

PRIVATE POLICE VIOLENCE AND THE SCOPE OF SECTION 1983

By Lynne Wilson

Ricky Renard Coleman never bothered to apply for a South Carolina Private Security Officer license. He didn't have to. In 1995, Coleman worked for Best Buy, Inc. as a "Product Security Controller," a job that is exempt from the licensing and training requirements of the South Carolina Private Security Act, S.C. Code §40-17-10 et.seq. Coleman just showed up for work at the Peachwood Mall in Spartanburg and stood near the Best Buy checkout stands, using his smile, his 5'9", 270 pound frame and a large "I Care" name tag to do his job.

On July 20, 1995, Coleman performed his job with a vengeance. At 3:00pm, a store manager started to question Douglas Fischer, a 24 year old college student, about what appeared to be the purchase of a \$4,500 laptop computer and printer with a fraudulent credit card. When Fischer abandoned the merchandise and bolted for the parking lot, Coleman grabbed him around the neck and wrestled him to the ground, using a chokehold method that is banned by public law enforcement agencies around the country. Even after the 5'8" 200 pound Fischer started spitting up blood and "obviously couldn't breathe," according to witnesses, Coleman "kept choking him" and said, "[q]uit fighting or I'll break your fucking neck." Despite resuscitation efforts, Fischer was

pronounced dead from a heart attack at the Spartanburg Regional Medical Center at 4:01pm. See Complaint filed 7/15/97 in Fischer, et al vs. Best Buy Co. Inc. et al, Cause No. 7:97-2109-21 (U.S.D.C. Spartanburg Division, S.C.).

Prior to Fischer's death, Coleman had a record for violence. Eight months earlier, in November 1994, Greenville, S.C. Police arrested him for assault, battery and pointing a firearm at a customer at a nightclub where he was working as "Coleman Security." Coleman had followed the customer to a pay phone where Coleman pulled out his pistol, forced the man to the ground and handcuffed him. The unlicensed but uniformed Coleman was also charged with violating the South Carolina Private Security Act.

"We've had trouble with Coleman and his security outfit before," said Greenville Police Lt. G.S. McLaughlin later. "They are untrained and cause more trouble than they solve. Their idea of security was shooting the customers." Brett Bursey, "Best Buy: A Killer Deal," The Point (March 1996) at 4. Bench warrants were issued when Coleman subsequently failed to show up for trial, warrants which were still outstanding at the time he applied for the Best Buy "Loss Prevention" job in June 1995. Id.

Because of his criminal record, on July 20, 1995, "Ricky Coleman would never have been licensed under the South Carolina Private Security Act, even if he applied," commented attorney Jeff

Turnipseed of Turnipseed & Associates in Columbia, S.C., the firm representing Fischer's estate in its wrongful death suit against Best Buy. "The South Carolina statute prohibits licensing as an independent private security guard someone with a background like Coleman's. But the statute doesn't apply to someone like Coleman works directly for Best Buy as a Loss Prevention employee." S.C. Code §40-17-150(a)(6) (exempting from licensing persons in an employer-employee relationship utilized solely as nonuniformed ... security personnel in connection with an employer's business).

If Coleman had been licensed, notes Turnipseed, the South Carolina Law Enforcement Division would have required training regarding special arrest powers granted under the Statute as well as minimal training regarding arrest procedures including the appropriate use of force. S.C. Code §40-17-130 (licensees granted arresting authority and power of sheriffs but limited to property being guarded); S.C. Code Regs §73-40(20) (requiring four hours of arrest procedure training). But because he possessed no license and had no need for one in his job, Coleman's arrest powers, including his authority to use force, were solely those of untrained private citizen making an arrest for a suspected felony. State v. Nall, 404 S.E.2d 202 (S.C.App. 1991) (common law permits private person to arrest for felony).

Also because he possessed no license and thus no special

arrest authority, Coleman was not a "state actor" for Fourth Amendment purposes. Therefore, no basis existed for filing a federal civil rights lawsuit under 42 U.S.C. §1983 [Section 1983]. "We researched this carefully before filing the wrongful death suit but came to the conclusion that with this set of facts there was no basis for doing so," said Turnipseed in a recent interview. Compare Thompson v. McCoy, 425 F.Supp. 407 (D.C.S.C. 1976) (actions taken under Private Security Act were taken "under color of state law") with State v. Cooney, 463 S.E.2d 597 (S.C. 1995) (Fourth Amendment's prohibition against warrantless, unreasonable searches and seizures does not apply to private individuals not acting as agents of the State). The federal court has jurisdiction over the tort claims [for negligent hiring, training, supervision, battery and failure to render aid] filed by Fischer's estate against Best Buy, Inc. based solely on diversity since Best Buy's principal place of business is in Minnesota.

It is an unfortunate reality of current civil rights law that many cases involving private police violence will, like Fischer v. Best Buy, involve no acts taken "under color of state law." They will thus fall outside the scope of Section 1983. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (the only proper defendants in a Section 1983 claim are those who represent the state in some capacity, whether they act

in accordance with their authority or misuse it).

It is also an unfortunate reality that, as the millennium approaches, the phenomenon of private and "quasi-private" police is growing exponentially and is in some areas actually replacing the democratically controlled police power of the state. As attorneys are increasingly faced with representing victims of private or "quasi-private" police violence, creative legal theories need to be asserted to ensure that civil rights are not completely gutted in the process.

In an attempt to sort out some of these issues, this article will address (1) the forces driving the huge increases in private police, (2) arrest powers of various private security personnel, (3) Section 1983 "under color of state law" theories as applied to private security guards and private police, and (4) civil rights liability of corporations that employ licensed or unlicensed security guards. It will also briefly address the **Private Security Officer Quality Assurance Act** that is currently before the United States Congress.

#### **BACKGROUND: THE RISE OF PRIVATE POLICING**

Tragic as it is, the story of Ricky Coleman and Douglas Fischer is not an aberration in a country where private security guards now outnumber public police officers by 3 to 1 and many are unlicensed, unregulated, unscreened and untrained. See Susan

Byrnes, "The Cost of Fighting the Private War on Crime," The Seattle Times (6/27/97) at A1, A13 (detailing two Seattle area killings by armed private security guards in 1997). Security industry executives now estimate that the number of these private guards will balloon to two million by the year 2000, inflating to 4 to 1 the ratio of private to public police in the United States. Mike Zielinski, "Armed and Dangerous: Private Police on the March," Covert Action Quarterly (Fall 1995) at 44.

Private police are virtually ubiquitous. As noted in the **Private Security Officer Quality Assurance Act**, currently before the Senate Judiciary Committee, the "American public is more likely to have contact with private security personnel in the course of a day than with sworn law enforcement officers." **Private Security Officer Quality Assurance Act**, [H.R. 103], Sec. 2 **Finding** (4). In addition to shopping malls, churches are hiring private security patrols, as are residential communities, apartment complexes and commercial business districts. As municipal law enforcement budgets shrink, corporate employers are turning to private security to protect employees in situations that might once have been considered the responsibility of the police. For example, some employers now hire security services to patrol parking lots and to escort employees to their cars. In addition, many functions formerly performed by public police such

as public building security and funeral escort services are now turned over to private firms with up to one third of all private security working for the government. Julien G. Patterson, "Forging Creative Alliances," Security Management (January 1995) at 33.

This exponential growth is a relatively recent phenomenon: In 1970, more public police officers patrolled the streets of America than private guards in shopping malls, apartment or business complexes. "Welcome to the New World of Private Security," The Economist (4/19/97) at 21. But by 1997, private security firms employed more than 1.8 million people, nearly triple the number [684,000] of state and local police officers.

The private security industry is now a \$100 billion business with firms ranging from one person offices to those of Pinkerton, Inc., the country's oldest security firm that employs more than 45,000 people internationally. Ann Brown, "Security Sweep," Black Enterprise (April 1997) at 33. Labor statistics indicate that more jobs will be created in the private security industry than any other category well into the 21st century. Zielinski, supra at 44, citing testimony before the House Subcommittee on Human Resources (6/15/93).

But the working conditions of those jobs are horrendous: Many security firms pay minimum wage, have turnover rates that

approach 500 percent per year, hire a guard one day and put him on duty the next with no training, no future and no thought about how the person will interact with the public. Id at 48. Critics and industry advocates alike agree that the industry's greatest weakness is the lack of rigorous background checks. "There are security officers in this nation who are convicted murderers and rapists, who are thrilled at the sight of fire, who think that a uniform gives them authority, and that a gun gives them power, who cannot control their urges or their wants, who prey on those they are hired to protect," comments Ira Lipman, president of Guardsmark, the fifth largest security firm in the U.S. "[Security firms] do not even attempt to check applicants' criminal records, military service records, personal references, previous employers or educational claims." Quoted in Zielinski, supra, at 48.

In spite of these conditions, the proliferation of this virtual private army is occurring without either federal or state regulation. Ricky Coleman notwithstanding, South Carolina is an oasis in a wilderness where few states go to the trouble of regulating, licensing or providing minimum screening standards for the hiring of private police. In October 1995, only eighteen states did so. Sherry Harowitz, "A Shot in the Dark," Security Management (Oct. 1995) at 47 (other states include Florida,

Arkansas, Oklahoma, California, Washington and New York). Oregon was the nineteenth state to pass private security legislation, effective January 1997. Jo Ann Langford, "Building Support for Security Legislation," Security Management (September 1996) at 176.

Incredibly, the vast majority of states do not even require firearms training for guards equipped with weapons, a group which has been estimated at twenty percent of the total. "Private Police," CAQ, supra at 48. Only twelve of the states that regulate private security even keep track how many officers are armed. Harowitz, supra at 47. Although insurers as well as industry groups such as the American Society for Industrial Security are now behind organized efforts to pass legislation in all states that will at least define minimum standards, regulation is happening at a glacial pace. Langford, supra.

The problems associated with private policing are not confined to the United States. Although the United States has a much larger private security "industry" than other countries [with estimates of between 10,000 and 15,000 companies], police privatization is rapidly growing everywhere. In Britain, Canada and Australia the number of private guards is now twice that of public police officers. In Russia and South Africa, the ratio is ten to one. "Welcome to the New World of Private Security," The

Economist (4/19/97) at 22.

In many of these countries, private security firms are even less regulated than they are in the U.S., with predictably disastrous consequences for the human beings they police. In one horrific incident in South Africa, sixteen commuters died and 65 were injured during a stampede at a railway station in the black township of Tembisa near Johannesburg. Private ticket inspectors, hired a few days before to provide security, used electric cattle prods and gun butts to crack down on fare dodgers although none were authorized to do so. Woodgate, "Community Fury Follows Deaths at Station," The Star [Cape Town, S.A.], 7/31/96.

The myriad of forces behind the phenomenal growth in private police are complex but the phenomena itself is not new. Prior to the emergence of professional public police forces in the United Kingdom in the early 1800s, policing was organized on a private basis. Daniel Nina & Stuart Russell, "Policing By Any Means Necessary: Reflections on Privatization, Human Rights and Police Issues," Australian Journal of Human Rights, Vol. 3, No. 2 (1997) at 166 and 161 n.14 (defining "policing" as a network of resources which are engaged in providing safety and security). After the creation of public forces, the private element did not disappear but rather co-existed in a subordinate position. The private sector did not begin to increase exponentially until the 1960s and

by the 1970s it became a significant part of all police functions in North America and Europe. Stuart Russell, "The Future of Private Policing in the Dualistic World of Policing," in Towards Democratic Policing (1997, 2nd Ed.) [Community Peace Foundation, Capetown, S.A.].

What has prompted the massive growth since then? One commentator charts the following reasons for the dramatic re-emergence of private policing: (1) loss of confidence in the public police force, given widespread corruption and inability to effectively provide security; (2) fear of crime, fueled largely by an imagined increase created by the media and not necessarily reflected in reality; (3) community insularity, isolation and prejudice; (4) structural social inequalities which spawn violence and property theft; and (5) the fiscal crisis of the state. Russell, supra at 4-6. The last factor is perhaps the "key determinant" since strapped governments consider more cost-effective the use of poorly paid, untrained, non-unionized police than highly paid, trained, unionized ones.

Growing privatization is also part of an ever-expanding net of social control in the interests of big business and the wealthy with private capital becoming more and more aggressive in protecting its property and profits while working with the state in marginalizing and criminalizing the less wealthy. Id at 8-9.

It is no coincidence that a major force behind privatization is the creation of "mass private property" like shopping malls where the corporate sector sets the rules regarding who stays and who is forced to leave for disrupting "the order of consumption." Nina, supra at 163.

It is also no coincidence that those rules are being enforced on the front lines by mostly minority employees with increasingly limited work options. Nor is it a coincidence that they are working for mostly white owned companies. Both Ricky Coleman and Douglas Fischer, for example, were black. "The opportunities [for blacks] to be employed as security guards are excellent, but the opportunities to own and operate security firms are limited," said one entrepreneur in California. Ann Brown, "Security Sweep," Black Enterprise (April 1997) at 33 (citing as reasons undercapitalization and lack of client base).

Private policing has essentially been transformed into a commodity, sold only to those who can afford it. This in turn creates serious equality issues. In Los Angeles, wealthy residents hire private security guards complete with squad cars with public streets barricaded to facilitate their work. Zielinski, supra, at 44-45. These same residents watched in 1992 as "Special Response Corporation", a private security company whose motto is "A Private Army When You Need It Most," joined

forces with the Los Angeles Police Department to protect their property during the aftermath of the riots following the Rodney King verdicts. Gayle Hanson, "Private Protection is Secure Industry," Insight on the News (9/29/97) at 19. One commentator foresees a "Blade Runner" future in which the urban landscape is militarized, public space is privatized, vigilantism is rife and those who can afford it buy protection from private police and retreat behind "gated enclaves." Mike Davis, "Beyond Blade Runner: Urban Control," The Ecology of Fear (Open Magazine Pamphlet Series; Westerfield, N.J.; 1992).

#### **PRIVATE POLICE ARREST POWERS AND USE OF FORCE**

Whether operating in a "Blade Runner" world or not, private police are restrained by the same laws that govern everyone else regarding the use of force as well as when and where they can arrest. Even though in practice a person in a uniform with a gun "carries self-imposed authority and power and may exploit a situation to place themselves and their employer above the law," in reality a private officer derives her arrest authority as well as any authority she has to use force from the common law right of citizen's arrest. Reynolds and Wilson, "Private Policing: Creating New Options," in Australian Policing: Contemporary Issues (1996, 2nd Ed.) at 220. The only exception to this is where a state grants individually licensed private officers

special arrest powers. See, e.g., S.C. Code §40-17-130 (licensees granted arresting authority and power of sheriffs).

#### 1. Citizen's Arrest and Detention

Under the common law, a private citizen could arrest for a misdemeanor only if (1) it constituted a breach of the peace and (2) was committed in her presence. 5 Am.Jur.2d Arrests §35 (1962). Many states have codified the law of citizens arrest. See, e.g., D.C. Code §23-582(b) (codifying and limiting the scope of citizen arrest power). Modern common law has basically done away with the "breach of the peace" element so that a private citizen has lawful authority to arrest for a misdemeanor committed in his presence. State v. Nall, 404 S.E.2d 202, 208 (S.C. 1991).

Based on modern common law, most states now permit a private person such as an employee working for a mercantile establishment to make a common law citizens arrest for shoplifting committed in his/her presence without a breach of the peace. State v. Gonzales, 604 P.2d 168 (Wash. 1979); Boquist v. Montgomery Ward Co., 516 S.W. 769 (Mo.Ct.App. 1974). Further, many states have codified the Restatement (Second) of Torts §120A, Temporary Detention for Investigation, under which a shopkeeper "who reasonably believes that another has tortiously taken a chattel upon his premises, or has failed to make due cash payment for a chattel purchase or services rendered there, is privileged,

without arresting the other, to detain him on the premises for the time necessary for a reasonable investigation of the facts." See, e.g., Wash.Rev.Code §4.24.220 ("reasonable grounds" as defense to action for being detained on mercantile establishment premises for investigation).

Under modern common law, any person who views a felony being committed has a positive duty to endeavor to arrest the felon either personally or by calling others to his aid or by seeking out an officer of the peace. 1 C. Alexander, The Law of Arrest in Criminal and Other Proceedings 438 (1949). A private citizen also has the right to arrest for a felony, even if not committed in the person's presence, so long as it is based on certain information that the felony has actually been committed. If it is later found that the person did not commit the felony, the arrest is still lawful if "there was reasonable cause for suspicion." State v. Nall, 404 S.E.2d 202 (S.C. 1991) (citing numerous English common law authorities).

## 2. Use of Force During Citizen's Arrest

Under the common law, a private citizen has the right to use force to detain one who has committed a felony if reasonable notice has been given and if the suspect attempts to flee or forcibly resist arrest. However, the force used must be reasonable. State v. Nall, 404 S.E.2d 202, 207 (S.C. 1991)

(private citizen making arrest may use reasonable means to effect it). Similarly, a store employee or private guard can use "reasonable force" to detain a person whom they have probable cause to believe has been engaged in the misdemeanor of shoplifting. Whether the force used is reasonable "is a question of fact, to be determined in light of the circumstances of each particular case." State v. Miller, 698 P.2d 554, 557 (Wash. 1985) citing W. Prosser Torts §26 at 137 (3d.ed. 1964) and W. LaFave & A. Scott, Criminal Law 399-400 (1972).

However, "the use of force intended or likely to cause serious bodily harm is never privileged for the sole purpose of detention to investigate, and it becomes privileged only where the resistance of the other makes it necessary for the actor to use such force in self-defense." Comment h to Restatement (Second) of Torts § 120A, Temporary Detention for Investigation. Under the Restatement, "serious bodily harm" is defined as: "A harm which creates a substantial risk of fatal consequences." Comment b to Restatement (Second) of Torts §63(1) [Use of Force Threatening Death or Serious Bodily Harm].

### 3. The Fourth Amendment and Private Arrests

The protections of the Fourth Amendment do not apply to a citizen's arrest. Similarly, private searches even if unreasonable when conducted solely for a private purpose such as

store, casino, concert or racetrack security enjoy no constitutional protection. Thus, there exists no prohibition against a state's use of evidence or information unlawfully obtained by a private citizen unless the actions of the private person were in some way "instigated, encouraged, counseled, directed, or controlled" by the state or its officers. State v. Gonzales, 604 P.2d 168, 171 (Wash. 1979) (leather coat found under defendant's clothing by store security guard held admissible). See also State v. Buswell, 460 N.W.2d 614 (Minn. 1990) (holding admissible controlled substances found by racetrack security guards during random motor vehicle search for "stowaways"). Furthermore, the Fourth Amendment's prohibition against using deadly force against an unarmed fleeing felony suspect does not apply to a felony arrest made by a private citizen. State v. Cooney, 463 S.E.2d 597 (S.C. 1995) (rejecting Tennessee v. Garner and holding as a jury question the reasonableness of deadly force).

### 3. Varieties of Private Police

Private security officers come in a number of varieties: (a) off-duty public police officers, (b) state licensed security guards **with** special arrest powers, (c) state licensed security guards **without** special arrest powers, (d) unlicensed security guards in states with no regulation, and (e) unlicensed employees

who work directly for employers in a "security" or "loss prevention" capacity.

*Off-Duty Officers.* When working in private security, an off-duty police officer may retain the full scope of his or her arrest powers as a sworn officer **or** may only have those of a non-police citizen. The scope of this rule depends on the law of the state or local jurisdiction as well as a number of other factors such as whether the off-duty officer was functioning in her security or "citizen" role versus her police officer role. State v. Graham, 927 P.2d 227 (Wash. 1996) (upholding arrest of juvenile by off-duty officers working security for a business improvement district). The distinction is most important in, for example, shoplifting situations since an off-duty officer working store security must, in his role as citizen, actually observe the misdemeanor taking place while he could rely on information provided by others if he were responding to an on-duty call from a merchant after a lawful detention. Stewart v. State, 527 P.2d 22, 24 (Okla. App. 1974). Some jurisdictions hold that an off-duty officer working private security is always discharging a public duty while others hold that an off-duty officer so employed "never acts as a public servant." Compare State v. Wilen, 539 N.W.2d 650 (Neb.App. 1995) (always on-duty) with People v. Corey, 581 P.2d 644 (Cal. 1978) (never on-duty).

*Specially Commissioned Police Officers.* A few jurisdictions have enacted laws that create categories of "special police officers" who have arrest powers beyond those of other citizens. Many state as well as private university and college campus police officers derive their special arrest authority from a such legislation. See, e.g., Nancy Rhodes, "Enhanced Powers for Private Security," Peace Newsletter (December 1996) at 10 (enhanced police powers for New York private campus security).

In the District of Columbia, for example, an owner of private property can apply to the Mayor for appointment of such a special police officer. Once appointed, the officer's commission authorizes him to exercise the arrest powers of a Metropolitan Police Officer "within the premises to which his jurisdiction extends" as well as "outside the premises on fresh pursuit for offenses committed on the premises." D.C. Code §23-582(a) (1991). Very few states or local jurisdictions have such statutes, however. Those that do limit the extended powers to those of arrest only and do not include other powers of public officers such as investigatory authority. See S.C. Code §40-17-130 [licensed officers have arrest authority of sheriffs].

*Licensed Security Guards.* At least nineteen states have statutory schemes that regulate the licensing of private security officers. For the most part, these schemes cover those who work

independently or for a private security company but the scope of the law in each state varies. Washington law requires, for example, that a separate license be obtained for each new employer. A unarmed guard license requires an in-state criminal background check and four hours of training. An armed guard license requires an FBI fingerprint check, a firearms certification test and eight hours of training. Wash.Rev.Code 18.170 et seq. As noted above, these guards have powers of citizen's arrest.

*Unlicensed Security Guards and Employees.* The vast majority of the nearly two million private police in the U.S. are unlicensed, unregulated and untrained. Even in states with licensing schemes like Washington or South Carolina, many more unlicensed than licensed guards work in private security. Byrnes, "The Cost of Fighting a Private War on Crime," supra at A12 (industry estimate of 5,000 unlicensed guards). These also have powers of citizen's arrest.

#### **UNDER COLOR OF STATE LAW AND PRIVATE POLICE**

To prove a violation of Section 1983, a plaintiff must show that the defendant (1) deprived her of a right secured by the U.S. Constitution and (2) acted under color of state law. West v. Atkins, 108 S.Ct. 2250, 2255 (1988). In order to show the alleged deprivation under the first prong, a plaintiff must demonstrate

"state action" based on the language of the Fourteenth Amendment. Shelly v. Kraemer, 334 U.S. 1, 13 (1948) (Fourteenth Amendment "erects no shield against merely private conduct"). Under the second prong, a plaintiff must independently show action "under color of" state law. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155-56 (1978).

In most situations, "color of state law" and "state action" overlap. Sheldon Nahmod, Section 1983: Law and Litigation §2.04 [State Action]. However, the U.S. Supreme Court has left open the possibility that it might take less to demonstrate action under color of state law than to demonstrate state action. Lugar v. Edmonson Oil Co., 457 U.S. 922, 935 n.18 (1982). Most federal courts, however, addressing these issues in the context of private security guards use the two terms interchangeably. They also recognize that the state action doctrine is "one of the more slippery and troublesome areas of civil rights litigation." Graseck v. Mauceri, 582 F.2d 203, 204 (2nd Cir. 1978).

#### 1. General State Action Case Law Regarding Private Police

Acts conducted during the course of a citizen's arrest are generally not conducted "under color of state law," and thus do not fall within the scope of Section 1983. Baugus v. Brunson, 890 F.Supp. 908 (E.D.Cal. 1995) (totality of circumstances test is applied to determine whether the acts of a private security guard

making a citizen's arrest are done under color of state law for purposes of Section 1983). This is true even in states such as California which have citizen's arrest statutes. Collins v. Womancare, 878 F.2d 1145 (9th Cir. 1989) (discussing Cal.Penal Code §837 and finding no state action for defendant employees of women's health clinic).

The U.S. Supreme Court has never decided whether a citizen's arrest qualifies as state action or action under color of state law for Section 1983 purposes. However, the Court has held that a private employee's use of violence to obtain a confession from a suspected thief violated 18 U.S.C. §242, the criminal analogue of Section 1983, which contains the same "under color of state law" requirement. Williams v. United States, 341 U.S. 97 (1951). In so doing, the Court emphasized that Williams had taken an oath and qualified as a "special police officer" in Miami, Florida, and that a regular police officer was present during the interrogation. Williams, 341 U.S. at 98. See also Griffin v. Maryland, 378 U.S. 130 (1964) (state action by private amusement park employee with deputy sheriff authority).

Merely because a security guard has "special police officer" arrest powers, all of his actions are not necessarily "under color of state law." The statute must be carefully scrutinized regarding exactly what powers the private officer has. One

federal court held that a private guard licensed in South Carolina was not acting under "color of state law" when he investigated and reported criminal behavior while on the job since the statute only conferred arrest authority and not investigation authority. Childs v. Crooks, 708 F.Supp. 127 (D.S.C. 1989) (statute only empowers private guard to arrest as a public officer would). Generally speaking, however, where a privately-employed security guard has powers "akin to those of a regular police officer and is appointed by a government official," state action will be found. U.S. v. Lima, 424 A.2d 113, 118 (D.C.App. 1980).

In contrast, for purposes of determining whether civil rights have been violated, mere regulatory licensing of security guards for private employment does not make their actions equivalent to those of the government. Jenkins v. White Castle Systems, Inc., 510 F.Supp. 981 (N.D.Ill. 1981) (licensing of store detective by statute did not make for state action); U.S. v. McDougald, 350 A.2d 375 (D.C.Ct.App. 1976) (no duty to discuss case with defense counsel). A private security guard's actions taken under "license of state law" are not the equivalent of actions taken under "color of state law." U.S. v. Lima, 424 A.2d 113, 199 (D.C.App. 1980) citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972) (licensing and regulation performed by the state insufficient to implicate Fourteenth Amendment).

In addition, whether a commissioned police officer is on-duty or off-duty does not control whether the officer was acting "under color of state law" for purposes of Section 1983. It is the "nature of the act" that controls. Layne v. Sampley, 627 F.2d 12 (6th Cir. 1980). Even clearly criminal acts of an off-duty police officer using his own car and not in uniform are actionable, depending on the circumstances. Revene v. Charles County Commissioners, 882 F.2d 870 (4th Cir. 1989) (officers on-duty 24 hours a day by local ordinance). Compare Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975) (officer who shot and killed two young men during dispute in a cafe acting under color of state law where he received workmen's compensation for injuries in the line of duty) with Barna v. City of Perth Amboy, 42 F.3d 809 (3rd Cir. 1994) (officer not acting under color of state law where excessive force used during personal family argument).

Whether the behavior of an off-duty police officer constitutes state action is often governed by local ordinances, police department policies and union contracts. See, e.g., Pickrell v. City of Springfield, 45 F.3d 1115 (7th Cir. 1995) (remanding to determine local ordinance). Where an off-duty officer responds to a call "as police officer" rather than as a "security" employee, his actions are said to be those of the state. Traver v. Meshriy, 627 F.2d 934, 938 (9th Cir. 1980) (if

officer believed crime was committed, his primary duty was to the police department not his private employer).

2. Detention Statutes as "Under Color of State Law"

Most states have enacted statutes that incorporate the common law privilege of a shopkeeper to detain a person suspected of shoplifting. See, e.g., W.Va. Code §61-3A-4 (allowing such detention for purpose of investigating not to exceed thirty minutes). Federal and state courts have addressed the question of whether such detention statutes constitute "under color of state law" for purposes of Section 1983. Generally, courts have determined that these shoplifting detention statutes **alone** do not satisfy the "under color of state law" element of Section 1983 sufficient to hold a merchant liable. White v. Scrivner Corp., 594 F.2d 140 (5th Cir. 1979) (no liability where Louisiana statute merely permits but does not compel detention); Hurt v. G.C. Murphy Co., 624 F.Supp. 512 (S.D.W.Va. 1986) (W.Va. statute not sufficient to hold merchant liable for exceeding time period); Davis v. Carson Pirie Scott & Co., 530 F.Supp. 799 (N.D. Ill. 1982) (Illinois Retail Theft Act insufficient to convert licensed store detectives into state actors). The only exception to this is where the statute is being enforced by a commissioned police officer working in a private capacity. Under those circumstances, the officer is acting as an agent of the state. Mendoza v. K-

Mart, Inc., 587 F.2d 1052, 1056 (10th Cir. 1978) (discussing cases); Woodward & Lothrop v. Hillary, 598 A.2d 1142 (D.C.App. 1991) (special police officers acted under color of state law when using excessive force during detention of customer not later arrested).

### 3. Joint Action and Private Police Liability

The Supreme Court takes a flexible approach to the state action doctrine, applying a variety of tests to the facts of each case. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351-352 (1974) (nexus and traditional state function theories); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (symbiotic relationship theory). Section 1983 plaintiffs have asserted numerous of these theories in an attempt to establish liability of private defendants involved in acts that would otherwise be protected by the Fourth Amendment. For the most part, these have been unsuccessful. See, e.g., Wade v. Byles, 83 F.3d 902 (7th Cir. 1996) (private security in housing development not performing an exclusive state function); Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442 (10th Cir. 1995) (promoter and concert security firm not state actors under any theory in suit based on pat-down searches); U.S. v. Garlock, 19 F.3d 441 (8th Cir. 1991) (bank security officer obtaining confession regarding embezzlement not engaged in "traditional public function" of law enforcement);

Collins v. Womancare, 878 F.2d 1145 (9th Cir. 1989) (rejecting "traditional state function" theory of citizen's arrest).

The most successful Section 1983 "state action" theory asserted against private police defendants is the "joint action theory." Under this theory, a private officer will be held liable if she "is a willful participant in a joint action with the state or its agents." Dennis v. Sparks, 449 U.S. 24, 27-28 (1980). "Joint action" is essentially a conspiracy theory of state action. Davis v. Murphy, 559 F.2d 1099 (7th Cir. 1977) (fireman was a willing participant and acted in concert with police). Compare Baugus v. Brunson, 890 F.Supp. 908, 913 (E.D.Cal. 1995) (highway patrol officer made arrest for driving under the influence after a security officer asked him to) with Bey v. Bridgeton Police Dept., 775 F.Supp. 1255 (E.D.Mo. 1991) (K-Mart employees not state actors where no evidence of conspiracy with police).

"Joint action" comes in many forms but the focus is often on who makes the decision to arrest or to use force or to search. For example, where a private security employee merely makes a complaint to the police, the private employee is not a joint state actor for purposes of Section 1983 liability. Carey v. Continental Airlines, Inc., 823 F.2d 1402 (10th Cir. 1987); Butler v. Goldblatt Bros., Inc., 589 F.2d 323 (7th Cir. 1979). This is always the case where the decision to search or to arrest is

independently made by the police officer. Jennings v. Joshua Independent School District, 877 F.2d 313 (5th Cir. 1989) (no state action for school security company using canines for car searches); Lee v. Town of Estes Park, Colo., 820 F.2d 1112 (10th Cir. 1987) (no state action where gas station owner provided information regarding suspected looting).

Similarly, where a security officer makes a search or an arrest at the direction of or under the supervision of a commissioned police officer, the private officer will be said to have acted "under color of state law." Alston v. United States, 518 A.2d 439 (D.C.App. 1986). Essentially the private guard is acting as the commissioned officer's agent. Conversely, where a private guard makes an **independent** decision to do so, no state action will be found. Williams v. Nagel, 643 N.E.2d 816 (Ill. 1994) (private apartment managers made ultimate decision on whether to place individuals on a "no trespass" list enforced by police).

However, if a "pre-existing" plan between a police department and department store management exists to arrest shoplifters without an independent investigation, the private security employees as well as their employer are joint state actors and can be held liable under Section 1983 for violating the Fourth Amendment. Lusby v. T.G.&Y. Stores, Inc., 796 F.2d 1307 (10th

Cir. 1986) (police chief admitted policy of arresting shoplifting suspects without independent investigation); Duriso v. K-Mart, 559 F.2d 1274 (5th Cir. 1977) (standard department policy to require store employee to agree to file charges before arrest made); Smith v. Brookshire Brothers, Inc., 519 F.2d 93 (5th Cir. 1975) (state action where defendant knew employee could simply call police and designed person detained for shoplifting arrest). Said one federal court, "state action is present when private security guards and police officers act in concert to deprive a plaintiff of his civil rights, particularly when a state statute authorizes a shopkeeper to detain suspected shoplifters." Murray v. Wal-Mart, Inc., 874 F.2d 555, 559 (8th Cir. 1989) (finding state action where loss prevention employee worked for police department and no independent investigation was made). See also Horton v. Flenory, 889 F.2d 454 (3rd Cir. 1989) (state action in beating death of employee at hands of private club owner where police had policy of deferring to private clubs for theft investigation).

Where no such pre-arrangement exists and police officers, for example, conduct a strip search of a shoplifting suspect, the private security employees are not state actors even though the officers searched at their insistence: The conduct is assessed under state tort law rather than the Fourth Amendment. Cruz v. Donnelly, 727 F.2d 79 (3rd Cir. 1984) (upholding summary judgment

dismissing private Section 1983 defendants). Courts assume that police officers made their own independent decisions regarding arrests and searches, unless sufficient evidence exists of an "agreement subordinating" police judgment to that of the private party. Cruz, 727 F.2d at 82. Similarly, where private security guards exercise discretion regarding whether to let a shoplifting or theft suspect go or whether to press charges, no state action will be found. Gramenos v. Jewel Companies, Inc., 797 F.2d 432, 436 (7th Cir. 1986) (supermarket's use of preprinted complaint form not enough to show pre-existing plan with police department where loss prevention employees had discretion).

#### **LIABILITY OF PRIVATE POLICE CORPORATE EMPLOYERS**

A number of federal and state cases involving "pre-existing" plans between department stores or supermarkets and police departments have raised the question of whether and under what theories corporate employers of private police can be held liable under Section 1983. The U.S. Supreme Court has not determined whether a private corporation can be held liable under the doctrine of respondeat superior for the unconstitutional acts of its employees. Some federal district courts have concluded that private employers can be held vicariously liable under Section 1983. See, e.g., Classon v. Chopco Stores, Inc., 435 F.Supp. 1186, 1187-88 (E.D. Wisc. 1977) relying on Adickes v. S.H. Kress

and Co., 398 U.S. 144, 152 (1970) (civil rights case proceeded against employer without addressing the vicarious liability issue). Most recently, one federal district court in a shoplifting arrest case commented, without decided the issue, that "none of the reasons for limiting a public employer's liability are present when the defendant is a private employer." Groom v. Safeway, Inc., 1997 U.S. Dist. Lexis 10999 (W.D.Wa. 1997) relying on language in Monell v. Dept. of Social Services, 436 U.S. 658, 690-95 (1978) (discussing reasons for holding public entities not vicariously liable) and Richardson v. McKnight, 117 S.Ct. 2100, 2103-2105 (1997) (discussing policy reasons for holding private prison guards not entitled to qualified immunity).

However, every federal circuit that has addressed the issue has determined that a private corporation is not vicariously liable under Section 1983 when its employees deprive others of their civil rights. Sanders v. Sears, Roebuck Co., 984 F.2d 972 (8th Cir. 1993) (store not liable for guard's detaining shoplifting suspect); Rojas v. Alexander's Dept. Store, 924 F.2d 406 (2nd Cir. 1990) (Dept. store not liable for shoplifting arrest without probable cause); Iskander v. Village of Forest Park, 690 F.2d 126 (7th Cir. 1982) (private corporation not liable for strip searching of customers); Powell v. Shopco Laurel Co., 678 F.2d 504 (4th Cir. 1982) (no recovery for beating from private guard's

employer); Draeger v. Grand Central, Inc., 504 F.2d 142 (10th Cir. 1974) (pre-Monell holding of no vicarious liability for department store). To establish Section 1983 liability for a private police employer requires a showing that an "impermissible policy" or a "constitutionally forbidden" rule or procedure was the "moving force of the constitutional violation." Iskander, 690 F.2d at 128 (plaintiff failed to show that store policy of detaining shoplifting suspects was unconstitutional). Most courts focus their decisions as to corporate liability in this area on whether the corporation itself "caused" the plaintiff's civil rights violations, either directly or through its policies. Arnold v. IBM, 637 F.2d 1350 (9th Cir. 1981) (plaintiff failed to show proximate or legal causation).

In a recent case in Seattle, a federal jury returned a \$750,000 punitive damages verdict against a store defendant where the corporation failed to train an off-duty police officer in **its** policies regarding detention of suspected shoplifters. Groom, supra. The off-duty officer attempted to arrest the plaintiff for allegedly stealing a package of shrimp and in the process, caused her numerous physical injuries. Although quite trained in arrest procedures, the officer had not been instructed to wait until the customer passed the check-out stand before being approached, as per store policy. Had he done so, he would have found that the

plaintiff did not steal the shrimp. The federal court upheld a finding against the store for failure to train based "under either the individual-capacity standard ... or under the standard for official capacity/municipal liability." Id.

#### **THE PRIVATE SECURITY OFFICER QUALITY ASSURANCE ACT**

In recognition of the rapid growth of private police in shopping malls, parking lots, and apartment complexes, Congress is currently assessing H.R. 103, the "Private Security Officer Quality Assurance Act." It is currently before the U.S. Senate Judiciary Committee. H.R. 103 establishes a procedure for individual state screening agencies to conduct expedited national criminal background checks for private security officer applicants through the Federal Bureau of Investigation. See Report 105-161 to the House Judiciary Committee on H.R. 103 (6/26/97).

However, the "Private Security Officer Quality Assurance Act" poses major civil liberties problems. Although it recognizes the growth of private police as a national problem for the first time, it frames the problem in corporate terms as simply one of "quality assurance" that can somehow be solved through an increase in fingerprinting and an expanded national computerized data system for criminal arrests. No restraints are placed on dissemination of the information and the Act's definition of "private security officer" is so expansive that it would include such jobs as pool

lifeguard and theater usher. Because of these "significant privacy concerns," the U.S. Department of Justice objects to the Act as it is written. Letter from U.S. Dept. of Justice, Office of Legislative Affairs to House Subcommittee on Crime (6/11/97), in Report 105-161 on H.R. 103.

The prospect of the FBI sharing its data banks with "security corporations" such as the one run by Ricky Coleman is a chilling and dangerous prospect. What is needed instead, in addition to higher wages, is effective licensing and monitoring systems in each state with substantially increased training requirements.

#### **CONCLUSION**

What is also needed, given the rapid increase in private police, is a more expansive definition of "under color of state law" by the federal and state courts. When private security police arrest or detain someone, they do not act as simply as citizens but rather as extensions of, as agents for, the state. From the victim's perspective, it makes no difference whether the officer is private or public. "It is," said one judge in dissent, "the nature of the activities performed by a security guard in acting as a substitute policeman which brings into play the state action." United States v. Lima, 424 A.2d 113, 122 (D.C.App. 1980) (J. Mack, dissenting). "A retail store security guard ... who pursues, apprehends and detains [suspected] criminals, who

performs custodial searches (consensual or nonconsensual) or seizes and preserves evidence, and who interrogates and refers the [suspect] for prosecution is performing a police function exclusively reserved to the state." Id. Unless these views, or some similar philosophy, are adopted, Section 1983 may move toward the privatized millenium as a relic of an interesting but increasingly irrelevant past.

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