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## Cops for Hire: Reforming Regulation of Private Police in Washington State

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By Andrew Stokes

### I. INTRODUCTION

In late 2015, some residents of Seattle, Washington believed their neighborhoods were experiencing a crime epidemic.<sup>1</sup> The Seattle Police Department was seen as slow to respond to some crimes, including property crimes and drug use.<sup>2</sup> In response, residents pooled their resources to hire private police<sup>3</sup> to patrol their neighborhoods.<sup>4</sup> The private police were seen as providing improved response times and more aggressive tactics: one group of residents in the Magnolia neighborhood claimed that “[t]he [public] police are not allowed to speak to anyone unless they have a reasonable suspicion that a crime may be afoot. Further, they must be able

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<sup>1</sup> See Erica C. Barnett, *Magnolia Resident Pepper-Sprayed by Private Security Guard*, THE C IS FOR CRANK (Mar. 4, 2016), <https://thecisforcrank.com/2016/03/04/magnolia-resident-pepper-sprayed-by-private-security-guard/> [<https://perma.cc/F27N-BEBS>].

<sup>2</sup> See, e.g., David Kroman, *Pepper-spraying in Magnolia puts private cops in the spotlight*, CROSSCUT (Mar. 8, 2016), <http://crosscut.com/2016/03/pepper-spraying-in-magnolia-puts-private-cops-in-the-spotlight/> [<https://perma.cc/KM7U-BVZ3>]; Jessica Lee, *Seattle neighborhoods hire private security amid ‘blatant lawlessness’*, SEATTLE TIMES (Jan. 29, 2016), <http://www.seattletimes.com/seattle-news/citizen-anti-crime-movement-afoot-in-seattles-neighborhoods/> [<https://perma.cc/HU54-GTPN>].

<sup>3</sup> By “private police” I refer to lawful, private, for-profit services whose primary objectives include preventing crime, protecting property and life, and maintaining order. See Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 55 (2004). While private police have similarities with other private security organizations, they are distinct from vigilante groups (vigilante actions are illegal; private police are authorized by law) and private military organizations (military organizations focus on operations abroad; private police are focused on domestic policing). See *id.* at 56. Because they are hired by a private actor, private police are distinct from private firms hired by a public police department to accomplish a traditional government function. See, e.g., Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 269–70 (2010).

<sup>4</sup> Lee, *supra* note 2.

to articulate this suspicion in clear language. Private [police] can interact with anyone at any time. Because they do not represent the Government and the Constitution does not apply to private [police].”<sup>5</sup>

While this characterization of the restrictions on public police is not entirely accurate, the claim nonetheless contains important insights. If an individual or group thinks that their local police department does not respond quickly enough to emergency calls or does not patrol the neighborhood often enough, they can simply hire private police to fill in the gaps. Furthermore, unlike public police, whose conduct is governed by state and federal constitutions and rules of criminal procedure, the private police are not typically regulated by state and federal constitutions because they are not considered state actors.<sup>6</sup> Rather, the private police “find their conduct governed by a hodgepodge of private contract provisions, state and local regulations, and tort and criminal law doctrines.”<sup>7</sup>

However, recent events show that these regulations are not adequate to protect the public from abuses by the private police. In December 2015, residents of the Magnolia neighborhood hired the firm Central Protection (CP) to patrol their neighborhood.<sup>8</sup> The CP vehicles proclaimed that they were “Unarmed” and CP had ostensibly been instructed that, if they observed “suspicious activity,” they were to immediately “contact 911, and maintain visual surveillance of the perpetrator until Seattle Police arrive at the scene.”<sup>9</sup>

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<sup>5</sup> *Private Security Officers vs Public Law Enforcement*, MAGNOLIA PATROL ASSOCIATION (Dec. 14, 2015), [https://web.archive.org/web/20160304231831/http://www.magnoliapatrol.org/blog/\[https://perma.cc/A7Z4-BU48\]](https://web.archive.org/web/20160304231831/http://www.magnoliapatrol.org/blog/[https://perma.cc/A7Z4-BU48]).

<sup>6</sup> See Joh, *supra* note 3, at 95.

<sup>7</sup> David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1166–67 (1999).

<sup>8</sup> MAGNOLIA PATROL ASSOCIATION, [https://web.archive.org/web/20160208203841/http://www.magnoliapatrol.org/\[http://perma.cc/HU24-7TCU\]](https://web.archive.org/web/20160208203841/http://www.magnoliapatrol.org/[http://perma.cc/HU24-7TCU]) (last visited Feb. 25, 2017).

<sup>9</sup> *Id.*

Less than three months later, a longtime neighborhood resident who had recently lost his home<sup>10</sup> was sitting in his car before his shift at a local gas station.<sup>11</sup> A blue-and-white CP Hummer pulled up behind him.<sup>12</sup> “Within the next five minutes or so, the officer had pepper-sprayed [the resident] in the face and, reportedly, knocked [his] Android phone out of his hand, sending the phone’s face, body, and battery scattering in different directions.”<sup>13</sup>

The officer had reportedly been accused of aggressive behavior a year earlier,<sup>14</sup> had been convicted of negligent driving and unlawful discharge of a firearm, and had pleaded guilty to one gross misdemeanor count of violating a no-contact order and one felony count of forgery.<sup>15</sup> In 2010, his felony conviction was vacated on the grounds that it was affecting his opportunities to obtain licensing for employment, and in 2011 the court restored his right to own a gun.<sup>16</sup> In 2013, he received his license to work as a private security guard.<sup>17</sup> In 2014, while employed by a different private police company, he was arrested and charged with two counts of fourth-degree assault after pepper spraying two teenagers.<sup>18</sup>

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<sup>10</sup> Gabriel Spitzer, *Pepper Spray Skirmish Shakes Homeless Magnolia Resident’s Faith in His Neighborhood*, KNKX 88.5FM (Jun. 11, 2016), <http://knkx.org/post/pepper-spray-skirmish-shakes-homeless-magnolia-resident-s-faith-his-neighborhood> [<http://perma.cc/9AHV-QH9N>].

<sup>11</sup> Barnett, *supra* note 1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Kroman, *supra* note 2.

<sup>15</sup> Erica C. Barnett, *Magnolia Guard Accused in Pepper-Spray Incident Pled Guilty to Felony; SPD Says He May Have Overstepped His Authority*, THE C IS FOR CRANK (Mar. 7, 2016), <https://thecisforcrank.com/2016/03/07/magnolia-guard-accused-in-pepper-spray-incident-pled-guilty-to-felony-spd-says-he-may-have-overstepped-his-authority/> [<https://perma.cc/R9CL-VZEE>].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Alison Grande, *Magnolia security guard previously charged with assault*, KIRO 7 (Mar. 8, 2016), <http://www.kiro7.com/news/magnolia-security-guard-previously-charged-with-assault/151435065> [<https://perma.cc/2Z45-KYDS>].

This incident was not the only example of inappropriate private police behavior in Seattle. In August 2014, a black man was walking near the Westlake Center mall in downtown Seattle when a person described in legal documents as “Shirtless White Man” accosted him.<sup>19</sup> A private police officer, who was providing security guard services for the mall, arrived on the scene; rather than confronting “Shirtless White Man,” the officer pepper-sprayed the black pedestrian in the face.<sup>20</sup> The officer reportedly then detained the pedestrian, in the process tearing ligaments in the pedestrian’s wrist, and prohibited him from washing the pepper spray out of his eyes.<sup>21</sup>

These stories demonstrate that the lack of regulation surrounding the private police in Washington creates a significant risk to the public. The Washington State Legislature should improve the regulation of private police companies in order to ensure that private police do not infringe on the rights of Washington residents. Specifically, the legislature should enact legislation to (1) modify the existing regulatory regime to cover all private police in Washington while allowing local flexibility to implement supplemental regulations, (2) improve transparency into the private police industry, (3) require more thorough training for private police, and (4) make it easier for people harmed by the private police to receive redress.

This article will begin by discussing the scope of the private police industry, both nationally and within Washington, and identifying some of the risks posed by that industry. It will then outline the existing regulatory framework for the private police, with a focus on Washington’s statutory and case law addressing the private police. The article will proceed to identify a series of reforms that should be enacted to improve the regulation

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<sup>19</sup> Ansel Herz, *What We Know About Use of Force by Mall Cops*, THE STRANGER (Nov. 26, 2014), <https://www.thestranger.com/seattle/what-we-know-about-use-of-force-by-mall-cops/Content?oid=21093635> [<https://perma.cc/KBC6-8ASA>].

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

of the private police industry in Washington. The article will conclude by addressing potential critiques of the reforms proposed.

## II. BACKGROUND: THE GROWTH OF THE PRIVATE POLICE INDUSTRY AND THE RISKS IT POSES

This section will discuss the scope of the private police industry. First, it will outline the size of the industry and the types of activities it undertakes. Second, it will identify some of the problems posed by the private police. These problems include private officers' power to exercise coercive pressures against members of the public, particularly the most vulnerable; the strong incentives discouraging the private police from enforcing the criminal law; and the potential of the private police to undermine efforts to reform the public police. Third, this section will discuss why people hire the private police.

### *A. Who Are the Private Police*

Private police provide a variety of services to their clients. They may be hired as security guards or bodyguards.<sup>22</sup> They may be hired to patrol neighborhoods and gated communities.<sup>23</sup> Private police clients may include owners of "mass private property" that is accessible to the public, such as housing complexes, college campuses, or shopping malls.<sup>24</sup> Other businesses, such as nightclubs<sup>25</sup> and retail establishments,<sup>26</sup> may hire private police to maintain order or deter criminal activity.

Private police have a substantial presence in the United States. According to some observers, there are roughly three private police officers for every

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<sup>22</sup> Amitai Etzioni, *Reining in Private Agents*, 101 MINN. L. REV. HEADNOTES 279, 294 (2016).

<sup>23</sup> *Id.* at 299.

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., *State v. Chavez*, No. 299619, 2013 WL 868201, 4 (Wash. Ct. App. Mar. 7, 2013) [<https://perma.cc/XJ2H-2KCV>].

<sup>26</sup> See, e.g., *State v. Davis*, No. 75234-1-I, 2016 WL 3982944, at \*3-4 (Wash. Ct. App. July 25, 2016) [<https://perma.cc/2X9R-GZPR>].

public police officer in the U.S.<sup>27</sup> Recent estimates show 2.7 million private police serving in the U.S. as of 2014.<sup>28</sup> The amount of money spent on private policing is double that spent on public policing.<sup>29</sup> The growth of private policing is a global trend, and has been very profitable.<sup>30</sup> In the U.S., private security services are a \$282 billion industry.<sup>31</sup>

Washington follows this trend; the state has approximately 11,000 licensed private police,<sup>32</sup> compared to 11,411 sworn public police officers.<sup>33</sup> The city of Sequim, WA, has privatized its prosecutorial function.<sup>34</sup>

Some private police are employed by companies dedicated to providing private police services, others are employed by other types of companies. In the past, most private police were employed directly by the business they serve; more recently, the number of officers employed by companies dedicated to private policing has grown.<sup>35</sup> Sixty-one percent of private police are employed by a company dedicated to providing private police services.<sup>36</sup> However, despite their prominence, private police officers have no more legal authority than an ordinary citizen to make stops, searches, or arrests.<sup>37</sup>

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<sup>27</sup> Karena Rahall, *The Siren is Calling: Economic and Ideological Trends Toward Privatization of Public Police Forces*, 68 U. MIAMI L. REV. 633, 647 (2014).

<sup>28</sup> Etzioni, *supra* note 22, at 295.

<sup>29</sup> Joh, *supra* note 3, at 55.

<sup>30</sup> See Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004).

<sup>31</sup> See Etzioni, *supra* note 22, at 295 (this measure includes spending on IT security, and thus does not perfectly capture the size of the private police industry).

<sup>32</sup> Herz, *supra* note 19. Washington's regulations refer to "private security guards" rather than "private police." See WASH. REV. CODE §§ 18.170.010–18.170.902 (1995). For the sake of clarity, this article will use "private police" where possible.

<sup>33</sup> Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, U.S. DEP'T OF JUSTICE, 15 (2011), <https://www.bjs.gov/content/pub/pdf/cslea08.pdf> [<https://perma.cc/M82X-XBSE>] (includes both state and local personnel).

<sup>34</sup> Fairfax, *supra* note 3, at 281.

<sup>35</sup> Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 168–69 (2012).

<sup>36</sup> *Id.* at 167.

<sup>37</sup> Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 186 (2005).

### B. Problems with Private Police

The private police create several risks for people in communities where they are present. This section will identify three primary challenges posed by the private police: first, despite their lack of legal authority, private police are able to exert significant coercive pressures over other people; second, private police have strong incentives to serve their clients at the expense of the general public; and third, private police threaten to undermine efforts to reform the public police.

#### 1. Private Police Exercise Coercive Pressures over Civilians

While the private police have no more legal authority than an ordinary person, the work of a private police officer “routinely includes . . . depriving individuals of their freedom.”<sup>38</sup> Their uniforms are designed to mimic those of public police and they are trained to behave like public police officers.<sup>39</sup> Though they have no official legal status, their dress and demeanor imply that they act with state authority.<sup>40</sup> Unlike most people, private police officers are familiar with the rules of criminal procedure and can use them to their advantage.<sup>41</sup> They can also employ private drug-sniffing dogs.<sup>42</sup> Private police officers regularly detain people, conduct searches, investigate crimes, maintain order, safeguard property, and conduct surveillance.<sup>43</sup> They also seize evidence, conduct pat-downs, question suspected persons, and arrest people.<sup>44</sup> They are able to exercise significant coercive pressures over other people.<sup>45</sup>

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<sup>38</sup> Sean James Beaton, *Counterparts in Modern Policing: The Influence of Corporate Investigators on the Public Police and a Call for the Broadening of the State Action Doctrine*, 26 *TOURO L. REV.* 593, 595 (2010).

<sup>39</sup> Joh, *supra* note 3, at 112.

<sup>40</sup> Boghosian, *supra* note 37, at 186.

<sup>41</sup> Joh, *supra* note 3, at 112.

<sup>42</sup> See Jeremiah K. Geffe, *License to Sniff: The Need to Regulate Privately Owned Drug-Sniffing Dogs*, 19 *J. OF GENDER, RACE AND JUST.* 167, 168 (2016).

<sup>43</sup> Rushin, *supra* note 35, at 182; Beaton, *supra* note 38 at 595; Joh, *supra* note 3, at 50.

<sup>44</sup> Joh, *supra* note 3, at 88–89.

<sup>45</sup> *Id.* at 64–66.



Their lack of legal status itself facilitates their ability to coerce others; unlike public police, private police are not required to provide *Miranda* warnings, and any evidence they obtain is not subject to the exclusionary rule.<sup>46</sup> Private police are largely free to search people without cause, detain them, question them without providing *Miranda* warnings, and then turn them over to the public police, along with any evidence found.<sup>47</sup> If the public police were to conduct a search or seizure that violated the Fourth Amendment, any evidence seized may be subject to suppression.<sup>48</sup> However, evidence seized by the private police is not subject to the exclusionary rule.<sup>49</sup> This enables them to use interrogations as a “mechanism of social control.”<sup>50</sup>

However, private police training is insufficient to prepare them to interact safely with the public. The law requires private police to undergo only minimal training,<sup>51</sup> and because turnover in the industry is high, companies typically cannot afford to spend significant resources training every new employee.<sup>52</sup> While Washington law requires private police to undergo additional training to carry a gun, no such requirement applies to private police who carry Tasers or pepper spray.<sup>53</sup> Anecdotal evidence suggests that private police receive little to no training regarding working with homeless populations and that this lack of training results in violence.<sup>54</sup>

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<sup>46</sup> Rushin, *supra* note 35, at 182.

<sup>47</sup> See *infra* Part III.A. (explaining why private police are not required to provide *Miranda* warnings.)

<sup>48</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>49</sup> See, e.g., *State v. Chavez*, No. 299619, 2013 WL 868201, 4 (Wash. App. Mar. 7, 2013).

<sup>50</sup> Rushin, *supra* note 35, at 182.

<sup>51</sup> See *infra* Part IV.C. (explaining the inadequacy of Washington’s private police training standards.)

<sup>52</sup> See Boghosian, *supra* note 37, at 1279.

<sup>53</sup> See WASH. REV. CODE § 18.170.130(2) (1995).

<sup>54</sup> See Evan Allen & Nicole Dungca, *TD Garden Cuts Ties with Firm Accused of Beatings*, BOSTON GLOBE (Jan. 26, 2017), <https://www.bostonglobe.com/metro/2017/01/25/garden-severs-ties-with-firm-accused->

In contrast, public police are typically required to undergo much more extensive training;<sup>55</sup> in Washington this consists of 720 hours of basic training.<sup>56</sup> This training is associated with increased professionalism among public police forces.<sup>57</sup>

## 2. Private Police Have Strong Incentives to Serve Their Clients Rather than Enforcing the Law

Private police have strong incentives discouraging them from reporting criminal activity to the police, assisting with prosecution, or otherwise helping enforce the criminal law.<sup>58</sup> If private police encounter criminal activity, they have powerful incentives to simply push that behavior away from their client's property, rather than calling the public police.<sup>59</sup> First, reporting the crime to the public police may require the private police to detain suspects, make statements, and testify in any future trial, all of which could lead to higher costs to the customer.<sup>60</sup> Second, some clients may instruct the private police not to pursue a criminal conviction due to a belief that the public criminal justice system is too punitive, too lenient, or otherwise ineffective.<sup>61</sup> Third, even if the client instructs private police to report suspicious activity and aid in prosecution, officers may have an incentive to under-report crime in order to meet contractual or performance

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homeless-beatings/6g9d1CbJ1QIKZWILTxOZSN/story.html [https://perma.cc/Z92G-HD8E].

<sup>55</sup> See Rushin, *supra* note 35, at 197; Joh, *supra* note 3, at 191–92.

<sup>56</sup> WASH. ST. CRIM. JUST. TRAINING COMMISSION: LAW ENFORCEMENT ACADEMY, [https://fortress.wa.gov/cjtc/www/index.php?option=com\\_content&view=article&id=15&Itemid=103](https://fortress.wa.gov/cjtc/www/index.php?option=com_content&view=article&id=15&Itemid=103) [https://perma.cc/6N9Y-LP9Y] (last visited Apr. 13, 2017). Private police are required to undergo only 16 hours of training and four hours of annual refresher training. WASH. REV. CODE § 18.170.105 (2007).

<sup>57</sup> Rushin, *supra* note 35, at 191.

<sup>58</sup> See Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 925 (2007).

<sup>59</sup> See *id.*

<sup>60</sup> *Id.* at 937–38.

<sup>61</sup> See, e.g., *id.* at 924–47.

objectives.<sup>62</sup> Fourth, private police have a profit motive to avoid enforcing the criminal law: by pushing criminal activity away, private police can increase the demand for their services in any areas that see a resulting spike in crime.<sup>63</sup> Private police advertising has attempted to fuel fears about crime in order to boost demand for their services.<sup>64</sup> Fifth, even if the private police were otherwise inclined to report criminal activity, the risk of losing business creates an overwhelming incentive not to report crimes when they are committed by clients.<sup>65</sup> Thus, private police who encounter criminal activity have a strong incentive to simply push the activity away from their customer's property rather than attempting to prevent its occurrence.

The mandate to serve the customer comes at a cost to the public. If private police are paid, not to stop criminal activity, but simply to move it away from their clients' property, those areas that are not privately policed may bear the burden of increased criminal activity. The impact will be felt most heavily in economically disadvantaged areas whose residents are unable to afford the services of private police.<sup>66</sup>

Empirical evidence supports the notion that the private police do not consistently turn criminal suspects over to the public police for prosecution.<sup>67</sup> Indeed, a Facebook page purportedly belonging to the private police officer reportedly involved in the Westlake Mall incident featured a post saying, "I'm not going to 'arrest' you, I am just going to throw your ass on the ground, handcuff you, drag you through the mall to the Security Office with the help of my uniformed buddies... Screw arresting! Detaining is way more fun! :D."<sup>68</sup>

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<sup>62</sup> See Rahall, *supra* note 27, at 666.

<sup>63</sup> Sklansky, *supra* note 7, at 1224.

<sup>64</sup> *Id.* at 1223.

<sup>65</sup> See Fairfax, *supra* note 3, at 285–86.

<sup>66</sup> See Etzioni, *supra* note 22, at 299 (noting that use of private police services is higher in areas marked by economic inequality).

<sup>67</sup> See Simmons, *supra* note 58, at 938–39.

<sup>68</sup> Herz, *supra* note 19.

### 3. Private Police Undermine Efforts to Regulate the Public Police

The ease with which people can hire private police to undertake activities that the public police cannot or will not has significant implications for efforts to regulate the conduct of the public police. Because public police are subject to institutional controls, such as oversight from elected officials or a desire to maintain legitimacy in the eyes of the public, they have incentives to cooperate with efforts to reform their conduct.<sup>69</sup> No similar concerns govern the conduct of the private police; they report only to their clients.<sup>70</sup>

The lax regulation of the private police may render ineffective reforms designed to curb abusive public police conduct and may undermine the legitimacy of the public police. Regulations that apply to the public police only rarely apply to the private police.<sup>71</sup> This regulatory discrepancy creates an incentive for private police to undertake activities that public police are prohibited from undertaking.<sup>72</sup> A jurisdiction that enacts reforms to prevent public police from using excessive force or engaging in racial profiling cannot be confident that those practices will be eliminated; they may simply shift from public to private police. Public police in such a jurisdiction can still take advantage of the prohibited tactics: they can simply wait for the private police to act and then take advantage of any evidence obtained.<sup>73</sup> Even if the public police do not take advantage of this opportunity, the similarity between public and private police uniforms<sup>74</sup> may cause the

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<sup>69</sup> See Simmons, *supra* note 58, at 926–27. See also Etzioni, *supra* note 22, at 296–97 (other institutional constraints on the public police include: internal affairs units, civilian review boards, independent state- or local-level commissions, and Department of Justice oversight; while these institutions do not eliminate all public police abuses, similar restrictions are completely absent from the private police).

<sup>70</sup> Rushin, *supra* note 35, at 176.

<sup>71</sup> See *infra* Part III.A (explaining that the provisions of law that govern public police—including the Constitution and rules of criminal procedure—do not generally govern the conduct of private police).

<sup>72</sup> See Joh, *supra* note 3, at 116.

<sup>73</sup> *Id.* at 115–16.

<sup>74</sup> Boghosian, *supra* note 37, at 181.

public to believe that the public police are still engaged in prohibited behavior.

Concern about the effect private police have on public police reform is particularly salient in Washington. In 2011, the Department of Justice (DOJ) identified a pattern or practice of unconstitutional use of force by the Seattle Police Department (SPD).<sup>75</sup> In response, the City and DOJ entered into a “consent decree” in order to reform the SPD and reduce improper use of force by public police.<sup>76</sup> While the reform efforts have made significant progress, there are still instances of excessive use of force, and it is unclear whether the reforms have eliminated discriminatory policing practices.<sup>77</sup> Lax regulation of the private police creates the risk that public police will circumvent the new regulations or that the public will distrust the public police reforms.

### *C. Why Do the Private Police Exist*

Most observers attribute the growth of the private police industry to the perception that the public police are unable or unwilling to provide the types of policing services that civilians desire.<sup>78</sup> In recent years, city and state budgets have declined, and those governments have been unable to maintain the level of public police funding that some people expect.<sup>79</sup> Reductions in funding may decrease the frequency of public police patrols or reduce their response times, especially to non-emergency situations. A

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<sup>75</sup> *Ninth Systemic Assessment: Use of Force*, SEATTLE POLICE MONITOR 1 (April 2017) <https://static1.squarespace.com/static/5425b9f0e4b0d66352331e0e/t/58e6a753ff7c50ebbba126f8/1491511130661/Ninth+Systemic+Assessment--Use+of+Force--FINAL.pdf> [<https://perma.cc/9DC6-WCEY>].

<sup>76</sup> *Id.*

<sup>77</sup> *See id.* at 9–10.

<sup>78</sup> *See, e.g.*, Cooper J. Strickland, *Regulation Without Agency: A Practical Response to Private Policing in United States v. Day*, 89 N.C. L. REV. 1338, 1338 (2011); Fairfax, *supra* note 3, at 274; Joh, *supra* note 3, at 67–68; Sklansky, *supra* note 7, at 1194; *see also, id.* at 1221–24 (rebutting alternative explanations of the growth of the private police industry).

<sup>79</sup> Rahall, *supra* note 27, at 659–60.

belief that the public police are not doing an adequate job of preventing crime will create a gap that private police firms will be eager to fill.<sup>80</sup> Indeed, Seattle residents have cited increased drug and property crime, inadequate response times to 911 calls, and infrequent public police patrols as justifications for hiring private police.<sup>81</sup>

The availability of private police creates a disincentive for richer neighborhoods to invest in public police funding. People with the resources to hire private police may push for lower taxes, confident that the private police can fulfill their policing needs.<sup>82</sup> While this reduces the quality of police services for the community as a whole, richer neighborhoods can offset any decline by hiring private police.<sup>83</sup> Indeed, studies have shown a correlation between economic inequality and reliance on private police.<sup>84</sup>

Additionally, many people turn to the private police because of dissatisfaction with how the public police operate. Someone who believes that the public criminal justice system is unduly punitive and ineffective may hire private police and instruct them to work to rehabilitate offenders or integrate them into the community, rather than turning them over to the public police.<sup>85</sup> However, some of the demand for private police has been driven by a desire to keep homeless people or people of color out of certain residential areas.<sup>86</sup> Unlike the public police, who may be barred by law from undertaking such activities, the private police operate under a much less restrictive regulatory framework.<sup>87</sup> Studies have suggested that perceptions

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<sup>80</sup> *Id.* at 671.

<sup>81</sup> *See* Lee, *supra* note 2.

<sup>82</sup> Sklansky, *supra* note 7, at 1283–84.

<sup>83</sup> *Id.*

<sup>84</sup> *See* Etzioni, *supra* note 22, at 299.

<sup>85</sup> *See, e.g.,* Simmons, *supra* note 57, at 913–17.

<sup>86</sup> Etzioni, *supra* note 22, at 299; Sklansky, *supra* note 7, at 1224–25.

<sup>87</sup> *See infra* Part III (explaining the lax regulatory framework governing the private police).

of a “racial threat” explain the presence of private police better than high crime rates.<sup>88</sup>

### III. EXISTING REGULATORY STRUCTURES ARE INADEQUATE TO PROTECT THE PUBLIC FROM ABUSES BY THE PRIVATE POLICE

This section will address the current legal frameworks governing the conduct of the private police. It will begin by reviewing the federal legal scheme with a focus on whether private police are subject to the constitutional provisions that govern the public police. It will then discuss Washington State regulations on the private police, focusing on the extent to which Washington courts have considered the private police subject to constitutional constraints and the statutory licensing scheme that serves as the primary body of law governing the private police in Washington.

#### *A. Federal Regulations on the Conduct of the Private Police Are Virtually Non-Existent*

The federal legal authorities governing the conduct of the public police do not apply to the private police because they are not considered state actors. Generally, public police conduct is regulated by civil rights laws such as § 1983,<sup>89</sup> the Fourth,<sup>90</sup> Fifth,<sup>91</sup> Sixth,<sup>92</sup> and Fourteenth<sup>93</sup> Amendments to the U.S. Constitution, the exclusionary rule,<sup>94</sup> and the

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<sup>88</sup> Etzioni, *supra* note 22, at 299.

<sup>89</sup> 42 U.S.C. § 1983 authorizes a civil suit against any person who “under color of any statute, ordinance, regulation, custom, or usage” deprives another person of “any rights, privileges, and immunities secured by the Constitution and laws.”

<sup>90</sup> U.S. CONST. amend. IV (prohibition on unreasonable searches and seizures).

<sup>91</sup> U.S. CONST. amend. V (protection against self-incrimination; due process).

<sup>92</sup> U.S. CONST. amend. VI (right to speedy and public trials; right to confront witnesses; right to counsel).

<sup>93</sup> U.S. CONST. amend. XIV (extending the Bill of Rights to the states; guarantee of due process).

<sup>94</sup> “[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in state court.” *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending rule that barred admission of such evidence in federal criminal trials).

*Miranda*<sup>95</sup> requirement. However, these regulations only apply to state actors.<sup>96</sup> When determining whether an entity is a state actor, a court examines whether that entity relies on government assistance or benefits or performs traditional governmental functions, as well as whether the injury caused is uniquely aggravated by governmental authority.<sup>97</sup> While some legal scholars believe that, under these factors, the private police should be considered state actors, courts have consistently refused to consider private police as state actors, thus leaving them un-governed by the provisions of law that generally govern the public police.<sup>98</sup>

The United States Supreme Court has twice addressed whether actors similar to the private police can be considered state actors.<sup>99</sup> However, in both of those cases, the private actor was acting with some element of official state authority: *Williams v. United States* concerned a private detective who was certified as a special police officer and flashed his badge while interrogating a suspect;<sup>100</sup> *Griffin v. Maryland* addressed a private security guard who had been deputized as a county sheriff, wore his sheriff's badge, and identified himself as a deputy sheriff.<sup>101</sup> The Court later clarified that these decisions do not govern private police, writing that *Griffin* "sheds no light on the constitutional status of private police forces, and we express no opinion here."<sup>102</sup> Lower courts are thus left with little guidance as to how to resolve the constitutional status of the private police.<sup>103</sup>

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<sup>95</sup> Requiring that a suspect be advised of her rights to remain silent and to have assistance of counsel before a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

<sup>96</sup> Joh, *supra* note 3, at 94.

<sup>97</sup> *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 621 (1991).

<sup>98</sup> Joh, *supra* note 3, at 95.

<sup>99</sup> *Williams v. United States*, 341 U.S. 97 (1951); *Griffin v. Maryland*, 378 U.S. 130 (1964).

<sup>100</sup> *Williams*, 341 U.S. at 98–99.

<sup>101</sup> *Griffin*, 378 U.S. at 132–35.

<sup>102</sup> *Flagg Bros. v. Brooks*, 436 U.S. 149, 163 n.14 (1978).

<sup>103</sup> Joh, *supra* note 3, at 101; Sklansky, *supra* note 7, at 1236–39.



The result is that lower federal and state courts have generally considered private police to be private actors not subject to constitutional constraint.<sup>104</sup> Courts have followed the Supreme Court's focus on whether the state has vested a private police officer with a formal title or authority.<sup>105</sup> Incidental state involvement in the actions of the private police is not sufficient to convert them into state actors.<sup>106</sup> Thus, the Constitution generally does not govern the conduct of the private police; protections like the prohibition against unreasonable searches and seizures, the exclusionary rule, and the requirement for *Miranda* warnings are not applicable when a person interacts with the private police.

There is very little federal legislation that directly addresses the private police. The most notable federal statute that addresses the private police prohibits the federal government and the government of the District of Columbia from employing the Pinkerton police or a similar agency, but this is rarely invoked.<sup>107</sup>

*B. Washington State Law Does Not Adequately Regulate the Private Police*

Washington law does not adequately govern the conduct of the private police. This section will discuss three aspects of Washington law that touch on the conduct of the private police. First, state courts do not consider the private police to be state actors. Second, the Washington State Constitution's stronger protection against search and seizure only applies to state actors. Third, Washington's statutory licensing scheme for private police is inadequate.

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<sup>104</sup> Sklansky, *supra* note 7, at 1239–44.

<sup>105</sup> *Id.* at 1244–46.

<sup>106</sup> Joh, *supra* note 3, at 92.

<sup>107</sup> 5 U.S.C. § 3108 (1966). *See* Joh, *supra* note 3, at 93.

### 1. Washington Courts Do Not Consider the Private Police to be State Actors

Like to the United States Supreme Court, Washington courts do not generally consider private police to be state actors; thus, they are not subject to the constitutional rules that constrain the public police. While the United States Supreme Court has not provided guidance as to when private police should be considered state actors, state courts have discretion to conduct their own state actor analyses.<sup>108</sup> Lower Washington courts have consistently found private actors, working without encouragement or support from the state, to be non-state actors.<sup>109</sup> One court noted that “it is well established that private security guards are not transformed into state

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<sup>108</sup> Indeed, some have argued that the correct application of existing Supreme Court precedent would require a finding that private police are state actors. *See* Joh, *supra* note 3, at 95.

<sup>109</sup> *See, e.g.,* State v. Davis, No. 75234-1-I, 2016 WL 3982944, at \*3–4 (Wash. Ct. App. July 25, 2016) (finding that a Wal-Mart loss prevention manager who questioned a shoplifting suspect pursuant to company policy was not a state agent); State v. Garcia, No. 59925-9-I, 2008 WL 2955881, at \*4–5 (Wash. Ct. App. Aug. 4, 2008) (finding that a bail recovery agent is not a state actor because he was not employed by the state and his contractual authority to seize a particular fugitive was not legal authority to enforce criminal law); Barbu v. Rite Aid Corp., No. 53494-7-I, 2004 WL 2526672, at \*3 (Wash. Ct. App. Nov. 8, 2004) (finding that Rite Aid security guards were not “transformed into state actors” when they detained a suspected shoplifter and worked with responding police officers to process the arrest paperwork); State v. Walter, 833 P.2d 440, 443 (Wash. Ct. App. 1992) (finding no state action when developer of photographic negatives brought evidence of a crime to police); State v. Ludvik, 698 P.2d 1064, 1067-68 (Wash. Ct. App. 1985) (finding that a state game agent who saw evidence of criminal activity near his home and took no action other than reporting it to the police was not acting in his official capacity and thus his report was not attributable to a state actor); State v. Gonzales, 604 P.2d 168, 170 (Wash. Ct. App. 1979) (finding that a security guard, as a private citizen, is not a state actor); State v. Sweet, 596 P.2d 1080, 1081–82 (Wash. Ct. App. 1979) (finding that evidence obtained by airline employees who were not acting as agents of, or in concert with, law enforcement authorities was not subject to the exclusionary rule); State v. Agee, 522 P.2d 1084, 1087–88 (Wash. Ct. App. 1976) (finding that the fact that a person had been a paid police informant in the past did not convert him into a government actor).

actors . . . merely because they detain and investigate shoplifters before turning them over to the police.”<sup>110</sup>

While the Washington Supreme Court has only rarely addressed the question of when actors like the private police are considered state actors, an analysis of its decisions in this area suggest that it will only consider a private police officer to be a state actor when the officer is vested with legal authority to investigate violations of the criminal law and a reasonable person would believe the actor possessed state authority.

*State v. Heritage* concerned two bicycle-mounted security officers in a park in downtown Spokane.<sup>111</sup> “Both officers wore shorts and white t-shirts with an emblem of a badge emblazoned with the words ‘Security Officer.’ They also carried a ‘duty bag’ containing a radio, pepper spray, handcuffs, and a collapsible baton.”<sup>112</sup> They were employed by the city and their responsibilities included patrolling for unlawful activities.<sup>113</sup> They observed several teenagers they suspected of smoking marijuana, approached them, and questioned them without providing *Miranda* warnings.<sup>114</sup> One teenager admitted possession of a marijuana pipe, was convicted of possession of drug paraphernalia, and appealed, arguing that the security officers were state actors and that their questioning thus violated the *Miranda* rule.<sup>115</sup> The court found that the guards’ appearance, including a duty belt with handcuffs and a t-shirt identifying them as park security, would have caused a reasonable observer to believe they were acting with state authority.<sup>116</sup> Because they were also employed by the city and were acting in their

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<sup>110</sup> *Barbu v. Rite Aid Corp.*, No. 53494-7-I, 2004 WL 2526672, at \*3 (Wash. App. Nov. 8, 2004).

<sup>111</sup> *State v. Heritage*, 95 P.3d 345, 346 (Wash. 2004).

<sup>112</sup> *Id.*

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

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

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 348.

official capacity to investigate suspected criminal activity, the court concluded that the officers were state actors.<sup>117</sup>

Another Washington Supreme Court case concerning a search by a private actor clarified that the state and federal constitutions only regulate searches by state actors. In *State v. Eisfeldt*, a repairman was called to a home and, while completing the repairs, noticed what he believed to be evidence of marijuana growing.<sup>118</sup> He called the police and let them into the home, where they also saw the evidence.<sup>119</sup> At this point, the police stopped their search and obtained a search warrant.<sup>120</sup> When they executed the warrant, they found evidence of an active marijuana-growing operation and arrested the defendant.<sup>121</sup> The defendant sought to suppress the evidence obtained from the search, alleging that the initial, warrantless, search with the repairman was a violation of the Fourth Amendment of the U.S. Constitution and Article I, Section 7, of the Washington State Constitution.<sup>122</sup> While the court overturned the conviction, it did so based on a finding that the initial, warrantless, police search of the home was a violation of the Washington Constitution.<sup>123</sup> The court clarified that Article I, Section 7, only regulates searches by state actors.<sup>124</sup>

Indeed, *Eisfeldt* has been interpreted narrowly. In *State v. Chavez*, the court of appeals declined to grant a motion to exclude evidence obtained by a private search.<sup>125</sup> In that case, a security guard at a nightclub searched the defendant when he entered the club and found cocaine.<sup>126</sup> The defendant

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<sup>117</sup> *Id.*

<sup>118</sup> *State v. Eisfeldt*, 185 P.3d 580, 583 (Wash. 2008).

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

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

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 587.

<sup>124</sup> *Id.* at 585 (noting that “article I, section 7 provides greater protection from *state* action than does the Fourth Amendment” (emphasis added)).

<sup>125</sup> *State v. Chavez*, No. 299619, 2013 WL 868201, at \*4 (Wash. Ct. App. Mar. 7, 2013).

<sup>126</sup> *Id.* at \*1

was handcuffed and police were called.<sup>127</sup> When the police arrived, the nightclub staff turned over the cocaine and the defendant was arrested.<sup>128</sup> The defendant attempted to suppress the cocaine, arguing that the private search was analogous to the illegal search in *Eisfeldt*.<sup>129</sup> The court disagreed, noting that *Eisfeldt*'s conviction was overturned based on an illegal search by the public police.<sup>130</sup> In contrast, the cocaine in this case was given to the police by the nightclub; the police did not actually search the defendant.<sup>131</sup> Since there was no warrantless search by a state actor, there was no violation of Article 1, Section 7, of the Washington State Constitution.<sup>132</sup>

A recent case further demonstrated that the Washington Supreme Court is unlikely to consider a quasi-private actor to be a state actor.<sup>133</sup> In *State v. K.L.B.*, the defendant was riding on Seattle's Link light-rail system when a Fare Enforcement Officer (FEO) requested proof of fare payment.<sup>134</sup> The FEOs are employed by a private police company, which has a contract to provide fare enforcement services on the light-rail, but the FEOs are empowered to issue citations for civil infractions, such as a failure to pay a fare.<sup>135</sup> They wear a uniform with patches saying "Sound Transit," "security," and "fare enforcement," and wear a tool belt with a radio and handcuffs, but do not carry a weapon.<sup>136</sup> When the defendant was unable to provide a valid proof of fare payment, the FEO asked him for

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *See id.* at \*4.

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

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

<sup>132</sup> *Id.*

<sup>133</sup> *See State v. K.L.B.*, 328 P.3d 886, 887 (Wash. 2014) (considering whether private actors were "public servants" under a statute that made it a crime to give a false or misleading statement to a public servant).

<sup>134</sup> *Id.*

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

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

identification.<sup>137</sup> The defendant gave the FEO a false name.<sup>138</sup> Public police were called, and when the defendant told them his true name, he was charged with making a false or misleading statement to a public servant.<sup>139</sup> The court vacated the charges on the ground that the FEOs were not public officers.<sup>140</sup> The court reasoned that even though the FEOs have limited authority granted by statute, they are not “vested with some sovereign power of government” and do not exercise the powers that ordinary public police officers do.<sup>141</sup> While this case addressed, not whether the private police were state actors for constitutional purposes, but whether the private police fit a statutory definition of a “public servant,” it suggests that the court is unlikely to consider a private police officer working for a non-governmental client as a state actor.<sup>142</sup>

In sum, the decisions by the Washington Supreme Court related to the private police suggest that the court will only find someone to be a state actor if the person is employed by the state, has authority to investigate and enforce the criminal law, and dresses and acts in a way that would cause a reasonable person to believe they act with state authority. A private police

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 891.

<sup>141</sup> *Id.* at 890.

<sup>142</sup> *Cf.* *State v. Graham*, 927 P.2d 227 (Wash. 1996) In *Graham*, two public police officers were armed and wearing their uniforms, but were off-duty and working as private security guards, when they saw a man carrying a large wad of money and what they believed to be cocaine. *Id.* at 228–29. When they attempted to arrest him, he fled, and when they caught him, he resisted arrest by flailing and kicking. *Id.* at 29. The defendant was charged with obstructing a public servant but argued that because the officers were working for a private company at the time of the arrest, they were not public servants. *Id.* at 230. The Washington Supreme Court held that though they were working for a private company, the officers were public servants at the time of the arrest because they “stepped out of their roles as private security guards and into their roles as police officers.” *Id.* at 233. The court emphasized that the officers had introduced themselves as public police and that the defendant knew that they were public police. *Id.* This decision provides further evidence that, when drawing a line between public and private authority, the Washington Supreme Court focuses on the presence or absence of formal legal authority and the reasonable perception of state authority.

officer who is not acting at the behest of the state is unlikely to be considered a state actor. Thus, any evidence obtained by the private police will be admissible at trial so long as the conduct of the public police comports with the law.

## 2. Washington's Constitution Does Not Govern the Behavior of Private Police

Though the state constitution provides greater protection than the federal Constitution, it also does not apply to private actors. Article I, Section 7 of the Washington State Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”<sup>143</sup> While broadly analogous to the Fourth Amendment of the United States Constitution, this provision has in some instances been interpreted as providing greater protection.<sup>144</sup> However, this provision has only been applied to state actors, and thus does not restrict the activities of the private police.<sup>145</sup>

## 3. Washington's Statutory Licensing Scheme for Private Police Is Inadequate

The body of state law that most directly governs the private police are licensing statutes, however, these regulations are not sufficient to protect the public. Washington State governs the private police primarily through licensing requirements for private police companies and officers; a person must have a license from the state to work as a private police officer or operate a private police company.<sup>146</sup> However, the licensing requirements

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<sup>143</sup> WASH. CONST. art. 1, § 7.

<sup>144</sup> See, e.g., *State v. Budd*, 374 P.3d 137, 140 (Wash. 2016).

<sup>145</sup> See *State v. Eisfeldt*, 185 P.3d 580, 585 (Wash. 2008).

<sup>146</sup> See WASH. REV. CODE §§ 18.170.010–18.170.902. As noted earlier, the Washington licensing requirements refer to “private security guards” rather than “private police.” For the sake of clarity, this article will use “private police” where possible. Nationally, state statutes defining private security guards encompass the vast majority of the private police industry. See Rushin, *supra* note 35, at 186.

only apply to private police officers primarily employed by a private police company—they do not apply to private police officers employed directly by a retail establishment, shopping mall, or other non-police business.<sup>147</sup> They also do not apply to off-duty public police officers employed by a private company.<sup>148</sup> These licensing requirements apply throughout the state; political subdivisions such as cities and counties are prohibited from enacting independent regulations on private police officers or companies.<sup>149</sup> Performing the functions of a private police officer without a license or violating the restrictions outlined below is a gross misdemeanor.<sup>150</sup>

To receive a license as an unarmed private police officer, an applicant must be at least eighteen years of age, be a citizen of the United States or a resident alien, be employed by a licensed private security company, pay a fee, and complete an application.<sup>151</sup> An applicant must complete sixteen hours of training, though this may be reduced to eight if the applicant was recently employed full-time as a sworn peace officer.<sup>152</sup> Additionally, past military training or experience satisfies the training requirements.<sup>153</sup> All employees must undergo four hours of annual refresher training.<sup>154</sup> Applicants must also provide fingerprints and undergo a state-level

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<sup>147</sup> WASH. REV. CODE § 18.170.020 (2015). This provision also provides that an employee engaged in marijuana-related transportation or delivery services on behalf of a common carrier must be licensed as an armed private security guard under this chapter in order to be authorized to carry or use a firearm while providing such services.

<sup>148</sup> *Id.*

<sup>149</sup> Political subdivisions are permitted only to enact general business taxes and rules that apply to all businesses, not just private security companies. WASH. REV. CODE § 18.170.140 (1991).

<sup>150</sup> WASH. REV. CODE § 18.170.160 (1995).

<sup>151</sup> WASH. REV. CODE § 18.170.030 (2012).

<sup>152</sup> WASH. REV. CODE § 18.170.105 (2007).

<sup>153</sup> WASH. REV. CODE § 18.170.310 (2011). The statute provides an exception to this rule if the Director of the Department of Licensing determines that the military training or experience is not “substantially equivalent to the standards of this state.” *Id.* However, the statute contains no requirement that the applicant be in good standing with the military; it appears that somebody who had been dishonorably discharged from military service may nonetheless be exempt from the training requirement.

<sup>154</sup> WASH. REV. CODE § 18.170.105 (2007).



background check.<sup>155</sup> If the applicant has committed a crime in another jurisdiction, the Director of the Department of Licensing (Director) may withhold the license upon a determination that the particular crime directly relates to the applicant's capacity to perform the duties of a public police officer and that the license should be withheld to protect citizens of Washington State.<sup>156</sup> The authority to withhold a license is discretionary; there is no requirement to do so.<sup>157</sup>

There are additional requirements for armed private police. They must be at least twenty-one years old and must have a current firearms certificate from the Criminal Justice Training Commission.<sup>158</sup> In addition to the state background check, they must submit to a national criminal history records check.<sup>159</sup>

To receive a license to operate a private security company, an applicant must meet the requirements to obtain a license as a private police officer and be at least twenty-one years of age.<sup>160</sup> Owning or operating a private security company without a license is a gross misdemeanor.<sup>161</sup> An owner of a private security company must have at least three years' experience as a manager, supervisor, or administrator in the private security field or a related field.<sup>162</sup> Private security companies are required to maintain general liability insurance coverage of at least \$25,000 for bodily or personal injury and \$25,000 for property damage.<sup>163</sup> These companies are also required to notify the Director and/or local law enforcement in the event of: the death or termination of a licensed private security guard; the company receiving

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<sup>155</sup> WASH. REV. CODE § 18.170.130(2) (1995).

<sup>156</sup> WASH. REV. CODE § 18.170.030(3) (2012).

<sup>157</sup> *See id.*

<sup>158</sup> WASH. REV. CODE § 18.170.040 (1991). To receive this certificate, an applicant must undergo at least eight hours of training. WASH. REV. CODE § 43.101.260 (1991).

<sup>159</sup> WASH. REV. CODE § 18.170.130(2) (1995).

<sup>160</sup> WASH. REV. CODE § 18.170.060 (1995).

<sup>161</sup> WASH. REV. CODE § 18.170.160(2) (1995).

<sup>162</sup> WASH. REV. CODE § 18.170.060(1) (1995).

<sup>163</sup> WASH. REV. CODE § 18.170.080 (1991).

information that would affect a licensed private police officer's continuing eligibility to hold a license; and any discharge of a firearm, outside of a shooting range, by an officer while on duty.<sup>164</sup> Private police companies are also barred from using any name, sign, shield, marking, accessory, or insignia that indicate that the individual, business, or equipment are part of a public law enforcement agency.<sup>165</sup>

The licensing regulations authorize the Director to issue punishment to licensed private police for unprofessional conduct.<sup>166</sup> Punishments can include the revocation of the license, remedial training, or “[o]ther corrective action.”<sup>167</sup> However, the disciplinary authority is purely at the discretion of the Director, and the Director has the authority to stay any action taken.<sup>168</sup> Since 2007, none of the 11,000 licensed private police officers in Washington have been disciplined by the state for misconduct or excessive use of force.<sup>169</sup>

#### 4. Lawsuits by Private Citizens are an Insufficient Check on the Behavior of Private Police

Current tort remedies are an insufficient check on abuses by the private police. While a tort action may succeed in case of serious physical injury or property damage, tort actions will not succeed in regulating the day-to-day operations of the private police.<sup>170</sup> First, because the damages in these cases

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<sup>164</sup> Notification of a death or termination must be given to the Director within 30 days of the event. Notification of an event affecting a guard's continuing eligibility to hold a license must be given immediately to the chief local law enforcement officer. Notification of any discharge of a firearm must be given to local law enforcement within 10 days. WASH. REV. CODE § 18.170.110 (2000).

<sup>165</sup> WASH. REV. CODE § 18.170.160(6)–(7) (1995).

<sup>166</sup> WASH. REV. CODE § 18.170.230 (1995).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Herz, *supra* note 19 (as of 2014).

<sup>170</sup> See Rushin, *supra* note 35, at 197; Joh, *supra* note 3, at 126.

are low, they are rarely brought.<sup>171</sup> Second, even when a person has been harmed, success in a lawsuit is not guaranteed.<sup>172</sup> Third, many people do not have the financial resources or knowledge required to pursue a civil suit against a private police company or its client.<sup>173</sup> As “repeat players” in the legal system, private police companies have an advantage over less experienced litigants, and may even see the expense of litigating and settling claims as a cost of doing business.<sup>174</sup> Fourth, the actions of private police may be immunized from civil suit by a “shopkeeper’s privilege.”<sup>175</sup> Finally, whereas an illegal search by public police may result in the suppression of improperly-obtained evidence,<sup>176</sup> a civil suit against the private police will never overturn a criminal conviction, no matter how egregious the behavior of the private police.

#### IV. THE WASHINGTON LEGISLATURE SHOULD ENACT LEGISLATION IMPROVING REGULATION OF THE PRIVATE POLICE

The Washington State Legislature should improve the regulation of private police companies in order to ensure that private police do not infringe on the rights of Washington residents. Specifically, the legislature should enact a new law that reforms the existing licensing statute so that it adequately regulates the private police. First, the existing law should be modified so that it covers all private police in the state and allows

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<sup>171</sup> Sharon Finegan, *Watching the Watchers: The Growing Privatization of Criminal Law Enforcement and the Need for Limits on Neighborhood Watch Associations*, 8 U. MASS. L. REV. 88, 128 (2013); Joh, *supra* note 3, at 109.

<sup>172</sup> *See, e.g., Shabazz v. Tecton Corp.*, No 27572-4-II, 2003 WL 734527 (Wash. Ct. App. March 4, 2003) (finding no liability for apartment management company for hiring unlicensed security guard who pepper-sprayed apartment resident and his guests); Sklansky, *supra* note 7, at 1185–86.

<sup>173</sup> Finegan, *supra* note 171, at 128; Rushin, *supra* note 35, at 197.

<sup>174</sup> Rushin, *supra* note 35, at 197.

<sup>175</sup> *See, e.g., Guijosa v. Wal-Mart Stores, Inc.*, 6 P.3d 583 (Wash. Ct. App. 2000) (holding that WASH. REV. CODE 4.24.220 provides liability from civil suit if store security has “reasonable grounds” to detain a suspected shoplifter and any detention is done for a “reasonable time”); Joh, *supra* note 3, at 109.

<sup>176</sup> Finegan, *supra* note 171, at 128.

jurisdictions to enact their own supplemental reforms. Second, it should require increased transparency into the actions of the private police. Third, it should require private police to undergo more thorough training. Fourth, it should make it easier for people who have been harmed by private police to seek redress.

The Washington State Legislature has broad authority to enact the suggested reform legislation. “[T]he power of the legislature to enact all reasonable laws is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and Federal constitutions.”<sup>177</sup> The proposed reforms could be accomplished by amending the existing licensing statutes for private police, which were initially enacted in 1991.<sup>178</sup> Given the pervasive use of licensing statutes to regulate businesses in Washington,<sup>179</sup> it is likely that the proposed reforms would be within the legislature’s constitutional authority.<sup>180</sup>

While drafting specific legislative language is outside of the scope of this article, the legislation must be specific and precise in order to ensure maximum effectiveness. Regulations that are vague create room for inconsistent implementation by the organizations they regulate.<sup>181</sup> Because private police are motivated by profit, they are likely to interpret ambiguous regulations in a way that maximizes profit, not public safety.<sup>182</sup> They may

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<sup>177</sup>Clark v. Dwyer, 353 P.2d 941, 945 (Wash. 1960) (the decision further notes that, when a statute’s validity is challenged, it is presumed constitutional and that “[w]here possible, it will be presumed that the legislature has affirmatively determined any special facts requisite to the validity of the enactment, even though no legislative finding of fact appears in the statute.”).

<sup>178</sup>S.B. 5124, 52nd Leg., 1991 Reg. Sess. (Wash. 1991).

<sup>179</sup>WASH. REV. CODE Title 18 contains licensing statutes for 93 different types of businesses or professions.

<sup>180</sup>See also WASH. CONST. art II, § 35. (“The legislature shall pass necessary laws for the protection of persons working in . . . employments dangerous to life or deleterious to health.”).

<sup>181</sup>Rushin, *supra* note 35, at 198–99.

<sup>182</sup>*Id.* at 199.

even attempt to evade regulation in order to better serve their clients.<sup>183</sup> In contrast, due to their need to maintain legitimacy in the eyes of the public and the various oversight regimes they are subject to, public police may have a stronger incentive to adhere to the spirit of ambiguous statutes.<sup>184</sup>

This section will identify four proposed legislative reforms: first, modifying existing regulations to cover all private police and allow local flexibility; second, promoting transparency of private police operations; third, requiring more rigorous training for private police officers; and fourth, improving access to remedies for citizens harmed by private police. This section will close by addressing potential criticisms of the proposed reforms and noting shortcomings in alternative reform proposals.

#### *A. Expand the Scope of Existing Regulations and Allow Local Flexibility*

The legislature should modify the existing regulations to ensure that the licensing statutes cover all private police in the state while ensuring that local jurisdictions have the flexibility to implement additional regulations as they need. Specifically, the legislature should expand the law to cover all private police, whether they are employed by a private police company or by some other type of business, and should allow cities and counties to implement their own supplemental regulations.

First, the legislature should expand the scope of the regulations to cover all private police forces. Currently, the state licensing requirements only apply to “third-party”<sup>185</sup> private police—companies whose primary function is providing private policing.<sup>186</sup> They do not apply to “internalized” private police—officers employed by a company, such as a shopping mall or retail establishment, that is not focused on providing private policing or security

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<sup>183</sup> See *id.* at 170–71 (arguing that private police companies, to a greater degree than the public police, are driven by profit maximization and client service).

<sup>184</sup> See, e.g., *id.* at 174; Joh, *supra* note 3, at 65–66.

<sup>185</sup> The distinction between “internalized” and “third-party” private police was adopted from Rushin, *supra* note 35, at 166.

<sup>186</sup> WASH. REV. CODE § 18.170.020(1) (2015).

services but nonetheless employs private police to patrol the business or detain shoplifters.<sup>187</sup> Broadening the scope of the regulation has two primary benefits. First, for the reasons outlined above, improving regulation of the private police industry as a whole is necessary to prevent abuses. Because internalized private police are more likely to make arrests, conduct searches, and carry weapons than third party private police,<sup>188</sup> they should not be exempt from regulation. Second, preserving an exemption for internalized private police undermines the reforms outlined above. A customer seeking to skirt regulations could simply develop an internalized private police force rather than contracting with a third-party firm. Because companies with significant resources to develop internalized private police forces, such as shopping malls or large retail establishments, are likely to receive a high number of customers, this loophole has the potential to affect a large swath of the public.<sup>189</sup>

Second, the legislature should allow cities and counties to implement their own supplemental regulations on private police conduct.<sup>190</sup> Currently, local governments are prohibited from creating independent regulations on the conduct of private police.<sup>191</sup> Permitting local governments to design and implement their own regulations to supplement the state regulations will be beneficial. For example, a jurisdiction may require additional training hours or may require training about a subject of local concern. Another may regulate what types of weapons private police can carry. An area with a

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<sup>187</sup> *Id.*

<sup>188</sup> Rushin, *supra* note 35, at 178–80.

<sup>189</sup> See also *Abuses Against Workers Taint U.S. Meat and Poultry*, HUMAN RIGHTS WATCH (Jan. 24, 2005), <https://www.hrw.org/news/2005/01/24/abuses-against-workers-taint-us-meat-and-poultry> [<https://perma.cc/2MBU-VJ2Z>] (documenting a company’s internal police force using “trumped-up charges to arrest workers who were active union supporters”).

<sup>190</sup> Local governments should only be permitted to strengthen regulation of private police. Permitting them to weaken or otherwise avoid the state-level regulation would undermine the other reforms discussed in this article.

<sup>191</sup> WASH. REV. CODE § 18.170.140 (1991).

substantial Spanish-speaking population may require private police who carry guns to have enough familiarity with the language that they can interact safely with all residents. Successful regulations can serve as a model that other jurisdictions can choose to adopt in the future.<sup>192</sup> Additionally, preserving local flexibility will allow private police companies to best meet the needs of their customers and allow localities to best meet the needs of their residents. For example, a shopping mall in Spokane, a vineyard in Walla Walla, and a private marina in Seattle may have substantially different needs. Allowing local regulation may encourage jurisdictions to enact innovative regulations that can enhance public safety and serve as a model for others.

*B. Improve Transparency in the Private Police Industry*

The legislature should increase the transparency requirements for private police companies so that policymakers and the public have a better understanding of the ways in which private police operate. Over the last several decades, observers of the criminal justice system have come to understand the importance of collecting information on the practices of the public police.<sup>193</sup> The result has been a wealth of data and both empirical and theoretical literature, which has helped guide efforts to reform public police practices.<sup>194</sup> However, similar efforts have not been made with respect to the private police, and there is comparatively little knowledge about the

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<sup>192</sup> See Sklansky, *supra* note 7, at 1168. (Noting that the decentralized regulatory structure that governs private police offers opportunities to test different models of policing regulation. For example, a jurisdiction may recognize a “right to police protection” and increase public police funding in order to eliminate the market for private police. See *id.* at 1170. Other possible avenues of private police reform include applying the exclusionary rule to improper searches conducted by the private police or further expanding tort liability. *Id.* at 1278.) Additionally, Chicago and the Bay Area have union-organized private police with a detailed training regime. Boghosian, *supra* note 37, at 183–84.

<sup>193</sup> Sklansky, *supra* note 7, at 1276.

<sup>194</sup> *Id.*

activities of the private police.<sup>195</sup> Increasing the amount of publicly-available information about the practices of private police will help guide future regulatory or reform efforts. Specifically, private police companies should be required to provide public reporting regarding their interactions with citizens, private police contracts should be open to public scrutiny, and the legislature should fund empirical field studies of private police.

Due to the secrecy of the private police industry, this information will likely not be made public voluntarily.<sup>196</sup> Because private police firms are paid by their clients, and not by the public, they may be hesitant to report abuses for fear of losing business.<sup>197</sup> Thus, legislative action is the only sure avenue to increased transparency in the private police industry. Specifically, the legislature should (1) require private police to produce publicly available reports about their interactions with citizens and to immediately report a use of force or discharge of a firearm to the public police, (2) facilitate transparency into private police contracts so the public knows who is paying the private police and what they are paid to do, and (3) fund empirical studies of the practices of the private police.

#### 1. Improve Reporting Requirements

Private police companies should be required to produce regular, public reports about their interactions with citizens and their uses of force. Currently, private police companies in Washington are only required to produce publicly-available reports in the case of the death or termination of private police officers, events that would disqualify a private police officer from holding a license, or a discharge of a firearm while on duty and outside of a shooting range.<sup>198</sup> Private police companies should also be required to produce regular, publicly available reports on the number of

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<sup>195</sup> *Id.* at 1277.

<sup>196</sup> *See, e.g., id.* at 1278.

<sup>197</sup> Rahall, *supra* note 27, at 666.

<sup>198</sup> WASH. REV. CODE § 18.170.110 (2000).



people accosted or detained, when and how they were questioned, how many suspects were turned over to the public police, the number and type of searches conducted, and the circumstances and results of those searches. They should also be required to report on how often they use force and what sort of contact or weapon is used, and should be required to report on the race, gender, age, and other salient characteristics of the person accosted.<sup>199</sup>

Additionally, the legislature should tighten the existing reporting deadlines by requiring immediate reporting of any use of force or of a weapon. “Shooting incidents involving private police are underreported and under-investigated relative to those involving public police.”<sup>200</sup> Currently, a private police company can wait up to 10 days before notifying local law enforcement of a discharge of a firearm by a private police officer.<sup>201</sup> There is no requirement to report any other use of force by a private police officer. Private police companies should be required to immediately report any discharge of a firearm or use of force by a private police officer to local law enforcement.<sup>202</sup>

## 2. Promote Contract Transparency

Private police contracts should be subject to increased public scrutiny.<sup>203</sup> Because private police companies are paid by their clients, and not by the public, they have a powerful incentive to serve those clients at the expense

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<sup>199</sup> While these reports should be publicly available, they should take legitimate privacy interests into account. Sklansky, *supra* note 7, at 1279.

<sup>200</sup> Etzioni, *supra* note 22, at 298.

<sup>201</sup> WASH. REV. CODE § 18.170.110 (2000).

<sup>202</sup> Depending on the frequency of private police officers’ use of force, the legislature may want to consider mandating some sort of review of such incidents. For example, the legislature could task the local bodies that review public police use of force incidents to review private police incidents as well.

<sup>203</sup> Unlimited public access to private police contracts would likely raise valid privacy and business secrets concerns, so some redactions will likely be necessary. However, at a minimum, private police companies should be obligated to disclose who they are working for and any provisions relating to working with public police or enforcing the criminal law.

of the public.<sup>204</sup> Private police companies should be required to disclose who their clients are and what services they are asked to perform. Are they instructed to remain unarmed or to carry weapons? What weapons do their contracts allow them to carry? Will they use any surveillance equipment, such as private drug-sniffing dogs? Are they obligated to report criminal activity to the police or are they instructed to take some sort of action to resolve it without involving the police? Are there any performance requirements, such as number of people stopped or number of reports to the public police, that officers are expected to meet?

Transparency into who is paying the private police and what the private police are being paid to do will allow the public to better understand the costs imposed by private policing. The private police have powerful incentives to serve their clients, even if it comes at the expense of the public. To enable effective governance of the private police, the public should know what the private police are being paid to do it and who is paying them.

Transparency into private police contracts may also deter inappropriate private police behavior. One private police firm has maintained quotas that its officers are expected to meet.<sup>205</sup> A requirement that officers stop, question, or detain a certain number of citizens may encourage private police to target vulnerable members of society who are unable or unwilling to resist. There is evidence that people hire private police to target racial minorities in their communities.<sup>206</sup>

### 3. Fund Empirical Studies

Finally, the legislature should fund empirical field studies of the private police to develop a more nuanced understanding of their practices and to

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<sup>204</sup> See Rushin, *supra* note 35, at 163.

<sup>205</sup> See, e.g., Joh, *supra* note 3, at 118–19 (noting one private police company that maintained quotas requiring officers to interrogate a certain number of shoplifting suspects).

<sup>206</sup> See Etzioni, *supra* note 22, at 299.

ensure that legal reforms result in changes in private police behavior.<sup>207</sup> Due to the lack of federal or constitutional constraints on private police, private criminal procedure differs significantly from public criminal procedure.<sup>208</sup> Because front-line officers in the field wield a significant amount of discretion, studying internal processes and regulations is an inadequate substitute for monitoring behavior in the field.<sup>209</sup> A detailed field study of the actual practices used by private police will help illustrate whether the proposed reforms are succeeding and will also illuminate further opportunities for reform.<sup>210</sup>

### *C. Require More Rigorous Training*

The legislature should require that private police training is adequate to protect both the public and officers themselves. Due to the high turnover rates in the private police industry,<sup>211</sup> proper training for new employees is particularly important. However, due to these high turnover rates, private police companies are hesitant to invest in training an employee who may only be around a short time.<sup>212</sup> Currently, Washington requires no more than 16 hours of preliminary training and four hours of annual refresher training.<sup>213</sup> While most states require just over eight hours of pre-employment training on average, Washington lags significantly behind several states.<sup>214</sup> California, Alaska, and Florida mandate forty hours of training before licensing.<sup>215</sup> Other states, including Georgia, Illinois, Oklahoma, and Texas require twenty to thirty hours of pre-licensing

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<sup>207</sup> Sklansky, *supra* note 7, at 1278–80.

<sup>208</sup> *Id.* at 1279.

<sup>209</sup> Rushin, *supra* note 35, at 198.

<sup>210</sup> This type of empirical study will also provide importance context to efforts to reform the behavior of the public police. *See* Sklansky, *supra* note 7, at 1279–80.

<sup>211</sup> Boghosian, *supra* note 37, at 179–80.

<sup>212</sup> *Id.* at 182–83.

<sup>213</sup> WASH. REV. CODE § 18.170.105 (2007).

<sup>214</sup> Rushin, *supra* note 35, at 191.

<sup>215</sup> *Id.*

training.<sup>216</sup> Washington should, at a minimum, increase its training requirements to forty hours to keep pace with the states that are leading in this area and ensure that private police are trained in de-escalating conflicts and avoiding use of force.<sup>217</sup>

Furthermore, the existing regulations contain only sparse details on what kind of training is required.<sup>218</sup> In contrast, improved training of public police officers over the past several decades has resulted in increased professionalism and compliance with the law.<sup>219</sup> Private police should be required to undergo training relating to use of force and de-escalation.<sup>220</sup> Private security guards have attributed excessive use of force against homeless people to inadequate training in interacting with those populations.<sup>221</sup> Additionally, training in implicit racial and other bias may help reduce disparate treatment of vulnerable populations.<sup>222</sup>

One of the primary benefits of increasing the transparency of private police practices is to illuminate areas where additional training is needed. However, the above suggestions are preliminary changes that the legislature can enact while additional information is gathered.

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<sup>216</sup> *Id.*

<sup>217</sup> Additional information about the private police industry, provided by the recommended transparency requirements, will help future policymakers determine the optimum amount and content of private police training.

<sup>218</sup> For example, “[n]o more than one hour per year of annual refresher training may focus directly on customer service-related skills or topics and the remaining three hours per year of annual refresher training must focus on emergency response concepts, skills, or topics including but not limited to knowledge of site post orders or life safety.” WASH. REV. CODE § 18.170.105(4) (2007).

<sup>219</sup> See, e.g., Rushin, *supra* note 35, at 191–92.

<sup>220</sup> Private police training requirements should attempt to keep pace with the requirements for public police. A discrepancy between the two could undermine attempts to reduce use of force by public police by migrating the barred tactics to private police forces. See *supra* Part II.B.3. (Part II.B.3 explains that lax regulation of private police undermines efforts to regulate public police.)

<sup>221</sup> See Allen & Dungca, *supra* note 54.

<sup>222</sup> See Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Can't We All Just Get Along*, 27 U. HAW. L. REV. 339, 376 (2015).

*D. Improve Access to Remedies for People Harmed by Private Police*

The legislature should increase access to civil remedies to ensure that any person harmed by private police is able to receive adequate redress. While federal law provides a remedy for civil rights violations by the public police, no such remedy is available with respect to abuses by the private police.<sup>223</sup> Furthermore, because interactions with the private police rarely result in arrest, courts rarely have a reason to review their practices.<sup>224</sup> The legislature should create a civil right of action for people who are harmed by private police forces, guarantee minimum damages for plaintiffs who can show violations of constitutional norms, and increase the minimum insurance requirements for private police companies.

The legislature should provide citizens with a right of action against private police for wrongful search, seizure, or use of force. People should be able to exercise this right of action in a forum, such as an administrative hearing, that is cheaper and more accessible to the general public than traditional civil litigation.<sup>225</sup> While the high costs associated with civil litigation can deter citizens from asserting their rights, a cheaper option such as an administrative hearing will encourage aggrieved citizens to come forward.<sup>226</sup>

Additionally, the legislature should impose minimum statutory damages for constitutional violations by private police, particularly those that result in a criminal conviction.<sup>227</sup> If a plaintiff can show that a private police officer has done something that the state or federal constitutions bar a public police officer from doing, the law should set a minimum dollar figure the plaintiff is entitled to recover. The minimum recovery should be higher

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<sup>223</sup> See Sklansky, *supra* note 7, at 1186–87 (noting that 42 U.S.C. § 1983, which allows plaintiffs to recover damages and attorneys’ fees, generally does not apply to suits against the private police).

<sup>224</sup> See Joh, *supra* note 3, at 92.

<sup>225</sup> Rushin, *supra* note 35, at 198.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

if the violation results in a criminal conviction. Because the monetary cost of a constitutional violation, alone, is difficult to quantify, statutory minimum damages will likely facilitate civil suits because they will make a potential recovery more predictable.

To ensure that private police companies have adequate resources to compensate anybody harmed, the legislature should raise the minimum level of insurance coverage that private police companies are required to hold. If, as it stands currently, a civil tort action is the primary vehicle by which an individual harmed by private police will receive redress, the insurance requirements must be high enough to cover any possible liability.

The information currently available suggests that the existing requirements are much too low. Washington law requires private police companies to hold only \$50,000 total general liability coverage.<sup>228</sup> In contrast, to receive a permit for a public fireworks display, an applicant must have at least \$75,000 of insurance coverage for each event.<sup>229</sup> A fishing guide must hold \$300,000 of coverage.<sup>230</sup> As private policing—and particularly armed private policing—may pose a risk to public safety, private police companies should be required to hold equivalent amounts of insurance coverage.<sup>231</sup>

Washington's requirement is inadequate to ensure compensation for people harmed by private police, particularly if there are serious injuries. After the Westlake Center pepper spray incident, the victim's attorney estimated the potential damages at \$450,000.<sup>232</sup> In another incident, the actions of an off-duty public police officer working as a private police

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<sup>228</sup> This includes \$25,000 for personal injury and \$25,000 for property damage. WASH. REV. CODE § 18.170.080 (1991).

<sup>229</sup> WASH. REV. CODE § 70.77.295 (1984).

<sup>230</sup> WASH. REV. CODE § 77.65.560 (1)(d) (2015).

<sup>231</sup> Cf. John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1339 (2017) (discussing the ways in which insurers regulate the behavior of public police).

<sup>232</sup> Herz, *supra* note 19 (noting that the plaintiff's attorney sent a letter requesting \$450,000).

officer resulted in the death of a minor and total liability of over \$1.5 million.<sup>233</sup> Collecting information on private police practices, particularly use of force, will enable the legislature to determine the appropriate level of insurance coverage to ensure that any person harmed by a private police company is able to receive appropriate compensation.

Creating a right of action in an administrative forum, guaranteeing minimum damages for Constitutional violations, and requiring more robust insurance coverage will facilitate civil suits against the private police when they violate peoples' rights. Such legal action will help prevent inappropriate private police behavior. Because private police companies are motivated by profit, the risk of monetary penalties creates a strong incentive to prevent abuses by private police.

#### *E. Responses to Criticisms*

The legislative reforms proposed will likely attract opposition, particularly from private police companies and from private police customers who fear increased prices or lower-quality service. The following section will address four possible criticisms: (1) the reforms are unnecessary because the private police can regulate themselves, (2) the reforms are unnecessary because the threat of criminal prosecution will deter misconduct, (3) the reforms will undermine the viability of the private police industry, and (4) without private police services, people may turn to vigilante activity. This section will conclude by addressing a common competing reform proposal: treating private police as state actors.

#### 1. State Regulation is Necessary; Voluntary Self-Regulation by the Private Police Industry is Inadequate

Private police companies will likely argue that this proposal is unnecessary because they can adequately regulate themselves without government interference. They will point to studies sponsored by the

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<sup>233</sup> Boghosian, *supra* note 37, at 186.

Department of Justice that have recommended that private police firms adopt and enforce voluntary guidelines.<sup>234</sup> British private police companies have implemented “industry-imposed” regulations.<sup>235</sup> Critics will argue that the profit motive and the need to provide quality service to customers will ensure that private police officers are well-trained, their backgrounds are checked, and they perform their jobs safely. Furthermore, because their actions can expose their clients to liability, the private police will have a financial incentive to avoid any abusive behavior.<sup>236</sup>

However, voluntary codes of conduct and the profit motive alone will not ensure adequate regulation of the private police; new legislation is needed to govern the conduct of private police. The examples of private police abuses identified earlier in the article provide evidence that private police companies are unable to adequately regulate their conduct. Furthermore, studies of the British regulatory scheme, which has been touted as a model for American companies to emulate, showed it to be entirely ineffective.<sup>237</sup>

Information disclosures, such as those suggested above, would be necessary to verify the success of any scheme of self-regulation. Furthermore, price competition among private police firms creates a powerful incentive to reduce expenses on things like wages, training, and background checks.<sup>238</sup> An effective scheme of self-regulation would require universal cooperation and a willingness to embrace higher prices or lower profits, both of which seem unlikely. Self-regulation is likely to be, at best, a supplement to regulation by the state.<sup>239</sup>

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<sup>234</sup> Joh, *supra* note 3, at 110.

<sup>235</sup> *Id.*

<sup>236</sup> Finegan, *supra* note 171 at 126–27.

<sup>237</sup> Joh, *supra* note 3, at 110.

<sup>238</sup> See Boghosian, *supra* note 37, at 177; Sklansky, *supra* note 3, at 1279.

<sup>239</sup> Joh, *supra* note 3, at 111.



## 2. The Threat of Criminal Prosecution Will Not Prevent Private Police Misconduct

Private police companies might also argue that legislation is unnecessary because the threat of criminal prosecution will deter the private police from harming people. However, the risk that abusive conduct will result in a criminal prosecution is an insufficient check on the actions of private police. The story of the private police officer in Part I, *supra*, provides anecdotal evidence of this. When the officer's felony conviction prevented him from seeking employment, he convinced a court to vacate it and received his license as a private police officer three years later.<sup>240</sup> He was hired as a private police officer, despite a criminal record showing negligent driving, unlawful discharge of a firearm, violation of a no-contact order, and forgery.<sup>241</sup> The officer's 2014 arrest and charges of fourth-degree assault for pepper-spraying two teenagers, while employed at a different private police firm, did not prevent CP from hiring him.<sup>242</sup> In Washington, not a single private police officer has been disciplined by the state Department of Licensing since 2007.<sup>243</sup>

One observer has noted that, empirically, criminal prosecutions of the private police "appear virtually nonexistent,"<sup>244</sup> but the proposed reforms may encourage prosecution for abuses by the private police. Because private police interactions rarely result in arrest, courts are rarely able to review the practices of the private police.<sup>245</sup> Current Washington law facilitates unpunished private police abuses: there is no requirement that

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<sup>240</sup> Barnett, *supra* note 15.

<sup>241</sup> *Id.*

<sup>242</sup> Grande, *supra* note 18.

<sup>243</sup> Herz, *supra* note 19 (statistic as of 2014).

<sup>244</sup> Sklansky, *supra* note 7, at 1186. Because police and prosecutors can benefit from the actions of private police, they have an incentive not to arrest or pursue charges against private police.

<sup>245</sup> Joh, *supra* note 3, at 92 (noting that absent an arrest, courts rarely have occasion to review police conduct), 79 (citing anecdotal evidence suggesting that private police arrests are rare).

private police companies report a use of force to law enforcement. Private police companies have no incentive to expose themselves to liability by doing so. Thus, it is likely that private police use of force will only be investigated if a victim or third party reports it. However, victims and bystanders may have an incentive not to report abuses if they have been engaged in criminal activity or fear interacting with the public police. The proposed legislation would require private police forces to immediately report any discharge of a firearm or use of force. This requirement would enable the public police to investigate these incidents before any evidence is lost.

### 3. Legislation Will Not Undermine the Effectiveness of Private Police Officers or the Viability of the Private Police Industry

Private police companies and their supporters may argue that the recommended legislation will impede the effectiveness of private police and may threaten the viability of the private police industry. A group of Seattle residents noted that one of the benefits of the private police is that they are willing to “perform many tasks that would be considered ‘beneath’ most beat cops.”<sup>246</sup> In this view, the lax regulatory environment that private police operate in is essential, as it enables them to respond to events more flexibly than the public police.

However, improving regulation of the private police will not undermine their effectiveness and may help the industry better serve its customers.<sup>247</sup> Improved training requirements will make the private police better at their jobs. Some private police have reported feeling “unprepared and anxious

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<sup>246</sup> *Private Security vs Public Law Enforcement*, MAGNOLIA PATROL ASSOCIATION, <https://web.archive.org/web/20160304231751/http://www.magnoliapatrol.org/private-security-vs-public-law-enforcement/> [https://perma.cc/7FTP-Q4DR] (last visited Mar. 5, 2017).

<sup>247</sup> WASH. REV. CODE § 18.170.150 (Because Washington law requires any out-of-state private security guards working in Washington to meet the same training, insurance, and certification requirements as guards licensed in Washington, there is no risk that the proposed reforms would benefit out-of-state companies over Washington companies.).

about how they would handle certain situations if they arose.”<sup>248</sup> Other private police have reported they do not receive self-defense training they need to protect themselves.<sup>249</sup> While the country’s largest membership group for private police, the International Foundation for Protection Officers, has recommended increased training standards, no state comes close to meeting the recommendations.<sup>250</sup> Private police personnel have said that the lack of training results in excessive use of force.<sup>251</sup> Thus, improving the training that private police receive will help protect both the public and the private police officers themselves.

#### 4. Improving Regulation of Private Police Will Not Provoke a Backlash by Vigilante Groups

Opponents of the proposed reforms may argue that it will make the public less safe by spurring vigilante movements. If the private police are no longer able to provide the aggressive tactics that residents want, residents may take matters into their own hands. Because vigilante groups are entirely untrained and unregulated, they may be more likely to infringe peoples’ rights or injure people. Fears of a citizen backlash are not unfounded; when a California state court held that the exclusionary rule applied to the private police, the decision was overturned by a state referendum.<sup>252</sup> In Seattle, there have been complaints of vigilante groups with dogs intimidating residents of the Columbia City neighborhood.<sup>253</sup>

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<sup>248</sup> Lauren Kirchner, *The Surprisingly Lax Oversight of the Security Guard Industry*, PAC STANDARD (July 1, 2014), <https://psmag.com/the-surprisingly-lax-oversight-of-the-security-guard-industry-1b3e5f9a7d83> [<https://perma.cc/NKR8-GCKV>].

<sup>249</sup> *Id.*

<sup>250</sup> Etzioni, *supra* note 22, at 279; Shoshana Walter & Ryan Gabrielson, *America’s gun-toting guards armed with poor training, little oversight*, REVEAL (Dec. 9, 2014), <https://www.revealnews.org/article/americas-gun-toting-security-guards-may-not-be-fit-for-duty/> [<https://perma.cc/4C99-ZXFM>].

<sup>251</sup> See Allen & Dungca, *supra* note 54.

<sup>252</sup> Simmons, *supra* note 58, at 931 n.86.

<sup>253</sup> Alex Tizon, *Columbia City Got Rid of Bad Guys – And Good? – Critics Call Canine Corps A Vigilante Group*, SEATTLE TIMES (Nov. 13, 1995),

However, the risks posed by private police are greater than those posed by vigilante groups. Even though they have the same legal authority as ordinary people, private police are “occupationally disposed to use powers that a citizen may rarely, if ever, invoke.”<sup>254</sup>

In addition, private police are more likely than vigilante groups to be mistaken for public police. Private police uniforms are frequently designed to mimic those of the public police.<sup>255</sup> This similarity causes confusion because an observer may mistakenly believe that a private police officer is actually a public police officer vested with legal authority.<sup>256</sup> This confusion increases the risk of infringing on peoples’ rights; people may mistakenly believe that they are legally obligated to submit to a search or detention by private police. In contrast, citizen patrols or vigilante groups are unlikely to be perceived as possessing legal authority because they do not wear official-looking uniforms.

Finally, existing state law likely prohibits the formation of vigilante groups. It is a gross misdemeanor for any person to perform the “functions and duties” of a private police officer without a license.<sup>257</sup>

##### 5. The Proposed Reforms Are a Better Solution Than Expanding the State Actor Doctrine to Cover Private Police

Several observers have argued that private police should be treated as state actors.<sup>258</sup> If courts or legislatures were to classify the private police as state actors, they would become subject to constitutional constraints, such as the exclusionary rule and the requirement to provide *Miranda* warnings.

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<http://community.seattletimes.nwsourc.com/archive/?date=19951113&slug=2152298>  
[<https://perma.cc/2767-VYQZ>].

<sup>254</sup> See Joh, *supra* note 3, at 64.

<sup>255</sup> See Boghosian, *supra* note 37, at 181.

<sup>256</sup> Etzioni, *supra* note 22, at 300.

<sup>257</sup> WASH. REV. CODE § 18.170.160 (4) (1995).

<sup>258</sup> See generally Beaton, *supra* note 38.

This alternative strategy for improving the regulation of the private police may make the proposed legislation unnecessary.

However, the legislative reforms advocated in this article are a superior means of regulating the private police. Expanding the state actor doctrine will not actually deter abuses by the private police. The primary consequence<sup>259</sup> of an illegal search or seizure by a state actor is that any evidence obtained will be excluded from a criminal trial.<sup>260</sup> This deters public police from conducting illegal searches because it makes it more difficult to obtain a criminal conviction. However, unlike the public police, many private police are not concerned with enforcing the criminal law or obtaining a criminal conviction.<sup>261</sup> Thus, expanding the state actor doctrine is unlikely to be a sufficient check on the behavior of private police. Because they are motivated by profit, not criminal convictions, the proposed legislative reforms are necessary to ensure that the public is protected from abuses by the private police.

## V. CONCLUSION

Lax regulation of the private police poses significant risks to public safety and encourages private police to violate constitutional norms with impunity. The stories of police abuses in Magnolia and at Westlake Center Mall demonstrate that these fears are not merely hypothetical; interacting with loosely-regulated private police places Washington residents at risk.

Existing regulations are inadequate to protect the public. Because they are not state actors, the constraints that the U.S. Constitution places on the public police do not apply to the private police. Thus, legal protections that the general public may be familiar with—the prohibition against unreasonable searches and seizures, *Miranda* warnings, or the exclusionary

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<sup>259</sup> Violating a person's constitutional rights also subjects a state actor to a civil lawsuit under 42 U.S.C. § 1983. However, these suits are often costly and difficult to bring, making them an insufficient check on abusive behavior. *See supra* Part III.B.4.

<sup>260</sup> *See* Beaton, *supra* note 38, at 615.

<sup>261</sup> Rushin, *supra* note 35, at 197; Joh, *supra* note 3, at 118.

rule—do not govern interactions with the private police. However, because the private police's dress and demeanor attempt to mimic that of the public police, the public may not realize the difference. Though the private police have no more legal authority than an ordinary person, the public may mistakenly believe they act with state authority. An individual who submits to a search or interrogation by a private police officer may see the evidence gathered passed along to the public police. This may result in a criminal conviction, even if the exact same search would have been illegal if conducted by the public police.

Washington's current regulatory structure is inadequate to combat this problem. Washington courts do not consider the private police to be state actors; thus, the behavior of the private police is not constrained by the state or federal constitution. Washington's licensing scheme, which serves as the primary source of regulatory authority, must be improved. It exempts private police who do not work for a private police company from its requirements and it prohibits local jurisdictions from enacting additional regulations to protect their residents. The legislature must enact new legislation to improve regulation of the private police. These reforms should include improving transparency in the private police industry, improving training requirements for private police, and facilitating redress for people who are harmed by private police.

These reforms will help protect the public from abuses by private police. The requirement to immediately report a use of force or discharge of a firearm will enable the public police to investigate abusive private police behavior. Transparency into the private police industry will enable future policymakers to design additional appropriate regulations. Improved training will enable the private police to interact safely with the public. If, despite these reforms, an individual is harmed by inappropriate private police conduct, improved access to remedies will help them receive appropriate redress. Finally, these reforms will help ensure the integrity of efforts to reform the public police, such as the City of Seattle's consent

decree with the Department of Justice, by preventing abusive tactics from simply migrating from the public to the private police. The proposed legislation will enable the private police to serve their clients' needs while maintaining public safety and strengthening constitutional norms.