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PRIVATE POLICE REGULATION AND THE EXCLUSIONARY REMEDY: HOW WASHINGTON CAN ELIMINATE THE PUBLIC/PRIVATE DISTINCTION

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Abstract: Private security forces such as campus police, security guards, loss prevention officers, and the like are not state actors covered by the Fourth Amendment's prohibition against unreasonable searches and seizures nor the Fifth Amendment's *Miranda* protections. As members of the umbrella category of "private police," these private law enforcement agents often obtain evidence, detain individuals, and elicit confessions in a manner that government actors cannot, which can then be lawfully turned over to the government. Though the same statutory law governing private citizens (assault, false imprisonment, trespass, etc.) also regulates private police conduct, private police conduct is not bound by constitutional protections like the exclusionary rule, which requires that evidence obtained in violation of a criminal defendant's rights be excluded from their prosecution. As a result of this disparity, evidence that would have been suppressed if government actors had procured it is often deemed admissible when procured by private police. Because private actors make up a significant and growing sector of law enforcement, the absence of robust constitutional regulation means that citizens whose rights are violated have little recourse because the default remedy of suppression is unavailable. This Comment examines how states' exclusionary rules impose higher standards on searches and seizures than the federal exclusionary rule by encompassing private actors. It also urges Washington State to adopt an exclusionary rule that recognizes suppression of illegally obtained evidence from both public and private actors.

INTRODUCTION

On June 8, 2020, Seattle organizers established the Capitol Hill Occupied Protest (CHOP),[1] a self-declared autonomous and "police-free" zone, near Cal Anderson Park and the Seattle Police Department's

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1. Community members first termed the area Capitol Hill Autonomous Zone (CHAZ) before changing it to better reflect their purpose. Katelyn Burns, *Seattle's Newly Police-Free Neighborhood, Explained*, VOX (June 16, 2020), https://www.vox.com/identities/2020/6/16/21292723/chaz-seattle-police-free-neighborhood [https://perma.cc/NPP8-PPYG].

abandoned east precinct building.[2] Among other demands, participants called for the city to reduce police funding, redistribute those funds to community health, and "drop all criminal charges against protesters."[3] In light of the occupation's stated mission, an opinion columnist at *The Seattle Times* highlighted the irony that, "[f]or a police-free zone, the CHOP sure has a lot of people in uniforms standing around with guns."[4] Commenting on the influx of private security groups, such as Iconic Global, Homeland Patrol Division, and Fortress Security, the columnist noted that in the aftermath of a failed police-free experiment, "citizen militias and corporate hired guns" would fill the void.[5] By July 1, the organizers' vision for a self-governing utopia had dissolved in the wake of fatal shootings and the forcible clearing of the area by police.[6]

In August of 2020, a community news blog reported that a police officer was injured while intervening in a clash between private security guards and protesters near the same park where anti-police brutality protests had continued post-occupation.[7] The security firm Iconic Global that employed the "heavily armed guards" had "a fleet of marked and unmarked vehicles that [we]re often mistaken for police or law enforcement officials."[8] Joseph Spiro, the company's owner, told the blog that neighborhood business owners hired him to protect their property during a summer of smashed glass, burned goods, and vandalism.[9] As *The Seattle Times* had already reported, Iconic Global was not the only (private) sheriff in town.[10] The blog claimed that at least two additional

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2. *Id.*; Mike Baker, *Free Food, Free Speech and Free of Police: Inside Seattle's 'Autonomous Zone*,*'* N.Y. TIMES (June 11, 2020), https://www.nytimes.com/2020/06/11/us/seattle-autonomous-zone.html (last visited Sept. 27, 2023); Brendan Kiley, Ryan Blethen, Sydney Brownstone & Daniel Beekman, *Seattle Police Clear CHOP Protest Zone*, SEATTLE TIMES (Aug. 12, 2020, 11:35 AM), https://www.seattletimes.com/seattle-news/seattle-police-clearing-chop-protest-zone [https://perma.cc/FCJ4-4C7S].

3. Baker, *supra* note 2.

4. Danny Westneat, *With Cops Away, It's Like Capitol Hill Is Slipping Back to the Pinkerton's Era*, SEATTLE TIMES (July 1, 2020), https://www.seattletimes.com/seattle-news/law-justice/with-cops-away-its-like-capitol-hill-is-slipping-back-to-the-pinkertons-era [https://perma.cc/G5RE-H9GU].

5. *Id.*

6. Kiley et al., *supra* note 2.

7. *SPD Says Officer Injured, Two Arrested as Police Step into Clash Between Private Security Team and Capitol Hill Protesters—UPDATE*, CAPITOL HILL SEATTLE BLOG (Aug. 13, 2020, 11:21 AM), https://www.capitolhillseattle.com/2020/08/spd-says-officer-injured-two-arrested-as-police-step-into-clash-between-private-security-team-and-capitol-hill-protesters/ [https://perma.cc/C5BW-DZAY] [hereinafter CAPITOL HILL SEATTLE BLOG].

8. *Id.*

9. *Id.*; *see also* Kiley at al., *supra* note 2 ("The occupation drew criticism from some Capitol Hill neighbors and business owners, who said they were left dealing with property damage, threats from protesters, a loss of business and other disruptions.").

10. Westneat, *supra* note 4.

security firms made rounds in the area—one called Iron and Oak and others unnamed.[11]

The following month, *The Seattle Times* reported that three private security guards from another firm, Jaguar Security, patrolled the same park after the city ordered the sweep of a camp of protesters and unhoused people.[12] Greeted with hostility and suspicion by a group of protesters, the guards departed after only a few hours, though the city had planned to pay four guards eighty-five dollars per hour to remain in the park from 8:00 p.m. to 6:00 a.m.[13] A spokesperson for the Seattle Parks Department told *The Seattle Times* that the city contracted the guards to "have a presence in the park overnight and to continue to remind people that the park remain[ed] closed."[14] All three guards were armed.[15]

The operations of at least four different private security firms in one park over the course of a few months reflect a complicated series of relationships: individuals protesting state violence inflicted by public police officers; private security working on behalf of private businesses; the city government contracting private security services; and individuals resisting the presence of that private law enforcement. Such a tangled web shows the varied purposes of public employees whom we term "police" and the private law enforcement officers working apart from them. These commonly understood purposes include maintaining public safety, preventing property loss and destruction, enforcing community norms, investigating crime, and quelling disorderly protest.[16]

As the examples from Cal Anderson Park demonstrate, public and private law enforcement serve many of the same functions. However, there is a key legal distinction between the groups: private security forces, such as campus police, security guards, loss prevention officers, and the like, are not state actors.[17] This means they are neither covered by the Fourth Amendment's prohibition against unreasonable searches and seizures nor the Fifth Amendment's *Miranda* protections against self-incrimination.[18] As members of the umbrella category of "private police,"

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11. CAPITOL HILL SEATTLE BLOG, *supra* note 7.

12. Heidi Groover, *Private Security, Hired by Seattle Parks After Police Cleared Cal Anderson, Leaves on First Night*, SEATTLE TIMES (Sept. 3, 2020, 5:13 PM), https://www.seattletimes.com/seattle-news/private-security-hired-by-seattle-parks-after-police-cleared-cal-anderson-park-quit-after-one-night [https://perma.cc/5KHR-LHQ5].

13. *Id.*

14. *Id.*

15. *Id.*

16. *See* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 792–802 (2021); Aya Gruber, *Policing and "Bluelining*,*"* 58 HOUS. L. REV. 867, 873–889 (2021).

17. *See infra* section II.A.

18. *See infra* section II.A.

these quasi-law enforcement agents often obtain evidence, detain individuals, and elicit confessions in a manner that government actors cannot.[19] Evidence can then be lawfully turned over to the government.[20] Though the same statutory law governing private citizens (assault, false imprisonment, trespass, etc.) also regulates private police conduct, private police conduct is not bound by constitutional protections like the exclusionary rule, which requires that evidence obtained in violation of a criminal defendant's rights be excluded from their prosecution.[21] As a result of this disparity, evidence that would have been suppressed if government actors had procured it is often deemed admissible when procured by private police.[22]

Focusing on the limits and promises of the exclusionary rule is important because of the growing privatization of criminal law and sheer number of private officers that are not state actors but perform traditional law enforcement functions.[23] In the absence of robust constitutional regulation, citizens whose rights are violated have little recourse because the default remedy of suppression is unavailable.[24] On any given day—not just in Seattle in one park over the course of three months—many citizens may be more likely to encounter a security guard or other private law enforcement officer than an actual police officer employed by the government due to the sheer number of private security personnel.[25] If both types of officers can essentially do the same things, the legal regimes governing each should not be so different.

To be clear, there are arguments that violent, thuggish, or otherwise illegal behavior on behalf of the State may be more concerning than private security firms' activities. As the Framers made explicit, the Fourth Amendment was borne out of a fear of State tyranny and

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19. *See infra* section I.B.

20. *See infra* section I.B.

21. *See infra* section II.B.

22. *See infra* section III.C.

23. *See* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1168 (1999) ("The private security industry already employs significantly more guards, patrol personnel, and detectives than the federal, state, and local governments combined, and the disparity is growing. Increasingly, private security firms patrol not only industrial facilities and commercial establishments but also office buildings, shopping districts, and residential neighborhoods.").

24. *See infra* section II.A.

25. *See* Sklanksy, *supra* note 23, at 1175; Alana Semuels, *Private Security Guards Are Replacing Police Across America*, TIME (May 2, 2023, 8:00 AM), https://time.com/6275440/insecure-private-security-replacing-police/ [https://perma.cc/QR9N-BL9X]. Of course, the likelihood of encountering private police is caveated based on race and class, as different communities have widely disparate levels of public police presence. *See* Frank Rudy Cooper, *Intersectionality, Police Excessive Force, and Class*, 89 GEO. WASH. L. REV. 1452, 1455–56 (2021).

implemented as a bulwark against the consolidation of sovereign power.[26] However, in the context of search and seizure, the reasons for diverging legal standards between public and private actors are less persuasive. With the imprimatur of authority, weapon-wielding private guards or public officers both make a strong and intimidating impression. Nevertheless, how the law treats each type of actor is distinct. Private police forces are a significant presence in our society, yet they operate in a legal gray zone.

Because the U.S. Constitution does not control private actors' conduct, some states, such as Texas and Rhode Island, have imposed higher standards on searches and seizures.[27] These broadened exclusionary rules have been applied to suppress evidence obtained by private actors under circumstances where the Fourth Amendment would not be applicable.[28] The United States Supreme Court has expressly acknowledged the right of state supreme courts, as final interpreters of state constitutions, "to impose higher standards on searches and seizures than [those] required by the Federal Constitution."[29] State legislatures may also codify more expansive statutory exclusionary rules.[30] As a result, states can regulate private police to a further extent than what the Fourth Amendment requires.

This Comment draws attention to the private search and seizure remedial gap and offers a new path for Washington State. Part I defines private police, surveys the historical development of private law enforcement, and describes their powers. This Part shows that private police engage in much of the same conduct we expect from public police. Part II explains how the Fourth Amendment regulates police conduct with explanations of the state action doctrine and the federal exclusionary rule. Part III focuses on private police regulation and examines how remedies for private misconduct differ from public actor remedies. This Part also summarizes Washington's private police regulatory regime and compares the state's exclusionary rule to the more expansive rules of Texas and Rhode Island. Part IV urges Washington to adopt an exclusionary rule, on either state constitutional or statutory grounds, that recognizes suppression of illegally obtained evidence from both public and private actors. This Part's primary analytic contribution invokes cases

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26. *See* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1322 (2016) ("The Founders' concern went beyond the amassing of tyrannical power in one place to the impact such an accumulation of power would have on the separation of powers.").

27. *See infra* section III.C.2 (Rhode Island); *infra* section III.C.3 (Texas).

28. Robert F. Williams, *The Claus Von Bulow Case: Chutzpah and State Constitutional Law?*, 26 CONN. L. REV. 711, 714 (1994).

29. Cooper v. California, 386 U.S. 58, 62 (1967).

30. *See infra* section III.C.3.

demonstrating that private action can rise to the level of State action when private parties make use of judicial procedures with the assistance of the State.

I. DEFINING PRIVATE POLICE

Private police, for the purposes of this Comment, include all private security forces that are not employed by the government—the "various lawful forms of organized, for-profit personnel services whose primary objectives include the control of crime, the protection of property and life, and the maintenance of order."[31] This intentionally broad umbrella encompasses private campus police, security guards, loss prevention officers, private detectives, and other quasi-police forces.[32] Private police also include moonlighting officers, i.e., off-duty public police officers who are privately employed.[33] The common thread that unifies these groups is that they are not employed by federal, state, or municipal governments, yet nonetheless perform similar functions to public law enforcement.[34]

Public law enforcement, then, can be defined in opposition. For purposes of this Comment, public police "refers to those bureaucratically organized, professionally trained public employees entrusted with the tasks of enforcing the criminal law and maintaining order, backed by the authority of the state, paid by public funds, and accountable to democratic institutions."[35] To examine the categorization of public versus private and its implications, this Part recounts the historical development of private police in the United States and explains their general typology and powers.

A. A Brief History of Private Policing

The history of law enforcement in the United States reflects an ongoing question about the role of private and public actors in maintaining order, keeping communities safe, prosecuting wrongdoers, and punishing the convicted. These aspects of policing have not always been monopolized

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31. Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 577 (2005) [hereinafter Joh, *Conceptualizing*] (emphasis omitted).

32. *See id.* at 598 (campus police); Sklansky, *supra* note 23, at 1172–74 (security guards); *id.* at 1175–76 (loss prevention officers, private detectives, and other quasi-police forces).

33. Seth W. Stoughton, *Moonlighting: The Private Employment of Off-Duty Officers*, 2017 U. ILL. L. REV. 1847, 1853 (2017).

34. *See infra* section I.B.

35. Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 61 (2004) [hereinafter Joh, *Paradox*].

by the government.[36] Throughout the majority of American history, private law enforcement has played a significant role.[37] Early private forms of law enforcement, with their focus on the protection of property, help explain how institutions with policing functions grew as our nation matured.

Colonial American towns modeled law enforcement on the medieval English system of communal policing, which featured the "hue and cry,"[38] the constable,[39] and the night watch.[40] This system of community protection made night watchmen responsible for "reporting fires, raising the 'hue and cry' when crimes were committed, and arresting or detaining suspicious persons."[41] Constables had a wider set of duties, including arresting perpetrators, ensuring witnesses appeared in court, and surveilling persons of interest.[42] The constable and night watch were seen as "legally and traditionally, agents of the courts," yet both fulfilled their duties out of an "unpaid civic obligation."[43] However, the line between public and private roles blurred as those who could afford to hire constables and night watch did so.[44]

The birth of modern American policing remains contested but began either with the founding of a paid police agency in Philadelphia in 1833 or the Boston Police Department in 1838.[45] Public police slowly became more centralized during the mid-nineteenth century in response to increasing urban disorder and as a way to manage those considered part of the underclass, which included criminals, homeless people, and the poor.[46] Nevertheless, people still turned to private detectives and patrols to compensate for the "perceived shortcomings of the new public police."[47] Outside of urban areas, private law enforcement continued to

36. *See* Sklansky, *supra* note 23, at 1194.

37. *Id.* at 1206–07.

38. Donohue, *supra* note 26, at 1231. The "hue and cry" refers to the shout of warning that legally obligated everyone between the ages of fifteen and sixty who heard it to assist in apprehending a wrongdoer. *Id.*

39. Sklansky, *supra* note 23, at 1205.

40. *Id.*

41. Joh, *Conceptualizing*, *supra* note 31, at 581.

42. *Id.*

43. Sklansky, *supra* note 23, at 1206.

44. *Id.*

45. Seth W. Stoughton, *The Blurred Blue Line: Reform in an Era of Public & Private Policing*, 44 AM. J. CRIM. L. 117, 125 n.62 (2017).

46. *See* Sklansky, *supra* note 23, at 1208.

47. Elizabeth E. Joh, *The Forgotten Threat: Private Policing and the State*, 13 IND. J. GLOB. LEGAL STUD. 357, 389 (2006) [hereinafter Joh, *Forgotten Threat*].

proliferate.[48] With the advent of the railroad and the widespread industrial operations it enabled, demand for police protection grew.[49] Out of this, two new forms of private policing emerged: company police hired by corporations to protect their business interests and large private police forces, like the Pinkerton National Detective Agency.[50] Towards the end of the nineteenth century, public distaste for private policing increased as employers used private enforcement power to disrupt strikes, spy on unions, and cripple labor organizing.[51] From 1866 to 1892, the Pinkerton agency alone participated in seventy strikes by providing private companies with employees to act as strike guards, scabs, and undercover agents.[52] "Pinkerton" became a generic term for private police by the end of the century.[53]

Despite the hostility toward private police for their anti-labor activities, Pinkerton and its progeny influenced the professionalization of modern police departments in the early twentieth century; the public sector looked to its private counterparts when adopting investigative and managerial techniques.[54] Public police departments "expanded their detective operations and became more professional, more bureaucratic, and more centrally controlled."[55] Public police were also shaped by the increasing independence of local police departments, as well as Progressive Era reforms, which introduced legalistic and professional norms, police academies, and technological developments that transformed patrol work.[56]

By World War II, private police faced less public backlash.[57] Agencies that previously protected the interests of industrial capitalism shifted to providing services to defense contractors who were concerned with theft

48. Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 923 (2007); *see also* Sklansky, *supra* note 23, at 1211 ("Throughout the nineteenth century, public policing remained an urban phenomenon.").

49. Sklansky, *supra* note 23, at 1211.

50. Simmons, *supra* note 48, at 923.

51. Sklansky, *supra* note 23, at 1218; *see also id.* at 1214 ("'Pinkertonism' had become synonymous with the practice of employing large numbers of private security personnel in the service of industrial capitalism, and with the underlying laissez-faire ideology this practice grew to symbolize. . . . Hostility to private policing mounted . . . , fueled by periodic stories of malfeasance and by a growing notion that the responsibility for peacekeeping should not be placed in private hands.").

52. Joh, *Forgotten Threat*, *supra* note 47, at 364–65.

53. *Id.* at 365.

54. Sklansky, *supra* note 23, at 1216.

55. *Id.*

56. Joh, *Forgotten Threat*, *supra* note 47, at 374–75.

57. *Id.* at 373.

and international (rather than domestic) espionage.[58] Some of these private companies contracted with the Department of Defense or worked directly with the Federal Bureau of Investigation, again blurring the lines between public and private.[59] Private police grew dramatically in the 1960s and 1970s, and by 1990, a report commissioned by the Department of Justice predicted that private police employment would surpass public law enforcement well into the future.[60] This prediction proved correct in the early twenty-first century as private security companies employed approximately 2,000,000 guards, while public law enforcement employed only 725,000.[61]

A number of theories exist to explain this late twentieth-century uptick in police privatization, including increasing distrust of public law enforcement, dissatisfaction with the results of public policing, and the availability of funding.[62] Criminal justice scholar David Sklansky debunks two other commonly-held hypotheses for this trend.[63] The first theory contends that "police privatization . . . is part of a broader shift of resources and responsibilities away from government and toward the private sector."[64] However, this theory falls apart under scrutiny because police privatization predated this trend.[65] Second, criminologists posit that the growth of private police resulted from much of public life now taking place on "'mass private property': large, privately owned facilities such as shopping malls, office buildings, housing complexes, manufacturing plants, recreational facilities, and university campuses."[66] Sklansky shows that this hypothesis lacks empirical data and fails to account for the increase in private police on public property.[67]

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58. *Id.*

59. *Id.*

60. *Id.* at 375–76.

61. Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 191 (2005).

62. *See* 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, 95–96 (2013); *see also* Simmons, *supra* note 48, at 912–13 ("[I]t is becoming increasingly clear that the public criminal justice system is inadequate on two counts: first, it makes almost no attempt to rehabilitate and reintegrate the perpetrators of crime; and second, it does not satisfy the needs of crime victims. And as we have seen in other industries, from education to postal services to resolving civil law disputes, a failure of the public system will inevitably lead to the development of a private alternative.").

63. Sklansky, *supra* note 23, at 1221.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1222.

Though the causes of the increase remain unclear, private law enforcement is nonetheless ubiquitous in contemporary life.[68] And since 2020, private police may be even more of a presence. Coinciding with contemporary movements to defund police departments, public police forces are shrinking throughout the country.[69] This has intensified the turn to private security forces as communities (and even public police departments themselves) react to the simultaneous perceived increase in crime and actual decrease in law enforcement staffing by hiring off-duty officers and other private security personnel.[70] Private security groups have capitalized on this public shortage to promote their own services.[71]

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68. *See* Simmons, *supra* note 48, at 919 ("Today, the so-called 'private police' are everywhere: conducting residential security patrols; monitoring shoppers in department stores; safeguarding warehouses; patrolling college campuses and shopping malls; and guarding factories, casinos, office parks, schools, and parking lots.").

69. Mitch Smith, *As Applications Fall, Police Departments Lure Recruits with Bonuses and Attention*, N.Y. TIMES (Dec. 25, 2022), https://www.nytimes.com/2022/12/25/us/police-officer-recruits.html (last visited July 21, 2023). For a Washington-based example of this trend, see Danny Westneat, *In Seattle, the Cops Keep Leaving, While the Backup Never Comes*, SEATTLE TIMES (Feb. 17, 2023, 9:36 AM), https://www.seattletimes.com/seattle-news/in-seattle-the-cops-keep-leaving-while-the-backup-never-comes/ [https://perma.cc/VUD8-6LYX].

70. *See, e.g.*, Jeremy Kohler, *St. Louis' Private Police Forces Make Security a Luxury of the Rich*, PROPUBLICA (Sept. 8, 2022, 6:00 AM), https://www.propublica.org/article/public-vs-private-policing-in-st-louis/ [https://perma.cc/FW7E-X7ZS] (affluent neighborhoods hired private security firms to patrol in St. Louis); *About Us*, MINNEAPOLIS SAFETY INITIATIVE, https://www.mplssafety.org/about-us/ [https://perma.cc/RKS8-8FDT] (initiative calling for neighborhood members to fund increased off-duty police patrols in Minneapolis); John Ruch, *Buckhead CID Adds Second Private Security Patrol; Neighborhood-Wide Safety Plan Coming*, ROUGH DRAFT ATLANTA (Dec. 2, 2020, 9:19 AM), https://roughdraftatlanta.com/2020/12/02/buckhead-cid-adds-second-private-security-patrol-neighborhood-wide-safety-plan-coming/ [https://perma.cc/FJL8-FGW9] (Buckhead Community Improvement District committed resources to hire an off-duty police officer in Atlanta); *Hire an Off-Duty Officer*, KAN. CITY MO. POLICE DEP'T, https://www.kcpd.org/about/services/hire-off-duty/ [https://perma.cc/JJ4L-W9PW] (Kansas City Police Department offers its personnel's services when they are off-duty); Alex Zielinski, *Audit Finds City-Approved Business Districts Rely on Unregulated Policing*, PORTLAND MERCURY (Aug. 13, 2020, 10:31 AM), https://www.portlandmercury.com/news/2020/08/13/28731801/audit-finds-city-approved-business-districts-rely-on-unregulated-policing/ [https://perma.cc/8W9U-BFWW] (describing how privately funded "Enhanced Service Districts" employ off-duty police and private security firms in Portland); Quinn Myers, *With Wealthy Neighborhoods Turning to Armed Private Security, Questions Raised About Accountability*, BLOCK CLUB CHI. (May 2, 2022, 4:10 PM), https://blockclubchicago.org/2022/05/02/with-wealthy-neighborhoods-turning-to-armed-private-security-questions-raised-about-accountability/ [https://perma.cc/BPK3-C4CJ] (community organizations in affluent neighborhoods of Chicago are hiring private security guards to patrol).

71. *See, e.g.*, *As Police Budgets Shrink, Private Security Opportunities Grow*, TOP GUN SEC. ACAD., https://topgunsecurityacademy.com/resources/as-police-budgets-shrink-private-security-opportunities-grow/ [https://perma.cc/4NN5-5J4U] (referring, as a private security training program advertisement, to an increase in crime, decrease in public police presence, and increased reliance on private security); Rebecca Norton, *Security Guard Services Are on the Rise in Seattle, WA*, GUARD ALL. INC. (Dec. 12, 2022), https://theguardalliance.com/2022/12/12/security-guard-services-are-on-

This Comment does not seek to address normative arguments for or against the increased prevalence of private police, but to draw attention to their numbers.[72]

B. Private Police Powers

The roles and responsibilities of private police depend on the individual's scope of employment. A campus security guard may be tasked with policing underage drinking or apprehending a campus trespasser, while a loss prevention officer employed by a supermarket may be responsible for monitoring security footage, questioning suspected shoplifters, and making arrests. To parse the different actors under the private police umbrella, scholar of policing Elizabeth Joh has broken down private policing into four types: protective, intelligence, publicly contracted, and corporate.[73] For purposes of this Comment, publicly contracted private policing is distinct because publicly contracted police are considered state actors and are therefore subject to Fourth Amendment remedies that the other categories evade.[74] This Comment focuses on the remedial gap for the many other types of private police not considered state actors.

Joh's four types of private policing provide a helpful framework. Protective policing seeks to prevent property loss from theft, trespass, or damage.[75] Though often procured by commercial property owners, this type of policing is also popular with homeowners' associations or neighborhood watches, which may hire private security companies to patrol residential neighborhoods.[76] Some neighborhoods even pay public police departments to have their officers patrol when they are off duty.[77]

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the-rise-in-seattle-wa/ [https://perma.cc/HH7A-KRNW] (referring, as a security guard company's blog advertisement, to an increase in Seattle's crime rate, staffing shortages in the Seattle Police Department, and increased reliance on private security).

72. Two examples of arguments for and against are noted for reference. For an argument that the United States is headed in a similar direction to South Africa, where increased private policing has eroded democratic norms, see Amelia Pollard, *The Rise of the Private Police*, AM. PROSPECT (Mar. 3, 2021), https://prospect.org/justice/rise-of-the-private-police/ [https://perma.cc/HM4C-78WK]. For an argument that an increase in private police will better bolster public law enforcement efforts, see David Risley, *Private Police Coming to a Neighborhood Near You! Why Private Police May Be an Important Element of Future Law Enforcement*, POLICE CHIEF MAG. (2015), https://www.policechiefmagazine.org/private-police-coming-to-a-neighborhood/ [https://perma.cc/QFL6-XQZN].

73. Joh, *Conceptualizing*, *supra* note 31, at 610.

74. *See infra* section II.A.

75. Joh, *Conceptualizing*, *supra* note 31, at 611.

76. *Id.*; *see also* John B. Owens, *Westec Story: Gated Communities and the Fourth Amendment*, 34 AM. CRIM. L. REV. 1127, 1129, 1137–38 (1997).

77. Farhang Heydari, *The Private Role in Public Safety*, 90 GEO. WASH. L. REV. 696, 708 (2022).

Intelligence policing involves acquiring information instead of apprehending wrongdoers.[78] Among other examples, a private investigator acquiring information about a spouse's alleged infidelity or insurance company employees investigating fraud by tracking suspicious activity fall into this category.[79] Publicly contracted policing is the outsourcing of a governmental function.[80] Usually this is limited to specific crime control activities, but some municipalities have experimented with privately contracting out their police force in its entirety with varying results.[81] Police departments hiring private security in the wake of staffing shortages fit into this category.[82] Publicly contracted private policing is generally considered state action, which means evidence seized illegally by publicly contracted private police is often subject to exclusion.[83] Corporate policing "replicate[s] features of a public department within a private environment,"[84] like security at a theme park, casino, transportation facility, or office building.[85] This type of policing often has multiple objectives, illustrating how the four categories overlap. For example, personnel engaged in corporate policing may be concerned with preventing property loss on behalf of the corporation, protecting lives, surveilling suspicious persons, managing risks and threats, and serving as first responders on the premises.[86]

Under these typologies, private police possess the same legal powers that any private citizen has "unless deputized, commissioned, or provided by ordinance or state statute."[87] Most people do not realize the extent of those powers. Private police can make common law citizen's arrests, conduct preemptive stop-and-frisks, investigate and interrogate suspects, and surveil communities.[88] Although public police are more likely to perform activities we consider policing, private police officers are engaged in much of the same conduct.[89] What distinguishes public and

78. Joh, *Conceptualizing*, *supra* note 31, at 611.

79. *Id.* at 611–12.

80. *Id.* at 613.

81. *Id.* at 613–14.

82. *See supra* note 70 and accompanying text.

83. *See infra* section II.A.

84. Joh, *Conceptualizing*, *supra* note 31, at 615.

85. *See* David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89, 89 (2006).

86. Joh, *Conceptualizing*, *supra* note 31, at 615.

87. Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 177 (2012) (first quoting CHARLES P. NEMETH, PRIVATE SECURITY AND THE LAW 73 (2005); and then quoting THOMAS A. CRITCHLEY, A HISTORY OF POLICE IN ENGLAND AND WALES 3 (1996)).

88. *Id.* at 176–83.

89. Sklansky, *supra* note 23, at 1179–80.

private police and sets the outer bounds of their respective authorities are not legal rules, but cultural norms.[90] A meaningful distinction, then, lies less with what private and public police do and more with why and for whom they do it. Private police have a "client-defined mandate," which means that the desires and objectives of the client supersede any social goal that a public police force may ostensibly have, such as ensuring public safety or deterring crime.[91] The difference in clientele served between public and private law enforcement is worth noting when considering how private actors conduct their investigations and whom they target.

II. THE FOURTH AMENDMENT AS POLICE REGULATOR

As outlined in section I.B, the conduct of private and public police overlaps significantly. Besides cultural norms that differentiate the two and divergent client mandates, the most legally significant distinction between private and public police is that public police are State actors governed by constitutional doctrines—thus, public police are subject to a form of legal control that private police are not. This Part discusses the state action doctrine and reviews the United States Supreme Court's exclusionary rule jurisprudence in the context of the Fourth Amendment.

A. State Action

The Fourth Amendment is the "primary source of legal restraint" on police.[92] Made applicable to the states through the Due Process Clause of the Fourteenth Amendment, the Fourth Amendment is a check on state police power.[93] The Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[94]

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90. Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 899 (2004).

91. *See* Simmons, *supra* note 48, at 926–27.

92. RONALD JAY ALLEN, JOSEPH L. HOFFMAN, DEBRA A. LIVINGSTON, ANDREW D. LEIPOLD & TRACEY L. MEARES, CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL 316 (4th ed. 2020).

93. *Id.* at 315.

94. U.S. CONST. amend. IV.

On its face, this single sentence prohibits unreasonable searches and seizures, but the text itself does not address who is actually conducting the search or seizure. As the United States Supreme Court stated, its "origin and history clearly show that [the Fourth Amendment] was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies."[95] The court-developed doctrine of state action provides further clarification.

Under the state action doctrine, the U.S. Constitution only regulates governmental actors or those acting under the "color of law."[96] The United States Supreme Court's decision in *Lugar v. Edmonson Oil Co., Inc.*[97] set forth a two-pronged analysis for state action: (1) the constitutional deprivation must have been "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor."[98] It is often simple to identify a state actor when the actor is a government officer, employee, or official, but for private actors, it is not always straightforward—courts have held that private conduct can rise to the level of state action in certain circumstances.[99]

Parsing when private action must comply with the Constitution has been called a "conceptual disaster area,"[100] and United States Supreme Court Justices themselves have recognized that their "cases deciding when private action might be deemed that of the state have not been a model of consistency."[101] Yet, the Supreme Court has provided some guidance to determine whether challenged private conduct may be fairly attributable to the state by articulating seven approaches.[102] Though these approaches overlap conceptually, four well-defined tests have predominated in lower courts' case law: (1) the public function test, (2) the joint action test, (3) the state compulsion test, and (4) the nexus

95. Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

96. *See* Civil Rights Cases, 109 U.S. 3 (1883); *see also* Richard H.W. Maloy, *"Under Color of"—What Does It Mean?*, 56 MERCER L. REV. 565, 565–66 n.2 (2005).

97. 457 U.S. 922 (1982).

98. *Id.* at 937.

99. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631–32 (1991) (O'Connor, J., dissenting); Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974); Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970).

100. Charles L. Black, Jr., Foreword, *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

101. *Edmonson*, 500 U.S. at 632 (O'Connor, J., dissenting).

102. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001).

test.[103] The public function test finds state action when the private party exercises powers traditionally exclusively reserved to the State, like holding elections or exercising eminent domain.[104] The joint action test establishes that state action is present when private parties act jointly or in concert with public officials.[105] Under the state compulsion test, courts determine whether the government "exercised coercive power" or encouraged the private party.[106] The nexus test requires "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[107]

All government actors are regulated by the Fourth Amendment, but it is most often enforced against police officers.[108] Adherence to the state action doctrine means that the U.S. Constitution's primary source of police regulation generally does not apply to private actors, like private police.[109] The United States Supreme Court came to this decision in *Burdeau v. McDowell*,[110] where it held that searches or seizures by private parties are not regulated by the Fourth Amendment.[111] However, *Burdeau*'s holding does not mean that all searches made by private parties are immune to constitutional limits: when the government participates in or instigates a private search, the state action requirement is met and the

103. David M. Howard, *Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts*, 16 CONN. PUB. INT. L.J. 221, 227 (2017).

104. *See Jackson*, 419 U.S. at 352 ("We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State."); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157–58 (1978) (holding that state action arises when a private actor engages in an "exclusively public function").

105. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) ("Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute."); Dennis v. Sparks, 449 U.S. 24, 27–28 (1980) ("Private persons, jointly engaged with state officials in the challenged action, are acting see [sic] 'under color' of law for purposes of § 1983 actions.").

106. *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.").

107. *See Jackson*, 419 U.S. at 351; Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) ("The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.").

108. ALLEN ET AL., *supra* note 92, at 315.

109. *See* Burdeau v McDowell, 256 U.S. 465, 475 (1921).

110. 256 U.S. 465 (1921).

111. *Id.* at 475.

Fourth Amendment applies.[112] Since the United States Supreme Court has left open the question of when private police can be considered state actors in other circumstances, federal courts of appeals have grappled with where to draw the line by using the various tests described above.[113] Applying a state compulsion or nexus theory to private police, circuit courts have considered police state actors when given full police powers.[114] More often though, circuit courts have been reluctant to extend Fourth Amendment protections to private police as "instrument[s] or agent[s]" of the government when given only limited police-like functions.[115]

Similar to the state action doctrine is the private search doctrine, first articulated in *United States v. Jacobsen*.[116] Under this doctrine, "once a private party has conducted an initial search independent of the government, the government may repeat that search, even if doing so would otherwise violate the Fourth Amendment."[117] In *Jacobsen*, the United States Supreme Court saw no distinction "between the government using information it obtained from a third party and the government searching a container that a third party had already searched."[118] The

112. *See* Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971) (holding that the Fourth Amendment did not apply to a search or seizure by a private party who was not acting as an "'instrument' or agent" of the government); Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 614 (1989) ("Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities.").

113. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 163–64 (1978) ("We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions [including police protection] and thereby avoid the strictures of the Fourteenth Amendment."); *see also id.* at 163 n.14 (expressing no opinion on the "constitutional status of private police forces").

114. *See, e.g.*, Payton v. Rush-Presbyterian-St. Luke's Med. Ctr., 184 F.3d 623, 630 (7th Cir. 1999) ("[N]o legal difference exists between a privately employed special officer with full police powers and a regular Chicago police officer."); Henderson v. Fisher, 631 F.2d 1115, 1118 (3d Cir. 1980) ("[T]he delegation of police powers, a government function, to the campus police buttresses the conclusion that the campus police act under color of state authority."); Romanski v. Detroit Ent., L.L.C., 428 F.3d 629, 640 (6th Cir. 2005) (holding that a licensed private security police officer was a state actor because the officer had plenary arrest powers).

115. United States v. Garlock, 19 F.3d 441, 443 (8th Cir. 1994); *see, e.g.*, *id.* at 443–44 ("[T]he mere fact that an individual's job involves the investigation of crime does not transform him into a government actor."); Johnson v. LaRabida Children's Hosp., 372 F.3d 894, 897 (7th Cir. 2004) (holding that a hospital security guard was not a state actor because he "was not expected or authorized to carry out the functions of a police officer"); Boykin v. Van Buren Twp., 479 F.3d 444, 452 (6th Cir. 2007) ("[A] private security guard, who merely places a call to police that a suspected shoplifting has occurred, but in no way directly confronts the suspect, can be deemed a state actor.").

116. 466 U.S. 109 (1984).

117. Andrew MacKie-Mason, *The Private Search Doctrine After* Jones, 126 YALE L.J. F. 326, 326 (2017).

118. *Id.* at 329.

Jacobsen Court reasoned that the subsequent search by "federal agents did not infringe any constitutionally protected privacy interest that had not already been frustrated as the result of private conduct."[119] By first destroying an individual's reasonable "expectation of privacy,"[120] a private search renders the subsequent government search free from Fourth Amendment requirements, like obtaining a warrant.[121] The caveats to the private search doctrine are that the government cannot have initiated or participated in the initial private search[122] and the subsequent search may not exceed the scope of the initial search.[123] Both the state action and private search doctrines help define the bounds of permissible searches under the Constitution.

B. The Exclusionary Rule

When evidence is obtained in violation of the Fourth Amendment's proscription against unreasonable searches and seizures, the exclusionary rule applies absent an exception.[124] The exclusionary rule provides that all incriminating evidence traceable and causally connected to the violation of the defendant's Fourth Amendment rights is excluded from use in the defendant's criminal prosecution.[125] As a result, the exclusionary rule serves as the default remedy in checking police power and the one most often raised by criminal defendants.[126] By creating a constitutional baseline for what is permissible and setting limits on police behavior, the exclusionary rule has been called "the best legal tool available for regulating the police."[127] However, whether the exclusionary rule actually provides optimal regulation is contested.[128] Because the exclusionary rule is the main remedy in many cases, this Comment focuses on the circumstances under which it is available.

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119. *Jacobsen*, 466 U.S. at 126.

120. *Expectation of Privacy*, BLACK'S LAW DICTIONARY (11th ed. 2019). Expectation of privacy refers to "a belief in the existence of the right to be free of governmental intrusion in regard to a particular place or thing. To suppress a search on privacy grounds, a defendant must show the existence of the expectation and that the expectation was reasonable." *Id.*

121. MacKie-Mason, *supra* note 117, at 326.

122. *See Jacobsen*, 466 U.S. at 113.

123. *Id.* at 115–16.

124. ALLEN ET AL., *supra* note 92, at 318; *see infra* section II.B.3 (discussing exceptions).

125. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 398 (1914) (establishing the exclusionary rule for federal actors); Mapp v. Ohio, 367 U.S. 643, 659–60 (1961) (extending the exclusionary rule to the states).

126. ALLEN ET AL., *supra* note 92, at 318.

127. William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 444 (1997).

128. *See infra* section II.B.4.

1. Origins of the Exclusionary Rule

In *Weeks v. United States*,[129] the United States Supreme Court first established the exclusionary rule to remedy constitutional violations committed by agents of the federal government.[130] The government convicted the defendant, Weeks, of illegal use of the U.S. postal system for gambling purposes.[131] At trial, the prosecution used evidence—letters and envelopes—seized by U.S. Marshals who had searched Weeks' house without a warrant.[132] In a unanimous decision, the Court reasoned that if the seized letters could be used as evidence, "the protection of the [Fourth] Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."[133]

Nearly fifty years later, *Mapp v. Ohio*[134] expanded the exclusionary rule's reach to state officials by holding that evidence obtained through an unreasonable search and seizure in violation of the Fourth Amendment is inadmissible in state criminal proceedings.[135] The *Mapp* Court reversed the defendant's conviction under Ohio state law for possession of obscene materials that were seized by state officials without a valid warrant.[136] The Court emphasized the contradictions of the law as it stood: a federal prosecutor could not admit illegally obtained evidence, but "a State's attorney across the street [could], although he supposedly [was] operating under the enforceable prohibitions of the same Amendment."[137] This critique of the "silver platter" gamesmanship of gaps in the exclusionary remedy motivated the Court's expansion of the remedy's scope.[138] Several explanations were given for the rule, including to deter future unreasonable searches and seizures,[139] to preserve judicial integrity,[140] and to sustain the public's belief that the government will not profit from

129. 232 U.S. 383 (1914).

130. *Mapp*, 367 U.S. at 648.

131. *Weeks*, 232 U.S. at 386.

132. *Id.*

133. *Id.* at 393.

134. 367 U.S. 643 (1961).

135. *Id.* at 655.

136. *Id.* at 645.

137. *Id.* at 657.

138. *See* Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1448–49, 1450 n.238 (2011) (discussing gamesmanship of the "silver platter" doctrine playing on the remedial gap between federal and state law enforcement officers).

139. *Mapp*, 367 U.S. at 656.

140. *Id.* at 659.

lawless behavior.[141] The deterrence rationale has come to dominate.[142] In theory, if illegally obtained evidence cannot be used to convict, then police are disincentivized to violate a suspect's rights.[143]

2. Limiting the Exclusionary Rule's Scope

Since *Mapp v. Ohio*, the United States Supreme Court has limited the scope of the exclusionary rule in what has been called "a sustained 'legal assault' against the doctrine."[144] In *Wong Sun v. United States*,[145] the Court extended the exclusionary rule to evidence that was the indirect product or "fruit" of unlawful police conduct, but emphasized that illegally obtained evidence need not always be suppressed.[146] *Wong Sun* originated the attenuation doctrine—illegally obtained evidence is admissible if the connection between the illegal police conduct and the evidence "become[s] so attenuated as to dissipate the taint" of illegality.[147]

The Court returned to the idea that illegally obtained evidence may still be admissible in *United States v. Calandra*,[148] where it rejected a blanket exclusionary rule.[149] The Court noted that the rule had "never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons."[150] Instead, the Court reasoned that the determination should be subjected to balancing and applied "where its remedial objectives are thought most efficaciously served."[151] Federal agents searched Calandra's place of business pursuant to a warrant that lacked probable cause and seized evidence of loansharking.[152] A grand jury subpoenaed Calandra based on the evidence, and he pleaded the Fifth Amendment and refused to testify.[153]

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141. *See id.* ("Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." (omission in original) (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting))).

142. *See infra* section II.B.2.

143. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, 2 CRIM. PROC. *Purposes of the Exclusionary Rule* § 3.1(b), Westlaw (4th ed. 2022).

144. Nadia Banteka, *Police Ignorance and (Un)Reasonable Fourth Amendment Exclusion*, 75 VAND. L. REV. 365, 376 (2022).

145. 371 U.S. 471 (1963).

146. *Id.* at 487–88.

147. *Id.* at 491 (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)).

148. 414 U.S. 338 (1974).

149. *Id.* at 348.

150. *Id.*

151. *Id.*

152. *Id.* at 340–41.

153. *Id.* at 341.

The *Calandra* Court held that grand juries may use illegally obtained evidence in questioning witnesses.[154] In its reasoning, the Court explained that applying the exclusionary rule to grand jury proceedings would not serve its original deterrence function and would "seriously impede" grand juries' investigative powers.[155] However, in a dissent, Justice Brennan stressed that two other objectives were more important: "enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[156] Despite Justice Brennan's competing conceptions of the exclusionary rule, a reliance on the deterrence rationale continued in subsequent exclusionary rule jurisprudence.

3. The "Good-Faith Exception" and Its Progeny

In *United States v. Leon*,[157] the United States Supreme Court created a good-faith exception to the exclusionary rule.[158] After receiving a tip from a confidential informant, officers of the Burbank Police Department initiated a drug-trafficking investigation and surveillance of respondent Leon.[159] The officers obtained a facially valid warrant to search Leon based on an affidavit containing a summary of their observations.[160] Searches made pursuant to that warrant produced drugs and other evidence.[161] The government indicted Leon on federal drug charges, but Leon moved to suppress the evidence and challenged the affidavit as insufficient to establish probable cause for a warrant.[162] The Court accepted the lower court's finding that the affidavit was insufficient, but held the exclusionary rule inapplicable and introduced a good-faith exception.[163] Under this good faith exception, evidence obtained in reasonable, good-faith reliance on a facially valid search warrant is not subject to the Fourth Amendment's exclusionary rule, even if the warrant

154. *Id.* at 354.
155. *Id.* at 348–49, 354.
156. *Id.* at 357 (Brennan, J., dissenting).
157. 468 U.S. 897 (1984).
158. *Id.* at 922–24.
159. *Id.* at 901.
160. *Id.* at 902.
161. *Id.*
162. *Id.* at 903.
163. *Id.* at 913–22.

is later deemed defective.[164] Invoking the deterrence rationale for the exclusionary rule, the Court concluded that if an officer mistakenly relied on a warrant they believed to be valid, exclusion of evidence would not serve any deterrent function for other police officers' reliance on similar warrants.[165] In other words, since *Leon*, the government has been able to argue that even if a police officer violated a defendant's constitutional rights, the defendant has no remedy to suppress the illegally obtained evidence because the officer reasonably believed that their search or seizure was legal.[166] The *Leon* Court identified four circumstances in which officers would not be deemed to have acted in objectively reasonable good faith,[167] but provided little guidance for judicial interpretation. Since *Leon*, the good-faith exception has ballooned into something much more expansive than its initial formulation.

The United States Supreme Court continued to limit the scope of the exclusionary rule in two cases decided in 1984: *Nix v. Williams*[168] and *Segura v. United States*.[169] The inevitable discovery doctrine created in *Nix* allows for the admission of evidence that inevitably would have been discovered by law enforcement through legal means.[170] The *Segura* Court held evidence would not be suppressed if law enforcement had an independent source of information justifying a valid search and seizure of evidence.[171] Post-*Segura*, the United States Supreme Court eroded the exclusionary rule even further with *Illinois v. Krull*[172] and *Arizona v. Evans*.[173] The *Krull* Court expanded *Leon*'s good-faith exception and held that the exclusionary rule does not apply to evidence obtained in a search carried out pursuant to a statute subsequently found to be

164. *Id.*

165. *Id.* at 919 ("Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." (quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974))).

166. Banteka, *supra* note 144, at 367–68.

167. *Leon*, 468 U.S. at 923 (describing four exceptions: (1) if the affidavit was based on knowingly false information or information given in reckless disregard of the truth; (2) where the magistrate judge wholly abandons the judicial role so that no reasonably well-trained officer would rely on the warrant; (3) where the affidavit is so lacking in probable cause as to render the belief that there is probable cause entirely unreasonable; and (4) where the warrant is so facially deficient, e.g., failing to particularize the place to be searched or the things to be seized, that executing officers cannot reasonably rely on it).

168. 467 U.S. 431 (1984).

169. 468 U.S. 796 (1984).

170. *Nix*, 467 U.S. at 444.

171. *Segura*, 468 U.S. at 805.

172. 480 U.S. 340 (1987).

173. 514 U.S. 1 (1995).

unconstitutional.[174] Like its reasoning in prior exclusionary rule cases, the Court claimed that suppression of evidence for this type of police conduct would serve no deterrent function.[175] In *Evans*, officers made a warrantless search after relying on a computer record that inaccurately showed an outstanding warrant; the error was due to a court clerk's failure to update the database to reflect that the warrant had been quashed.[176] Applying the good-faith exception reasoning from *Leon*, the *Evans* Court held the exclusionary rule does not apply to evidence obtained in a search carried out as a result of a court employee's clerical mistake.[177] Once again, deterrence, or the lack thereof, justified the holding. The Court concluded that there was no basis to believe that the threat of exclusion would alter the behavior of court employees, who are neither involved in the "competitive enterprise of ferreting out crime," nor police officers whose conduct the exclusionary rule was intended to deter.[178]

Since 2009, *Herring v. United States*,[179] *Hudson v. Michigan*,[180] *Davis v. United States*,[181] and *Utah v. Strieff*[182] have carved out more exceptions to the exclusionary rule, leading one scholar to comment that "[the] Court . . . is now willing to take much larger bites out of the rule, and perhaps even swallow it whole."[183] In these cases, the Court continued to base its reasoning on the deterrence rationale.[184] Yet, despite the steady march of decisions based on deterrence, the Court still wrestled with competing understandings of the exclusionary rule. Justice Ruth Bader

174. *Krull*, 480 U.S. at 349–50.

175. *Id.* at 349.

176. *Evans*, 514 U.S. at 4–5.

177. *Id.* at 15–16.

178. *Id.* at 15.

179. 555 U.S. 135 (2009) (holding that a defendant's Fourth Amendment rights are not violated when police mistakes that lead to unlawful searches are merely the result of isolated negligence and not systematic error or reckless disregard of constitutional requirements).

180. 547 U.S. 586 (2006) (holding that evidence need not be excluded when police violate the "knock-and-announce" rule).

181. 564 U.S. 229 (2011) (holding that a search conducted in objectively reasonable reliance upon binding appellate precedent that has since been overruled is not subject to the exclusionary rule).

182. 579 U.S. 232 (2016) (holding that the attenuation exception to the exclusionary rule admits evidence seized in violation of the Fourth Amendment if lack of flagrant impropriety, lack of temporal proximity, or an intervening circumstance attenuates the chain between police misconduct and the seizure).

183. Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 341 (2013) [hereinafter Slobogin, *Exclusionary*].

184. *See* Andrew Guthrie Ferguson, *Constitutional Culpability: Questioning the New Exclusionary Rules*, 66 FLA. L. REV. 623, 629 (2014); Comment, *Fourth Amendment—Exclusionary Rule—Deterrence Costs and Benefits*—Utah v. Strieff, 130 HARV. L. REV. 337, 343 (2016).

Ginsburg's dissent in *Herring* exemplifies an alternative view.[185] Justice Ginsburg quotes Justice Stevens's call for a "more majestic conception" of the Fourth Amendment that goes beyond deterrence.[186] Though Justice Ginsburg acknowledges that deterring misconduct is a main objective, she cites Justice Brennan's *Calandra* dissent to remind the Court of the exclusionary rule's other important purpose: preserving judicial integrity.[187] Under this conception, excluding evidence avoids tainting the judiciary with illegal behavior and thus legitimizing the conduct that produced it.[188]

4. Critiques of the Exclusionary Rule

As a result of the consistent narrowing of the exclusionary rule since *Calandra*, the United States Supreme Court now interprets the exclusionary rule "not as an individual remedy stemming directly from Fourth Amendment protections but as a prophylactic remedy created to deter future Fourth Amendment violations."[189] Yet critics question whether the exclusionary rule actually deters future police misconduct.[190] At the most basic level, the exclusionary rule only matters if "incriminating evidence is found and . . . the government wishes to charge the defendant with a crime that the evidence tends to prove."[191] If officers "know beforehand that one or both these conditions will be absent, they have no reason to fear application of the exclusionary rule."[192] There are many other reasons besides eventual prosecution that police search and seize: to dispose of drugs; to harass, inconvenience, or punish suspects; to intimidate; or for other reasons not having to do with formal criminal proceedings.[193] The exclusionary rule does not deter these searches or seizures, and they may be the kind most in need of deterring.[194]

185. *See* Herring v. United States, 555 U.S. 135, 148 (2009) (Ginsburg, J., dissenting).

186. *Id.* at 151.

187. *Id.* at 152.

188. *Id.*

189. Banteka, *supra* note 144, at 377.

190. *See* Slobogin, *Exclusionary*, *supra* note 183; Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 365 (1999); Stuntz, *supra* note 127; George C. Thomas III & Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad-Faith "Exception" to Exclusionary Rule Limitations*, 45 HASTINGS L.J. 21, 22 (1993).

191. ALLEN ET AL., *supra* note 92, at 329.

192. *Id.*

193. Rachel A. Harmon, *Legal Remedies for Police Misconduct*, *in* 2 REFORMING CRIMINAL JUSTICE: POLICING 27, 31 (Erik Luna ed., 2017).

194. *Id.* ("The exclusionary rule also does not deter unconstitutional policing that is unlikely to produce evidence—such as the use of excessive force or police activity designed to harass or to punish

Another major criticism of the exclusionary rule is that it simply lets criminals walk.[195] As Justice Benjamin Cardozo famously commented, "[t]he criminal is to go free because the constable has blundered."[196] Furthermore, the exclusionary rule has limited benefits in deterring the use of excessive force.[197] Scholars have pointed out that the law of criminal procedure focuses heavily on what sorts of things the police can see and seize at the expense of constraining "the ways and settings in which police officers use force on suspects."[198] This is a problem because "police violence is a more serious problem than police snooping."[199]

Despite these criticisms and the hollowing out of the doctrine, the exclusionary rule's defenders claim that one of its great virtues is that it does not deter too much, in contrast to a harsher regime that would overdeter.[200] The theory posits that if an officer faces the possibility of serious legal consequences like damages, criminal prosecution, or fines whenever they make a bad arrest, they "will make fewer bad arrests, but also many fewer good ones."[201] As a result, society pays the cost with weakened law enforcement capabilities.[202] Having local governments bear the costs for their employees' misconduct creates a similar issue: municipalities would be incentivized to reduce their liability by skimping on policing.[203] Instead, the theory goes, the exclusionary rule is the perfect "Goldilocks" remedy—not too harsh and not too lenient:

> Suppression is restitutionary: the officer loses the very thing he gained from the illegal search, and no more. That largely takes care of overdeterrence. And because the rule does not seriously overdeter, courts need not reserve it for the worst constitutional

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rather than to promote criminal adjudication."); *see* Cooper, *supra* note 25, at 1490 (discussing "new policing" based on "broken windows theory" and "zero tolerance methods"—"the pervasive stopping and frisking of young brown and black men in certain neighborhoods for weapons and the use of pretextual de minimis offenses to target the same cohort for searches for drugs").

195. Harmon, *supra* note 193, at 30–31.

196. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

197. Circuits are split as to whether categorical exclusion can ever be a remedy in excessive force claims in the execution of a lawful search or arrest warrant. *Compare* United States v. Collins, 714 F.3d 540, 541 (7th Cir. 2013) (holding that officers' alleged use of excessive force in attempting to arrest defendant did not require suppression of drugs and money), *with* United States v. Ankeny, 502 F.3d 829, 836–37 (9th Cir. 2007) (stating in dicta that the use of flash bangs and resulting property damage weigh in favor of a conclusion of unreasonableness though deciding the case on other grounds).

198. Stuntz, *supra* note 127, at 443.

199. *Id.*

200. *Id.* at 445–46.

201. *Id.* at 445.

202. *Id.*

203. *Id.* at 446.

> violations. Instead, the exclusionary rule can be applied across the board to the mass of illegal searches and seizures, without fear that doing so will lead officers to stop searching altogether. This gives courts the chance to define just where the constitutional line falls, to develop a working body of law in this area that tells police what they should and should not do.[204]

Moreover, as discussed in the next Part, some remedy is better than no remedy at all when it comes to the remedial gap in regulating private police.

III. REGULATING PRIVATE POLICE

Private police are subject to minimal regulation, and what local regulation exists often comes in the form of state statutes that prescribe licensing, registration, and training requirements.[205] This Part summarizes the existing regulatory regime, focuses on private police regulation in Washington, and describes states' efforts to regulate private actors through expansive state exclusionary rules that go beyond what the Fourth Amendment requires.

A. Remedies for Private Police Misconduct

In addition to minimal licensing registration and training requirements, statutes may require private police to have liability insurance or bonding, undergo background checks, or complete firearms training.[206] They may also limit security personnel's "display of visual signs of authority, like badges or insignia."[207] Some states have no regulation whatsoever.[208] In the absence of robust statutory schemes, legal gap-fillers, like contracts, state and local regulations, and tort and criminal law doctrines of assault, trespass, and false imprisonment, govern private police conduct.[209] The legal regime is "deconstitutionalized, defederalized, tort based, and heavily reliant both on legislatures and on juries."[210]

The state action doctrine renders the standard remedies for public police misconduct unavailable for private police misconduct.[211]

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204. *Id.*

205. *See* Rushin, *supra* note 87, at 187–88.

206. *Id.* at 186.

207. *Id.*

208. Joh, *Paradox*, *supra* note 35, at 50.

209. Sklansky, *supra* note 23, at 1166–67.

210. *Id.* at 1168.

211. *See supra* section II.A.

Individuals whose rights have been violated by private police cannot sue for damages under the same provisions that allow suit against government employees. The most widely used civil rights enforcement statute, 42 U.S.C. § 1983, only provides a plaintiff a cause of action in federal or state court when their federal constitutional rights have been violated by state officials acting under the color of state law.[212] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[213] decided in 1971, created a similar cause of action for violations by federal officials.[214] Suits against private police do not fall under either regime.

Apart from money damages, § 1983 also permits private plaintiffs to sue state actors for equitable relief, either in the form of declaratory relief or injunctions.[215] Rather than deter future misconduct indirectly like damages or the exclusionary rule, these equitable remedies address the structural conditions that led to the constitutional violations in the first place.[216] In practice, private suits for equitable relief have not had a significant impact on reforming police departments' policies and conduct because of constitutional standing limitations.[217] Regardless, claims against private police for equitable relief are barred because they are not state actors.

Besides being unable to sue individuals under § 1983, plaintiffs with claims against private police are also not able to sue municipalities by showing their injury arose from "execution of a government's policy or custom," like plaintiffs with public police claims.[218] By definition, private police are independent from any municipality that could be held liable and, therefore, the plaintiff's injury will not arise out of the municipality's policy or custom. To incentivize the private enforcement of federal civil rights claims against public officials, attorney's fees are awarded to the prevailing party.[219] Once again, this does not apply to suits against private police.

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212. 42 U.S.C. § 1983.

213. 403 U.S. 388 (1971).

214. *Id.* at 389.

215. Harmon, *supra* note 193, at 35–36.

216. *Id.* at 36.

217. *See id.*; City of Los Angeles v. Lyons, 461 U.S. 95, 110–12 (1983) (holding that Lyons did not have standing to seek injunctive relief preventing the Los Angeles Police Department from using certain chokeholds because Lyons had not shown that they would be subject to a chokehold in the future).

218. *See* Monell v. Dep't of Soc. Servs. of N.Y.C., 436 U.S. 658, 694 (1978).

219. 42 U.S.C. § 1988(b).

"Structural reform litigation"[220] is another check on police power limited to suits against public actors.[221] 42 U.S.C. § 14141 (re-codified at 34 U.S.C. § 12601) prohibits governmental authorities or those acting on their behalf from "engag[ing] in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[222] When a state or municipal police force engages in systematic deprivation of rights, the U.S. Department of Justice can bring suit under this federal statute.[223] In practice, § 14141 investigations are often resolved without litigation, with the U.S. Department of Justice negotiating a consent decree or an agreement mandating reform in the police department.[224] The federal government cannot enter similar agreements with private police groups under § 14141.

Criminal prosecution of public police officers under state or federal law is also an available remedy; however, it is rarely pursued and often unsuccessful.[225] Under 18 U.S.C. § 242, it is a federal crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the U.S. Constitution or laws of the United States.[226] Federal prosecutors use this statute when bringing charges, and though often deployed for excessive force violations of the Fourth Amendment, it can be used to prosecute other constitutional violations like illegal searches and seizures.[227] Private police cannot be

220. "Structural reform litigation" refers to "the federal government [using] equitable relief to force problematic police agencies to adopt significant structural, procedural, and policy reforms aimed at curbing misconduct." Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1347 (2015).

221. *See* Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 106–09 (2012).

222. 34 U.S.C. § 12601 (formerly codified at 42 U.S.C. § 14141 before editorial reclassification and still commonly referred to as such).

223. *See generally* Eugene Kim, *Vindicating Civil Rights Under 42 U.S.C. § 14141: Guidance from Procedures in Complex Litigation*, 29 HASTINGS CONST. L.Q. 767 (2002).

224. *Id.* at 773 ("The methodology of the DOJ has been to investigate and try to negotiate consent decrees, rather than to pursue litigation.").

225. Harmon, *supra* note 193, at 40–43.

226. 18 U.S.C. § 242 ("Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both."). A term of ten years of imprisonment may be imposed when bodily injury is inflicted or with the "use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." *Id.* A term of life imprisonment or the death sentence may be imposed "if death results" or the constitutional violation involved "kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill." *Id.*

227. Harmon, *supra* note 193, at 40.

prosecuted under this statute because they do not act under the color of law as state actors.[228] Even when charges are brought pursuant to § 242, prosecutors face the difficult task of proving mens rea beyond a reasonable doubt—that the officer willfully intended to do what the law specifically forbids.[229] Such a high hurdle helps explain why fewer than 100 federal prosecutions are brought against public law enforcement officers per year.[230] Criminal prosecutions are similarly uncommon at the state level for both public and private police misconduct.[231]

Despite the general lack of remedies compared to public police, private police are not subject to public-sector protections like Law Enforcement Officer Bill of Rights statutes,[232] union contracts, civil service boards, and arbitrators.[233] They are also not shielded by qualified immunity like public police officers.[234] In this narrow sense, one can argue that it may be easier to hold private actors accountable.

B. Private Police Regulation in Washington

Washington law regulates private investigators and private security guards through licensing requirements and a few basic prohibitions in Chapters 18.165 and 18.170 of the Revised Code of Washington.[235] These two Chapters are the only statutory regulations of private police that exist in the state. The code defines a "private investigator" as "a person who is licensed under [Chapter 18.165] and is employed by a private investigator agency for the purpose of investigation, escort or body guard services, or property loss prevention activities."[236] "Private security guard" refers to

228. *See infra* section II.A.

229. Harmon, *supra* note 193, at 40–41.

230. *Id.* at 41.

231. Jordyn Manly, *Policing the Police Under 42 U.S.C. § 1983: Rethinking* Monell *to Impose Municipal Liability on the Basis of* Respondeat Superior, 107 CORNELL L. REV. 567, 580 (2022); *see also infra* section III.B (discussingWashington's private police regulation).

232. Law Enforcement Officer Bill of Rights are statutes that limit investigation and resolution of police misconduct allegations by often delaying officer interrogation, raising the standard for complaints, and/or preventing police departments from disciplining or firing problematic officers. *See* Eli Hager, *Blue Shield*, MARSHALL PROJECT (Apr. 27, 2015, 12:06 PM), https://www.themarshallproject.org/2015/04/27/blue-shield#.Etqk3UTYF [https://perma.cc/73U5-VYYT]; *see also Thorough Reformation of Law Enforcement Officers' Bill of Rights*, NAACP (2021), https://naacp.org/resources/thorough-reformation-law-enforcement-officers-bill-rights [https://perma.cc/TR25-8Q2N] (resolution calling for "legislative bodies to eliminate Law Enforcement Officers' Bill of Rights statutes").

233. *Id.*

234. Heydari, *supra* note 77, at 738–40.

235. *See* WASH. REV. CODE § 18.165 (1995); WASH. REV. CODE § 18.170 (2007).

236. WASH. REV. CODE § 18.165.010(11) (1995).

> an individual who is licensed under [Chapter 18.170] and principally employed as or typically referred to as one of the following: (a) Security officer or guard; (b) Patrol or merchant patrol service officer or guard; (c) Armed escort or bodyguard; (d) Armored vehicle guard; (e) Burglar alarm response runner; or (f) Crowd control officer or guard.[237]

For both categories, the code exempts state actors working in their official capacities.[238]

Private investigator and private security guard licensing requirements involve little more than a background check for both unarmed and armed individuals.[239] Training requirements are similarly sparse: private investigators must undergo a minimum of four hours of training and pass an exam,[240] while private security guards must complete a minimum of sixteen hours of training and also pass an exam.[241] Upon licensure, private security guards are required to undergo only four hours of refresher training each year.[242] Military training or experience generally exempts potential licensees from all training requirements,[243] and three years of experience in either field—investigative or private security work—reduces testing requirements.[244]

Washington law provides minimal procedure for complaints against private investigators[245] and outlines mild penalties for unprofessional or unlawful conduct.[246] However, performing the functions and duties of either profession without a license is a gross misdemeanor.[247] State law also bars anyone, including private investigators or private security guards, from using "any vehicle or equipment displaying the word 'police' or 'law enforcement officer' or having any sign, shield, marking,

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237. WASH. REV. CODE § 18.170.010(19)(a)–(f) (2007).

238. *See* WASH. REV. CODE § 18.165.020(2) (2015); WASH. REV. CODE § 18.170.020(2) (2022).

239. For general licensing requirements, see WASH. REV. CODE § 18.165.030 (2012); WASH. REV. CODE § 18.170.030 (2012). For armed licensing requirements, see WASH. REV. CODE §§ 18.165.040–.060 (1995); WASH. REV. CODE § 18.170.040 (1991). *See also* WASH. ADMIN. CODE § 308-17 (2022) (chapter of regulations for private investigative agencies and private investigators); *id.* § 308-18 (chapter of regulations for private security guard companies and private security guards).

240. WASH. ADMIN. CODE § 308-17-300(1) (1997); WASH. ADMIN. CODE § 308-17-310(1) (2003).

241. WASH. REV. CODE § 18.170.105(2) (2007) (eight hours of pre-assignment training); *id.* § .105(3) (eight hours of post-assessment training); WASH. ADMIN. CODE §§ 308-18-300, 305 (2007); WASH. ADMIN. CODE § 308-18-310 (1991).

242. WASH. REV. CODE § 18.170.105(4) (2021).

243. WASH. REV. CODE § 18.165.310 (2011); WASH. REV. CODE § 18.170.310 (2011).

244. WASH. REV. CODE § 18.165.050(1)(b) (1995); WASH. REV. CODE § 18.170.060(1)(a) (1995).

245. *See* WASH. REV. CODE § 18.165.180 (1995).

246. *See* WASH. REV. CODE § 18.165.220 (1995); WASH. REV. CODE § 18.170.230 (1995).

247. WASH. REV. CODE § 18.165.150(1) (1995); WASH. REV. CODE § 18.170.160(1) (1995).

accessory, or insignia that indicates that the equipment or vehicle belongs to a public law enforcement agency."[248] Private security guards are forbidden more broadly from using "any name that includes the word 'police' or 'law enforcement' or that portrays the individual or business as a public law enforcement agency."[249] In the same vein, criminal impersonation in the second degree of a law enforcement officer is a gross misdemeanor.[250] Thus, the limitations on private police authority in Washington are less to circumscribe their actual job duties, but more to visually delineate them from public police.

C. Regulation By Exclusionary Rule

Because the U.S. Constitution does not control private actors' conduct in illegal searches and seizures, some states have relied on state constitutional and statutory grounds to do so. With no or reduced state action requirements, state search and seizure protections can be applied to suppress evidence obtained by private actors under circumstances where the Fourth Amendment would not be applicable.[251] Even though many states have more expansive protections, the overwhelming majority of states still adhere to the state action doctrine[252] and only cover public actors.[253] Texas and Rhode Island are two outliers with state exclusionary rules that have regulated searches by private actors. This section compares the ways Washington, Rhode Island, and Texas have created variations on the federal exclusionary rule: Washington's exclusionary rule tracks the federal public/private distinction but grounds its rationale for suppression in individual privacy interests; Rhode Island similarly tracks the federal public/private distinction but with a caveat; and Texas rejects the federal public/private distinction entirely.

1. Washington's Exclusionary Rule, Though Expansive, Only Covers Public Actors

Washington's exclusionary rule does not regulate private police activities. The state's analog to the Fourth Amendment is article I,

248. WASH. REV. CODE § 18.165.150(6) (1995); WASH. REV. CODE § 18.170.160(6) (1995).

249. WASH. REV. CODE § 18.170.160(7) (1995).

250. WASH. REV. CODE § 9A.60.045(2) (2004).

251. Williams, *supra* note 28, at 714.

252. *See supra* section II.A.

253. *See* Adam M. Gershowitz, *Is Texas Tough on Crime but Soft on Criminal Procedure?*, 49 AM. CRIM. L. REV. 31, 46 (2012) ("Texas stands alone in embracing a private actor exclusionary rule. In addition to the federal system, every other state in the nation admits evidence that was unlawfully seized by private actors.").

section 7 of the Washington Constitution: "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[254] A violation of either this provision or the Fourth Amendment triggers the exclusionary rule in state courts absent an exception.[255] Unlike the United States Supreme Court, the Washington State Supreme Court has expressed that the most important rationale for the state's exclusionary rule is "to protect privacy interests of individuals against unreasonable governmental intrusions," while deterrence and preserving judicial integrity are secondary objectives.[256] Because of how broadly Washington courts construe privacy interests, Washington's exclusionary rule is more expansive than what the Fourth Amendment requires.[257] For example, unlike the United States Supreme Court, the Washington State Supreme Court has declined to adopt the good-faith exception under the state constitution.[258] Even if an officer acts in good faith reliance on an invalid warrant, the evidence must be suppressed.[259] The Washington State Supreme Court has also declined to adopt the private search doctrine, holding that it runs contrary to the state constitution.[260] Despite these wider protections, article I, section 7, like the Fourth Amendment, only

254. WASH. CONST. art. I, § 7.

255. Charles W. Johnson & Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2019 Update*, 42 SEATTLE U. L. REV. 1277, 1453–55 (2019).

256. State v. Bonds, 98 Wash. 2d 1, 12, 653 P.2d 1024, 1031 (1982); *see also* State v. White, 97 Wash. 2d 92, 110, 640 P.2d 1061, 1071 (1982) (noting that article I, section 7 of the Washington Constitution emphasizes "protecting personal rights rather than . . . curbing governmental actions"). For more examples of Washington centering privacy in its exclusionary rule jurisprudence, see State v. Afana, 169 Wash. 2d 169, 180, 233 P.3d 879, 884 (2010); State v. Winterstein, 167 Wash. 2d 620, 631–32, 220 P.3d 1226, 1230–31 (2009); State v. Duncan, 146 Wash. 2d 166, 176–77, 43 P.3d 513, 518–19 (2002); State v. Rife, 133 Wash. 2d 140, 148, 943 P.2d 266, 269–70 (1997).

257. *See, e.g.*, State v. Eisfeldt, 163 Wash. 2d 628, 637, 185 P.3d 580, 585 (2008) ("Unlike the Fourth Amendment and its reasonability determination, article I, section 7 protections are not 'confined to the subjective privacy expectations of modern citizens.' . . . We have repeatedly held the privacy protected by article I, section 7 survived where the reasonable expectation of privacy under the Fourth Amendment was destroyed." (quoting State v. Myrick, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984)).

258. State v. Huft, 106 Wash. 2d 206, 212, 720 P.2d 838, 841 (1986) (declining to apply the good-faith exception pursuant to *United States v. Leon*, 468 U.S. 897 (1984)); *see also* State v. Crawley, 61 Wash. App. 29, 35, 808 P.2d 773, 776 (1991) ("The Washington Supreme Court has not adopted the federal rule announced in *Leon*.").

259. *See Crawley*, 61 Wash. App. at 33–35, 808 P.2d at 776.

260. *Eisfeldt*, 163 Wash. 2d at 638, 185 P.3d at 585–86 ("The individual's privacy interest protected by article I, section 7 survives the exposure that occurs when it is intruded upon by a private actor. . . . We therefore reject the private search doctrine and adopt a bright line rule holding it inapplicable under article I, section 7 of the Washington Constitution.").

applies to searches conducted by government actors meaning that private police are not covered.[261]

2. Rhode Island's Exclusionary Rule Has Regulated Private Actors

The Rhode Island Constitution contains its search and seizure provision in article I, section 6,[262] and the Rhode Island General Assembly has codified an exclusionary rule as a statutory corollary.[263] Article I, section 6, like Washington's constitutional provision, has been interpreted more broadly than the Fourth Amendment. A much publicized example occurred during the criminal prosecution of Claus von Bülow, a Danish-American lawyer and socialite.[264] In *State v. von Bulow*,[265] the Rhode Island Supreme Court imposed higher standards on searches and seizures in the context of private actors by holding that evidence seized by a private investigator should have been suppressed.[266] Rhode Island prosecuted von Bülow for attempting to murder his wife by injecting her with doses of insulin.[267] Members of the wife's family hired a private investigator to search von Bülow's belongings, and the investigator found a black bag allegedly containing prescription drugs, vials of liquid, and syringes.[268] The investigator had the contents of the bag tested by private physicians.[269] Later, Mrs. von Bülow's son turned over the contents to the Rhode Island State Police, who ran their own tests.[270] At trial, von Bülow moved to suppress the results of the tests performed by state officials because they had never obtained a search warrant.[271]

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261. *See* State v. Clark, 48 Wash. App. 850, 855, 743 P.2d 822, 826 (1987) ("Article 1, section 7 of the Washington Constitution affords no more protection from private searches than does the Fourth Amendment.").

262. R.I. CONST. art. I, § 6 ("The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched and the persons or things to be seized.").

263. R.I. GEN. LAWS § 9-19-25 (1956) ("In the trial of any action in any court of this state, no evidence shall be admissible where the evidence shall have been procured by, through, or in consequence of any illegal search and seizure as prohibited in § 6 of article 1 of the constitution of the state of Rhode Island.").

264. Enid Nemy, *Claus von Bülow, Society Figure in High-Profile Case, Dies at 92*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/obituaries/claus-von-bulow-dead.html (last visited Sept. 19, 2023).

265. 475 A.2d 995 (R.I. 1984).

266. *Id.* at 1019–20.

267. *Id.* at 999.

268. *Id.* at 1001–02.

269. *Id.* at 1002.

270. *Id.* at 1002–03.

271. *Id.* at 1003.

The Rhode Island Supreme Court vacated the conviction and rested its decision on two grounds. First, "that the state's subsequent chemical analysis of certain contents of the black bag was a significant expansion of the private search and that there were no exceptions to the warrant requirement" under the Fourth Amendment.[272] Essentially, the Court held the State went beyond what the private search doctrine allowed by exceeding the scope of the initial search.[273] Second, the Court held that state constitutional grounds were an "alternative, independent foundation" upon which to rest its holding.[274] Citing the privacy interests of Rhode Island citizens under article I, section 6 of the state constitution, the Court found the trial court erred in admitting the evidence obtained by the private investigator.[275] Post-*von Bulow*, the Rhode Island Supreme Court has relied on article I, section 6 to suppress evidence the Fourth Amendment would deem admissible,[276] but it has not ruled in favor of suppressing evidence seized by private actors again.[277]

3. Texas's Statutory Exclusionary Rule Encompasses All Actors

Texas has a statutory exclusionary rule that exceeds Fourth Amendment protections by excluding evidence illegally procured by private citizens.[278] Article 38.23 of the Texas Code of Criminal Procedure specifies that "[n]o evidence obtained by an officer *or other person* in violation of [federal or state law], . . . shall be admitted in evidence against the accused on the trial of any criminal case."[279] This rule's broad scope means that if a private citizen illegally violates any law while obtaining evidence, that evidence will be inadmissible if handed over to law enforcement. The Texas Court of Criminal Appeals, the state's court of last resort for criminal cases,[280] endorsed a plain language reading of the statute and held "art. 38.23 supports the conclusion that the

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272. *Id.* at 1018. For a discussion of the private search doctrine, see generally *supra* section II.A.

273. See *supra* section II.A for a discussion of the private search doctrine and its caveats.

274. *von Bulow*, 475 A.2d at 1019.

275. *Id.* at 1020.

276. *See, e.g.*, Pimental v. Dep't of Transp., 561 A.2d 1348, 1353 (R.I. 1989) (holding police roadblocks for drunk driving unconstitutional and requiring the exclusion of evidence obtained).

277. *See, e.g.*, State v. Barkmeyer, 949 A.2d 984, 996 (R.I. 2008) (refusing to exclude a privately obtained rope because it was seized by public authorities with consent).

278. *See* Gershowitz, *supra* note 253, at 32.

279. TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West 1987) (emphasis added).

280. TEX. CONST. art. V, § 5(a) ("The Court of Criminal Appeals shall have final appellate jurisdiction coextensive with the limits of the state, and its determinations shall be final, in all criminal cases of whatever grade, with such exceptions and under such regulations as may be provided in this Constitution or as prescribed by law.").

unlawful or unconstitutional actions of *all* people, governmental and private alike, fall under the purview of Texas' exclusionary rule."[281] The peculiar quirk of Texas's exclusionary rule arose from its history of vigilante justice and predates *Mapp v. Ohio*.[282]

Since its adoption in 1925, article 38.23 has aided Texan defendants in suppressing evidence seized by private citizens.[283] However, the Texas Court of Criminal Appeals has reined in the exclusionary rule's reach and weakened its scope by permitting evidence taken by private individuals under quasi-legal circumstances.[284] The bar for what constitutes "in violation" of the law is high when the private individual actively sought to aid law enforcement efforts.[285] As a result, the statutory exclusionary rule's plain text renders evidence turned over by a private actor inadmissible, but courts have construed suppression to only apply when the individual was not acting with the intent to aid law enforcement.[286]

Regarding private police, Texas courts have suggested that article 38.23 could regulate their conduct, but existing case law has not found them sufficiently in violation of the law to warrant suppression.[287] Again, this may be a matter of courts being wary to find private police conduct illegal when it produces advantageous evidence for a defendant's prosecution and the private police act with the intent to turn over the

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281. State v. Johnson, 939 S.W.2d 586, 587 (Tex. Crim. App. 1996) (emphasis in original).

282. *See* Gershowitz, *supra* note 253, at 47 ("When the Texas legislature drafted its exclusionary rule in 1925, legislators were concerned that these vigilante organizations might take matters into their own hands and undertake searches without police participation, and that private citizens would then hand the evidence to law enforcement on a 'silver platter.'" (quoting Miles v. State, 241 S.W.3d 28, 35 (Tex. Crim. App. 2007))).

283. *See, e.g.*, Flanary v. State, 117 S.W.2d 71, 71–72 (1938) (holding that agents of the Texas Liquor Control Board had no legal authority to execute a search and were statutorily private citizens, therefore, the evidence they seized should not have been admitted); *Johnson*, 939 S.W.2d at 587–88 (holding that evidence taken by the decedent's son and turned over to the police be suppressed); McCuller v. State, 999 S.W.2d 801, 804–05 (Tex. App. 1999) (holding that photographs taken of the defendant's home by a private attorney who was trespassing without warrant or consent must be suppressed).

284. *See, e.g.*, Jenschke v. State, 147 S.W.3d 398, 402 (Tex. Crim. App. 2004) ("[W]hen a person who is not an officer or an agent of an officer takes property that is evidence of crime, without the effective consent of the owner and with the intent to turn over the property to an officer, the conduct may be non-criminal even though the person has intent to deprive the owner."); Carlson v. State, 355 S.W.3d 78, 80–81 (Tex. App. 2011) ("Under some circumstances, . . . a trial court may admit evidence that a private person acquired by conduct that violated a criminal law when that person turns over such evidence to law enforcement.").

285. *See Jenschke*, 147 S.W.3d at 402; *Carlson*, 355 S.W.3d at 80–81.

286. *See Jenschke*, 147 S.W.3d at 402; *Carlson*, 355 S.W.3d at 80–81.

287. *See* Melendez v. State, 467 S.W.3d 586, 594 (Tex. App. 2015) (affirming the trial court's denial of a motion to suppress by holding that private security guards lawfully detained the defendant, rather than committed an illegal citizen's arrest); Jones v. State, 490 S.W.3d 592, 598 (Tex. App. 2016).

evidence to public law enforcement.[288] In addition to not distinguishing between public and private actors, Texas law does not permit the inevitable discovery exception[289] and has only adopted a very narrow good-faith exception.[290]

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Washington's, Rhode Island's, and Texas's exclusionary rules show how states build upon the constitutional floor of the Fourth Amendment to expand the scope of when evidence can be suppressed. Though not completely outside the bounds of the public/private distinction, these states have offered rationales other than simple deterrence for exclusion, such as judicial integrity and individual privacy. The alternative legal bases, offered in contrast to the federal exclusionary rule, can be used to expand private police regulation in Washington.

IV. WASHINGTON SHOULD ADOPT AN EXPANSIVE EXCLUSIONARY RULE

Because the exclusionary rule borne out of the U.S. Constitution's Fourth Amendment only limits state actors, Washington should adopt an expansive state exclusionary rule that regulates both public and private actors. As a result, Washington would fill the remedial gap left open by the limited coverage of the state action doctrine and allow plaintiffs a remedy for privacy violations that would otherwise be unavailable.[291] There is sufficient legal basis to rest this exclusionary rule on state constitutional or statutory grounds.[292] This Part explores how Washington could adopt this rule on either basis and addresses other proposals to reform private police regulation through the lens of the public/private distinction.

A. Washington Can Base an Expansive Exclusionary Rule on State Constitutional Grounds

As the highest source of state law, a state's constitution provides a stronger foundation on which to base an exclusionary rule than statutory

288. *See Jenschke*, 147 S.W.3d at 402; *Carlson*, 355 S.W.3d at 80–81.

289. *See* State v. Daugherty, 931 S.W.2d 268, 269–70 (Tex. Crim. App. 1996).

290. *See* Gordon v. State, 801 S.W.2d 899, 912–13 (Tex. Crim. App. 1990).

291. For a discussion of the remedial gap and the inadequacy of existing remedies, see *supra* section III.A.

292. *See infra* section IV.A (constitutional); section IV.B (statutory).

law.[293] The Washington State Supreme Court has explicitly stated that it "view[s] the purpose of the exclusionary rule from a slightly different perspective than does the United States Supreme Court" when interpreting the Washington Constitution.[294] This view considers the right to privacy paramount with no express limitations and believes that safeguarding personal rights should predominate over curbing future governmental actions.[295] The Washington State Supreme Court views the deterrence rationale as a secondary objective.[296] Though the Court also acknowledges preserving judicial integrity as a secondary objective, its view of search and seizure protections aligns with Justice Ginsburg's "more majestic" formulation that elevates judicial integrity to the fore.[297] An exclusionary rule that centers privacy rights is one that simultaneously preserves judicial integrity.

Justice Harlan, concurring in *Bivens*, wrote that "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment."[298] The same would apply for analogous state constitutional interests. The Washington judiciary could play a critical role in upholding aggrieved parties' rights—without effective remedies for article I, section 7 violations, the provision would be meaningless. The exclusionary rule serves as an essential way a court can directly vindicate a citizen's privacy interests.[299] Consequently, centering privacy rights and excluding evidence obtained through illegal private searches and seizures bolsters judicial integrity and legitimates state courts as institutions where wrongs can be remedied.

By refusing to suppress illegally obtained evidence, a court signals that it will partake in official illegality.[300] This does not square with the Washington State Supreme Court's own conception of its exclusionary rule jurisprudence.[301] Furthermore, the judiciary's willingness to partake in illegality by admitting evidence can be considered state action. The admission of illegally obtained evidence by private parties taints the court,

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293. *See* Freedom Found. v. Gregoire, 178 Wash. 2d 686, 695, 310 P.3d 1252, 1258 (2013) ("[T]he [Washington C]onstitution supersedes contrary statutory laws, even those enacted by initiative.").

294. State v. Bonds, 98 Wash. 2d 1, 12, 653 P.2d 1024, 1030 (1982).

295. *See supra* section III.C.1.

296. *Bonds*, 98 Wash. 2d at 12, 653 P.2d at 1031.

297. Herring v. United States, 555 U.S. 135, 151 (2009) (Ginsburg, J., dissenting).

298. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407 (1971) (Harlan, J., concurring).

299. *See supra* section II.B.

300. *See* Terry v. Ohio, 392 U.S. 1, 13 (1968) ("A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.").

301. *See supra* note 256 and accompanying text.

and that is sufficient taint to violate article I, section 7. *Shelley v. Kraemer*[302] and *Edmonson v. Leesville Concrete Co., Inc.*[303] present useful legal analyses for state action that could be applied here on state constitutional grounds. Both cases stand for the proposition that private action can rise to the level of state action when private parties make use of judicial procedures with "the overt, significant assistance of state officials."[304]

In *Shelley*, a Black family purchased a home in St. Louis that was subject to racially restrictive covenants.[305] Neighboring residents challenged the purchase and sought enforcement of the covenant.[306] The United States Supreme Court concluded that the restrictive covenants alone could not be regarded as a violation of the Shelley family's rights under the Equal Protection Clause of the Fourteenth Amendment.[307] However, *judicial enforcement* of the covenants would be considered state action and amount to a violation of the Shelley family's constitutional rights.[308]

In *Edmonson*, a Black plaintiff challenged the defendant's use of racially biased peremptory challenges[309] during voir dire as a violation of the excluded jurors' equal protection rights.[310] The United States Supreme Court relied on three factors to hold that a private party exercising peremptory challenges was considered a state actor.[311] First, the court noted that the preemptory challenge system could not exist without the overt and significant participation of the government and would "have no utility outside the jury system, a system which the government alone administers."[312] Second, the challenged action involved the performance of a traditional government function: "the objective of jury selection proceedings is to determine representation on a governmental body."[313]

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302. 334 U.S. 1 (1948).

303. 500 U.S. 614 (1991).

304. *Id.* at 622 (quoting Tulsa Pro. Collection Servs., Inc. v. Pope, 485 U.S. 478, 486 (1988)).

305. *Shelley*, 334 U.S. at 4–5.

306. *Id.* at 5–6.

307. *Id.* at 13.

308. *Id.* at 20.

309. A jury challenge is "[a] party's request that a judge disqualify a potential juror or an entire jury panel." *Challenge*, BLACK'S LAW DICTIONARY (11th ed. 2019). A peremptory challenge is "[o]ne of a party's limited number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex." *Id.*

310. Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 616–17 (1991).

311. *Id.* at 621–22.

312. *Id.* at 622.

313. *Id.* at 626.

Third, the injury was "made more severe because the government permit[ted] it to occur within the courthouse . . . where the law itself unfolds."[314] The *Edmonson* Court acknowledged that bias in jury selection "mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."[315]

Just as the United States Supreme Court construed judicial enforcement of a private contract state action in *Shelley*, the Washington State Supreme Court could construe judicial admission of privately obtained evidence as state action. The *Shelley* Court recognized that the State was not merely abstaining from action, "leaving private individuals free to impose such discriminations as they see fit," but instead making "available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights."[316] A state court admitting illegally obtained evidence from a private party similarly uses the procedural powers of the judiciary to violate a defendant's state constitutional right to privacy—a right that the state supreme court itself has said has "no express limitations."[317]

According to *Edmonson*'s reasoning, the admission or exclusion of evidence by private actors is a judicial process that could not exist without the overt and significant participation of the government. Without a government entity administering a trial, there would be no adjudication procedure from which evidence could be admitted or excluded. *Edmonson*'s second factor—the challenged action involves the performance of a traditional government function—can also apply. Though the investigatory powers of police are not limited to public actors, the adjudication of criminal cases (and thus the admission or exclusion of evidence) could be considered traditionally only the province of the government. Finally, analogous to the peremptory challenges in *Edmonson*, the admission or exclusion of evidence takes place in a courthouse where the law unfolds. This means that admitting illegally procured evidence similarly mars the integrity of the judicial system. These three factors all point to the conclusion that judicial admission of evidence seized illegally by private actors can be considered state action.

If the Washington State Supreme Court wanted to take a more restrained approach to create a state constitutional exclusionary rule that covers private actors, it could simply echo the Rhode Island Supreme Court's reasoning in *State v. von Bulow*. There, the court found the

314. *Id.* at 628.

315. *Id.*

316. Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

317. State v. Bonds, 98 Wash. 2d 1, 12, 653 P.2d 1024, 1031 (1982) (citing State v. White, 97 Wash. 2d 92, 110, 640 P.2d 1061, 1071 (1982)).

privately obtained evidence had to be suppressed for two separate reasons: it was both an impermissible expansion of the private search doctrine and considered a privacy violation under Rhode Island's expansive constitutional search and seizure provision.[318] The Washington State Supreme Court is halfway to the same conclusion. It has already refused to adopt the private search doctrine on state constitutional grounds.[319] If an apt case were to come before it, the Washington State Supreme Court should go one step further, like the *von Bulow* Court, and hold that admitting evidence from private searches is inconsistent with the state's article I, section 7 privacy protections.

B. Washington Can Base an Expansive Exclusionary Rule on State Statutory Grounds

In the alternative to a state constitutional basis, the Washington State Legislature could enact a statute similar to Texas's article 38.23 regulating all actors, regardless of their status as officers of the state. Such a provision could be drafted to prohibit Washington courts from admitting evidence seized illegally by anyone. Going further than the judicial gloss added to Texas's article 38.23, Washington could also statutorily prevent all illegally obtained evidence from being used in Washington courts, even if the evidence was intended to be turned over to law enforcement. This would align with the State's already more expansive search and seizure protections[320] and further enshrine citizens' right to privacy as paramount.

C. Other Proposals are Insufficient or Redundant

Past scholarship on private police regulation in Washington has focused on the inadequacy of the State's licensing scheme and suggested legislative fixes that increase transparency, reporting requirements, training, and accessibility of legal remedies.[321] This scholarship has also cast a skeptical eye on expanding the exclusionary rule out of concern that it would serve no deterrence function.[322] This wariness fails to recognize that the Washington State Supreme Court interprets the Washington Constitution's search and seizure provisions by focusing on privacy

318. State v. von Bulow, 475 A.2d 995, 1018–19 (R.I. 1984).

319. *See* State v. Eisfeldt, 163 Wash. 2d 628, 637, 185 P.3d 580, 585 (2008).

320. *See supra* section III.C.1.

321. *See, e.g.*, Andrew Stokes, *Cops for Hire: Reforming Regulation of Private Police in Washington State*, 16 SEATTLE J. SOC. JUST. 561 (2018) (calling on the Washington State Legislature to regulate private police).

322. *See id.* at 600–01.

rationales over deterrence.[323] An expansive exclusionary rule may or may not deter private police, but more importantly would reflect the State's deep-seated objective to safeguard the privacy rights of its citizens. Providing citizens with a remedy for privacy violations is reason enough. As discussed in Part II, suppression is often the only effective remedy to redress a search or seizure violation. Legislative action focused on increasing private police oversight and control would be helpful, but inadequate, on its own in the absence of a broadened constitutional or statutory exclusionary rule.

Other scholarship on private police reform has suggested that because public and private actors are so intertwined and often "operate in a reciprocal relationship," policymakers should recognize that private influences are unavoidable and regulate their impact using a parity approach.[324] Instead of legislation classifying an actor as public or private (which leads to regulatory gaps), parity-focused regulations center the harm at stake regardless of the type of actor.[325] This approach, advocated by scholar of policing Farhang Heydari, hints at completely collapsing the state action doctrine, but never goes as far as to say so.[326] Heydari specifies that rather than just treat all nonstate actors as state actors, parity-based regulation would instead allow "legislators to carefully weigh the likely benefits and harms and regulate to mitigate those harms while preserving benefits."[327] In the private police context, Heydari suggests that lawmakers require compliance with the Fourth Amendment's limits as a matter of statutory law, rather than by considering private police equivalent to state actors to invoke constitutional protections.[328]

Heydari's proposal fits nicely with Justice Ginsburg's "more majestic conception" by centering the harm of the individual and judicial integrity over deterrence.[329] However, parity-based regulations need not be limited to statutory regimes. Because it is not likely Washington will abolish the state action doctrine in its entirety, a state constitutional theory of privacy rights described above could provide a similar remedy.

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323. *See supra* note 256 and accompanying text.

324. Heydari, *supra* note 77, at 747–52.

325. *Id.* at 750.

326. *Id.* at 750–52.

327. *Id.* at 752.

328. *Id.*

329. Herring v. United States, 555 U.S. 135, 151 (2009) (Ginsburg, J., dissenting).

CONCLUSION

As a future wave of protests inevitably rises again against police abuses of power, we should also acknowledge that a shadow force of private police conducts much of the same activities as state employees but is governed by different legal standards. As a result, these law enforcement officers are held even less accountable. An expansive exclusionary rule recognized by the Washington State Supreme Court would fill the remedial gap left open by the current state action requirement in the search and seizure context. Doing so would provide Washington residents with an affirmation that their privacy rights matter and preserve the state's judicial integrity by compelling courts to refuse to partake in government-sanctioned illegality.