill will toward X, and as long as his client has a legitimate business purpose for obtaining the information, the investigator will not be liable for defamation. In a few jurisdictions, if the investigator is sufficiently negligent in obtaining or reporting his information he may be held liable for defamation. But even if the doctrine of privilege is not a barrier to recovery, the sanctions against defamation are inadequate to control information gathering from third persons. Persons injured by reports of investigative agencies are unaware in most instances that they have been the subject of an investigation, let alone a false report.

Potential liability for defamation not only affects the reporting of information gathered from third persons, it also imposes some restrictions upon the manner in which private investigators question third persons. Questioning concerning such subjects as extramarital affairs and homosexuality may sufficiently imply improper conduct as to defame the subject of the report. Although a court may believe that the social utility of credit reports is great enough to justify their protection by the privilege doctrine, it should not hold that implied defamations made in the course of gathering information for such reports are privileged. Such a rule would not inhibit a responsible private investigator, who will inquire about particular types of conduct rather than suggest particular conduct to his sources. The rule of conditional privilege should not be extended when it serves no social utility.

If an action for defamation based on the gathering and reporting of information obtained from third persons is not likely to succeed, an action for invasion of privacy is even less likely to succeed. The tort of invasion of privacy is designed to protect two interests: the interest of an individual in not having private aspects of his life publicized, and his interest in avoiding intrusions into his private affairs. The most well-developed aspect of the right of privacy is that concerning the avoidance of unwarranted publicity. An essential element of the tort is "publication." [260] It has been held that the dissemination of a private fact to a plaintiff's employer [261] or to a small group of people [262] does not constitute "publication." Judicial modification of the requirement of publication may not enhance the likelihood of recovery, since it probably would be replaced by a rule of conditional privilege similar to that applied in the tort of defamation, i.e., that a communication made to someone with a valid interest in the subject matter, such as an employer or an insurance company, is privileged. However, some courts might in the near future be willing to find an invasion of privacy when a private investigator negligently disseminates information to persons not having a valid interest therein.

The other theory upon which an individual might recover damages for invasion of privacy is intrusion into his private affairs. Private investigators frequently collect information about extremely sensitive aspects of an individual's life—his sexual affairs, his relations with his wife and children, the character of his friends. There are cases recognizing that an intrusion into a plaintiff's personal life can be an invasion of privacy, but the intrusion must be extreme.[263] Apparently the only case that has considered a claim of invasion of privacy resulting from questioning of third persons is *Nader v. General Motors Corporation*.[264] Nader claimed an invasion of privacy resulting from various acts of investigators for General Motors Corporation, one of which was the questioning of his friends under false pretenses about aspects of his personal life. The New York Court of Appeals held such questioning did not constitute an invasion of privacy. *A fortiori*, questioning of third persons which is not conducted under false pretenses is not grounds for an invasion-of-privacy suit.

The holding of the New York Court of Appeals may be criticized, and other courts might be willing to find an invasion of privacy when private information is obtained from third persons under false pretenses. Under Professor Fried's rationale for judicial recognition of the right of privacy, control of private information is important because the exchange of such information facilitates the formation of such important human relationships as trust and friendship.[265] When a person communicates personal information to a friend, he assumes the risk that the friend may voluntarily pass the information on to others. But he does not assume the risk that the information will become public because an interviewer convinces the friend that its disclosure will be beneficial to the person, or that the friend is under a public duty to divulge the information.[266] Thus, judicial recognition that a person's privacy has been invaded when an investigator procures personal information under false pretenses would uphold that person's justified expectations as to the privacy of his communications to others. Under this theory, the friend who is questioned, as well as the subject of the inquiry, might have a cause of action for invasion of privacy. The friend is injured in that his ability to form relations of trust and friendship is lessened when he is induced by trickery to reveal confidences.

Though questioning of third persons about private matters, even when conducted under false pretenses, has not been held to constitute an invasion of privacy, it might be held actionable as an intentional infliction of mental distress. Indeed, this was indicated by the court in *Nader v. General Motors Corporation*.[267] But this tort has much stricter requirements of pleading and proof than the tort of invasion of privacy. As the New York Court of Appeals stated, relief under this theory is available only if "severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation." [268] The law is applied in most jurisdictions to permit recovery for infliction of mental distress only if the defendant's conduct was outrageous and intentional, and if it resulted in actual physical or mental injury to the plaintiff.[269] Thus, there appear to be few situations in which courts will allow recovery for intentional infliction of mental distress resulting from questioning of third persons.

In sum, the gathering of information from third persons is virtually unregulated, either by statute

or by common-law tort doctrines. A few states have statutes which forbid the reporting by credit agencies of information that is more than a certain number of years old, and which permit limited recovery for injuries caused by the inaccurate reporting of information.[270] However, such inaccuracies must be the result of negligence or gross negligence in order to recover under these statutes.

Common-law doctrines of defamation generally allow recovery for injuries caused by the reporting of false information only if the reporting agency showed actual malice toward the plaintiff, though in some states recovery may be had if the reporting agency simply is grossly negligent.[271]

Thus, what little regulation there is concerns the reporting, rather than the gathering, of information, although the gathering of information might be regulated through the torts of invasion of privacy and intentional infliction of mental distress. However, the courts have not yet been willing to extend these torts to the procurement by private investigators of personal information from third persons.

Federal Statutory Regulations

The only federal statute regulating the gathering of information from third persons by private investigative firms is the Fair Credit Reporting Act.[272] This statute is very similar to statutes regulating credit bureaus which have recently been enacted in some states. The federal statute explicitly provides that state legislation is preempted only to the extent that it is inconsistent with the federal law.[273]

The Fair Credit Reporting Act does not directly regulate the gathering of information from third persons. Rather, it regulates the reporting of such information and it requires that notice be given to the subject of the investigation. The Act applies to agencies furnishing reports for use by persons granting personal, family, or household credit or insurance, by employers, or by persons with a legitimate need for the information in connection with a business transaction with the subject of the report. The Act provides for notice to the subject of an "investigative consumer report." [274] An "investigative consumer report" is a report "in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends or associates" of the consumer, or is obtained from "others with whom he is acquainted or who may have knowledge concerning any such items of information." [275] Notice need not be given until 3 days after the date on which the report is requested. And only after the individual has received notice that a report has been requested and has filed a written request for further information is he entitled to learn the nature and scope of the report.[276] Thus, an individual is given no opportunity in advance to determine whether he wants to be the subject of an "investigative consumer report," or whether he would prefer to forego a particular transaction such as an application for employment or life insurance.

Reporting agencies are forbidden to report any "adverse item of information which antedates the report by more than seven years." [277] Adverse information contained in an "investigative consumer report" cannot be included in a subsequent consumer report unless the information has been verified in the process of making the subsequent report, or unless the information was received within the 3-month period preceding the furnishing of the subsequent report. A reporting agency is required to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." [278] When credit, employment, or insurance for personal, family, or household purposes is denied an individual either wholly or partly because of information furnished by a reporting agency, the user of the report must notify the individual of this fact and must furnish the name and address of the reporting agency.[279] The reporting agency must then, upon his request, furnish to the individual the "nature and substance of all information in its files" concerning him.[280] The individual can then dispute particular items in his file, and if the dispute is not satisfactorily resolved by the reporting agency, the agency is required to include either a written statement furnished by the consumer, or a summary of that statement, in any subsequent reports.[281]

The provisions of the Act are enforced by civil liability for willful or negligent noncompliance.[282] The statute may thus facilitate recovery for defamation in a state court, in that it may raise the standard for accurate reporting by private investigators to that set forth in the federal statute, which requires "reasonable procedures to assure maximum possible accuracy of the information" contained in the report. However, an individual who desires to bring a state court action for defamation, rather than a federal court action for willful or negligent noncompliance with the federal statute, should avoid use of the federal statute's machinery for obtaining disclosure of information. No action can be brought "in the nature of defamation, invasion of privacy, or negligence" that is based on information disclosed pursuant to the federal statute. Thus, the Fair Credit Reporting Act and state tort law offer competing, rather than complementary, remedies.

The Fair Credit Reporting Act is concerned with the accuracy with which information gathered in private investigations is reported to others. The subject of such a report is informed of its contents and given an opportunity to dispute information contained therein that may have adverse consequences. Recovery for injuries resulting from the distribution of inaccurate information is facilitated. The statute does nothing to regulate the kind of information that can be gathered and reported, or the techniques by which information is gathered.

Federal Constitutional Restrictions

The Constitution is largely irrelevant to the information-gathering activities of public and private agencies. The Constitution would prohibit extreme behavior by public police, and private security firms would probably also be prohibited from engaging in such behavior in cooperation with public police. The police, for example, could not torture a suspect's next-door neighbor to force him to give evidence, nor could they arrest the neighbor and detain him until he talks. But the police seldom, if ever, engage in such activities. The normal practices of police and of private investigators in gathering information from third persons are virtually uninhibited by the Constitution.

The police are free to question third persons so long as the third persons are willing to be questioned. Apparently the police do not violate an individual's constitutional rights if they use false pretenses to gather information about him from third persons. In *Hoffa v. United States*,[283] the Supreme Court found that Hoffa's Fourth Amendment rights were not violated when the government placed an informer among his entourage to gather evidence from Hoffa and his associates. The evidence so gathered was thus held inadmissible against Hoffa in a trial for attempting to bribe jury members. The Court reasoned that the Fourth Amendment does not protect a "wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." [284] If police deception to gather evidence directly from a suspect is not a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures, then *a fortiori* there is no violation of an individual's Fourth Amendment rights when the police use deception to obtain information from his friends and associates. Nor would private security personnel, acting in cooperation with the police and using deception to obtain information from third persons, violate an individual's Fourth Amendment rights. Under the Court's reasoning in *Hoffa*, an individual who communicates his thoughts to another assumes the risk that those thoughts will be exposed by deceptive methods.[285]

Private investigators do not usually cooperate with the police in their information-gathering activities but are acting for purely private purposes. Typically, private investigations are made for insurance or employment purposes. The private investigator is even further removed from constitutional restrictions in the absence of the "state action" which is a prerequisite for application of the prohibitions against interferences with the constitutional rights of individuals that are contained in § 1983, enacted under the Fourteenth Amendment.[286]

While there are few constitutional restrictions upon the procurement of information from third persons, there is one theory that may lead to the imposition of restrictions on the public police and on private investigators acting in cooperation with them. When police questioning of third persons to gather information about an individual is sufficiently intrusive and sufficiently without justification, the constitutional right of privacy which the Supreme Court recognized in *Griswold v. Connecticut* [287] may be violated. Since the scope of this right of privacy is as yet unclear, it is difficult to determine what restrictions it may place on the police. If an individual were questioned concerning his sexual relations with his wife, there would probably be a violation of the right of marital privacy recognized in *Griswold*. If the individual's neighbors were questioned on the same subject, the conduct is somewhat less intrusive, but if the intrusion was without justification, it might well be found a violation of the individual's constitutional right of privacy. If, however, the police were to question an individual's neighbors concerning his whereabouts

on a particular night when he was suspected of having committed a crime, no court would seriously entertain a suggestion that the individual's constitutional right of privacy had been violated. The only restrictions the courts might develop in this area would likely focus on whether the police justifiably suspected the individual of having committed the crime. The courts undoubtedly would allow such interrogation upon a showing that the police had superficial justification for suspicion. While the requirement of probable cause for highly intrusive activities such as an arrest or a search of an individual is sound, such a requirement for relatively nonintrusive measures such as interrogation of an individual's neighbors would inhibit police investigations to obtain probable cause.

There may be some argument that police use of deception to question a third person about an individual is a violation of the third person's right of privacy. The police may have used deception to gain entry into the third person's house and to elicit information from him which he otherwise would not have revealed. Though this theory is as yet untested in the courts, it probably would be held that such activities are privileged at least so long as the police had a reasonable basis for making such inquiries and a reasonable basis for believing that deception was necessary to obtain the information sought.

Private security personnel, when acting in cooperation with the public police, would likely be subject to the same minimal restrictions deriving from the constitutional right of privacy.

The Constitution, in sum, places very few restrictions upon the information-gathering activities of public police and even fewer restrictions upon such activities by private investigators. The principal activities of private security firms in this area, such as the procurement of information for life insurance and employment background reports, are unaffected by constitutional restrictions.

Critique and Suggested Standards

In order to criticize present regulations and to suggest new standards, it is necessary first to identify what abuses exist or may exist when private investigators gather information about an individual from third persons. Questioning of third persons normally is not very intrusive, and in many situations there is substantial justification for such questioning. Employers have a need to gather information about their employees which will help them to predict job success; to the extent that employers are thereby able to make more rational hiring decisions, there is a general economic benefit. Insurance companies have a need for information which will help them to calculate their risk of loss; to the extent that they are able to make rational cost allocations, the costs of insurance can be allocated more fairly and the total costs can be reduced. When an insurance company is faced with a suit based on permanent disability and it hires a private investigator to question neighbors about the plaintiff's activities, the social interest in preventing frauds on justice and in securing lower insurance premiums is served.

Generally, then, private security firms perform valuable social functions in gathering information about individuals from third persons. There are, however, four problem areas. First, individuals who apply for a job or for insurance under present regulatory standards generally do not have an opportunity to make an informed choice as to whether they would prefer to forego the insurance or the job and thus avoid a background investigation. Second, private investigators may be careless in gathering and reporting their information, with the result that individuals are injured by inaccurate adverse reports. Reports based on information furnished by third persons are more likely to be inaccurate because such information is peculiarly unreliable. Neighbors may distort or fabricate because of a grudge, and a private investigator has little basis for evaluating the reliability of his informants. Yet legal doctrines that allow recovery for defamation against a private investigator only if he acted with actual malice toward the plaintiff offer little incentive to the industry to improve the accuracy of its reports. Third, the questioning of third persons by private security personnel under false pretenses may invade the privacy of an individual's relations with his friends. The formation of intimate relations is hampered when individuals must fear that their communications with friends may be revealed, through trickery, to a private investigator posing, perhaps, as a public official or as the representative of a prospective employer. Courts, however, have been unwilling to provide a remedy for invasion of privacy under such circumstances. Finally, there may be some lines of inquiry which are so intrusive, and for which the justification is so slight, that questioning should be prohibited entirely.

There are two broad approaches to the regulation of information gathering from third persons. The first approach would be a scheme which attempts directly to prohibit the procurement and reporting of certain information. The second approach would be a "laissez-faire" concept, providing incentives for private security firms to act in a desired fashion and facilitating the ability of individuals to control the collection of information about themselves. The first approach requires many difficult value judgments for which there is little empirical guidance. It must be determined, for example, when, if ever, an investigator is justified in asking a man's acquaintances whether he drinks too much, or whether he is happily married. And direct prohibitions in this area pose a substantial enforcement problem. If people such as employers believe that a particular item of information is particularly important, they will try to obtain it regardless of the prohibitions.

In the absence of any experience with the direct control of information-gathering activities and the enforcement of such control, it would seem preferable to follow the second, or laissez-faire, approach to regulation. The goals of such an approach could be achieved either through amendments to the federal Fair Credit Reporting Act or through state legislation. Because the Fair Credit Reporting Act provides a good basis for regulation in this field, because many states may be unwilling to act, and because there is a need for national minimum standards of protection in this area, the following proposals are made in the form of suggestions for amendment of the Fair Credit Reporting Act.

At present, individuals are not able to learn the nature and scope of a report that is being prepared concerning them, or even to learn that a report is being prepared, until the report has already been requested and an investigation is likely already under way. The Act should be amended to require that before a background investigation (in the language of the Act, an "investigative consumer report") is commenced on an individual who has applied for some benefit, he should be fully informed of the nature of the report and the scope of the investigation. He would thus be enabled to make an informed choice about whether to forego the benefit (e.g., life insurance or credit) and avoid the investigation.[288]

In order to provide incentives for private security firms to be more accurate, the Act should facilitate recovery for injuries resulting from inaccurate information contained in reports. An individual currently may obtain disclosure from a reporting agency of the nature and substance of the information possessed by the agency pertaining to him. But information so disclosed can be used only in lawsuits arising out of willful or negligent violations of the Act. Such information should be available for use in any state or federal suit based on defamation, invasion of privacy, intentional infliction of mental distress, or any other theory.

The Act at present allows recovery for injuries resulting from negligent violation of the provision of the Act which requires reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of the information" which they report. Though this provision has not yet been interpreted by the courts, it appears to establish a standard that is more difficult for a plaintiff to meet than a simple negligence standard. For example, proof that the employees of a reporting agency were negligent in collecting and reporting a particular item of misinformation might not be sufficient to establish liability under the Act. If the employees of the reporting agency were negligent, but the agency had exercised due care in establishing reasonable procedures to insure the accuracy of its information, it would not appear to be in violation of the Act.

The Act shrould be amended to make reporting agencies strictly liable for injuries caused by inaccurate information reported by them. Intent or negligence would then be irrelevant; the reporting agency would be held liable if it made a mistaken report resulting in injury. Courts in the last few years increasingly have held manufacturers strictly liable in tort for injuries caused by their defective products. The trend has been so widespread that strict liability is now the general rule for manufacturers of goods. The reports prepared by private investigative firms are as much products as automobiles or electric drills. The preparation of such reports is fairly standardized, and they have a high potential for causing injury if they are defectively made, although the latter requirement is becoming increasingly irrelevant in the area of products liability.

Thus, the same reasoning that has led courts to develop the rule of strict liability for defectively manufactured products should influence Congress to make strict liability the rule under the Fair Credit Reporting Act, at least for "investigative consumer reports" which are based on interviews

with third persons. Loss occurring as a result of defective reports can best be borne by the reporting agency, which can insure against the risk and can spread the cost among all consumers. And if reporting agencies are required to bear the risk of loss occasioned by inaccurate information, they will have a powerful incentive to improve the accuracy of their collection and reporting procedures. A rule of strict liability might force the reporting agencies and their clients to determine that some information, such as that relating to extramarital affairs or homosexual tendencies, is so inherently unreliable and of such marginal relevancy that it is not worth the risk of collection and reporting. But the decision of whether to collect such information would be made in a decentralized fashion by those who bear the risk of loss and obtain the benefits derived from the use of such information.

The imposition of strict liability for inaccurate words in reports as well as for defective products should not be shocking. The law has long applied a rule of strict liability for defamation, and inaccurate, adverse information derived from interviews with third persons is usually defamatory. But just as the courts long favored the development of nascent manufacturing industries by inhibiting recovery against a manufacturer of defective products, so the courts have favored retail credit bureaus in their early stages of development by applying the rule of privilege to their reports. With credit bureaus and other investigative agencies now well established, they are more a threat than a hope; it is time to apply the traditional rule of strict liability for injuries caused by their inaccurate reports.

The Fair Credit Reporting Act also should be amended in one final respect. In order to prevent invasions of privacy resulting from the procurement of information about an individual from his friends and acquaintances under false pretenses, the Act should require that an investigator making an "investigative consumer report" identify himself, his firm, and the purpose of his inquiry. Most of the information needed by investigative firms for such purposes as employment reports and insurance reports can be obtained in an open manner. The unusual case, such as the investigation of a crime, which may require the use of deception, is best left to public law-enforcement agencies.

Courts and legislatures have largely avoided the issues that are involved in the collection of information about individuals from third persons. But there is a significant need for regulation which is rapidly becoming more urgent with the trend toward computerized storage and retrieval of information maintained by credit bureaus and other reporting agencies. When the "soft" data that are gathered from third-person interviews are forced into the format required for computerized storage and access, the potential for inaccuracy is greatly increased. The potential for harm is also increased as it becomes possible to gain access to central computer files from anywhere in the nation, and as the dispersal of computer terminals to users makes control of unauthorized access more difficult. The suggestions made above, added to the Fair Credit Reporting Act, or enacted in a state statute incorporating the federal Act's requirements concerning disclosure, should provide a workable scheme for correcting the abuses that exist in the area of gathering information from third persons. In addition, the suggestions discussed in Chapter V of this report with regard to ways of reducing impersonation of, and confusion with, public police are also relevant here, since these measures should make it less likely that an investigator will obtain information improperly.

IV. LAW ENFORCEMENT AND PROTECTION FUNCTIONS: ARREST, DETENTION, SEARCH, INTERROGATION, AND USE OF FORCE

A. CURRENT PRACTICE AND PROBLEMS

While many business organizations hire private policemen for the deterrence that results from their mere physical presence, many employers expect their guards and detectives to take certain actions when confronted with disturbances, crimes, and threats to life and property. Therefore, private security forces perform various law-enforcement and protection functions including arresting and detaining suspected shoplifters, ejecting persons from private property, quieting disturbances, and defending against potential attackers. These activities, akin to public police functions, create the greatest risk of infringement upon the rights of innocent citizens.

Private security personnel engage in enforcement and protective functions in a variety of situations and for a variety of employers. Retail stores hire guards or detectives to stop or arrest shoplifters; many businesses hire night watchmen or guards to arrest or deter burglars; many manufacturing concerns employ guards to control access to their plants during working hours; guards are hired at sports or entertainment events to expel gate-crashers or to control unruly spectators.

It is difficult to generalize about current practices in handling such situations. The standards and procedures for in-house as well as contract guards vary with each employer involved. However, some conclusions about certain functions, such as arrest, search, and interrogation, can be drawn from the instructions given by some contract guard agencies.

In general, the major contract guard agencies, at least in their training and instructions, attempt to restrain the apprehension, search, and questioning activities of their guards. For example, some contract firms caution employees that if they deny personal liberties without legal justification, both the employee and the company may be subject to civil and criminal liabilities. The instructions strongly recommend that whenever possible all matters of arrest and search be turned over to the local police authorities. As to the use of force in the arrest process, these firms typically caution employees to use force only where a serious violation of the law is involved, and only as a last resort when all less harmful means have failed, and to use only the amount of force necessary. Deadly force should be used only when necessary to protect life, never property. They are less cautious as to searches. Guards are advised that the right of an arresting official to search a person legally taken into custody is well established in law and that when the guard becomes involved in the position of arresting a person who has committed a felony or a serious type of crime, it must be determined if this individual does have a weapon that could assist in escape or allow possible harm to the guard or other persons. They further advise the guard to treat any person who has been apprehended in the commission of a serious crime as though he will kill the guard if he gets the chance.

Other firms discourage arrests by informing guards that they are not authorized to make an arrest unless they are deputized. They similarly discourage searches by advising that the guard is not authorized to search a person under any circumstances unless he is deputized and has made an arrest. But instructions are not quite so negative with respect to interrogation. Some guards are admonished not to try to obtain a confession from a suspect, but those same guards are not prohibited from accepting statements from witnesses. The guards are told that when involved in reporting an incident, they are to obtain names, addresses, and written or verbal statements from witnesses in regard to the incident.

Still other firms try to avoid problems by encouraging employees to rely upon the public police for arrests.

There is no indication that any of the relatively detailed training instructions are impressed upon the guards by their supervisors in the course of

day-to-day operation. Indeed, our survey of private security personnel indicates not only that guards are largely ignorant of the extent of their powers but that many guards mistakenly assume they have more power than they actually have.[289] For example, 18 percent of those surveyed stated that they did not know their legal powers to detain, arrest, search, and use force; and 23 percent stated that they were "somewhat unsure" of their powers. Moreover, a small, but significant number (5.5 percent) felt that their arrest powers were the same as a public policeman's. When asked how often they feel unsure of their actions when handling actual crime-related incidents, 10 percent were usually unsure and an additional 19 percent were "sometimes unsure."

In addition to these findings, the reported incidents and litigated cases involving improper force or arrests indicate that the caution expressed in training may not be carried out in the field. One example involved an assault and battery by a guard: [290]

> For the wife of a member of Congress, an encounter with a guard in the parking lot of a drive-in restaurant caused the loss of her front teeth. She was spotted drinking a beer in her Lincoln Continental by a guard who knew that it was against policy and maybe against the law. He walked to her car, asked her to stop drinking the beer, and was told to go to hell. Instead of calling the police, the guard hit her in the mouth with his nightstick.

In another case of false arrest,[291] the injured party claimed that he was the victim of a "contest" among a department store security force to see which guard could garner the most arrests in one month. Indeed, assault and improper or wrongful detention appear to be among the more important problems involving private police.[292]

Wrongful-detention problems arise most frequently in the context of retail store security. The following case is fairly typical of the fact situations encountered in reported cases involving retail stores: [293]

> On Friday, July 29, 1966, at about 12:30 p.m., plaintiff drove her automobile to the Hecht Company store and went to the women's sportswear department. A month or two before she had purchased at the same store a three-piece 'bikini-set', consisting of a bra, a 'bikini' and a pair of pants, low-waisted, knee length, thin, tight, with ruffles at the knees. The Court is advised that such a garment is known as a 'hip-hugger'. The pants were blue-green in color, and plaintiff wanted to see if she could find a 'top' or blouse to go with them.
>
> When she entered the store she was carrying the pants either in a paper bag or in her purse • • •
>
> Two female store detectives first noticed plaintiff while she was taking garments off the rack. They did not see the pants or the paper bag . . . . The detectives became suspicious of plaintiff and decided to watch what she did in the fitting room, which could easily be done through vents in the walls which separate one fitting room from those on each side of it. When the detectives began to observe plaintiff in the fitting room, she was putting on the pants preparatory to trying on the several tops or blouses. The blouses were not of a length or material which would ordinarily be thought appropriate to go with the pants, but *de gustibus non est disputandum*. None of the tops or blouses pleased plaintiff, she put them and the slacks back on the hangers, and put the pants into a paper bag, which she took out of her handbag or appeared to take out of her handbag.
>
> Plaintiff then left the fitting room, replaced the blouses and slacks on their racks and left the department, carrying her handbag and the paper bag containing the pants. • • • The detectives noticed that plaintiff had left an empty hanger in the fitting room; they had seen no tags on the pants, and found none on the floor of the fitting room.
>
> The detectives discussed the matter with the chief security officer and it was decided that one of the detectives, Mrs. Williams, should stop plaintiff as she was leaving the store and inquire about the contents of the paper bag. Double doors lead from the store onto Fenton Street, and as plaintiff put her hand on the second door, Mrs. Williams took plaintiff's arm, displayed her deputy sheriff's badge, and asked plaintiff to come with her to the office to explain the contents of the paper bag. Plaintiff did not demur, but asked Mrs. Williams to let go of her arm, saying that she would accompany her to the office. Mrs. Williams complied with plaintiff's request, and she and the other detective walked on either side of plaintiff up the center aisle to the escalator. There were relatively few people in the store at that time, probably fewer than plaintiff believed but more than the detectives admitted. Plaintiff naturally felt they were all looking at her, and she heard a salesgirl say: 'They've got her.' Plaintiff saw no one in the store whom she recognized. At the escalator, the three women were joined by the chief security officer, who accompanied them down the escalator and across the lower floor to the office. Plaintiff sat in a chair by the desk; the door was open; the store employees looked in the paper bag, examined the pants, saw that they had no tags on them, and when plaintiff told them she had purchased the pants at the store as part of a three-piece set a month or two before, checked the records and found that plaintiff had indeed purchased a three-piece set, but could not tell from the records whether the pants had actually been a part of that sale. Upon learning this, the chief security officer stated that he would give plaintiff the benefit of the doubt, apologized to her, and told her that she might go.

For the damages suffered in the above incident, plaintiff was awarded $500.00.

More recently, this same retail department chain has been subject to two sizable damage claims. In the first instance, a secretary was paid $30,000 in an out-of-court settlement of a lawsuit in which she claimed that store guards "attacked" her on a public street and tried to force her to confess to stealing some gloves.[294] In the second instance, a 31-year-old man was awarded $165,000 for a 1½-hour detention by department store guards who suspected him of stealing a pair of cuff links.[295]

Lawsuits for false arrest are not, however, confined to the retail store situation. In a 1968 case, a jury awarded $400,000 to a hotel guest for damages suffered when the hotel security officer confined her and her daughter in their hotel room for failure to pay a hotel bill. While the basic judgment was upheld, damages were reduced by the courts to $75,000.[296]

Thus, abuses of the enforcement powers of private security forces do occur, and with sufficient frequency and severity to result in a substantial number of reported cases often involving large damage awards.

B. GENERAL RESTRICTIONS AND LIABILITIES

There are two basic sources of restrictions on the enforcement and protection activities of private security personnel. The first is the criminal law, which imposes fines and jail sentences for such crimes as assault, battery, murder, manslaughter, and negligent homicide.[297] Criminal liability can be avoided, however, by a legal justification or defense,[298] such as self-defense, defense of property, prevention of crime, or apprehension of criminals.[299]

The second basic limitation is tort law. There are an almost endless variety of torts that could be brought to play in circumstances involving security enforcement and protection activities. The most frequent torts involved are false imprisonment (the nonconsensual, intentional confinement of a person without lawful privilege for an appreciable length of time) and assault or battery (the intentional harmful or offensive touching of another, or the threat of such). However, there are various other torts that might be involved: defamation, if the activity results in a public injury to reputation; malicious prosecution, if formal criminal proceedings are instituted without probable cause and with malicious purpose; negligence, if the guard acted without due care for the rights of others, even if he did not intentionally undertake such action.

For example, the following factual situation described by the court in *Reicheneder v. Skaggs Drug Center*,[300] gave rise to three distinct tort claims:

> Reicheneder testified that while browsing he picked up two sparkplugs. Frank Kubasek, the manager of this store, testified that from his office he could observe the floor and saw Reicheneder put the sparkplugs in his coat pocket and observed him walk to the front of the store. Kubasek left his office and proceeded to stop Reicheneder, asking him if he had anything in his pocket that belonged to the store and [Reicheneder] replied that he did. Reicheneder testified that he kept the sparkplugs in his hand, and did not have them in his coat pocket. Reicheneder repeatedly admitted to having the sparkplugs in his possession. There was still a checkout counter that the plaintiff had not passed at the time he was stopped by Kubasek to come to the manager's office and he complied voluntarily. After entering the office there was a discussion during which time Mr. Maples, the assistant manager, was present. During the conversation Maples was instructed by the manager to call the police, and police officers arrived. Kubasek explained to the police officers what had taken place and he 'had a shoplifter', pointing out Reicheneder. The police took plaintiff into custody, led him from the store through the sales area, handcuffed him outside the store and took him to the police station where he was detained from twenty to thirty minutes and charged with shoplifting. Kubasek testified that he had mentioned this incident to some of his employees, stating that he had a shoplifter but not giving Reicheneder's name. Reicheneder was later tried on the charge of shoplifting and was acquitted.

The suspected shoplifter in this case sued for false imprisonment, malicious prosecution, and defamation. The court found the store liable for false imprisonment, because the store employees wrongfully caused the police to take the plaintiff into custody. For this interpretation of false imprisonment, the court relied upon a rule applied in some jurisdictions: "When a person points out another as the perpetrator of a crime and requests or directs police officers to arrest him, the person making the request or the direction is liable for subsequent false imprisonment even though he acted in good faith." [301] For the injuries caused by this false imprisonment, the plaintiff was awarded $10,000. As for the defamation claim, the court found that the statement to some employees that the plaintiff was the shoplifter, plus the taking of the plaintiff from the store by police officers in view of those same employees, was sufficient to constitute defamation. The court awarded $15,000 in damages for this claim. The court dismissed the malicious prosecution count because the jury found that the store

acted without malice in causing a complaint to be filed against the plaintiff.

While there are various legal theories for holding a security officer liable for improper conduct, other legal theories may enable a private security guard to escape liability.

First, no false imprisonment, assault, battery, or other tort usually exists if the plaintiff freely consents to the interference. For example, in the *Reicheneder* case (described above) the court held that the imprisonment of Reicheneder did not begin *until* the police were called in. Up to that point the court found that plaintiff was voluntarily cooperating with the store manager's request to accompany him to the store office.[302] Of course, consent cannot be obtained by threats, physical violence, coercion, or misrepresentation, nor can one take action beyond the scope of that which is permitted by the consent.[303]

Another means of avoiding liability is to rely upon a "legal privilege." The available legal privileges were briefly outlined in the general discussion above and will be discussed in greater detail in the following sections. Finally, whenever negligence is charged, one can avoid liability by proving that he acted reasonably under the circumstances, or by showing that the plaintiff acted unreasonably or assumed the risk of injury.

C. TORT LAW GOVERNING ARREST

Every citizen has some privilege to arrest a person who is committing or has committed a crime, and to turn that person over to the proper authorities.[304] In common parlance, this privilege is referred to as the power of "citizen's arrest." The power exists in every state by virtue of statutes or of court decisions under the common law. However, the extent and nature of the power varies from state to state. In some states, the common law still controls. Thus, a private citizen can arrest for a felony committed in his presence (or out of his presence if he has reasonable grounds to believe that the arrested person committed the felony) and can arrest for a misdemeanor *only* when the misdemeanor involves a breach of peace *and* is committed in his presence.[305] In other states, the powers of arrest have been expanded so that a citizen can arrest for any misdemeanor if committed in his presence.[306]

The power of citizen's arrest is of limited value to the private security officer. In many states the privilege is lost if the arresting person is mistaken in some respect, no matter how reasonable. For example, in the case of a felony arrest, while a citizen is allowed a reasonable mistake as to the identity of the felon, he is allowed no mistake as to whether a felony has in fact been committed.[307] As to misdemeanors, *no* mistakes are allowed: The arrested person must be guilty of the misdemeanor.[308] In addition, a private security guard cannot arrest for a misdemeanor unless the misdemeanor was committed in his presence. Since shoplifting is often merely a misdemeanor and since actual guilt and presence are required for misdemeanor arrests, shoplifting arrests are extremely precarious.[309] Since the power of arrest often varies with the classification—felony or misdemeanor—of the crime being committed, the private citizen must be fairly sure of his state's penal code before arresting someone. Finally, the arrest power is valid only where the purpose of such arrest is to turn the suspect over to proper public authorities as soon as is practicable. The arrest power does not allow detention for other purposes (such as to obtain a confession), and liability is imposed if there is unreasonable delay in turning the suspect over to the authorities.[310]

D. TORT LAW GOVERNING DETENTION

Under the common law, a property owner had the right to defend his personal property from wrongful dispossession and to recapture it if wrongfully taken by another. However, these privileges, particularly the more relevant one of recapture, have been subject to various restrictions and limitations, making mistakes very costly.[311] These restrictions, plus the limited usefulness of arrest powers in cases of misdemeanors, have rendered merchants relatively helpless in the face of sharp increases in the incidence of shoplifting. As a result, most states have developed a privilege for the detention of suspected shoplifters.[312] Detention differs from formal arrest in that the latter allows (indeed compels) one to turn the suspect over to the authorities.

In California, the privilege was developed in a Supreme Court decision, *Collyer v. S. H. Kress & Co.*[313] In that case the court upheld the right of a department store to detain a customer if the store had probable cause to believe that the customer was about to injure some person or property, as long as the detention was reasonable in

time and manner. In the particular case, the court found it reasonable to detain a 70-year-old man for 20 minutes, during which time he was threatened with arrest, subjected to an attempted search, and asked to sign a confession.

In other states, the privilege has been developed by statute. For example, the Alabama law provides as follows: [314]

> (1) A peace officer, or a merchant, or a merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a person and that he can recover them by taking the person into custody, may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time.

Some antishoplifting statutes expressly limit the permissible purpose of the detention.[315] For example, the Colorado law [316] provides as follows:

> [T]he merchant or any employee thereof • • • acting in good faith and upon probable cause based upon reasonable grounds therefor, may question such person, in a reasonable manner for the purpose of ascertaining whether or not such person is guilty of theft.

However, this detention privilege is subject to two important limitations. First, probable cause for believing the suspect has stolen the goods must exist before one is entitled to detain a suspected shoplifter. And probable cause is a highly elusive concept, defined differently by different courts. For example, in *J. C. Penney Co. v. Cox*,[317] the court upheld a finding that the defendant store acted without probable cause in detaining the plaintiff. As stated by the court: [318]

> From the evidence in this case, no one saw the defendant take anything. In this day and time, in our ways of commerce in our mercantile business, people go through the stores, pick up goods, put them in containers, and move them about. Probable cause cannot be based on mere belief of a third person that somebody did or did not do something. None of the employees even saw her so much as touch an article, and the only evidence here that would connect the defendant in any way is that someone in the store told one of the clerks that they believed that she had stolen something.

In contrast, in *Meadows v. F. W. Woolworth Co.*,[319] Chief Judge Carswell found that "the manager, Wingate, did indeed have probable cause for momentarily detaining the subject plaintiffs for searching and interrogating in an attempt to recover articles reasonably thought by him to have been unlawfully taken" because of the following facts: [320]

> Defendant's manager, Wingate, was warned by police officials of Panama City several days prior to the incident complained of to be on the lookout for teenage girls believed to be shoplifting. • • •
>
> On the day in question the two plaintiffs, together with a companion were in Woolworth's on two different occasions and had been walking around looking at various merchandise. Around 4:30 p.m. Wingate noticed that two hair pieces were missing. He noticed the three girls and asked the clerk if those three had been near the hair piece counter. The clerk responded that the girls had been near the subject counter. The three girls according to Wingate's evaluation generally fit the description of the teenage girls discussed by him and the policeman earlier. • • •

Second, even where probable cause exists, the detention privilege will be lost if exercised in an unreasonable manner. For example, in *Wilde v. Schwegmann Bros. Giant Supermarkets*,[321] the Court found that defendants abused the merchant's detention privilege not only because of insufficient probable cause, but because of the following described method of detention: [322]

> Mrs. Wilde was accompanied to the room by Centanni and Mr. Aubrey MacDonald, another store detective. There a printed form entitled a 'Confession Blank,' prepared by Schwegmann's attorneys and printed in pads of 50 or 100, was presented to plaintiff for her signature. She refused to sign the confession and requested that she be permitted to telephone her husband or the police. When this request was refused she asked the store detective to call her husband or the police themselves. This request was also refused. She was given the alternative of signing the confession or remaining in the room. After being thus held against her will for over thirty minutes Mrs. Wilde signed the 'confession'. • • •

In contrast, in *Cooke v. J. J. Newberry & Co.*,[323] the court held that a detention for 27 minutes in the store's office during which the defendant searched the plaintiff's handbag was reasonable.

E. POWERS SHORT OF ARREST OR DETENTION

A security guard may often be called upon to take action short of arresting or detaining suspects—for example, simply stopping undesired conduct. However, like all activities which interfere with the rights of other persons, unless there is privilege or consent, the private guard may be held liable. For example, expelling unruly fans at an entertainment event could lead to liability for assault, battery, or false imprisonment.

The primary legal basis for many such activities is consent. Many persons will freely comply with requests that they leave the property of another.

Where consent is absent, there are various privileges that may provide the legal basis for these enforcement activities.

The first is the right of a real property owner to prevent trespassers from coming onto his property.[324] There is a related right to control the conduct of other persons legally on the premises.[325] Indeed, in some instances, a property owner has not only a right but a duty to insure that certain people on his property do not endanger other people also on the property.[326] But the right to control the conduct of others on the premises is often limited, in cases of public amusement and business centers, to ejection for "good cause." [327]

A second privilege is that of self-defense. A person may use reasonable force against someone who reasonably appears to be about to inflict physical harm. A related privilege is that of defending others against illegal assaults as long as there is a duty or obligation to protect that particular person.[328]

Finally, a private citizen may not only arrest one who has committed a crime for purposes of turning the criminal over to the police, he is also privileged simply to prevent the commission of the crime. However, this privilege is usually limited to serious crimes or crimes which constitute a felony or breach of the peace, and it does not apply to misdemeanors.[329]

Some or all of these privileges may be applicable in any given fact situation. For example, in *Nakashima v. Takase,*[330] the court relied on two privileges—felony prevention and self-defense—to save a store owner from tort liability for the shotgun killing of a burglar who had broken into his store.

All of these privileges are subject to varying rules on the effect of mistakes. Usually, *reasonable* mistakes are allowed. For example, one can rely on the privilege of self-defense even if one was mistaken as to the immediacy of a threatened attack, as long as the mistake was reasonable.[331] However, in some cases even reasonable mistakes are not allowed, and certainty is required. For example, in some jurisdictions the privilege to defend a third person exists only when the third person would, in fact, have a privilege to defend himself.[332]

Such privileges will also be lost if exercised in an unreasonable manner. Even though a guard acting for his employer has the right to eject unruly patrons, excessive force cannot be used and one cannot place a person in peril by such ejectment. For example, in *Bartley v. Cincinnati, N.O. & T.P. Ry. Co.,*[333] the court found the railroad negligent in the exercise of its right to eject an intoxicated passenger. The railroad left him in a helpless situation, thus allowing him to wander onto the tracks where he was killed. And in *Saenger Theaters Corp. v. Herndon,*[334] the court found the defendant theater liable for $1,000 because of its use of insulting language in denying entry to a small girl. Even though the theater had a right to deny entry to the girl because of her prior disruptive activity, it was an abuse of that privilege to use insulting language.

F. TORT LAW GOVERNING GENERAL USE OF FORCE

All of the privileges described above sanction the use of some degree of force. Generally, however, only an amount of force reasonably necessary to realize the legitimate purposes of the privilege is allowed. If excessive or unreasonable force is used, not only is one liable for the torts flowing from this excessive force (usually battery), but the original privilege is also lost.

For example, in *Haworth v. Elliott,*[335] the defendant, a bar, was held liable for use of excessive force in physically ejecting a quarreling customer, breaking his finger and nose. As the court stated: "Excessive force was used by the bartenders against plaintiff who could have been removed from the barroom without breaking his bones or bruising his body.... The actor is privileged to apply only such force as a reasonable man under the circumstances would believe to be necessary to prevent a further disturbance of the peace within the barroom or to avoid injury to persons or property there." [336]

Not only will excessive force invalidate the operative privilege, it may also lead to liability for negligence. For example, in *Oshogay v. Schultz,*[337] the bartender tried to scare off an unruly patron with pistol shots but accidentally shot the patron in the foot. The court held the bartender liable for over $1,000 in damages because of his lack of due care. And in *Gross v. Goodman,*[338] a truck driver attempted to frighten some fleeing thieves into stopping by firing a gun and accidentally wounded the plaintiff—an innocent bystander. The court held the truck driver liable for $2,500 in damages because of his negligent use of the gun.

There are no clear rules as to what force is allowable in given situations. Usually "unreasonableness" controls, and what is reasonable turns on the nature of the interest being protected, the nature of the act being resisted, and the particular facts in a given situation. To add to the confusion, the amount of force allowed is different depending upon which privilege is being invoked. Certain generalizations can, however, be made; and there are usually clearer rules on when deadly force can be used.

Where property rights are involved, a request for voluntary cooperation should precede the use of any force.[339] Similarly, when only property is at stake, the use of lethal or deadly force—for example, a gun—is impermissible,[340] unless the threat to property *also* threatens life.[341] As stated by Prosser: "[S]ince the law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels, unless there is also such a threat to the defendant's personal safety as to justify self-defense." [342]

The privilege to detain shoplifters seems to be subject to the same rules that govern other property-related privileges; deadly force cannot be used to effect the detention, unless there are also threats to life.[343] As outlined in the Restatement of Torts (2d): [344]

> Reasonable force may be used to detain the suspected person; but, as in the case of the recaption of chattels (see §106), the use of force intended or likely to cause serious bodily harm is never privileged for the sole purpose of detention to investigate, and it becomes privileged only where the resistance of the other makes it necessary for the actor to use such force in self-defense. In the ordinary case, the use of any force at all will not be privileged until the other has been requested to remain; and it is only where there is no time for such a request or it would obviously be futile, that force is justified.

As for the privilege of crime prevention, deadly force is usually sanctioned only when the crime threatens life and there are no other means to prevent the crime; however, some jurisdictions allow the use of deadly force to prevent any felony.[345] As for the related privilege of arrest, the amount of force allowable usually varies depending on the nature of the crime, and different jurisdictions draw different lines on what crimes will warrant what force. Nevertheless, two rules seem to have some consensus support: Deadly force cannot be used to prevent or arrest for a misdemeanor, and deadly force can always be used to prevent or arrest for a felony which threatens the life or safety of a human being.[346] Apart from these rules, few generalizations can safely be made. Many states allow deadly force to be used in the arrest for any felony; [347] and many states draw distinctions between overcoming resistance and stopping flight or escape.[348]

As for the privilege of self-defense, the rules are stated aptly by Prosser: [349]

> The privilege is limited to the use of force which is, or reasonably appears to be, necessary for protection against the threatened injury.
>
> * * * * * * *
>
> Ordinarily, the question of what is reasonable force is to be determined by the jury. Certain boundaries have, however, been marked out by the law. It is unreasonable to use force which is calculated to inflict death or serious bodily harm, such as a deadly weapon, unless one has reason to believe that he is in similar serious danger, and that there is no other safe means of defense. Where a reasonably safe way of escape is open, the courts have not agreed as to the rule to be applied. It is clear that the defendant may stand his ground and use force short of that likely to cause serious physical injury. A considerable majority of the American courts, centering largely in the south and west, have had a high regard for the dignity and sense of honor of the individual, and have held that he may stand his ground and use deadly force against an attack which calls for it, even to the extent of killing his assailant. A minority of some fifteen jurisdictions have adopted the view, which seems to be preferred in a civilized community, that personal honor does not justify the killing or wounding of a human being, and that the defendant must retreat if it appears that he can do so with safety. The obligation to retreat is ended when it is no longer apparent that it is safe to do so. 'Detached reflection cannot be demanded in the presence of an uplifted knife,' and if there is any reasonable doubt, he need not run. With firearms what they are today, and the possibility of safe retreat accordingly curtailed, the whole controversy has lost most of its importance; and the intelligent rule would appear to be that it is merely one element to be considered in judging reasonable conduct.

In sum, the law governing the use of force—like most law governing the enforcement activities of private police—is a maze of privileges and general standards which ultimately turn on a concept of reasonableness under the circumstances. There are a few general rules, especially as to the use of lethal weapons, but even the applicability of these

rules depends upon an after-the-fact assessment of the particular circumstances.

G. INTERROGATION AND QUESTIONING

As long as the suspect is legally detained, there is no absolute ban on simply asking questions. As stated in *Allen v. Eicher,* "Unlike an illegal arrest, or an illegal search or seizure, an improper interrogation is not itself a tort." [350] Indeed, questioning is specifically authorized under many of the laws and decisions giving merchants the power to detain suspected shoplifters.[351] The *Collyer* decision, discussed above, which forms the foundation of the temporary detention privilege in California, specifically approved reasonable interrogation, even to the point of requesting a signed confession: [352]

> The request to sign a statement of his acts was not improper, under the circumstances. In fact, the only way in which defendants could protect their property, if taken, was to ask plaintiff to restore, which if done, in and of itself, amounted to a confession.

However, there are still certain limits imposed by state law on the methods of interrogation. The suspect is under no legal obligation to answer the questions. He has a right to remain silent.[353] This right is the foundation of the restrictions which courts have imposed upon interrogation.

Some indirect control over interrogation methods is exerted by virtue of contract law: Any releases, promises, or agreements signed or entered into as a result of coercion or duress would be unenforceable. For example, in *S. H. Kress & Co. v. Rust,*[354] the court nullified a document releasing a retail store from liability when the document was signed under duress by a suspected shoplifter. Thus, the plaintiff was allowed to recover for being falsely imprisoned by the store. Indirect control also exists by virtue of decisions by some courts that confessions or admissions obtained by coercion, force, and, sometimes, promises are inadmissible in subsequent criminal proceedings against the suspect.[355] For example, in *People v. Frank,*[356] the court held that a statement to security guards would not be admissible in the criminal prosecution of the suspect if it were gained by coercion.

It seems clear that use of physical force or threats of physical force to coerce answers is prohibited. Such threats or force would be tortious, either directly as assault or battery, or indirectly as constituting unreasonable exercise of the detention or arrest privilege involved.[357] On the other hand, threats to turn a suspect over to the police seem to have been sanctioned by the *Collyer* [358] decision, discussed above. However, the court also indicated that such a threat can only be used if there is, in fact, a right to arrest and not merely to detain. One cannot threaten something which one has no right to effect.

Questioning a suspect in public is limited by the tort law of slander and defamation, which prohibits publicly uttering false statements injurious to reputation without a privilege.[359] For example, in *J. C. Penney Co. v. Cox,*[360] the questioning of a suspected shoplifter "in view of all the sales people and customers in the store" constituted slander,[361] where the questioning implied that the suspect was guilty of a crime and the store manager acted without probable cause.[362] In contrast, in *Burnaman v. J. C. Penney Co.,*[363] the court refused to find the store liable for slander of a suspected shoplifter. The court held that plaintiff failed to show that any other persons understood the accusations, "What did you do with the merchandise?" and "Where is that red dress?" in the defamatory sense of charging a crime.

Questioning suspected shoplifters under the merchant's temporary detention privilege is limited by a general "reasonableness" standard. For example, in *Wilde v. Schwegmann Bros. Giant Supermarkets,*[364] a 30-minute detention for the purpose of forcing the suspected shoplifter to sign a confession against her will was held to be an abuse of the detention privilege. In contrast, in *Delp v. Zapp's Drug & Variety Stores,*[365] a 30-minute detention of a shoplifter was held reasonable when the purpose was to obtain the name of the shoplifter, and the suspect repeatedly refused to give this information.

In sum, there is no ban on asking questions, nor is there a requirement for suspects to answer. The legality of any interrogation or questioning will turn on the manner in which the questioning is conducted, and the standard for the manner of questioning is basically "reasonableness."

H. SEARCH

The legality of a search, like the legality of interrogation, is usually inseparable from the legality of the initial detention of the suspect. If there was no probable cause for the detention, then any search would also be illegal.[366] But assuming a legitimate basis for the detention, the question is whether a private security officer has the legal power to search a suspect's person, including any purse, briefcase, or other items the suspect is carrying.

Often consent will render the search valid, particularly if the suspect physically cooperates in the search at the request of the arresting agent.[367] Without consent, some legal privilege or right must be found to justify a search. However, the privileges which might allow searches are not clear-cut, nor is any single privilege expansive enough to sanction a wide range of searches in a number of different situations. The law of searches in the private sector has simply not been developed as it has in the public police sector.

The common-law right of self-defense might justify reasonable searches for weapons, but only where there is reasonable ground to fear imminent attack by use of a concealed weapon. Under the common law, the arresting individual was empowered to search a suspect who is *already under arrest* if he (the arresting individual) "has reason to believe that he has on or about him any offensive weapons or incriminating articles." [368] However, this power was limited to cases of formal arrest (i.e., where the person will be turned over to the authorities), not mere detention. A similar right is provided by state statutes specifically authorizing private citizens when making an arrest to seize weapons from the arrested person. For example, Section 846 of the California Penal Code states as follows: "Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person. . . ." However, such a privilege is limited to weapons [369] and, apparently, to cases of actual arrest. Additionally, some states authorize private citizens in arresting a person to search for incriminating evidence about the person.[370] These statutes also seem limited to arrest situations. The common-law privilege of recapturing chattels wrongfully taken would seem to support a search about the person for such goods in a nonarrest situation; however, as pointed out above,[371] this privilege is quite limited. Finally, whether merchant detention privileges would support a search is open to question. Most detention statutes do not explicitly give such a right, and at least one such statute prohibits searches during detention.[372] Nor has there been sufficient judicial interpretation of such laws on the question of search. However, at least those detention statutes aimed at recapturing stolen property might well be interpreted to allow searches of the person. Moreover, at least one antishoplifting statute explicitly gives the right to search incident to detention.[373] Finally, a search was approved in the *Collyer* decision [374] as part of a temporary detention.

In sum, the law surrounding the privilege to search a suspect is ambiguous at best.[375] However, it is clear that wherever such a privilege exists, it must be effected in a reasonable manner and with the least possible use of force, intimidation, and embarrassment. For example, in *J. C. Penney Co. v. Cox,*[376] the court found that commanding a suspected shoplifter to empty her bag and purse in public was an unreasonable exercise of the shoplifter detention privilege. In contrast, in *King v. Anderson,* the court found no assault where the security officer of a drug store took a suspected shoplifter by the arm and asked to inspect her shopping bag.[377]

I. PUBLIC AND PRIVATE POLICE COMPARED

Under state tort law and state statutes, a public policeman has significantly more powers than a nondeputized [378] private policeman. A public policeman can obtain and serve a search or arrest warrant. Without a warrant, a public policeman may arrest or detain a suspect in all of the situations in which a private citizen could—plus many more. For example, a public policeman can usually arrest for the commission of a felony as long as he has reasonable grounds for believing a felony has been committed. In contrast, a private citizen may usually arrest for a felony only when, in fact, the felony has been committed.[379] Further, not only is a public policeman usually vested with the same powers as a merchant or his agent to detain shoplifters,[380] he is often empowered to stop or temporarily detain persons suspected of other crimes.[381] A public policeman is usually granted specific statutory power to conduct a search incident to an arrest for weapons and contraband,[382] and to frisk any temporarily detained person for a weapon if probable cause exists.[383]

Further, a public policeman would seem to have at least the same powers as a private police officer to take actions short of arrest—for example, expelling intruders or persons causing disturbance from private property. He is as capable of acting on behalf of the owner as any other agent of the owner. Moreover, he is often given specific statutory author-

ity to take such action in particular situations.[384]

Moreover, as a practical matter, enforcement of restrictions on his activities by means of civil or criminal lawsuits is much less likely,[385] and a police officer is likely to encounter much less resistance to requests for voluntary cooperation. Finally, in some states it is illegal to resist an arrest by an officer of the law, even if the arrest is illegal.[386]

On the other hand, the public policeman is subject to various restrictions imposed by the federal Constitution which, so far, have not been generally imposed upon private detectives and guards. In those areas controlled by the Constitution, a private person may be less restricted and thus have more power than the public police.

First, a public policeman's power to arrest without a warrant is restricted by the Fourth Amendment to situations in which he has probable cause, regardless of whether the crime was in fact committed.[387] In contrast, under some common-law decisions, lack of probable cause of a private citizen's arrest would be excused if the felony had in fact been committed.[388] However, this distinction is probably of limited practical significance.

Second, in *Chimel v. California*,[389] the Supreme Court has held that warrantless searches incident to a valid arrest may extend only into the area within which an arrestee might reach a weapon or destructible evidence. And while the court in *Terry v. Ohio* [390] sanctioned the warrantless "stop and frisk" of a person engaged in suspicious activities, in *Sibron v. New York* [391] the court strictly limited the searches incident thereto to a pat-down for suspected weapons—not for evidence. These constitutional limits upon the scope of searches incident to arrests and detentions have not yet been directly imposed on private searches,[392] and these constitutional standards may be more restrictive than those the courts have so far applied by tort law to private searches. On the other hand, tort law governing private searches of the person is neither clear nor well developed. Thus, since both the Supreme Court's recent Fourth Amendment decisions and the tort law rely heavily upon "reasonableness," the two areas of law may well coincide—without directly imposing "constitutional" standards upon the activities of private security officers. Indeed, tort law might eventually impose more restrictive standards on private police than are now applied by constitutional law to public police.

Third, in various constitutional-law decisions, the Supreme Court has placed restrictions upon police methods of interrogating suspects to ensure that any confessions or admissions are voluntary and not "coerced." The court has enforced these standards by excluding evidence obtained by improper interrogations from subsequent criminal prosecutions of the suspect. Many courts have rendered these constitutional standards applicable indirectly to private persons by excluding any "coerced" confessions from criminal prosecutions, regardless of whether the source of coercion was public or private. For example, in *People v. Frank*,[393] the court held that statements obtained by the private security guards of a department store would be inadmissible unless made "freely, voluntarily, and without compulsion or inducement of any sort." Moreover, many tactics of the public police which are condemned by the Constitution because they render confessions involuntary would also be condemned for private security personnel by tort law.[394]

However, in *Miranda v. Arizona*,[395] the Supreme Court imposed an additional requirement for the admissibility of incriminating statements: Before interrogation, the suspect must be informed of his right to remain silent and to obtain the assistance of counsel. This requirement clearly goes beyond what might be required of private security personnel by virtue of tort law or by the admissibility standards applied in such decisions as *People v. Frank*. Thus, if *Miranda* is not applied to private security activities guards may have greater interrogation powers than the public police.

The cases so far seem to hold that the *Miranda* warning requirements do not apply to private security guards [396] or to other private citizens' activities,[397] unless there is state involvement in the interrogation [398] or the security officers are directly commissioned by the Governor of a state to act as policemen.[399]

In sum, the public police may have greater arrest, search, and interrogation powers under state law, but they are also subject to constitutional restrictions which, so far, have not been imposed upon private policemen. Nevertheless, these constitutional restrictions may not be significantly different from the restrictions imposed on private police by tort law. And in practice these constitutional restrictions may not be enforceable against public policemen,[400] so that this disparity in powers between public and private police may be somewhat illusory.

J. CRITIQUE AND RECOMMENDATIONS

Because of the lack of sufficient empirical data, evaluation of the propriety of the current methods for conducting enforcement and protection activities by private security personnel necessarily must be subjective. While the guard manuals and industry spokesmen indicate a desire to have their guards act prudently and within the bounds of their authority, interviews with the guards, data from regulatory authorities, and the outrageousness of some reported cases and incidents [401] indicate that in some firms the desire may not be deeply felt or that the policy may not be strongly enforced.

As for the tort controls over the powers of private police, a detailed critique is difficult because of the general vagueness and complexity of the law. The law on use of force, detention, arrest, search, and interrogation is controlled by such general concepts as "reasonableness," "probable cause," or "necessary under the circumstances": For detention or arrest there must be probable cause; the force used must be necessary and reasonable; a search is permissible if there is probable cause; interrogation is permissible if reasonable. Uncertainty is compounded by the fact that a particular factual situation might be covered by various different privileges, each of which might allow different conduct. For example, the conduct of a person preventing a burglary might be governed by the privilege of crime prevention, privilege of arrest, or privilege of property defense; and there may be different standards for each privilege. Further, the law in a given situation depends upon the nature and legality of the conduct of the person being detained, stopped, or ejected. An intruder might be intentionally committing a burglary; he might be drunk; or he might be lost and mistaken about his rights to be on certain property. Moreover, the power of the private security employee turns on whether the intruder's action is a felony or a misdemeanor. To add to the complications, the law often takes into account the subjective state of mind of the person making the arrest or using force. His liability may turn on what he was thinking when he saw the alleged burglar approach the premises.

Such uncertainty creates special problems for the employer of private security personnel trying to give his personnel adequate instructions in terms that they can understand. And the individual guard, whose intelligence and educational level may be relatively low, may also be incapable of setting any guidelines for himself. For example, even if the guard were able to master the distinction between felony and misdemeanor—a basic distinction most guards have not learned, according to our security employee survey—he still might not have a complete notion of what force he can use in a particular situation. However, it is clear that present training is inadequate (see Chapter VIII of R–870–DOJ) and can be improved.

Furthermore, these vague standards cause the private citizen to be unsure of his rights when he is accosted by a private security guard. For example, many states give an arrested person a limited privilege to resist with force an "unlawful" arrest.[402] However, in many instances, it would take a legal expert to make this judgment on the spot so that he could exercise this privilege. Indeed, even after the arrest is over, the arrested person would be unsure of whether he had been wronged and probably could not obtain a quick decision, since he must await the ultimate decision of court or jury as to who acted "reasonably under the circumstances"—he or the arresting officer.

Finally, the existence of uncertain standards encourages litigation once an abuse occurs or a dispute arises, for neither side can be certain of his position. As a result, the overall costs of remedying abuses may be greatly increased.

Of course, it is true that uncertainty plus potentially large claims [403] may often deter unlawful private security activity more than could any "bright-line" standards: The fear of such recoveries may lead security personnel to be more cautious than they would be if they knew the exact boundaries of permissible conduct. This may be especially true of the more responsible, conservative, and deep-pocketed employers and security agencies. However, such fears may not operate on the less responsible, free-wheeling, and probably judgment-proof operators, and such operators may be the main causes of problems in the area. Flexibility, uncertainty, and complexity may encourage such private security operators to take action they might not otherwise take on the chance that they can win a court battle. Moreover, uncertainty may allow the private security guard—who has the ostensible authority and some knowledge of his powers—to take advantage of a comparatively ignorant private citizen.

Therefore, greater certainty in the definition of

permissible conduct in the areas of arrest, search, interrogation, and use of force may be a warranted and helpful step. Of course, the entire law of this area could not be codified. But an attempt should be made to isolate some particularly troublesome problem areas and promulgate standards to govern the conduct of guards as well as the conduct of citizens.

One problem that may be subject to such a solution is retail shoplifting. There have now been enough decided cases, reported incidents, and experience with shoplifting detentions to allow some specific standards to be formulated. For example, there could be explicit guides for where, how long, with what force, and in what manner detention should take place; whether weapons can be worn, exhibited, or used by retail security guards; and what restrictions stores can place on general customer shopping practices. The number of litigated cases indicates a high degree of misunderstanding, intolerance, and unacceptable conduct by both customers and stores. And the enactment of merchant antishoplifting laws has not added much clarity. As one court stated of an antishoplifting law: "At the outset we readily concede that the statute is certainly not a model of clarity." [404] The need for greater specificity of what conduct is permissible still exists, and until it is brought about by legislation, incidents of misunderstandings and improper detentions will probably continue.

As for the current differences in public and private police powers due to the imposition of constitutional restrictions upon the former and not the latter, there is certainly room for improvement. There are significant advantages to be gained by applying to private security work the same standards of conduct developed in constitutional decisions for arrest, detention, search, and interrogation by public police. Compliance with most of these standards is not too difficult, as they are often no more than amplifications of what might be required by common-law tort rules. For example, there should be no difficulty in requiring probable cause for citizen's arrest [405] or in limiting private searches of the person to the areas within the immediate control of the arrested person.[406] Even where the requirements are more than what the tort law might require, they may not be difficult to meet; and in any case, the benefits derived from their application would outweigh any such difficulty. For example, the *Miranda* [407] warning is not difficult to learn or give, and, if given, might have beneficial effects on detention procedures. The suspect does have a right to remain silent and a warning to that effect might prevent misunderstandings. And if the suspect takes advantage of the opportunity to call counsel, many abuses and misunderstandings might be avoided. Moreover, the simple fact that private and public police will be governed by the same standard will have a salutary effect on the ability of courts and the citizenry to determine their rights. The civil law could draw on the massive body of criminal-law developments in the areas of arrest, search, and interrogation.

However, two problems are raised by an attempt to apply constitutional standards to private police activities in general. First, as stated before,[408] enforcement of such standards by use of the Exclusionary Rule could have undesirable effects on public prosecutions. The Exclusionary Rule might not be a sufficiently effective deterrent to warrant such a risk. Thus, an attempt should be made to use tort remedies to enforce these standards. And if a particular constitutional standard or requirement is found unamenable to enforcement through tort-law methods,[409] such a standard should not be applied.

A second problem raised by imposing constitutional standards is defining to whom, when, and for what activities these standards apply. For example, would constitutional requirements, such as the *Miranda* warning, apply only to licensed security officers,[410] to any citizen performing security-type work (licensed or not), or to any "custodial interrogation" by any citizen? The licensing statutes of the different jurisdictions are too inconsistent to allow any reliance on licenses as a determinative point for drawing a line. Perhaps a wholesale application of constitutional standards should await some greater clarity or uniformity in licensing laws. Until then, constitutional restrictions should probably only be applied when private police are deputized, or in those jurisdictions where private police are licensed in a fashion that gives them more power than a normal citizen, or when any private policeman acts in conjunction with the public authorities.

V. OTHER PROBLEM AREAS

A. IMPERSONATION OF AND CONFUSION WITH PUBLIC POLICE—UNIFORMS AND BADGES

Current Practice

Private citizens are often confused about the powers and prerogatives of private policemen (which are, in fact, generally the same as those of any citizen acting in a private capacity). Indeed, most citizens have little knowledge of the comparative powers of public police, private police, and private citizens. Moreover, a private policeman's uniform, badge, weapons, actions, and claims create an apparent authority that may lead citizens to mistake him for a public policeman. Whatever the cause of the confusion, the potential for abuse exists because public police have greater powers than private police, and the activities of private police are not subject to the same review and control as are those of the public police.

In the United States today there are an estimated 260,000 uniformed guards in the private sector plus an additional 120,000 guards in the public sector. With such a large number of guards and watchmen exercising police functions and wearing a variety of uniforms and badges, it is not surprising that citizens commonly mistake private police for public officers or assume that they possess identical powers. This confusion is compounded when private police intentionally pose as public officers. For example, a recent incident involved an off-duty policeman and a private guard on a highway: [411]

> Recently a Washington, D.C. policeman, heading home after work, was pulled over for speeding by a white car with a flashing light. Dutifully, the officer stood by his auto. When he looked at the uniformed figure approaching him, he saw not the familiar markings of a fellow patrolman but the trappings of a rent-a-cop. After a few minutes, the off-duty officer interrupted the ersatz patrolman's lecture on safe driving and threats of traffic tickets. The real officer demanded to be ticketed. The rent-a-cop said he would go the motorist one better and would haul him into the nearby police station. Again the officer called his bluff. When the two entered the station, the desk sergeant's greeting to the "motorist" sent the color draining from the "arresting officer," who was promptly charged with impersonating a police officer.

Confusion is not confined to uniformed guards or watchmen. The private detective or private investigator can also be mistaken for the plainclothes policeman.

A survey of governmental agencies which regulate private police indicates that impersonation of public police officers is one of the most typical complaints made against security agencies.[412] The issues were clearly stated in the following official response to an inquiry concerning the reasons for the recent enactment of anticonfusion legislation by a large West Coast urban county:

> The . . . County Ordinance . . . prohibits the use of official police markings and insignia to identify private security personnel. The drafting of this ordinance was requested by [a county] Commissioner and resulted from his concern that certain security forces were adopting uniforms and insignia which are in some cases indistinguishable from those worn by the police.
>
> The growth in the number and size of such private security forces has increased tremendously within the last few years. The general public concern with rising crime rates, law and order, and urban crime problems in general has been matched by an upsurge in plant and building security consciousness and the patrolling of commercial enterprises. In the process, I believe there is a tendency on the part of such private organizations to look the part of the persons they augment or replace; namely the police.
>
> It is, furthermore, not uncommon to find such personnel wearing sidearms. In their eagerness to appear competent and professional, the private security forces tend to look as nearly like police officers as is possible. It is the Commissioner's . . . feeling that there should be a clear and obvious distinction between the police and the private security forces. Accordingly, . . . County passed an ordinance designed to maintain in appearance a proper distance between security force personnel and the regular police.[413]

Extensive federal, state, and local regulations exist to deal with confusion and impersonation of public police. The sufficiency of these regulations is an important issue. If abuses are not controlled

and diminished, encounters between private citizen and private policeman will be more painful than they might be.

Regulations Proscribing Impersonation

Both private citizens and private security personnel are generally prohibited from impersonating public police officers and from wearing badges or uniforms that might be confused with those worn by public police. Generally, however, private security officers do have explicit legislative authority to wear uniforms and badges, and private citizens can presumably wear police-type badges or uniforms as long as they are sufficiently different from those used by local law-enforcement agencies.

There are no specific federal statutes regulating the use of badges or uniforms by private security offcers.[414] However, it is a criminal offense for anyone to impersonate an officer or employee of the United States.[415] The application of this statute to private security activities has been treated in at least two cases. In *Massengale v. United States,*[416] the defendant, a private detective, claimed he was from the "Federal Bureau" when he was in fact employed by the Federal Detective Bureau, Inc., and the badge he wore so stated. In the *Massengale* case, the Sixth Circuit found no evidence in the record that defendant at any time declared himself to be an FBI agent, or assumed or pretended to be an officer or employee acting under authority of the United States, and therefore set aside judgment entered upon his conviction of violation of this federal impersonation statute. In *Whaley v. United States,*[417] however, the defendant, a private policeman, carried identification which stated that he was an agent for the FBI. In this assumed role, he coerced information from people to aid in his repossession of automobiles. The court affirmed defendant's conviction of violation of the statute in the *Whaley* case.

In California, private persons are expressly forbidden from impersonating a police officer.[418] State regulations are complemented by local ordinances.[419] More generally, it is unlawful in California for one falsely to assume the identity of another and, in such assumed character, do any act for the impersonating party's benefit.[420] A private investigator's license may be suspended or revoked for the impersonation of any person, whether or not a public officer.[421]

California extensively regulates private police uniforms and badges, reflecting the legislative policy that private patrolmen shall not create the impression that they are acting under government authority. Under these regulations, private investigators are prohibited from using badges, titles, uniforms, or insignia or identification cards in connection with their activities. Violations are punishable by fine, imprisonment, and license revocation.[422] All security personnel, with the exception of special police officers, are also prohibited from making statements with the intent to give an impression that they are connected in any way with federal, state, or local government.[423]

California expressly allows for local regulation of private watchmen, guards, and patrolmen and of persons who furnish such services.[424] Local ordinances have been passed regulating such things as the color and style of uniforms, the manufacturing and distribution of badges, and the style of markings of vehicles.[425]

In New York, it is a misdemeanor for a private person to pretend to be a public servant or to wear the badge or uniform of a public servant without authorization and with the intent to induce another to act in reliance on such pretended authority.[426] This statute is also complemented by local ordinances.[427]

While New York state law does not regulate uniforms, it does regulate badges.[428] Violations are punishable by fine, imprisonment, and license revocation. Watchmen and uniformed guards are authorized to wear a rectangular medal or woven insignia approved by the Department of State.[429] As in California, New York law prohibits a private investigator from owning, exhibiting, or displaying a shield or badge in the performance of his duties.[430] In New York, private patrolmen are appointed by local jurisdiction.[431] The color and design of uniforms are regulated in some localities. In New York City, for example, public police uniforms are blue with gilt buttons, while special-patrolman uniforms are grey with white metal buttons.[432]

In Florida, false impersonation of a sheriff, police officer, or other state officials is a criminal offense,[433] and Florida's laws regulating private investigative agencies and persons engaged in related activities provide for suspension, denial, and revocation of private investigative agency, private guard agency, private detective, private watchman, and branch office licenses for such behavior.[434] This law does not prescribe standards for uniforms or badges of private security personnel, but administrative rules do require licensed private police agencies to provide uniforms, badges, and insignia that are clearly distinguishable from those worn by federal, state, and local official police.[435] While offenses may not be punished by fines and imprisonment, provision has been made for license suspensions and revocations.[436]

Local jurisdictions in Florida also regulate watchmen and guards. In Tampa, for example, city ordinances provide that the uniforms of watchmen, messengers, and guards shall be of a design distinctive from that worn by city police. Badges are issued by the Chief of Police.[437]

Rights and Remedies Based Upon Common-Law Tort Principles

Private security personnel, like other private citizens, are subject to civil liability for impersonating a police officer or assuming his powers. In many situations, such traditional tort remedies as those for battery, false imprisonment, defamation, and invasion of privacy would be available when a private policeman intentionally confuses a person as to his identity and either arrests or searches the person or intrudes into the person's privacy or dwelling. Any consent that the injured party gives for the search or intrusion should be nullified if it was given because he mistakenly thought that the private security man was a policeman. A person might also recover for intentional misrepresentation if a private security man intentionally represents himself to be a policeman and causes the person to act in reliance on that representation to his damage.[438] For example, a person might be persuaded to give up valuable information which he would otherwise keep secret, if he believed the requesting party were a policeman entitled to the information for official purposes. A similar theory of recovery was relied upon in an English case in which a private detective represented himself as a police officer and threatened to charge the plaintiff with espionage unless she surrendered private papers in her possession.[439] The King's Bench justices in that case, emphasizing the outrageous action of the private detective, allowed her recovery based upon a theory of intentional infliction of mental distress.

Effectiveness of Present Regulations, Remedies, and Suggested Improvements

There appears to be ample legislation proscribing direct and indirect impersonation of federal, state, and local law-enforcement officers. Federal and state laws in general proscribe the direct impersonation of officers, agents, and employees. Some state and local laws indirectly proscribe the impersonation of government officials, agents, and employees. These regulations generally prescribe the color, style, and wearing of uniforms and badges. To the extent that confusion still exists, more effective legislation might ban the use of the word "police" when referring to or identifying private security personnel[440] and might require the use of even more distinctive uniforms or badges, or even possibly the wearing of a patch stating that the wearer is not a police officer. Indeed, a long-term goal might be nationwide, standardized police uniforms with clearly distinguishable colors for public and private police. However, as a practical matter, such pervasive federal control of local police uniforms will be slow in coming.

Despite existing and most recommended legislation, the public will probably still be confused by the uniforms and badges of private security personnel. There are two distinct aspects to the confusion problem. First, the public may believe that private policemen are public policemen, with the result that the public police will bear the responsibility in the public eye for the activities of private police. A substantial effort has been made to deal with this problem by means of widespread legislation forbidding the impersonation of police officers and prescribing the wearing of uniforms and badges that are easily distinguishable from those worn by the public police. But as long as private security firms are allowed to wear uniforms at all, the second aspect of the confusion problem will exist: In the absence of substantial public knowledge concerning the respective powers of public and private police, many people will impute special powers to private police from the wearing of a uniform and a badge. One observer has noted, "The mere presence of a uniformed individual constitutes a psychological condition of great significance to the average mind. Over a period of many years, the wearer of the uniform has represented a leader, designated and recognized by governmental bodies. This association has been attached to the form of distinctive wearing apparel."[441] If this observation is accurate, legislation providing for distinctions between the uniforms of public and private officers will solve only one of the problems created by confusion, i.e., public police will not be blamed for the illegal acts of private officers.

Because few people know that a private security officer, unless commissioned as a special patrolman,[442] has no greater authority to assert such powers as arrest or search than does a private citizen, the fact that private security officers are often fully uniformed and armed can only result in confusion. Moreover, few private citizens are aware of the powers of arrest that they themselves possess. When they observe a security officer exercising these powers, they may easily conclude that he possesses all the powers of a public police officer.

An obvious means of preventing confusion would be to forbid private security personnel from wearing uniforms and badges. But substantial benefits may be derived from having private personnel uniformed and badged, and such benefits may in some situations outweigh the cost of confusion.

First, what are the costs of confusion? When people assume that a uniformed private policeman possesses greater powers than he in fact possesses, the private policeman can command obedience to demands that people are not legally obligated to obey. Thus, because of confusion about the powers of uniformed private police, a uniformed store guard may succeed in detaining and searching a customer when the customer has no obligation to submit to detention and search. Private security personnel, taking advantage of public confusion over the powers connoted by uniforms and badges, may succeed in questioning and obtaining information from individuals who are under no duty to talk. Uniformed private security personnel might succeed in committing an assault and a battery on individuals, perhaps in the course of conducting a search; the individuals would fail to exercise their right to resist out of fear that to do so would constitute unlawful resistance to arrest.

But if significant costs result from confusion about the powers of uniformed private security personnel, there are also, in certain situations, significant benefits associated with wearing uniforms. For example, uniformed guards in a retail store may be much more effective deterrents to shoplifting than nonuniformed personnel. And a uniform may enable private security personnel to obtain obedience to their commands much more readily in situations in which they are entitled to obedience. For example, any private citizen is entitled, if necessary, to use reasonable force to expel trespassers from his land. The uniform and badge of a private security guard give him no greater power and no privilege for mistakes that he makes in exercising his power. But trespassers may peacefully obey the command of a uniformed private security guard, while they would not be so inclined to obey the command of nonuniformed personnel. If confusion exists here, it is benign confusion.

To take another example, plant guards may find it much easier to obtain obedience to their lawful commands if they have the pyschological advantage of a uniform. And the uniform is a visible symbol that the particular individual has been duly authorized by the employer to give the kind of order that he has given. Moreover, workers may much prefer having uniformed plant guards, rather than nonuniformed personnel who are better able to "spy" on them. Finally, a uniform may prevent a citizen from mistaking a guard for a robber or trespasser.

The benefits derived from wearing uniforms and badges appear to be sufficiently substantial that it would be a mistake to forbid private security personnel from utilizing uniforms and badges in all circumstances. But there are situations in which uniforms and badges should be prohibited. Private security personnel engaged in investigatory activities such as questioning should not be permitted to utilize uniforms and badges. These include, for example, personnel conducting preemployment, insurance, and credit investigations. They should be allowed to show cards identifying themselves as representing whomever they represent, but these cards should not be designed to give an appearance of official sanction or official power. Since individuals are not obligated to answer the questions of private security personnel, this is not a situation in which uniforms enable private guards to better exercise powers which they have a right to exercise anyway, and the costs of confusion may be substantial. Thus, although uniformed store guards might be used to deter shoplifting and to apprehend suspected shoplifters, uniformed personnel should not be utilized in questioning because they connote official power which they do not have.

In most situations in which uniforms are presently worn, the justifications for their use are sufficient to support their continued use. But administrative sanctions should be available not only for impersonating police officers, but also for any situation in which private security personnel use their uniforms and badges as a basis for an assertion of authority which they do not possess. And there may also be a need for legislation facilitating private damages recovery for those who are the victims of false assertions of authority based upon the wearing of uniforms and badges. A provision for recovery of costs and attorney's fees would facilitate obtaining private remedies for wrongful assertions of authority by private security personnel. And the common-law theories upon which recovery would be based may need to be modified in certain respects. For example, consent is a defense to torts such as assault and battery, intentional infliction of emotional distress, and false imprisonment. Given public confusion over the power possessed by uniformed private security personnel, "requests" by private policemen are inherently coercive. Thus if a store guard asks a customer to submit to a search, the customer's submission should not be viewed as consent, and thus as a defense to a battery, unless the situation was free from coercion based on the authority connoted by uniforms and badges. Only if the store guard informed the customer that he was not required to submit to a search could the coercion inherent in the situation be negated. Some courts might achieve this result in the course of judicial decisions based on common-law principles. But it would be well to clarify the matter by means of a statutory provision to the effect that consent to the requests of uniformed security personnel will only be recognized if the security personnel explain that consent is not required.

B. USE OF FIREARMS [443]

Current Practice and Concern

Almost 40 percent of the private security personnel who responded to our survey carried a firearm full-time while on duty and almost an additional 10 percent carried one part-time.[444] Recent statewide surveys by the California and Michigan regulatory agencies support these figures.[445] Firearms are carried on many types of assignments performed by security personnel, including work in financial institutions and retail stores and guard duty in factories. Not surprisingly, however, the data from the Rand survey indicate that a higher percentage of private police carry weapons in manufacturing, patrol, and central station alarm assignments than in, for example, retail and investigative assignments.

The widespread practice of arming security personnel has caused alarm among some observers because of the increased risk of seriously harming members of the public. Situations involving the improper use of handguns by security personnel appear to fall into three basic categories:

1. Accidental discharge
2. Mistaken identity and innocent bystanders
3. Excessive use of force [446]

Newspaper reports of instances where an armed guard has either carelessly discharged a firearm, wounded innocent bystanders, or deliberately shot someone are common. For example, in one incident at Virginia's Lake Barcroft community, a boy was swimming in the private lake.[447] When the guard told the youth to stop swimming, the boy ignored him. The guard then fatally shot the boy. In another incident a security guard in Orlando, Florida, was suspended after he ordered a life-size dummy to step from the shadows of a darkened classroom and then blasted away with his pistol when the dummy remained stationary.[448] The guard said he believed the dummies to be real people and thought he was outnumbered 10 to 1. Florida Merchant Police said the paper dolls were part of an art display and had been cited for being the most life-like creations at an art festival.

In the Los Angeles area, two private guards employed by the same contract security agency recently killed two men in separate shootings in one day.[449] In one case, a guard shot a man during a party in an apartment complex, when the victim whom he was attempting to eject advanced on him with a bottle and refused to stop. In the other case, a guard was called to a service station because of an allegedly belligerent customer. When the customer, saying he was armed, advanced menacingly on the guard and refused to stop, the guard shot him.

In still another incident in a restaurant, a shooting occurred during an argument between the guard and a customer.[450] The guard "said he had drawn his gun, a snub-nosed revolver, because he was afraid of the other man. *He said he had placed it on the seat beside himself while preparing to have breakfast.* [Emphasis added.] . . . He stated that he stood up and was replacing the gun in his holster when a third man reached over and slapped it from his hand. The gun fell and fired, wounding the third man, just as police officers arrived." [451]

There is some evidence that the many serious firearm abuses by security personnel occur while they are off-duty. A recent bizarre incident involved an off-duty Sacramento, California, security guard who attempted to frighten a young woman out of an attack of the hiccups by brandishing his gun. She was killed when the weapon discharged and

the bullet struck her in the forehead.[452] Gordon Bishop, Chief of the California Bureau of Collection and Investigation Services, reports that cases coming to his a ntion reveal that many of the most serious firearm abuses involve off-duty security personnel.[453]

It should be noted, however, that the number of *reported* incidents seems to be relatively small. In California, for instance, Mr. Bishop states:

> While we have reason to believe that, with over 9,000 armed men on duty, there are shooting incidents occurring, very few are reported to the Bureau. To my knowledge, no licensee has been found to be liable, criminally or administratively, for a wrongful death or shooting, although I believe that employees on occasion have been prosecuted.[454]

Statistics furnished by one very large contract security agency, indicating the number of personal injury claims filed against the company from 1966 to 1971, also suggest that on-duty firearm abuses by private security personnel may not be numerous.

Profesed Need

A program aimed at disarming guards would undoubtedly meet resistance from segments of the guard industry. The concern over the alleged breakdown in law and order and the rising disrespect for the peace officer has affected the perceptions of some leaders of the industry. James McGahey, International President of the United States Guard Workers of America, states:

> The resources and manpower of police and other public safety forces are already stretched almost to the breaking point. As a result, private security forces are becoming more and more the front line of defense and action in dealing with emergency situations. . . . Therefore, it is essential that private guards and security personnel be fully and effectively trained and equipped to meet the problems they may face in carrying out their assignments.[455]

It is clear that Mr. McGahey believes that perhaps the most serious problem guards face is violence aimed at both security personnel and the plants they protect:

> Violence and threat of violence is growing day by day with employees reporting to work not only drunk but hopped up with dope, carrying guns and knives and lethal weapons. Outsiders are forcing their way into the plants to assault workers. There have been bombings and arson and threats of more, daily in the plants.[456]

While Mr. McGahey does not propose to arm all guards as a matter of course, he does argue that guards should receive firearms training and have firearms available in case they are needed.[457] Any program to completely disarm security personnel would encounter stiff opposition from private police who share Mr. McGahey's perceptions of the social environment.

However, the need for firearms may not be as great as some claim, especially since nonlethal alternative weapons are available which arguably serve guards just as well. Robert Jupiter, a retired New York police executive, has indicated that private security personnel should not be armed with lethal weapons because the risks far outweigh the need for such weapons. He argues:

> The most effective weapon insofar as security guards are concerned is the police baton, commonly known as the nightstick. . . . There is little danger that innocent persons would be killed or even injured; whereas, when a firearm is used, much too frequently, innocent persons are struck or endangered. . . . The security officer possessing a nightstick, two-way portable radio and an aerosol agent has the effective means of facilitating his task of providing protection to the institution and its personnel.[458]

The carrying of nonlethal weapons is one possible solution to the dangers inherent in the use of firearms by security personnel, and survey data indicate that there is a pool of support for such a program among guards themselves. Only 44 percent of the guards surveyed thought it was necessary for them to carry a firearm, while 22 percent thought it was necessary only occasionally. Moreover, if they were not allowed to carry a firearm on duty, only 35 percent felt they would need to carry a police baton, 28 percent a chemical spray, and 12 percent a sap or blackjack. Significantly, 35 percent felt they would not need anything.[459]

Lack of Training

At the heart of the concern over the arming of security guards is the belief that security guards are often not adequately trained to use firearms. Robert M. Jupiter notes:

> Many persons now entering security work have no prior experience with firearms, and of those who do claim experience, it is usually of a casual nature rather than any development of expertise. Some security guards do come from the armed forces and from police departments, but this is not generally typical, despite what many people may believe; thus, those who lack experience with firearms would require intensive training prior to their induction into an armed security department.[460]

Mr. Jupiter's observations are confirmed by Rand's survey data. Even though almost 50 percent of the guards surveyed carried firearms, either full-time or part-time, only 19 percent received firearms training on their present job. Eighteen percent had never received any firearms training, while most respondents received their training from the military or learned from personal experience.[461]

Even when security personnel receive firearms training, the instruction may be superficial. One of the large security firms, for example, has a 10-hour "Basic Guard Course" for new personnel. Only 1 hour is devoted to firearms and 30 minutes to nomenclature of and safety precautions in their use. Mr. Jupiter notes:

> The indoctrination required to make a guard an expert pistol shot is very time consuming and costly. It must be remembered that a guard once trained does not remain trained; thus it is necessary to have repeated training sessions to maintain proficiency.[462]

The "Basic Guard Course" mentioned above is typical of the better training given by security firms; clearly, it in no way approaches the intensity of instruction recommended by Mr. Jupiter.

Present Regulation and Control

Regulation of firearms for security personnel is a delicate issue. Traditionally, all private citizens in the United States have had the right to bear arms.[463] Private security personnel have been assumed to have the same right, subject to regulation by the state. In some jurisdictions, however, legislation has been enacted to grant private security personnel greater privileges and responsibilities in connection with the use of firearms than is the case for private citizens.

Federal Firearms Regulations

Prior to 1968, federal control over firearms was minimal. It consisted of two statutes, both primarily aimed at the criminal purchaser. The National Firearms Act of 1934, 26 U.S.C. Sections 5801 *et seq.*, imposes a tax on the manufacture or transfer of firearms such as machine guns, submachine guns, all other fully automatic weapons, all cut-down or sawed-off shotguns and rifles, mufflers, and silencers.[464] The Federal Firearms Act of 1938 [465] was basically a licensing statute requiring manufacturers, importers, and dealers to secure a federal license before engaging in interstate trade in firearms or ammunition. The Federal Firearms Act of 1938 was repealed in 1968, when Congress enacted two major pieces of legislation dealing with firearms, The Omnibus Crime Control and Safe Streets Act [466] and the Gun Control Act of 1968.[467] The Omnibus Crime Control Act prohibits the receipt, possession, or transportation in commerce of firearms other than shotguns and rifles by felons, persons discharged from the Armed Forces under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship. The Gun Control Act is largely aimed at reinforcing state and local gun control laws by regulating interstate firearms transactions. This Act also prohibits certain classes of person from buying or receiving guns, including persons under 21 years of age (18 years for rifles and shotguns), persons under indictment for or convicted of a felony, unlawful drug users, drug addicts, and persons adjudicated as mentally defective.[468]

Under the federal gun control legislation, private security personnel are treated no differently from private citizens. First, the National Firearms Act controls the use of certain "gangster weapons." Second, in states with weak gun control legislation, a person who might qualify to possess a firearm under state law might be prevented from doing so by federal law.[469] Also, in states that either do not regulate the security industry or do not tax or license the possession of firearms, the federal gun control legislation might deter the specified classes of persons from buying or receiving firearms.[470]

State Firearms Regulation

Regulation of the Private Citizen's Right to Possess and Use Firearms. All 50 states have statutes regulating firearms. While these state laws are diverse,[471] the state approach to gun control falls into two distinct patterns. As stated in a 1967 survey:

> Only nine states impose the primary requirement of a license for the initial purchase of a firearm; the remainder exercise control only subsequent to purchase, either requiring that local police be notified of sales or regulating the carrying of weapons, usually by the requirement of a permit to carry a concealed weapon.[472]

A tenth state has imposed a permit requirement for initial purchase since this survey; [473] the District of Columbia also has such a requirement.[474] The license-to-purchase method appears to be the most effective means of control.

The following discussion will focus on regulation in California, New York, and Florida, as these states generally represent the various approaches to gun control.

California controls firearms only subsequent to purchase. Its gun control law is modeled after the Uniform Firearms Act, which "provided for no license to purchase, but required the seller to provide the local police with the description and iden-

tity of all purchasers of handguns and prohibited sales to anyone the seller has 'reasonable cause to believe' is of unsound mind, a minor, drug addict, or criminal." [475] California requires a permit to carry a concealed weapon [476] and prohibits the carrying of a loaded unconcealed weapon upon the person or in an automobile, except under certain specified conditions.[477]

Licenses to carry concealed weapons are issued by local authorities upon proof that the applicant is of good moral character, has good cause for issuance of the license, and is a resident of the county in which the application is made.[478] The license is issued for up to 1 year, and the applicant is required to give detailed information to the licensing authority concerning his identity and residence. The applicant also must pay a fee, and a set of his fingerprints are taken and sent to the State Bureau of Criminal Identification. The local licensing authority cannot issue a permit until it receives the report from the Bureau.[479] California, in short, seeks to control firearms by requiring a permit to carry a concealed weapon and by prohibiting the carrying of loaded unconcealed weapons in public. This approach to firearms control has been criticized because, "Too often violations will be detected only after violence has occurred." [480]

New York is one of 10 states whose approach to firearms control starts at the primary point of acquisition.[481] New York issues permits for the initial purchase of firearms which allow a merchant or storekeeper to have a firearm at his place of business, a "householder" to have a firearm at his dwelling, a messenger of a bank to have and carry a concealed firearm while so employed, an employee of a correctional governmental agency to have a firearm if the warden or commissioner requests the license, and any persons to have firearms when proper cause exists.[482] New York has a strong public policy against the issuing of purchase permits to private citizens.[483] It requires that an applicant for a license show he has good moral character, has not been convicted of a felony, and has no history of mental illness, and that there is no good cause for denial of the license.[484] Moreover, New York requires that applicants be photographed and fingerprinted, and these documents are used to conduct a thorough investigation of the applicant's background.[485]

Florida does not have detailed gun control legislation. However, it does prohibit the carrying of a concealed weapon or unconcealed handgun or repeating rifle without a license by anyone except police officers.[486] Licenses are issued by local authorities upon a showing that an applicant is 21 years of age and of good moral character and upon payment of a $100 bond.[487]

State Firearms Regulation of Private Security Personnel. In terms of the relative rights of private citizens and private security officers to bear arms, there are essentially two patterns; In many states, private police have no greater privilege to bear arms than private citizens, but in others they are given greater power. Regardless of the language of the statutes, it is presumably easier for private security officers to obtain permits, since their work is more readily accepted as proper justification.

In California most in-house security guards are exempted from the state law which prohibits carrying loaded unconcealed weapons,[488] and bank guards and messengers are exempted from the law requiring a permit to carry concealed weapons.[489] In effect, this latter class of guards has the same authority to carry handguns as do the public police in California. In addition, California gives contract private security personnel the right to carry firearms in situations where private persons may not do so.

In 1970, California legislation was enacted empowering the Director of Professional and Vocational Standards to institute a statewide firearms training program for the security industry.[490] The program is to be administered by the Bureau of Collection and Investigation Services. According to the Bureau's Chief, the industry itself fostered the legislation.[491] The program grew out of concern over the use of firearms by over 9,000 armed security men on duty in California.

Although the details of the program have not been established, an indication of the standards to be implemented can be gleaned from the recommendations made by an ad hoc committee representing 19 private security firms operating in Southern California. This committee recommended that security personnel be trained by certified firearms instructors who would instruct on the following lines:

1. Classroom training to include the philosophy of defensive use of weapons, response to stress situations, and safety aspects including range safety, weapons handling, and the danger of firing in a public area.

2. An annual course of familiarization firing on either line fire or Red Jet Ranges.

Once the Bureau issues the training standards, guards will be exempted from the California penal provisions prohibiting the carrying of unconcealed firearms upon completion of the training program.[492] Compliance with the provisions of this program will not give private security personnel the right to carry concealed weapons without a license. However, those private security personnel who are already exempted from the provisions prohibiting the carrying of unconcealed handguns are not required to comply with these training standards. Despite this limited exemption, the California approach to ensuring that security personnel receive some training prior to the carrying of firearms is certainly an important step in the right direction. This program could well become a model for other states.

Private security personnel are not exempted from the New York licensing procedure but must follow the same licensing procedure as private citizens in order to purchase and carry handguns. The public policy of New York to discourage the ownership of firearms by persons other than law-enforcement officials applies to private security personnel as well as private citizens. This point is reflected in the following statement by an official of the New York City Police Department:

> The special patrolman, although possessing the powers of patrolmen while acting in the performance of his duties, is not automatically a 'peace officer' under Section 154 of the Code of Criminal Procedure, giving them the right to possess firearms. *Because the department does not favor needless proliferation of firearms,* the Police Commissioner often must turn down requests from other city agencies to arm their special patrolmen.[493]

However, one of the permits in New York allows messengers and guards of banking institutions to carry concealed weapons.[494] The principal omission in the New York system of regulation is that the state makes no attempt to ascertain an individual's ability to handle a firearm before a permit is issued, and it has no special statewide program for firearms training of private security personnel.

In Florida, private security personnel have no special authority to carry handguns. The statute that regulates the private security industry states explicitly:

> It is hereby specifically provided, that nothing in this chapter shall be construed to authorize any licensee to carry any weapon, whatsoever.[495]

In order to carry a handgun, a private guard or detective must apply for a license as would any private citizen.[496] Florida has no statewide firearms training program for security personnel.

Sanctions and Remedies

The state legislation discussed above deals solely with the right to possess and bear firearms. It does not deal with the appropriate use of these firearms. Consequently, the only sanctions imposed by such legislation are for the unauthorized possession of firearms. In California, however, the license of a private investigator may be suspended or revoked if he commits assault or uses force on any person without proper justification.[497] This law does not apply to other types of security guards. The most important sanctions for the misuse of firearms are those based on traditional criminal laws, such as those concerning murder, manslaughter, and assault with a deadly weapon. As yet, there are no special statutory remedies providing for recovery by innocent third parties who are injured by the use or misuse of firearms wielded by private security personnel. They must rely on traditional tort remedies. The two major questions in this area are the bases for recovery against the private security personnel who misuse their firearms, and the liability of the employer of private security personnel under the doctrine of *respondeat superior* for his employee's misuse of firearms.

Tort Bases for Recovery Against the Private Security Officer

When firearm abuses occur, civil recovery can be based on theories of assault, battery, and negligence.[498] A prima facie case of battery is made when the plaintiff is in fact wounded by the defendant. The elements of assault are satisfied if the plaintiff is frightened either by being shot at or by being threatened with a firearm.[499]

The use of firearms in any situation may result in injury to innocent persons. If the injured person can show that the person using the firearm did not handle it with the requisite care, that is, that he was negligent, the injured person may recover. While there is no clear rule on the degree of care that is required of a person as he conducts his everyday affairs, the standard of care is generally quite high for persons who are engaged in dangerous activities. In most American jurisdictions, the highest standard of care is expected of persons handling firearms.[500] This standard approaches imposing strict liability, making a gun user liable for any injury to an innocent person, no matter what

degree of care was used. The rule in California was succinctly stated in *Warner v. Santa Catalina Island Co.*:

> The risk incident to dealing with firearms . . . requires a great deal of care to be exercised. In other words, the standard of care required of the reasonable person when dealing with such dangerous articles is so great that a slight deviation therefrom will constitute negligence.[501]

Therefore, a private guard who accidentally discharges his gun and wounds someone or who fires into a crowd while pursuing a fleeing suspect generally would be subject to liability for negligence.

Liability of the Employers of Private Security Officers

There are two distinct types of employers who face potential liability for the conduct of their private security employees. In the case of the in-house guard or investigator, the employer is the owner of the premises that are being guarded. With contracted guard services such as roving patrols and plant guards, the employer is the guard company.

Recovery against the employer of a private security officer would generally be based on the theory of agency: The guard is the employer's agent while acting within the scope of his employment. The employer is therefore generally liable for any unlawful conduct of the guard which occurs within the scope of his employment.[502]

Another possible theory of recovery against the employer is based on negligence. When an employer directs a man who is untrained in the use of firearms to carry out the duties of an armed guard on his premises, such action might well be viewed as direct negligence on the part of the employer, so that the employer would be held directly liable for his employee's misuse of firearms. The argument for holding the employer directly liable is strengthened when the person he employs not only is untrained in the use of firearms but also is ignorant of his powers and of the situations in which his use of deadly force is legally authorized. Responses to Rand's security employee survey show that such employees are not at all uncommon. For example, 18 percent of the guards questioned stated that they did not know their legal powers to detain, arrest, search, and use force, and an additional 23 percent stated that they were unsure of these powers.[503] Few of the guards knew the difference between a felony and a misdemeanor,[504] a difference that can be crucial to the right to arrest and to use force. And many were confused about whether particular actions are crimes. For example, 41 percent believed that it is a crime for someone to drink on the job if it is contrary to company rules.[505] When employers trust employees who knew neither how nor when to use firearms with performing the tasks of an armed guard, such conduct should be held negligence per se. States should provide by statute that employers (including guard agencies, employers of in-house guards, and employers who contract with guard agencies to provide guards) will be held liable for misuse of firearms of armed security guards if those employers have not taken steps to ascertain that the guards have been properly trained in the use of their weapons and that they understand the situations in which use of deadly force is authorized.

In many states, an employer may in some circumstances avoid liability if the private security employee is a special police officer commissioned by a local jurisdiction. Special police officers have statutory obligations to keep the peace and to make arrests. Such obligations transcend any duties special police may have to their employers.[506] Thus, a private employer may not be responsible for the negligence of a private security employee when the employee is a special officer performing a "public duty." In the California case of *Maggi v. Pompa*,[507] the defendant owned a private patrol service. His employee was a special police officer commissioned by a local jurisdiction. The employee was attempting to effect a misdemeanor arrest on his assigned patrol when he unlawfully discharged his gun, injuring a bystander. The court found that because the special patrolman had a statutory duty to make arrests and keep the peace, he was not acting for the benefit of his employer at the time he discharged his gun. Rather, he was performing a "public duty." Consequently, the employer was not held liable for the employee's negligence.

While this rule applies only to special policemen commissioned by local authorities,[508] it has been given wide application throughout the United States:

> The Courts generally recognize, however, that the privite employer will be relieved from liability for acts of a commissioned police officer in his official capacity, although he has paid such officer for services in and about the employer's property; and the fact that the special police officer was commissioned as such by the state protects his private employer from liability for his acts, so far as in any particular case his act may fairly be regarded as having been performed in his official capacity, rather than simply in behalf of his private employer.[509]

Some courts have said that a special policeman's acts are presumed to have been committed in his official capacity, so that the plaintiff, to recover against the employer, has to show that the special policeman was acting under the direction of his employer.[510] But most courts have recognized that when the special policeman is acting in the performance of the duties for which he was employed, such as protecting his employer's property, his employer will be liable for damages caused by his tortious acts. In these circumstances, most courts view as irrelevant the fact that the special policeman may have also been under a public obligation, derived from his commissioning, to protect the property of his employer or of others that is threatened with theft or destruction.[511]

There is no consistency among the states with respect to imposition of liability on the employer for the acts of special police officers assigned at his request and for his benefit. Moreover, since the question of whether a special police officer was acting in his public capacity or was acting in his employer's behalf is generally one for the jury to determine,[512] the imposition of liability may also vary from case to case.

In states that do not hold the employer liable for acts committed by special police officers acting within the scope of their employment, there is a need for legislative change. The idea that a special police officer is generally acting to perform a public duty is no more than a fiction created to avoid imposing on the employer the liability that would normally be imposed by *respondeat superior*. There is no distinction between special police officers and any private security personnel that should lead to applying a different rule with respect to the employer's liability, if the employee was acting within the scope of employment. In many jurisdictions, special police officers are appointed at the request of an employer, with the most perfunctory review by the appointing authority, which is frequently the police commissioner. Appointment of an individual as a special police officer represents no judgment that the individual is qualified by background and training to perform the duties of a regular police officer. Rather, it is usually nothing more than a determination that an employer has a need for an employee with the powers of a special police officer. Since special police officers and other private security personnel are essentially the same in background and in function, *respondeat superior* should operate to make the employer liable for the tortious acts of special police as well as for the tortious acts of other security personnel that he employs. Where state courts have reached a contrary result, legislation should be passed making it clear that an employer is liable for the tortious acts of special police performed within the scope of their employment.[513] The fact that the special policeman may have been acting pursuant to a "public duty" would then be irrelevant so long as he was acting within the scope of his employment. At the very least, appointments of special police officers should be more carefully scrutinized as to the necessity of the appointment, qualifications of the person appointed, and restrictions which might be imposed on performance of the assignment in light of special circumstances.

The Need for Firearms and Firearms Control

A strong argument can be made that guards should be prohibited, except in extreme cases, from carrying firearms. Only a relatively small percentage of guards receive adequate firearms training. The training that is received by most guards is minimal or nonexistent.[514]

An alternative approach to improving the quality of the use of firearms by security personnel would involve the adoption of statewide training programs, such as that adopted in California, where a licensee receives firearms training prior to obtaining authority to carry loaded firearms. The California model might be improved by using psychological testing to eliminate persons who are relatively more likely to misuse firearms. Robert Jupiter notes:

> The mere wearing of a firearm often gives some individuals a sense of braggadacio and could lead to rash behavior which the bearer would not engage in if he were not so equipped. Hence, it affects attitude and behavior which are difficult to predict. Psychological testing would be a requisite to determine if a person would not be adversely affected by being put into possession of such a potentially dangerous instrument.[515]

Finally, if the problem of armed security personnel is viewed as part of the larger problem of the proliferation of firearms among private citizens in general, then perhaps a minimal approach would be to enact more stringent gun control legislation at both the state and national levels. Congressional enactment of the strict gun control laws found in New Jersey and New York, which seek to control firearms at the crucial point of purchase, would

be a great improvement. If such a strong public policy against the proliferation of firearms were coupled with requirements of competency in their use before licenses were issued, the problem of potential weapons misuse might be greatly alleviated.[516] Obviously, however, such legislation would meet stiff opposition from many quarters and would run counter to strongly entrenched American traditions.

C. DIRECTING AND CONTROLLING TRAFFIC

Current Practice

Guard manuals indicate that the typical traffic functions performed by private police are the checking of credentials at entry points to plants and the regulation of parking-lot traffic. They are specific in directing guard employees *not* to undertake traffic control on public streets. However, private guards are sometimes deputized by local police to perform traffic duties on public streets near the private property on which they work.

As an empirical matter, it is unclear that traffic control gives rise to abuses by private security guards. Thus, while state regulatory agencies cite impersonating public police officers as one of the most prominent reasons for license revocation,[517] it is unclear to what extent such impersonations of police officers are related to traffic control.* In some instances, private police may represent themselves as public officers for the purpose of "shaking down" motorists on both private and public property. This form of private fund-raising has been a classic form of improper conduct by public police,[518] and it is probably not unknown to private police. This may be the evil to which the Los Angeles and Miami governments directed their attention in enacting ordinances which specifically prohibit private police from attempting to enforce the traffic laws.[519]

State and Local Government Regulation

General Standards

On Public Property. Traffic-control functions on public property, including the power to issue citations, are typically entrusted to public police. The California Vehicle Code, for example, commands motorists to obey "traffic officers." [520] These "traffic officers" are defined as members of the Highway Patrol (state police) and peace officers (municipal police).[521] This system of traffic control is common. In Florida, for example, the power to enforce public traffic laws is vested in the Motor Vehicles Department, the Department of Public Safety, and law-enforcement officers.[522] Full deputies are also sometimes granted power to enforce the traffic laws. In New Jersey, for example, campus police can be deputized (licensed) by the local chief of police and can then enforce the traffic laws.[523] Ohio law specifically provides that orders of police officers regarding traffic should be obeyed [524] and that no private security officer has the powers of a law-enforcement officer,[525] yet a county sheriff can appoint deputies who are then empowered to assist in the enforcement of the traffic laws.[526] Apart from deputization, traffic-control powers are usually excepted from the few statutes or ordinances giving special powers to special police. In Los Angeles, for example, the Los Angeles Board Rules Governing Special Officers specify that commissioned special officers are prohibited from representing that they have power to enforce traffic laws.[527] Thus, private security personnel are given by statute little or no role in regulating traffic on public highways or other public property.

This does not mean, however, that private persons, perhaps occasionally including private security personnel, never engage in controlling traffic on public streets and highways. Construction workers, for example, frequently control traffic to permit heavy equipment to enter and leave construction projects, or to direct traffic away from a portion of road that is under construction. When private individuals control traffic, without official authorization, they are not privileged to make arrests, to issue citations, or to use force in support of their efforts at traffic control. Moreover, they would be subject to tort liability for any harm resulting from negligence in attempting to control traffic. An individual who was merely inconvenienced in his use of the public roads by unauthorized traffic directions given by another private individual would not, however, have a cause of action. Only the municipality or other governmental unit that owned the road could bring action against an individual for obstruction.[528] This limitation on who can bring suit for obstruction of public highways may explain, in part, the frequency of unauthorized traffic control by private individuals.

Common-Law Rights on Private Property. Private security personnel do not have any special powers to control traffic on private property in situations in which the property owner himself would not have such power. In other words, the powers of private police to control traffic are essentially derivative; the private police exercise the powers delegated to them by the landowner who employs them. But these powers are quite extensive. A landowner, in general, has the right to determine who can come onto his property and the right to set conditions which must be complied with by those who enter his property if they are to remain there. This right of the landowner is not absolute—under certain circumstances individuals are privileged to enter private property. For example, public officials are privileged to enter land to extinguish a fire or to inspect property for violations of housing codes; private individuals are privileged to enter the land of another if necessary to recover property which is on the other's land without the consent or the fault of the entering individual.[529] But in most circumstances the landowner can forbid or condition entry on his property as he chooses. Thus, he can confine traffic on his property to specified areas, restrict parking areas, impose safety regulations, and post guards at property entrances to deny or restrict entrance.

Not only does a landowner have the right to regulate traffic on his property, in many situations he has a duty to regulate traffic on his property to prevent harm to others. A landowner owes a duty to those who are invited onto his property to fulfill some purpose of his own (for example, the customers of a business) to use reasonable care in the conduct of activities thereon so as to avoid harm to the invitees.[530] This duty of care requires a landowner to use his powers of control and expulsion to regulate traffic so as to make the premises reasonably safe for invitees.[531] A landowner also has a duty to prevent his land from being used in such a way as to obstruct a public highway and a duty to provide his employees with a safe place to work. Thus a landowner in many situations not only can, but must, control traffic on his property if he is to avoid liability for harm resulting from dangerous conditions created by his failure to do so.

A landowner can delegate his power to control traffic on his property to private security guards who are hired by him directly, or who are provided to him under a contract arrangement with a private security agency. The principal power possessed by the landowner and the guards who work for him is the power to use reasonable force to exclude from the land those whom the landowner does not want to enter and to expel from the land those who do not abide by the traffic regulations imposed by the landowner.[532] But use of force is an ultimate sanction. Forcible expulsion from private property would not be justified to enforce traffic regulations unless the violator had first been informed that he was in violation and that he would be required to leave the property unless his violation ceased. And enforcement of traffic regulations could never justify the use of deadly force.

The removal of vehicles parked on private property is, perhaps, one of the most common problems in private traffic control. Many states restrict by statute the landowner's right to remove cars wrongfully parked on his property. For example, California law provides that "The owner or person in lawful possession of any private property may, subsequent to giving notice to the city police or county sheriff . . . cause the removal of a vehicle parked on such property to the nearest public garage if there is displayed in plain view on the property a sign prohibiting public parking and containing the telephone number of the local law enforcement agency." Notice must be given to the owner of the vehicle if his identity can be readily ascertained.[533]

Though the employer may delegate the function of traffic control to private security guards, in many situations this will not allow the employer to escape liability for injuries resulting from dangerous conditions that arise when traffic is improperly controlled. The duty to keep premises reasonably safe for business visitors, the duty to refrain from obstructing public highways, and the duty to provide employees a safe place to work have generally been held to be "nondelegable." Thus the employer can delegate performance of the function, but he cannot escape liability for injuries resulting when it is improperly performed.[534]

State and Local Government Sanctions

Public Remedies. When private police use excessive force in traffic control or use any force when they are not privileged to do so, they are subject to administrative remedies (e.g., license suspension and revocation), as well as criminal penalties (e.g., those for assault and battery). In the traffic-control context, a private policeman may occasionally commit the offense of impersonating an officer, and there are separate administrative and criminal pen-

*However, one such incident reported in the media was cited above. See p. 53.

alties for such misconduct.[535] When impersonation of an officer constitutes a felony, commission of that crime additionally subjects the private policeman to the more severe administrative sanctions that are usually imposed for commission of a felony.[536]

Private Tort Remedies. When private security personnel use excessive force in controlling traffic, or when they use force in situations in which they are not entitled to use force, they are vulnerable to tort liability for assault and battery. If a private policeman in the course of enforcing traffic regulations detains or confines an individual against his will, liability for false imprisonment or false arrest may be incurred. When a private policeman is negligent in performing his traffic-control duties and his negligence causes injury to the person or property of others, the private policeman will be liable for the resulting damages, and the private security firm that employs him will usually be held vicariously liable.

Federal Constitutional Restrictions

Constitutional restrictions are of very little importance in the area of traffic control. In one situation, however, the Constitution may impose some limits on the power of a private property owner to control traffic. When private property is used for essentially public purposes, as were the streets and sidewalks of a company town in *Marsh v. Alabama* [537] or the parking lot of a suburban shopping center in *Food Employees Union v. Logan Valley Shopping Plaza*,[538] the property owner cannot interfere with the reasonable exercise of First Amendment rights by the public. Thus, the property owner cannot use traffic control as a guise to prohibit activities such as leafletting or peaceful picketing when these speech-related activities do not interfere with his use of his property. But if the speech-related activity interferes with the flow of traffic on the premises or obstructs the access of customers to portions of the landowner's property, the landowner can act to halt the interference. When the landowner is empowered to act directly, of course, he can act indirectly through private security guards.

Suggestions

Private security personnel are frequently used to control traffic on private property. But in most states their use for controlling traffic on public property (streets and highways) is severely restricted. As noted above, in many states, such as California, there is no authorization for private individuals, such as private police, to control traffic on public property. In some other states, such as Ohio, private individuals, including private police, can perform traffic-control functions on public property only if they have been deputized to do so.

The opportunity exists for much greater utilization of private police to control traffic on public property. While control of moving traffic violations such as speeding, reckless driving, and driving while intoxicated often involves difficult judgments and requires skills which can only be developed through extensive training and experience, control of non-moving traffic violations, such as illegally parked or abandoned cars, is well within the capabilities of many private security personnel. Moreover, these latter tasks may frequently divert the public police from more important crime control activities. And in many cities these tasks are not fully discharged by public police because more important activities claim their time. Many already congested central city areas have been further choked by illegally parked or abandoned cars. At present there is insufficient knowledge about the task of parking control to justify a recommendation that any particular city begin to subcontract parking control functions to private security firms. Among other unknowns are the following: Does parking control provide useful training for new public policemen? Are there significant economies involved in utilizing public policemen who are in the neighborhood for other purposes (e.g., crime control) for the additional task of parking control? Could private security firms perform parking control functions more inexpensively than the public police by employing less-well-trained individuals, paying them less, and having lower administrative expenses?

Though there are many unknowns relating to parking control, there is sufficient reason to believe that some cities could achieve better parking control at a lower cost by utilizing private security firms to warrant modifying state laws, where necessary, so that cities would have the option to use private security firms for this function.

D. THE LEGAL RELATIONSHIPS BETWEEN THE USERS AND PROVIDERS OF PRIVATE SECURITY SERVICES

Relevance of Particular Legal Doctrines

The relationship between the agency that provides private security services and the company that hires those services is of legal significance in a variety of ways. At the most fundamental level, the direct contractual relationship between the agency and the hiring company is a legal document with legal ramifications; to some extent, the nature of the industry requires that all such contracts be of a unique character, and the appropriate form of the contract for this industry is therefore of legal significance. But at a more sophisticated level, there are two aspects of the legal relationship that stand out as being of particular significance both to the operation of the private security industry as a whole and to the interaction between the contract agency and the hiring company.

First, the legal doctrine of *respondeat superior* ("let the master respond"), which requires that an employer compensate any third party who is injured by an act of an employee within the scope of his employment, is central to the question of whether the hiring company, the contract agency, or both, may be required to bear legal responsibility for the acts of an individual security guard. Because of the practical burden of such liability, the legal allocation of such responsibility may have serious implications for the structure established by the agency or the company in dealing with guards. That structure, in turn, will have a substantial effect on the entire process of interaction between the parties to the security services contract. The second aspect of the legal relationship between the parties that has particular significance for the industry as a whole is the question of the legal ability or inability of the agency and the hiring company to determine between themselves who will bear what portion of any liabilities that may arise out of the situation into which the private security guard is imported.

Responsibility for the Acts of the Private Policeman

The doctrine of *respondeat superior* is among the more well-established legal doctrines. As such, the parameters of the doctrine itself tend to be relatively stable, and disputes involving it are usually of a primarily factual nature.[539] It is clear that an employer must compensate injured third parties for harm caused by an employee acting within the scope of his employment. Thus, there is no question that an employer who himself hires a security guard will be required to respond in damages to any person who is injured by the wrongful act of that security guard (such as false arrest or battery), provided the guard was acting within the scope of his employment as a security guard.

If, however, the individual causing the injury is designated an "independent contractor," rather than an employee, the person paying for the services of that individual will not, except in unusual circumstances, be liable for any harm that he causes. Moreover, even an employer is absolved from liability if the act causing the injury is not within the relatively vague notion referred to as the "scope of employment" of the employee.

Although there remains some dispute as to the societal need which gave rise to the doctrine of *respondeat superior*, it is generally accepted that the doctrine developed because employers are typically more able to compensate injured parties than are employees.[540] Nonetheless, the general exemption of independent contractors from the application of the doctrine suggests the importance of such other considerations as the ability of the employer to control his employees' acts and the notion that the employee is acting for the benefit of his employer.

Within the context of the private security industry, the doctrine of *respondeat superior* is essential to determining the liability of the security agency and that of the hiring company under existing law, and the desirability of that existing legal structure. Although it will almost always be true that the individual guard will be an employee of an agency, rather than an independent contractor for that agency, it is not clear whether the guard will be regarded as an independent contractor with respect to the hiring company, whether he will be regarded as an employee of that company, or whether he will be regarded as an employee of the agency which in turn is an employee of the hiring company. Although the last of those possibilities seems unlikely, there are cases which support that view,[541] perhaps primarily because it is the way in which the plaintiff can be best assured of a recovery: If the guard is unable to satisfy a judgment, the agency for which he works should be, and if that agency is unable to satisfy a judgment, then the hiring company should be.

Determining whether the guard is an employee or independent contractor of the hiring company usually turns on an analysis of the control exercised by the hiring company over the contracted guard. One of the factors which will inevitably enter into that analysis of "control" is the terms of the contract between the hiring and contracting companies.

For example, the contract may call for the complete control of and responsibility for the guard to be placed only on the contracting company, with the hiring company to avoid any attempt at control.[542] However, in at least some cases it has been held that the general control exerted by a hiring company over its premises, together with a judicial resistance to allowing a hiring company to subject third persons to the irresponsibility of a detective agency, precludes the hiring company from effectively creating a contractual setting in which the guard is to be viewed as an independent contractor.[543] In such situations—which may well comprise the majority—it is clear that the guard, the contract agency, and the hiring company will each be liable for acts within the scope of the guard's employment.

There is, however, a fundamental objection to the traditional notion that the existence of control—including all of the various considerations which have over time become a part of the notion of control [544]—should be completely determinative of liability. The impropriety of that legal conclusion may be demonstrated by reference to a recent article [545] in which the author indicated that security guards are often inadequate and that the hiring company should take care to examine the qualifications of the individual sent out by the contract agency. Furthermore, if the hiring company is to obtain the maximum benefit from its security guard, the company should carefully examine the procedures he is to follow and should make such changes as it deems proper. In terms of social desirability, it is clear that the suggestions of the author are advantageous: A well-trained guard who is aware of what is expected of him is far less likely to cause injury to third persons than is a guard with inadequate training or experience who is unfamiliar with the premises he is guarding. Nonetheless, the company that carefully examines the credentials of the guard, carefully determines the procedures the guard will follow, and pays close attention to all his activities may be substantially increasing its risk of liability to any third persons who are, in fact, injured by an act of the guard.

Thus, the distinctions of the common law, developed to create a balance between the seeming injustice of requiring that one man pay for an injury caused by another and the desire to ensure that the injured plaintiff will be compensated for the harm he suffers, provide incentives that are entirely contrary to the needs of society with respect to the private security industry. Indeed, the existing incentives are completely perverted: Not only is there a disincentive to control guards where there should be an incentive, there is an actual incentive to avoid the control of guards where there should be a disincentive. Although some consolation can be taken in the clear trend of the cases toward expansion of the areas in which liability will be found and toward restriction of the definition of "independent contractor," [546] it remains true that as long as the exemption of independent contractors from liability retains any meaning, at least in the private security industry, the applicable legal rules will serve an essentially negative social function. Nonetheless, the courts have not shown any particular sensitivity to that problem, and the reported decisions suggest that the courts are continually minimizing any desire on the part of hiring companies to regulate the activity of security guards. In *Dillon v. Sears, Roebuck & Co.*,[547] for example, a contractual provision requiring cooperation in the supervision of guards was sufficient to render the hiring company an "employer" and, as such, liable for a false arrest made by a guard. Indeed, the decisions have gone so far as to encourage hiring companies to avoid controlling the activities of the guards who serve on their premises and to avoid any requirement that the guard obtain clearance from the hiring company for activities that he undertakes. In one case, for example, an award of punitive damages was reversed because an employer had not specifically authorized or ratified the wrongful arrest that was the foundation of the case.[548] Thus, an incentive was provided for employers to suggest that their employees, if they find it necessary to arrest an individual, should take all steps required for that arrest without any supervision from the company and without any specific authority for them. Although there are other incentives which should encourage employers to exert control, it should be clear that any incentive against this socially desirable goal should be carefully scrutinized: Guards should be encouraged to contact the hiring company before making an arrest, whenever time permits, for then there is a good chance that the adverse consequences of a wrongful arrest will be minimized.

To some extent, the tendency to create inappropriate incentives is the natural product of gradual reform through tunnel-visioned courts, trying one case at a time, rather than substantial change through more broadly based legislatures. As the courts have felt more and more need to expand the areas of employer liability, they have not done so by suggesting that those who hire independent contractors should be liable just as an employer is, but rather they have allowed an expansion of the definition of employee at the expense of the definition of independent contractor. Accordingly, the extent to which one could control the activities of a hired guard without becoming liable for those activities has become smaller and smaller and the incentive against any control at all has become stronger and stronger. The tendency is very similar to that which formed the rationale of a recent New York case in which the New York City Housing Authority was found liable for failure to provide adequate police protection. The decision did not rest solely on the failure to provide protection; it was an essential part of the case that the City of New York had in fact provided some protection but that the protection provided had not been sufficient. Thus, the court may have created an incentive to avoid providing any police protection in the future.[549]

There are, however, court-developed doctrines that could be used to negate the creation of inappropriate incentives that has resulted from the development of the doctrine of *respondeat superior*. One such legal theory is the "nondelegable duty" rule, which provides in essence that there are some duties that are necessarily imposed on an individual and for which he will be responsible even though he hires an independent contractor to discharge them. Such duties include, for example, those of keeping premises reasonably safe for business visitors and of providing employees with a safe place to work.[550] Both of these duties might ordinarily be entrusted to a contract guard. It is apparent that there are other duties of contract guards that may be viewed as nondelegable obligations of the hiring company. To the extent that the nondelegable duty rule is expanded, the distinction between an employee and an independent contractor loses much of its importance, as do the disincentives to control which arise out of the independent contractor doctrine. However, not all courts have seen fit to expand these nondelegable duty rules, and such expansion was clearly rejected in *Brien v. 18925 Cullins Ave. Corp.*,[551] a quite recent case in which it was determined that a motel owner was not liable when his guard shot and killed an individual whom he had detained for questioning.

An alternative means for eliminating the disincentives that arise out of the employee-independent contractor distinction is to establish that the employer who does not take care in the selection and training of security guards whom he hires is himself negligent. Accordingly, if injury is caused to a third person, that injury may be directly attributable to the negligence of the hiring company in failing to supervise and control adequately the individual whom it hired. In the *Brien* case, the court clearly suggested that it would have been willing to find the motel owner directly negligent and to impose liability for that negligence if sufficient proof had been presented.[552] For any such negligence, of course, the hiring company would be directly liable and would not be entitled to any recovery against the employee.

To the extent that no hiatus exists between the minimum amount of control by the hiring company that will relieve it of a charge of negligence and that amount which will make the hiring company an employer, it follows that the hiring company would always be liable for injury caused by a guard. The incentives created by that situation would be entirely appropriate: Since the employer could recover against the employee when the employer was found liable on a theory of *respondeat superior*, but could not recover against the independent contractor if the theory of recovery were one of direct negligence in the hiring, it would become desirable for the hiring company to be in the posture of employer. Thus, the hiring company would probably be willing to become an "employer" and to exert the control necessary to reduce the possibility of injury by the contract guard to third persons. Indeed, in situations such as the *Brien* case, there would be additional control incentives, since a finding of negligence could lead to a charge of manslaughter for which the employer might be criminally liable.[553] At least in situations where the contract guard is likely to be using firearms, the disincentive to avoiding control may be sufficient to eliminate any meaningful need for concern. Thus the legal liabilities that the hiring company may incur if it exercises no control or only very minimal control may negate the disincentives to control that have been created through the expansion of the doctrine of *respondeat superior*. And there are other, practical considerations that may lead to the hiring company exerting control regardless of the disincentives provided by potential liability. As the extent of control that suffices to make the hiring company liable decreases, many companies would find that in order to exercise effective control of operations on their premises there is an irreducible

minimum amount of control which they cannot surrender. Thus they would exercise this level of control even though it might expose them to liabilities on a theory of *respondeat superior*.

The Allocation of Risk of Loss

It is quite apparent that the contract agency and the hiring company cannot, by a contract between themselves, limit or reduce the rights of injured third persons to recover an amount equal to the total value of the injury. However, to at least some extent, it is possible for the hiring company and the contract agency to allocate the risk of loss between themselves so that if either party is required to respond in damages in excess of the agreed amount, it can recover that excess from the other party. Furthermore, it is true that an agreement between the parties may effectively limit the liability of either party to the other.

Typical agreements between contracting agencies and hiring companies contain provisions to the effect that the amount to be paid to the agency is based upon the value of the services rendered, rather than the value of the property protected, and that the agency will not be liable for damages in excess of a certain specified amount that result from any activity in connection with its performance under the contract.[554] The premise for the limitation of liability—that payment is rendered solely for the services rendered and is unrelated to the property protected—is fallacious to some extent, since a company would not hire a security agency unless the assets being protected by the agency were of some significant value. However, to the extent that the fees for protective services do not vary with the value of the assets being protected, as is certainly true in most instances, the premise may have some validity.

Whether or not the stated basis for the limitation of liability is legitimate, however, it will usually be true that the dollar limitation on the liability of the contract agency is valid, under one of two legal theories. Under the first theory, it should be valid as a limitation of liability. Such limitations are generally valid, at least in contracts between parties having relatively equal bargaining power,[555] and there is no substantial indication in the case law that the security industry has historically been treated differently. But even if the limitation on liability were not accepted, such contracts might still be regarded as providing for liquidated damages. Provisions for liquidated damages are generally upheld as valid if when the contract was entered into, it appeared that evaluating any injury caused by a breach would be extremely difficult and if the amount selected is reasonable in relation to the type of damages that might have been anticipated at the time the contract was entered into. As a general rule, these qualifications will be met by any liquidated-damages clause in a contract providing for guard services. The prerequisites to validity are most clearly present in those contracts providing for the use of devices such as burglar alarms, since the damage caused by the failure of an alarm to operate depends entirely upon the nature of the event that should have caused it to operate, the extent of the success of that event, and, most important, the question of whether the damage would have been prevented if the alarm had worked. Accordingly, it is not surprising that at least two cases have upheld such clauses as legitimate liquidated-damages provisions even though the damage provision was extremely low in both cases.[556] Although that result has been criticized on the grounds that the provisions in question should instead have been viewed as limitation-of-liability clauses,[557] it is apparent that the end result will usually be much the same, whichever theory is applied.

Clauses such as those discussed above will not prove useful as a defense against actions brought by third persons. If, for example, a hiring company enters into a contract with a contract agency and the contract provides that the agency will not be liable in excess of $50, should the guard that the agency provides falsely imprison an individual at the plant of the hiring company, the contract agency would not be able to assert as a defense to an action by the individual that it cannot be held for damages in excess of $50. However, such a provision would in most instances provide the agency with a legitimate cause of action against the hiring company for any amounts in excess of $50 that the agency is required to pay. In essence, in such a situation, the parties have done no more than write an insurance policy for the agency with a deductible clause in an amount equal to the amount of the agency's maximum liability. It is significant, however, that there is a public policy against insuring against one's own willful actions, and in some instances that policy has been enacted into statutory law; [558] where such a public policy

is applicable, any insurance against a willful act will be void. Under that view, a contract agency cannot limit its liability for intentional torts. Thus, a contract which provided that the agency would guard the premises of a hiring company but would not be liable (or would have a limited liability) if the agency's employees were to steal the assets of the hiring company would no doubt be invalid. A question arises, however, as to the extent to which the intent of an individual guard may be imputed to the contract agency so that the contract agency may be held liable for his willful and intentional tort. If, for example, an individual is hired to guard a jewelry store and steals jewelry from that store, may the jewelry store recover against the contract agency? Such recovery would, of course, be permitted if the agency could be found negligent in hiring or training the individual guard. Otherwise, however, it will usually be true that the willful act of the guard will take him beyond the scope of employment, so that the agency would not be liable. Indeed, there are some cases which suggest that any act of a contract guard that is not directly and primarily for the benefit of the employing agency will relieve that agency of liability.[559] But if the willful act can be viewed as being within the scope of employment, such as is possible in the case of a guard who willfully assaults an individual he finds on the premises, then the contract agency, in the absence of any limitation on liability, would be liable, with no right of recovery against the hiring company. If the individual is acting within the scope of his employment, then his intentional act should be imputed to the agency. Accordingly, if there is an applicable limitation on the liability of the agency, which amounts essentially to an insurance contract for the agency, this might arguably be held invalid under the doctrine that one cannot insure against his own wrongdoing. However, arriving at that conclusion compels the further conclusion that the agency cannot acquire any insurance to cover the risk involved. It is therefore likely that a limitation on liability incurred through the willful acts of contract guards should not be found invalid, at least for the suggested reasons, and that view is consistent with the decided cases, which indicate that the policy against insuring against willful acts is applicable only to acts performed at the personal direction of the insured [560] and that the insured will be precluded from recovery only where the allowance of recovery would clearly benefit the actual wrongdoer.[561] Thus, although a third person injured by the willful acts of a contract guard might be able to recover from the contracting agency, the contracting agency under existing law would probably be able to use a limitation-of-liability clause to throw the ultimate liability in this situation on the hiring company.

In this area, too, however, it appears that the incentives created by the existing case law are not the incentives that will be most beneficial for society as a whole. When contract guards are hired, the hiring company places a considerable amount of trust in them, and the hiring company usually relies on the agency for the control of the training and choice of guards.[562] If the guard hired should take advantage of his position of trust to steal from the hiring company, the effect of a valid limitation on the liability of the agency will be to eliminate or reduce the likelihood that the contract agency will effectively control the guard.

Although a provision for liquidated damages or for limitation on liability will not prove undesirable in most circumstances, it does appear that such limitations should not be permitted in cases involving willful torts on the part of the contract guard. It is not, however, desirable to preclude the contract agency from obtaining insurance against that risk. Although a limitation on liability may discourage an agency from exercising control, the same consequence will not usually follow from the acquisition of insurance, simply because insurance is acquired on a large enough scale that there will be pressures from the insurance company to minimize the risk of loss. Accordingly, an appropriate vehicle for limiting the right to limit liability would be the simple notion that a higher duty is owed by private police forces to their clientele than the usual duty and, as a result, limitations of liability in such situations will not be permitted. That approach is similar to the "nondelegable duty" view discussed earlier in connection with the doctrine of *respondeat superior*, and the imposition of such extraordinary duties is not unknown to the law.[563] It was suggested above that most courts would likely uphold limitations between the contracting parties on the liability of contract agencies for the willful torts of contract guards. But this is not a well-settled result. Courts applying common-law principles of decision (i.e., without the benefit of a statute changing the law) could easily find limitations on liability invalid in this context on the basis of the rationale given above: Private security firms would

be viewed as owing a higher than usual duty to their clientele.

Conclusions and Suggestions

As has been discussed in this section, the two most significant aspects of the legal relationship between the users and the providers of private security services are found in the employment relationships among the hiring company, the contract agency, and the individual guard, and in the legal ability of the parties to a security contract to determine the extent of each other's liability. With respect to both areas—but far more significantly with respect to the matter of employment and the doctrine of *respondeat superior*—it appears that the existing legal doctrine substantially interferes with the development of the private security industry in a socially beneficial manner. The means are available, however, for a reversal of those existing doctrines in this industry, through statutory change or through future court decisions, and such a reversal is appropriate wherever tort liability is the only effective means of protecting the public and the users of private security services.[564] With respect to the question of control of contract guards which is so much a part of the doctrine of *respondeat superior,* the existing incentive to avoid control can be satisfactorily eliminated by the recognition that failing to control a servant is considerably more harmful than attempting unsuccessfully to control him. Accordingly, it is appropriate to recognize that a failure of control is negligence on the part of the master, and the master should be held directly liable for it.

With respect to the existing ability of the contract agency to limit the damages it may suffer, the flaw of the existing standards and the suggested remedy are much the same as those for the problem of control. Existing standards do not provide an incentive for contract agencies to exert their control and influence in selecting honest employees and in ensuring that those employees will not take advantage of the trust that is placed in them. To correct that flaw, it would be appropriate to recognize the duty of contract agencies to select and to train their personnel, and to provide that the extent of the duty cannot be reduced through the limitation of liability.

FOOTNOTES

1. See discussion in Chapter IV of this report.
2. See, e.g., Cal. Bus. & Prof. Code § 7520.
3. See, e.g., Cal. Bus. & Prof. Code § 7551.
4. Fla. Stat. Ann. § 493.19.
5. Cal. Bus. & Prof. Code § 7538 (a).
6. See, e.g., Fla. Stat. Ann. § 493.12.
7. See, e.g., Cal. Bus. & Prof. Code § 7545. ($2,000 bond only for licensees, not employees.)
8. See discussion in Chapter V of this report.
9. See Rand report R-871-DOJ, Chapter IV.
10. For example, in California, a formal administrative hearing is required, after which judicial review is available. See, e.g., Donkin v. Director of Prof. & Voc. Stds., 240 C.A.2d 193, 49 Cal. Rptr. 495 (1966). Cf. Stewart v. County of San Mateo, 246 C.A.2d 273, 54 Cal. Rptr. 599 (1966) (summary revocation by county of private patrol permit).
11. See Rand report R-871-DOJ, Chapter IV.
12. Despite the limited effectiveness of the regulatory laws and agencies, as presently administered, they have nevertheless managed to create a good deal of bureaucratic red tape for the industry and the taxpayers. For example, in California every private detective licensee must notify the state of every change of officers or partners. Cal. Bus. & Prof. Code § 7534. For a national company, this could be a significant task, especially if required in every state. Moreover, the various states have inconsistent methods and scope of regulations. For example, some may regulate "patrolmen" and some may regulate "guards." Furthermore, even within a single state, each jurisdiction may have its own definition of who is regulated, its own method for licensing operators, and its own qualification and revocation standards. See, e.g., *Stewart v. County of San Mateo, supra* note 10.
13. See the Pennsylvania Professional Thieves Act of 1939, discussed in DeCarlo v. Joseph Horne & Co., 251 F. Supp. 935 (W.D. Pa. 1966), which authorized watchmen to arrest professional thieves.
14. See, e.g., Cal. Penal Code § 830.6 (b).
15. See Wilgus, "Arrest Without a Warrant," 22 Mich. L. Rev. 541, 798–99 (1924).
16. Md. Ann. Code Art. 41, § 60.
17. *Id.* § 64.
18. N.C. Gen. Stat. §§ 74A-1 to A-2.
19. O.R.S. § 148.210.
20. It is not clear whether a deputized guard would be favored with the social and other pressures which have generally operated to render tort damage claims against public police unsuccessful. Note, "Private Police Forces: Legal Powers and Limitations," 38 U. Chi. L. Rev. 555, 563 (1971) ("It is generally agreed that civil liability is an ineffective deterrent to public police abuse").
21. See discussion of this law in Chapter III.
22. 325 U.S. 91 (1945).
23. See discussion of Exclusionary Rule in Chapter III.
24. 91 S. Ct. 1999 (1971).
25. See L. Hall & Y. Kamisar, Modern Criminal Procedure 217 (3d ed. 1969).
26. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 91 S. Ct. 1999, 2002 n.4 (1971); note 20 *supra*.
27. See discussion in Chapter III, *infra*.
28. See Note, U. Chi. L. Rev., *supra* note 20 at 563 n.55.
29. See the opinion of Harlan, J., in United States v. Guest, 383 U.S. 745, 771–72 (1966).
30. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, *supra* note 26.
31. See e.g., Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).
32. See discussion of Exclusionary Rule in Chapter III.
33. See Adickes v. S. H. Kress & Co., *supra* note 31.
34. 341 U.S. 97 (1951), discussed in Chapter III. See also Pratt v. State, 9 Md. App. 220, 263 A.2d 247 (1970), discussed in Chapter IV.
35. 383 U.S. 787, 794 (1966). (Alleged murder of a civil rights worker by 15 private individuals and 3 Mississippi policemen constituted state action under 18 U.S.C. § 242).
36. 365 U.S. 715 (1961).
37. 279 F. Supp. 283 (W.D. Pa. 1968).
38. *Id.* at 287.
39. 326 U.S. 501, 506 (1946).
40. *Id.* at 502.
41. 345 U.S. 461 (1953).
42. 384 U.S. 436 (1966).
43. 391 U.S. 308 (1968).
44. For example, it has been argued that the state action requirement of 42 U.S.C. § 1983 is satisfied by the state's passing a law giving merchants and their agents specific powers to detain persons suspected of shoplifting, and thus a private detective who detains a shoplifter acts under color of state law. This argument has been rejected in two actions against private police under 42 U.S.C. § 1983. See Warren v. Cummings, 303 F. Supp. 803 (D. Col. 1969); Weyandt v. Mason's Stores, Inc., 279 F. Supp. 283 (W.D. Pa. 1968). But see DeCarlo v. Joseph Horne & Co., 251 F. Supp. 935 (W.D. Pa. 1966).
45. Of course, state action is not a prerequisite for enactment of specific legislation restricting the activity of private citizens. Congress could pass a law explicitly prohibiting private security personnel from depriving other citizens of their constitutional rights. See Griffin v. Breckenridge, 91 S. Ct. 1790 (1971).
46. For example, the handbooks or guard manuals of large contract security agencies include admonishments to

avoid physical contact, including body search, when making an arrest and to search only when necessary.

47. Rand security employee survey, Chapter IV of Rand report R-870-DOJ.

48. See, e.g., Cal. Penal Code §§ 447–587 (dealing *inter alia* with burglary and housebreaking, larceny, unlawful interference with property).

49. See discussion of licensing laws in Chapter II.

50. Cal. Bus. & Prof. Code § 7538(g). See also Cal. Bus. & Prof. Code § 7551.

51. "Except as hereinafter in this subdivision provided, no such license shall be issued to any person who has been convicted in this state or any other state or territory of a felony, or any of the following offenses, to wit: . . . (d) unlawful entry of a building. . . ." Art. 7, N.Y. Gen. Bus. Law § 74-2 (McKinney).

52. Art. 7, N.Y. Gen. Bus. Law § 81 (McKinney).

53. Restatement of Torts (2d) § 164.

54. See Generally W. Prosser, Law of Torts §§ 14–15 at 76–97 (4th ed. 1971) [Hereinafter cited as Prosser].

55. Prosser § 22, at 117–121.

56. Prosser at 120. If, in fact, the chattels are not in the home, or they do not belong to the person who enters without consent, he will be liable in tort. Prosser at 118.

57. Blair v. Pitchess 5 C.3d 258, 273 (1971).

58. Prosser at 804; Note, 23 Okla. L. Rev. 223 (1970).

59. 27 Ga.App. 365, 108 S.E. 309 (1921).

60. 108 Ga.App. 21, 132 S.E.2d 206 (1963).

61. 127 So.2d 715 (Fla. 1961). A newspaper printed appellant's office number, advising readers to call the number to hear "Louise" who had a "sexy voice."

62. 410 F.2d 701 (D.C. Cir. 1969).

63. *Id.* at 704.

64. For example, in 1970, one very large contract security agency had only three claims filed against it for trespass or illegal search. An insurance reserve, of $100, was established for only one of the claims. In 1969 there was only one claim. In 1968, there were none. In 1967 there were two invasions of privacy claims and in 1966 there were none.

65. 91 S. Ct. 1999 (1971).

66. For instance, defenses under state law, such as consent, may be inconsistent with the protection afforded by the Fourth Amendment. As Justice Brennan indicated in the *Bivens* case, "an agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. . . . A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. . . . But one who demands admission under a claim of federal authority stands in a far different position. . . . The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well." 65 S. Ct. at 2002–04.

67. 15 Am. Jur. Trials 555, 580–590 (1968).

68. 91 S. Ct. at 2002 n.4.

69. Griswold v. Connecticut, 381 U.S. 479 (1965); Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969); Verdugo v. United States, 402 F.2d 599, 613–17 (9th Cir. 1968) (Browning, J.).

70. An in-depth discussion of the problems inherent in the Exclusionary Rule is contained in the dissenting opinion of Burger, C. J., in *Bivens, supra*, 91 S. Ct. 25 2012. And see the discussion of the Exclusionary Rule below.

71. Williams v. United States, 341 U.S. 97 (1957).

72. "The facts are these: The Lindsley Lumber Co. suffered numerous thefts and hired petitioner, who operated a detective agency, to ascertain the identity of the thieves. Petitioner held a special police officer's card issued by the City of Miami, Florida, and had taken an oath and qualified as a special police officer. Petitioner and others over a period of three days took four men to a paint shack on the company's premises and used brutal methods to obtain a confession from each of them. A rubber hose, a pistol, a blunt instrument, a sash cord and other implements were used in the project. One man was forced to look at a bright light for fifteen minutes; when he was blinded, he was repeatedly hit with a rubber hose and a sash cord and finally knocked to the floor. Another was knocked from a chair and hit in the stomach again and again. He was put back in the chair and the procedure was repeated. One was backed against the wall and jammed in the chest with a club. Each was beaten, threatened, and unmercifully punished for several hours until he confessed. One Ford, a policeman, was sent by his superior to lend authority to the proceedings. And petitioner, who committed the assaults, went about flashing his badge. Williams v. United States, 341 U.S. 97, 98–99 (1957).

73. In United States v. Price, 383 U.S. 787 (1966), several private persons were jointly charged with law enforcement officers with the violation of 18 U.S.C. § 242. The District Court dismissed the indictments as to the non-official defendants, ruling their actions were not taken "under color of law." The United States Supreme Court reversed that ruling. "Section 242 applies only where a person indicted has acted 'under color' of law. Private persons, jointly engaged with state officials in the prohibited actions, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the state. It is enough that he is a willful participant in joint activity with the state or its agents." 383 U.S. at 794.

74. "We were out-spied, Maheu Employee says," *Los Angeles Times,* December 20, 1970, Part A, p. 24.

75. See Chapter V of Rand report R-870-DOJ.

76. "A technological breakthrough in techniques of physical surveillance now makes it possible for government agents and private persons to penetrate the privacy of homes, offices, and vehicles; to survey individuals moving about in public places; and to monitor the basic channels of communication by telephone, telegraph, radio, television, and data line. Most of the 'hardware' for this physical surveillance is cheap, readily available to the general public, relatively easy to install, and not presently illegal to own. As of the 1960's, the new surveillance technology is being used widely by government agencies of all types and at every level of government, as well as by private agents for a rapidly growing number of businesses, unions, private organizations, and individuals in every section of the United States. Increasingly, permanent surveillance devices have been installed in facilities used by employees or the public. While there are defenses against 'outside' surveillance, these are so costly and complex and demand such constant vigilance that their use is feasible only where official or private matters of the highest security are to be protected. Finally, the scientific prospects for the next decade indicate a continuing increase in the range and versatility of the listening and watching devices, as well as the possibility of computer processing of recordings to identify automatically the speakers or topics under surveillance. These advances will come just at the time when personal contacts, business affairs, and government operations are being channeled more and more into electronic systems such as data-phone lines and computer communications." A. Westin, Privacy and Freedom at 365–366 (1967).

77. See the responses to the security employee questionnaire, Chapter IX of Rand report R-870-DOJ. Only 15 percent indicated that they thought that wiretapping was a misdemeanor. However, it was not possible to ascertain what proportion of the remaining 85 percent thought it was a felony as opposed to thinking it was no violation of federal law at all.

78. The use of electronic surveillance by federal authorities is presently being investigated by the Senate Subcommittee on Constitutional Rights, chaired by Sen. Sam J. Ervin. In addition, the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, chaired by John L. McClellan, is preparing to hold hearing on the effectiveness of the Federal Eavesdropping Law discussed below.

79. Annotation, "Eavesdropping as Violative Right of Privacy," 11 ALR3d. 1296, 1297.

80. Tucker v. American Employers Ins. Co., 171 So.2d 437 (Fla. App. 1965).

81. Forester v. Manchester, 410 Pa. 192, 189 A.2d 147 (1963).

82. Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

83. 108 Ga.App. 159, 132 S.E.2d 119 (1963).

84. 88 SO.2d 716 (La.App. 1956).

85. 151 Wis. 537, 139 N.W. 386 (1913).

86. Long, Comment, 19 Adm. L. Rev. 442, 444 (1967), and see E. Long, The Intruders (1966).

87. 302 U.S. 379 (1937).

88. 47 U.S.C. § 605.

89. Note "Electronic Surveillance in California: A Study in State Legislative Control," 57 Cal.L.Rev. 1182, 1249 (1969).

90. 18 U.S.C. §§ 2510–2520.

91. As the legislative history makes clear, "where one of the parties consents, it is not unlawful. . . . Consent may be express or implied. Surveillance devices in banks or apartment houses or for institutional or personal protection would be implied consented to. Retroactive authorization, however, would not be possible." Senate Report No. 1097, Omnibus Crime Control and Safe Streets Act of 1968, 1968 U.S. Code Cong. and Adm. News, 2112, 2182.

92. This is consistent with the United States Supreme Court ruling in Alderman v. United States, 394 U.S. 165 (1969). The statute does provide, however, for certain wiretaps without a warrant. 18 U.S.C. § 2511 (3) provides that the statute shall not limit the constitutional power of the President to gather intelligence information regarding the security of the United States. It also provides that the President's constitutional power to protect the United States against overthrow or against any other clear and present danger to the existence of the government shall not be limited. The power of the United States government to conduct wiretaps and electronic surveillance against domestic groups who are believed to pose a threat to the government is a question currently before the courts.

93. Weiss v. U.S., 308 U.S. 321 (1939).

94. The Fourteenth Amendment, § 1 provides in part: ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

95. The Fourteenth Amendment, § 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provision of this article." In United States v. Guest, 383 U.S. 745 (1966), six members of the United States Supreme Court declared that Congress could reach individual action in enforcing the Fourteenth Amendment, and in Katzenbach v. Morgan, 384 U.S. 641 (1966), the court declared that Congress had power to invalidate state laws which were, themselves, not in violation of the Constitution, if that action aided Congress in enforcing the provisions of the Fourteenth Amendment. See also Senate Report No. 1097, 1968 U.S. Code Cong. and Adm. News at 2180. Note, "Electronic Surveillance in California: A Study in State Legislative Control," 57 Cal.L.Rev. 1182 (1969).

96. Article I, § 8 of the United States Constitution provides: "The Congress shall have the Power . . . To regulate Commerce for foreign Nations, and among the several States, and with the Indian Tribes. . . ."

97. For a listing of state statutes in effect in 1966, see Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess., Laws Relating to Wiretapping and Eavesdropping (Comm. Print 1966). See also American Bar Assn., Project on Minimum Standards for Criminal Justice, Electronic Surveillance (Tent. Draft, 1968).

98. Those states were Arizona, Colorado, Florida, Georgia, Kansas, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, South Dakota, Washington and Wisconsin. See Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for the Period January 1, 1969 to December 31, 1969, Administrative Office of the United States Courts, April 30, 1970.

99. People v. Kurth, 34 Ill.2d 387, 216 N.E.2d 154 (1966); Commonwealth v. Murray, 423 Pa. 37, 223 A.2d 102 (1966). Nevada requires the consent of all parties for wiretapping, Nev.Rev.Stat. § 200.620(1), but not for electronic eavesdropping, *id.* § 200.650. Michigan requires all-party consent for electronic eavesdropping, Mich.Comp.Laws Ann. §§ 750.539c, but its wiretapping statute speaks only in terms of unauthorized tapping, *id.* 750.540. See generally Greenawalt, "The Consent Problem in Wiretapping and Eavesdropping," 68 Colum.L.Rev. 189, 207–11 (1968); Note, "Electronic Surveillance in California: A Study in Legislative Control," 57 Cal.L.Rev. 1182 (1969).

100. Cal. Penal Code § 631; Del. Code Ann. Tit. 11, § 757.

101. Cal. Penal Code §§ 630–637.2. See also, Note, "Electronic Surveillance in California: A Study in State Legislative Control," 57 Cal.L.Rev. 1182 (1969).

102. Section 637.2 provides: "(a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts: (1) Three thousand dollars ($3,000). (2) Three times the amount of actual damages, if any, sustained by the plaintiff. (b) Any person

may, in accordance with the provisions of Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, bring an action to enjoing and restrain any violation of this chapter, and may in the same action seek damages as provided by subdivision (a). (c) It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages."

103. Cal. Bus. & Prof. Code § 7551.

104. Md.Ann.Code, Art. 35, §§ 93, 99.

105. Md.Ann.Code, Art. 27, § 125A.

106. *Id.* § 125B.

107. *Id.* § 125D.

108. N.Y. Crim. Proc. Law § 700.05 (McKinney).

109. N.Y. Penal Law § 250 (McKinney). See also Report of Joint Legislative Committee on Privacy of Communications and Licensure of Private Investigators, State of New York, 1961.

110. Article 7, N.Y.Gen.Bus.Law § 74-2 (McKinney).

111. *Id.* § 81-1.

112. *Id.* § 79-1.

113. Committee Report, Eavesdropping and Wiretapping, March 1956 at 28.

114. Letter from Gordon H. Bishop to John L. McClellan, Chairman, Subcommittee on Criminal Law and Procedures of the Senate Committee on the Judiciary, dated August 6, 1971.

115. See the comment of Senator Long, *supra* note 86.

116. 120 Ohio App. 129, 28 Ohio Ops.2d 374, 201 N.E. 2d 533 (1963).

117. 60 Ga.App. 92, 2 S.E.2d 810 (1939).

118. Fowler v. Southern Bell Tel. & Tel. Company, 343 F.2d 150 (5th Cir. 1965); McDaniel v. Atlanta Coca Cola Bottling Company, 60 Ga.App. 92, 2 S.E.2d 810 (1939). See also Note, 93 Harv.L.Rev. 1923 (1970); Note, 23 Okla.L.Rev. 223 (1970). For a general discussion of tort recovery in this area see Prosser at 807-808 and Restatement of Torts (2d) § 687.

119. 106 N.H. 107, 206 A.2d 239 (1964)

120. See also Roach v. Harper, 143 W.Va. 869, 105 S.E.2d 564 (1958).

121. Cal. Penal Code § 637.2.

122. See Statement of Senator Long in the text at note 86, *supra*.

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

124. Exclusion from federal trials was mandated in Weeks v. United States, 232 U.S. 383 (1914). Application of the Exclusionary Rule to state trials followed by 47 years. Mapp v. Ohio, 367 U.S. 643 (1961).

125. Although there is some conflict concerning whether the Exclusionary Rule applies to the admission of government-obtained evidence in civil actions (Case Note, 19 Drake L.Rev. 476 (1970), citing 29 Am. Jur.2d Evidence § 412 (1967)), it has only been extended to quasi-criminal actions such as forfeiture proceedings. In One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693 (1965), the Pennsylvania Supreme Court had ruled that illegally seized evidence could be introduced in a proceeding to determine whether a car would be forfeit for carrying unstamped liquor. The United States Supreme Court ruled that this proceeding was quasi-criminal, and that the Exclusionary Rule would thus apply. Implicit in this ruling is the premise that the Exclusionary Rule does not apply in civil proceedings.

126. 256 U.S. 465 (1921). In *Burdeau*, private parties had stolen papers from the petitioner and given them to an assistant attorney general who was preparing a case against the petitioner regarding fraudulent use of the mails. The petitioner sued to have the papers returned. The Supreme Court ruled that the Fourth Amendment protects against illegal searches and seizures by government agencies only and could not be relied upon to require the return of these papers, which were stolen by private parties. Justices Brandeis and Holmes dissented on the ground that, if the papers were still in private hands, the court would surely order them returned. They argued the government should not be permitted to keep papers which a private individual would be required to return. The *Burdeau* distinction is still viable. For example, in *Barnes v. United States*, 373 F.2d 517 (1957), the 5th Circuit ruled that evidence obtained by an illegal search of defendant's bag by a motel manager was admissible. In *Knoll Associates Inc. v. Dixon*, 232 F.Supp. 283 (S.D.N.Y. 1964) a federal district court ruled that files stolen by an employee and given to the Federal Trade Commission were admissible at a hearing before a Federal Trade Commission examiner. Perhaps one of the most flagrant examples of an illegal search by a private individual, resulting in admissible evidence in a state proceeding is *Sackler v. Sackler*, 15 N.Y.2d 40, 203 N.E. 2d 481 (1964). There, a private detective obtained evidence for a divorce by breaking into a wife's bedroom and catching her *in flagrante delicto*. Here the purpose of the search was clearly directed toward a judicial proceeding, but, the search having been made by a private individual, the evidence was admitted. Also see Note, "Seizures by Private Parties: Exclusion in Criminal Cases," 19 Stanford L.Rev. 608 (1966-67).

127. 367 F.2d 1 (9th Cir. 1966).

128. *Id.* at 5.

129. 378 F.2d 588 (9th Cir. 1967).

130. See, e.g., People v. Fierro, 236 Cal.App.2d 344, 46 Cal.Rptr. 132 (1965), in which the police requested that a motel manager get narcotics from an individual's room. The search was declared illegal and the evidence obtained was excluded.

131. 70 C.2d 97, 73 Cal.Rptr. 575, 447 P.2d 967 (1968).

132. 70 C.2d at 100, 73 Cal.Rptr. at 577, 447 P.2d at 969.

133. 70 C.2d at 100, n.3, 73 Cal.Rptr. at 577, n.3, 447 P.2d at 969 n.3.

134. 70 C.2d at 103, n.4, 73 Cal.Rptr. at 579, n.4, 447 P.2d at 971 n.4.

135. Letter from Francis Coyne, Lieutenant, Legal Divison, The City of New York Police Department, dated July 16, 1971.

136. In a different context the United States Supreme Court has ruled that the actions of a private detective, deputized as a sheriff, would be "state action." In *Griffin v. Maryland*, 378 U.S. 130 (1964), a privately owned amusement park employed a special policeman by arrangement with a detective agency. The agent was retained and paid by the agency and wore its uniform, but he was subject to the control and direction of the park management. At the request of the park, he was deputized as a sheriff of Montgomery County, Maryland. He wore a deputy sheriff's badge on his uniform. He was told by the park management that negroes were to be excluded from the park and, following this direction, he arrested Griffin and others for criminal trespass when they refused to leave. The defense of Griffin was that their arrest was "state action," the involvement of the State of Maryland in racial discriminatory practices. The state argued that the amusement park had the right to exclude anyone it desired, and that this situation was no different than if the park had called a public policeman who had come out to arrest the individuals for trespass. In that case, it was argued, the policeman would not be justified in asking the park management what their reasons for requiring the individual's exclusion were. The court reasoned, however, that this was not a case where a private person had ordered the individuals to leave and, on their refusal, had them arrested for trespassing. It reasoned, "Collins—in ordering the petitioners to leave the park and in arresting and instituting prosecutions against them—purported to exercise the authority of a deputy sheriff. He wore a sheriff's badge and consistently identified himself as a deputy sheriff rather than as an employee of the park . . . If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law." 378 U.S. at 135. In its decision, the Supreme Court suggested that if the detective had not been deputized and had not acted in his public role there would not have been any state action. This caveat was expressed by Justice Clark in his concurring opinion. "If Collins had not been a police officer, if he had ordered the appellants off the premises and filed the charges of criminal trespass, and if then, for the first time, the police had come on the scene to serve a warrant issued in due course by a magistrate, based on the charges filed, that might be a different case." 378 U.S. at 137-138. From the reasoning of this case it would seem possible to conclude that searches made by private patrolmen, who are deputized or serve as special patrolmen with arrest powers should be treated as searches by public police officers for purposes of the Exclusionary Rule.

137. 354 Mich. 427, 93 N.W.2d 281 (1958).

138. 8 Ohio Misc. 156, 221 N.E.2d 622 (1966).

139. For a detailed discussion of the application of the Exclusionary Rule in civil cases such as these, see 48 Cornell L.Q. 345 (1963); 63 Colum.L.Rev. 168 (1963); 110 U.Pa.L. Rev. 1043 (1962); 5 ALR 3d 670 (1966).

140. As in Sackler v. Sackler, *supra* note 126.

141. 70 C.2d 97, 73 Cal.Rptr., 575, 447 P.2d 967 (1968).

142. Berger v. New York, 388 U.S. 41 (1967) (wiretap); Katz v. U.S., 389 U.S. 347 (1967) (electronic surveillance via a device on telephone booth without penetration of booth constitutes a search for purposes of the Fourth Amendment).

143. 18 U.S.C. § 2511 (1) (c).

144. 18 U.S.C. § 2515.

145. Cal. Penal Code §§ 631, 632; Ill.Ann.Stat. Ch.38 § 14-5; Nev.Rev.Stats. § 200.680; Ore.Rev.Stats. § 41.910.

146. Md.Ann.Code Art. 35, § 97; Pa.Stats.Ann. Ch.15 § 2443. Relying on this last statute, the Pennsylvania Supreme Court ruled that evidence secured by a private detective's wiretap was inadmissible in a criminal proceeding. Commonwealth v. Murray, 423 Pa. 37,223 A.2d 102, (1966).

147. Del.Code Ann.Tit. 11, § 757.

148. N.Y. Civ.Prac.Act § 345a; N.Y.C.P.L.R. § 4506 (McKinney).

149. State v. Brecht, 485 P.2d 47 (Mont. 1971).

150. *Id.* at 51.

151. 91 S.Ct. 1999 (1971).

152. 347 U.S. 128, 136 (1954).

153. 91 S.Ct. at 2016.

154. 91 S.Ct. 2022 (1971).

155. 384 U.S. 436 (1966).

156. 388 U.S. 218 (1967).

157. 388 U.S. 263 (1967).

158. People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

159. A recent case involved eight private detective agencies and two airlines indicted in New York City on charges of using bribery to obtain confidential information from the police department. The indictments charged that payments ranged from $30 to nearly $30,000 and involved efforts to obtain information regarding any past criminal records of prospective employees. In return for guilty pleas to the misdemeanor charge of giving an unlawful gratuity to a public servant, the prosecution agreed to dismiss the remaining felony charges of bribery, conspiracy, and rewarding official misconduct. Subsequently, three companies which had pleaded guilty to the misdemeanor charge were each fined $5000. See the New York Times, January 27, 1971 (p. 41) and February 21, 1967. One other company was fined $4000 for giving unlawful gratuities, and three executives of the three companies mentioned above were fined $1000 each for giving unlawful gratuities. See the New York Times, February 24, 1971.

160. Form reproduced in AFL-CIO Maritime Trades Department, Credit Bureaus: A Private Intelligence Network (1971).

161. See Kogan & Loughery, Sealing and Expungement of Criminal Records—The Big Lie, 61 J. of Crim. Law, Criminology & Police Science 378 (1970).

162. See Hess and LePoole, Abuse of the Record of Arrest Not Leading to Conviction, 13 Crime and Delinquency 494 (1967).

163. See Federal Bureau of Investigation, Crime in the United States: Uniform Crime Reports 118, Table 31 (1969).

164. Project SEARCH, Security and Privacy Considerations in Criminal History Information Systems (Technical Report No. 2, July 1970) 17-18. Project SEARCH is a federally funded, cooperative project of several states which is working toward a national computerized system of criminal information retrieval.

165. *Id.*

166. Government Code § 6253 *et seq.*

167. Government Code § 6255.

168. Penal Code § 11105.

169. See 36 Opinions of the Attorney General of California 1, 3 (1960).

170. See Los Angeles Municipal Code §§ 52.38-52.42.

171. Los Angeles Municipal Code § 52.42.

172. See Kogan & Loughery, *supra* note 161; Hess and LePoole, *supra* note 162, at 498.

173. See, e.g., Hale v. City of New York, 296 N.Y.S. 443 (S.Ct., App. Div., 1937).

174. See New York Times, Jan. 27, 1971, p. 41.

175. See Hess and LePoole, *supra* note 162, at 498.

176. See New York Times, Nov. 21, 1970. (Report of the testimony of John Maurer, described as a Wackenhut executive.)

177. See New York Times, Feb. 21, 1971.

178. See New York Times, Jan. 27, 1971, at 41.

179. In re Smith, 310 N.Y.S.2d 617 (Family Ct., City of N.Y., 1970).

180. See Hess & LePoole, *supra* note 162.

181. See New York Times, Feb. 5, 1970, p. 1; Wall Street Journal, Feb. 5, 1970, p. 17.

182. 4 D.C. Code § 135 (1967).

183. See District of Columbia Board of Commissioners, The Report of the Committee to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia (Oct. 25, 1967) (The Duncan Report).

184. This sequence of events, including the Board of Commissioner's resolution, is set forth in Morrow v. District of Columbia, 417 F.2d 728 (D.C. 1969).

185. A rap sheet is a record of an individual's arrests and convictions as contained in the files of the police department or agency which furnishes it.

186. See Comment, 1 Cal. Western L. Rev. 126, 132 (1965).

187. See The Duncan Report 9.

188. *Id.*

189. *Id.*

190. Wash. Rev. Code Ann. § 72.50.170. (Cum. Supp. 1970.)

191. The Washington confidentiality statute is Wash. Rev. Code Ann. 72.50.140.

192. See Conn. Gen. Stat. Rev. §§ 29.16 & 29.17.

193. See Note, Discrimination on the Basis of Arrest Records, 56 Cornell L. Rev. 470 (1971).

194. Wash. Rev. Code Ann. § 72.50.100.

195. 28 C.F.R. § 50.2 (b) (4).

196. 28 U.S.C. § 534.

197. See 430 F.2d 486 (D.C. Cir. 1970).

198. 28 C.F.R. § 0.85 (b) (1970).

199. See Hess & LePoole, *supra*, note 162, at 498.

200. Los Angeles Municipal Code § 52.08.

201. 430 F.2d 486 (D.C. Cir. 1970).

202. *Id.* at 492.

203. 28 U.S.C. § 534.

204. See Executive Order 10450.

205. See 328 F. Supp. 718 (D.D.C. 1971).

206. 385 F.2d 734 (5th Cir. 1967).

207. 271 F. Supp. 968 (D.P.R. 1967).

208. 310 N.Y.S.2d 617 (Family Ct., City of N.Y., 1970).

209. 417 F.2d 728 (D.C. Cir. 1969) (Wright, J.).

210. See Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971).

211. See Prosser at 796–97.

212. See Prosser at 617 (2d ed. 1955); Hooper-Holmes Bureau v. Bunn, 161 F.2d 102 (5th Cir. 1947); Watwood v. Stone's Mercantile Agency, 194 F.2d 160 (D.C. Cir. 1952).

213. See H. E. Crawford Co. v. Dun and Bradstreet, Inc., 241 F.2d 387, 396 (D.C. Cir. 1957).

214. See H. E. Crawford Co. v. Dun and Bradstreet, Inc., 241 F.2d 387 (D.C. Cir. 1957); Hooper-Holmes Bureau v. Bunn, 161 F.2d 102 (5th Cir. 1947).

215. See Prosser at 810.

216. See Prosser at 637–38 (2d ed., 1955).

217. 15 U.S.C. § 1681 *et seq.*

218. 15 U.S.C. § 1681c (a) (5). An exception is made if the employment is for a position paying over $20,000, the credit transaction involves $50,000 or more, or the amount of life insurance involved is $50,000 or more. 15 U.S.C. § 1681c (b).

219. 15 U.S.C. § 1681e (b).

220. 15 U.S.C. § 1681k.

221. 15 U.S.C. § 1681k.

222. 15 U.S.C. § 1681n.

223. 15 U.S.C. § 1681o.

224. 15 U.S.C. § 1681n & o.

225. 15 U.S.C. § 1681a.

226. 42 U.S.C. §§ 2000e to 2000e–15.

227. 42 U.S.C. § 2000e–2.

228. 316 F. Supp. 401 (C.D. Cal. 1970).

229. 430 F.2d 486 (D.C. Cir. 1970).

230. 310 N.Y.S.2d 617 (Family Ct., City of N.Y., 1970).

231. See Menard v. Mitchell, 430 F.2d 486, 492 (D.C. Cir. 1970) (Bazelon, J.).

232. *Cf.* Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970) (in view of continuing and pervasive state regulation of liquor licenses; license granted club governed by constitution restricting membership to caucasians invalid as violative of equal protection). (Seidenberg v. McSorley's Old Ale House, Inc., 317 F. Supp. 593 (S.D.N.Y. 1970) (refusal of ale house, which was subject to extensive and pervasive state regulation, to serve women denied women equal protection.)

233. 391 U.S. 308 (1968).

234. See In re Smith, 310 N.Y.S.2d 617 (Family Ct., City of N.Y., 1970).

235. See footnote 164, *supra*.

236. Project SEARCH, Security and Private Considerations in Criminal History Information Systems (Technical Report No. 2, July 1970) 27.

237. See Wall Street Journal, Feb. 5, 1968.

238. Retail Credit Co., Personnel Reports (a Promotional publication by Retail Credit Co.).

239. *Id.*

240. See Wall Street Journal, Feb. 5, 1968.

241. *Id.*

242. Washington Post, July 21, 1969, at A5.

243. A. Westin, "The Career Killers," Playboy Magazine, June 1970.

244. *Id.*

245. *Id.*

246. Hearings on S. 823 before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 91st Cong., 1st Sess., at 399–402 (1969).

247. *Id.* at 176, 186.

248. Washington Post, May 8, 1969, at B6.

249. See Note, "Credit Investigations and the Right to Privacy: Quest for a Remedy," 57 Geo. L.J. 509, 527–28 (1969).

250. See, e.g., Cal. Bus. & Prof. Code § 7538 (g); Ind. Ann. Stat. § 42–1224 (e).

251. See, e.g., Ark. Stat. Ann. § 71–2110, Cal. Bus. & Prof. Code § 7522 (c); Pa. Stat. Ann. Tit. 22, § 25.

252. N.Y. Gen. Bus. Law §§ 370–76 (McKinney).

253. Mass. Gen. Laws Ann., Ch. 93, §§ 44–46A.

254. See H. E. Crawford Co. v. Dun & Bradstreet, Inc., 241 F.2d 387 (4th Cir. 1957); Wetherby v. Retail Credit Co., 235 Md. 237, 201 A.2d 344 (1963); Shore v. Retailers Commercial Agency, 342 Mass. 515, 174 N.E.2d 376 (1961); Barker v. Retail Credit Co., 8 Wis.2d 664, 100 N.W.2d 391 (1960).

255. See, e.g., Watwood v. Stone's Mercantile Agency, 90 U.S. App. D.C. 156, 194 F.2d 160 (1952).

256. See, e.g., H. W. Crawford v. Dun & Bradstreet, Inc., 241 F.2d 387 (4th Cir. 1957); Hooper-Holmes Bureau v. Bunn, 161 F.2d 102 (5th Cir. 1947).

257. See, e.g., Mil-Hall Textile Co. v. Dun & Bradstreet, Inc., 160 F. Supp. 778 (S.D.N.Y. 1958).

258. See Stationer's Corp. v. Dun & Bradstreet, Inc., 62 Cal.2d 412, 398 P.2d 785, 42 Cal. Rptr. 449 (1965).

259. See Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc., 367 F.2d 625 (3d Cir. 1966); Hartman Co. v. Hyman, 87 Pa. Super. 358, *aff'd*, 287 Pa. 78, 134 A. 486 (1926).

260. Prosser at 809–10.

261. Harrison v. Humble Oil & Ref. Co., 264 F. Supp. 89 (D.S.C. 1967); Yoder v. Smith, 253 Iowa 505, 112 N.W.2d 862 (1962).

262. See Gregory v. Bryan Hunt Co., 295 Ky. 345, 174 S.W.2d 510 (1943).

263. Thus recovery has been allowed for invasions of privacy based on a physical intrusion into a person's home, Young v. Western & A.R. Co., 39 Ga. App. 761, 148 S.E. 414 (1929); or peering through a person's windows, Souder v. Pendleton Detectives, 88 So.2d 716 (La. App. 1955); and for harassing a debtor to collect a debt, Norris v. Moskin Stores, 132 So.2d 321 (Ala. 1961).

264. 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (N.Y. Ct. App. 1970).

265. Fried, "Privacy," 77 Yale L.J. 475 (1968).

266. This argument is made in Casenote, 83 Harv.L.Rev. 1923, 1927–28 (1970).

267. See 255 N.E.2d 770.

268. *Id.*

269. See Casenote, 83 Harv.L.Rev. 1923, 1929 (1970).

270. See, e.g., N.Y. Gen. Bus. Law §§ 370–76 (McKinney); Mass. Gen. Laws Ann., Ch. 93, § 44–46A.

271. See, e.g., Mil-Hall Textile Co., v. Dun & Bradstreet, Inc., 160 F. Supp. 778 (S.D.N.Y. 1958). A few courts have applied a negligence standard. See Altoona Clay Prods., Inc., v. Dun & Bradstreet, Inc., 367 F.2d 625 (3d Cir. 1966). Hartman Co. v. Hyman, 87 Pa. Super. 358, *aff'd*, 287 Pa. 78, 134 A, 486 (1926).

272. 15 U.S.C. § 1681.

273. 15 U.S.C. § 1681t.

274. 15 U.S.C. § 1681d.

275. 15 U.S.C. § 1681a (e).

276. 15 U.S.C. § 1691d (b).

277. 15 U.S.C. § 1681c (a) (6).

278. 15 U.S.C. § 1681e (b).

279. 15 U.S.C. § 1681m.

280. 15 U.S.C. § 1681g.

281. 15 U.S.C. § 1681i (c).

282. 15 U.S.C. §§ 1681n & o.

283. 385 U.S. 293 (1966).

284. 385 U.S. at 302.

285. See Note, "The Supreme Court, 1966 Term," 81 Harv.L.Rev. 69, 191–96 (1967).

286. The Supreme Court has repeatedly held that, "The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*." United States v. Williams, 341 U.S. 70, 92 (1951) (opinion of Douglas, J.). See United States v. Price, 383 U.S. 787, 799 (1966); United States v. Cruikshank, 92 U.S. 542, 554–55 (1876).

287. 381 U.S. 479 (1965).

288. Most report users probably will find it more economical to meet the Act's notice requirement by including a statement in the application to the effect that an investigation may be conducted through interviews with friends and neighbors concerning the individual's personal characteristics. But the users of reports should be required to go further in their original notices in order to fully inform the applicant of the nature and scope of the investigation that will be conducted. Thus, for example, where the investigation will involve questioning neighbors about an individual's sexual activities and drinking habits, he should be informed of this prospect.

289. See Chapter IX of Rand Report R–870–DOJ.

290. James Norell and John Acqualino, "Scarecrows in Blue," *THE WASHINGTONIAN*, August 1971.

291. Bonkowski v. Arlan's Dept. Store, 383 Mich. 90, 174 N.W.2d 765 (1970).

292. See Chapter IX of Rand Report R–869–DOJ.

293. Roberts v. Hecht Co., 280 F. Supp. 639 (D. Md. 1968).

294. Washington Evening Star, Dec. 5, 1970, at A–6.

295. Washington Post, April 17, 1971, Section B, at 1.

296. See Rothschild v. Drake Hotel, Inc., 397 F.2d 419 (7th Cir. 1968).

297. However, the authors of Note, "Private Police Forces: Legal Powers and Limitations," 38 U. Chi. L. Rev. 555, 563, n.55 (1971) have concluded that instances of successful prosecution of private police guards are rare.

298. See generally, Note, "Justification for the Use of Force in the Criminal Law," 13 Stanford L. Rev. 566 (1961).

299. People v. Silver, 16 Cal.2d 714, 108 P.2d 4 (1940). This case is criticized in Note, Stanford L. Rev., *supra* note 298 at 578.

300. 421 F.2d 307 (5th Cir. 1970). See also Rothschild v. Drake Hotel, Inc., *supra* note 296, where plaintiff sued for assault, false imprisonment, and malicious prosecution.

301. *Id.* at 311.

302. *Id.* at 311.

303. Prosser § 18.

304. See generally, Note, "The Law of Citizen's Arrest," 65 Colum.L.Rev. 502 (1965); Wilgus, "Arrest Without a Warrant," 22 Mich. L. Rev. 673 (1924); Perkins, "The Law of Arrest," 25 Iowa L. Rev. 201 (1940).

305. See Note, 65, Colum. L. Rev., *supra* note 304 at 503, 505.

306. Note, "Shoplifting and the Law of Arrest: The Merchant's Dilemma," 62 Yale L. J. 788, 795 (1953).

307. Note, 65 Colum. L. Rev., *supra* note 304, at 511.

308. *Id.*

309. Note, 62 Yale L. J., *supra*, note 306, at 796.

310. See, e.g., Cal. Penal Code § 847; Ohio Rev. Stat. § 2935.06.

311. See generally, Comment, "The Protection and Recapture of Merchandise from Shoplifters," 46 N.W.U.L. Rev. 887, 889–92 (1952):

"At common law, the possessor of personal property can, under certain conditions, defend it by the use of force which reasonably appears to be necessary to prevent a threatened interference or dispossession. Even if interference is not actually threatened or dispossession occurring, if the possessor reasonably believes that it is, he may use reasonable force in defense of the property. He may not, however, use force to prevent dispossession by anyone who actually has a privilege to take the property; mistake as to the privilege of the intruder is a defense only when the latter is intentionally or negligently responsible for the defendant's error.

"[I]n a situation where the possessor of property has lost the possession as the reult of a wrongful taking, he can, if he acts in fresh pursuit and meets certain other conditions, use reasonable force to retake the property. But there is respectable opinion and at least some authority that in so doing he acts completely at his peril; any mistake, however reasonable, concerning the presence of the required conditions, does not justify the use of force. Nor can he ever use force to extract payment from the taker. Thus where the possessor believes that he has been wrongfully dispossessed of property and he uses force, however reasonable, to recapture it, he is liable if it turns out either that the taker has a right to take possession or that nothing in fact has been taken.

"Thus the only situation in which the possessor of property can mistakenly use force without liability is that in which he still has possession and reasonably thinks that someone, who in fact has no privilege to take possession, is threatening to or is in the process of dispossessing him. This condition of the law presents substantial theoretical difficulties, especially in the shoplifting area.

"In the first place, a merchant practically never accosts a shoplifter until the latter has completed the dispossession. Most customers handle merchandise before they purchase it, and the merchant cannot know at that stage which customers intend to pay and which intend to steal. Therefore, almost always, the apprehension of a shoplifter involves an attempt to recapture property rather than an attempt to defend the possession of it. That automatically puts the merchant in the area in which the law least protects his reasonable mistakes. . . . Of course, if a suspect had actually paid for the merchandise, the defense-recapture distinction would be immaterial anyway because the plaintiff then would have been privileged to take what he has, and defendant is not permitted to make a reasonable mistake about that in either a defense or recapture situation."

312. Prosser § 22; Note, 62 Yale L. J., *supra* note 306; Comment, "Legislation—Survey and Analysis of Criminal and Tort Aspects of Shoplifting Statutes," 58 Mich. L. Rev. 429 (1960).

313. 5 Cal.2d 175, 54 P.2d 20 (1936).

314. Ala. Code, title 14 § 334(1).

315. See, e.g., Ohio Rev. Code § 2935.041.

316. Colo. Rev. Stat. § 40-5-31.

317. 246 Miss. 1, 148 So.2d 679 (1963).

318. 246 Miss. at 10; 148 So.2d at 683–84.

319. 254 F. Supp. 907, 909 (N.D. Fla. 1966).

320. *Id.* at 908.

321. 160 So.2d 839 (La. App. 1964).

322. *Id.* at 841.

323. 96 N.J. Super. 9, 232 A.2d 425 (1967).

324. See generally Prosser § 21.

325. See *id.*

326. See generally Prosser § 31; see, e.g., Bartosh v. Banning, 251 C.A.2d 378, 69 Cal. Rptr. 382 (1967). (Bar owner responsible for injuries to customer resulting from fight between two other customers.)

327. See Cummins v. St. Louis Amusement Co., 147 S.W.2d 190 (Mo. 1941), a case involving the forceful ejection of a patron, where the court reversed a judgment for the defendant theater because of the trial court's failure to instruct the jury that the theater must show good cause for the ejection. See also 86 C.J.S., Theaters & Shows §§ 34–36.

328. See generally Prosser §§ 19 and 20.

329. See Restatement of Torts (2d) §§ 140–144.

330. 8C.A.2d 35, 46 P.2d 1020 (1935); see also Brooks v. Sessagesimo, 139 C.A. 679, 34 P.2d 766 (1934).

331. See 1 F. Harper & F. James, The Law of Torts § 3.11 (1956) [hereinafter Harper & James].

332. See Prosser § 20.

333. 67 F. Supp. 991 (E.D. Ky. 1946).

334. 180 Miss. 791, 178 So. 86 (1938); see 86 C.J.S., Theaters & Shows §§ 34–36.

335. 67 C.A.2d 77, 153 P.2d 804 (1944).

336. *Id.* at 82–3, 153 P.2d at 806–7.

337. 257 Wis. 323, 43 N.W.2d 485 (1950).

338. 173 Misc. 1063, 19 N.Y.S.2d 732 (Sup. Ct. 1940).

339. See 1 Harper & James § 3.13; Silas v. Bowen, *infra* note 341.

340. However, where property rights are involved, and therefore deadly force could not be used, it is not clear whether the threat of deadly force is sanctioned. See Prosser § 21 at 115, and § 22 at 118 n. 16; Restatement of Torts (2d) § 81(2).

341. See, e.g., Silas v. Bowen, 277 F. Supp. 314 (D.S.C. 1967).

342. Prosser § 21 at 115.

343. See Comment, Mich. L. Rev., *supra* note 312, at 443.

344. Restatement of Torts (2d) § 120A, comment h.

345. 1 Harper & James § 3.19.

346. Prosser § 26 at 134–35.

347. *Id.*

348. See Perkins, *supra* note 304, at 268.

349. Prosser § 19 at 109–11.

350. 295 F. Supp. 1184, 1186 (D. Md. 1969).

351. See the Colorado law quoted in the text at note 316.

352. Collyer v. S. H. Kress & Co., 5 Cal.2d 175, 182, 54 P.2d 20, 24 (1936).

353. See Restatement of Torts (2d) § 132, comment d.

354. 120 S.W.2d 425 (Tex. 1938).

355. See generally, Note, "Admissibility of Testimony Coerced by a University," 55 Cornell L. Rev. 435, 445–48 (1970); Comment, "Admissibility of Confessions or Admissions of Accused Obtained During Custodial Interrogation by Non-Police Personnel," 40 Miss. L. J. 139 (1968); Comment, "Confessions Obtained Through Interrogations Conducted by Private Persons, Investigators, and Security Agents," 4 Williamette L. J. 262 (1966).

356. 52 Misc.2d 266, 275 N.Y.S.2d 570 (Sup. Ct. 1966).

357. See Restatement of Torts (2d) § 132, comment d.

358. 5 Cal.2d 175, 54 P.2d 20 (1936).

359. See generally, Annotation, 29 ALR3d 961 (1970).

360. 246 Miss. 1, 148 So.2d 679 (1963).

361. 246 Miss. at 6, 148 So.2d at 681.

362. See also Southwest Drug Stores v. Garner, 195 So.2d 837 (Miss. 1967); Clark v. Kroger Co., 382 F.2d 562 (7th Cir. 1967).

363. 181 F. Supp. 633, 636 (S.D. Tex. 1960).

364. 160 So.2d 839 (La. App. 1964) (See text at note 321 *supra*).

365. 395 P.2d 137 (Ore. 1964).

366. See Gibson v. J. C. Penney Co., 165 C.A.2d 640, 331 P.2d 1057 (1958) where lack of probable cause served to invalidate a detention as well as a search of a suspected shoplifter. The search involved plaintiff opening up a shopping bag, as well as undressing in a dressing room upon orders of the store guard.

367. See the incident described in Roker v. Gertz Long Island, 34 A.D.2d 680, 310 N.Y.S.2d 536 (1970).

368. See Perkins, *supra*, note 304 at 261, Warner, "The Uniform Arrest Act," 28 Va. L. Rev. 315, 324 (1942); United States v. Viale, 312 F.2d 595 (2d Cir. 1963); Restatement of Torts (2d) § 132, comment d.

369. People v. Martin, 225 C.A.2d 91, 36 Cal. Rptr. 924 (1964).

370. See, e.g., Mich. Stat. Ann., § 28.884.

371. See text at note 311 *supra*. See also McLean v. Colf, 179 Cal. 237, 176 P. 169 (1918).

372. See Note, U. Chi. L. Rev., *supra* note 297 at 567 ("Shoplifting statutes generally do not authorize a search of a suspect"); Ohio Rev. Code § 2935.041.

373. Tex. Pen. Code Ann., art. 1436e(2).

374. 5 Cal.2d 175, 54 P.2d 20 (1936). See also Bettolo v. Safeway Stores, 11 C.A.2d 430, 54 P.2d 24 (1936).

375. See Note, U. Chi. L. Rev., *supra* note 297, at 567.

376. 246 Miss. 1, 148 So.2d 679 (1963).

377. 242 C.A.2d 606, 51 Cal. Rptr. 561 (1966). See also Cooke v. J. J. Newberry & Co., 96 N.J Super. 9, 232 A.2d 425 (1967); Bonkowski v. Arlan's Dept. Store, 383 Mich. 90, 174 N.W.2d 765 (1970).

378. As described above, deputization is a somewhat confusing, general word, that includes various methods for increasing the powers of private security personnel to the level of a public policeman, although usually limited to a particular time, place, and situation. In effect, the deputized private officer has the same powers in the limited situation as a public police officer in that jurisdiction. While most deputization statutes refer only to arrest powers, the incidental powers of a public officer to search and interrogate would probably accompany the increased arrest powers. However, it is not clear whether a deputized private security agent could directly obtain a search or arrest warrant.

379. See Restatement of Torts (2d) §§ 119, 121.

380. See Comment, Mich. L. Rev., *supra*, note 304 at 445.

381. See, e.g., N.Y. Crim. Proc. Law § 140.50 (McKinney); Fla. Stat. Ann. § 901.151.

382. See, e.g., Fla. Stat. Ann. § 901.21.

383. See note 381 *supra*.

384. See, e.g., Cal. Penal Code § 830.3.

385. See note 20, *supra*, regarding the inadequacy of tort and criminal remedies for public police abuses.

386. See, e.g., Cal. Penal Code § 834a.

387. See, e.g., Beck v. Ohio 379 U.S. 89 (1964).

388. See Wilgus, *supra*, note 304 at 685; Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 90 S.Ct. 1999, 2003 n. 5 (1971).

389. 395 U.S. 752 (1969).

390. 392 U.S. 1 (1968).

391. 392 U.S. 40 (1968).

392. See discussion of Burdeau and the Exclusionary Rule in Chapter III. See also Note, U. Chi. L. Rev., *supra* note 297, at 567.

393. 52 Misc.2d 266, 267, 275 N.Y.S.2d 570, 571 (Sup. Ct. 1966).

394. See Brown v. Mississippi, 297 U.S. 278 (1936) (torture held to render confession involuntary).

395. 384 U.S. 436 (1966).

396. People v. Frank, *supra* note 393; People v. Amata, 270 C.A.2d 575, 75 Cal. Rptr. 860 (1969).

397. Hood v. Commonwealth, 448 S.W.2d 388 (Ky. 1969).

398. See, e.g., Commonwealth v. Bordner, 432 Pa. 405, 247 A.2d 612 (1968).

399. Pratt v. State, 9 Md. App. 220, 263 A.2d 247 (1970).

400. See General Discussion in Ch. II, *supra*.

401. See Bonkowski v. Arlan's Dept. Store, *supra* note 291.

402. See generally, Chevigny, "The Right to Resist an Unlawful Arrest," 78 Yale L. J., 1128 (1969).

403. See the sums recovered against the Hecht Co. in cases discussed *supra*. See also Note, 62 Yale L. J., *supra* note 306, at 798.

404. J. S. Dillon & Sons Stores Co. v. Carrington, 169 Colo. 242, 247, 455 P.2d 201, 203 (1969).

405. See *supra*, page 122.

406. See *supra*, page 122.

407. See *supra*, page 123.

408. See Chapter III.

409. As stated in Note, U. Chi. L. Rev., *supra*, note 297, at 580 n. 155: "It is unlikely that the courts would enforce administration of the Miranda warnings by liability in tort." The step has not been taken even in the public police context. See Allen v. Eicher, 295 F. Supp. 1184, 1185–86 (D. Md. 1969) (". . . Miranda does not per se make an interrogation which violated its precepts into an actionable tort.").

Yet it seems inconsistent and unsound as a matter of public policy to hold that the violation of a rule of police conduct is important enough to require overturning prosecutions conducted on behalf of the public, but refuse to require the wrongdoers to compensate the victim.

410. See Pratt v. State, 9 Md. App. 220, 263 A.2d 247 (1970), where the *Miranda* requirements were imposed on deputized or commissioned private security officers.

411. James Norell and John Acqualino, "Scarecrows in Blue," The Washingtonian, August 1971.

412. See Chapter III of Rand Report R-871-DOJ.

413. Letter from Donald E. Rocks, Assistant to the Board of County Commissioners, Multnomah County, Oregon to Stefan M. Mason, dated May 20, 1971.

414. 18 U.S.C. § 703 prohibits, among other things, the wearing of any police uniform of a foreign nation with which the United States is at peace with intent to deceive or mislead. 18 U.S.C. § 702 prohibits the unauthorized wearing

of the uniform of any of the armed forces of the United States or the Public Health Service.

415. 18 U.S.C. § 912 provides: "Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

416. 240 F.2d 781 (6th Cir. 1957).

417. 324 F.2d 356 (9th Cir. 1963), *cert. denied* 376 U.S. 911 (1964).

418. Section 538d of the California Penal Code provides: "Any person other than one who by law is given the authority of a peace officer, who willfully wears, exhibits, or uses the authorized badge, insigne, emblem, device, label, certificate, card, or writing, of a peace officer, with the intent of fraudulently personating a peace officer, or of fraudulently inducing the belief that he is a peace officer, is guilty of a misdemeanor.

"Any person who willfully wears, exhibits, or uses, or who willfully makes, sells, loans, gives, or transfers to another, any badge, insigne, emblem, device, or any label, certificate, card, or writing, which falsely purports to be authorized for the use of one who by law is given the authority of a peace officer, or which so resembles the authorized badge, insigne, emblem, device, label, certificate, card, or writing of a peace officer as would deceive an ordinary reasonable person into believing that it is authorized for the use of one who by law is given the authority of a peace officer, is guilty of a misdemeanor."

419. In Los Angeles, for example, Section 52.28 of the Municipal Code prohibits persons other than sworn police officers from wearing any uniform in semblance of a uniform used by regular members of the Los Angeles Police Department. According to an interdepartmental memorandum of the Los Angeles Police Department regarding special officers, the following persons are exempt from the local regulations: private investigators, in-house guards who work solely on private property, and guards licensed by the state but available for assignment to fixed posts, dances, or events, i.e., "the rent-a-cop."

420. California Penal Code Section 529 provides:

"Every person who falsely personates another in either his private or official capacity, and in such assumed character, either

. . . . . .

"3. Does any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person;

"Is punishable by a fine not exceeding five thousand dollars, or by imprisonment in the state prison not exceeding two years or in a county jail not exceeding one year, or by both such fine and imprisonment."

421. Taylor v. Bureau of Private Investigators and Adjusters, 128 Cal. App. 2d 219, 275 P.2d 579 (1954).

422. Under California Business and Professions Code § 7560, any violation of the chapter dealing with private security personnel is a misdemeanor, punishable by fine not to exceed $500, or imprisonment not to exceed one year, or both, and under § 7551, the Director of Professional and Vocational Standards may revoke a private detective's license for such violations. See also, N.Y. Gen. Bus. Law, Art. 3, § 84 (McKinney).

423. Section 7538 of the California Business and Professions Code provides, in part:

"(d) No licensee, or officer, director, partner, manager, or employee of private investigator, insurance adjuster, and repossessor licensees, shall use a badge in connection with the official activities of the licensee's business.

"(e) No licensee, or officer, director, partner, manager, or employee of a licensee, shall use a title, or wear a uniform, or use an insignia, or use an identification card, or make any statement with the intent to give an impression that he is connected in any way with the federal government, a state government, or any political subdivision of a state government." See also 48 Ops. Cal. Atty. Gen. 80 (1966). Pocket identification cards are issued to licensed investigators pursuant to California Business and Professions Code § 7538.

424. Cal. Bus. & Prof. Code § 7523.

425. In the City of Los Angeles, for example, private patrolmen may be commissioned as special police officers. Under the Los Angeles Municipal Code § 52.28 they are required to wear slate grey uniforms and, under City of Los Angeles Board Rules governing special officers, Rule No. 13, they can wear no marking or insignia rank such as sergeant or captain. They must wear the Los Angeles Special Police Officers badge on their uniform at all times while performing special duties. L. A. Municipal Code § 52.08. This badge, issued by the Police Commission, is recorded (*Id.* § 52.13) and must be returned upon termination of employment (*Id.* § 52.13). Under Board Rule 17, special patrolmen are prohibited from using vehicles which resemble or can be mistaken for those used by law enforcement officers.

Other local jurisdictions in California have enacted similar regulations. See, for example, Oakland Mun. Code, Article II, §§ 5–11.15, 5–11.16, 5–11.17; and San Diego Mun. Code, Art. 3, Division 29, § 33.2906.

426. New York Penal Law § 190.25.

427. For example, New York City Administrative Code, § 434(a)–7.1, makes it a misdemeanor for any person who is not a member of the police force to represent himself as a member of the police force with fraudulent designs on another person or on property or to have, use, wear, or display, without authority, any uniform, shield, button, or other insignia in any way resembling those worn by members of the police force.

428. See N.Y. Gen. Bus. Law, Art. 7, § 80.

429. *Id.*

430. *Id.* § 84. Pocket identification cards are issued to private investigators. *Id.* § 80.

431. See letter from Lewis M. Neco, Deputy Commissioner of Legal Matters, City of New York Police Department to Mr. Richard S. Post, dated Feb. 22, 1971.

432. Police Department, City of New York, Regulations Governing the Appointment and Conduct of Special Patrolmen, Nos. 11, 12, 13, and §§ 142.0 and 142.1 of the Administrative Code.

433. Fla. Stat. Ann. § 843.08.

434. Fla. Stat. Ann. § 493.14(i) (impersonation of a law enforcement officer or employee of the State, the United States or any political subdivision thereof made grounds for suspension of license by department of state).

435. Rules of the Office of the Secretary of State, Licensing Division, Chapter II, Private Investigative Agencies, 2P–2.08(10).

436. Rules of the Office of Secretary of State, Licensing Division, Chapter II, Private Investigative Agencies, § 2P–2.10. See Annot., "Private Detective License Revocation," 63 ALR 2d 775, for a general review of the cases on this subject.

437. Tampa Florida, City Ordinance § 28–42. These regulations are considered adequate for the local authorities. According to one official, "The requirement of distinctive uniforms and badges gives the public reasonable notice that these individuals are not police officers." Letter to Richard S. Post of March 8, 1971, from City of Tampa Police Department.

438. See Prosser at 683–736 for a full discussion of the law of misrepresentation.

439. Janvier v. Sweeney, 2 K.B. 316 (1919) (discussed in Prosser at 56).

440. See, e.g., Multnomah County, Oregon, Ordinance 35, which forbids the use of the term "police" by private security firms.

441. Davis, Industrial Plant Protection, 22 (1957), cited in Note, "Regulation of Private Police," 40 S.C.L. Rev. 540, 544, n.26 (1967).

442. Because special patrolmen, commissioned by the San Francisco Chief of Police, have a duty to make arrests and keep the peace, under San Francisco charter, injury inflicted by special patrolman to bystander in the course of making arrest not actionable. Maggi v. Pompa, 105 Cal. App. 496, 500–01, 287 P.982, 984 (1930).

443. This section focuses only on the use of lethal weapons, such as hand guns. State regulation of non-lethal weapons such as batons and chemical aerosols such as mace is extensive. Generally, private police can carry batons, but require special permission to use chemical sprays. See, e.g., Cal. Pen. Code §§ 12002, 12020, 12401, 12402, 12403, 12420, 12423, 12426, 12450; Cook v. Superior Court, 4 C.A. 3d 822, 828 (1970) 84 Cal. Rptr. 664, 669 (Chemical mace is tear gas); People v. Horner, 9 C.A. 3d 23 87 Cal. Rptr. 917 (1970); N.Y. Penal Law §§ 265.05–.20, 270.05; Fla. Stat. Ann., Title XLIV § 790.001, 790.01; Ohio Criminal Code, Title 29, § 2923.012.

444. Guard Survey, Chapter IX of Rand Report R–870–DOJ. (Note: The Survey does not distinguish between concealed and unconcealed weapons).

445. Letter from Gordon Bishop, Chief of Bureau of Collection and Investigative Services, Cal. Dept. of Consumer Affairs, dated 1971; letter from Col. John R. Plants, Dir. Mich. St. Police, dated October 21, 1971.

446. See also, "Civil Liability for Fire-Arms," 11 Canadian B.J. 247 (1968) for a discussion of gunshot cases in Canada.

447. James Norell and John Acqualino, "Scarecrows in Blue," The Washingtonian, August 1971.

448. Crime Control Digest, April 2, 1971, p. 12.

449. "Slayings by Guards Held Justifiable," Pomona (California) Bulletin, June 17, 1971.

450. "Security Guard Jailed in Shooting," Pomona (California) Bulletin, June 17, 1971.

451. *Id.*

452. Los Angeles Times, August 23, 1971, at 2.

453. Personal interview and correspondence with Gordon H. Bishop, Chief of Bureau of Collection and Investigative Services, Department of Consumer Affairs, State of California.

454. *Id.*

455. Statement by James C. McGahey, International President International Union, United Plant Guard Workers of America, enclosed in Mr. McGahey's letter to Sorrel Wildhorn, dated May 3, 1971.

456. *Id.* See also, New York Times, July 9, 1971, at 9 (slaying of two night security guards armed only with nightsticks as an example of violence which occurs outside of the large auto plants).

457. Statement by James C. McGahey, International President, International Union, United Plant Guard Workers of America, enclosed in Mr. McGahey's letter to Sorrel Wildhorn, dated May 3, 1971.

458. Robert M. Jupiter, "Security Guards and Firearms," Industrial Security, October, 1970, at 20 [hereinafter Jupiter].

459. Chapter IX of Rand Report R–870–DOJ.

460. Jupiter, p. 18.

461. Chapter IX of Rand Report R–870–DOJ.

462. Jupiter, at 18.

463. U.S. Constitution, Second Amendment.

464. For an analysis of the provisions and effectiveness of both the National Firearms Act of 1934 and the Federal Firearms Act of 1938, see, Note, "Firearms: Problems of Control," 80 Harv. L. Rev. 1328 (1967); Note, "Firearms Legislation," 18 Vand. L. Rev. 1362 (1965).

465. 75 Stat. 757 (1968) (as amended prior to appeal).

466. Title VII of the Omnibus Crime and Control and Safe Streets Act, 18 App. U.S.C. §§ 1201–1203.

467. The Gun Control Act of 1968, 18 U.S.C. §§ 921–928, Title I; 26 U.S.C. §§ 5861–5872, Title II.

468. For an analysis of the 1968 federal legislation see Consultant's Report on Firearms and Federal Criminal Law (Zimring; July 2, 1969; Working Papers for a New Federal Code), and Comment on Firearm Offenses, Sections 1811–1814 (Bancroft, Swartz; February 12, 1970).

469. Many states, for example, do not specifically prohibit persons adjudicated as mentally defective from owning firearms. For a survey of state gun control laws, see "Effectiveness of State and Local Regulations of Handguns: A Statistical Analysis," 1969 Duke L. Journal 647.

470. Moreover, even in states that license security personnel, men with criminal records are sometimes employed by licensees. See, e.g., State of New York, Report of the Joint Legislative Committee on Privacy of Communications and Licensure of Private Investigators, 1961, p. 18.

471. For a compilation of state gun control statutes see Note, "Firearms Legislation," 18 Vand. L. Rev. 1312 (1965).

472. Note, "Firearms: Problems of Control," 80 Harv. L. Rev., 1328, 1336–1337 (1967). The nine states that control at the point of purchase are Hawaii, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, and Rhode Island. Louisiana requires an application and prior government approval to transfer all weapons, except revolvers. La. Rev. Stat. § 40.1784. Mississippi requires that the purchaser of a firearm, except a dealer, regis-

ter with the sheriff of the county in which he resides, but appears to place no sanctions on dealers who sell to persons who do not comply with this law. 6A Miss. Code §§ 8621–30.

All the states have been ranked in terms of the strictness of their gun control legislation. New Jersey ranked highest with an index value of 39. New York followed with 36, while California had 28 and Florida, 6. See "Effectiveness of State and Local Regulation of Handguns," 1969 Duke Law Journal 652–53.

473. Connecticut, Conn. Rev. Stat. § 29–33.

474. Dist. of Col. Code § 22–3208.

475. Note, "Firearms: Problems of Control," 80 Harv. L. Rev. 1328, 1337 n.60 (1967).

476. California Penal Code § 12025 requires that persons be licensed to carry concealed weapons. The only private security personnel exempted from this requirement are "Guards or messengers of common carriers, banks, and other financial institutions while actually employed in and about the shipment, transportation, or delivery of any money, treasure, bullion, bonds, or other thing of value within the state." Cal. Penal Code § 12027 (e).

477. California Penal Code § 12031 prohibits carrying a loaded unconcealed weapon upon the person or in a vehicle except that a person may carry a loaded handgun without a license at his business or on property which he lawfully possesses, Cal. Penal Code §§ 12026 and 12031 (f), or when he has a reasonable belief that he or his property or another person or his property is in immediate danger, and that carrying such a weapon is necessary for the defense of the person or his property, Cal. Penal Code § 12031 (h), or when a person is making a lawful arrest, Cal. Penal Code § 12031 (i).

478. Cal. Penal Code § 12050.

479. Cal. Penal Code § 12052.

480. Note, "Firearms: Problems of Control," 80 Harv. L. Rev. 1328, 1337 (1967).

481. New York Penal Law § 1903.

482. *Id.* § 1903.2.

483. See Hearing Before Committee on Ways and Means, House of Representatives, 89th Congress, at 357, 474, for statements of both police and private citizens regarding the difficulty of obtaining a permit even for a weapon to protect the home. New York Penal Law 1897 (2) makes it a felony for any person to have in his possession a loaded firearm or an unloaded firearm and ammunition unless he is exempt or licensed.

484. New York Penal Law § 1903.1.

485. New York Penal Law § 1903.3 and .4.

486. Fla. Stat. Ann. §§ 790.01, 790.05.

487. Fla. Stat. Ann. § 790.06.

488. Cal. Penal Code Sections 12031 (b) (2), (5), (10), (11) and (12) exempt guards and messengers of common carriers, banks, and other financial institutions, patrol special police officers appointed by local jurisdictions, uniformed security guards or nightwatchmen employed by any public agency or other lawful business to protect its property and employees or agents of a burglar alarm company while responding to an alarm or, when in uniform, while on duty for the purpose of responding to an alarm, from the provisions of Cal. Penal Code Section 12031, which prohibits the carrying of an unconcealed handgun.

489. Cal. Penal Code § 12027 (e).

490. Bus. & Prof. Code § 7514 (e).

491. Gordon H. Bishop, Chief of Bureau of Collection and Investigative Services, Department of Consumer Affairs, State of California. See Chapter IV of Rand Report R-871-DOJ.

492. Cal. Penal Code §§ 12031 (b) (5) and (7).

493. Letter from Lt. Francis Coyne, Legal Division, New York City Police Department to Douglas Eakeley, dated July 16, 1971. (Emphasis added). New York exempts peace officers from the permit requirements. New York Penal Law § 1900. An opinion of the New York State Attorney General held that private detectives did not qualify for the exemption as peace officers. 1930 Ops. Atty. General 160 (1930).

494. New York Penal Law § 1903 (2).

495. Fla. Stat. Ann. § 493.21.

496. Fla. Stat. Ann. § 790.05.

497. Cal. Bus. & Prof. Code § 7551 (h).

498. In a California case in which a private guard negligently fired a gun over the head of a fleeing suspect and injured an innocent bystander, the court noted: "Early American cases, dealing with injuries from wrongful shooting, procedurally were brought in trespass (assault and battery) for the act itself; while in later decisions the fashion changed toward emphasis of the omission to use due care, i.e., action on the case. Either is proper." Callum v. Hartford Accident and Indemnity Company, 186 C.A. 2d Supp. 885, 888, 337 P.2d 259, 260 (1959).

499. For a general discussion of assault and battery see I. F. Harper and F. James, Law of Torts §§ 3.1–3.5 (1956).

500. See, e.g., Skinner v. Ochiltree, 148 Fla. 705, 708, 5 So.2d 605 (1941); Warner v. Santa Catalina Island Co., 44 C.2d 310, 317, 282 P.2d 12, 16 (1955).

501. 44 C.2d 310, 282 P.2d 12 (1955).

502. The large guard companies are well aware of the possible tort liability of security personnel for misuse of firearms and warn against firing warning shots, firing into stones or concrete because of ricochet. In fact, they use the threat of a civil suit as one means of alerting the guards to the high degree of care expected of those who use firearms.

503. Chapter IX, Rand Report R-870-DOJ.

504. *Id.*

505. *Id.*

506. See, e.g., Maggi v. Pompa, 105 Cal. App. 496, 501, 287 P. 982, 984 (1930).

507. *Id.* See St. John v. Reid, 17 C.A.2d 5, 61 P.2d 363 (1936).

508. See Hanna v. Raphael Weill & Co., 90 C.A.2d 461, 203 P.2d 564 (1949).

509. 35 Am. Jur. 972; see also 53 Am. Jur.2d 429–30.

510. See Maggi v. Pompa, 105 Cal. App. 496, 207 P. 982 (1930). Erie R. Co. v. Johnson, 106 F.2d 550 (6th Cir. 1939) (Federal Court applying Ohio law).

511. See Wheatley v. Washington Jockey Club, 39 Wash.2d 163, 234 P.2d 878 (1951); Hanna v. Raphael Weill & Co., 90 C.A.2d 461, 203 P.2d 564 (1949).

512. See Schramko v. Boston Store of Chicago, 243 Ill. App. 251, 255 (1927).

513. See Md. Ann. Code Art. 41, § 64. The Maryland statute arguably imposes liability on the employer not only for acts performed by a special police officer within the scope of his employment, but also for acts performed in his official capacity outside the scope of his employment. The language is: "The requesting authority for whose convenience and protection the policeman has been appointed shall also be responsible for any wrongful actions committed by him in the course of his duties as well as any abuse of the powers granted by the Commission either on or off the premises."

514. See discussion in first part of this section on weapons.

515. Jupiter, p. 18.

516. See Note, "Firearms: Problems of Control," 80 Harv. L. Rev. 1328, 1340–42 (1967).

517. See this chapter and Chapter IV of Rand Report R-871-DOJ.

518. See, e.g., M. Royko, Boss (1971).

519. Los Angeles Board Rules Governing Special Officers (Rule No. 7); Miami City Code § 43–18.

520. Cal. Vehicle Code § 2800.

521. Cal. Vehicle Code § 625.

522. Fla. Stat. Ann. § 317.012. See also Mich. Comp. Laws Ann. §§ 257.602.

523. N.J.S. Ann. (Cum. Supp. 1971–72) § 18A: 6–4.7.

524. Page's Ohio Revised Code Ann. § 4511.02.

525. *Id.* 4749.08.

526. *Id.* 5577.13.

527. Rule No. 7. See also Miami City Code § 43–18.

528. Restatement of Torts. (2d) § 36d.

529. Prosser at 96–105 (2d ed. 1955).

530. *Id.* 452–62.

531. *Id.* 460.

532. *Id.* 92–95.

533. California Vehicle Code § 22658.

534. Prosser at a 359–60 (2d ed. 1955).

535. Fla. Stat. Ann. (Cum. Supp. 1971–72) § 493.14 (i); New York Gen. Bus. Law § 84 (McKinney). See also pp. 131–40 *infra*.

536. See, e.g., Cal. Bus. & Prof. § 7551.

537. 326 U.S. 501 (1946).

538. 391 U.S. 308 (1968).

539. J. Fleming, The Law of Torts at 170–72 (1968).

540. *Id.* at 171.

541. Adams v. F. W. Woolworth Co., 144 Misc. 27, 257 N.Y.S. 776 (1932); Burlingham v. Gray, 22 Cal.2d 87, 137 P.2d 9 (1943).

542. For example, one of the agreements for the provision of security services studied in the preparation of this report provides that all control is to remain with the agency and that the guard is to perform duties as directed by the agency. In the event that the client assigns duties other than those specified in the manual, the contract provides that the client assumes responsibility for those duties.

543. Adams v. F. W. Woolworth Co., 144 Misc. 27, 257 N.Y.S. 776 (1932).

544. See generally Prosser § 69.

545. Schnabolk, "Protection Against a Guard Force," Security World 45 (May, 1971).

546. F. Mechem, Agency § 351 (1952).

547. 126 Neb. 357, 253 N.W. 331 (1934).

548. Alterauge v. Los Angeles Turf Club, 97 C.A.2d 735, 218 P.2d 802 (1950).

549. Bass v. City of New York, 61 Misc.2d 465, 305 N.Y.S.2d 801 (S. Ct. 1969).

550. See generally Prosser § 70.

551. 233 So.2d 847 (Fla. App. 1970).

552. Brien v. 18925 Cullins Ave. Corp., 233 So.2d 847 (Fla. App. 1970).

553. Perkins, Criminal Law 549 (1957).

554. See, for example, the contract discussed in Atkinson v. Pacific Fire Extinguisher Co., 40 Cal.2d 192, 253 P.2d 18 (1953); and Better Food Markets, Inc. v. American District Telephone Co., 40 Cal.2d 179, 253 P.2d 10 (1953). Similar provisions were found in a number of the contracts studied in connection with this report.

555. Comment, "Probability vs. Possibility in Liquidated Damages Losses," 5 Stan. L. Rev. 822 (1953).

556. J. Murray, Grismore on Contracts § 205 (1965). For example, in Atkinson v. Pacific Fire Extinguisher Co., 40 Cal.2d 192, 253 P.2d 18 (1953), the liquidated damage clause provided for $25, and in Better Food Markets, Inc. v. American District Telephone Co., 40 Cal.2d 179, 253 P.2d 10 (1953), the liquidated damages clause provided for payment of $50.

557. See Comment, *supra* note 556.

558. For example, California Insurance Code § 533 provides that an insurer is not liable for loss caused by a willful act of the insured.

559. See, e.g., Mackie v. Ambassador Hotel and Inv. Corp. 123 C.A. 215 11 P.2d 3 (1932), in which it was held that the hiring company was not liable for a false arrest since the arrest itself in no way could be said to aid in the business of the principal nor serve to protect the principal's property

560. Arenson v. National Automobile and Casualty Ins. Co., 45 Cal.2d 81, 286 P.2d 816 (1955); Capachi v. Glens Falls Insurance Co., 215 C.A.2d 843, 30 Cal. Rptr. 323 (1963).

561. Erlin-Lawler Enterprises, Inc. v. Fire Insurance Exchange, 267 C.A.2d 381, 73 Cal. Rptr. 182 (1968).

562. See Schnabolk, *supra* note 546.

563. See, e.g., McCurrie v. Southern Pacific Co. 122 Cal. 558, 55 P. 325 (1898); Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 P. 169 (1902); Pezzoni v. San Francisco, 101 C.A.2d 123, 225 P.2d 14 (1950).

564. See Note, "Private Police Forces: Legal Powers and Limitations," 38 U. Chi. L. Rev. 555 (1971).

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