

## Notes

### PRIVATE PATROLLING AT THE BOUNDARIES OF PUBLIC DUTY

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**ABSTRACT**—In the shadow of contemporary debates over police functions, funding, and accountability, a new form of preventative policing has proliferated. Improvement districts, most commonly associated with downtown revitalization efforts, increasingly served a new purpose—crime control. Communities dissatisfied with public police services have found that they may leverage improvement district tax revenues to hire off-duty police officers to patrol their neighborhoods. This trend has not been without controversy. Critics have contended that these semiprivate, semipublic police patrols create a two-tier system of public safety, allowing wealthy residents to privately purchase powers that belong to the public as a whole.

This Note critically examines improvement-district-sponsored policing through the lens of anti-corruption law. It observes that while American law has long prohibited officials from privately profiting from their public powers, the historically blurry line between public and private policing has frustrated attempts to categorize the actions of off-duty police officers as pursuant to public power. Yet, many of the distinctions courts rely upon when classifying off-duty officers as private actors do not exist when those off-duty officers work on behalf of an improvement district. Consequently, this Note finds that improvement-district-sponsored policing violates state anti-corruption laws by enabling off-duty officers and contracted security companies to exchange public power for private profit.

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INTRODUCTION

After a long patrol shift, a St. Louis police officer returns to headquarters. Dressed in uniform and carrying his duty weapon, he enters a building emblazoned with one word: “POLICE.” This is not a police substation, though, and he is not working for the St. Louis Metropolitan Police Department—at least not today. He’s an off-duty cop, moonlighting for The City’s Finest (TCF), a private security company founded by a retired police detective.<sup>1</sup> He is, however, still working for the local government. The Central West End Southeast Special Business District—formed pursuant to city ordinance,<sup>2</sup> funded by neighborhood property taxes, and governed by a mayorally appointed board<sup>3</sup>—has contracted with TCF to provide supplementary patrol services to the neighborhood.<sup>4</sup>

This form of beat-cop policing—formally a privately contracted service but financed by special district tax revenues and staffed by off-duty police officers—has proliferated in St. Louis over the last three decades.<sup>5</sup> While St. Louis may be an outlier in terms of the sheer pervasiveness of the practice, it is by no means alone in experimenting with this form of semiprivate

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<sup>1</sup> Jeremy Kohler, *St. Louis’ Private Police Forces Make Security a Luxury of the Rich*, PROPUBLICA & ST. LOUIS POST-DISPATCH (Sept. 8, 2022), <https://www.propublica.org/article/public-vs-private-policing-in-st-louis> [<https://perma.cc/68K7-6KHY>].

<sup>2</sup> St. Louis, Mo., Ordinance 63,780 (May 31, 1996).

<sup>3</sup> *About Us*, CWE SE. SPECIAL BUS. DIST., <https://cwesoutheastsbd.com/> [<https://perma.cc/4G7F-TDHZ>].

<sup>4</sup> See Kohler, *supra* note 1.

<sup>5</sup> See *id.*

policing. Residents of cities across the country have formed special districts for the express purpose of hiring off-duty police officers to patrol their neighborhoods.<sup>6</sup>

Despite their proliferation and impact on the people they police, special district-sponsored patrols have garnered relatively little academic attention. While articles exploring developments in private policing have observed that special districts employ security guards, they have done so largely in passing.<sup>7</sup> Scholars of local government law have considered the phenomenon in moderately more depth, analyzing security as one of many traditionally municipal services increasingly provided by improvement districts.<sup>8</sup> Yet this existing literature does not address that these improvement district patrols are often staffed by off-duty public police officers, nor does it grapple with the legal consequences of their complex mixture of public and private duties, money, and power.<sup>9</sup>

This Note breaks new ground by cataloging and critically appraising this new form of neighborhood policing, which I term “the sublocal patrol.” Part I defines the sublocal patrol and chronicles its rise. It observes that although sublocal patrolling has been dogged with charges of fundamental

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<sup>6</sup> Neighborhoods in Atlanta, Boston, Chicago, Fort Worth, Kansas City, New Orleans, New York, and St. Louis, among others, rely on special district governments to finance police patrols staffed by off-duty cops. *See infra* note 68.

<sup>7</sup> *See, e.g.*, Seth W. Stoughton, *The Blurred Blue Line: Reform in an Era of Public & Private Policing*, 44 AM. J. CRIM. L. 117, 143–44 (2017) (describing the formation of Minneapolis’s Downtown Improvement District, which funds supplemental security services through a special tax on property owners); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1173 (1999) (“[E]ven ungated communities are increasingly hiring private patrols . . . [funded by] government-approved special assessments.”); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 71–72 (2004) (explaining how BIDs use district tax revenues to pay for private police services).

<sup>8</sup> *See, e.g.*, Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 368–69 (1999) (“Most BIDs focus on traditional municipal activities, such as garbage collection, street maintenance, and security patrols.”); Nicole Stelle Garnett, *Governing? Gentrifying? Seceding? Real-Time Answers to Questions About Business Improvement Districts*, 3 DREXEL L. REV. 35, 43 (2010) (“Most BIDs, except the largest and wealthiest ones, primarily focus on two things: security and sanitation.”); Brett Dolin, Note, *One Condo, One Vote: The New York BID Act as a Threat to Equal Protection and Democratic Control*, 18 CUNY L. REV. 93, 103–04 (2014) (“Perhaps most controversially, the BID also proposes public and pedestrian safety services and coordination with law enforcement.”). Improvement districts are subdivisions of local government formed by local property owners to raise funds for additional services and infrastructure improvements within the district. *See Briffault, supra*, at 368–69, 378.

<sup>9</sup> Existing literature generally regards the security forces employed by improvement districts to be more akin to mall cops than a semiprivate extension of the public police force. *See, e.g.*, Briffault, *supra* note 8, at 398–99 (describing how districts refer to their security staff members as “community service representatives” and dress them in brightly colored outfits); Noah M. Kazis, *Special Districts, Sovereignty, and the Structure of Local Police Services*, 48 URB. L. 417, 422, 427–28 (2016) (finding special districts “essentially never provide policing” and distinguishing BID security efforts from policing because the BID officers do not “make arrests, obtain warrants, or detain suspects”).

unfairness, traditional constitutional means of ensuring fairness in government have done little to check its growth.

Part II suggests that longstanding anti-corruption prohibitions on profiting from public office may nonetheless provide fertile ground for legal challenges to sublocal patrols. This Part first traces the evolution of anti-corruption laws from their common law roots to their current state statutory forms. Next, it catalogues how courts have historically distinguished between actions pursuant to public duty and those pursuant to private prerogative. It then evaluates sublocal patrolling under common tests of private versus public duty. This Part finds that the sublocal patrol officers routinely act within the scope of their public duties yet are managed by and responsive to private financial interests. This Note, therefore, contends that the sublocal patrol's combination of public duty and private incentive is both the driving force behind the patrol's popularity and a violation of state anti-corruption laws. Finally, Part III suggests avenues for reforming the practice.

#### I. DEFINING THE SUBLOCAL PATROL

In 2002, for the first time in a decade, Americans reported that they thought crime was worsening both in their area and in the United States as a whole.<sup>10</sup> Since then, public perception of crime has ticked steadily up.<sup>11</sup> A record 56% of Americans reported in 2022 that crime was increasing in their local community,<sup>12</sup> even as official statistics show that violent crime rates have remained largely flat.<sup>13</sup> Yet perception, not reality, drives public policy preferences. In 2021, 47% of Americans reported wanting to see either “a little” or “a lot” more spending on police in their area. This number was up by 31% from the year before.<sup>14</sup> For Americans who want greater spending on local police, appeals to the city for additional police services could seem futile. At a meeting between local business owners and police officers in St. Louis, a gas station owner summed up these frustrations: “To be

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<sup>10</sup> See Megan Brenan, *Record-High 56% in U.S. Perceive Local Crime Has Increased*, GALLUP (Oct. 28, 2022), <https://news.gallup.com/poll/404048/record-high-perceive-local-crime-increased.aspx> [<https://perma.cc/3X8F-ZZYU>].

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

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

<sup>13</sup> John Gramlich, *Violent Crime Is a Key Midterm Voting Issue, but What Does the Data Say?*, PEW RSCH. CTR. (Oct. 31, 2022), <https://www.pewresearch.org/fact-tank/2022/10/31/violent-crime-is-a-key-midterm-voting-issue-but-what-does-the-data-say/> [<https://perma.cc/FEP2-CXKE>].

<sup>14</sup> Kim Parker & Kiley Hurst, *Growing Share of Americans Say They Want More Spending on Police in Their Area*, PEW RSCH. CTR. (Oct. 26, 2021), <https://www.pewresearch.org/fact-tank/2021/10/26/growing-share-of-americans-say-they-want-more-spending-on-police-in-their-area/> [<https://perma.cc/2KGS-D69W>]. 37% of Americans thought spending should stay the same, and 15% thought spending should decrease in 2021. *See id.*

honest, you guys don't come . . . . No offense, but if someone's not dying, you're not coming."<sup>15</sup>

The issues of crime, policing, and public safety are hardly new. Nor are the techniques developed to address these issues. In the 1990s, dissatisfied communities discovered a means of circumventing the politics of police funding and prioritization: the improvement district. Originally envisioned as a means to make targeted investments in ailing downtown business districts,<sup>16</sup> many improvement districts now fund privatized neighborhood police patrols staffed by off-duty public police officers.<sup>17</sup> These publicly funded, privately managed patrols are a new form of local policing—"the sublocal patrol."

The following Sections explore how improvement districts have enabled the rise of the sublocal patrol. In Section I.A, I unpack the history of improvement districts and clarify their structure. Then, in Sections I.B and I.C, I explore the history of improvement districts and sublocal patrolling in two cities that have heavily relied upon them: New Orleans and St. Louis. I also briefly canvas the use of improvement districts to support sublocal patrols in other cities. Finally, in Section I.D, I discuss common critiques of the sublocal patrol that form the normative foundation for the legal challenge that is the focus of Part II.

#### A. Municipal Governance and the Improvement District

Business Improvement Districts (BIDs) are subdivisions of existing local governments, formed via a petition of neighboring commercial property owners or by other local initiative.<sup>18</sup> First emerging in the 1970s, BIDs rapidly rose in popularity during the '90s<sup>19</sup> as a means of promoting urban revitalization and avoiding the free-rider problems inherent to voluntary fundraising efforts by business associations.<sup>20</sup> Enabled by state

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<sup>15</sup> Kohler, *supra* note 1; see also Max Marin, Ryan W. Briggs & William Bender, *Philadelphia Police Response Times Have Gotten 4 Minutes Longer, About 20% Worse*, PHILA. INQUIRER (Feb. 15, 2022, 5:01 AM), <https://www.inquirer.com/news/philadelphia-police-911-calls-response-time-20220215.html> [<https://perma.cc/BNG6-4MMU>] (quoting a neighborhood association leader saying when residents call for quality of life issues, "sometimes the cops don't come at all").

<sup>16</sup> See Lorlene Hoyt & Devika Gopal-Agge, *The Business Improvement District Model: A Balanced Review of Contemporary Debates*, 1 GEOGRAPHY COMPASS 946, 948 (2007) (noting that BIDs' flexibility and ability to "microfit" local conditions made them popular vehicles for urban revitalization efforts).

<sup>17</sup> See *infra* Sections I.B, I.C.

<sup>18</sup> Briffault, *supra* note 8, at 377–79; see also Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373, 404 (2004) ("BIDs are rarely, if ever, formed over the objection of a majority of the property owners.").

<sup>19</sup> Richard Briffault, *The Business Improvement District Comes of Age*, 3 DREXEL L. REV. 19, 19, 23 (2010).

<sup>20</sup> Hoyt & Gopal-Agge, *supra* note 16, at 947–48.

legislative acts and authorized by either their governing city or county,<sup>21</sup> BIDs may define their own geographic boundaries and levy property taxes on their residents.<sup>22</sup> BIDs generally use the revenue they raise to initiate infrastructure improvements, provide additional municipal services, and host promotional events.<sup>23</sup>

While improvement district leadership structures vary by state, most are governed by an appointed board. Some states allow city council members or mayors to directly appoint board members, while others require the city to select a nonprofit corporation to manage the improvement district.<sup>24</sup> Eight states and the District of Columbia require BID boards be elected,<sup>25</sup> while six states provide for a mixture of appointments and elections.<sup>26</sup>

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<sup>21</sup> Gökтуğ Morçöl & James F. Wolf, *Understanding Business Improvement Districts: A New Governance Framework*, 70 PUB. ADMIN. REV. 906, 906 (2010).

<sup>22</sup> See Rachel Meltzer, *Understanding Business Improvement District Formation: An Analysis of Neighborhoods and Boundaries*, 71 J. URB. ECON. 66, 68 (2012) (noting that defining BID boundaries is an iterative process where BID sponsors approach other local property owners about joining the BID).

<sup>23</sup> Briffault, *supra* note 8, at 368–69 (noting that BIDs collect garbage, maintain and patrol public streets, provide social services to people experiencing homelessness, issue promotional materials, and sponsor street fairs).

<sup>24</sup> See, for example, requirements in Kansas (KAN. STAT. ANN. § 12-1790 (West 1981) (“The governing body of a city establishing a business improvement district under the provisions of this act shall provide by ordinance for an advisory board for each such district, the members of which shall be representative of businesses located within the district.”)); Minnesota (MINN. STAT. ANN. § 428A.07 (West 1988) (“The governing body of the city may create and appoint an advisory board for each special service district in the city to advise the governing body in connection with the construction, maintenance, and operation of improvements, and the furnishing of special services in a district.”)); Mississippi (MISS. CODE ANN. § 21-43-5 (West 1974) (“The governing authority of any participating municipality shall appoint an advisory board consisting of five (5) members who shall serve at the pleasure of the appointing authority; such board members shall be professional businessmen within the affected area . . . .”)); Oregon (OR. REV. STAT. ANN. § 223.151 (West 1991) (“If an advisory committee is created, the council shall appoint persons conducting business within the economic improvement district to the advisory committee.”)); and Pennsylvania (53 PA. STAT. AND CONS. STAT. ANN. § 18106 (West 2016) (“[A]n existing nonprofit development corporation, an existing nonprofit corporation or a nonprofit development corporation or nonprofit corporation established by the governing body or authorized to be established by the governing body of the municipality in which the [improvement district] is to be located [shall] administer the [improvement district].”)).

<sup>25</sup> The states requiring elections for BID board members include: Alabama (ALA. CODE § 11-54B-50 (West 2019)); Connecticut (CONN. GEN. STAT. ANN. § 7-339q (West 1973)); Louisiana (LA. STAT. ANN. § 33:2740.75 (West 2003)); Maryland (MD. CODE ANN., ECON. DEV. § 12-404 (West 2010)); Massachusetts (MASS. GEN. LAWS ANN. ch. 40O, § 5 (West 1994)); New York (N.Y. GEN. MUN. LAW § 980-m (McKinney 2016)); Ohio (OHIO REV. CODE ANN. § 1710.04 (West 2009)); and South Dakota (S.D. CODIFIED LAWS § 7-25A-9 (1989)). The District of Columbia also requires elections. D.C. CODE § 2-1215.04 (West 1989).

<sup>26</sup> The states providing for both appointive and elective methods include: Alaska (ALASKA STAT. ANN. § 29.46.020 (West 1985)); Colorado (COLO. REV. STAT. ANN. § 31-25-1209 (West 2014)); Georgia (GA. CONST. art. IX, § 7, ¶ III (West 1984)); Missouri (MO. ANN. STAT. § 67.1401 (West 2021), *Id.* § 71.798 (West 2006)); Nevada (NEV. REV. STAT. ANN. § 318.080 (West 1995)); and Utah (UTAH CODE

Slightly more than half of state enabling acts vest control of district budgets with the district's supervising governing body, either by requiring city or county approval of district-drafted budgets or by mandating the city or county develop the budget themselves.<sup>27</sup> The remainder of enabling acts either make no statement regarding budgetary authority or vest it with the BID itself.<sup>28</sup>

Neighborhood business leaders typically comprise BID management.<sup>29</sup> This likely contributes to high satisfaction and public confidence in BIDs.<sup>30</sup> Perhaps most crucially, as one scholar noted, "residents find BIDs attractive precisely because 'every penny collected for the BID goes back into the BID.'" <sup>31</sup> The assurance that every dollar raised in the district will remain in the district enables the BID to overcome popular aversion to tax increases.

While BIDs were originally conceived as a mechanism for downtown commercial development, enthusiasm for this sublocal form of city governance seeped into residential areas.<sup>32</sup> Many states passed laws explicitly enabling the formation of improvement districts in primarily residential neighborhoods.<sup>33</sup> Others allowed the application of existing BID laws to commercial and residential areas.<sup>34</sup> Some states continue to refer to these districts as BIDs. However, today these districts also go by many other

ANN. § 17B-1-304 (West 2023), *Id.* § 17B-1-306). See also *Board of Directors, ANCHORAGE DOWNTOWN P'SHIP*, <https://anchoragedowntown.org/board-of-directors/> [<https://perma.cc/Y9H8-WGDJ>]; Lindsay Kuhn, *What You Need to Know About Georgia's Community Improvement Districts*, *CTR. FOR STATE & LOC. FIN., GA. STATE UNIV.* (Nov. 28, 2016), <https://cslf.gsu.edu/2016/11/28/key-facts-about-community-improvement-districts-in-georgia/> [<https://perma.cc/78D2-VLMN>].

<sup>27</sup> See Göktuğ Morçöl & Turgay Karagoz, *Accountability of Business Improvement District in Urban Governance Networks: An Investigation of State Enabling Laws*, 56 *URB. AFFS. REV.* 888, 904 (2020).

<sup>28</sup> See *id.*

<sup>29</sup> See Briffault, *supra* note 8, at 369 ("Many states provide for property owner- or business-dominated advisory, administrative, or management boards which implement the BID's program and manage its operations.").

<sup>30</sup> See *id.* (observing that BIDs are popular in part because they ensure that "the revenues generated by the supplemental taxes . . . are reserved for programs these taxpayers want, and are controlled by their representatives").

<sup>31</sup> Reynolds, *supra* note 18, at 406.

<sup>32</sup> See Robert H. Nelson, Kyle R. McKenzie & Eileen Norcross, *From BIDs to RIDs: Creating Residential Improvement Districts*, 20 *MERCATUS POL'Y SERIES* 1, 1 (2008) ("Given the many successful experiences of BIDs in recent years, we propose . . . the creation of a similar institution, the Residential Improvement District.").

<sup>33</sup> See, e.g., FLA. STAT. ANN. § 163.503 (West 2021) (enabling public-safety-focused improvement districts in residential areas); LA. STAT. ANN. §§ 33:9091.1–.27 (West 2014) (same); WIS. STAT. ANN. § 66.1110 (West 2017) (enabling residential improvement districts); DEL. CODE ANN. Tit. 9, § 3503 (West 2022) (same).

<sup>34</sup> See, e.g., 73 PA. STAT. AND CONS. STAT. ANN. § 833 (West 2021) (enabling neighborhood improvement districts, including both their BID and RID subtypes); MO. ANN. STAT. § 67.457 (West 2022) (same); TEX. LOC. GOV'T CODE ANN. § 372.003 (West 2011) (same); VA. CODE ANN. § 15.2-2403.4 (West 2014) (same); GA. CONST. art. IX, § 7, ¶ I (West 1984) (same).

names: community improvement districts, public improvement districts, enhanced services districts, special taxing districts, and special service areas.<sup>35</sup> For the purposes of this Note, I refer to these districts—which may encompass both residential and commercial property—collectively as “improvement districts” or “BIDs.”

The BID’s initial expansion into residential areas is notable for its impetus. Early residential improvement district campaigns were animated by a singular purpose—improving neighborhood security through supplemental privatized police patrols.<sup>36</sup> As this Note chronicles in its next Sections, these neighborhood campaigns discovered that improvement districts could be divorced from their economic development mandate and leveraged primarily to fund additional police patrols. Where communities failed to secure additional on-duty, public police officers from city hall, improvement districts provided the next best option: off-duty police officers moonlighting for the district’s chosen private security company and funded by district tax revenue. New Orleans and St. Louis, two of the earliest adopters of improvement-district-sponsored policing, illustrate perhaps the most extreme examples of the model.

### *B. New Orleans and the Security Taxing District*

In 1998, the Lake Forest Estates Improvement District became New Orleans’s first special district to sponsor private police patrols.<sup>37</sup> The arrangement rapidly proliferated across the city. Driven by concerns over crime, New Orleans neighborhoods organized to form security-focused improvement districts.<sup>38</sup> By 2010 there were twenty-five such districts within

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<sup>35</sup> See *supra* notes 24–26.

<sup>36</sup> See, e.g., Joyce Purnick, *METRO MATTERS; Plan for Private Police Force Sets Off Alarms on Upper East Side*, N.Y. TIMES, May 29, 1995, at 25, <https://www.nytimes.com/1995/05/29/nyregion/metro-matters-plan-for-private-police-force-sets-off-alarms-on-upper-east-side.html> [https://perma.cc/326J-CDHF] (noting that the Upper East Side RID campaign sprung from a desire to fund private police patrols); Aaron Malone, *Why New Orleans’ Residential Security Districts May Be Undermining Public Safety*, LONDON SCH. OF ECON.: U.S. POL. & POL’Y BLOG (Dec. 4, 2019), <https://blogs.lse.ac.uk/usappblog/2019/12/04/why-new-orleans-residential-security-districts-may-be-undermining-public-safety/> [https://perma.cc/9QE3-5VBT] (describing the development of New Orleans’s “residential security districts” and discussing how RIDs almost exclusively focused on securing neighborhood safety by instituting private patrols).

<sup>37</sup> Deonna Anderson, Kara Chin & Emily Siegel, *Enhanced Security Only Benefits Neighborhoods in New Orleans Who Pay for Them 2* (Jan. 6, 2017) (M.A. capstone, CUNY), [https://academicworks.cuny.edu/gj\\_etds/336/](https://academicworks.cuny.edu/gj_etds/336/) [https://perma.cc/6ZAW-QZCE].

<sup>38</sup> Aaron Malone, *(Im)mobile and (Un)successful? A Policy Mobilities Approach to New Orleans’s Residential Security Taxing Districts*, 37 POL. & SPACE 102, 103 (2019).



New Orleans.<sup>39</sup> As of January 2017, more than a quarter of New Orleans residents were covered by a security district.<sup>40</sup>

These districts' emphasis on security is both formal and functional. In addition to devoting 85% of their tax revenues to private patrols,<sup>41</sup> the New Orleans improvement districts are expressly termed "security" or "crime prevention" districts. The Louisiana state legislature enabled these security districts by special act "to aid in crime prevention and to add to the security of district residents by providing for an increase in the presence of law enforcement personnel in the district."<sup>42</sup>

While these districts privately contract for additional security, the guards they employ are often public police officers. The New Orleans Office of the Inspector General estimated in 2013 that roughly four out of ten security district patrol officers were either on- or off-duty New Orleans Police Department (NOPD) officers.<sup>43</sup> Hiring uniformed, off-duty police officers, rather than civilian guards, has instinctive appeal for improvement districts. Although private security guards possess legal powers to engage in preventative policing roughly equivalent to public officers,<sup>44</sup> uniformed police officers generally have a greater deterrent effect. In an interview with the *San Francisco Chronicle*, a corporate security executive explained the attraction of hiring moonlighting officers: "The goal of using a cop is to try to prevent the theft from happening in the first place, rather than having security guards chase someone . . . . If the thieves see a police officer, they usually move on to another target."<sup>45</sup>

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<sup>39</sup> E. R. QUATREVAUX, OFF. OF INSPECTOR GEN., CITY OF NEW ORLEANS, REVIEW OF NEW ORLEANS SECURITY TAXING DISTRICTS 13 (2013).

<sup>40</sup> Anderson et al., *supra* note 37, at 2.

<sup>41</sup> QUATREVAUX, *supra* note 39, at 1.

<sup>42</sup> LA. STAT. ANN. § 33:9091.1 (West 2014); *see also id.* § 33:9091.2 (West 2002) (using similar language to describe the purposes of various Louisiana security districts).

<sup>43</sup> QUATREVAUX, *supra* note 39, at 1.

<sup>44</sup> Nineteenth-century public police forces grew out of earlier private and collective means of ensuring public safety. They inherited the powers and responsibilities once possessed by private individuals. Private actors also largely retain those policing powers today. *See* Sklansky, *supra* note 7, at 1227–28 (finding that modern legal distinctions between public and private police are "hazy" because the distinction between the powers of ordinary citizens and law enforcement officers in Anglo-American law have historically always been unclear). For example, public and private police alike may patrol and surveil public streets, carry weapons, and detain, question, and arrest individuals. *See* Stoughton, *supra* note 7, at 129, 138; *see also* Joh, *supra* note 7, at 88–89 ("[S]ome private police do . . . engage in activity that might appear more conventionally 'police-like': seizing evidence, conducting pat-downs for weapons, questioning suspected persons, and effectuating arrests.").

<sup>45</sup> Phil Matier, *Businesses Hiring Real SF Cops on OT to Keep Crime Down, Employees Safe*, S.F. CHRON. (Aug. 21, 2019, 4:00 AM), <https://www.sfchronicle.com/bayarea/philmatier/article/Businesses-hiring-real-SF-cops-on-OT-to-keep-14365181.php> [<https://perma.cc/Y5F5-LYY5>].

Employing moonlighting officers may also increase the public police department's responsiveness when issues arise. A behavioral study of private security companies working on behalf of special districts noted that informal relationships with local police departments not only legitimized the private police's authority, but also ensured access to public police assistance should security staff require backup.<sup>46</sup>

New Orleans's extensive use of off-duty officers to secure public streets has been controversial. In a 2011 report, the Department of Justice lambasted NOPD's "paid detail" system, under which NOPD officers provided supplemental patrol services to neighborhood security districts, as well as private businesses.<sup>47</sup> Noting that NOPD officers were "paid and largely controlled" by non-NOPD actors while moonlighting, the DOJ described the paid duty system as "'the aorta of corruption' within NOPD."<sup>48</sup> The report detailed an incident where officers reportedly threatened to withhold public police services from a business if the business did not hire officers at a certain pay rate.<sup>49</sup> The report also described instances of officers receiving free or subsidized housing in exchange for residing or parking their patrol car in certain neighborhoods.<sup>50</sup>

Following the DOJ's report, NOPD agreed to a consent decree, avoiding litigation over the constitutionality of its policing practices. Among other reforms, the decree required NOPD to restructure its secondary employment system to "comport[] with applicable law and current professional standards."<sup>51</sup> To comply with the decree, New Orleans centralized its paid duty system under the newly created and independent Office of Police Secondary Employment (OPSE).<sup>52</sup> New Orleans security districts seeking supplemental policing services today must go through OPSE for off-duty officer scheduling, payments, and accounting, rather than

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<sup>46</sup> See Amanda D'Souza, *An Examination of Order Maintenance Policing by Business Improvement Districts*, 36 J. CONTEMP. CRIM. JUST. 70, 80–81 (2020) (noting that while some study participants had no personal connection to the city police, these officers reported feeling that they could rely on public police backup because their managers were all retired city police officers).

<sup>47</sup> See DOJ., C.R. DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, at xv–xvi (2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd\\_report.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf) [<https://perma.cc/QPC5-WWTS>]. Officers on paid detail may also provide security for special events or private businesses. *Id.*

<sup>48</sup> *Id.* xvi.

<sup>49</sup> *Id.* at 72. The exact words the officer allegedly used were: "You f\*\*\* with me and you will never see a police car again." *Id.*

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

<sup>51</sup> Amended & Restated Consent Decree Regarding the New Orleans Police Department, United States v. City of New Orleans, No. 2:12-cv-01924-SM-JCW, at \*85 (E.D. La. Oct. 2, 2018).

<sup>52</sup> *Office of Police Secondary Employment: Frequently Asked Questions*, CITY OF NEW ORLEANS, <https://nola.gov/opse/faq/> [<https://perma.cc/4TY5-NWSN>].

contracting with the officers directly.<sup>53</sup> Security district reliance on moonlighting police officers nonetheless remains widespread.<sup>54</sup>

New Orleans is not alone in experimenting with the sublocal patrol and encountering the corrupt and inequitable practices that so often accompany it. The next Section explores the rise of the sublocal patrol in St. Louis and the city's ongoing debate over its place in local governance.

### C. St. Louis and The City's Finest

Local business owners in St. Louis realized in 1992 that improvement districts were a politically expedient way to secure additional policing services.<sup>55</sup> Today, many St. Louis city commercial districts and neighborhoods rely on improvement districts to provide supplemental security services.<sup>56</sup> Like New Orleans's security districts, the centrality of policing to St. Louis improvement districts' mission is evident in their budgets. Empirical analysis of current improvement district budgets is difficult, as many St. Louis improvement districts have not published their budgets since 2019.<sup>57</sup> Nevertheless, a review of available data shows that districts often devote more than half of their revenue to funding private

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<sup>53</sup> See *id.*

<sup>54</sup> See, e.g., *Patrol Officer Bios*, HURSTVILLE SEC. & NEIGHBORHOOD IMPROVEMENT DIST. (2022), <https://hurstvillesecurity.com/neighborhood-patrol/patrol-officer-bios/> [<https://perma.cc/99G2-6JDG>] (naming current NOPD officers among the district's private patrol officers); *About Mid City Security District*, MID CITY SEC. DIST., <https://midcitysecuritydistrict.org/about.html> [<https://perma.cc/Z7WB-XXVZ>] (“The NOPD officers assigned to the [Mid City Security District] are working overtime shifts. They have the same authority and responsibilities as when working their regular NOPD shifts.”); *Security Services*, GARDEN DIST. SEC. DIST., <http://gdsdpatrol.org/> [<https://perma.cc/MK36-AQ5P>] (encouraging local residents to communicate regularly with the NOPD detail officers on the security district's supplemental patrol).

<sup>55</sup> See Kohler, *supra* note 1 (describing a neighborhood meeting where a local business owner demanded improvements to public safety and an alderman suggested that they form a special business district).

<sup>56</sup> See *id.*

<sup>57</sup> For example, searching “business district” & “budget” on the City of St. Louis's website returns no results after 2019 for the Westminster-Lake Special Business district or the Central West End North Special Business District. See *Search Results*, ST. LOUIS-MO.GOV, <https://www.stlouis-mo.gov/searchresults.cfm?q=%22business+district%22+%22budget%22> [<https://perma.cc/9PK9-7YZ9>]. For the year 2022–2023, only seven improvement districts published budgets on the City of St. Louis's website. See *Resolutions: Session 2022-2023*, ST. LOUIS-MO.GOV, <https://www.stlouis-mo.gov/government/city-laws/resolutions/resolution.cfm?sessionRS=2022-2023&search=Choose+Session> [<https://perma.cc/MS5S-Z9GS>] (approving the budgets of the Gardenside BID, Debaliviere Place BID, 60 Plaza Square CID, Bevo CID, and Soulard CID, and establishing the St. Louis Hills BID and the Holly Hills BID). Lack of transparency into improvement district budgeting caught the eye of the Missouri State Auditor, who released a report in 2019 finding that “85 of 86 [improvement districts] reviewed (99 percent) did not submit a proposed annual budget for fiscal year 2018 to the city within the statutory required time frame.” NICOLE GALLOWAY, MO. STATE AUDITOR, REP. NO. 2019-114, CITY OF ST. LOUIS LOCAL TAXING DISTRICTS 14 (2019).

patrols, with some districts spending nearly 100% of available revenue on private patrols.<sup>58</sup>

Many of these dollars fund moonlighting police officers employed by private patrol companies like TCF. Jim Whyte, a retired city police officer and executive director of his neighborhood improvement district's public safety committee, explained the attraction of hiring moonlighting police officers: "We don't care if we're hiring a patrolman or a colonel; we're hiring a police officer that has the powers of arrest that can enforce statutes and ordinances."<sup>59</sup> The 2023 meeting minutes for a St. Louis BID committee confirms the popularity of hiring off-duty police officers among improvement district leadership: While preparing a request for proposal, the BID leadership noted its desire that any potential security company be able to provide the district with armed officers who possessed arrest powers and police radios and would provide the improvement district with reports on incidents.<sup>60</sup>

Investigative reporting from the *St. Louis Post-Dispatch* and *ProPublica* illustrated the special advantages conferred on St. Louis's improvement districts employing sublocal patrols. For instance, stores owned by a local property developer who sat on the BID board overseeing TCF's contract were repeatedly burgled. In response, TCF owner and retired police detective Rob Betts reached out to the public police department for help. In an email addressed to his own moonlighting officers' official police emails, including two of St. Louis's six district captains, Betts offered "a minimum of \$1000 to any officer(s) that locate[d] [the perpetrator's] vehicle and hopefully [its] occupants."<sup>61</sup> He also expressed hope that department data sources, including "hot shot sheets" and license plate registration

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<sup>58</sup> For instance, the Tower Grove South BID devoted 65% of funds to private patrols in 2018, St. Louis, Mo., Res. 120 (Oct. 29, 2021); the Gardenside BID devoted 95% of funds to private patrols in 2023, St. Louis, Mo., Res. 180 (Feb. 7, 2023); the Westminster Lake BID devoted 85% of funds to private patrolling in 2019, St. Louis, Mo., Res. 167 (Nov. 2, 2018); and the Soulard BID earmarked 46.7% of funds to private patrolling in 2022, *Soulard Special Business District Neighborhood Safety Forum*, SOULARD SPECIAL BUS. DIST. (May 9, 2022), [www.soulard-sbd.org/wp-content/uploads/2022/05/SSBD-Safety-Forum-Presentation-2022.pdf](http://www.soulard-sbd.org/wp-content/uploads/2022/05/SSBD-Safety-Forum-Presentation-2022.pdf) [<https://perma.cc/2ARW-S7RN>].

<sup>59</sup> Jeremy Kohler, *A Private Policing Company in St. Louis Is Staffed with Top Police Department Officers*, PROPUBLICA & ST. LOUIS POST-DISPATCH (Sept. 9, 2022, 6:00 AM), <https://www.propublica.org/article/off-duty-officers-as-private-police-in-st-louis> [<https://perma.cc/XE7M-3FMU>].

<sup>60</sup> *Safety and Security Meeting Minutes*, HOLLY HILLS SBD (Feb. 23, 2023), <https://hollyhillssbd.files.wordpress.com/2023/03/safety-and-security-meeting-minutes-2-23-23-draft.pdf> [<https://perma.cc/HX8C-K7MN>].

<sup>61</sup> Kohler, *supra* note 1.

information, would be used to assist the search.<sup>62</sup> Shortly thereafter, a suspect in the crime was taken into police custody.<sup>63</sup>

In part due to the *Post-Dispatch* and *ProPublica*'s investigation, St. Louis's sublocal patrols have also been dogged with criticisms of corruption. And in September 2022, the city announced that it was investigating SLMPD's moonlighting policies.<sup>64</sup> Yet even prior to these journalistic efforts, corruption concerns plagued the sublocal patrols. In early 2021, former SLMPD officer Brad Stephens was sentenced to one year and one day in federal prison for defrauding an improvement district. He had lied about working 169 supplemental patrol shifts for the district over a period of two years.<sup>65</sup> In some instances, Mr. Stephens was actually in Memphis, Tennessee during the hours the improvement district had paid him to patrol the neighborhood.<sup>66</sup> In its sentencing memorandum, the Government described Mr. Stephens conduct as a breach of public trust, shattering residents' confidence in the SLMPD.<sup>67</sup>

New Orleans and St. Louis demonstrate that widespread reliance on sublocal patrol by improvement districts has created cause for concern regarding corruption. While these cities are outliers in the number of sublocal patrols operating within their borders, they are by no means alone. Atlanta, Boston, Chicago, Fort Worth, Kansas City, and New York all use some form of sublocal patrolling to supplement public policing efforts.<sup>68</sup> As such, it is

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Jeremy Kohler, *Some Talk but Little Action on Private Policing in St. Louis*, PROPUBLICA & ST. LOUIS POST-DISPATCH (Dec. 19, 2022, 7:00 AM), <https://www.propublica.org/article/some-talk-little-action-private-policing-st-louis> [<https://perma.cc/ZK6C-LG3A>]. As of July 2023, Google searching yielded no further updates from the City of St. Louis on the status of the investigation.

<sup>65</sup> Press Release, U.S. Att'y's Off., E. Dist. of Mo., Former St. Louis Police Officer Enters Plea of Guilty in Fraud Case (Dec. 6, 2021), <https://www.justice.gov/usao-edmo/pr/former-st-louis-police-officer-enters-plea-guilty-fraud-case> [<https://perma.cc/765T-LPN8>].

<sup>66</sup> Government's Sentencing Memorandum at \*3, *United States v. Stephens*, No. 4:21-cr-00310 (E.D. Mo. May 12, 2021).

<sup>67</sup> *See id.* at \*2.

<sup>68</sup> *See* Everett Catts, *Buckhead CID Approves Adds Off-Duty Bicycle Cops for Security Plan*, NORTHSIDE NEIGHBOR (Mar. 12, 2021), [https://www.mdjonline.com/neighbor\\_newspapers/northside\\_sandy\\_springs/news/buckhead-cid-approves-adds-off-duty-bicycle-cops-for-security-plan/article\\_06cedcc2-8370-11eb-95d2-67010980c92b.html](https://www.mdjonline.com/neighbor_newspapers/northside_sandy_springs/news/buckhead-cid-approves-adds-off-duty-bicycle-cops-for-security-plan/article_06cedcc2-8370-11eb-95d2-67010980c92b.html) [<https://perma.cc/XSS6-4JAA>] (Atlanta); Robert Channick, *Rising Crime Scaring Some Visitors Away from Michigan Avenue and Other Chicago Destinations During Crucial Holiday Shopping Season*, CHI. TRIB. (Dec. 11, 2021, 9:39 AM), <https://www.chicagotribune.com/business/ct-biz-downtown-chicago-crime-holiday-shopping-20211211-jpjj34llffik6cu5av5bnfkq-story.html> [<https://perma.cc/FKX2-YRAL>] (Chicago); Franklin Kimbrough, *Westport's Proposal for Strategic Street Vacation*, WESTPORT REG'L BUS. LEAGUE (June 1, 2017), <https://westportkcmo.com/westport-kansascity-news/westport-proposal-strategic-street-vacation/> [<https://perma.cc/9Q6D-AUPR>] (Kansas City); Tim Logan, *As Mass. and Cass Crisis Continues*,

important to further examine the critiques of relying on these publicly funded but privately managed off-duty police officers.

*D. “Fundamentally Unfair”: Common Critiques of the Sublocal Patrol*

Despite the sublocal patrol’s increasing popularity, the practice has been riddled with criticisms of fundamental unfairness. Scholars, citizens, and elected officials have all raised concerns that sublocal patrols create a two-tier system of public safety. These critics observe how the sublocal patrol enables wealthier, and often whiter, neighborhoods to receive enhanced police services despite lower rates of violent crime.<sup>69</sup> A second line of criticism objects to the antidemocratic nature of private patrols, noting that their governance structures are generally electorally unaccountable to the people they police.<sup>70</sup> Still others focus their criticism more squarely on the city, arguing that residents should not have to levy additional taxes to receive basic services their general taxes ought to already fund.<sup>71</sup>

The question then becomes what, if anything, should the law do about it? For some, the inequity inherent to the practice is a mere fact of life. When asked whether he thought the sublocal patrols were fair, one Democratic state representative in Missouri shot the question back: “Is it fair that wealthier people drive nicer cars, have better homes, have home security

*Landowners Nearby Band Together to Fund Extra Services*, BOS. GLOBE (Sept. 24, 2021, 7:37 PM), <https://www.bostonglobe.com/2021/09/24/business/mass-cass-crisis-continues-landowners-nearby-band-together-fund-extra-services/> [<https://perma.cc/YZ4D-DW2K>] (Boston); Chris Welch, *Off-Duty NYPD Officers Hired by Manhattan Neighborhood to Protect Businesses*, FOX 5 N.Y. (Feb. 2, 2023), <https://www.fox5ny.com/news/garment-district-nypd-officers-private-security> [<https://perma.cc/77JW-DJGT>] (New York); *PID6 Public Safety Page*, PID6PATROL (Aug. 17, 2021), <http://www.pid6publicsafetypage.org/index.html> [<https://perma.cc/BW7F-33B6>] (Fort Worth).

<sup>69</sup> See Briffault, *supra* note 8, at 400 (finding concerns that BIDs promote especially acute inequality when the BID provides policing services); Jenice Armstrong, *Fishtown Hired Private Security. Too Bad Other Neighborhoods Can’t Do the Same.*, PHILA. INQUIRER (Sept. 30, 2022, 7:00 AM), <https://www.inquirer.com/opinion/fishtown-private-security-safety-20220930.html> [<https://perma.cc/NBT7-EF8N>] (“Will [the private patrols] be just another thing that drives gentrification in neighborhoods that can pay for extra protection, while further disadvantaging those who can’t?”); 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/B8Q6-C2W7>] (quoting Chicago Mayor Lori Lightfoot as expressing concern that the new local patrols would create “a circumstance where public safety is only available to the wealthy”).

<sup>70</sup> See Lisa M. Card, *One Person, No Vote? A Participatory Analysis of Voting Rights in Special Purpose Districts*, 27 T. JEFFERSON L. REV. 57, 59 (2004); Briffault, *supra* note 8, at 400.

<sup>71</sup> See Malone, *supra* note 38, at 112 (describing conservative objections to improvement districts as a form of “double taxation”); Doron Taussig, *Neighborhood Improvement Districts, and the Taxes We Already Pay*, PHILA. INQUIRER (Oct. 25, 2011), <https://www.inquirer.com/philly/blogs/our-money/NIDs.html> [<https://perma.cc/59WV-L7HG>] (asking if neighborhood improvement districts services, such as lighting and sanitation, are not already covered by existing property taxes, “what the heck is?”).

systems, get better health care, go to better schools? People with less resources get the lower end of the stick.”<sup>72</sup> Even as the Department of Justice condemned the NOPD’s paid duty system due to corruption issues, the report acknowledged that “any community that wants extra security certainly has a right to pay for it.”<sup>73</sup>

The law, then, seems to have largely foreclosed relief. Critics may not argue that private actors lack the legal authority to patrol public streets, as few, if any, preventive police powers are truly exclusive to the public police.<sup>74</sup> These policing powers need not be distributed across the entire city or passed through the democratic deliberation of city hall. Federal constitutional challenges frequently employed to fight inequality or injustice also seem to have little to offer those who object to the existence of the sublocal patrol. While American culture has norms of equal provision of city services,<sup>75</sup> the Equal Protection Clause does not command it.<sup>76</sup> Some commentators have suggested that the law ought to resolve issues in private policing by recognizing a substantive due process right to minimally adequate policing.<sup>77</sup> Yet, the trajectory of the current Supreme Court is to sharply curtail the number of rights encompassed within the doctrine of substantive due process, recognizing only that which is objectively and deeply rooted in American history.<sup>78</sup> Government-provided preventive policing lacks these deep roots in the Anglo-American tradition.<sup>79</sup>

As such, federal constitutional law may not protect against the sublocal patrol’s unequal form. There is, however, another charge levied at sublocal patrols that the law may have an answer for: that the patrols are corrupt. Even as American law elects not to distinguish between the powers of the public and private police, it forces a financial separation between public officers

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<sup>72</sup> Kohler, *supra* note 1.

<sup>73</sup> U.S. DEPT. OF JUST., C.R. DIV., *supra* note 47, at 73.

<sup>74</sup> *Supra* note 44.

<sup>75</sup> Briffault, *supra* note 8, at 455.

<sup>76</sup> See *Goldstein v. City of Chicago*, 504 F.2d 989, 991, 992 (7th Cir. 1974) (applying a deferential rational basis test to claims that the city violated the Equal Protection Clause when discriminating against condominium owners in the provision of garbage services); *Johnson v. City of Arcadia*, 450 F. Supp. 1363, 1379 (M.D. Fla. 1978) (holding that to prove the city violated the Constitution by unequally providing municipal services, the plaintiffs must show the city intended to discriminate by race).

<sup>77</sup> See Sklansky, *supra* note 7, at 1281 (“The Supreme Court has refused to recognize a right to minimally adequate protection under the Due Process Clauses, reasoning that the clauses guard only against injuries directly inflicted by government.”); *id.* at 1284–85 (“[J]udges and scholars should begin to give fresh thought to whether law has a role to play in assuring minimally adequate police protection.”).

<sup>78</sup> See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2247 (2022) (“[A] fundamental right must be ‘objectively, deeply rooted in this Nation’s history and tradition . . . .’” (quoting *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997))).

<sup>79</sup> See *infra* Section II.A.

and private funds. Anti-corruption statutes, adopted by states across the country, prohibit payments to public officers that warp governmental priorities and erode confidence in the state. In the next Part, I contend that the sublocal patrol violates these anti-corruption laws.

## II. SUBLOCAL PATROLLING AND THE CORRUPTION OF PUBLIC DUTY

Having defined the sublocal patrol and explored the conditions facilitating its rise, this Note now turns to a legal doctrine that may provide a check on the phenomenon—common law and state statutory prohibitions on privately profiting from public office. This Part first traces the origins and evolution of state laws barring the mixture of public power and private compensation. It observes that Anglo-American law has long prohibited law enforcement officers from accepting private money in exchange for acts within the scope of their public duties.

Next, this Part explores how courts distinguish between public policing duties and private officer actions. In particular, it identifies an inconsistency in the law's treatment of moonlighting officers. Courts generally categorize off-duty officers as acting pursuant to public duty when criminal defendants are prosecuted for assaulting or obstructing them, but not when evaluating if their employment contracts violate anti-corruption laws.

This Part then observes that American courts reached these inconsistent conclusions by adopting an almost quantum mechanical understanding of officer moonlighting. Courts have reasoned that off-duty officers are purely private actors when standing guard for their private employers. Witnessing illegal conduct, however, activates these officers' latent public duty and transforms them into purely *public* actors. Because off-duty officers' public and private duties never mix, they may freely accept private compensation for their private work. They may also retain their public officer protections.

This Part concludes by arguing that the courts' current conception of officer moonlighting unravels when applied to the sublocal patrol. Noting that the sublocal patrol lacks any separation between its private prerogatives and its officers' public duties, this Part finds that the patrol's private compensation inevitably influences the exercise of public duty. As a result, this Note argues that the sublocal patrol's mixture of private money and public power violates state anti-corruption laws.



### A. Anti-Corruption Efforts and the Private Past of the Public Police

#### 1. English Roots

Concerns that officers were privately profiting from their public powers trace back to early in the English common law system.<sup>80</sup> Profiting from public office was recognized as an ill in itself by common law courts over four hundred years ago.<sup>81</sup> In 1605, the Court of the King's Bench found an agreement between a sheriff and a private party compensating the sheriff for executing duties he was already obligated to perform unlawful and “quasi extortion.”<sup>82</sup> The Court, therefore, prohibited sheriffs from seeking additional compensation for an action they were already obligated to take. In 1760, the Court extended the prohibition, finding it “oppression” for a sheriff to accept private money in exchange for an action within their discretion.<sup>83</sup>

These early cases were decided against the backdrop of a system of public safety in transition. Anglo-American policing, now tightly intertwined with our conception of the state, did not originate from top-down governmental action, but from grassroots, local efforts.<sup>84</sup> The sheriffs reprimanded for extortion and bribery in the aforementioned cases were public officers—enforcers of the king's peace and enablers of the development of the common law.<sup>85</sup> Yet while these sheriffs were responsible for serving processes and writs, executing decrees of the court, and conserving peace within their county,<sup>86</sup> their impact on day-to-day public safety was limited. For routine, preventative policing, English cities and towns relied upon the resident-led night watch and constabulary system of collective, obligatory labor.<sup>87</sup> Decentralized, largely limited to crime deterrence, and poorly compensated, this system crumbled under the pressures of increasing urbanization and industrialization of the seventeenth

<sup>80</sup> See James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 844–45 (1988) (tracing prohibitions on public extortion and bribery back to the reign of King Edward I and the First Statute of Westminster).

<sup>81</sup> *Bridge v. Cage* (1791) 79 Eng. Rep. 89 (CP).

<sup>82</sup> *Id.* (holding that it was the sheriff's “duty and oath . . . to execute the writ; and therefore to have a promise of consideration for executing it is not lawful; and it is quasi extortion, and therefore ill and unlawful” (emphasis omitted)).

<sup>83</sup> *Stotesbury v. Smith* (1760) 97 Eng. Rep. 635, 636 (KB).

<sup>84</sup> ROBERT C. WADMAN & WILLIAM THOMAS ALLISON, *TO PROTECT AND TO SERVE: A HISTORY OF POLICE IN AMERICA* 2 (2004). Policing remains a uniquely local function today. See K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 686 (2020) (finding that policing is a quintessentially local matter of public policy); see also Kazis, *supra* note 9, at 421 (“[L]ocal government is the primary provider of police services.”).

<sup>85</sup> Sklansky, *supra* note 7, at 1196.

<sup>86</sup> Raymond Moley, *The Sheriff and the Constable*, 146 ANNALS AM. ACAD. POL. & SOC. SCI. 28, 29 (1929).

<sup>87</sup> WADMAN & ALLISON, *supra* note 84, at 2.

and eighteenth centuries.<sup>88</sup> In its stead, both public corruption and new, market-based approaches to securing public safety flourished.<sup>89</sup> By the eve of reform efforts, London relied on a public safety system composed of a “loosely coordinated patchwork of public and private [policing] arrangements,”<sup>90</sup> with forty-five different parishes within a ten-mile radius of the city leveraging some form of private police patrols.<sup>91</sup>

It was not until 1829, when the Metropolitan Police Act passed Parliament, that preventative policing became a government-run, tax-funded, full-time occupation.<sup>92</sup> The Act did not entirely prohibit public officers from working on behalf of private actors. However, through a series of incremental reforms, it gave the London city government a monopoly on constabulary patrols. So, all requests for policing services at “[b]alls, [d]inner [p]arties, or on any other occasion” were required to route through the police divisions.<sup>93</sup> Payments were made to the state, rather than directly to the constables themselves, who were compensated by their division, according to a fixed allowance schedule.<sup>94</sup> By stamping out individual contracting for policing services, the Act brought individuals engaging in preventative policing within the strictures of prohibitions on profiting from public office. In doing so, the Act transformed the English bobby into “a public servant in the contemporary sense of the word.”<sup>95</sup>

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<sup>88</sup> Sklansky, *supra* note 7, at 1197–98. By the early 1700s, all English citizens with the financial resources to do so hired substitutes to complete their night watch or constabulary service, rendering the collective system dysfunctional. See T.A. CRITCHLEY, A HISTORY OF POLICE IN ENGLAND AND WALES, 900–1966, at 18 (1967) (“No man who could afford to pay his way out of serving as constable in the reign of King George I neglected to do so. . . . When the admirable principle of personal service died out, the office sank to its lowest grade, and men paid deputies who were ‘scarcely removed from idiotism.’”).

<sup>89</sup> See Sklansky, *supra* note 7, at 1189–90. Among those market experiments was the Thames River Police. Formed in response to “sustained losses by Pillage and Plunder” at the Port of London, the force sought to deter gangs of thieves by establishing a continuous police patrol. Initially deriving four-fifths of its support from private shipping interests, after two years of successful operation Parliament converted the effort into a public concern. See H. Dalton, *The Thames Police*, 8 POLICE J. 90, 90 (1935); CRITCHLEY, *supra* note 88, at 42.

<sup>90</sup> Sklansky, *supra* note 7, at 1202.

<sup>91</sup> Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 584 (2005).

<sup>92</sup> Sklansky *supra* note 7, at 1202–03.

<sup>93</sup> L. Radzinowicz, *Trading in Police Services: An Aspect of the Early 19th Century Police in England*, 102 U. PA. L. REV. 1, 22 (1953).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 18. This transformation was not without challenges. In 1851, the London Police Commissioners found occasion to remind division superintendents that as a result of their duties to the public, it was inappropriate for them to seek additional compensation through service to private clients. *Id.* at 22.

2. *The Early American Approach:  
Defining the Boundaries of Public Duty*

The Metropolitan Police Act served as a model for the nineteenth century creation of urban police departments across the United States.<sup>96</sup> Yet unlike in London, newly minted American police forces lacked a monopoly on the provision of preventive policing. Historians have observed that “[n]ot only did the [American] state fail to monopolize violence through the organization of police forces, it often did not even attempt to do so.”<sup>97</sup> Policing for hire boomed in the United States in the second half of the nineteenth century; private actors and municipally appointed policemen alike proffered their services on the private market.<sup>98</sup> As the distinction between public and private policing remained blurry, challenging questions emerged regarding the proper bounds and exercise of public duty.

By the early twentieth century, most American states had incorporated the English prohibition on privately profiting from public office into their common law.<sup>99</sup> Explaining the importance of applying the prohibition to law enforcement officers, the Pennsylvania Supreme Court proclaimed that “[i]t would open a door to profligacy, chicanery, and corruption, if the officers appointed to carry out the criminal law were permitted to stipulate by private contract.”<sup>100</sup> In 1899, the U.S. Supreme Court affirmed the prohibition’s place in American law.<sup>101</sup>

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<sup>96</sup> Sklansky, *supra* note 7, at 1202. New York, Boston, and Philadelphia all watered down their transitions to city-run police in response to libertarian objections to centralized authority. In 1833, where London staffed one “bobbie” for every 434 residents, Philadelphia provided only one policeman for every 3,352. WADMAN & ALLISON, *supra* note 84, at 24. Rural areas and the American West often lacked public police altogether late into the nineteenth century. Stoughton, *supra* note 7, at 126.

<sup>97</sup> Jonathan Obert, *The Coevolution of Public and Private Security in Nineteenth-Century Chicago*, 43 LAW & SOC. INQUIRY 827, 829 (2018). American government’s failure to monopolize violence stands in stark contrast to modern political theorists, including John Locke, Max Weber, and Robert Nozick, who advanced the idea “that the very point of government is to monopolize the coercive use of force, in order to ensure public peace, personal security, and the use and enjoyment of property.” Sklansky, *supra* note 7, at 1188.

<sup>98</sup> Sklansky, *supra* note 7, at 1210.

<sup>99</sup> See, e.g., *Morrell v. Quarles*, 35 Ala. 544, 548–49 (1860) (“A promise to reward a public officer, aside from a compensation directed by the law, for the discharge of an official duty, is void.”); *Lees v. Colgan*, 120 Cal. 262, 265 (1898) (“[A] public officer working for a fixed compensation, or whose fees are prescribed by law, cannot demand or contract for a reward for services rendered in the line or scope of his official duty.”); *Mason v. Manning*, 150 Ky. 805, 807 (1912) (“[A]n agreement to pay money to a sheriff or other public officer for doing what he ought to do, is void and against public policy.”); *Kick v. Merry*, 23 Mo. 72, 76 (1856) (“[T]o permit an officer to stipulate for extra compensation for services to which the public was entitled, would lead to great corruption and oppression in office.”).

<sup>100</sup> *Smith v. Whildin*, 10 Pa. 39, 40 (1848).

<sup>101</sup> *United States v. Matthews*, 173 U.S. 381, 414–15 (1899). The Supreme Court observed that:

Nevertheless, American courts did not create any substantive doctrines defining what policing activities were the *exclusive* realm of the state.<sup>102</sup> Private actors could continue to provide policing services and be privately compensated for their efforts. Only private money for “official” or “public” duty was prohibited. Without substantive distinctions between private and public policing, nineteenth century courts faced a difficult legal question that continues to bedevil courts today: what differentiates unlawful private compensation of public duty from lawful private compensation of purely private activity?

This question first presented itself when public officers sought private rewards for apprehending fugitives.<sup>103</sup> If the officer acted pursuant to public duty during the arrest, he was ineligible to receive a reward. Alternatively, if that same officer acted pursuant to his personal prerogative, the officer was free to collect private compensation. Nineteenth and early twentieth century courts resolved the ambiguity between public and private action by looking to the jurisdiction of the officer, largely defined in geographical terms. In *Morell v. Quarles*, the Alabama Supreme Court permitted a Louisiana police officer to claim a reward for apprehending a fugitive from Alabama because it was not shown that police officers in Louisiana had a legal duty to arrest fugitives of crimes committed in another state.<sup>104</sup> Consequently, the Louisiana officer was not acting pursuant to public duty.<sup>105</sup> Further, in *Somerset Bank v. Edmund*, the Ohio Supreme Court found that a constable could not collect a reward for arresting someone who committed a felony within his jurisdiction.<sup>106</sup> While the constable claimed the arrest was made

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It is undoubted that both in England and in this country it has been held that it is contrary to public policy to enforce in a court of law, in favor of a public officer, whose duty by virtue of his employment required the doing of a particular act, any agreement or contract made by the officer with a private individual, stipulating that the officer should receive an extra compensation or reward for the doing of such act. An agreement of this character was considered at common law to be a species of quasi extortion, and partaking of the character of a bribe.

*Id.*

<sup>102</sup> Sklansky, *supra* note 7, at 1274 (arguing that legal treatment of policing has been determined less by “categories of actions” than “categories of actors” as “the notion of the state officer as a distinct and salient legal entity has shown remarkable persistence, notwithstanding . . . a surprising vagueness about what powers officers may exercise”). In 1893, Congress considered curtailing the power of private police forces. A Senate report investigating the bloody Homestead steel strike declared that “the employment of armed bodies of men for private purposes . . . should not be resorted to. Such use of private armed men is an assumption of the State’s authority by private citizens.” Nevertheless, the report ultimately found that it was unclear whether Congress possessed the power to regulate the issue and deferred the issue to the states. S. REP. NO. 52-1280, at xv (1893).

<sup>103</sup> See, e.g., *Morrell*, 35 Ala. at 544–46; *Somerset Bank v. Edmund*, 81 N.E. 641, 642 (Ohio 1907).

<sup>104</sup> 35 Ala. at 548–49.

<sup>105</sup> *Id.*

<sup>106</sup> 81 N.E. at 643.

“in his individual capacity, as a private citizen,” the court rejected the contention, finding that:

A constable in this state is, by virtue of his office, a conservator of the peace, and whenever he has knowledge, or specific information, that a felony has been committed at a particular locality within his jurisdiction, it is clearly his duty to take diligent and prompt measures for the arrest and apprehension of the perpetrators of said crime . . . .<sup>107</sup>

Early courts, therefore, envisioned police officers as imbued with intrinsic public duties within their jurisdiction. External circumstances, such as the officer being off duty, could not transform an exercise of those duties into a privately compensable act.

In the late nineteenth and early twentieth century, this robust notion of public duty was codified in state statutes. Pennsylvania, which continues to have some of the greatest restrictions on private employment of public police officers today,<sup>108</sup> amended its state code in 1897 and made it unlawful “for any [municipal] policeman to charge or accept any fee or other compensation, in addition to his salary, for any service rendered or performed by him of any kind or nature whatsoever pertaining to his office or duties as a policeman.”<sup>109</sup> In some states, the prohibition was expressed in more general terms that outlawed the receipt of gratuities or emoluments by public officers on account of their position or office.<sup>110</sup> For example, California prohibits officers from receiving “any emolument, gratuity, or reward, or any promise thereof . . . for doing an official act.”<sup>111</sup> Still other states frame their prohibitions on profiting from public office in antibribery terms. For example, Missouri outlaws conferring on “any public servant any

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<sup>107</sup> *Id.*

<sup>108</sup> The Philadelphia Police Department prohibits its officers from engaging in off-duty security work for either private or other public entities because leadership felt that “the practice wasn’t fair and that policing wasn’t just for those who could afford it.” James Pilcher, *For Cincinnati Cops, Off-Duty Work Often a Second Job*, CIN. ENQUIRER (July 2, 2018, 3:49 PM), <https://www.cincinnati.com/story/news/your-watchdog/2017/06/08/cincinnati-cops-off-duty-work-often-second-job/354775001/> [<https://perma.cc/6GLH-AFP8>].

<sup>109</sup> 53 PA. STAT. AND CONS. STAT. § 633 (West 1897).

<sup>110</sup> *See, e.g.*, ALA. CODE § 36-25-5(a) (1973) (“No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself”); N.Y.C. CHARTER § 2604(b)(13) (1988) (“No public servant shall receive compensation except from the city for performing any official duty or accept or receive any gratuity from any person whose interests may be affected by the public servant’s official action.”).

<sup>111</sup> CAL. PENAL CODE § 70 (West 1872).

benefit, direct or indirect, in return for . . . action or exercise of discretion as a public servant.”<sup>112</sup>

These anti-corruption laws helped bolster the image of policing as a quintessentially professional, and public, service. From 1930 to 1970, the public police appeared ascendant. Some scholars even remarked that private policing was “an anachronistic institution,” irrelevant to modern life.<sup>113</sup> Litigation over the proper bounds of a police officer’s public duty largely went quiet during this period. Yet, private policing’s retreat proved temporary. As private policing organizations shifted focus “from the detection and apprehension business to the preventive patrol business,”<sup>114</sup> a new line of cases emerged. As the next Section will explore, courts were asked to define the public–private nature not of reward-seeking,<sup>115</sup> but of police officers moonlighting as security guards on behalf of private corporations. Namely, what distinguishes unlawful public corruption from lawful off-duty employment?

## B. Modern Anti-Corruption Law and the Moonlighting Police Officer

### 1. The Pervasive Practice of Police Officer Moonlighting

While the public largely assumes the uniformed police officers they encounter are working on behalf of the government,<sup>116</sup> moonlighting police officers are pervasive in contemporary society. In 1988, a study of trends in private law enforcement in the United States found that the number of off-duty, uniformed police officers working for private parties exceeded the number of on-duty police officers.<sup>117</sup> In 2015, Professor Seth Stoughton

<sup>112</sup> MO. ANN. STAT. § 576.010 (West 1977). West Virginia’s code has a similar prohibition. W. VA. CODE ANN. § 61-5A-3 (West 1970) (“A person is guilty of bribery . . . if he . . . accepts or agrees to accept from another, directly or indirectly . . . [a]ny pecuniary benefit as consideration for the recipient’s official action as a public servant . . .”).

<sup>113</sup> Sklansky, *supra* note 7, at 1219 (quoting Clifford D. Shearing, *The Relation Between Public and Private Policing*, in MODERN POLICING 408 (Michael Tonry & Norval Morris eds., 1992)).

<sup>114</sup> *Id.* at 1220.

<sup>115</sup> While contractual disputes over bounties are rare today, they are not nonexistent. For a modern reincarnation of early fugitive reward cases, see *Slattery v. Wells Fargo Armored Serv. Corp.*, 366 So. 2d 157, 158–59 (Fla. Dist. Ct. App. 1979), which holds that a licensed polygraph operator employed by the office of the State Attorney could not collect a \$25,000 private reward for extracting a confession of murder from a suspect in an unrelated matter.

<sup>116</sup> See Leon Neyfakh, *The Blurred Blue Line*, SLATE (Sept. 1, 2016, 10:00 AM), <https://slate.com/news-and-politics/2016/09/moonlighting-police-officers-should-private-companies-be-able-to-hire-off-duty-cops.html> [<https://perma.cc/YE88-5M35>] (expressing that the author “had no idea that police officers were allowed to do off-duty work for private employers while wearing their uniforms and carrying their service weapons”).

<sup>117</sup> Alison Wakefield & Mark Button, *Private Policing in Public Spaces*, in THE OXFORD HANDBOOK OF POLICE AND POLICING 571, 577 (Michael D. Reisig & Robert J. Kane eds., 2014).

conducted a survey of law enforcement agencies' moonlighting policies.<sup>118</sup> More than 80% of responding agencies permitted their officers to moonlight for private employers.<sup>119</sup> While few agencies rigorously tracked the practice, frustrating attempts to precisely define its extent, Professor Stoughton found that "[f]ar more officers across the country may be working for private employers than is commonly assumed."<sup>120</sup> Just under 43% of the sworn officers at agencies which did track secondary employment engaged in some form of private, off-duty policing work.<sup>121</sup> Professor Stoughton estimated that public police officers may spend as many as forty-three million hours moonlighting each year.<sup>122</sup>

The public's difficulty distinguishing between on-duty and moonlighting officers is generally regarded as a feature of the practice, not a bug. The increased authority that accompanies a uniformed police officer can often more effectively deter crime and secure order.<sup>123</sup>

In addition to blurring the public's perception, officer moonlighting may also muddy functional distinctions between public and private policing. Off-duty officers retain access to the knowledge, people, and technologies of the public policing system while moonlighting. Private employers prize this less visible connection to public police departments, too. When asked about private patrols in Chicago's Bucktown neighborhood, Alderman Brian Hopkins described them as a "force multiplier": "You actually do have police officers on the street. They just happen to be in security vehicles as opposed to police cars, but their experience comes with them."<sup>124</sup> Furthermore, as discussed in Section I.C, informal relationships between off-duty officers and public police departments may ensure availability of

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<sup>118</sup> Seth W. Stoughton, *Moonlighting: The Private Employment of Off-Duty Officers*, 2017 U. ILL. L. REV. 1847, 1857 (2017). 162 state and local police departments, employing approximately 20% of all state and local officers in the United States, responded to the survey. *Id.*

<sup>119</sup> *Id.* at 1858.

<sup>120</sup> *Id.* at 1864.

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

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

<sup>123</sup> See Matier, *supra* note 45.

<sup>124</sup> Joe Barrett, *In Chicago, Wealthy Neighborhoods Hire Their Own Private Police as Crime Rises*, WALL ST. J. (Apr. 29, 2022, 9:00 AM), <https://www.wsj.com/articles/in-chicago-wealthy-neighborhoods-hire-their-own-private-police-as-crime-rises-11651237201> [<https://perma.cc/Y2FT-3GD3>].

backup police assistance<sup>125</sup> and grant preferential access to technologies of the state.<sup>126</sup>

The blurry line between officers on public and private duty is not only advantageous to the officers' private employers—it also often serves municipal police department objectives. When moonlighting officers are indistinguishable from the on-duty public police, city departments may leverage them to enhance community perceptions of public safety—all on the private client's dime.<sup>127</sup> Police agency policies reflect this goal. Professor Stoughton found that more than half of the agencies surveyed *required* moonlighting officers to wear their official police uniform and an additional 26% of agencies either permitted the practice or had no policy regarding it.<sup>128</sup>

The intentional blurring of public and private roles has produced confusion among the American judiciary and public alike. Courts have struggled to clearly identify when American law ought to treat moonlighting officers as public officials, or, alternatively, when the law ought to regard these officers as private individuals. The next Section explores these struggles and the inconsistency they have produced.

## 2. *Finding Public Duty in “Off the Clock” Actions*

The question of moonlighting officers' public-private status has most frequently arisen in American courtrooms as a result of the prosecution of crimes committed against them. To deter violence against the police, the law often punishes crimes against police officers more severely. For example, while resisting a citizen's arrest is not a crime, resisting an arrest by a police officer is.<sup>129</sup> Defendants charged with murdering a police officer may also be subject to sentence enhancements.<sup>130</sup> To secure a guilty verdict on these charges, prosecutors must prove, beyond a reasonable doubt, that the officer-victim was acting pursuant to his or her official duties at the time of the

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<sup>125</sup> See D'Souza, *supra* note 46, at 80–81 (noting that while some participants in a study of BID security teams had no personal connection to the city police, these officers reported feeling that they could rely on public police backup because their managers were all retired city police officers).

<sup>126</sup> For instance, St. Louis Metropolitan Police officers searched department databases and arrested the suspected perpetrator of burglaries occurring within a BID following an email from their supervisor at TCF. See Kohler, *supra* note 1.

<sup>127</sup> See ALBERT J. REISS, NAT'L INST. JUST., PRIVATE EMPLOYMENT OF PUBLIC POLICE 8 (1988) (“Municipalities and their police generally were not averse to meeting the demand of these private interests, especially since . . . they were enhancing the collective welfare for public order. A public good seemingly was supplied at private cost.”).

<sup>128</sup> Stoughton, *supra* note 118, at 1879.

<sup>129</sup> See MASS. GEN. LAWS ANN. ch. 268, § 32B (West 1995) (“A person commits the crime of resisting arrest if he knowingly prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor . . .”).

<sup>130</sup> See N.C. GEN. STAT. ANN. § 15A-2000(e)(8) (West 1977).



offense.<sup>131</sup> As a result, prosecution of these cases has forced modern courts to grapple with moonlighting officers' dual public-private roles.

Compelled to choose a side, American courts have been reluctant to rule that a moonlighting officer's actions fall entirely outside the scope of his or her official duties. Courts have, instead, conducted a functional inquiry and found public duties embedded within moonlighting officers' ostensibly private employment.

As an initial matter, courts deciding these cases have rejected two formalistic distinctions between moonlighting officers and on-duty police: (1) the officer's status as on- or off-the-clock, and (2) the source of the officer's compensation. Jurisdictions throughout the country have found that an officer's on- or off-the-clock status is irrelevant to whether the officer was acting pursuant to public duty, because police officer duties extend beyond the end of the officer's shift.<sup>132</sup> For example, in *Meyers v. State*, the Supreme Court of Arkansas explained the all-encompassing public responsibilities that attach to public police officers and observed that they are "in a sense, on duty 24 hours a day, seven days a week and [are] not relieved of [their] obligation to preserve the peace while 'off duty.'"<sup>133</sup>

Courts have similarly refused to rely upon the source of an officer's compensation to assess whether the officer was acting pursuant to public or

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<sup>131</sup> See, e.g., *id.* (requiring that a law enforcement officer murder victim be "engaged in the performance of his official duties" at the time of the murder, or be murdered "because of the exercise of his official duty" in order for the victim's law enforcement officer status to constitute an aggravating circumstance); NEB. REV. STAT. ANN. § 28-930(1)(b) (West 1982) (requiring that the peace officer be "engaged in the performance of his or her official duties" at the time of the assault in order to charge a criminal defendant with assault on an officer); WASH. REV. CODE ANN. § 9A.76.020(1) (West 1995) ("A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." (emphasis added)).

<sup>132</sup> See, e.g., *State v. Wilen*, 539 N.W.2d 650, 659 (Neb. Ct. App. 1995) ("[R]egardless of whether they are officially on duty . . . police officers have a duty to preserve the peace and to respond as police officers at all times."); *Arrington v. City of Chicago*, 259 N.E.2d 22, 24 (Ill. 1970) (noting that a peace officer "has the duty to maintain public order wherever he may be; his duties are not confined to a specific time and place"); *District of Columbia v. Coleman*, 667 A.2d 811, 818 n.11 (D.C. 1995) ("Members of the police force are 'held to be always on duty', and are required to take police action when crimes are committed in their presence." (quoting 6A DCMR § 200.4 (1988))); *Duncan v. State*, 294 S.E.2d 365, 366 (Ga. Ct. App. 1982) ("[A]ll law enforcement officers have the general duty to enforce the law and maintain the peace. They carry this duty twenty-four hours a day, on and off duty."). *But cf. Stewart v. State*, 527 P.2d 22, 24 (Okla. Crim. App. 1974) ("[A]s a matter of law when an off-duty police officer accepts private employment and when engaged in this private employment he becomes a private citizen.").

<sup>133</sup> 484 S.W.2d 334, 339 (Ark. 1972).

private duty.<sup>134</sup> For instance, the Supreme Court of North Carolina found that a police officer, who was murdered while providing private security services to the Red Roof Inn, was nevertheless acting pursuant to public duty. In fact, in an unusually direct examination of the private employer's motives, the court held that the Red Roof Inn's reasons for hiring the officer reinforced the court's finding that the officer was acting as a public official. The court held that:

Officer Griffin was hired by the Red Roof Inn primarily on the basis of his official, governmental status with all the advantages which this status would bring to any secondary employment . . . . While he also served to benefit the Red Roof Inn, his ultimate or primary purpose was to keep the peace at all times without regard to his "off-duty" or "off-shift" status.<sup>135</sup>

In lieu of formalistic distinctions between public and private action, courts have looked to several functional factors to support findings that an off-duty officer was acting pursuant to public duty. These factors include (1) the public's perception of the moonlighting officer,<sup>136</sup> (2) the nature of the officer's moonlighting activities,<sup>137</sup> and (3) the moonlighting officer's motivations.<sup>138</sup>

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<sup>134</sup> See, e.g., *State v. Gaines*, 421 S.E.2d 569, 576 (N.C. 1992) ("The fact that the law enforcement officer receives supplemental compensation from a private employer, along with his continuing salary from public employment, is of no consequence."); *Wilén*, 539 N.W.2d at 660 (finding the same).

<sup>135</sup> *Gaines*, 421 S.E.2d. at 576.

<sup>136</sup> See, e.g., *State v. Graham*, 927 P.2d 227, 233 (Wash. 1996) (en banc) (noting that off-duty officers were in uniform, identified themselves as police officers, and the defendant who was convicted of obstructing a public servant and resisting arrest was under the impression that they were police officers); *Oulds v. Commonwealth*, 532 S.E.2d 33, 34–36 (Va. 2000) (affirming conviction for assault and battery on an off-duty police officer where the officer was dressed in uniform, carrying handcuffs and a side arm, and the defendant recognized him as a law enforcement officer); *Bates v. State*, 172 So.3d 695, 701 (Miss. 2015) (noting that the fact that an officer was in full uniform is "a factor for the jury to take into consideration on the question of whether [the off-duty officer] was acting within the scope of his duty as a law-enforcement officer"); *Stewart*, 527 P.2d at 24 (finding no evidence that off-duty patrolman was carrying out official police duties when he was neither in uniform nor carrying a gun).

<sup>137</sup> See, e.g., *Wilén*, 539 N.W.2d at 660 (finding that the functions performed by an off-duty officer working as a security guard at a fast food restaurant "are consistent with the powers and duties of her primary employment as a law enforcement officer for the city"); *Graham*, 927 P.2d at 231 ("[M]ost [jurisdictions] have held that the courts must look to the particular facts of any given case to determine whether the officer involved was acting on behalf of the private employer or, instead, was discharging his or her 'official powers or duties' when the officer stopped or arrested the individual suspected of violating the law.").

<sup>138</sup> See, e.g., *State v. Phillips*, 520 S.E.2d 670, 677 (W. Va. 1999) (noting that the conduct of an officer who was working as a private security guard "did not spring from the private motivations of his employer to withhold or activate a public officer's duty at will. They sprang from his determination of what he perceived to be the appropriate response to a public disturbance being committed in his presence").

Many courts have, for example, relied upon the fact that the officer was uniformed to support a finding that the officer was acting pursuant to public duty.<sup>139</sup> Courts have also pointed to whether the police officers introduced themselves as public officers,<sup>140</sup> emphasizing the importance of public perception to the analysis.

When considering the nature of the officer's functions, some courts have characterized public duty in broad terms. For instance, a Nebraska court found that because the moonlighting officers were responsible for curtailing disorderly and unlawful conduct, a function shared by their primary employment as public officers, they acted pursuant to public duty when engaging in secondary employment.<sup>141</sup> Other states have taken a narrower view of the actions relevant to the inquiry. For example, the Washington Supreme Court found that moonlighting officers were not acting pursuant to public duty when patrolling public streets as security guards.<sup>142</sup> Once the officers saw an individual they believed to be in possession of drugs, the officers' function transformed into "arrest[ing] drug offenders," and could be properly attributed to the public police.<sup>143</sup>

Finally, courts have considered a subjective factor—the officer's motivations at the time of the incident. Courts have, for example, emphasized that a moonlighting officer's employer never directed him to exercise official power or arrest the criminal defendant when finding the officer was acting pursuant to his own inherent public duties.<sup>144</sup>

When determining the degree of protection that the law should afford moonlighting officers, American courts have readily acknowledged that moonlighting arrangements frequently mix public with private duty. Yet, as the next Section chronicles, these same courts have been reluctant to

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<sup>139</sup> See, e.g., *Graham*, 927 P.2d at 233 (finding an inference of public duty is particularly justified when the officer–victim is in uniform); *Oulds*, 532 S.E.2d at 35–36 (noting that the officer was in uniform and the defendant was aware that he was a law enforcement officer); *Bates*, 172 So.3d at 701 (emphasizing the importance of the fact that the officer was "in full uniform" to finding that he was acting pursuant to a public duty for the purposes of the criminal statute); *Stewart*, 527 P.2d at 24 (noting that because the off-duty officer was not in uniform or carrying a gun, there was no evidence that he was performing official duties at the time the defendant assaulted him).

<sup>140</sup> See, e.g., *Tapp v. State*, 406 N.E.2d 296, 302 (Ind. Ct. App. 1980) (holding that the nonuniformed, off-duty officer was engaged in the performance of his official duties when he "displayed his police badge and announced his status" to the defendant).

<sup>141</sup> *Wilén*, 539 N.W.2d at 660.

<sup>142</sup> *Graham*, 927 P.2d at 233.

<sup>143</sup> *Id.*

<sup>144</sup> See *Phillips*, 520 S.E.2d at 677 (finding that "the record reflects that Officer Dytzel, of his own volition and duty as a police officer, made the independent decision to arrest Appellant" and therefore his actions were pursuant to his public duties as a police officer); *State v. Kurtz*, 278 P.2d 406, 408 (Ariz. 1954) ("Let us apply this test: were the officers acting in 'vindication of public right and justice' or were they merely performing acts of service to their private employer?").

recognize this amalgamation of public and private duty when assessing whether the law ought to protect the *public* from the corrupting tendencies of officer moonlighting.

### 3. *Officer Moonlighting and the Anti-Corruption Contradiction*

The decisions discussed in the prior Section possess an instinctive logic. At its most coherent, the law matches the public's reasonable expectations: commit a crime against someone dressed and identified as a police officer, be punished accordingly. The decisions also create an inconsistency in American law. American courts frequently consider moonlighting officers to be acting pursuant to public duty under criminal laws that provide harsher penalties for violence against a police officer. But moonlighting officers are considered purely private actors for the purposes of applying anti-corruption laws that bar public officers from accepting private money in exchange for the execution of public duties.

Most courts do not directly address this discrepancy. In *State v. Phillips*, however, West Virginia's highest court attempted to harmonize the law. In this case, the court held that Wal-Mart did not pay its moonlighting officers for official acts as public servants, but rather to monitor its cash registers—a purely private task.<sup>145</sup> While performing this nonofficial task, though, these officers had an independent and simultaneous legal duty to “aid in the enforcement of the criminal laws of the state.”<sup>146</sup> So, when the officer in *Phillips* determined that a public disturbance was occurring in his presence, his status transformed from that of Wal-Mart security guard to that of a public police officer.<sup>147</sup> At no point did the officer's two sets of duties, motivations, or payments intermingle. The officer's public and private duties were both concurrent and binary. This conception of officer moonlighting enabled the state to charge the defendant with assaulting a police officer without finding that the officer's secondary employment contract violated West Virginia's Bribery and Corrupt Practices Act.<sup>148</sup>

While not directly addressing the inconsistency between laws governing assault on a police officer and those concerning public corruption, courts in other states have similarly alluded to the idea that witnessing a

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<sup>145</sup> See 520 S.E.2d at 677 (finding that the officer's actions did not constitute public corruption because Wal-Mart was only remunerating the officer for “the services he performed as a security guard . . . [which] consisted mainly of monitoring the cash registers”).

<sup>146</sup> *Id.* at 677 (quoting W.VA. CODE § 8-14-3).

<sup>147</sup> See *id.* at 679 (“[A]n off-duty police officer has the authority and duty to react to criminal conduct at all times . . .”).

<sup>148</sup> *Id.* at 674, 676–77.

crime activates a moonlighting officer's latent public duty.<sup>149</sup> Yet the notion that, by default, a moonlighting officer's actions on behalf of his or her private employer do not constitute an exercise of public duty, stretches credulity. The distinctions courts draw between public and private functions in these cases can ring hollow—such as when the Supreme Court of Washington found that arresting drug dealers was an exercise of public duty, but the patrolling of public streets by uniformed officers was not.<sup>150</sup>

Moreover, as one court observed, moonlighting officers are often hired “on the basis of [their] official, governmental status with all the advantages which this status would bring to any secondary employment.”<sup>151</sup> Should Wal-Mart call 911 requesting assistance with a disorderly customer, there is no guarantee the public police department will prioritize the call. If Wal-Mart already employs an off-duty officer on its premises, it ensures an officer will act, both pursuant to his or her public duty and in service of his or her private employer. Private employers do not regard the public duties of moonlighting police officers as constituting separate physical and mental states, independent of private employment contracts. Moonlighting officers' public duties are integral to their day-to-day responsibilities on behalf of private employers. Indeed, private employers make no secret of their desire to tap into the power of the state via moonlighting officers.<sup>152</sup>

If the West Virginia Supreme Court's approach in *Phillips* seems naïve, then perhaps it might be justified by looking at the consequences of the road not taken. In *People v. Corey*, the California Supreme Court, too, encountered a case charging a defendant with battery on a police officer, where the officer in question was moonlighting on behalf of a private client at the time of the incident.<sup>153</sup> Observing that California's Penal Code “has specifically made illegal the receipt by any public employee or officer of any ‘emolument, gratuity or reward, or promise thereof . . . for doing an official act,’” the court found that the officer must not have been serving in an official capacity at the time of the battery. Otherwise, the moonlighting arrangement would violate California's anti-corruption statute.<sup>154</sup>

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<sup>149</sup> See, e.g., *Bates v. State*, 172 So.3d 695, 698 (Miss. 2015) (finding that the officer switched from “private security guard” to “law-enforcement mode” when defendant acted in a hostile manner); *State v. Graham*, 927 P.2d 227, 233 (Wash. 1996) (en banc) (finding that when the moonlighting officers believed they saw the defendant holding a bag of drugs “they stepped out of their roles as private security guards and into their roles as police officers”).

<sup>150</sup> *Graham*, 927 P.2d at 233.

<sup>151</sup> *State v. Gaines*, 421 S.E.2d 569, 576 (N.C. 1992).

<sup>152</sup> See, for example, statements of the corporate security executive to the *San Francisco Chronicle* or Alderman Hopkins's comments regarding private patrols in Chicago, *supra* notes 45, 124.

<sup>153</sup> 581 P.2d 644, 646 (Cal. 1978).

<sup>154</sup> *Id.* at 649 (alteration in original) (quoting CAL. PENAL CODE § 70).

As a matter of law, the California Supreme Court held that police officers were not acting pursuant to public duty while working for private employers.<sup>155</sup> In a subsequent civil suit, the court reaffirmed this finding, holding that moonlighting officers were acting pursuant to private duty and therefore were subject to civil claims for false arrest.<sup>156</sup> Political objections to this course of events mounted. In 1997, the California legislature amended the anti-corruption statute to exclude moonlighting officers. The statute now reads:

Nothing in this section precludes a peace officer . . . from engaging in, or being employed in, casual or part-time employment as a private security guard or patrolman by a private employer while off duty from his or her principal employment and outside his or her regular employment as a peace officer . . . .<sup>157</sup>

American law largely excepts moonlighting officers from state statutory and common law prohibitions on profiting from public office, even as it recognizes that actions taken while moonlighting may be found to be pursuant to public duty under other legal doctrines. Decisions of various state courts demonstrate this, and the reaction of the California legislature to *People v. Corey* reinforces it. The courts' reasoning and the California legislature's amendment are worth careful examination, however. As I contend in the next Section, the courts' legal analysis and the text of California's amended statute compel a second look at whether officer moonlighting, as implemented in improvement district sublocal patrolling, violates anti-corruption law.

### *C. Sublocal Patrols and the Inapplicability of Existing Exceptions to Anti-Corruption Law*

Having explored American courts' general efforts to exclude moonlighting officers from the strictures of anti-corruption laws, it is this Section which turns specifically to sublocal patrolling. Applying existing standards for distinguishing public from private duty, this Section finds that officers moonlighting for the sublocal patrol are inescapably and exclusively public actors. Therefore, the sublocal patrol should not be exempted from state anti-corruption laws.

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<sup>155</sup> *Id.* at 646.

<sup>156</sup> *Cervantez v. J.C. Penney Co.*, 595 P.2d 975, 979–80 (1979).

<sup>157</sup> CAL. PENAL CODE § 70(d)(1) (West 2004). The statute further states “[i]t is the intent of the Legislature by this subdivision to abrogate the holdings in *People v. Corey* . . . and *Cervantez v. J.C. Penney Co.* . . . to reinstate prior judicial interpretations of this section as they relate to criminal sanctions for battery.” *Id.* at § 70(c)(2).

First, this Section notes that the sublocal patrol has a uniquely public character, implicating concerns central to the law's prohibition on profiting from public duty. Next, this Section finds that the public duty of sublocal patrol officers is active, not latent. The default functions and motivations of officers moonlighting on behalf of improvement districts are equivalent to that of the public police. This renders American courts' task of distinguishing sublocal patrolling contracts from unlawful public corruption much more difficult.

Finally, this Section argues that the challenge of substantively distinguishing sublocal patrolling from public corruption can be seen in the plain language of California's amended anti-corruption statute. While the statute expressly authorizes officer moonlighting, it does so by defining moonlighting as employment "outside" of the officer's "regular employment as a peace officer."<sup>158</sup> Yet, American courts would be hard-pressed to explain how sublocal patrolling constitutes employment outside of the officer's regular employment. The struggle to distinguish the sublocal patrol from regular policing reveals a hard truth: the core purpose for instituting a sublocal patrol is to privately purchase the exercise of public duty. As such, sublocal patrolling is the exact kind of arrangement anti-corruption laws seek to foreclose.

### *1. The Sublocal Patrol's Uniquely Public Character*

When evaluating sublocal patrols under factor-based tests of public duty, the results point only one way. Officers moonlighting for improvement districts are acting pursuant to public duty. This public duty is perhaps even more pronounced than that of officers working on behalf of private businesses like Wal-Mart in *Phillips*. Sublocal patrols are oftentimes indistinguishable from the public police. They wear police uniforms, drive in police squad cars, and bear police badges. They are attractive to the neighborhoods they patrol precisely because the community perceives them to be public police. Sublocal patrols are also engaged in a function inseparable from modern conceptions of public police duty—patrolling and securing public streets. Finally, moonlighting officers' subjective motivations are also rooted in public duty. Unlike off-duty officers working on behalf of Wal-Mart, Red Roof Inn, or other private entities, sublocal patrolmen work on behalf of public communities and are funded by public tax revenue. The motivation of the sublocal patrol, to enhance security for residents of a public neighborhood, is indistinguishable from the motivation that animates on-duty officers walking the streets of American communities every day.

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<sup>158</sup> *Id.* at § 70(d)(1).

2. *The Untenability of Selectively Distinguishing  
Public and Private Duty*

When evaluating the sublocal patrol under *State v. Phillip*'s officer moonlighting exception to anti-corruption law, the reasoning of the decision becomes untenable. We can perhaps accept that a Wal-Mart security guard possesses a different set of duties and motivations during a typical hour minding the cash registers than when arresting a disorderly customer. We may also be willing to find that the private compensation provided by the moonlighting officer's private employer is not generally compensating or influencing the exercise of public duty.

This distinction is impossible to maintain for the sublocal patrol. The objective of the patrol is not to monitor cash registers or serve other parochial purposes—it is to ensure safety and order on public streets in the same function as on-duty officers. There is no moment of transformation when, upon witnessing a crime, the latent public duty of moonlighting officers overtakes their private purpose. Deterring, identifying, and responding to crime is the sublocal patrol's *default* purpose. The money provided to sublocal patrol officers cannot be couched as compensation for private services, as the sublocal patrol is both continuously, and exclusively, engaged in public duties on behalf of a public community.

Even so, the sublocal patrol is not configured as a fully public entity. Supporters may wish to portray the patrol as the hyperlocal equivalent of the public police department—not a corruption of it. This misses a key distinction between sublocal patrolling and public policing. While improvement district tax revenues pay for sublocal patrolling, these funds pass through a layer of private management. It is within this layer of private interest that corrupt practices and conflicts of interest can emerge, skewing the overall priorities of the public police department. Look no further than the NOPD prior to the consent decree, where a moonlighting officer, attempting to negotiate a higher rate of pay, told a local business that “[y]ou f\*\*\* with me and you will never see a police car again.”<sup>159</sup> Or, consider TCF, offering a bounty to its moonlighting officers for apprehending someone suspected of robbing a board member's store.<sup>160</sup>

In a sense, the sublocal patrol is both too public and too private. Its duties and functions are too public to fall within the *State v. Phillips* moonlighting officer exception. And its management and compensation methods are too private to regard the patrol as a public entity. As a result, the

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<sup>159</sup> DOJ, C.R. Div., *supra* note 47, at 72.

<sup>160</sup> Kohler, *supra* note 1.



sublocal patrol's impermissible mixture of public duties and private incentives run afoul of state anti-corruption law.

### 3. *The Impossibility of Excepting Sublocal Patrols from Anti-Corruption Statutes*

Even under California's statutory exception to anti-corruption law for moonlighting officers, the sublocal patrol encounters challenges. The statute permits private remuneration of public police officers, so long as the officer's moonlighting is "outside his or her regular employment as a peace officer."<sup>161</sup> The requirement that the moonlighting be outside of regular employment as a police officer is necessary to prevent entirely gutting anti-corruption laws' applicability to the public police. Otherwise, officers would be free to accept private money for the exercise of public power, quintessential bribery, or extortion, by simply labeling the bribe as compensation from "private employment."<sup>162</sup>

Under the terms of the California statute, we may find that moonlighting on behalf of a private client like Wal-Mart is outside the officer's regular employment as a peace officer. Most on-duty public police officers do not find themselves assigned to mind the cash registers of private businesses. Sublocal patrolling poses greater difficulties. Patrolling neighborhood streets to deter crime and ensure public order falls squarely within the bounds of the moonlighting officer's "regular employment as a peace officer." Without some distinction to draw between the officer's public duties and secondary employment, the sublocal patrol remains within the anti-corruption statute's prohibition on private compensation for public duty.

That the sublocal patrol should not be excepted from anti-corruption provisions becomes clearer when considering the empirical consequences of intermingling the public duties of patrol officers with the financial incentives of the private market. In cities where the sublocal patrol has taken root, stories of bribery and extortion are abound. Look no further than the Department of Justice's consent decree with NOPD, finding the paid duty system to form an "aorta of corruption" within the department.<sup>163</sup> Or consider the bounties offered by St. Louis's TCF, allowing a local property developer

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<sup>161</sup> CAL. PENAL CODE § 70(d)(1).

<sup>162</sup> For an example of a defendant that raised such a defense, see *State v. Seneff*. There, the police officer defendant was prosecuted for soliciting and accepting a bribe for recovering and returning a stolen automobile. In rejecting the officer's defense that it was payment for "his personal, off-duty activities," the court emphasized that recovering the automobile fell within the scope of Officer Seneff's public duties. He was, therefore, not free to accept private compensation. *State v. Seneff*, 435 N.E.2d 680, 681–82 (Ohio Ct. App. 1980). Should California's statute not include a clause requiring the moonlighting to occur outside the officer's regular employment, it could inadvertently legalize conduct like Officer Seneff's.

<sup>163</sup> See *supra* note 48 and accompanying text.

to access more attentive police services than the community at large.<sup>164</sup> There, individuals leveraged private money to influence the exercise of public duty, corrupting the public police department in the process.

The law has a means of checking these abuses—the prohibition on privately profiting from public office. This legal doctrine has deep roots in American law, predating the creation of public police forces. It has been incorporated into state common law and anti-corruption statutes across the country and it properly restricts features inherent to sublocal patrolling that corrupt the exercise of the public power to police.

### III. REFORMING THE SUBLOCAL PATROL

Having explored how the sublocal patrol came to be and why it violates American anti-corruption laws, this Part proposes solutions for bringing improvement district security efforts into compliance with the law.

As an initial matter, reforms to the sublocal patrol are more feasible than municipal action in many other policy areas. Motivated local government leaders need not wait for their state legislatures to enable them to act, nor must they work around preemptive state laws tying their hands.<sup>165</sup> Mayors and county executives have a potent tool for pushing reforms today—even in the face of police union intransigence. In the majority of jurisdictions, local government leaders have the power to approve or decline improvement district budgets.<sup>166</sup> Mayors and city councils may refuse to approve any improvement district spending that fails to comply with their preferred policies regarding sublocal policing. Indeed, St. Louis Mayor Tishaura Jones has begun to pressure improvement district boards to end their usage of the sublocal patrol.<sup>167</sup>

Local government leaders face a choice in how they might bring the sublocal patrol into compliance with the law. Reformers may alternately strip away improvement districts' access to off-duty police officers, on the one hand, or entirely do away with improvement districts' reliance on the private market, on the other. These two paths offer distinctly different visions of the

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<sup>164</sup> See *supra* Section I.C.

<sup>165</sup> See, e.g., Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1170–74 (2018) (observing how state preemptive laws have blocked municipal ordinances regulating tobacco, protecting the environment, providing low-cost broadband internet, raising the minimum wage, and restricting firearms, among other topics).

<sup>166</sup> See Morçöl & Karagoz, *supra* note 27, at 904.

<sup>167</sup> See *Meeting Minutes*, TOWER GROVE S. CONCERNED CITIZENS SBD (Sept. 19, 2022), <http://tgsc-stl.org/wp-content/uploads/2022/11/TGSCC-SBD-Sept-2022-Meeting-Minutes2177.pdf> [<https://perma.cc/A7S3-MT5R>] (reporting that an improvement district board member “heard from Mayor Jones that they do not want neighborhoods hiring secondary officers for security [as it] favors wealthier neighborhoods”).

scope and nature of city governance and local policing, cutting to the very heart of debates over what local power is and where it ought to be vested.

First, and perhaps most obviously, the city could prohibit improvement districts from contracting with off-duty police officers. Or in a more modest reform effort, it could restrict those off-duty officers from wearing their official uniforms, carrying their duty weapons, or using public police radios. At first glance, reforms of this type would seem to vindicate the public nature of policing, prohibiting all but the city police department from leveraging the symbols, technologies, and human resources of government-sponsored policing. On closer examination, these reforms actually represent a *privatization* of neighborhood level public safety efforts.

Stripping away what makes the sublocal patrol “public”—its reliance on public officers—still leaves behind what makes the patrol “private.” Revoking improvement districts’ ability to hire public police officers will not, in itself, decrease neighborhood demand for supplemental security services. Nor will it alter the ability of wealthy and more politically powerful areas of the city to fund these additional services. In lieu of public officers, improvement districts may turn to private security officers, a practice common among homeowners’ associations and gated communities in the suburbs.<sup>168</sup> While mayors may attempt to stave off this redirection of demand by further prohibiting improvement districts from contracting for private patrols writ-large, community groups might opt for more voluntary forms of funding.<sup>169</sup> Without a broader rethinking and restriction of the private policing industry—beyond the scope of mayoral power—cities are unlikely to entirely eradicate private safety efforts.

Moreover, in attempting to restrict wealthy neighborhoods from funding their own security, local governments may threaten their own tax base. City residents that both demand additional security services and have the means to finance them may elect to move to the suburbs if they feel their

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<sup>168</sup> Barbara Coyle McCabe & Jill Tao, *Private Governments and Private Services: Homeowners Associations in the City and Behind the Gate*, 23 REV. POL’Y RSCH. 1143, 1147 (2006) (finding that 63% of large-scale homeowners associations provided security patrol services).

<sup>169</sup> See, e.g., Melody Mercado, *New Fulton Market Group Backed by Top Restaurateurs, Developers Wants to Hire Private Security for the Area*, BLOCK CLUB CHI. (May 25, 2023, 9:35 AM), <https://blockclubchicago.org/2023/05/25/new-fulton-market-group-backed-by-top-restaurateurs-developers-wants-to-hire-private-security-for-the-area/> [<https://perma.cc/9UP8-NVCL>] (discussing how a restaurant group in Chicago is raising funds to hire private security patrols staffed by off-duty cops); *DPD Expanded Neighborhood Patrol*, PRENTICE HOLLOW E. HOMEOWNERS ASS’N, <https://pheha.org/DPDExpandedpatrol> [<https://perma.cc/U7WX-KDB6>] (explaining the homeowners association’s efforts to raise funds for patrols by off-duty Dallas Police Department cops).

needs are not being met, taking their property wealth with them.<sup>170</sup> As local government scholars have long observed, sublocal service provision (and government, generally) may provide a bulwark against the secession of the successful and concomitant local government fragmentation.<sup>171</sup> While troubling from an equity perspective, keeping wealthier citizens happy often keeps those citizens' money within a locality's borders, allowing it to subsidize public services that poorer areas require, but are unable to fully fund, including the provision of police services. Viewed from this perspective, a blanket prohibition on improvement-district-sponsored safety efforts represents a governmental retreat, not a vindication of city power.

There is an alternative path. Instead of what makes the sublocal patrol "public," reformers could target what makes the sublocal patrol "private." Cities could continue to allow improvement-district-sponsored supplemental police patrols—but require districts to exclusively contract with the city to obtain such services, cutting out policing for private profit. For example, mayors could require that all improvement district moonlighting jobs be arranged and compensated via a public office, akin to the NOPD's Office of Police Secondary Employment and the regulations instituted in London following the passage of the Metropolitan Police Act. Such a reform would allow greater public oversight of off-duty officer's moonlighting activities, ensuring that those activities do not run afoul of public policies and priorities. This reform would also guarantee that moonlighting officers are paid a regular wage for their work, eliminating bounties and bribes that threaten to corrupt public discretion.

Requiring all compensation for officer moonlighting to route through a public office also has the potential to lessen inequities inherent in allowing wealthy neighborhoods to purchase enhanced preventative policing services (or secede when their demands are not met). Police departments could charge improvement districts a fee, on top of the moonlighting officers' hourly rates, and redistribute the revenue raised to bolster public safety in underresourced neighborhoods. Such a program could operate akin to public school funding equalization, another area of local government policy where sublocal financing and control has faced allegations of unfairness and inequity.<sup>172</sup>

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<sup>170</sup> See James M. Buchanan, *Principles of Urban Fiscal Strategy*, 11 PUB. CHOICE 1, 1 (1971) ("[P]otentially-mobile central-city taxpayers who contribute to net fiscal surplus must be deliberately induced to remain in the sharing community by appropriate fiscal adjustments.").

<sup>171</sup> See Nadav Shoked, *Quasi-Cities*, 93 B.U. L. REV. 171, 201 (2013) (observing that certain kinds of special districts may provide a "viable alternative" to secession).

<sup>172</sup> See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 110–11 (1995) (describing how states have sought to mitigate the unequal effects of local financing for education through "power equalization," among other methods). *But see* Laurie Reynolds,

This model of funding would also vindicate demands for community control of the police.<sup>173</sup> While a public police department would still operate at a citywide level, providing a minimum level of service and avoiding the most extreme externalities of fragmented control, local areas would get a greater say in the scope and nature of policing in their area. Communities that prize beat-cop policing could pay for supplemental services. Communities that object to increased police presence could leverage redistributed revenue from the sales of supplemental police services to other districts to fund public safety projects that reflect their local needs and wants. For example, instead of funding patrols, the additional revenue could even be used for safety-focused infrastructure projects, such as updates to street lighting.

Reforming, rather than abolishing, the sublocal patrol may thus provide benefits to localities—additional revenue and enhanced democratic participation—while simultaneously addressing many of the public policy concerns undergirding state corruption laws and the prohibition on profiting from private office. It is also possible that funding redistribution and increased municipal oversight of sublocal patrols may reduce the desirability of sublocal patrols and improvement districts, generally. However, if the sublocal patrol is unable to command public support without being corrupt, it is not an institution worth saving.

#### CONCLUSION

Policing, widely regarded as a quintessential function of city government, is now provided to many wealthy city neighborhoods on a private, contractual basis. For the passerby, the uniformed officers that patrol these neighborhood streets are often indistinguishable from the public police. Yet these moonlighting officers answer to a complex mix of private and public demands. By chronicling the sublocal patrol's development via improvement districts, for instance in New Orleans and St. Louis, this Note illustrates the fragility of democratic norms we often take for granted, like equality in city service provision. It also observes how federal constitutional law does little to legally enforce equality norms in the area of privatized policing.

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*Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS L. REV. 1835, 1892–93 (2007) (finding that revenue-raising discretion must be entirely removed from school districts to ensure richer and poorer schools alike have sufficient funds to truly exercise local control).

<sup>173</sup> See, e.g., Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 814, 818 (2021) (observing that police reform activists in Chicago have sought neighborhood-level control of policing policies and priorities).

While American law lacks doctrines requiring equal, or even adequate, provision of police services, it retains prohibitions on corruption. Implicit in these prohibitions is a democratic conception of government service on behalf of all citizens—a conception of public duty. In this Note, I argue that sublocal patrolling erodes this notion of public duty, leveraging public power for private goals. In doing so, the sublocal patrol runs afoul of state statutory and common law prohibitions on profiting from public office. Anti-corruption laws, therefore, may provide a weapon for pushing back against sublocal patrolling's corrupt and inequitable effects on city policing. Finally, I show that the ways in which sublocal patrols fail to comply with anti-corruption statutes may provide a roadmap for reform and facilitate the development of a system of local policing that balances competing demands for equity and local control.