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Introduction

Private policing, as noted in The Hallcrest Report II, plays an integral role in the detection, protection, and apprehension of criminals in modern society. Many interested sources deem it as the more responsive, efficient, and productive player in the administration of justice. The advantages of private sector justice are many and diverse.


Aside from its efficiencies and customer service orientation, private policing retains a strong procedural advantage in matters of constitutional oversight. As noted already, the
typical constitutional protections that emanate in public policing matters, do not apply to private sector police. Naturally, business and industry prefer to deal with private sector justice since their own private police forces are not constrained by constitutional dimensions. As Professor William J. O’Donnell eloquently notes:

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

Constitutionally, the private sector has the upper hand because the extension of traditional police protections have never materialized. As the role of private security and private police develops, criminal defendants and litigants will clamor for increased protection. Already, defense advocates argue that Fourth, Fifth, Sixth, and Fourteenth Amendment—standards regarding arrest, search and seizure, and general criminal due process are applicable to private security, though most appeals courts reject these claims.

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

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

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

*In order to perform effectively, private security personnel must, in many instances, walk a tightrope between permissible protective activities and unlawful interferences with the rights of private citizens.*
Given that the criminal justice system is already administratively and legally beleaguered, it is natural for both the general public and criminal justice professionals to seek alternative ways for stemming the tide of criminality and carrying out the tasks of arrest, search, and seizure. Privatization is a phenomenon that surely will not dissipate. Private security has played an increasingly critical role in the resolution of crime in modern society.

Profound questions arise in the brave new world of private policing. Should private sector justice adhere to constitutional demands imposed on the public sector when detecting criminality or apprehending criminals? Should the Fourth Amendment apply in private sector cases? Are citizens who are arrested and have their persons and property searched and seized by private security personnel entitled to the same protections as individuals apprehended by the public police? Have public and private police essentially merged, or become so entangled as to prompt constitutional protections? Does public policy and constitutional fairness call for an expansive interpretation of the Fourth, Fifth, Sixth, and Fourteenth amendments regarding private security actions? Clarification of these constitutional dilemmas is the prime aim of this chapter.


Constitutional Framework of American Criminal Justice

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

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

Responding to the clamor for individual rights, calls for a reduction in arbitrary police behavior, and a general recognition that the rights of the individual are sometimes more important than the rights of the whole, judicial reasoning, public opinion, and academic theory for since the early 1990s have suggested and formulated an expansive interpretation of the Fourth Amendment. When and where police can be constrained and criminal defendants liberated appears to be the trend.

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

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

The Court’s ruling is certainly not surprising, given the historical tug-of-war between federal and states’ rights in the application of constitutional law. Over the long history of constitutional interpretation, courts have been hesitant to expand constitutional protections to cover the actions of private individuals rather than governmental actions. The Burdeau decision has been continuously upheld in a long sequence of cases and is considered an extremely formidable precedent. The Burdeau decision and its progeny enforce the general principle that the Fourth Amendment is applicable only to arrests, searches, and seizures conducted by governmental authorities. The private police and private security system have historically been able to avoid the constrictions placed on the public police in the detection and apprehension of criminals.

If constitutional protections do not inure to defendants and litigants processed by private sector justice, then what protections do exist? Could it be argued that the line between private and public justice has become indistinguishable or at least so muddled that the roles blur? Are private citizens, subjected to arrest, search, and seizure actions by private police, entitled to some level of criminal due process that is fundamentally fair and not overly intrusive? Does the Fourth Amendment’s strict adherence to the protection of rights solely in the public and governmental realm blindly disregard the reality of public policing? Is this an accurate assessment of what the general citizenry experiences? Or should the constitution be more generously applied to encompass the actions of private police and security operatives? All of these dilemmas are, at first glance, easy to answer, when assessing case law. Even despite the continuous resistance to said applications, the advocates for such arguments are perpetually persistent.

**Arrest and Private Sector Justice**

As a general proposition, private security officers, private police, and other private enforcement officials may exercise arrest rights at the same level of authority as any private citizen:

*While many private security personnel perform functions similar to public law enforcement officers, they generally have no more formal authority than an average citizen. Basically, because the security officer acts on behalf of the person, business, corporation, or other entity that hires him, that entity’s basic right to protect persons and property is transferred to the security officer.*
When one considers the amazing similarity of service and operation between public and private police functions, the general assertion that security officers and other responsible personnel are guided only by the rights of the general citizenry seems extraordinary. Private police serve a multiplicity of purposes, including the protection of property and persons from criminal activity, calamity, and destructive events; the surveillance and investigation of internal and external criminal activity in business and industry; and the general maintenance of public order. Therefore, it would seem prudent that private police be guided by some level of constitutional and statutory scrutiny. However, “unless deputized, commissioned, or provided for by ordinance or state statute, private security personnel possess no greater legal powers than any private citizen.”

For the most part, the lack of express language in guiding constitutional documents that exclusively tend to matters of “state action,” or governmental action, the private agent is left out of the mix. This is the stark reality when reading and interpreting constitutional texts.

Because private police do not derive their authority from a constitutional framework, the foundation for the arrest action rests in the common and statutory law—those codifications that simultaneously give the power of arrest to a private person. “The security officer has the same rights both as a citizen and as an extension of an employee’s right to protect his employer’s property. Similarly, this common law recognition of the right of defense of self and property is the legal underpinning for the right of every citizen to employ the services of others to protect his property against any kind of incursion by others.”

The Law of Citizen’s Arrest: The Private Security Standard

The scope of permissible citizen’s arrest has remained fairly constant in American jurisprudence. At common law, the private citizenry could make a permissible arrest for the commission of any felony in order to protect the safety of the public. An arrest could also be effected for misdemeanors that constituted a breach of the peace or public order, but only when immediate apprehension and a presence of an arresting officer was demonstrated. Much of our contemporary analysis of reasonable suspicion and probable cause also relates to the citizen’s right to subject another individual to the arrest process. “A citizen could perform a valid and lawful arrest on his own authority, if the person arrested committed a misdemeanor in his presence or if there were reasonable grounds to believe that a felony was being or had been committed by the arrestee although not in the presence of the arresting citizen.” Private citizens are also permitted to search individuals that they have arrested or detained for safety reasons, and this right is comparable to the incident to arrest or stop and frisk standard applicable in the public jurisdiction. “When an articulable suspicion of danger exists, granting a private policeman or citizen the authority to search for the purpose of finding or seizing weapons of an arrestee is at least equivalent to a pat down approved by Terry v. Ohio, and seems to be a necessary concomitant of the power to arrest.” [Discussing Terry v. Ohio]
A review of the opinion of the Wisconsin attorney general on the power of private security guards to make arrests is presented at http://www.doj.state.wi.us/ag/opinions/2008_09_03Mohr.pdf.

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

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

Statutorily, the scope of citizen’s arrest varies according to jurisdiction. A list of statutory enactments, from Alaska to Florida, can be found in the Appendix 1. Two legislative examples are as follows:

Alaska:
(a) A private person or a peace officer without a warrant may arrest a person
   (1) for a crime committed or attempted in the presence of the person making the arrest;
   (2) when the person has committed a felony, although not in the presence of the person making the arrest;
   (3) when a felony has in fact been committed, and the person making the arrest has reasonable cause for believing the person to have committed it.20

New York:
§140.30. Arrest without a warrant; by any person; when and where authorized
1. Subject to the provisions of subdivision two, any person may arrest another person (a) for a felony when the latter has in fact committed such felony, and (b) for any offense when the latter has in fact committed such offense in his presence.
2. Such an arrest, if for a felony, may be made anywhere in the state. If the arrest is for an offense other than a felony, it may be made only in the county in which such offense was committed.21

In Illinois, a police officer “can make an extraterritorial warrantless arrest in the same situation that any citizen can make an arrest.”22

To thwart and effectively defend against citizen-based challenges to the regularity of the citizen arrest, the security officer conducting any arrest should complete documentation that justifies the decision making. First, an incident report, which details
the events comprising the criminal conduct, should be completed (Figure 3.1).\textsuperscript{23}
Second, an arrest report (Figure 3.2)\textsuperscript{24} records the officer’s actions. An arrest warrant is shown in Figure 3.3.

![Building Security Inspection Report](image)

**FIGURE 3.1** Building Security Inspection Report.
FIGURE 3.2 Arrest Report.
### 44 Officer's Observations

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

### 45 Reason for Stop

<table>
<thead>
<tr>
<th>DRIVING TOO FAST/SLOW</th>
<th>ACCIDENT</th>
<th>DRIVING IN INAPPROPRIATE AREA</th>
<th>WEAVING/DRIFTING</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>NEARLY STRIKING CAR OR OBJECT</td>
<td>WIDE RADIUS TURN</td>
</tr>
<tr>
<td></td>
<td></td>
<td>STOPS WITHOUT CAUSE</td>
<td>LOOKS INTOXICATED</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NOT IN MARKED LANE</td>
<td>EQUIPMENT VIOLATION</td>
</tr>
<tr>
<td></td>
<td></td>
<td>RAN STOP SIGNLIGHT</td>
<td>FOLLOWING TOO CLOSELY</td>
</tr>
<tr>
<td></td>
<td></td>
<td>BRIGHT/NO LIGHTS</td>
<td>OTHER</td>
</tr>
</tbody>
</table>

### 46 Field Test

<table>
<thead>
<tr>
<th>WALK AND TURN</th>
<th>3</th>
<th>MARK</th>
</tr>
</thead>
<tbody>
<tr>
<td>CANT KEEP BALANCE WHILE LISTENING TO INSTRUCTIONS</td>
<td>ALCOHOL LEVEL</td>
<td></td>
</tr>
<tr>
<td>STARTS BEFORE INSTRUCTIONS FINISHED</td>
<td>DISCOLORATION</td>
<td></td>
</tr>
<tr>
<td>STOPS WHILE WALKING TO STEADY</td>
<td>OF</td>
<td></td>
</tr>
<tr>
<td>DOES NOT TOUCH HEEL TO TOE</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>LOSES BALANCE WHILE WALKING</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>INCOMPLETE NUMBER OF STEPS</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>CANNOT/REFUSES TO DO TEST</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

INSTRUCTIONS READ PER MTL FORM: 

### 47 Chemical Testing

<table>
<thead>
<tr>
<th>TIME OF TEST</th>
<th>2</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHEMICAL BREATH TEST: ADMINISTERED BY</td>
<td></td>
</tr>
<tr>
<td>DEVICE</td>
<td>SERIAL #</td>
</tr>
<tr>
<td>RESULTS</td>
<td></td>
</tr>
<tr>
<td>URINE TEST SAMPLE: OBTAINED BY</td>
<td></td>
</tr>
<tr>
<td>SAMPLE STORED IN</td>
<td></td>
</tr>
<tr>
<td>BLOOD SAMPLE: TAKEN BY</td>
<td></td>
</tr>
<tr>
<td>AT</td>
<td>HOSPITAL</td>
</tr>
<tr>
<td>SAMPLE STORED IN</td>
<td>AT MTLP FOR TRANSPORTATION</td>
</tr>
<tr>
<td>TO</td>
<td>LAB</td>
</tr>
</tbody>
</table>
FIGURE 3.3 U.S. District Court Arrest Warrant.
Generally, legislation concerning citizen’s arrest needs to attend to diverse variables and criteria, which determine its legality. Types and category of crimes, standards of action, time of day, and alternative retreat potential are but a few of these. Critics have charged that the codification appears to be “more a product of legislation in discrimination than a logical adaptation of a common law principle to the conditions of modern
While legislators hope and wish for skilled, trained, and educated individuals to effect as many arrests as possible, the statutes have essentially sought a middle ground permitting arrests only when needed and emphasizing the system of citizen referral to public authority when at all possible. However, the process of citizen's arrest is “filled with legal pitfalls,” which “may depend on a number of legal distinctions, such as the nature of the crime being committed and proof of actual presence at the time and place of the incident.” Some analyses of these variables and factors follow.

Time of the Arrest
Both common law and statutory rationales for the privilege or right of citizen's arrest impose time restrictions on the arresting party. In the case of felonies, the felon's continuous evasion of authorities was considered a substantial and continuing threat against the public order and police. Therefore, an arresting party could complete the process regarding a felon at any time. Persons committing misdemeanors, however, were afforded greater protection from private citizen arrest actions. Some states require that the person committing a misdemeanor be arrested by a private citizen only when actually engaging in conduct that undermines the public order. However, other states have dramatically expanded the misdemeanor defense category beyond the breach of the public peace typology. More specifically, states have expanded the arrest power to include petty larceny and shoplifting, and they have provided a rational barometer of when citizens' arrests are appropriate.

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

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

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

A few jurisdictions have attempted to reconcile this dilemma by allowing felony arrests to occur without a presence requirement. Presence is simply replaced with a reasonable grounds or reasonable cause criteria. The Report of the Task Force on Private Security from the National Advisory Committee on Criminal Justice Standards and Goals addresses this qualification:

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

A review of citizen’s arrest standards on a state-by-state basis is provided in Table 3.1. Note that Table 3.1 makes a distinction between minor and major offenses, namely between felonies and misdemeanors. It also outlines the general grounds leading to a finding of probable or reasonable grounds required to affect an arrest. Some general statutory conclusions can be made:

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

In sum, hunches, guesses, or general surmises are not a satisfactory framework in which to conduct citizens’ arrests. Just as the public police system must adhere to some fundamental standards of fairness regarding the arrest, search, and seizure process, so too must private sector justice. Arrest based on reasonable grounds is the benchmark.
Table 3.1 Summary of Citizen’s Arrest Standards by State

<table>
<thead>
<tr>
<th>Minor Offense</th>
<th>Major Offense</th>
<th>Certainty of Correct Arrest</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of Minor Offense</td>
<td>Type of Knowledge Required</td>
<td>Type of Major Offense</td>
</tr>
<tr>
<td>Crime</td>
<td>Breach of the peace</td>
<td>Felony</td>
</tr>
<tr>
<td>Misdeemeanor</td>
<td>Breach of the peace</td>
<td>Larceny</td>
</tr>
<tr>
<td>Misdemeanors Amounting to a Breach of the Peace</td>
<td>Upon reasonable grounds that is being committed</td>
<td>Petty larceny</td>
</tr>
<tr>
<td>Pardonable offense</td>
<td>Immediate knowledge</td>
<td>Crime involving theft or destruction of property</td>
</tr>
<tr>
<td>Pardonable offense</td>
<td>Reasonable grounds to believe being committed</td>
<td>Information a felony has been committed</td>
</tr>
<tr>
<td>Immediate knowledge</td>
<td>Upon reasonable grounds</td>
<td>Reasonable grounds</td>
</tr>
</tbody>
</table>

Alabama
Alaska
Arizona
Arkansas
California
Colorado
Georgia
Hawaii
Idaho
Illinois
Iowa
Kentucky
Louisiana
Michigan
Minnesota
Mississippi
Montana
Nebraska
Nevada
New York
N. Carolina
N. Dakota
Ohio
Oklahoma
Oregon
S. Carolina
S. Dakota
Tennessee
Texas
Utah
Wyoming
The Restatement of the Law of Torts cogently justifies a citizen's arrest in these circumstances:

a. If the other person has committed a felony for which he is arrested;
b. If a felony has been committed and the arrestor reasonably suspects the arrestee has committed it;
c. If the arrestee in the arrestor's presence is committing a breach of the peace or is about to renew it;
d. If the arrestee has attempted to commit a felony in the arrestor's presence and the arrest is made at once or in fresh pursuit.32

Depending on jurisdiction, another factor to be considered by security personnel in the arrest process is notice, an announcement advising a suspect of one's intention to arrest. The level of force utilized and the detention techniques for a person awaiting formal processing may also be significant factors in any resolution of the propriety of a citizen's arrest.

The Law of Search and Seizure: Public Police

There are two fundamental ways in which a public peace officer can conduct a search and seizure: with or without a warrant. Warrants are expressly referenced in the Fourth Amendment and their probable cause determination is explicitly mentioned. Searches with warrants are mandated unless one of the various exceptional circumstances exists to justify a warrantless action. There are numerous exceptions to the warrant requirement from consent of the arrested party to exigency and safety. The exceptions have been shaped and crafted, not as an affront to the fundamental protection, but in full recognition of the practical reality and criminal activity and law enforcement policy. When public police search without justification or legal right, the evidence so taken is excluded due to the constitutional infringement. This restrictive policy is labeled the exclusionary rule.33 In *Mapp v. Ohio*34 the U.S. Supreme Court rendered inadmissible evidence obtained by public law enforcement officials in violation of the Fourth, Fifth, and Sixth amendments of the U.S. Constitution. The Fourteenth Amendment has selectively incorporated these three amendments as they apply to state police action. For an example of a federal search warrant see Figure 3.4.

As part of routine procedure, a police officer who makes a lawful and valid arrest, with or without an arrest warrant or at arm's length, is entitled to search the suspect and the area within his immediate control. At other times, the search and eventual seizure may arise from a plain view observation. Plain view permits any law enforcement official who sees contraband, weaponry, or other evidence of criminality within direct sight or observation to seize the evidence without warrants or other legal requirements. Police may search and seize contraband in any open space environment, such as agricultural centers for narcotics. This warrantless exception is often referred to as the
FIGURE 3.4 U.S. District Court, Search & Seizure Warrant.
FIGURE 3.4—Cont’d

<table>
<thead>
<tr>
<th>Return</th>
</tr>
</thead>
</table>

Case No.: | Date and time warrant executed: | Copy of warrant and inventory left with: |

Inventory made in the presence of: |

Inventory of the property taken and name of any person(s) seized: |

<table>
<thead>
<tr>
<th>Certification</th>
</tr>
</thead>
</table>

I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.

Date: ___________________  

[Signature]  

[Printed name and title]
open field rule. Police can search and seize evidence in any abandoned property or place. Warrant requirements for police are waived in cases of extreme emergency known as exigent situations, as when there is a high likelihood of lost evidence. Naturally, police have also been given leeway to conduct warrantless searches when their personal safety is at risk. Auto searches and consent searches generally bypass the more restrictive warrant requirements. Stop and frisk, as outlined in *Terry v. Ohio*, allows police to “pat down” a suspect if it’s reasonable to suspect weaponry or other potential harm.

A review the Handout summary prepared by Stanford University on the Terry doctrine and its inapplicability to private security guards can be found at http://streetlaw.stanford.edu/Curriculum/Short_Lesson3.pdf.

One other factor is worth mentioning as well—namely, immunity. Historically, public officers operated under some level of “immunity,” whether whole or qualified in design. That immunity insulated government agents from liability as long as his or her “actions [are] taken in good faith pursuant to their discretionary authority.” Determining whether a public official is entitled to qualified immunity, then, “requires a two-part inquiry: (1) Was the law governing the state official’s conduct clearly established? (2) Under that law could a reasonable state official have believed his conduct was lawful?” This standard “gives ample room for mistaken judgments by protecting ‘all but the plainly incompetent or those who knowingly violate the law.’”

The Law of Search and Seizure: Private Police

The rationale behind the exclusionary rule is to deter police misconduct and to halt illegal and unjustified investigative processes. As noted previously, in *Burdeau v. McDowell*, the Supreme Court of the United States was unwilling to extend the exclusionary rule to private sector searches. Burdeau held exclusionary rule inapplicable, as it was clear that there was “no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure as whatever wrong was done by the act of individuals in taking the property of another.” Trial attorney John Wesley Hall, Jr., writes in *Inapplicability of the Fourth Amendment*:

*One of the oldest principles in the law of search and seizure holds that searches by private or non-law enforcement personnel are not protected by the Fourth Amendment regardless of the unlawful manner in which the search may have been conducted. The Fourth Amendment historically only applies to direct governmental*
action and not the passive act of using relevant evidence obtained by a private party's conduct.\textsuperscript{44}

Others disagree with these lines of legal explanation, especially when one considers how extensive the inroads of private sector justice are in the war on crime. The regularity of arrest, search, and seizure processes in private security settings are now amply documented. In retail establishments, security personnel regularly search individuals suspected of shoplifting. Security firms have now taken over entire neighborhoods, housing projects and planned communities, and even cities and towns.

Searches are also seen in business and industrial applications. “These could include search of a car or dwelling for pilfered goods or the use of electronic surveillance devices to obtain information for use in making legal, business or personal decisions.”\textsuperscript{45} Additionally, surveillance by private security companies utilizing various forms of electronic eavesdropping, emerging technologies, and other interception devices, while still regulated to some extent in the public sector, is more readily utilized and commonly employed in the private sector.

The Private Security Advisory Council ponders a noticeable lack of either common law or statutory authority governing private search parameters.\textsuperscript{46} Yet even with the industry's practices, this lack of restrictions in the private sector is inexcusable. However, the council does list these instances as legitimate private search actions:

1. Actual consent by a person
2. Implied consent as a condition of employment or part of an employment contract
3. Incidental to valid arrest
4. Incidental to valid conditions\textsuperscript{47}

In some respects, these four categories parallel the very conditions under which public law enforcement may permissibly conduct warrantless searches. “As a general consideration since the public police are intended to be society's primary law enforcers, the limitations on public police search should set the upper boundaries of allowable search by private police.”\textsuperscript{48} Of course, it is also critical to note that while constitutional restrictions may not yet apply in the private security realm without a more demonstrable showing, other remedies are available to those who have been illegally arrested, searched, or had personal effects or property unjustly seized. These tort actions and corresponding civil and criminal remedies include, but are not limited to the following:

- Battery
- Theft
- Trespass
- False imprisonment
- Invasion of privacy or being placed in a false or humiliating light
• An action for false imprisonment or malicious prosecution as well as potential civil rights violations

To track a private sector search of the person, review the checklist at Figure 3.5.49

In summary, the constitutional guidelines and case law interpreting standards of public police practice have yet to make a remarkable dent in private security activity.

![Figure 3.5 Checklist for Search and Seizure.](image-url)
Relying on strong precedent, statutory noninvolvement, and a general hesitancy on the part of the courts and the legislatures to expand constitutional doctrines like the exclusionary rule, private security practitioners are still provided a safe haven in the law of arrest, search, and seizure.

**Challenges to the Safe Harbor of Private Security**

Despite this general resistance to expanding the constitutional dynamic to private sector police, legal advocates push hard for such reforms, and a variety and steady stream of case law reach appellate courts across the country every year. Some case law is more significant than others. Few cases have had much success in altering this legal landscape. An appeals decision from California carved out a noticeable precedent for those arguing for the expansion of these constitutional rights.

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

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

Mindful of the facts of this case, the Supreme Court of California could not recite any cases including a connection or legal nexus between private and public police activity. Instead, the court simply dismissed previous decisions based upon a variety of rationales, including the security industry’s new and dynamic involvement in the administration of justice. The court cited that the “increasing reliance placed upon private security personnel by local enforcement of criminal law” particularly as it relates to privacy rights and procedural rights of defendants. In the end, the California Supreme Court relied on its own Constitution, Article 2, Section 13, which ironically is a mirror image of the federal provision. Upon closer reading, the decision is a startling departure, at least at the state level. Stephen Euller, in his article “Private Security in the Courtroom: The Exclusionary Rule Applies,” made a bold prediction:
Like it or not the Zelinski rule is coming. There are good reasons why professionals should welcome it. The Zelinski court recognized that private security personnel play an important role in law enforcement and often act on the public’s behalf. Part of the reason some people are concerned about abuse is simply because security professionals have at times demonstrated rather impressive investigative skills and sophistication. The new rules will encourage the private security industry to upgrade itself, its level of professionalism, to discipline itself, to erase the image of the lawless private eye.56

Just when the private act transforms into a public one is difficult to tell. The level of public inducement, solicitation, oversight, and joint effect manifest a transformation. In State of Minnesota v. Beswell,57 the court claims to have witnessed the transformation of private security personnel at a racetrack, who conducted searches on patrons, into a public persona. When cocaine was discovered, defendants assert that the private security agents had sufficient public connections to trigger a series of constitutional protections. The court qualified its public finding by corroborating the private/public interplay. It stated:

In the instant case, a meeting occurred where public officials and private personnel reached an understanding regarding arrest procedures to be utilized upon the discovery of contraband by the private guards. Although this meeting dealt with the aftermath of searches, and not the manner of searching, the meeting produced a standing arrangement for contacts by the supervising security agent with police during the hours of operation, and a police officer was designated on call to assist with arrests.58

Add to this reasoning the adoption of the “public function” test, that imputes constitutional remedies when the nature and scope of private police conduct exhibits all the qualities and characteristics of a “public” act.59 Regardless of direct police involvement, systematic use of random contraband searches serves the general public interest and may reflect pursuit of criminal convictions as well as protection of private interests. Marsh v. Alabama60 supplies the basis for concluding that private investigators and police may be subject to the Fourth Amendment where they are with some regularity engaged in the “public function” of law enforcement.61,62

Courts in the mold of Beswell look to corroborate the advocate’s assertions. In short, does the private security officer act like a public police officer?63

Wearing police uniforms and using police restraint processes “(handcuffing appellants to fences, conducting body searches), indicates the similarity of function and role.”64 Function infers a similarity of approaches and thereby awards an identical series of protections—at least in a theoretical sense. Finally, the court weighed the security agency hiring a full-time public police officer as further evidence of the transformation. Such officers are formally affiliated with the government and are usually given authority
beyond that of an ordinary citizen. Thus, they may be treated as state agents and subject to the constraints of the Fourth Amendment.\(^{65}\)

Zelinski and Beswell manifest a voice of discontent and a resulting intellectual demand for change in traditional constitutional applications for the private security industry.\(^{66}\) In this sense, Zelinski and Beswell signify a slow and very ineffective evolution. A quick glance at the precedential power of these cases attests to the firmness of the present legal foundation.

**The Platinum Platter Doctrine**

Challenges to the applicability of the exclusionary rule, whereby evidence is excluded for errant search, seizure, or arrest processes, are continuously witnessed in higher courts. It is not a popular legal principle in more conservative quarters. Initially, the exclusionary rule was held applicable to federal action alone and was not applicable in state cases.\(^{67}\) Federal agents realized this early on and clandestinely employed the services of state agents who delivered up evidence or other treasure while avoiding the constitutional challenges. For state police officers, the delivery of the evidence, despite its procedural impropriety, was figuratively handed over on a “silver platter.”\(^{68}\)

These types of abuses, while inevitable, have long been minimized by the selective incorporation of the Bill of Rights by and through the Fourteenth Amendment. By this interpretation, state action becomes the type of governmental action that triggers constitutional demands. Consequently, state law enforcement and federal law enforcement play under identical rules. But private security is still exempt from these constitutional mandates, and the silver platter is irrelevant. Even so, there are some advocates who claim that public law enforcement uses private sector justice operatives as conduits or feeders. As a result, private security gives life to another version of the platter—the platinum variety. Hence, the use by state and federal officials of private security operatives to arrest, search, or seize, without the usual constitutional oversight, has been labeled the Platinum Platter Doctrine. In arguing that the entanglement of private sector/state involvement creates a relationship substantial enough to justify expansion of the Fourth Amendment, B.C. Petroziello calls for a reexamination of the Burdeau doctrine. Referring to special police officers in the state of Ohio as quasi-public figures, he argues that special police should no longer be permitted to hand over elicited evidence on a “platinum platter.”\(^{69}\) His comments provide food for thought:

*The confusion caused by the current state of the law could be obviated by the use of a much simpler and more preferable standard. The substance of this standard encompasses a different view of what is meant by private individual: no one should be considered private under Burdeau if he is employed or paid to detect evidence of crime or has delegated any more power possessed by the average citizen. Whenever a person meeting either of these qualifications tramples a defendant’s rights the evidence so gathered is to be excluded at trial.*\(^{70}\)
For critics of unbridled private sector power, the more the private sector cooperates with public authority, the more its occupational role metamorphoses from private to public function. In essence, the entanglement and entwining is so complex and complicated that distinct roles have evaporated. As attractive as the theory is, it suffers conceptually. The principles of Burdeau should not be inapplicable simply because a person is employed or paid to detect criminality or because that person is chartered by the state or other governmental authority. If such reasoning were followed, then any attorney or licensed individual, including truck drivers, polygraph examiners, forest rangers, or park attendants, who are subject to governmental review, would fall within this scheme.

Despite the difficulties of merging public and private functions to the extent they are one and the same, it is equally undeniable that the private security industry is increasingly engaged in public activity, public protection and safety, and public function. The question of whether this “public” dimension is substantial enough to apply the constitutional regimen is still debatable. What is certain is that in the age of escalating privatization, adoption of a public function theory may be plausible in a host of contexts.

**Private Action as State Action**

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

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The principles of private action/state action have largely been argued in discrimination cases. Assess the historical underpinnings of this theory at http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/stateaction.htm.

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Few functions, systems, enterprises, endeavors, or institutions are completely free from some level of governmental involvement or oversight. The tentacles of governmental influence weave their way into literally every facet of modern life. Whether it be business operation or licensing, environment or workplace safety, unions and work rules, the heavy hand of government is discoverable just about everywhere. The security
industry, like any other commercial concern, is subject to an endless series of oversights including these:

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

Some legal advocates and their plaintiffs think any interaction is sufficient to meet the public function theory. In *Copeland v. City of Topeka*, the court threw out the allegation of public involvement, commenting:

> Nothing in plaintiff’s complaint sufficiently alleges that defendants, or either of them, engaged in acts under color of state law. Instead, the seizure and subsequent treatment of plaintiff at Dillons cannot be fairly attributed to the City of Topeka under any of the tests for state action. For a merchant or its security officers to call the police when they suspect shoplifting or destruction of property is insufficient to constitute state action. No acts allegedly taken by officers of the City of Topeka at the scene reveal prior collusion with defendants, or compliance with any requests by the defendants, or either of them, let alone the requisite joint action. Plaintiff’s assertion that defendants “directed and controlled” the City police department is conclusory and unsupported by the facts alleged in the complaint.

Licensure and the state’s grant to incorporate or operate as a business form is a favorite of those hoping to prove the interplay of the public and the private. The theory concludes that the mere erection of the business form, which in turn seeks the approval of a governmental entity, is sufficient to change the private into the public. In turn, this “public” quality of the act justifies the imposition of new constitutional requirements.

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

_The exclusionary rule itself was adopted by the courts because it was recognized that it was only by preventing the use of evidence illegally obtained by public officials that a curb should be put on overzealous activities of such officials. The Supreme Court has in no instance indicated that it would apply the exclusionary rule to cases in which evidence was obtained by private individuals in a matter not countenanced if they were acting for state or federal government._77

While most, if not all, security entities have some level of state involvement due to approval mechanisms, this is not the stuff of “institutional character, derived at least in part from grants of state authority and reflect[ing] governmental functions from which one may infer state action.”78 Although this argument may be partially meritorious, it lacks the substantiality, the depth, and the breadth to be equated with state action. While modern constitutional jurisprudence has been comfortable elasticizing principles of state action in a variety of settings, especially in race and sex discrimination cases, these principles are a harder sell in the occupational marketplace. Even so, arguments regarding state action in the security environment do have a following. Arguably, a case of state action exists if there is direct participation and assistance by public police officers in the seizure of evidence by private security officers. John Wesley Hall comments:

_In view of the long-standing rule permitting private searches it will be incumbent on defense counsel to demonstrate some form of law enforcement participation in the search. Mere acceptance of the benefits of a private search by the prosecution authorities is not participation in the private search and seizure._79

Direct involvement or participation is not proven by inference, but instead by a defendant’s demonstration of direct involvement. In _United States v. Lima_,80 the D.C. Appellate Court articulately espoused that private individuals can become agents or instruments of the state if the government is sufficiently involved in the development of actual plans or actions carried out by private persons. The Lima decision mandates “a significant relationship … between the state and private security employees to find state action; something whereby the state intrudes itself into private entity.”81 The Lima case contends that mere licensing is not a sufficient basis for state action and that the D.C. licensing statute vested no particular state authority to license security personnel.82

A second rationale for finding state action, outside of direct assistance or participation, is when private security personnel are found not to have acted alone but at the direct suggestion, supervision, or employment of the public police system.83 In short, the private security officers act as fronts for the public police. This form of supervision, control, or direction would include instigation, encouragement, direct suggestions as to
an operation, or any other strategy illustrating law enforcement involvement. 84
“Whether there has been enough police contact for an agency, the relationship to have
existed is a question of fact to be answered by the court.”85

In Snyder v. State of Alaska,86 a defendant appealed his conviction, asserting that his
Fourth Amendment rights were violated. An airline baggage employee had called police
on at least 12 previous occasions to report the discovery of drugs and illegal goods.
Police informed airline employees that they themselves were not permitted to open
packages without a warrant, but that under Civil Aeronautics Board rules, airline
employees had a right to open packages if they believed there was something wrong
or that the items listed on the bill of lading did not accurately reflect what was in the
parcels. The airline employee opened the package, on direction of the Alaskan Police
authorities, and the defendant contended that this level of active involvement, encour-
gagement, and investigation transformed private conduct into state action. The court
denied that there was a sufficient level of conduct to find state action, holding that
the airline employee was

\[ p \]erforming his duties as private employee of a private company in opening the
package received under circumstances reasonably arousing…. The prior contact,
of a general nature, between the State police and airline employees did not cause
the employees to become agents of the police. A zealous citizen does not subject
his activities to the requirements of the Fourth Amendment in Article 1, Section
14 of the Alaskan Constitution.87

A synonymous result was reached in a Georgia case, Lester v. State.88 The appellant
moved to suppress as evidence pieces of copper tubing, which a fire investigator had
taken from the ruins of the appellant’s house. Claiming that the investigator engaged
in governmental activity, the defendant sought to have his conviction overturned on
Fourth Amendment principles. The court ruled with little trepidation that:

Even assuming arguendo that the appellant had standing to object to his search of
these premises it was not error to overrule the motion. The investigator was
dispatched by a private firm at the behest of the fire insurance company. He was
not connected with any law enforcement agency nor did he communicate with
one prior to conducting his investigation. Therefore the search could not have
violated his Fourth Amendment rights.89

Governmental action arising in a private policing context requires a substantial cor-
relation between public and private behavior. The case of Gilette v. the State of Texas,90
in which the defendant asserted that security officers, spying on prospective customers
in a fitting room, violated constitutional protection, is a failed but instructive argument.
The court cited Burdeau v. McDowell as doctrine, maintaining not only its precedential
power, but resisting attempts to expand this constitutional territory. Similar denials of
the state action theory regarding private conduct were also found in New York and New Hampshire. What is striking about these judicial decisions is their simplicity and firm renunciation of legal novelty. The tone could be described as abrupt and impatient over the attempts to unseat well-settled law. The majority of appellate-based decisions treat the argument of state action similarly.

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

*In such cases state action has been recognized when private officers have been formally designated “special police officers.” States often commission “special police officers” to patrol retail stores or to perform occasional public law enforcement services such as traffic or crowd control at parties or sports events.*

Ponder the hiring of the uniformed private security guard at a Job Corps Program, a federally funded retraining facility, and program for disadvantaged youth. Job Corps is funded totally by the public in tax dollars and the uniformed security guards that work on the premises are there to ensure proper behavior of oftentimes some extremely difficult young adults.

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

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

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

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

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

*From the evidence herein it could only be concluded that Lazarus Security employees at the times in question were engaged in activity within the scope of their employment with Lazarus solely for the benefit of their employer, Lazarus, to detect and prevent thievery of Lazarus merchandise. They were acting outside of any public duty they might be authorized to perform as a commissioned special deputy sheriff and only one of the employees could have acted in that respect in any event. To hold in this case that the actions of the Lazarus Security employees constituted state action on their part would not only be contrary to the realities of the situation but would constitute an unwarranted extension of constitutional provisions to apply to the activities of corporations conducted through its employees.*

Deputization, a special commission, or other status, in and of itself, appears an insufficient basis for finding state action. State action requires meaningful participation, significant involvement, and intentional instigation, a series of conducts rarely witnessed. “The exclusionary rule should apply then in cases where government officials directly instigate or supervise searches and seizures committed by private parties for the purpose of acquiring evidence for a criminal prosecution. If courts do not apply the rule of exclusion in these cases, government officials will be permitted to conduct improper searches by employing a private party to commit the physical search.”

A more provocative argument emerges in *Austin v. Paramount Parks,* where plaintiffs alleged that Kings Dominion Park Police where answerable, in a supervisory sense, to the public office of the local county sheriff. The case is further complicated by an employee manual that designates the necessary interaction of the private force with public authority. The manual listed a chain of command that undeniably integrates public policing into this private security context.

The chain of command and authority for all Kings Dominion Park Police shall be as follows involving official law enforcement:

**a.** Sheriff of Hanover County

**b.** Lieutenant of Kings Dominion Park Police
Despite this clear entanglement of private/public law enforcement, the Austin majority rejected the plaintiff’s allegation of sufficient public assumption to trigger constitutional protections. The court further held that the park’s manager of loss prevention lacked all authority over the operations of the public force and dismissed the argument with scant reservation.

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

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

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Assess how fixed and dependable the conclusion that the exclusionary rule does not apply to the private sector is in a recent New Mexico Supreme Court case at http://www.nmcompcomm.us/nmcases/NMSC/2009/09sc-045.pdf.

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The Public Function of Private Security

Proponents of the public function theory would expand and extend the protections of the Fourth Amendment and other aligned constitutional provisions by alleging the public nature of tasks performed by private security. See Figure 3.8 for a portrayal of the many public functions performed by private security. Not only is the occupation alleged to be “public,” its multiple tasks and competencies are “public” in design and scope.

The theory of public function was first advocated in _Marsh v. Alabama_. The case involved a company town, which was privately owned, though its services and functions...
Consent to Search

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

This written permission is given by me voluntarily. No threats or promises of any kind have been made to me.

Signed ________________________________

Date ________________________________

Location ________________________________

WITNESSES:

______________________________

Name, Title, Date & Location

______________________________

Name, Title, Date & Location

FIGURE 3.6 Consent to Search.

mirrored a typical municipality or city. Services undertaken primarily for the benefit of the general public and exercising functions traditionally associated with a form of sovereignty can lead to a public function charge. Advocates of the public function doctrine assertively point out that all police functions are inherently public in nature and design. "Policing is one of the most basic functions of the sovereign when security personnel are hired to protect business premises, arrest, question and search for evidence against criminal suspects. They perform public police functions."107 In the eyes of Professor William J. O’Donnell, in his article “Private Security, Privacy in the Fourth Amendment,”108 courts give far too much credence to the legal status of the party performing the public function rather than the function itself. He notes persuasively:

On the other hand where status does not correspond with function courts have been too quick to rule out state action. Security guards who have not been deputized,
specially commissioned, or otherwise formally charged to protect public interest are routinely equated with private persons by courts despite the fact they are hired to survey, apprehend, detain, and interrogate criminal suspects.109

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

This kind of problem exists, of course, largely because legal authorities continue to define state action principally on the basis of status rather than function—a de jure as opposed to a de facto orientation. As long as this remains the approach, however, the threats to individual privacy rights will increase in proportion to the privatization of policing. A functional approach . . . subject[s] the greater portion of private security industry to Fourth Amendment coverage.110

FIGURE 3.7 Consent to Search, Alternate Form.
Functions of Private Security Personnel

Guard and Patrol Services and Personnel

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

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

Investigative Services and Personnel

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

- Crime or wrongs committed or threatened;
- The identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation, or character or any person, group of persons, association or organization, society, other group of persons or partnership or corporation;
- Preemployment background checks of personnel applicants;
- The conduct, honesty, efficiency, loyalty, or activities of employees, agents, contractors, and subcontractors;
- Incidents and illicit or illegal activities by persons against the employer or employer’s property;
- Retail shoplifting;
- Internal theft by employees or other employee crime;
- The trust or falsity of any statement or representation;
- The whereabouts of missing persons;
- The location or recovery of lost or stolen property;
- The causes and origin of or responsibility for fires, libels or slanders, losses, accidents, damage, or injuries to property;
- The credibility of informants, witnesses, or other persons; and
- The securing of evidence to be used before investigating committees, boards of award or arbitration, or in the trial of civil or criminal cases and the preparation thereof.
That security performs an enormous array of public functions, which include, but are not limited to, arresting shoplifters, controlling crowds, keeping peace in educational institutions, correctional institutions, providing secure environments in banks, hospitals, and other institutions open to the general public, is not a debatable contention. If this is so, does participation in public functions naturally lead to public status? Did the framers of the Constitution intend constitutional coverage to be tied to questions of occupational functionalism? Using police function as a rationale for employing constitutional protections in the private realm may open a Pandora's box. Are toll collectors and maintenance workers next in line for this constitutional scrutiny because they do public things? If this reasoning is adopted, the public function theory could be applied in numerous other environments, including all governmental agencies, social service centers, and welfare offices. While the comparison is not strictly valid, it does shed some light on the complexity of the public function doctrine. The intellectual and legal obstacles to the public function doctrine compel the “apparent hostility of the Supreme Court to expansion of any state action doctrines.” Despite this, some commentators are optimistic regarding the public function theory. The public function analysis is particularly persuasive when applied to cases involving private security protection. The demands of modern commerce have created a need for large numbers of private security forces to assist in the protection of persons and property. Private security companies and their personnel engage in activities that are normally reserved for the police. They often have authority to detain suspects, conduct investigations, and make arrests. Their actions can be as intrusive to individual privacy rights as those carried out by the police. Whether these activities can be construed or defined strictly as governmental functions and thereby as state action subject to the Fourth Amendment may be a breach too difficult to fill.

On top of these considerations, the argument disregards the rights of citizens, businesses, and industries who purposely employ a chosen method or technique of private law enforcement to protect their property interests. Certainly state action doctrines provide a vehicle for extending the Fourth Amendment to some private search cases, but to propose that the function controls legal application constitutes questionable legal logic. If function becomes the dominating factor, then status becomes irrelevant. In People v. Holloway, a Michigan court emphatically stressed the Fourth Amendment's limits. The facts of the case involve a private security guard surveying a consumer acting in a suspicious manner and, according to the guard, about to shoplift. The guard noticed the bulge in the defendant's pocket and subsequent pat down revealed a .32 caliber pistol and knife. The defendant argued a violation of the Fourth Amendment, which the court denied:

Thus an individual has the right to address any wrongs which may have been committed by private citizens be they security guards or not. They can bring civil actions or file defenders. It is because the cloak of sovereign immunity is wrapped around law enforcement officials that the Fourth Amendment is applied to their actions.
There is a growing feeling among the courts of the country that the exclusionary rule has been stretched far beyond its original and very useful purpose.\textsuperscript{114}

A dissenting opinion in the Holloway case, by Judge Falkman, provides a thoughtful counter:

\begin{quote}
Surely it will be argued that the mere fact of licensing alone does not a public official make. It is true that recitation of a familiar “talismanic formula” … has soothing effect on those who invoke it. Even fervent incantation cannot dispel the reality of what function is being licensed here, that of protection of person or property by an organized peacekeeping force.\textsuperscript{115}
\end{quote}

As eloquent as the reasoning may be, to uphold the public function argument may lead to greater difficulties than maintaining the status quo. Public function theorists posit that a private citizen’s privacy rights are undermined when the unreasonableness of a search is “made to depend on the identity of the searcher rather than the activity itself and its infringement on his privacy.”\textsuperscript{116} This argument was unconvincingly made in\textit{ New Hampshire v. Keyser}.\textsuperscript{117} The setting included a department store shopper who switched the contents of a $6.99 cooler with two tape decks worth a total of $150. The defendant claimed he had no knowledge of how the tape decks got into the box. Upon conviction, the defendant appealed, asserting that his Fourth Amendment rights were violated, not by the members of the local police department, but instead by the security guards. The court noted the issues:

\begin{quote}
The question in this case is whether the Fourth Amendment protections extend to the action of the security guards because of their authority, official appearance and police-type function.\textsuperscript{118}
\end{quote}

Providing security in a retail store environment is an insufficient basis to invoke the exclusionary rule.\textsuperscript{119} Hence, the future of the public function argument appears less likely to expand into the private security domain as other competitive theories.

\textit{Color of State Law: A Legislative Remedy}

When constitutionalism fails, the appellate strategist considers legal actions based on statutory schema. Instead of a plea rooted in the Bill of Rights, the advocate urges remedial action based on a particular code or section of a particular act. For example, claims based on Civil Rights infractions and violations are commonly witnessed in the actions against private security personnel. Borrowing from the civil rights theater, plaintiffs assert civil rights violations, infractions, and other wrongs by utilizing the “color of state law” standard discoverable at 42 U.S.C. §1983.\textsuperscript{120}

Put another way, the advocate does not claim a harm arising under a particular amendment but rather an injury to self or property caused by a specific action that
eventually connects to some state action. Proof or demonstration that a state action caused a personal loss, affront, or indignity under the auspices of color of state law is part and parcel of the Civil Rights acts, and in select portions of said acts, these allegations must be grounded in matters that are racially, religiously, or ethnically motivated. Examples might be arbitrary state licensing boards or bodies that reject applications on racial grounds, or denial or rejection of applicants based on religion or creed. Another claim might be a contrived or intentional plan to single out targeted minority groups in a shoplifting deterrence program.\textsuperscript{121}

To discover how private casino employees can act under color of state law, see http://www.martindale.com/business-law/article_Lewis-Roca-LLP_813180.htm.

To claim that security officers or other personnel are acting under color of state law requires objective proof of a racial, religious, or gender motivation, or at least a demonstration that the acts alleged and the injury inflicted were done under the auspices and approval of the state or other governmental authority. The Civil Rights acts have leaned toward a more liberal application in recent years with the emphasis on personal harm arising because of government action by government personnel. \textit{United States v. McGreevy}\textsuperscript{122} provides instruction on the color of state law standard in regard to whether or not the government actor is acting under color of state law. McGreevy’s facts consist of a security officer who held two jobs, one at a Federal Express company and the other as an agent with the Drug Enforcement Administration (DEA). In his capacity as a security officer, he had the right to inspect and open packages that were not properly identified or appeared to be mislabeled or mismarked. During a routine investigation, he found a package that rattled, and upon inspection illegal drugs were discovered. The defendant proposed that the employee with dual jobs was acting under color of state as a DEA agent. The court, much to the dismay of the defendant, disregarded his DEA affiliation and reminded the defendant that the opening of a package occurred under auspices of his Federal Express position. It held categorically:

\textit{Here Petre was not acting under a color of state law when he opened a package. Petre did not hold his Federal Express position because he was a police officer. He carefully separated the two jobs. He knew of no understanding between Federal Express and the DEA for the disposal of contraband.}\textsuperscript{123}

A well-respected Pennsylvania Superior Court decision, \textit{Commonwealth v. Lacey},\textsuperscript{124} assessed an appellant’s claim that a statute governing security guard conduct provided a basis for a color of state law declaration. The court, in interpreting a retail theft statute, dealt precisely with the color of state question:
A peace officer, merchant, or merchant’s employee, or an agent under contract with a merchant who has probable cause to believe that retail theft has occurred or is occurring on or about a store or other retail mercantile establishment and has probable cause to believe that a specific person has committed or is committing the retail theft may detain the suspect in a reasonable manner for a reasonable time on or off the premises for all or any of the following purposes: to require the suspect to identify himself, to verify such identification, to determine whether such suspect has in his possession un-purchased merchandise taken from the mercantile establishment, and, if so, to recover such merchandise, to inform a peace officer or to institute criminal proceedings against the suspect, such detention shall not impose civil or criminal liability on the peace officer, merchant, employee or agent so detaining.125

The appellant’s reasoning concludes that the retail theft statute, in its terms and applicability, inherently bestows police powers on private persons, which the court completely rejected.

To prove color of state law requires proof of a direct relationship between a public official and private security agent. The evidence must demonstrate significant involvement of the private agent acting under a state law and, as a result, causing injury. In Bouye v. Marshall,126 a U.S. District Court held, in the rarest of cases, that an off-duty county police officer crossed the line from private to public since he “wore a police sweatshirt and bullet-proof vest, displayed badge, was performing police function, and used police authority to detain and search visitor.”127

To prove color of state law cases, the courts have devised a series of tests that seek to quantify the level of state involvement, such as the Significant Involvement Test. The test mandates a look at how much state action and state oversight played a role in the harm inflicted while simultaneously looking for participatory schemes between state and federal officials. In Byars v. United States,128 the Supreme Court held that evidence was inadmissible when the unreasonable search and seizure was performed by state officials concluding that state law enforcement was significant enough to satisfy the term “significant.” In Gambino v. United States,129 the Supreme Court also employed the Significant Involvement Test, ruling inadmissible evidence that was seized and acquired by New York State Police in an unjustifiable search met the color of state law standard. The Court was satisfied that the wrongful arrest, search, and seizure was performed for the benefit and exclusive purpose of federal prosecution, and, therefore, “the state officers acting to enforce the federal law were subject to the Fourth Amendment just as if they acted under federal direction.”130 Finding significant involvement or participation between state and federal agents, however, is very different from deducing that the actions of the private security industry and police are equally in concert.

Another argument bolstering color of state law theory is the Police Security Nexus Test: “Under the nexus approach to state action analysis, a court considers the facts of
the situation, looks for a contact between the private actor and the government, and makes a qualitative judgment as to whether there is enough involvement in a challenged action to say that it was an action of the state.”131 As in previous attempts to corral in the protection of the Fourth Amendment, liberal constructionists must show either a significant involvement; a private action fostered, authorized, or colored by state authority; or a public/private relationship conspiratorial in design. The natural procedural ties that develop between private security and public policing give further ammunition to those who propose an expansion of the color of state law theory. Since both public and private law enforcement seek similar ends, are hankering for increased cooperation, and are increasing their overall interaction, some critics call for an end to the immune status accorded private practice.132 Not unexpectedly, public law enforcement has long been considered the private security industry feeder system for informants and assistance. There is a pipeline of trained investigators and security administrators moving from public law enforcement agencies into the private sector. These agencies train the personnel in patrol techniques, investigation, interrogation, arrest, search and seizure, and police administration. Years of experience working with these agencies give security officers a common language, a common method of operation, and a common outlook with those who stayed beyond.133

Professor Euller, in his article in the *Harvard Civil Rights and Civil Liberties Law Review*, contends that police officers have no sense of changeover or “crossing over to the other side” when they join private security systems.134 Consequently, scholarly commentary has emphasized a reexamination of the state action in private security activities. Since a close and symbiotic relationship is emerging with public law enforcement, and since the procedural ramifications of private justice are starting to have a more marked impact on the public justice system, further study is necessary.

**Constitutional Prognosis for Private Security**

One of the chief reasons claimed for the phenomenal growth of the security industry is its ability to avoid the often complex and convoluted legalities that hamper public police operations. Equally crucial is the security industry’s ability to avoid the political machinations that so encumber local, municipal, and federal police departments. Police departments, not security departments, are concerned with statistics, clearance sheets, and the general political issues that emerge in major municipal police departments. “Private agency police appear to be even less conviction-oriented than the public police. They seem to be concerned primarily with the protection of property and personnel.”135

The hostility toward the expansion of rights into the private security realm has been fairly obvious in appellate case law review. A case in point includes *Sackler v. Sackler,*136 from the New York Court of Appeals. A wife, appealing a grant of divorce on the basis of adultery, sought to exclude from evidence information acquired by private
investigators employed by her husband. Surprisingly, defense counsel relied on *Mapp v. Ohio*\(^\text{137}\) as a basis for its decision, stating cynically:

> The theory seems to run like this: before *Mapp* the law of evidence in this state was the same as to all illegal searches whether governmental or not, that is, all evidence so produced was receivable. Now we are told that . . . evidence which is the fruit of illegal government incursions is banned . . . except when under non-governmental auspices. The argument goes too far and proves too much.\(^\text{138}\)

The court, citing *Burdeau v. McDowell*\(^\text{139}\) and other representative precedents, stated that neither “history, logic, nor law give any support for the idea that uniform treatment should be given to governmental and private searches to the evidence disclosed by such searches.”\(^\text{140}\) When research divulges such spirited appellate ponderings, the expansionists’ reasoning pulls at straws. Creative, innovative approaches that afford protection to the general citizenry are always commendable, but to develop various theories of argumentation that fail to withstand legal rigor assures futility for Fourth Amendment applicability in private sector justice. The expansionist camp has to formulate rock-hard, substantive ideas based on the occupational nexus between private and public and criminal procedure. It would be foolhardy to argue a lack of parallels between the private and public police systems, but the similarities are not compelling enough to afford this extraordinary transformation. “Courts and commentators alike should be sensitive to the possibility that the existing powers and controls of private police may require alteration,”\(^\text{141}\) but alteration does not require or lead jurors, practitioners, or academics to the conclusion that what is good for public justice is equally necessary in the private world of professional security. As Eugene Finneran, in his excellent text, *Security Supervision: A Handbook for Supervisors and Managers*, imparts:

> The other side of the controversy believes, as does the author, that it is impossible to separate security from a degree of law enforcement or to separate loss prevention from crime prevention. Even if it were possible to eradicate the joint history of public and private safety and security operations, it would be a mistake to do so. All previous expertise in the protection of assets through crime prevention must be maintained and built upon using this experience as solid base for developing all the skills necessary to become viable risk managers. All professional fields are constantly changing and searching for better methods and procedures for improving performance. Security is no exception.\(^\text{142}\)

Clearly, private sector justice cannot infallibly mimic or imitate public sector justice. Its obligation rests principally in distinct though complimentary mission when compared to the public sector.\(^\text{143}\) By any reasonable measure, it should draw from public sector justice the best it has to offer—namely, the public police system’s dedication to fundamental fairness and due process. Other public sector traits to emulate include
the system's adherence to procedural guidelines, substantive rules and regulations that ensure equity, and an academic and political community of both practitioners and theorists who call to the forefront deficiencies in the American administration of justice. Probably the greatest catalyst in ensuring additional adherence to the public justice model will be the security industry's own desire and motivation as it treks down the long path of professionalism.

Summary

A review of case law, statutory materials, and common law principles concludes that the expansionists' theory of constitutional protection, as to the arrest, search, and seizure principles in private security, garners little intellectual or judicial support. Scholarly materials urge increased constitutional oversight in private sector justice, but jurists and legislators alike have turned a deaf ear. The arguments posed throughout this section have included attempts, disguised in different forms, to show that the task of private sector justice is, at best, mimicry of public law enforcement. While there may be cooperation between public and private law enforcement in their fight against crime, and while there is frequent interaction between the two camps, only the public system, as the Constitution intends, is subject to the severest of judicial scrutiny. The Constitution was designed and devised for the protection of the general citizenry from overzealous government regulation, taxation, and oversight. Arguably, the chief basis for the American Revolution was to remove the onerous restrictions and heavy-handed bureaucracy that government had thrust upon the colonists. From this it is fair to conclude that expansion of this sort is contrary to American legal tradition.

CASE EXAMPLES

STATE OF TENNESSEE V. GREGORY D. HUTSON, 649 S.W.2D 6 (1982)

Facts

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

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

**PRIVATE SEARCH AND SEIZURE—UNITED STATES OF AMERICA V. LACEY LEE KOENIG AND LEE GRAF, 856 F.2D 843 (7TH CIR. 1988)**

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

After replacing all but a small sample of the cocaine with cornstarch, the package was resealed. After consulting a DEA agent, the officer returned the package to the West Palm Beach Federal Express office with instructions to perform a controlled delivery. The package was routed through the Federal Express hub in Memphis, Tennessee. While in Memphis, the package was kept in a Federal Express safe and was opened on two occasions by Federal Express employees to check its contents. The box was once again opened upon its arrival in Peoria, Illinois, on July 19, this time by Illinois state police and a Federal Express employee. Again the contents tested positive for cocaine. The package was again sealed and then delivered to its intended recipient, one Koenig. A federal search warrant was then obtained and executed on Koenig’s apartment, resulting in the seizure of several items including the Federal Express package containing the packets of cornstarch and cocaine samples.

**Issue**
Have defendants been constitutionally violated by this warrantless search?

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

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**Discussion Questions**

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

Notes
6. U.S. Const. amend. IV.


25. Note, Citizen’s Arrest, supra note 17, at 504.


27. Private Security Advisory Council, supra note 4, at 10.

28. Note, Citizen’s Arrest, supra note 17, at 505.

29. Id. at 506.

30. Id. at 506-507.


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42. 256 U.S. 465 (1921).
43. Id.
44. John W. Hall, Jr., Search and Seizure Inapplicability of the Fourth Amendment 53 (1982).
46. Private Security Advisory Council, supra note 4, at 3.
47. Id. at 15.
48. Id.
51. Id.
52. Id. at 1002.
53. Id. at 1006.
54. Id. at 1005.
56. Id.
57. 449 N.W.2d 471 (Minn. App. 1989).
61. Id. at 506. See 1 W. LaFave, §1.8(d) at 200. See also Feffer, 831 F.2d at 739.
65. Id.
70. Id. at 287-288.
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76. 547 F.2d 891 (1977).
79. John W. Hall, Jr., Search and Seizure Inapplicability of the Fourth Amendment 61 (1982).
81. Id. at 121.
82. Id. at 119-120.
87. Id. at 232.
88. Lester v. State, 244 S.E.2d 880 (1978).
89. Id. at 881.
94. Euller, supra note 55, at 606.
96. Id.; see also People v. Tolivar, 377 N.E.2d 207 (1978).
98. Id. at 180.
99. Id.
101. Note, Seizures, supra note 8, at 613.
102. 195 F.3d 715 (4th Cir. 1999).
103. Id. at 730.
104. Id.


109. *Id.* at 12.


113. *Id.* at 456.

114. *Id.* at 460.


117. *Id.* at 225.

118. *Id.* at 226.

119. *See* Smith v. Brookshire, Inc., 519 E2d 93 (5th Cir. 1975); *cert denied*, 424 U.S. 915, 96 S. Ct. 1115, 47 L. Ed. 2d 320 (1976); Duriso v. K-Mart No. 4195, Division of Kresge Co., 559 E2d 1274 (5th Cir. 1977); El Fundi v. Deroche, 625 E2d 195 (8th Cir. 1980); White v. Scraner Corp., 594 E2d 140 (5th Cir. 1979).


122. 652 E2d 849 (9th Cir. 1981).


127. *Id.* at 1358.


129. 275 U.S. 310 (1927); *see also* Stonehill v. U.S., 405 E2d 738 (9th Cir. 1968); U.S. v. Mekjian, 505 E2d 1320 (5th Cir. 1975). Note, *Private Searches and Seizures: supra* note 71, at 185.


131. *Id.*


134. *Id.*


139. 256 U.S. 465 (1921).
140. Sackler v. Sackler, 15 N.Y.2d 42.