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Citizens should be better protected against private policing, says Bryan Schwartz

IN some ways, our legal system offers more protection against public than private tyranny. The Charter of Rights, for example, applies only against government action. While government does have a lot of power, so do some employers and business people. Oppression is not a public-sector monopoly; there are still ample opportunities for private-sector initiatives. In fact, there is some real growth potential. Many industries are being privatized and deregulated, and some new technologies are available for intruding on employees and customers.

An overbearing government can be chastened by public criticism and removed in short order by popular vote. An employer or merchant usually feels no pressure from the electorate or the press. The economic marketplace can actually reward heavy-handed conduct. Subject your employees to polygraphs and drug-testing, and you can rid yourself of undesirable employees. The riffraff will flunk the tests, or refuse to take them. You're rid of people impaired by kleptomania, alcoholism, anxiety or dignity. Your organization is mean, clean and competitive. Courts have occasionally applied the Charter to private activity that amounts to enforcing criminal law. In the 1986 *Lerke* case, some tavern employees arrested a young customer, searched his pockets, and discovered some marijuana. The Alberta Court of Appeal said that a "citizen's arrest" is essentially a state function, so the Charter applies. The court said the search was unreasonable, violated the Charter and the evidence obtained was not admissible.

In contrast is the 1989 *Shafie* case. The employer was looking into a series of thefts at its parking lot. It escorted an employee to a private investigator. The employee was questioned there, in a closed room, without being told of any right to consult a lawyer. The employee made some incriminating statements that were later used to charge and convict him. The Ontario Court of Appeal said the Charter did not apply. It said society would not tolerate the excessive "judicialization of private relationships."

Federal and provincial governments have passed human-rights statutes that do apply to the private sector. But these laws usually aim primarily at eliminating discrimination. They often do not address private-sector "police activity," such as surveillance, searching people or subjecting them to polygraphs and drug tests.

It would be interesting to see a systematic study of the extent and dangers of private-sector police activity. Looking at everyday life does raise some concern. On your way out of a store these days, a clerk may ask to check your parcels against your sales receipt. You may find the experience insulting and demeaning. But people usually don't know whether they have the right to refuse and are intimidated by displays of authority. The law is not always clear, but generally our criminal and civil laws say a store cannot physically detain an innocent customer or search his or her property.

ONCE you pass security at your local Pinkerton's Groceteria, you can go out into the mall - and see security guards. Give some people a uniform and a walkie-talkie, and they look as if they want to call in a SWAT team, or even an air strike. I've seen mall guards interrogate innocent civilians suspected of eating their salads too slowly in food courts. Employers have a lot of new gadgets available for intruding on employees: polygraphs, drug tests, video surveillance cameras, centralized phone and computer systems that can monitor what an employee is saying or writing.

Jobs may be hard to come by, so quitting oppressive work may not be a practical option. You might wish to avoid a particular store that treats customers like suspects; but what if all the big chains were to start acting that way?

Perhaps our human-rights statutes should be reviewed and expanded to include "legal rights." There should be much tighter safeguards on the way you can be questioned, searched or arrested by private citizens. Private police, like public officers, should have to explain your rights to you. If private police act illegally, the courts should have the discretion to exclude the evidence they obtain. Legislators should also study and possibly regulate the new technologies of employee and customer surveillance.

Yes, we have to watch out for the big state, but we sometimes need its help against local bullies. The leviathan may be the biggest thing in the sea, but it does not always have the sharpest teeth.

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