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## Counterparts in Modern Policing: The Influence of Corporate Investigators on the Public Police and a Call for the Broadening of the State Action Doctrine

Sean James Beaton  
*Touro Law Center*

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## Counterparts in Modern Policing: The Influence of Corporate Investigators on the Public Police and a Call for the Broadening of the State Action Doctrine

Cover Page Footnote

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## COUNTERPARTS IN MODERN POLICING: THE INFLUENCE OF CORPORATE INVESTIGATORS ON THE PUBLIC POLICE AND A CALL FOR THE BROADENING OF THE STATE ACTION DOCTRINE

*Sean James Beaton*\*

### I. INTRODUCTION

One typically views policing as a function wholly governmental in nature. In recent years, however, public law enforcement has been consistently reaching out to private corporations for assistance in conducting investigations. This policy comes from public law enforcement's unwillingness and inability to confront the totality of modern security needs. This failure has left a void that is being filled by other groups known as the private police.<sup>1</sup> Private police have been defined as "the various lawful forms of organized, for-profit personnel services whose primary objectives include the control of crime, the protection of property and life, and the maintenance of order."<sup>2</sup> This definition extends to investigators acting on behalf of some of the largest and most influential corporations in the world.<sup>3</sup>

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\* Juris Doctor Candidate, Touro College Jacob D. Fuchsberg Law Center, 2010. B.A., University of Hartford. This Comment could never have been developed without the help and support of my parents, grandparents, and Marine Vorperian. Their encouragement, understanding, and love have put all my goals within reach. I have grown before their eyes and I look forward to making them proud in the future. They have taught me that nothing worthwhile in life comes easy and hard work will always carry the day. I also would like to thank my writing adviser, Professor Jeffrey Morris, for his tireless efforts throughout the writing process. His dedication and knowledge is unparalleled.

<sup>1</sup> Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 55 (2004).

<sup>2</sup> *Id.* Professor Joh's definition of the private police is extremely workable and her scholarship on this group has proven to be the most influential and reliable authority on this consistently overlooked topic.

<sup>3</sup> eBay, Trust and Safety, eBay Global Law Enforcement Operations, <http://pages.ebay.com/securitycenter/law-enforcement.html> (last visited Feb. 27, 2010) (describing the composition and goals of eBay's Global Law Enforcement Operations team, including the fact

Some of these corporations were formed to provide security services, but the vast majority of corporations set forth herein have business objectives involving the production of goods and services wholly separate and apart from the security industry. This Comment highlights the entanglement these entities have with governmental law enforcement and argues that their joint participation should lead to the extension of the definition of who is acting under color of state law. This extension will ensure that the intended protections in the United States Constitution are not circumvented through the government's surreptitious utilization of private entities.

This Comment first provides an overview of the constitutional concerns that arise when the private police interact with criminal defendants, and the even graver issues that are present when this interaction also involves governmental law enforcement. Part III presents an in depth look at private police, with some detail focused specifically on corporate investigators who work in conjunction with public law enforcement. After assessing this ubiquitous group, Part IV harmonizes the private police and the state action doctrine. Because the state action doctrine has been classified as not being a "model of consistency"<sup>4</sup> and a "conceptual disaster area,"<sup>5</sup> the analysis focuses solely on pieces of the doctrine apposite herein. Part V highlights the nexus theory of state action. The nexus theory has been the most helpful to courts in dealing with cases where injuries have been caused by both the government and private entities. Part VI discusses and analyzes the relevant case law. The Supreme Court has ruled on the constitutional status of the private police on two occasions: *Williams v. United States*<sup>6</sup> and *Griffin v. Maryland*.<sup>7</sup> These

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that their professional investigators continuously work in conjunction with governmental law enforcement); Geico's Special Investigations Unit, <http://www.geico.com/claims/claims-process/special-investigations-unit/> (last visited Feb. 27, 2010) (providing an overview of Geico's SIU division and emphasizing their continuous conjunctive effort with governmental law enforcement to pursue perpetrators of insurance fraud); National Insurance Crime Bureau, What We Do, <http://www.nicb.org/cps/rde/xchg/nicb/hs.xsl/39.htm> (last visited Feb. 27, 2010) ("NICB's mission is to lead a united effort of insurers, law enforcement agencies and representatives of the public to prevent and combat insurance fraud and crime through Data Analytics, Investigations, Training, Legislative Advocacy and Public Awareness.") (emphasis added).

<sup>4</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting).

<sup>5</sup> Charles L. Black, Jr., *The Supreme Court 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967).

<sup>6</sup> 341 U.S. 97 (1951).

decisions were rightfully decided, but the focus of the Court's analysis has led to an arbitrary standard, which has created innumerable inconsistencies among the lower courts. This Comment exposes these capricious tendencies through an in depth analysis of lower court decisions involving the private police and state action. Part VII provides an analytical framework for subsequent case law to rely on. The framework utilizes the strengths of the state action doctrine and minimizes its weaknesses. Governmental law enforcement's increased reliance on private sector resources, concurrent to modern state action jurisprudence, should rightfully lead to a broader definition of who is acting under color of state law.

## II. CONSTITUTIONAL CONCERNS

Private police conduct investigations, prevent loss, provide testimony, safeguard property, and make arrests. Their employment routinely includes interviewing, searching, and depriving individuals of their freedom.<sup>8</sup> Although private police make discretionary decisions that greatly impact people's lives, they are not usually held to the same constitutional standards as their public counterparts.<sup>9</sup> This differential treatment can be attributed to the doctrine of state action. The underlying principle of state action is that the protections embodied in the United States Constitution are only applicable against the federal and state governments.<sup>10</sup> Any evidence acquired by a corporate investigator through an unlawful search and seizure, or obtained through a non-Mirandized confession without the presence of an attorney, may be used as evidence against a defendant in subsequent judicial proceedings.<sup>11</sup> Essentially, the Fourth, Fifth, and Sixth

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<sup>7</sup> 378 U.S. 130 (1964).

<sup>8</sup> See *infra* Parts V and VI.

<sup>9</sup> See *infra* Part VI.

<sup>10</sup> U.S. CONST. amend. XIV, § 1. Stating in relevant part:

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

*Id.* (emphasis added).

<sup>11</sup> See *United States v. Francoeur*, 547 F.2d 891, 894 (5th Cir. 1977) ("Such illegal conduct [by the private police] would not, however, give [the defendants] the protection of the Fourth Amendment and the exclusionary rule which has developed from it.").

Amendments to the United States Constitution do not offer protection to potential defendants dealing with the private police.<sup>12</sup> This has produced an egregious practice that has been labeled “the new version of the silver platter doctrine,” where private police collect evidence in ways proscribed to the public police, and then turn over the evidence to the prosecution to be used during subsequent criminal proceedings.<sup>13</sup> By handing statements, contraband, or other evidence over to the government on a silver platter, the private police and government are surreptitiously circumventing a fundamental principle of constitutional law. To make matters worse, a criminal defendant does not have the entrapment defense available to confront any inculpatory evidence seized.<sup>14</sup> This reality can have detrimental effects on defendants who are confronted with evidence obtained by corporate investigators through undercover investigations. For example, if in an undercover capacity a corporate investigator elicits a non-disposed individual to commit a crime, recordings of that conversation will be admissible without the defendant having the entrapment defense available to him. Introducing these recordings into evidence could, very well, be the difference between a conviction and an acquittal. In addition to the issues dealing with criminal liability, when a person’s rights have been violated by the private police, the individual will likely want to recover civil damages. They will be disheartened to discover that the Civil Rights Statutes, including § 1983, are unavailable to them.<sup>15</sup> The only remedy for redress will lie in state tort ac-

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<sup>12</sup> U.S. CONST. amend. IV (concerning search and seizure); U.S. CONST. amend. V (concerning grand jury indictment for capital crimes, double jeopardy, self incrimination, due process, and just compensation for property); U.S. CONST. amend VI (concerning jury trial for crimes and procedural rights). All of these amendments require the finding of State Action before any protection is given. *See also* *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . .

*Id.*

<sup>13</sup> Under the original silver platter doctrine, illegally seized evidence by state officers could lawfully be introduced against a defendant in a federal criminal trial. *Joh, supra* note 1, at 114-17 (describing the silver platter doctrine and its new version involving the private police).

<sup>14</sup> David A. Slansky, *The Private Police*, 46 UCLA L. REV. 1165, 1240 (1999).

<sup>15</sup> 42 U.S.C.A. § 1983 (West 2009) (“[U]nder color of any statute, ordinance, regulation,

tions such as assault, trespass, wrongful termination, or false imprisonment. State tort actions against private police, however, are strikingly rare and unsuccessful.<sup>16</sup>

The United States Supreme Court has articulated a doctrine that enables a seemingly private entity to be labeled a state actor for constitutional and federal civil rights purposes.<sup>17</sup> The doctrine consists of the public function, nexus, and pervasive entwinement theories of state action.<sup>18</sup> As this Comment demonstrates, under a theoretical examination of these doctrines, activities of corporate investigators and other private police can clearly be attributable to the state.<sup>19</sup> However, in the last forty-five years, the Supreme Court has continuously declined to review the constitutional status of the private police.<sup>20</sup> Further, in *Flagg Bros. Inc. v. Brooks*,<sup>21</sup> the Court expressly declined to express an opinion of whether actions of the private police would be subject to the strictures of the Fourteenth Amendment.<sup>22</sup> The precedent that has been established in federal and state courts in the area of private police is now antiquated, unsound, and inconsistent.<sup>23</sup> This Comment respectfully submits that a “nexus plus” theory of state action jurisprudence will produce sound results if utilized to confront the constitutional concerns that arise with corporate investigators. Finally, this Comment advocates that legislative action must be taken to confront the issues that arise when private se-

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*custom, or usage . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities, secured by the Constitution . . .*) (emphasis added).

<sup>16</sup> Slansky, *supra* note 14, at 1183, 1186.

<sup>17</sup> See *Edmonson*, 500 U.S. at 622 (finding state action in a private litigant’s use of a peremptory challenge); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (finding state action in a private restaurant’s discrimination of an African American).

<sup>18</sup> See *infra* Parts IV and V.

<sup>19</sup> See *infra* Part VIII.

<sup>20</sup> See, e.g., *Romanski v. Detroit Entm’t, L.L.C.*, 428 F.3d 629, 638 (6th Cir. 2005), *cert. denied*, 549 U.S. 946 (2006).

<sup>21</sup> 436 U.S. 149 (1978).

<sup>22</sup> *Id.* at 163-64.

[W]e . . . note that there are a number of state and municipal functions . . . administered with a greater degree of exclusivity by States and municipalities . . . such . . . as education, fire, and *police* protection . . . . We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment.

*Id.* (emphasis added).

<sup>23</sup> See *infra* Parts V and VI.

curity personnel detain and interview suspects.

### III. THE PRIVATE POLICE

#### A. Statistics and Concepts

Private police have been defined as “the various . . . forms of organized, for-profit personnel services whose primary objectives include the control of crime, the protection of property and life, and the maintenance of order.”<sup>24</sup> The private police will unquestionably be more influential during the twenty-first century than many federal and state law enforcement agencies. A 2008 study published by the United States Department of Labor revealed that there are over one million private investigators and security personnel, compared to just over 625,000 public police officers.<sup>25</sup> Other estimates state that there are three times as many private police as there are public police in the United States.<sup>26</sup> Regardless of what empirical data is employed, it is very clear that there are significantly more members of this pervasive group than governmental law enforcement officers.

The most venerable argument against classifying private police as state actors is that these business entities employ investigators and guards for their own private interest—not for the public good.<sup>27</sup> The business of corporate loss prevention is helpful in ascertaining the validity of this argument. In support of the position, UCLA Professor Elizabeth Joh argues that the Macy’s Department Store has no incentive to prosecute shoplifters because of the protracted nature of the justice system.<sup>28</sup> The theory is that by resorting to public prosecution, which will inevitably entail the store detectives’ to search and interview subjects, and also provide statements and testimony, crucial time will be taken away from their duties at the store.<sup>29</sup> The assump-

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<sup>24</sup> Joh, *supra* note 1, at 55.

<sup>25</sup> Bureau of Labor Statistics, U.S. Dept. of Labor, May 2008 National Occupational Employment and Wage Estimates 33, *available at* [http://www.bls.gov/oes/current/oes\\_nat.htm#b33-0000](http://www.bls.gov/oes/current/oes_nat.htm#b33-0000).

<sup>26</sup> Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 191 (2005).

<sup>27</sup> See Elizabeth Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 591 (2005).

<sup>28</sup> *Id.* at 590.

<sup>29</sup> *Id.*



tion is that Macy's benefits more by partaking in "private justice," and in lieu of public prosecution, banishing the shoplifter from the store.<sup>30</sup>

However, Professor Joh contradicts the validity of the theory by addressing the fact that nearly sixty percent of the shoplifting cases at Macy's in New York City are reported to the police.<sup>31</sup> Before the arrival of the public police, there is the very real possibility that the shoplifters are taken to the store's private detention center, searched with an indifference to probable cause, handcuffed, and subjected to an interrogation process without being given their *Miranda* warnings. Upon arrival of the New York Police Department, the store detectives presumably hand a confession over to the officers on a "silver platter." The shoplifter is then arrested, and processed at the local precinct. This systematic degradation of personal civil rights and liberties is inexcusable. Regardless of corporations' subjective goals, the affect of corporate policies on the public are not merely ancillary or harmless, but instead can be profound and impacting.<sup>32</sup> Through a judicial broadening of the state action doctrine for custodial interrogations, or legislatively mandating store detectives to proffer subjects their *Miranda* rights, the potential for these flagrant abuses can be circumscribed.

## B. Some Quintessential Examples of the Private Police

eBay, Inc. is an internet company that manages and operates eBay.com, an online shopping website where people and businesses sell goods and services worldwide.<sup>33</sup> In addition to brokering the sale of goods and services between individuals all over the world, eBay provides another service: an immense, highly sophisticated, fully functional, private police force that works cooperatively with public law enforcement on a multinational basis.<sup>34</sup> eBay's private police

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<sup>30</sup> *Id.* at 589-90.

<sup>31</sup> *Id.* at 590.

<sup>32</sup> *See, e.g.*, Bruce Schneier, *Schneier on Security: Private Police Forces* (Feb. 27, 2007), [http://www.schneier.com/blog/archives/2007/02/private\\_police.html](http://www.schneier.com/blog/archives/2007/02/private_police.html) (criticizing the use of private police and highlighting an incident where an untrained Best Buy Security guard choked and killed a fraud suspect).

<sup>33</sup> *See* eBay Home Page, <http://www.ebay.com> (last visited Jan. 21, 2010).

<sup>34</sup> *See* eBay, *supra* note 3 (describing the composition and goals of eBay's Global Law Enforcement Operations team).

force calls itself Global Law Enforcement Operations, and “The North America Fraud Investigation Team” is comprised of over eighty investigators, many of whom are former governmental law enforcement officials.<sup>35</sup> Their webpage proudly displays a gold “police” shield, resting on top of a keyboard.<sup>36</sup> Global Law Enforcement Operations states it works in concert with governmental law enforcement agencies around the world to “pursue, apprehend, and prosecute online criminals.”<sup>37</sup>

Their investigations concern a wide array of crimes including “merchant fraud, illegal goods,” “bank and credit card fraud,” and “identity theft.”<sup>38</sup> During a three month period in 2007, the investigators’ casework led to the arrest of ninety-seven criminals throughout the United States and Europe.<sup>39</sup> The arrestees were “suspected of committing over \$1.2 million in crimes, both online and off.”<sup>40</sup> Other undertakings of the North American Fraud Investigations Team consists of training governmental law enforcement, initiating fraud cases, and collecting, analyzing, and presenting evidence in criminal prosecutions.<sup>41</sup> This often requires the professional investigators to operate in an undercover capacity, testify at trial, and interview potential subjects.<sup>42</sup> Keep in mind that your typical undercover investigation involves the recording of conversations, which is a way of collecting inculpatory evidence to be used at trial. Furthermore, similar to the policy of governmental law enforcement agencies to release reports of their activities to local periodicals and newspapers, the eBay website maintains a “police blotter,” which details cases in which the eBay investigators “pursue, apprehend and prosecute fraudsters.”<sup>43</sup>

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<sup>35</sup> *Id.*; See also Ian Wylie, *Romania Home Base for EBay Scammers*, L.A. TIMES, Dec. 26, 2007, at C1.

<sup>36</sup> See eBay, *supra* note 33.

<sup>37</sup> See Mike Rou, EBay General Announcements (July 20, 2007), <http://www2.ebay.com/aw/core/200707201527132.html>.

<sup>38</sup> eBay, *supra* note 33.

<sup>39</sup> See Rou, *supra* note 37.

<sup>40</sup> *Id.*

<sup>41</sup> See eBay, *supra* note 33.

<sup>42</sup> *Id.*; see also Dan Goodin, *Notorious EBay Hacker Arrested in Romania*, THE REGISTER, Apr. 18, 2008, [http://www.theregister.co.uk/2008/04/18/vladuz\\_arrested/](http://www.theregister.co.uk/2008/04/18/vladuz_arrested/) print.html (“Undercover eBay investigators closed in on Duiculescu by pretending to be interested in buying one of his applications.”) (emphasis added).

<sup>43</sup> See eBay Security & Resolution Center, Police Blotter, [http://pages.ebay.com/SECURITYCENTER/law\\_case\\_study.html](http://pages.ebay.com/SECURITYCENTER/law_case_study.html) (last visited Jan. 21, 2010) (highlighting cases of identity theft, car theft, and money laundering in which eBay Investigators “pursue[d], ap-

The intention of the police blotter is to “share information with the Community [sic] about [eBay’s] efforts with law enforcement around the world.”<sup>44</sup> It is astounding that this corporation is partaking in quasi-governmental functions to this extent without their investigators being exposed to any formal legal or law enforcement oversight.

In eBay’s most prolific success story to date, eBay investigators made multiple month-long trips to Romania with high ranking governmental law enforcement agencies, working in an undercover capacity, and dismantled an eleven member, multi-million dollar internet crime syndicate.<sup>45</sup> This “cross functional” investigation and “arrest was due to a formalized collaboration between eBay and the Romanian General Directorate for Combating Organized Crime, the DIICOT and in cooperation with the United States Secret Service and the FBI.”<sup>46</sup> The primary target of the investigation was a twenty year-old Romanian hacker who preyed on credulous eBay users.<sup>47</sup>

Let us assume the investigators are working on an Internet fraud case. eBay Investigator Spasova is conducting surveillance of a known hangout, when a man who resembles one of the suspects walks up to the surveillance vehicle and asks for directions. Suppose eBay Investigator Spasova jumps out of the vehicle, displays her credentials and searches the man without considering probable cause. She discovers a zip drive on his person that contains the identifying information of 3,000 elderly Americans. The subject claims the zip drive was not his, and says he was “just delivering something to his cousin.” Investigator Spasova brings the man back to a hotel and interrogates him without giving *Miranda* warnings. He denies any involvement, so she utilizes various torture techniques to garner a confession about international identity theft, and turns the written confession over to the FBI on a “silver platter.” Subsequent to being arrested, the defendant proclaims his innocence and refuses to bargain with the United States Department of Justice. At trial, the Assistant United States Attorney presents evidence of the zip drive and the confession in a cogent and charismatic fashion. The jury convicts

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prehend[ed] and prosecut[ed] fraudsters on ebay.com and paypal.com”).

<sup>44</sup> See *id.*

<sup>45</sup> See eBay, *supra* note 33.

<sup>46</sup> See Posting of RBH to eBay INK, <http://ebayinkblog.com/2008/05/14/the-arrest-of-vladuz-a-team-effort> (May 14, 2008).

<sup>47</sup> Goodin, *supra* note 42.

and the man is sentenced to fifteen years in prison.

Because of the private characterization of eBay Investigator Spasova, the search and confession are constitutionally sufficient, thus completely available to use for prosecutorial purposes. The defendant will not be able to assert any Fourth Amendment illegal search and seizure, Fifth Amendment wrongful self-incrimination, or Fourteenth Amendment due process violations. Also, after eBay revokes the defendant's account because of the suspected criminal activities, he surely will have no redress for the loss of profits to his business. Moreover, Investigator Spasova will not be liable to anyone for § 1983 liability. This immunity is simply because she works for a private corporation and not the United States government. A broadening of the state action doctrine to include eBay and other corporate investigators while working with governmental law enforcement will mitigate these constitutional concerns.

This potential for concerted abuse of the public/private dichotomy is very real, and the coordinated effort between corporate investigators and public law enforcement has been prevalent for many years. From 1991-1993, the Federal Bureau of Investigations ("FBI") worked with investigators from the International Business Machines Corporation ("IBM") on a multi-million dollar fraud case related to the illegal sale of computer parts.<sup>48</sup> In conceivably "the largest industrial espionage case ever in the United States," IBM investigators created a bogus consulting firm called "Glenmar Associates."<sup>49</sup> An IBM security official operated in an undercover capacity for months posing "as the firm's attorney."<sup>50</sup> While acting in an undercover capacity, the IBM security official offered to sell stolen IBM secrets to high-ranking employees of two other technological giants, Hitachi and Mitsubishi.<sup>51</sup> As a result of the undercover operation, criminal charges were filed against twenty-one individuals.<sup>52</sup> Subsequent to the arrest of the subjects, FBI director William H. Webster applauded IBM for its "excellent assistance rendered during

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<sup>48</sup> Steve Lohr, *Company News; I.B.M. Helps Parts-Scam Investigators*, N.Y. TIMES, Sept. 30, 1993, at D5.

<sup>49</sup> Gary T. Marx, *The Interweaving of Public and Private Police Undercover Work*, in PRIVATE POLICING (Clifford D. Shearing & Phillip C. Stenning eds., 1987), available at <http://web.mit.edu/gtmarx/www/private.html>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

this investigation.”<sup>53</sup> In a telling claim that demonstrates the amount of ascendancy that IBM, a private corporation, had in a governmental criminal investigation, the defense attorney for the arrestees “claimed that the sting operation was controlled by IBM and was undertaken as part of a struggle against international competition.”<sup>54</sup>

Undercover sting operations pose procedural due process and evidentiary concerns that may be circumvented through the use of private investigators. Assume the undercover IBM investigator asks to a non-disposed Hitachi executive, “Do you want to buy these computer chips?” After some inducement, the executive agrees, and a crime is committed. At trial, the Hitachi executive will not have the defense of entrapment available to him. As long as the IBM investigator was not deputized, not an agent of the police, and was not instructed to act illegally, he will not be considered a governmental actor; therefore, no entrapment defense is available.<sup>55</sup> The defense counsel may have had a stroke of intuition, perceiving the IBM Investigator handing the tape recorder to the FBI agent on a “silver platter,” when he claimed that the undercover operation was “controlled by IBM.”<sup>56</sup> The broadening of the state action doctrine will go far in alleviating the likelihood for such aforementioned potential abuses. Moreover, this relationship between both eBay and IBM and governmental law enforcement epitomizes the quintessential, mutually beneficial, symbiotic relationship that underlies state action jurisprudence.

### C. Shrinking Constitutional Concerns

At the heart of every business entity is the objective to keep both its employees and customers honest and safe. Companies facilitate this goal by creating and managing a corporate security department. They hire detectives, guards, and investigators to keep the

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<sup>53</sup> Jeff Gerth, *Japanese Executive Charged in I.B.M. Theft Case*, N.Y. TIMES, June 23, 1982, at A1.

<sup>54</sup> Marx, *supra* note 49.

<sup>55</sup> *Id.* (indicating that the obvious concern of what constitutes “agency” is open to interpretation).

<sup>56</sup> *Id.*; see also *United States v. Jacobsen*, 466 U.S. 109, 111, 125 (1984) (holding the Fourth Amendment protections against unlawful search and seizure inapplicable when defendant’s package containing cocaine was unreasonably opened by private Federal Express employee and subsequently handed over to Federal DEA agents); Joh, *supra* note 1, at 115-17.

workplace safe, prevent theft, and maintain the overall integrity of the business. Some corporate investigators interact with governmental law enforcement on an expansive level.<sup>57</sup> In most cases, your typical store detective has little or no interaction with the public police. The little interaction they do have consists of handing a customer or employee over to public officers for arrest processing. Due to the small amount of intercommunication, many courts have been unwilling to treat these corporate security personnel any differently than private citizens.<sup>58</sup>

The inherent prevalence of corporate security personnel to detain, search, and arrest members of the public mandates that, in certain situations, they should be treated as state actors. One such situation occurs when a corporate store detective detains a customer or employee and questions him. There is too great a potential for coerced confessions and prolonged detentions without the protections of *Miranda* and probable cause.<sup>59</sup> However, without being deputized or given special police powers, these store detectives are treated legally in the same manner an average person would be when making a citizen's arrest and handing a subject over to the public police.<sup>60</sup> Therefore, victims are afforded no constitutional protections where their injury was at the hands of these private security personnel. This Comment advocates that state legislatures mandate that, at a minimum, corporate security personnel furnish detainees with their *Miranda* rights. This will assure that custodial interrogations result in voluntary statements or confessions.

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<sup>57</sup> See *supra* Part III.B.

<sup>58</sup> See *discussion infra* Part VI.

<sup>59</sup> See Joan E. Marshall, *The At-Will Employee and Coerced Confessions of Theft: Extending Fifth Amendment Protection to Private Security Guard Abuse*, 96 DICK. L. REV. 37, 37-38, 40 (1991) (examining the potential abuses that present themselves when store detectives detain and interview employees suspected of theft). See also *Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1126 (D.N.J. 1990) (discussing former employees' claims under the Racketeer Influenced and Corrupt Organizations Act and state antiracketeering law arising out of the conduct of loss prevention specialists who allegedly extorted confessions and payments from employees suspected of theft).

<sup>60</sup> From a public policy perspective, the courts' reasoning is sound. Many of these store detectives and security guards are subjected to limited employment screening, have little or no training, and go virtually unregulated in many states. See Boghosian, *supra* note 26, at 178, 187, 189, 206, 211.

#### D. The Division of Labor

It is important to recognize that the world's ever increasing population necessitates the existence of private police. This fact resonates because there are certain areas of policing that should be kept private because the public is better served. This is most clearly illustrated by viewing the administration of business entities situated on mass areas of private property. Places like Disney World and private university campuses are good examples.<sup>61</sup> The private nature of these properties lends itself to private policing. It saves the public tax dollars that would be allocated if governmental police were required to patrol the Magic Kingdom or the Harvard University dormitories. It allows the officers to focus on the nuances and intricacies of their environment without any outside influences. Further, modern society sometimes requires the government to supplement its police work with the private sector.<sup>62</sup> Typically, this is done through contractual relationships. Recently, the Nassau County Department of Social Services contracted with a private detective agency to help county investigators detect and pursue welfare fraud.<sup>63</sup> A sociological theory that is helpful in understanding this approach is the division of labor.<sup>64</sup> The theory posits that "the activity of policing extends beyond what the public police do and includes the private police."<sup>65</sup> By not limiting the concept of police to prototypical governmental employees, one can fully understand contemporary reality. It is helpful to see that in certain provinces, public police are best equipped to handle the job. In some circumstances, the private police are superlative. Still, in other situations, a combination of the two is optimum. However, regardless of who is policing, there are certain minimal constitutional protections that need to be afforded to people who encounter the police.

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<sup>61</sup> See Harvard University Police Department, [http://www.hupd.harvard.edu/hupd\\_overview.php](http://www.hupd.harvard.edu/hupd_overview.php) (last visited Jan. 21, 2010) (indicating that the Harvard University Police department consists of special state police officers).

<sup>62</sup> See Joh, *supra* note 1, at 51, 66 (noting that private police increasingly carry the same police work as public police; thus, private police can no longer be viewed as "mere 'night watchmen'").

<sup>63</sup> See Bruce Lambert, *Audit Faults Nassau's Efforts to Combat Welfare Fraud*, N.Y. TIMES, May 21, 2004, at B6.

<sup>64</sup> Maksymilian Del Mar, *Jurisprudence on the Frontline*, 19 EUR. J. INT'L L. 1095, 1100 (2008).

<sup>65</sup> Joh, *supra* note 27, at 593.

#### IV. STATE ACTION

##### A. Introduction and History

Throughout the existence of our nation, one question has been raised when an individual or entity inflicts harm onto another person or entity: Is the government in some way responsible? Justice Bradley's articulation of the state action doctrine in *The Civil Rights Cases*<sup>66</sup> answers this question and is the genesis of the most fundamental principle of American constitutional law. His primary premise is that the prohibitory provisions of Section 1 of the Fourteenth Amendment operate only against state action and not against private action.<sup>67</sup> This formulation is an application of the understanding that the United States Constitution generally is a restraint on governmental action and does not provide one private citizen with rights against another.<sup>68</sup> The proliferation of privatization has resulted in the majority of society's injuries being caused by private entities, and not the hands of government.<sup>69</sup> As a necessary consequence of this contemporary reality, the Supreme Court, through many cases, has constructed a doctrine whereby a private individual or entity's actions can be attributed to the government.<sup>70</sup> The different principles will be set forth, followed by the relevance of each to corporate investigators and other segments of the private police.

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<sup>66</sup> 109 U.S. 3 (1883).

<sup>67</sup> *Id.* at 10-11 ("It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment.").

<sup>68</sup> *Id.* at 11.

<sup>69</sup> See Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?*, 58 OHIO ST. L.J. 175, 221-222 (1997) (discussing the effect of privatization of governmental functions and the growing trend of injured individuals seeking damages from "the private entities that have taken over the government agency's operations").

<sup>70</sup> See Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 Hous. L. REV. 333, 336 (1997) (providing the backbone for anybody interested in studying the intricacies of the state action doctrine).



## B. Public Function

Governments often delegate to private entities functions that the government itself could perform.<sup>71</sup> If a person is injured by a private entity performing a governmental function, it may be argued that the private entity did not hold itself to a constitutional standard. In other words, but for the government's delegation of authority to the private entity, no injury would have occurred. Citizens should not be deprived of their constitutional protections and liberties simply because the government could not meet the needs of modern society. The controlling test is, "whether the actor [in question] is performing a traditional governmental function."<sup>72</sup> If found to be performing a traditional governmental function, the private entity can be held accountable for any injuries suffered as a result of its deprivation of a constitutionally protected right.<sup>73</sup>

To those wishing to impose § 1983 liability upon a corporate investigator, the public function doctrine may appear as a blessing furnished by the Supreme Court.<sup>74</sup> Further, Justice Stevens' dissenting opinion in *Flagg Bros* seems like divine inspiration.<sup>75</sup> He states, in pertinent part, "it is clear that the maintenance of a police force is a unique sovereign function, and the delegation of police power to a private party *will entail state action*."<sup>76</sup> As enticing as that language may seem, it does nothing for a plaintiff bringing a § 1983 claim for deprivation of his constitutional rights against the majority of the private police.

Most corporate investigators and security personnel are not

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<sup>71</sup> See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (describing why constitutional protections should be afforded in a company owned town); *Terry v. Adams*, 345 U.S. 461, 468-69 (1953) (ruling on whether race based exclusions in a privately organized political primary are constitutional); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358-59 (1974) (holding that a private utility company was not a state actor for Fourteenth Amendment purposes); *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (analyzing the status of a private school's discharge policies under the state action doctrine and "whether the school's action . . . can fairly be seen as state action").

<sup>72</sup> *Edmonson*, 500 U.S. at 621.

<sup>73</sup> See *Marsh*, 326 U.S. at 509-10.

<sup>74</sup> *City of Newport v. Fact Concerts Inc.*, 453 U.S. 247, 259-260 (1981).

<sup>75</sup> *Flagg Bros*, 436 U.S. at 178 (Stevens, J., Dissenting) (analyzing whether a creditor's response in dealing with a debtor's property constitutes state action when the process was statutorily approved).

<sup>76</sup> *Id.* at 173 n.8. (emphasis added).

delegated any police powers by the state.<sup>77</sup> They are not labeled special police officers, or “deputized” as police officers in certain contexts. Thus, an exorbitant amount of private police will be excluded as state actors under public function jurisprudence. The Seventh Circuit, influenced by Justice Stevens, held in *Payton v. Rush—Presbyterian—St. Luke’s Medical Center*<sup>78</sup> that private police officers licensed to make arrests could be state actors under the public function test.<sup>79</sup> What about the overwhelming number of investigators, detectives and guards who have not been granted statutory police powers? Moreover, what are “police powers?” Notwithstanding the ability to enact arrest and search warrants, the sole distinction between a regular citizen and an individual with “police power” is that only the latter may make a felony arrest with solely “probable cause to believe that a felony has occurred.”<sup>80</sup> That is, a citizen’s arrest power is limited to misdemeanors that are committed in the citizen’s presence and felonies that have in fact been committed.<sup>81</sup> The public function doctrine makes an arbitrary distinction between corporate investigators and “deputized” private police personnel with augmented arrest powers. A plaintiff will only be able to impose § 1983 liability against the latter.<sup>82</sup> Furthermore, a persuasive argument that defendant corporations will always have when confronted with a public function argument in § 1983 litigations is that, historically, policing was private in character.<sup>83</sup> Municipal police departments did not rise until the mid 19th century.<sup>84</sup>

## V. NEXUS THEORY—HOPE ON THE HORIZON

The nexus theory of state action jurisprudence is most beneficial to courts in analyzing whether corporate investigators are state

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<sup>77</sup> See, e.g., John B. Owens, *Westec Story: Gated Communities and the Fourth Amendment*, 34 AM. CRIM. L. REV. 1127, 1158 (1997) (“[Flagg Brothers] may not establish that private police forces equal state actors, but it does illustrate Justice Stevens’ view.”).

<sup>78</sup> 184 F.3d 623 (7th Cir. 1999).

<sup>79</sup> *Id.* at 630.

<sup>80</sup> Sklansky, *supra* note 14, at 1184. See also *Florida v. White*, 526 U.S. 559, 565 (1999).

<sup>81</sup> Sklansky, *supra* note 14, at 1184.

<sup>82</sup> *Id.* at 1186-87.

<sup>83</sup> *Id.* at 1210-1211 (providing a great history of policing and its private roots in the United States).

<sup>84</sup> *Id.* at 1206-07.

actors for constitutional or civil rights purposes. The theory is comprised of the symbiotic relationship and state compulsion doctrines. The importance of the nexus doctrine is buttressed by the Supreme Court's arbitrary reliance on "police powers."<sup>85</sup> The nexus doctrine allows a corporate investigator without statutorily granted police powers to be labeled a state actor in circumstances when he is working closely with governmental law enforcement.<sup>86</sup> The question under the theory is: "When do the contacts between government and the action of a private actor become so extensive that the action in question may be fairly attributed to government? At some point along the nexus continuum, the action of government and the private actor become so intertwined that the courts will . . . pin the state action label on the [private actor]."<sup>87</sup>

State action exists through a symbiotic relationship when a close nexus exists such that the private entity's actions automatically belong to the state through their joint participation or an exchange of mutual benefits.<sup>88</sup> Joint action may be defined as an "agreement on a joint course of action in which the private party and the state have a common goal" and act in furtherance of that goal.<sup>89</sup> A private citizen comes within the reach of § 1983 liability only when "he is a willful participant in joint action with the [s]tate or its agents."<sup>90</sup> Under the state compulsion test, a private entity can become a state actor when

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<sup>85</sup> See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 666 (1887).

By the settled doctrines of this court, the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government.

*Id.* (internal quotations omitted).

<sup>86</sup> See, e.g., *Jackson*, 419 U.S. at 351 ("But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.").

<sup>87</sup> *Buchanan*, *supra* note 70, at 391.

<sup>88</sup> See *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 941-42 (finding state action when a corporate creditor and the government jointly participated in a challenged action); *Burton*, 365 U.S. at 724-26 (finding state action after observing the mutual benefits between governmental lessor and private lessee).

<sup>89</sup> *Gramenos v. Jewel Cos.*, 797 F.2d 432, 435 (7th Cir. 1986).

<sup>90</sup> *Dennis v. Sparks*, 449 U.S. 24, 27 (1980).

it acted in a manner coerced or encouraged by the state.<sup>91</sup>

While jointly participating, corporate investigators and governmental police have the classic symbiotic relationship. Private corporations benefit through the relationship by strengthening the foundation of their business through the removal and prosecution of problematic consumers, employees, and clients. Governmental law enforcement increases its productivity through an increase in arrests, prosecutions, and convictions. This, in turn, garners the governmental police agency a stronger reputation in the community and increased public support. Governmental law enforcement relies on corporate investigators for easy access to corporate records and databases without having to rely on the often arduous subpoena process. Further, the government relies on the corporate investigators to initiate and develop their cases. By dealing with governmental law enforcement and having the threat of punishment in the form of prosecution available to them, the corporate investigators can strengthen their deterrence model. During interviews, the corporate investigators can utilize the threat of prosecution to extract confessions.

Perceiving the symbiotic relationship between governmental law enforcement and the private police, some courts have relied on these instruments of state action jurisprudence to impose constitutional restraints upon corporations and their investigators.<sup>92</sup> In *Moore v. Detroit Entertainment, L.L.C.*, the Michigan Court of Appeals utilized the nexus doctrine to hold the security personnel of Motor City Casino, a private entity, to be state actors and liable to plaintiffs under § 1983.<sup>93</sup> *Moore* is meaningful because the court found it necessary to hold the casino security personnel to be state actors under the nexus test; notwithstanding the lower court already holding “as a matter of law” that they were state actors because they had statutorily

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<sup>91</sup> See e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 169-71 (1970).

<sup>92</sup> See *Stapleton v. Super. Ct. of L.A. County*, 447 P.2d 967, 969-70 (Cal. 1968) (imposing constitutional restraints on the actions of credit card company investigators while jointly participating in search with municipal police officers). But cf. *Minnesota v. Buswell*, 460 N.W.2d 614, 615 (Minn. 1990) (refusing to impose constitutional restraints on private security agents who arrested and searched individuals, subsequently turning over evidence to the public police for prosecution).

<sup>93</sup> *Moore v. Detroit Entm't, L.L.C.*, 755 N.W.2d 686, 699-700 (Mich. 2008) (“[D]efendants’ joint engagement with the Detroit [P]olice in the arrest and detention of plaintiff also satisfies the symbiotic relationship or nexus test of action ‘under color of state law.’ ”).

granted special police powers.<sup>94</sup> The *Moore* decision reinforces the premise of this article that courts should not solely rely on the Supreme Court's arbitrary distinction between private police with statutorily granted arrest powers and corporate investigators with no such power. The latter also have the ability to deprive individuals of their constitutional rights and protections.

In *Moore*, the "plaintiff's [unlawful] detention within the locked casino security room commenced immediately after a combined force of Detroit [P]olice [Department] officers and casino security personnel confronted the plaintiff."<sup>95</sup> Both the casino security manager and the plaintiff's companion "testified that the Detroit [P]olice . . . authorized and indeed encouraged [the] . . . security personnel to seize plaintiff and escort him back to the casino."<sup>96</sup> "[T]he state 'provided a mantle of authority' that constrained plaintiff to subject himself to detention by defendant."<sup>97</sup> This was "not [simply] a close working relationship between [the casino] security personnel and the Detroit [P]olice officers."<sup>98</sup> This was "a joint and cooperative effort to detain plaintiff either in a city jail cell or its casino equivalent."<sup>99</sup> The court held that the defendant security personnel's "joint engagement with the Detroit [P]olice in the arrest and detention of plaintiff also satisfied the symbiotic relationship or nexus test of action 'under color of state law.' "<sup>100</sup> The *Moore* court is but one of a small number of decisions that have used the nexus test to find members of the private police liable under § 1983.<sup>101</sup>

Many of the cases dealing with the constitutionality of joint efforts between the public police and corporate investigators focus on whether the private individual was an "agent of the government."<sup>102</sup>

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<sup>94</sup> *Id.* at 695, 698.

<sup>95</sup> *Id.* at 699.

<sup>96</sup> *Id.* at 691, 699.

<sup>97</sup> *Id.* at 699.

<sup>98</sup> *Moore*, 755 N.W.2d at 700.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See *Chapman v. Higbee Co.*, 319 F.3d 825, 834-35 (6th Cir. 2003); *Murray v. Wal-Mart Inc.*, 874 F.2d 555, 558-59 (8th Cir. 1989) ("[S]tate action is present when private security guards and police officers act in concert to deprive a plaintiff of his civil rights . . .").

<sup>102</sup> Compare *United States v. Koenig*, 856 F.2d 843, 845, 846-47 (7th Cir. 1988) (holding that the Federal Express security employee was not to be considered an "agent of the government" when he illegally opened a package and found cocaine, subsequently turning the package over to the Drug Enforcement Administration), with *United States v. Walther*, 652

This determination is a factual one and “must be made on a ‘case-by-case basis and in light of all of the circumstances.’ ”<sup>103</sup> Due to the subjective nature of a totality of the circumstances test, the results have been inconsistent.<sup>104</sup> Likewise, analysis under the nexus theory of state action jurisprudence is very fact intensive. However, the nexus tests are theories separate and apart from general agency law. Unlike agency law, the nexus theory does not require that “one person . . . manifests assent to another person” to act on his behalf and be subject to his control.<sup>105</sup> Expressly or impliedly, manifestation of assent to act on behalf of and under the control of the government is not readily perceivable in a majority of the private/public police cases. Most corporate investigators are acting on behalf of their corporation and have their company’s interests in mind; not the interests of governmental law enforcement. For example, in the aforementioned examples, the eBay and IBM investigators were acting on behalf of their own corporate interests; not strictly on behalf of the government. Further, in many instances, corporate investigators regulate and control the details of an investigation; sometimes the government does not become aware of or get involved until a latter phase of the investigation.<sup>106</sup> In this instance, where a corporate investigator initiates and conducts an investigation on his own volition—only notifying governmental law enforcement of the case afterwards, a general agency theory will not suffice in finding state action if the violations occurred before the government became involved. Theoretically, it should be easier to find the private police to be engaging in state action under the nexus theory rather than an agency theory. The nexus theory facilitates a finding of state action notwithstanding the private corporations’ personal interest in and control of the investigation.<sup>107</sup>

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F.2d 788, 791-92 (9th Cir. 1981) (holding an airline employee to be “an agent of the government” when she illegally opened plaintiff’s package, violating the plaintiff’s Fourth Amendment rights).

<sup>103</sup> *Koenig*, 856 F.2d at 847 (quoting *United States v. Feffer*, 831 F.2d 734, 739 (7th Cir. 1987)).

<sup>104</sup> *See Walther*, 652 F.2d at 791 (“[T]here exists a ‘gray area’ between the extremes of overt governmental participation in a search and the complete absence of such participation . . . [and that] the ‘gray area’ can best be resolved on a case-by-case basis.”).

<sup>105</sup> RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

<sup>106</sup> *See Koenig*, 856 F.2d at 845 (stating that a “Federal Express Senior Security Specialist” conducted an investigation of a suspicious package before contacting the Drug Enforcement Agency).

<sup>107</sup> *See Feffer*, 831 F.2d at 739 (stating that in determining whether an individual is an

In 2001, the United States Supreme Court articulated a theory of state action jurisprudence that has been labeled “pervasive entwinement.”<sup>108</sup> The theory focuses on the overlapping identities of the public and private entities involved. A challenged activity may be state action “when it is ‘entwined with governmental policies,’ or when government is ‘entwined in [its] management or control.’”<sup>109</sup> The analysis in *Brentwood* was “necessarily fact-bound,” and the Court found state action primarily because eighty four percent of the private association’s members were public officials.<sup>110</sup> In the private police context, this theory may be helpful for a plaintiff who was injured by a public police officer while moonlighting as a security employee for a private company.<sup>111</sup>

## VI. CASE LAW

### A. The Supreme Court—Proper holdings with Antiquated Legal Analysis

In the two instances where the United States Supreme Court has dealt with the constitutional status of the private police, the Court made the proper holdings but based its decisions on legal analysis that is currently unsound and antiquated. In the two cases, the Court found the private detectives to be state actors because they had been granted statutory police powers. The Court was correct because it is readily apparent that when a state legislature authorizes a person to possess police powers, that individual should be labeled a state actor. However, by neglecting to emphasize the contacts between governmental law enforcement and the private detectives, the Court’s reasoning offers little contemporary protection to individuals who have had their constitutional rights assaulted by corporate investigators

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agent of the state, the court must make a case-by-case analysis).

<sup>108</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291 (2001).

<sup>109</sup> *Id.* at 296 (alteration in original) (citing *Evans v. Newton* 382 U.S. 296, 299, 301 (1966)).

<sup>110</sup> *See Brentwood*, 531 U.S. at 298 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)).

<sup>111</sup> *See Joh*, *supra* note 27, at 605-07 (“The most recent and reliable national study estimates that approximately 150,000 public police officers work in private policing jobs when not on duty.”) (internal citation omitted).

without statutory granted police powers.

*Williams v. United States*<sup>112</sup> involved the actions of a private detective who was hired by a lumber company to ascertain the identity of thieves.<sup>113</sup> The issue was whether the private detective violated the antecedent to 18 U.S.C.A. § 242 by using brutal and violent methods to garner confessions.<sup>114</sup> The “thieves” were repeatedly beaten with a rubber hose, choked with a sash cord, and temporarily blinded by bright lights.<sup>115</sup> A municipal police officer was also present for the beatings.<sup>116</sup> The Court held that the private detective was acting under color of state law.<sup>117</sup> It focused its analysis on the fact that the detective was designated as a special policeman in the City of Miami, Florida.<sup>118</sup> Justice Douglas stated it was “common practice . . . for private . . . detectives to be vested with policeman’s powers.”<sup>119</sup> Instead, what if the private detective was similarly situated to most corporate investigators and did not have a “special police officer card[?]”<sup>120</sup> Would the case have come out differently? Justice Douglas next averred that the “investigation [was] conducted under the aegis of the State, as evidenced by the fact that a regular police officer was detailed to attend it.”<sup>121</sup> This is the only statement in the opinion that emphasizes the relationship between the private detective and the public police, as opposed to the private detective and the state legislature. This is a precursor to the nexus theory of state action jurisprudence, and is a glimmer of hope for plaintiffs wishing to impose liability resulting from an investigation conducted by corporate investigators without statutorily granted police powers.

In *Griffin v. Maryland*, the Court dealt with the issue of whether a deputized private detective was in violation of the Fourteenth Amendment.<sup>122</sup> While working for an amusement park, the private detective enforced the park’s policy of segregation by arrest-

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<sup>112</sup> 341 U.S. 97 (1951).

<sup>113</sup> *Id.* at 98.

<sup>114</sup> *Id.* at 98.

<sup>115</sup> *Id.* at 98-99.

<sup>116</sup> *Id.* at 99.

<sup>117</sup> *See Williams*, 341 U.S. at 100.

<sup>118</sup> *Id.* at 98-100.

<sup>119</sup> *Id.* at 99.

<sup>120</sup> *Id.* at 98.

<sup>121</sup> *Id.* at 99-100.

<sup>122</sup> 378 U.S. 130, 131 (1964).



ing a group of African Americans for trespassing on the property.<sup>123</sup> Due to the “deputized” status of the private detective, the Court had no trouble holding that he was a state actor for constitutional purposes.<sup>124</sup> After *Griffin*, the Court left unanswered the constitutional status of private police who are not deputized or otherwise given enhanced arrest powers from the state legislature. This Comment avers that when the contacts on the nexus continuum between corporate investigators and governmental law enforcement reach a certain level, the corporate investigators should be considered state actors for constitutional and civil rights purposes.

### B. Lower Courts—Failing the Adversarial System

The unwillingness of many lower courts to hold corporate investigators to a constitutional standard has failed both adversarial parties of the American judicial system. Criminal defendants are unable to suppress inculpatory evidence that was obtained in a constitutionally deficient manner by the private police. Accordingly, the prosecution has access to confessions and contraband that unfairly buttresses their leverages in plea bargaining and trial practice. In addition, promising civil rights plaintiffs are incapable of asserting civil rights claims against the private police. As a result, individuals injured by the private police are powerless.<sup>125</sup>

In many cases, a criminal defendant’s most compelling argument is that the exclusionary rule of the Fourth Amendment should preclude evidence procured from an unlawful search and seizure from being presented against him at trial.<sup>126</sup> In *United States v. Francoeur*, the defendants did not have access to this constitutional protection after being detained and searched with an indifference to probable cause by members of the Walt Disney World Security force.<sup>127</sup> After a Disney employee allegedly saw a counterfeit bill in one of the defendant’s presence, the Disney Security force unlawfully detained the defendants in a security office, searched and confiscated

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<sup>123</sup> *Id.* at 132-33.

<sup>124</sup> *Id.* at 132, 137.

<sup>125</sup> The stark reality of a lack of remedial measures is supported by the fact that state tort actions against the private police are strikingly rare and unsuccessful. See Slanksy, *supra* note 14, at 1185-86.

<sup>126</sup> Slanksy, *supra* note 14, at 1266.

<sup>127</sup> 547 F.2d 891, 892-93 (5th Cir. 1977).

airline tickets, hotel receipts, and counterfeit fifty dollar bills.<sup>128</sup> Behind a one-way mirror, Disney employees then identified the defendants to have passed counterfeit bills in their stores earlier that morning.<sup>129</sup> The United States Secret Service arrived and the Disney Security force handed the evidence over to them on a silver platter.<sup>130</sup> The defendants were subsequently convicted of passing counterfeit U.S. currency.<sup>131</sup> The United States Supreme Court denied certiorari.<sup>132</sup> If the Disney Security force “does not provide law enforcement services,” and only issues “Mickey Mouse traffic citations,” why were the officers in *Francoeur* detaining, searching, and implementing identification procedures behind one way mirrors?<sup>133</sup>

Governmental law enforcement’s duty to provide *Miranda* warnings before custodial interrogations is meant to secure a person’s Fifth Amendment right against self-incrimination. Statements secured by the government from a defendant in the absence of *Miranda* warnings “may not be used by the prosecution in any proceedings against the defendant.”<sup>134</sup> Individuals have no accompanying protection against compelled confessions when they are being interrogated by the private police. In *Grand Rapids v. Impens*, the Michigan Supreme Court considered “whether a signed statement procured by private security guards, one of whom was an off-duty deputy sheriff, may be admitted into evidence against a defendant even though no *Miranda* warnings were given.”<sup>135</sup> The court easily concluded that the “security personnel who did not act at police instigation and functioned without police assistance and cooperation are to be regarded as private individuals.”<sup>136</sup> The defendant’s written confession was deemed admissible into evidence and he was convicted.<sup>137</sup>

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<sup>128</sup> *Id.* at 892-93.

<sup>129</sup> *Id.* at 893.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 891.

<sup>132</sup> *Francoeur v. United States*, 431 U.S. 932 (1977).

<sup>133</sup> *Sipkema v. Reedy Creek Imp. Dist.*, 697 So.2d 880, 882 (Fla. App. 5th Dist. 1997) (discussing a high speed chase by officers of the Disney Security Force that resulted in the tragic death of a young man).

<sup>134</sup> *City of Grand Rapids v. Impens*, 414 Mich. 667, 672-73 (1982).

<sup>135</sup> *Id.* at 670.

<sup>136</sup> *Id.* at 677.

<sup>137</sup> *Id.* at 670, 672.

## VII. NEXUS PLUS THEORY AND A CALL TO CONGRESS

In cases where investigations are jointly conducted by governmental law enforcement and corporate investigators, courts should look to the nexus theory of state action jurisprudence. Though not perfect, the symbiotic relationship and state compulsion doctrines are workable. The theories entail a factual inquiry into the circumstances of each case. This Comment respectfully submits that, in addition, a “nexus plus theory” of state action analysis should be utilized in joint investigation cases. Including all the aspects judges already consider in making a state action determination, courts will also look to a plus factor. The plus factor directly confronts and considers the issues that arise with “new version of the silver platter doctrine.” Courts will be aware of and factor into consideration the situation where evidence is procured by corporate investigators and subsequently turned over to governmental law enforcement on a “silver platter.” Under the nexus plus theory, it is highly relevant to the state action analysis who obtained the statements, contraband, identifications and other evidence. In searching for state action, courts will heavily weigh the situation where corporate investigators turn over evidence they obtained to the government. Unlike a general agency theory, this nexus plus theory will find state action if the corporate investigators acted on their own volition in procuring evidence in a constitutionally deficient manner. Further, courts will also analyze: the amount of interaction between the two entities, reasoning for interaction; and possible overlapping identities.

In dealing with custodial interrogations by the private police, Congress or state legislatures should get involved. A regulation requiring all state-licensed security personnel to disseminate *Miranda* warnings to subjects of custodial interrogations would remedy many of the self-incrimination issues. In *Miranda*, Chief Justice Warren stated:

It is impossible for us to foresee the potential alternatives for protecting the [Fifth Amendment] privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities . . . . We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while

promoting efficient enforcement of our criminal laws.<sup>138</sup>

### VIII. CONCLUSION

This Comment has shown the profound impact the private police have on modern American society. Their interaction with the public police buttresses the government's ability to provide law enforcement. However, as this Comment has demonstrated, the private police have the inherent ability to deprive individuals of their fundamental rights and freedoms. A broadening of the state action doctrine will preclude the government from surreptitiously circumventing the United States Constitution, and hold the private police accountable for their actions. By utilizing a "nexus plus theory" of state action analysis, courts will be well equipped to provide efficient state action analysis in dealing with joint investigations between corporate investigators and governmental law enforcement.

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<sup>138</sup> 384 U.S. 436, 467 (1966).