MOONLIGHTING: THE PRIVATE EMPLOYMENT OF OFF-DUTY OFFICERS

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Every day, law enforcement officers across the country don their uniforms, strap on their gun belts, and head to work. They carry the equipment and weapons they have been issued and bear the badges that symbolize their authority, but they are not all reporting to the government agency that employs them. Instead, many are "moonlighting." From directing traffic at a busy church parking lot, to making arrests at a packed nightclub, to using deadly force—uniformed off-duty officers exercise the full panoply of police powers while working for private employers.

The private employment of off-duty officers blurs the line between private and public policing, raising questions about accountability, officer decision-making, police-community relationships, and the role that police agencies play in modern society. Thus far, however, the employment of off-duty officers by private companies has almost entirely evaded the attention of legal scholars. This Article is the first to provide an empirical assessment of moonlighting in the United States, reporting the results of an original survey of nonfederal law enforcement agencies that collectively employ over 143,000 full-time sworn officers, almost a fifth of all state and local officers in the country. A substantial majority of agencies—about 80%—allow officers to engage in moonlighting, and tens of thousands of officers at those agencies log millions of hours every year working for private employers. Yet governing law and agency policies reflect substantial variation in how off-duty employment is regulated. Moonlighting may be the norm, but as the multitudinous justifications for it, the many issues its raises, and the inconsistency in statutory and administrative regimes suggest, there is a strong need for attention to this area. This

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Article starts down that path by identifying stakeholders and considerations necessary to the development of professional best practices.

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I. INTRODUCTION

On August 14, 2013, uniformed officers with the Eastern Pike Regional Police Department were patrolling the construction site of a controversial oil pipeline near the border between Pennsylvania, New York, and New Jersey. A civilian went to the construction site, took a series of pictures, and allegedly yelled obscenities at construction workers. One of the officers patrolling the construction site later wrote the individual a summons, charging him with trespassing and disorderly conduct.[1]

1. Adam Federman, *Kinder Morgan Paid Pennsylvania Police Department to 'Deter Protests*,' EARTH ISLAND J. (May 21, 2015), http://www.earthisland.org/journal/index.php/elist/eListRead/kinder_morgan_paid_pennsylvania_police_department_to_deter_protests/.

On October 8, 2014, a uniformed officer with the Metropolitan Police Department was patrolling the Shaw neighborhood in central St. Louis, Missouri. He observed three men who fled shortly after seeing him; one of the men ran in a way that led the officer to believe that he was carrying a weapon. After a brief foot pursuit and a physical altercation, the suspect shot at the officer. The officer returned fire, killing the suspect.[2]

In March 2015, a uniformed officer with the Texas Department of Public Safety agreed to pose for a photograph with Calvin Broadus, Jr. (best known under his stage name, Snoop Dog). When the picture was posted online, the officer was reprimanded for posing with someone known to have a criminal history and was formally instructed to refuse to pose for photographs in the future.[3]

Arrests, the use of force, and administrative discipline are entirely unexceptional aspects of modern policing. In the three incidents described above, however, there is an added wrinkle: the officers were not working for their primary employers at the time. The Eastern Pike Regional Police officer patrolling the pipeline construction site was being paid by Kinder Morgan, a private energy infrastructure company.[4] The uniformed Metropolitan Police officer patrolling the St. Louis neighborhood was working for Hi-Tech Security, a private security company that provided the vehicle he was patrolling in at the time.[5] The uniformed Texas Department of Public Safety officer was working for SXSW, Inc., which hosts the South-by-Southwest festival.[6]

Every day, police officers[7] across the country don their uniforms, strap on their gun belts, and head to work. They carry the equipment and weapons they have been issued. They wear the uniforms and badges that symbolize their authority. But they are not all reporting to the government agency that employs them. Many officers will instead be using their authority, training, and equipment on behalf of a private employer, and they will spend many hours doing so. Indeed, some 300,000 state and local officers may be putting in more than 43.45 *million* hours of moon-

2. Fred Barbash & Abby Phillip, *Fatal Shooting of 18-Year-Old by Off-Duty Police Officer Ignites Protests in St. Louis*, WASH. POST (Oct. 9, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/10/09/crowds-in-streets-of-st-louis-after-fatal-shooting-by-off-duty-police-officer/.

3. Christy Hoppe, *DPS Trooper Required to Get Counseling for Posing with Snoop Dogg*, DALL. MORNING NEWS (Apr. 1, 2015, 4:29 PM), http://trailblazersblog.dallasnews.com/2015/04/dps-trooper-required-to-get-counseling-for-posing-with-snoop-dogg.html/?hootPostID=e6e9b84abc86957c270df5491316107a.

4. Kinder Morgan had, according to a letter, contracted with the police department to provide uniformed officers in marked vehicles so as to "deter protests and prevent delays." Letter from Dwayne Jones, Manager, Corp. Sec., Kinder Morgan, to Chad Stewart, Chief of Police, E. Pike Police Dep't (May 1, 2013), http://earthisland.org/elist/assets/KM-EPRD.pdf.

5. *See infra* Part II. Note that this estimate is an extrapolation from a nonrepresentative sample, so it should not be considered statistically rigorous.

6. Hoppe, *supra* note 3.

7. I used the terms "police" and "police officer" to refer to law enforcement and law enforcement officers generically. Although there can be both substantive and purely formal distinctions between police departments, sheriffs' offices, and other agencies, as well as among the various agencies' employees, those distinctions are not relevant in the context of this Article.

lighting work in any given year.[8] From directing traffic at the exit of a busy church parking lot to providing security at a packed nightclub, uniformed police officers can, and do, exercise the full panoply of police powers while working in a private, off-duty capacity. Agencies typically take a favorable view of moonlighting, permitting, or even encouraging, officers to accept off-duty employment.[9] Not only does it increase police visibility in the community, it also supplements agency staffing; off-duty officers will handle situations that would otherwise require an on-duty officer. Moonlighting benefits officers, who may be paid directly by the business that employs them, perhaps in cash and at an hourly rate that exceeds their normal pay.[10] Officers may also receive in-kind remuneration, such as free or reduced rent, or other collateral benefits, including employee discounts.[11] But the benefits to agencies and officers are not without cost. The employment of off-duty officers by private entities raises serious concerns about democratic legitimacy, legal accountability, the potential effect on police practices, and the role that law enforcement agencies play in society.

These concerns are at the core of current and long-standing discussions about policing, but the private employment of public police has largely evaded the notice of legal scholars,[12] sociologists,[13] and police and security professionals.[14] This lacuna is all the more surprising given the robust legal and sociological literature on "private policing" and "plural policing," which explores how policing duties are often shared by public and private entities,[15] and the smaller, if equally important, body of work

8. *See infra* Part II.

9. *See* BUREAU OF GOV'T RESEARCH, MOONLIGHTING: AN OVERVIEW OF POLICIES GOVERNING PAID POLICE DETAILS 1 (2011), http://www.bgr.org/files/reports/BGR--Police_Details.pdf.

10. *See id.*

11. *See* Jason McGahan, *Rent Breaks for Off-Duty Officers*, WASH. POST (Feb. 15, 2001), https://www.washingtonpost.com/archive/local/2001/02/15/rent-break-for-off-duty-officers/9782ebf3-4aa8-4108-a038-7c78f1093d65/?utm_term=.7b9bba33d801.

12. David Sklansky offers a rare exception in a paragraph that describes the 150,000 police officers that were estimated to work as private security guards in 1990. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1176 (1998). More recently, Elizabeth Joh raised concerns about the private employment of public police in an op-ed in the Los Angeles Times, noting that the officer who shot and killed eighteen-year-old Vonderrit Myers, Jr. while patrolling a St. Louis neighborhood was working for a private security company at the time. Elizabeth E. Joh, *When Police Moonlight in Their Uniforms*, L.A. TIMES (Oct. 13, 2014, 5:38 PM), http://www.latimes.com/opinion/op-ed/la-oe-joh-police-moonlighting-vonderrit-myers-20141014-story.html.

13. The late Albert J. Reiss, Jr. was an exception, authoring a study of private employment practices at thirteen different police agencies in the 1980s. ALBERT J. REISS, JR., PRIVATE EMPLOYMENT OF PUBLIC POLICE (1988); *see also* Albert J. Reiss, Jr., *Private Employment of Public Police*, *in* WILLIAM T. GORMLEY JR., PRIVATIZATION AND ITS ALTERNATIVES 226 (1991) (providing an overview that describes common practices and the competition between private security companies and public police officers working off-duty security details).

14. The lengthy second volume of the Hallcrest Report, which studied twenty-year trends in the private security industry and projected those trends for an additional ten years, included all of six pages about the employment of off-duty officers by private security firms, relying both on original surveys and on Reiss's work. WILLIAM C. CUNNINGHAM ET AL., THE HALLCREST REPORT II: PRIVATE SECURITY TRENDS, 1970–2000, at 289–95 (1990).

15. Trevor Jones & Tim Newburn, *The United Kingdom*, *in* PLURAL POLICING: A COMPARATIVE PERSPECTIVE 34 (2006); LORRAINE MAZEROLLE & JANET RANSLEY, THIRD PARTY

on the interplay of officer self-interest and policing practices.[16] The private employment of public police is an important and relevant consideration that has, thus far, gone largely overlooked. This Article begins to correct that oversight by describing the results of original survey research of three years of off-duty employment practices at state and local law enforcement agencies across the country—with responses received from more than 160 agencies that collectively employ more than 143,000 full-time sworn officers—by exploring the legal and administrative regulations that govern the practice, and by identifying the concerns raised by off-duty employment.

This Article proceeds in three parts. Part II describes private, off-duty employment in more detail. I first provide a more complete definition of "private, off-duty employment," then present the results of an original survey sent to almost 400 state, city, and county police agencies across the country. The 162 responding agencies[17] employ a collective total of 143,927 full-time, sworn employees, representing almost a fifth of all state and local officers at general-service law enforcement agencies in the United States.[18] The survey queried agencies on whether they allowed officers to work in a law-enforcement capacity for private employers, their justifications for permitting or prohibiting the practice, and about the regulations they have adopted to govern off-duty employment. Agencies that indicated they had a written policy governing private, off-duty employment were later asked to provide a copy of that policy. Approximately 80% of responding agencies, employing a collective total of more than 123,600 full-time, sworn officers, authorize off-duty employment, although their reasons for doing so vary. The remaining roughly 20% of responding agencies, which collectively employ over 20,000 full-time sworn officers, prohibit off-duty employment, again for a variety of reasons. Agencies also provided data on the number of officers who were approved to or who actually worked for private employers, the total number of hours worked, and the number of moonlighting requests that the agency declined, although fewer than half of the agencies tracked the relevant information.

POLICING (2005); Sean James Beaton, *Counterparts in Modern Policing: The Influence of Corporate Investigators on the Public Police and a Call for the Broadening of the State Action Doctrine*, 26 TOURO L. REV. 593 (2010); Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 5736 (2005); Elizabeth E. Joh, *The Forgotten Threat: Private Policing and the State,* 13 IND. J. GLOBAL LEGAL STUD. 357 (2006); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIM. 49 (2004); Hayden P. Smith & Geoffrey P. Alpert, *Joint Policing: Third Parties and the Use of Force*, 12 POLICE PRAC. & RES. 136 (2011); Cooper J. Strickland, *Regulation Without Agency: A Practical Response to Private Policing in* United States v. Day, 89 N.C. L. REV. 1338 (2011).

16. *See, e.g.*, EDITH LINN, ARREST DECISIONS: WHAT WORKS FOR THE OFFICER? (2009).

17. The 40% response rate is generally consistent with prior survey research of police agencies.

18. The almost 144,000 full-time, sworn officers employed by the 162 responsive agencies make up 19.86% of the approximately 724,600 full-time, sworn personnel employed by general service state and local police agencies in the United States as of 2013. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES 2 (2015), http://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf [hereinafter REAVES, POLICE DEPARTMENTS].

Part III examines the state statutes and agency policies that govern moonlighting. A fifty-state survey identified thirty-four states and the District of Columbia that have no laws authorizing or governing the private employment of off-duty officers, although officers are likely regulated by more generic statutes regulating government officials' outside employment. The remaining sixteen states either explicitly authorize moonlighting (ten) or do so implicitly (six) through statutes that regulate the practice even though no statute specifically permits it. State statutes that regulate moonlighting do so by establishing procedural or substantive regulations or by delegating to political subdivisions the authority to craft such regulations. Other statutes regulate moonlighting by situating it within a broader legal context by allocating liability for off-duty officers' actions or by distinguishing between off-duty officers and private security personnel. Despite these thematic similarities, there are substantial differences in whether and how state laws regulate moonlighting.

Agency policies show even more variation. The survey asked agencies whether they had written policies, procedures, directives, or guidelines for the private employment of off-duty officers and, if so, whether they would provide their policies if requested. Although the vast majority of agencies indicated that they had a written policy (153) and would be willing to share it (117), only thirty-eight of the agencies that permit moonlighting (29.2%) did so when requested. I reviewed the provided policies and other documents[19] with a specific eye to identifying requirements for and restrictions on moonlighting; the administration of private, off-duty jobs; the use of police uniforms, equipment, and vehicles while off-duty; and officer remuneration.

Part IV explores the practical, legal, and conceptual concerns raised by the private employment of off-duty officers. Practically, moonlighting may affect officers' decisions and actions, changing their behavior while both on and off duty. Legally, the private employment of off-duty officers raises questions about the applicability of both civil liability—for officers, police agencies, and private employers—and criminal liability for the individuals who interact with off-duty officers. Conceptually, moonlighting raises questions about the nature of law enforcement agencies and the roles they play in the communities they serve. This Article does not attempt to answer those questions. Instead, my goal is to set the stage for a much-needed body of work to engage with the normative and prescriptive implications of moonlighting.

I conclude by outlining areas for future research and calling for the development of best practices to regulate the private employment of off-duty officers.

19. For example, some agencies provided copies of the off-duty employment contracts that private employers enter into or similar documentation.

II. PRIVATE, OFF-DUTY EMPLOYMENT

In this Part, I define the widespread practice of "moonlighting"—officers working in a law enforcement capacity for private employers while off-duty. This Part describes off-duty employment practices by relying on an original survey that gathered information from 162 state and local law enforcement agencies around the country that collectively employ more than 143,000 full-time, sworn officers, almost 20% of all state and local police officers in the country.

Before turning to the results of my research, it is worth identifying how little we know about contemporary moonlighting. There has never been a great deal of information about moonlighting, and the limited analysis that exists reflects a very different time and social context. It is an understatement to say that the practice has not been the subject of sustained academic attention; indeed, it has been almost entirely overlooked since the mid-1980s, when Yale sociologist Albert J. Reiss, Jr.[20] examined the practices of thirteen agencies, ranging in size from 288 to 1,829 officers.[21] To the extent that moonlighting has been the subject of study since, it is almost entirely encapsulated in the broader study of the private security industry. In the late 1980s, the National Institute of Justice, for example, surveyed police executives, corporate security executives, and contract security executives about the private security industry, including in that topic a brief exploration of moonlighting.[22] According to that study, 81% of police executives indicated that officers were permitted to work in a private security capacity, with the remaining 19% prohibiting or severely restricting the practice.[23] The police executives estimated that about 20% of their officers had "regular outside security employment," leading researchers to estimate at the time that "at least 150,000 local law-enforcement officers in the U.S. are regularly engaged in off-duty employment in private security."[24] The researchers further estimated, based on several field studies, that if the officers were each working fifteen hours per week and getting paid fifteen dollars per hour—which the study identified as "the low end of the off-duty pay range"—the total annual earnings of police for off-duty employment would be about $1.8 billion, or roughly equal to the combined total revenue of the four largest security companies in the country in 1988.[25] The

20. Among policing scholars, Reiss is perhaps best known for his ground-breaking observational studies of officer activity, including police violence and officer misconduct.

21. *See supra* notes 13–14 and accompanying text.

22. CUNNINGHAM ET AL., *supra* note 14, at 289–95. The section that discusses the private employment of off-duty officers makes up six pages of the 326-page report, excluding the bibliography. This second Hallcrest Report built on an earlier report, released in 1985. WILLIAM C. CUNNINGHAM & TODD H. TAYLOR, THE HALLCREST REPORT: PRIVATE SECURITY & POLICE IN AMERICA 283–87 (1985).

23. CUNNINGHAM ET AL., *supra* note 14, at 290.

24. *Id.*

25. *Id.* at 295.

brief section of the report that discussed moonlighting observed that "the practice [was] growing."[26]

A. Defining Private, Off-Duty Employment

In this Article,[27] I use the terms "moonlighting" and "private, off-duty employment" to refer to public police officers working in a law enforcement capacity for private employers outside of their normal working hours in exchange for some financial benefit derived from that private entity. For example, uniformed officers may be paid for providing security at a nightclub or bar or for directing traffic outside of a church or synagogue.[28] Officers may also receive free or discounted rent at an apartment complex (so-called "courtesy officers") in exchange for parking their marked police vehicle in a visible spot or for responding, when off-duty, to non-emergency calls like noise complaints.[29] Officers may be compensated directly by the private entity that hires them, or the employer may pay the city or agency so the officer's compensation is channeled through the public payroll system.[30] Officers may also receive collateral benefits from private employers, such as employee discounts and earlier-than-public access to information and products.[31]

For purposes of this project, "private, off-duty employment" specifically excludes officers who have outside jobs unrelated to law enforcement. An officer who owns a landscaping business, works as an insurance adjustor, or does freelance photography is not engaged in private, off-duty employment as I use that term. The term also excludes officers who work, while off duty, in a law enforcement capacity when their compensation derives from a governmental entity rather than a private entity. Thus, officers who work overtime, in uniform and on their day off, at road construction sites or at collegiate sports events are not engaged in private, off-duty employment, even if the Department of Roads or the

26. *Id.*

27. I include this disclaimer because there is no universally accepted industry language that refers to the concept I label "private, off-duty employment." Law enforcement agencies and organizations use a variety of terms—such as "off-duty employment," "secondary employment," "special details," "extra duty," and so on—that may or may not, depending on the individual agency, refer to what I describe as "private, off-duty employment."

28. *See* Jon Vanderlaan, *Texas City Bans Off-Duty Cops from Working Bars*, POLICEONE (Aug. 24, 2016), https://www.policeone.com/financial-planning/articles/213471006-Texas-city-bans-off-duty-cops-from-woring-bars/.

29. LAWRENCE J. FENNELLY, HANDBOOK OF LOSS PREVENTION AND CRIME PREVENTION 459 (2012).

30. Kristyn Martin et al., *Cops for Hire*, AL JAZEERA AM. (Apr. 27, 2015, 2:23 PM), http://america.aljazeera.com/watch/shows/real-money-with-alivelshi/articles/2015/4/27/pay-money-and-hire-off-duty-cops.html.

31. *See* Desiree Stennett, *OPD Officers Paid Well Above Normal Pay to Work 'Extra Duty' Security Details at Local Businesses*, ORLANDO SENTINEL (July 15, 2015, 5:53 PM), http://www.orlandosentinel.com/news/breaking-news/os-orlando-police-off-duty-work-20150715-story.html.

public university hosting the sporting event reimburses the agency or pays the officers directly.[32]

Many individuals employed in public service may perform work for private parties, but the employment of off-duty police officers is unique. Other officials—traffic engineers, building inspectors, and law professors, for example—are privately employed because of their knowledge or skills. To the extent that their public position is valuable to the private employer, it is because of the symbolic importance of their public position, not because they will be exercising their public powers on behalf of their private employer. Consider the example of a law professor working for a state school: the professor may be engaged as a consultant to advise on litigation strategy, retained to offer an expert opinion, or hired as a lecturer by a test preparation company. In each case, the private employer benefits from the very attributes that qualify the professor for her public position—her knowledge of the law, her subject-matter expertise, and her ability to teach effectively. Her public position is important because it is a strong signal—both to the private employer and to the audience the private employer wants to impress—of the professor's qualifications. In other words, litigation advice, an expert opinion, or exam preparation information may be perceived as more authoritative *because* it is provided by a professor. But the value, while very real, is purely symbolic. The fact that the professor works at a public school does not qualify her to offer opinions or take actions that would be beyond the ken of a similarly situated consultant, expert, or instructor who works for a private university or outside of higher education altogether. In other words, the professor's position does not in and of itself instill her with additional knowledge, skills, or abilities, and the professor is certainly not hired to exercise her authority *as* a professor. As with the traffic engineer or building inspector, being hired by a private employer to use her public authority—to include or exclude information in a particular course or to grade exams a certain way, for example—would raise at least the appearance of impropriety. In short, the professor's public position may bolster her appeal and gravitas, but it does not itself allow her to say or do anything that she could not say or do in the absence of public employment.

That is decidedly not the case for the privately employed, off-duty police officer. Like the professor, officers will use the training and skills that qualify them for their public positions. But, unlike the professor, the officer can use her public authority on behalf of her private employer. Indeed, the officer's greater capacity to detain, search, arrest, and use force—which may be predicated on a higher quantum of proof than a private security guard can act upon, but is not tied to a limited set of offenses like merchant's privilege or an employer's property[33]—is a large

32. An officer would be engaged in private, off-duty employment for working a sporting event if their pay originated from a private entity such as a sports franchise, stadium ownership or management, or a booster organization.

33. Seth W. Stoughton, *The Blurred Blue Line: Reform in an Era of Public & Private Policing*, ___ AM. CRIM. L. REV. ___, 16-25 (forthcoming 2017).

part of the reason that private employers hire off-duty officers rather than armed security guards.[34] As with the examples at the beginning of this Article, the actions that off-duty officers take while working for private employers can be indistinguishable from the actions that an on-duty officer might take. In contrast with other public officials who may also work for private employers, a public police officer is hired primarily *because* of her ability to take the same types of action on behalf of her private employer that she can take on behalf of the public: detaining, searching, and arresting, for example. Where the professor's title symbolizes her expertise and gravitas, an officer's title and uniform symbolize her legal authority.

To further demonstrate the contrast between police officers and other public sector workers, consider the private employment prospects of retired public officials. A retired law professor retains her gravitas and expertise and can thus expect to remain attractive as a consultant, expert, or lecturer long after leaving her professorship. A retired police officer, on the other hand, is no longer vested with public authority. While she might hope to be hired as a consultant or expert based on the knowledge, skills, and experiences she developed as an officer, she will never again be hired to provide law enforcement services to a private employer.

B. Survey Results

To obtain information about contemporary moonlighting, I sent surveys to almost 400 state and local (city and county) police agencies representing forty-two states and the District of Columbia.[35] Agencies were selected for inclusion in a nonprobabilistic sample based in part on the availability of contact information, with a conscious preference for larger agencies and those representing a variety of geographic locations.[36] The mailings were addressed to the head of the agency—*e.g.*, sheriff or police chief—and included a two-page letter that defined private, off-duty employment[37] and a three-page survey about the agency's private, off-duty employment practices. The surveys could be returned in hard copy (by use of a stamped, self-addressed envelope included in the mailing) or scanned and returned via e-mail. The letter also explained that respondents could complete an electronic version of the survey on Google Forms—which used identical language and was formatted to re-

34. Phoenix-based security firm Law Enforcement Specialists, which specializes in placing off-duty police officers with private employers, lists the comparative benefits of hiring off-duty officers over "ordinary security guards" on its website, focusing not just on the officers' greater training and weaponry, but also on their legal authority, their ability to take action—including the use of deadly force, when warranted—immediately and decisively. *See Why Choose Off Duty Law Enforcement Over Security Guards?,* LAW ENF'T SPECIALISTS, http://offdutypoliceofficers.com/ (last visited Aug. 21, 2017).

35. Arkansas, Iowa, Kansas, Mississippi, Minnesota, Nebraska, New Hampshire, and Utah were not included. Their exclusion was unintentional, not deliberate.

36. The preference for larger agencies was based on the hypothesis that such agencies would be more likely to track the data requested by the survey.

37. *See supra* Section II.A.

semble the hard-copy survey as much as possible—in lieu of filling out the hard-copy survey. The original survey requests were mailed out in February 2015. Agencies that did not respond by May 2015 were contacted and asked to complete and return the survey. The surveys solicited information about the agencies, about the legal and administrative regulation of private, off-duty employment, and about the private, off-duty employment practices at the agencies. A copy of the survey as it was mailed out in hard copy appears in Appendix A.[38] A copy of the electronic version of the survey can be accessed online.[39]

A total of 162 state and local police agencies responded to the survey.[40] The responding agencies collectively employ 143,927 full-time, sworn officers, or just under 20% of the more than 720,000 state and local officers in the United States.[41] Chart 1 details the responsive agencies and the number of full-time, sworn officers they employ, categorizing agencies into seven size ranges that are generally consistent with the categories used by the Bureau of Justice Statistics.[42]

38. *See infra* App. A.

39. Seth W. Stoughton, *Private*, *Off-Duty Employment Research Form* (2015), https://docs.google.com/forms/d/1t0Fkqzn2GgnANheVurESe1cLGuD6U2kv9BYQBzYS748/viewform?fbzx=6067124011061185137.

40. Chart 1 provides a breakdown of the responding agencies by agency size, relying on the self-reported number of full-time, sworn employees and organized into the categories used by the Bureau of Justice Statistics. *See infra* App. A. Fifty-four agencies completed the electronic version of the survey, and 101 filled out the hardcopy of the survey. In reporting the results of the survey, I do not further distinguish between agencies that returned a hand-written survey and those that filled out the electronic version of the survey.

41. REAVES, POLICE DEPARTMENTS, *supra* note 18, at 2.

42. The relevant categories include agencies that employ over 1,000 officers, 500 to 999 officers, 250–499 officers, 100–249 officers, 50–99 officers, 25–49 officers, and 1–24 officers. The Bureau of Justice Statistics separates the smallest of the categories used in this project (1–24 officers) into four categories: agencies that employ 10–24 officers, 5–9 officers, 2–4 officers, and only a single officer. *Id.* at 3. These categories were combined into the 1–24 officers for administrative convenience. Of the eleven responding agencies that employed 1–24 full-time officers, seven had from 10–24 officers, two had from 5–9 officers, and two had 2–4 officers.

CHART 1: RESPONSIVE LAW ENFORCEMENT AGENCIES & NUMBER OF SWORN OFFICERS

	Agency Size by Number of Full-Time, Sworn Employees							
	All	>1000	999-500	499-250	249-100	99-50	49-25	<25
Total Agencies	162	40	24	23	29	22	13	11
Full-Time Sworn Officers	143,927	111,947	16,733	8,280	4,846	1,513	473	135
Part-Time Sworn Officers	1,017	276	296	180	64	46	113	42

Of the 162 responding agencies, 130 agencies (80.25%) permit at least some form of private, off-duty employment.[43] The remaining 32 (19.75%) prohibit officers from working in a law enforcement capacity for private employers while off duty.[44] This finding is consistent with findings from research conducted in the 1980s.[45] A majority of agencies in each size category permitted at least some form of private, off-duty employment, ranging from a high of 95.83% (23 out of 24) of the agencies that employed 500–999 full-time officers to a low of 65.21% (15 out of 23) of the agencies that employed 250–499 full-time officers. Chart 2 provides a breakdown of permissive and prohibitive agencies.

43. This is very similar to the information obtained by the Hallcrest study of the private security industry. *See supra* note 22 and accompanying text.

44. Several agencies that checked the box indicating that they did not permit private, off-duty employment clarified, in their free-form responses, that they *do* permit some form, often a restricted form, of private, off-duty employment. For example, one agency indicated that it did not permit private, off-duty employment, but then explained:

> We do allow Officers to work for private organizations directing traffic in uniform outside of their 40-hour work week. These outside details may or may not be for a government agency. That being said, all details are arranged through the police department. Money from the agency that hires the Officer goes to the PD and then the PD pays the Officer. Those details include sporting events, proms, traffic details for the City or for utility companies, as well as many more. We do not allow Officers to work jobs that are not scheduled through our PD.

Survey Response by Northampton Police Department, submitted electronically on March 27, 2015. For the statistics reported in this article, I have categorized such responses as permitting private, off-duty employment.

45. *See supra* notes 13–14, 22–26, and accompanying text.

CHART 2: AGENCIES THAT PERMIT OR PROHIBIT PRIVATE, OFF-DUTY EMPLOYMENT

	Agency Size by Number of Full-Time, Sworn Employees							
	All	>1000	999-500	499-250	249-100	99-50	49-25	<25
Agencies	162	40	24	23	29	22	13	11
Permissive Agencies	130 (80.24%)	34 (85%)	23 (95.83%)	15 (65.21%)	23 (79.31%)	16 (72.72%)	10 (76.92%)	9 (81.81%)
Prohibitive Agencies	32 (19.75%)	6 (15%)	1 (4.16%)	8 (34.78%)	6 (20.68%)	6 (27.27%)	3 (23.07%)	2 (18.18%)

Agencies were asked to briefly explain why they permitted or prohibited private, off-duty employment and were given a space on the survey form to provide free-form answers that could include multiple justifications from a single agency. Before reporting the results, it is important to acknowledge the limitations of the responses: the answers, after all, were provided by individual employees who may not have been privy to or involved in the decision to permit or prohibit moonlighting. Although it would be a mistake to take the accuracy and authority of any particular response for granted, the collective responses provide general insights into the considerations that may motivate policy decisions in this area. This may be particularly true when the same justifications are provided by multiple agencies. Among the thirty-two agencies that prohibit the practice ("prohibitive agencies"), three justifications were repeated in multiple answers: concerns about liability, conflicts of interest, and governing laws or codes. Additionally, eight justifications were offered by individual agencies but not reported by multiple agencies.[46] Ten agencies either provided no response or provided a nonresponsive answer. Chart 3 provides a breakdown of the justifications for prohibiting moonlighting.[47]

46. Those individual reasons include: "[Officers] are trained w/public dollars not to be used for private entity"; "workman's comp"; "affecting on duty status"; "prohibited by union contract"; "it would not be fair [for businesses to get police services because they can pay for them while other businesses do not because they cannot pay for them]"; "[i]t is not a commonly accepted practice in Alaska [the state in which the agency is located]"; and the availability of overtime through the department.

47. Note that column totals may be greater than 100% because agencies were permitted to provide more than one justification.

CHART 3: AGENCIES PROHIBITING PRIVATE, OFF-DUTY EMPLOYMENT – JUSTIFICATIONS

		Agency Size by Number of Full-Time, Sworn Employees						
	All	>1000	999-500	499-250	249-100	99-50	49-25	<25
Agencies	32	6	1	8	6	6	3	2
Officers	20,284	15,029	900	2,865	953	387	137	13
Liability	13 (40.62%)	2 (33.33%)	0 (0%)	2 (25%)	4 (66.66%)	2 (33.33%)	1 (33.33%)	2 (100%)
Conflict of Interest	6 (18.75%)	2 (33.33%)	0 (0%)	2 (25%)	1 (16.66%)	0 (0%)	1 (33.33%)	0 (0%)
Contrary to Law/Code	4 (12.5%)	2 (33.33%)	0 (0%)	1 (12.5%)	1 (16.66%)	0 (0%)	0 (0%)	0 (0%)
Other (Various)	8 (25%)	1 (16.66%)	0 (0%)	0 (0%)	1 (16.66%)	4 (66.66%)	2 (66.66%)	0 (0%)
No response / Nonresponsive	10 (31.25%)	2 (33.33%)	1 (100%)	3 (37.5%)	1 (16.66%)	2 (33.33%)	1 (33.33%)	0 (0%)

Among the 130 agencies that permit officers to work for private employers while off duty ("permissive agencies"), seven justifications were repeated by multiple agencies:

1. Forty agencies identified benefits to community relations;
2. Thirty-six agencies identified benefits to officers, either financial benefits (thirty-two) or unspecified benefits (four);
3. Thirty-three agencies identified benefits to agency staffing;
4. Twenty-five agencies cited some authority that allowed or required the agency to permit moonlighting, including collective bargaining agreements (five), agency policy or practice (six),[48] or state law (four);
5. Eighteen agencies identified the increased presence or visibility of police in the community;
6. Eleven agencies identified benefits to public safety; and
7. Four agencies cited public demand.

Individual agencies also provided four additional justifications, none of which were reported by more than a single agency.[49] Note that a single agency could provide multiple justifications, all of which were counted

48. There is, of course, a tautological issue with the six agencies that justified permitting private, off-duty employment by stating that the practice is allowed by agency policy. I include those justifications in an effort to report survey results comprehensively and accurately, although that answer is arguably not responsive to the question asked.

49. Those individual reasons include: "Officers are only allowed to work off-duty when there is a direct benefit to the University"; "[g]ood for . . . officer engagement"; "[t]o reduce calls for service saving tax payer fees for service"; and "improve enforcement and coordination between private security and department."

separately—thus, twenty-nine of the thirty-four agencies with over 1,000 full-time, sworn officers provided a total of fifty-one justifications, while the remaining five either did not respond to that survey question or provided a nonresponsive answer. Twenty-seven agencies provided either no response or an entirely nonresponsive answer. A breakdown of the justifications for prohibiting private, off-duty employment is found in Chart 4.

CHART 4: AGENCIES PERMITTING PRIVATE, OFF-DUTY EMPLOYMENT–JUSTIFICATIONS

	Agency Size by Number of Full-Time, Sworn Employees							
	All	>1000	999-500	499-250	249-100	99-50	49-25	<25
Agencies	130	34	23	15	23	16	10	9
Officers	123,643	96,918	15,833	5,415	3,893	1,126	336	122
Community Relations	40 (30.76%)	14 (41.17%)	5 (21.73%)	6 (40%)	7 (30.43%)	3 (18.75%)	5 (50%)	0 (0%)
Staffing	33 (25.38%)	11 (32.35%)	5 (21.73%)	4 (26.66%)	8 (34.78%)	3 (18.75%)	0 (0%)	2 (100%)
Supplement Officer Income	32 (24.61%)	4 (11.76%)	8 (34.78%)	3 (20%)	4 (17.39%)	5 (31.25%)	5 (50%)	3 (150%)
Increase Visibility	18 (56.25%)	5 (14.7%)	4 (17.39%)	3 (20%)	1 (4.34%)	1 (6.25%)	2 (20%)	2 (100%)
Required by Collective Bargaining	15 (11.53%)	4 (11.76%)	2 (8.69%)	0 (0%)	6 (26.08%)	0 (0%)	1 (10%)	2 (100%)
Public Safety	11 (8.46%)	4 (11.76%)	1 (4.34%)	2 (13.33%)	4 (17.39%)	0 (0%)	0 (0%)	0 (0%)
Established Policy or Practice	6 (54.54%)	2 (5.88%)	1 (4.34%)	0 (0%)	2 (8.69%)	1 (6.25%)	0 (0%)	0 (0%)
Legislative Choice	4 (3.07%)	2 (5.88%)	0 (0%)	0 (0%)	1 (4.34%)	1 (6.25%)	0 (0%)	0 (0%)
Public Demand	4 (3.07%)	2 (5.88%)	1 (4.34%)	1 (6.66%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
Benefits Officers	4 (100%)	1 (2.94%)	2 (8.69%)	1 (6.66%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
Other (Various)	4 (3.07%)	2 (5.88%)	0 (0%)	1 (6.66%)	0 (0%)	0 (0%)	0 (0%)	1 (50%)
No response / Nonresponsive	27 (20.76%)	5 (14.7%)	6 (26.08%)	5 (33.33%)	4 (17.39%)	4 (25%)	2 (20%)	1 (50%)

The 130 permissive agencies were asked to provide information about private, off-duty employment for 2012, 2013, and 2014, including the number of sworn officers who were approved to work for private employers, the number of sworn officers who actually worked for private employers, and the total number of hours sworn officers worked for pri-

vate employers. For each question, more than half of the responding agencies either reported that they do not track the relevant information or they did not provide any information: 30.76% of agencies tracked the number of officers approved to work for private employers, 46.15% tracked the number of officers who actually worked for private employers, and 23.84% tracked the number of hours that officers worked for private employers. In each case, agencies that had at least 1,000 officers were more likely to track the requested information than most of the smaller categories. A breakdown of the responses can be found in Charts 5, 6, and 7.[50] Additionally, although this is not reflected on the charts, more agencies reported tracking data in 2014 than in 2012.

CHART 5: NUMBER OF OFFICERS APPROVED FOR OFF-DUTY EMPLOYMENT, 2012-2014

		Agency Size by Number of Full-Time, Sworn Employees						
	All	>1000	999-500	499-250	249-100	99-50	49-25	<25
Agencies	130	34	23	15	23	16	10	9
Does not Track	76 (58.46%)	16 (47.05%)	15 (65.21%)	9 (60%)	16 (69.56%)	9 (56.25%)	5 (50%)	6 (66.66%)
No Answer	14 (10.76%)	6 (17.64%)	2 (8.69%)	1 (6.66%)	1 (4.34%)	2 (12.5%)	1 (10%)	1 (11.11%)
Agencies with Data	40 (30.76%)	12 (35.29%)	6 (26.08%)	5 (33.33%)	6 (26.08%)	5 (31.25%)	4 (40%)	2 (22.22%)
2012	18,199 (of 59,161)	15,217 (of 52,769)	1,876 (of 3,763)	742 (of 1,611)	322 (of 567)	34 (of 358)	8 (of 0)	0 (of 93)
2013	18,403 (of 59,203)	15,332 (of 52,769)	1,913 (of 3,763)	746 (of 1,611)	330 (of 567)	34 (of 358)	48 (of 128)	0 (of 135)
2014	23,178 (of 62,312)	19,252 (of 54,431)	2,332 (of 4,513)	902 (of 1,877)	610 (of 992)	34 (of 358)	46 (of 128)	2 (of 141)

50. Note that responses of "0" were treated as responsive.

CHART 6: NUMBER OF OFFICERS WHO WORKED FOR PRIVATE EMPLOYERS, 2012-2014

		Agency Size by Number of Full-Time, Sworn Employees						
	All	>1000	999-500	499-250	249-100	99-50	49-25	<25
Agencies	130	34	23	15	23	16	10	9
Does not Track	62 (47.69%)	11 (32.35%)	9 (39.13%)	9 (60%)	14 (60.86%)	9 (56.25%)	4 (40%)	6 (66.66%)
No Answer	8 (6.15%)	2 (5.88%)	1 (4.34%)	1 (6.66%)	1 (4.34%)	1 (6.25%)	1 (10%)	1 (11.11%)
Agencies with Data	60 (46.15%)	21 (61.76%)	13 (56.52%)	5 (33.33%)	8 (34.78%)	6 (37.5%)	5 (50%)	2 (22.22%)
2012	28,168 (of 75,158)	21,727 (of 64,200)	5,033 (of 8,034)	438 (of 1,161)	822 (of 1,281)	109 (of 358)	39 (of 117)	0 (of 124)
2013	30,275 (of 77,587)	23,402 (of 65,379)	5,173 (of 8,835)	621 (of 1,568)	891 (of 1,281)	109 (of 358)	79 (of 159)	0 (of 166)
2014	35,514 (of 83,316)	27,906 (of 70,008)	5,620 (of 9,585)	850 (of 1,834)	945 (of 1,281)	113 (of 436)	78 (of 159)	2 (of 172)

CHART 7: NUMBER OF HOURS OFFICERS WORKED FOR PRIVATE EMPLOYERS, 2012-2014

		Agency Size by Number of Full-Time, Sworn Employees						
	All	>1000	999-500	499-250	249-100	99-50	49-25	<25
Agencies	130	34	23	15	23	16	10	9
Does not Track	87 (66.92%)	16 (47.05%)	15 (65.21%)	10 (66.66%)	19 (82.6%)	12 (75%)	9 (90%)	6 (66.66%)
No Answer	12 (9.23%)	3 (8.82%)	3 (13.04%)	1 (6.66%)	2 (8.69%)	1 (6.25%)	1 (10%)	1 (11.11%)
Agencies with Data	31 (23.84%)	15 (44.11%)	5 (21.73%)	4 (26.66%)	2 (8.69%)	3 (18.75%)	0 (0%)	2 (22.22%)
2012	3,324,871	2,999,529	258,653	61,670	4,979	40	0	0
2013	4,050,163	3,514,056	466,829	64,718	4,520	40	0	0
2014	3,727,242	3,283,667	347,254	89,607	6,643	40	0	32

Further, among agencies that permit officers to engage in moonlighting, refusing to allow it in a particular instance is relatively rare. Chart 8 provides data from the 29.23% of agencies that track decisions to refuse private, off-duty employment requests.

CHART 8: NUMBER OF PRIVATE EMPLOYMENT REQUESTED DECLINED, 2012-2014

		Agency Size by Number of Full-Time, Sworn Employees						
	All	>1000	999-500	499-250	249-100	99-50	49-25	<25
Agencies	130	34	23	15	23	16	10	9
Does not Track	83 (63.84%)	22 (64.7%)	15 (65.21%)	11 (73.33%)	17 (73.91%)	8 (50%)	4 (40%)	6 (66.66%)
No Answer	9 (6.92%)	1 (2.94%)	3 (13.04%)	1 (6.66%)	1 (4.34%)	1 (6.25%)	1 (10%)	1 (11.11%)
Agencies with Data	38 (29.23%)	11 (32.35%)	5 (21.73%)	3 (20%)	5 (21.73%)	7 (43.75%)	5 (50%)	2 (22.22%)
2012	536	63	463	4	5	0	1	0
2013	534	54	465	7	7	1	0	0
2014	1,106	617	468	11	9	1	0	0

Although fewer than half of the responding agencies reported tracking private, off-duty employment practices, the information provided by the minority of agencies that do provides some sense of the scope of the practice. Far more officers across the country may be working for private employers than is commonly assumed. The sixty agencies that provided tracked data indicated that 35,514 of their total 83,316 full-time, sworn employees, or 42.63%, actually worked in a private, off-duty capacity in 2014.[51] This was not intended to be a representational survey, and it would be difficult to generate reliable numbers given the relative infrequency with which agencies track the data, but an estimate based on that figure suggests that more than 300,000 state and local officers may be engaged in moonlighting in a given year. Further, they may be doing so more frequently than previously thought. The twenty-eight agencies that tracked the number of hours that officers worked for private employers reported an average of 3.7 million hours from 2012 to 2014, and those agencies employed an average of 61,486 officers in that time.[52] Applying that ratio to the roughly 725,000 state and local officers at general-purpose agencies in the United States, officers may spend 43,636,763 hours working for private employers in a given year, the equivalent of over 20,900 full-time positions.[53] These rough estimates—which, again, should not be taken as statistically rigorous—certainly suggest the need for better information about moonlighting; its regulation; and the practical, legal, and conceptual questions that it raises.

51. Comparing this figure to the number of officers who were approved to work for private employers in 2014—23,178 out of 62,312—is misleading, as the agencies that provided information about the number of approvals were not necessarily those that provided data about the number of hours actually worked, and vice versa.

52. The 61,486 average includes officers who did not work for private employers at all. The survey instrument and responses were not fine-grained enough to exclude the officers at responsive agencies who did not work for private employers.

53. This figure was reached by applying the 2,087-hour work year described in federal law. 5 U.S.C. § 5504(b) (2012) (identifying how to calculate hourly pay).

III. REGULATING PRIVATE, OFF-DUTY EMPLOYMENT

Potentially hundreds of thousands of officers work millions of hours for private employers every year, yet the rules that govern moonlighting vary tremendously from state to state and agency to agency. In this Part, I examine the statutory and agency-level regulations that govern the private employment of off-duty officers. As a threshold matter, the Constitution itself is silent on the practice of moonlighting, although off-duty officers who work for private employers raise a host of questions that implicate constitutional concerns. Those questions and concerns are discussed in Part IV. Further, I did not attempt to study the regulation of moonlighting through city or county ordinances. This Part explores the scope and variety of existing legal and administrative regulations, setting the stage for an informed discussion of the concerns raised by moonlighting and best practices for addressing those concerns.

A. Statutory Regulation

Both policing and private security are regulated by state law, but there are few statutes dealing explicitly with the private employment of off-duty officers and fewer yet that provide more than a blanket authorization of the practice. An examination of all fifty states and the District of Columbia revealed that statutory regulation falls into one of three categories; states that do not prohibit moonlighting, but are otherwise silent on the issue; states that explicitly authorize moonlighting, but do not regulate it; and states that permit and regulate moonlighting. No state categorically prohibits police moonlighting.

1. Statutory Silence

For thirty-three states and the District of Columbia, I was unable to find any statutory law directed specifically at the private employment of off-duty officers.[54] These states may, of course, have generalized statutes that, for example, prohibit private employment when it would impair a public official in the exercise of their public duties.[55] Such statutes may include police officers under their broad provisions, which tacitly approve of public officials working for private employers when there is no

54. States for which I have not identified any specific statutes include: Alaska, Arkansas, Colorado, Delaware, the District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Vermont, Wisconsin, and Wyoming.

55. *See, e.g.*, DEL. CODE ANN. tit. 29, § 5806 (West 2016); D.C. CODE § 1-618.02; FLA. STAT. § 112.313 (2016); LA. REV. STAT. § 42:1111 (2016); MICH. COMP. LAWS § 15.342(6) (2016); N.M. STAT. ANN. § 10-6-3 (2016). New York leaves it to the governing body of local political subdivisions to develop standards governing, *inter alia*, "private employment in conflict with official duties, future employment, and such other standards relating to the conduct of officers and employees as may be deemed advisable." N.Y. GEN. MUN. Law § 806 (McKinney 2016).

conflict of interest, but they say nothing specific about moonlighting itself.[56]

In these states, the ability of off-duty officers to work for private employers is often assumed under the rationale that what is not prohibited is permitted, particularly in light of historical precedent. An opinion letter by the Texas Attorney General provides an example of such logic, describing the lack of explicit authorization for moonlighting, but noting "that the practice of permitting outside employment is a long-standing one, having been recognized by many opinions and decisions of this office, as well as by various Texas courts, and the legislature has never taken any action to prohibit the practice."[57]

2. Statutory Authorization

Other states have statutes that authorize, in some fashion, the private employment of off-duty officers. The authorization can be somewhat backhanded, coming in the form of an exception to a more general rule that otherwise prohibits government employees from taking outside employment, especially private employment that involves the use of public authority or equipment. California, for example, prohibits executive employees from receiving any "emolument, gratuity, or reward," for official acts,[58] a prohibition that was read by the state Supreme Court to preclude the private employment of off-duty officers.[59] The legislature amended the statute, creating a specific exemption to avoid precluding officers from providing security[60] and other services[61] on behalf of private employers. In its current iteration, the statute includes a series of limitations on the ability of local public employees to work for private employers,[62] but a different provision of California law makes clear that those limitations are not a prohibition against moonlighting: "It is not the intent of [the Government Code] to prevent the employment by private business of a public employee, such as a peace officer, . . . who is off duty to do work related to and compatible with his regular employment."[63] Iowa, similarly, exempts police officers from a general prohibition that otherwise forbids public employees from engaging in outside employment

56. This is not to suggest that such laws have no effect on police practices. For a more thorough discussion, see Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179 (2014) (describing laws that, while not aimed specifically at policing, still exert a significant effect on police practices).

57. *See* Tex. Atty. Gen. Op., No. GA-0256, 2004 WL 2231869, at *3 (Oct. 4, 2004). Texas law explicitly provides for *some* officers to accept private employment. *See* TEX. GOV'T CODE ANN. §§ 411.0077–.0078 (West 2016).

58. CAL. PENAL CODE § 70(a) (West 2016).

59. Cervantez v. J. C. Penney Co., 595 P.2d 975, 979 (Cal. 1979), *superseded by statute*, CAL. PENAL CODE § 243; People v. Corey 581 P.2d 644, 639 (Cal. 1978), *superseded by statute*, Cal. Penal Code § 243, *as recognized in* Melendez v. City of L.A., 73 Cal. Rptr. 2d 469 (1998).

60. CAL. PENAL CODE § 70(c)(1).

61. *Id.* § 70(e).

62. CAL. GOV'T CODE § 1126(a) (West 2016).

63. *Id.* § 1127.

> that involves the use of [public] time, facilities, equipment, and supplies or the use of [a public] badge, uniform, business card, or other evidences of office or employment to give the person . . . an advantage or pecuniary benefit that is not available to other similarly situated members of . . . the public.[64]

Some states go beyond not prohibiting the practice by explicitly authorizing it. Kentucky law, for example, allows officers "while in office, and during hours other than regular or scheduled duty hours" to provide security services as well as engage in "any other similar or private employment."[65] A Washington statute provides clear authorization for state patrol officers, establishing that they "may engage in private law enforcement off-duty employment, in uniform or in plainclothes for private benefit."[66]

It is possible for authorization to be both explicit and tepid: Virginia allows private, off-duty employment, but it does so by delegating the decision to authorize private, off-duty employment to the political subdivision in which an officer works.[67]

3. Statutory Regulation

In addition to authorizing the private employment of off-duty officers, several states have adopted statutes that regulate the practice in some way. Some statutes directly govern the practice of moonlighting itself by establishing procedural or substantive regulations or by delegating to political subdivisions the authority to craft such regulations. Other statutes regulate moonlighting by situating it within a legal framework, by allocating liability for off-duty officers' actions, or by distinguishing between off-duty officers and private security personnel.

a. Direct Regulation

The direct regulation of moonlighting comes in the form of statutes that set out procedural requirements or substantive rules, or which explicitly delegate regulatory authority to localities or police agencies. Although the primary focus here is state statutes, I would be remiss if I omitted the observation that federal law explicitly contemplates that police officers—as well as firefighters and correctional officers—may engage in moonlighting. It does so by setting out that, for purposes of overtime compensation, the hours that any state or local officer does "special detail work" by providing "law enforcement[] or related activities" to a "separate or independent employer" are not added to the hours the officer works for the primary employer.[68] For the statute to apply, the of-

64. IOWA CODE § 68B.2A(1)(a) (2016).

65. KY. RV. STAT. ANN. § 61.310(4) (West 2016).

66. WASH. REV. CODE § 43.43.112 (2016). The statute does not address officers who work for other state or local agencies.

67. VA. CODE ANN. § 15.2-1712 (2016).

68. 29 U.S.C. § 207(p)(1) (2012).

ficer must choose to engage in the special detail and the agency must either require the officer to be privately employed to work the special detail, facilitate the officer's private employment, or "otherwise affect[] the condition of employment . . . by a separate and independent employer."[69]

At the state level, the statutes that impose procedural regulations on the private employment of off-duty officers are directed primarily at creating a formal approval process. Some states require the head of a police agency to approve private, off-duty employment. Georgia requires the written approval of the head of the police agency (or a designee) that employs the officer.[70] Washington allows officers to work as security guards only when approved to do so by the "chief law enforcement officer of the jurisdiction where the employment takes place," which, in certain circumstances, could mean the approval of the head of an agency other than the one the officer works for.[71] Other states require some supervisory approval but do not limit it to the head of an agency. Iowa, for example, requires officers to obtain the approval of the agency but does not designate who in the agency must provide that approval.[72] Similarly, California allows off-duty officers to work for private employers after being certified as qualified—a term it does not define—by the police agency and receiving "the approval of [the officer's] agency supervisor," but it does not identify what level of supervisor must approve the request.[73] Yet other states require approval outside the police agency. Mississippi requires deputies to have the approval of the county sheriff[74] and municipal employees to get permission from the "governing authority of a municipality"; in both contexts, state law directs the approving authority to consider, in each individual case,[75] whether private employment will bring disrepute or promote the public interest.[76]

Some states require certain types of approval only for certain types of private employment. For officers working in a security capacity, California requires the local political body—city council or county board of supervisors—to approve the "casual or part-time employment as a private security guard or patrolman,"[77] and the police agency must approve the officer's use of its uniform and equipment.[78] The agency's approval is essential, as the law requires the officer to wear a police uniform while working in a security capacity.[79] In South Carolina, off-duty officers may

69. *Id.* § 207(p)(1)(C).
70. GA. CODE ANN. § 16-10-3(c) (2016).
71. WASH. REV. CODE § 18.170.020(3) (2016).
72. IOWA CODE § 68B.2A(1)(a) (2016).
73. CAL. GOV'T CODE § 1127 (West 2016).
74. County sheriffs are, in many states, constitutional officers that are entirely separate from, and do not answer to, a county political authority such as a board of governors. *Cf.* Stoughton, *Incidental Regulation*, *supra* note 56, at 2197 n.72.
75. Mississippi law requires that approval must be given individually, rather than established as blanket authorization. MISS. CODE ANN. § 17-25-11(1).
76. MISS. CODE ANN. § 17-25-11(1)–(2) (2016).
77. CAL. PENAL CODE § 70(d)(1)(B) (West 2016).
78. *Id.* § 70(d)(1)(C).
79. *Id.* § 70(d)(1)(A).

wear their police uniforms, equipment, and weapons while working for a private employer if they receive the approval of both the agency and the "governing body" that employs them.[80] Florida law imposes specific procedural requirements only in certain cases, requiring written approval of the agency or department head before officers can provide security services to businesses licensed to sell alcoholic beverages.[81]

In addition to *ex ante* approval, procedural regulations may require the officer or private employer to provide certain information to the police agency. In Mississippi and South Carolina, for example, individual officers who take private, off-duty jobs must provide their police agency advance notification of the place and type of employment as well as the hours to be worked.[82] In other states, information may need to be provided to the private employer. In Washington, state patrol officers must provide written notice of the state's liability rules to their private employer.[83]

In addition to procedural requirements, some statutes establish substantive rules. Such statutes typically reflect legislative discomfort with the use of public authority on behalf of private employers in certain situations, such as labor disputes, or with regard to certain businesses, such as those that serve alcohol. Off-duty officers in California cannot "exercise the powers of [a] police officer if employed by a private employer as a security guard during a strike, lockout, picketing, or other physical demonstration of a labor dispute at the site of the strike, lockout, picketing, or other . . . demonstration."[84] Kentucky goes even further, prohibiting officers from working, "directly or indirectly, in any labor dispute during [their] off-duty hours."[85] West Virginia law, similarly, states that officers shall not "engage in off-duty police work for any party engaged in or involved in [a] labor dispute or trouble between employer and employee."[86] Rhode Island takes an even broader approach by prohibiting municipalities and all agents, servants, and employees from accepting from any party to the labor dispute any compensation or reimbursement for any expense incurred in connection with a labor dispute.[87] The law specifically identifies off-duty officers as municipal employees and explicitly prohibits "[p]rivate security guard services provided by off-duty police officers."[88]

With regard to businesses that sell alcohol, New York forbids officers from having any direct or indirect interest in the manufacture or sale of alcoholic beverages, permitting officers to work for private employers who sell alcohol only in severely limited circumstances: officers may

80. S.C. CODE ANN. § 23-24-10 (2016).
81. FLA. STAT. § 561.25(3) (2016).
82. MISS. CODE ANN. § 17-25-11(4) (2016); S.C. CODE ANN. § 23-24-50.
83. *See infra* notes 96–97 and accompanying text.
84. CAL. PENAL CODE § 70(d)(2).
85. KY. REV. STAT. ANN. § 61.310(4) (West 2016).
86. W. VA. CODE § 8-14-3 (2016).
87. 28 R.I. GEN. LAWS § 28-10-13.1(a) (2016).
88. *Id.* § 28-10-13.1(b).

"work in a premise licensed to sell beer at retail for off-premises consumption . . . [or] work solely as a security guard or director of traffic on the premises of a volunteer firefighters' organization licensed to sell beer and wine at retail pursuant to a temporary permit for on-premises consumption."[89] According to the State Liquor Authority, this precludes officers not just from working for a business licensed to serve alcohol but also from working for a security company hired by such a business.[90]

In addition to regulating the procedure or substance of private, off-duty employment, state laws may also delegate regulatory authority. California law gives police agencies the authority to establish "reasonable rules and regulations" that officers must abide by while working for a private employer.[91] Similarly, Virginia has a statute authorizing localities to regulate the private employment of off-duty officers by ordinance or, at the locality's option, to "delegate the promulgation of . . . reasonable rules to the [police] chief . . . or sheriff."[92]

b. Indirect Regulation

Not all state statutes regulate moonlighting by establishing procedural or substantive rules for the practice itself. Some instead situate the private employment of off-duty officers into a broader legal context by allocating liability for officers' actions or by distinguishing between moonlighting and the private security industry.

Several states explicitly limit or allocate liability arising from the actions of off-duty officers who are working for private employers. California puts "any and all civil and criminal liability" arising from an off-duty officer's actions, even those taken on behalf of a private employer, on the officer's principal (public) employer.[93] Mississippi takes the opposite tack, putting liability for an off-duty officer's actions and omissions solely on the private employer and insulating the state and any political subdivisions from liability for any actions taken on behalf of the private employer.[94] Further, Mississippi explicitly requires private employers to "fully indemnify" police agencies "for any expense or loss, including attorney's fees, which results from any action taken against the jurisdiction arising out of the acts or omissions of the officer in discharge of private security services while wearing the official uniform or using the official weapon."[95] Washington has adopted a similar approach with regard to off-duty state patrol officers; the state specifically disclaims liability for conduct "that occurs while such officers are engaged in private law en-

89. N.Y. ALCO. BEV. CONT. LAW § 128-a (McKinney 2016).

90. Michel Lou & Matthew Spina, *Molly's Update: State Law Prohibits Cops from Working for Bars*, BUFFALO NEWS (May 20, 2014), http://www.buffalonews.com/city-region/police-courts/mollys-update-state-law-prohibits-cops-from-working-for-bars-20140520.

91. CAL. PENAL CODE § 70(d)(1)(D) (West 2016).

92. VA. CODE ANN. § 15.2-1712 (2016).

93. CAL. PENAL CODE § 70(d)(2).

94. MISS. CODE ANN. § 17-25-11(3) (2016).

95. *Id.*

forcement off-duty employment."[96] State officers are required to provide written notification of that rule to private employers.[97]

It is possible to take a less absolute approach. In a statute governing sheriffs' offices, Florida apportions liability for an off-duty deputy's actions to the private employer but sets out explicitly that, for workers' compensation purposes, an injury that occurs while the off-duty deputy is "enforcing . . . criminal, traffic, or penal laws" is to be considered an on-duty injury.[98] It takes a broad view of what constitutes "on-duty," defining it to include "providing security, patrol, or traffic direction for a private . . . employer."[99]

Another approach is to make liability conditional. Alabama requires private employers who hire off-duty officers that "perform any type of security work or to work while in the uniform of a peace officer" to maintain $100,000 in liability insurance to indemnify the officer for actions taken "within the line and scope of the private employment."[100] The failure to maintain insurance that indemnifies the officer renders "every individual employer, every general partner of a partnership employer, every member of an unincorporated association employer, and every officer of a corporate employer individually liable" for the off-duty officer's actions.[101]

Several states have statutes that seek to distinguish, in some way, the regulation of off-duty officers from the regulation of the private security industry. Perhaps the most common form of statutory regulation touching on the private security industry is the exemption of public police officers from the licensure or regulatory requirements that apply to other security guards and private investigators—off-duty officers may work in a private security capacity without fulfilling the general requirements that a private security guard would have to satisfy. Texas, for example, exempts from private security regulations any "person who has full-time employment as a peace officer and who receives compensation for private employment."[102] Arizona, similarly, allows people to "act or attempt to act or represent to that [they are] security guard[s]" only if they are either a registered security guard or "a regularly commissioned peace officer."[103] Washington takes a similar approach, exempting sworn officers who are "employed by any person to engage in off-duty employment as a private security guard" from the requirements otherwise imposed on security guards.[104] Florida is similar, exempting off-duty dep-

96. WASH. REV. CODE § 4.92.175(1) (2016).
97. *Id.* § 4.92.175(3)
98. FLA. STAT. § 30.2905(b)(2) (2016).
99. *Id.*
100. ALA. CODE § 6-5-338(c) (2016).
101. *Id.*
102. TEX. OCC. CODE ANN. § 1702.322(1) (West 2016).
103. ARIZ. REV. STAT. ANN. § 32-2608(A) (2016).
104. WASH. REV. CODE § 18.170.020 (2016).

uty sheriffs from the licensure requirements that otherwise apply to "persons who watch or guard, patrol services, or private investigators."[105]

Driven perhaps by concerns about competition between private security agencies and public police providing private security services[106] or by the potential problems of blurring the line between public police and the private security industry, some state statutes have attempted to draw a firm line between the two. In Tennessee, for example, an off-duty officer can work in a security capacity on behalf of a private employer, but if the private employer is a licensed, contract security company, the officer is prohibited from wearing a police uniform or identifying themselves as a police officer.[107] Similarly, officers in North Carolina may not be licensed as private investigators or security guards,[108] and, if an officer works for a "licensed security guard and patrol company," the officer is prohibited from wearing her police uniform or using police equipment.[109] As in Tennessee, however, off-duty officers can provide similar services for *other* employers, and there is no prohibition on such officers wearing their police uniforms or using police equipment when they work for private employers *other than* a licensed security guard and patrol company.[110] Some state laws authorize police officers to work in environments that are closed to the private security industry. In Connecticut, for example, only sworn officers—current or retired—can provide armed security services in public schools.[111]

B. Administrative Regulations

Well over half the states lack any statutory regulation of moonlighting, and the remainder have adopted statutes that, with few exceptions, provide little governance other than liability allocation or low-level procedural or substantive rules. Consequentially, the regulation of moonlighting is left primarily to law enforcement agencies themselves.

Research into the administrative regulation of moonlighting is limited. Perhaps the broadest review was documented in six pages of the Hallcrest Report II published in 1990, which examined twenty-year trends in the private security industry and was published in 1990.[112] That report described, in general terms, different aspects of agency-level regulations. The report stated that agency policy often specified that off-duty officers had the full authority of on-duty officers, most agencies permitted officers to wear their uniforms, and "many" permitted officers to use

105. FLA. STAT. § 30.2905(3) (2016).
106. *See supra* Part II.A.
107. TENN. CODE ANN. § 62-35-127 (2016); Tenn. Op. Atty. Gen., No. 00-166, 2000 WL 1616931 (Oct. 31, 2000). *But see* TENN. CODE ANN. § 62-35-141(b)(2).
108. N.C. GEN. STAT. § 74C-21(a) (2016).
109. *Id.* § 74C-21(b).
110. *Id.* § 74C-21(c).
111. CONN. GEN. STAT. § 10-244a (2016).
112. CUNNINGHAM ET AL., *supra* note 14, at 286–87.

other equipment, "especially radios and police vehicles."[113] It also found that agencies typically inserted themselves between individual officers and private employers, keeping off-duty assignments and payments "in-house," and requiring liability waivers from both officers and private employers.[114] The Hallcrest Report II also found that many agencies set a maximum number of hours—"generally 20 hours per week"—that officers could work for private employers.[115] More recently, in August 2011, the Bureau of Governmental Research ("BGR") released a report on proposed changes to the New Orleans Police Department's moonlighting practices, which were based on problems identified during a Department of Justice investigation that ultimately resulted in a consent decree.[116] For that report, the BGR reviewed model policies, actual policies at thirty agencies, and best practices.[117] That report identified seven essential elements for strong policies to govern off-duty employment (the report refers to moonlighting jobs as "details"):

> Centralized control and administration of all or most aspects of details[;]
>
> Appropriate limitations on the types of businesses that can hire officers for details[;]
>
> Eligibility requirements for officers seeking to work details[;]
>
> Limitations on work hours[;]
>
> A process for fairly assigning work and ensuring proper staffing of details[;]
>
> A fee policy that compensates officers on a standardized basis and cover[s] related departmental costs[; and]
>
> Monitoring and supervision of details.[118]

In its 2007 survey of local police departments, the Bureau of Justice Statistics ("BJS") found that the vast majority of police departments had written policies governing off-duty employment, although the BJS did not offer any details about the content of those policies.[119]

For this Article, the survey instrument I sent asked agencies whether they had written policies, procedures, directives, or guidelines for the private employment of off-duty officers. The vast majority of agencies

113. *Id.* at 285.
114. *Id.*
115. *Id.* at 286–87.
116. BUREAU OF GOV'T RESEARCH, *supra* note 9.
117. *Id.* at 9–10.
118. *Id.* at 3.
119. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2007, at 13 (2010), https://www.bjs.gov/content/pub/pdf/lpd07.pdf (finding 83% of all local police departments had off-duty employment policies, ranging from more than 98% of agencies serving populations of more than 10,000 to 68% of agencies serving populations of less than 2,500). The lack of details makes it difficult to determine whether the reported policies governed off-duty employment in a law enforcement capacity, which is the focus of this Article, or whether it also includes policies that govern employment unrelated to law enforcement.

(153, or 94.4%) indicated that they did, although six (3.7%) indicated that they did not, and three (1.9%) did not answer the question. Of the agencies with written policies, most (109, or 71.2%) had been modified in the last two years, while forty-two (27.5%) had not been, and two agencies (1.3%) did not answer the question. Recent changes to the policies were generally modest, ranging from semantic changes and minor clarifications to introducing Internet-based resources for managing off-duty jobs. A few agencies expanded or restricted moonlighting or made changes to the maximum number of hours officers could work or the pay scale for off-duty employment. Only one agency, which is now under a consent decree, described a substantial overhaul of its off-duty employment policy, which was the result of a consent decree.

The survey also asked whether agencies would provide their policies if requested.[120] Of the 153 agencies with written policies, only 117 (76.4%) stated that they would be willing to provide a copy. Twenty-three agencies (15%) stated that they would not do so, and sixteen agencies (10.5%) did not answer the question. A few agencies provided their policies at the time they sent in their survey responses. The remaining agencies that indicated they were willing to provide a copy of their moonlighting policies were later asked to do so. Relatively few responded. I received and reviewed policies from thirty-eight agencies (29.23% of the 130 agencies that permit moonlighting) that employ a total of 36,848 full-time sworn officers, which are broken into size categories in Chart 9.

CHART 9: AGENCIES PROVIDING OFF-DUTY EMPLOYMENT POLICIES

		Agency Size by Number of Full-Time, Sworn Employees						
	All	>1000	999-500	499-250	249-100	99-50	49-25	<25
Agencies Permitting Moonlighting	130	34	23	15	23	16	10	9
Agencies Providing Policies	38	14	6	6	6	5	1	0

I reviewed the provided policies and other documents[121] with a specific eye to identifying requirements for and restrictions on moonlighting; the administration of private, off-duty jobs; the use of police uniforms, equipment, and vehicles while off duty; and officer remuneration. As with any policy analysis, review was complicated by the inconsistent use of terminology between agencies[122] and the differing level of specificity in

120. I intentionally did not request a copy of the policy with the survey instrument, as I was concerned that doing so might have had a chilling effect on agencies' willingness to complete the survey itself.

121. For example, some agencies provided copies of the off-duty employment contracts that private employers enter into or similar documentation.

122. What this Article calls "private, off-duty employment," for example, agencies call "extra duty," "secondary employment," "outside employment," and a variety of other terms.

agency documentation.[123] Further, it is important to keep in mind that agency policies can be complicated and overlapping: for example, an agency's vehicle policy may regulate the off-duty use of vehicles, its leave policy may regulate moonlighting while on leave, and its off-duty employment policy may regulate both the off-duty use of vehicles and moonlighting while on leave. Obtaining a full understanding of how a particular agency regulates different aspects of moonlighting requires a comprehensive review of all applicable policies, but doing so was outside the scope of my research for this Article. Given those realities and the relatively small number of policies, this Section is more properly read as an illustration of different regulatory approaches than as a representative of industry norms.

1. Requirements & Restrictions for Moonlighting

Agency policies establish a variety of restrictions and requirements that officers, private employers, or both must meet before an officer is permitted to accept moonlighting work. Twenty-five of the thirty-eight policies (65.8%) regulate when in their careers officers can begin moonlighting, as, for example, by prohibiting off-duty officers from working for private employers during the police academy (fifteen policies), or field training (eleven policies), or a probationary period[124] following field training (eight policies). Several policies were more nuanced, allowing officers to work off duty in some capacities but not others at certain points. One agency, for example, generally permits officers to engage in moonlighting once they have finished field training and are in a probationary period, but prohibits them from moonlighting for private businesses that serve alcohol. At that agency, only officers who have completed the probationary period can moonlight at private businesses that serves alcohol. Similarly, some agencies permit officers to accept positions as "courtesy officers"—receiving reduced rent at an apartment building or complex—during the probationary period. Other agencies prohibit it. Sometimes a policy is nuanced by exceptions, as with policies that generally prohibit probationary officers from accepting off-duty employment but allow it in the case of officers who have recently worked at another police agency.

Officers who have fully completed training and a probationary period are not freed of all restrictions, of course. A few policies prohibit officers who have been assigned to specialized units, like vice or narcotics, from engaging in moonlighting. Twenty-seven policies (71.1%) address

123. Some policies were fairly comprehensive, while other policies were limited to a single page. Understanding several policies required going beyond the policy itself to other agency documentation.

124. The duration of the probationary period varies from agency to agency. The policies reviewed for this project suggest a range from six to eighteen months, but when exactly that clock starts can differ. Some agencies start the probationary clock after an officer completes basic recruit training (at a police academy) while others start the clock only when an officer is sworn in or completes field training.

officers who are on a limited, light, or restricted duty assignment.[125] Most of the policies prohibit officers from moonlighting when they are on anything other than regular duty, although a few allow for off-duty work if it is consistent with the restrictions that prevent the officer from working a regular-duty assignment. Nine policies (23.7%) require an officer to be in good standing or otherwise take into account an officer's disciplinary record or present job performance.

Another common, though hardly universal, aspect of off-duty employment policies addresses officers moonlighting while on leave. Twenty-six policies (68.4%) prohibit or restrict an officer from moonlighting while they are on leave for medical reasons, and some policies prohibit officers from doing so within a certain amount of time (typically eight or twenty-four hours) of returning from sick leave. Twenty-three policies (60.1%) address disciplinary leave, prohibiting officers from working for private employers while they are suspended from regular duty. Other policies prohibit moonlighting while officers are on other types of leave, including bereavement leave, Family and Medical Leave Act leave, workers compensation leave, military leave, and so on. Interestingly, most of the policies explicitly or implicitly allow officers to engage in moonlighting while taking personal (vacation) leave or compensatory time.[126]

Even when officers are allowed to engage in moonlighting, agency policy may regulate the schedule or number of hours an officer can work. Ten policies (26.3%) prohibit officers from moonlighting for a period of time immediately before (up to eight hours) or after (up to thirty minutes) their regular shift. Nineteen policies (50%) limit the total number of hours that officers can work, both on duty and off duty, in a specific period, although there is little consistency in what that total can be: maximums ranged from fourteen to eighteen hours in a day and from sixty-four to 112 hours in a week. Additionally, thirteen policies (34.2%) restrict the number of purely off-duty hours that an officer may work in a given period. Here, figures ranged from five to sixteen hours per day, from twenty to thirty-six hours per week, and from forty to seventy-two hours per month. The most detailed policy came from an agency with between twenty-five and fifty full-time officers; it limited moonlighting to no more than five hours on officers' regular duty days, no more than seven hours on the last work day of the week, and no more than twelve

125. As opposed to a "regular duty assignment," which indicates that the officer is physically and psychologically capable of conducting the full range of police functions, a limited, light, or restricted duty assignment is typically used to accommodate medical or other limitations. For example, an officer who was injured may be placed on light duty until a doctor clears the individual to return to regular duty.

126. Compensatory time gives officers time off for working beyond their normal duty assignment in a given period. Thus, an officer who is regularly scheduled to work a forty-hour week on patrol, but who actually works fifty hours may take or be given ten hours of compensatory leave rather than pay (or fifty hours, at time-and-a-half, rather than overtime pay). At some agencies, officers can choose to take compensatory leave in lieu of pay. At other agencies, officers may be required to take one or the other in certain circumstances.

hours on officers' days off. Policies that limit the total number of hours that officers can work function as a *de facto* "time off" requirement, but a few policies were more explicit, requiring officers to get adequate rest or specifying a minimum amount of rest time that officers must have between shifts.

Officers may also be prohibited from working for certain types of employers or from engaging in certain types of work. Such policies seem to be motivated by some combination of the desire to avoid confusing the public nature of an officer's law enforcement duties (as with policies that prohibit officers from working as bill collectors), the desire to maintain moral authority (as with policies that prohibit officers from working for sexually oriented businesses), and the desire to minimize or mitigate the risk of liability. The single most common restriction related to the type of employer involves businesses that serve alcohol: thirty-two of the thirty-eight policies (84.2%) prohibit or restrict moonlighting at such establishments. Restrictions range from prohibiting the officer from serving or selling alcohol, to requiring multiple officers, to prohibiting officers from physically working inside an establishment, limiting them to working at the entrance or in the parking lot. Other alcohol-related restrictions include limiting the nature of an off-duty officer's role: several policies explicitly state that officers are only to fulfill law enforcement duties, not serve as bouncers or provide other services.

As with alcohol-related businesses, officers may be prohibited from or restricted in working for: sexually oriented businesses (eighteen policies, 47.4%), tow-truck companies (sixteen policies, 42.1%), criminal enterprises or businesses owned by criminals (twelve policies, 31.6%), gambling establishments (nine policies, 23.7%), political employers (eight policies, 21.1%), public utility companies (two policies, or 5.3%), and racist organizations (two policies, or 5.3%). Additionally, sixteen policies (42.1%) prohibit or restrict officers from working for businesses in the midst of a strike or labor-management dispute. Notably, ten policies (26.3%) prohibit officers from working for private attorneys or restrict them from assisting with criminal defense work.

Various policies also prohibit officers from working in certain capacities, regardless of the nature of the private employer. Twenty-eight policies (73.7%) prohibit or restrict officers from working as private investigators, bounty hunters, or officers in another jurisdiction, and fourteen policies (36.8%) prohibit or restrict officers from working as bodyguards or bouncers. Twenty-four policies (63.4%) prohibit or restrict officers from working as bill collectors or bondsmen. Officers are also prohibited or restricted from working as repossession agents (seventeen policies, 44.7%); process servers (eleven policies, 28.9%); in jobs involving investigative techniques such as performing polygraphs, crash reconstruction, or background checks (ten policies, 26.3%); and as couriers of cash or valuables (six policies, 16.7%).

Other restrictions on the type of private employer or nature of work include insurance companies, taxi companies, junk yards, businesses under investigation, businesses that require officers to sign indemnity agreements, businesses that compete with private security firms, locksmiths, raves, dance halls, billiard parlors, and employers that the agency has put onto a blacklist.

2. Off-Duty Employment Administration

There was substantial variation in how law enforcement agencies administered private, off-duty employment programs and who in the agency had the authority to approve or decline a moonlighting request. Twenty agencies (52.6%) employ an in-house, off-duty employment coordinator. The coordinators' positions are split almost equally between a purely administrative role (with no authority to approve or disapprove requests) and a supervisory approach that includes evaluating and authorizing moonlighting requests. Whether administrative or supervisory, internal coordinators appear to do little or no negotiation with the private employer; they may review and implement an off-duty work schedule, but they do not work with the private employer to create the schedule. One policy took a different approach, allowing private employers to hire an officer as a coordinator—a coordinator for the specific private employer or job, rather than a coordinator for the police agency. As an external coordinator, that officer would work with the private employer to develop a schedule, negotiate pay rates, hire other officers for off-duty work, and so on. Such a coordinator may be paid an hourly rate by the private employer or receive a percentage of the total paid to other officers who work off-duty for that employer.[127]

The survey solicited information about the lowest-ranking supervisor who could approve a request for private, off-duty employment. Agencies largely fell into two categories: forty-eight agencies reported requiring the approval of either the agency head (thirty-four) or assistant or deputy agency head (fourteen), while thirty-nine agencies reported requiring the approval of a front-line supervisor such as a sergeant (twenty-six) or lieutenant (thirteen). Relatively few agencies required approval by a captain (three), major (four), colonel (two), or commander (seven).[128] Thirteen agencies that reported permitting private, off-duty employment also reported that they did not require any supervisory approval. Four agencies that permit moonlighting did not respond to this question. Several agencies indicated that supervisory approval depended on the employee who would be working off-duty; officers required the approval of a front-line supervisor, while higher-ranked employees re-

127. Brendan McCarthy, *Biggest Earners in New Orleans Police Details are Often High-Ranking Officers Overseeing the Jobs,* TIMES-PICAYUNE (May 16, 2011, 6:08 AM), http://www.nola.com/crime/index.ssf/2011/05/post_271.html.

128. Importantly, not all police agencies have all of those ranks, and some agencies may have different ranks that the survey did not account for.

quired higher-level approval. The survey also solicited information on the role of discretion in refusing moonlighting requests. Of the 130 agencies that permit moonlighting, 105 (80.8%) indicated that supervisors retained discretion to refuse moonlighting requests even if those requests complied with all written policy criteria. Seventeen agencies (13.1%) require supervisors to approve such requests, while eight agencies (6.2%) did not respond to that question.

Of the thirty-eight agencies that provided policies for review, twenty-three policies (60.5%) identified the lowest-ranking supervisor who can decline a moonlighting request. Although some policies explicitly state that only high-level commanders can refuse a request, most allow the immediate supervisor to do so. Separately, twenty-nine policies (76.3%) identified the highest-ranking supervisor who must approve such requests, with the vast majority requiring the approval of the agency head (police chief or sheriff).

3. Uniforms, Equipment, and Vehicles

Many agency policies governed, to some extent, what public equipment an officer can wear or use while moonlighting. Twenty agencies (52.6%) require officers to wear their uniforms[129] while working off duty for private employers, although nine policies allowed exceptions when authorized by a supervisor—exactly what level supervisor varied, from lieutenant to agency head, but no policies allowed sergeants to exempt officers from the uniform requirement. Five agencies (13.2%) had policies that permitted, but did not appear to require, officers to wear a uniform while moonlighting. Five agencies (13.2%) had policies that did not discuss uniforms.

Similarly, twenty-one policies (55.3%) either require officers to carry their issued weapons and other equipment with them while moonlighting or permit them to do so with supervisory approval. As a general matter, officers are typically expected to carry their firearm and secondary weapons whenever they are in uniform. One policy specifically allows officers to use other agency equipment beyond what is personally issued to the officers—such as traffic cones or extra flashlights—so long as that equipment is not needed by an on-duty officer. None of the policies I reviewed discussed body-worn cameras (commonly referred to as "body cams"), although an analysis by the Associated Press found that only five of the twenty largest police agencies require uniformed officers to wear body cams while off-duty.[130] Several agencies, on the other hand, specifi-

129. A full review of what *type* of uniform agencies require, permit, or prohibit is outside the scope of this Article. One agency, for example, required officers to wear at least a "Class B" uniform while moonlighting.

130. *Moonlighting Police Leave Body Cameras at Home,* ASSOCIATED PRESS, June 11, 2017, http://www.wctv.tv/content/news/Moonlighting-police-leave-body-cameras-at-home-427813483.html.

cally do not require moonlighting officers to wear body cams even when they do require on-duty officers to wear them.[131]

There was slightly more variation with regard to officers' use of police vehicles for private, off-duty employment. Eighteen policies (47.4%) allow officers to use a police vehicle while moonlighting, although some require special approval (eight policies, 21.1%) or impose a fee on the officer or the private employer (five policies, 13.2%). Four policies (10.5%) prohibit the use of police vehicles for moonlighting jobs.

4. Officer Remuneration

Of the thirty-eight agencies that provided documentation, a substantial majority (twenty-seven, or 71.1%) require the private employer to pay the officer directly. Two agencies prohibit direct cash payments, but allow direct payments by check or other means. One agency requires officers to report to the agency all compensation received. Ten agencies (26.3%) appear to require private employers to pay the agency itself, which then pays the officer. One agency allows private employers to either pay the officer directly or to channel compensation through the agency. Six agencies that receive payments from private employers include in their policies an administrative fee; most of the policies do not identify exactly how much that fee is, but the ones that do range from two dollars per hour per officer to five dollars per hour per officer. At least one agency charges the officer an administrative fee—fifty dollars per month for use of an agency vehicle.

There was similar variation in the way policies regulate the pay officers receive for private, off-duty employment. Seventeen policies (44.7%) do not mention pay scale at all. Fifteen agencies (39.5%) have either a fixed pay rate or a pay schedule that private employers must abide by. Five agencies (13.2%) set a minimum pay rate but allow for negotiation above that amount. The minimum pay rate may be scaled to a particular dollar amount (*e.g.*, one agency set a twenty-five dollar minimum) or to some other referent (one agency set the minimum at the hourly rate of a rookie officer). Several agencies have policies that set a minimum number of *hours* for which officers must be paid, separate and apart from the minimum hourly pay. No agency policy establishes a negotiable pay scale with an hourly maximum.

IV. MOONLIGHTING CONCERNS AND CONSIDERATIONS

Where Part III discussed the statutory and administrative regimes that govern the private employment of off-duty officers, this Part explores the considerations that should underlie regulatory decision-making. Specifically, I seek to identify the practical, legal, and conceptual concerns about the effects of moonlighting on the officers themselves,

131. *Id.*

the agencies they work for, and the communities they serve. Understanding the potential effects of moonlighting is a necessary prerequisite to evaluating the way the practice is regulated and to developing industry best practices.

A. Practical Considerations

Moonlighting may affect the overall quality of police services by either compensating for or contributing to low pay. Given limited municipal and county budgets, pay scales that are often set by the terms of collective-bargaining agreements, and benefits packages governed by collective bargaining or state law, police agencies may be unable to offer flexible, competitive salaries. By permitting moonlighting, such agencies may be able to attract applicants by offering the potential for a higher income than the agency itself could provide. In such cases, private employers—or, more accurately, the possibility of private employment—may supplement what the agency itself provides, expanding the agency's applicant pool by appealing to candidates with desirable educational or professional backgrounds who might otherwise be inclined to accept a higher paying position with a different agency or pursue an entirely different career field. In that way, agencies that permit moonlighting may improve the quality of police services by allowing them to hire more or better officers than they could otherwise afford. On the other hand, the potential for individual officers to supplement their income through private employment might reduce the salary that police agencies must offer to attract candidates. In that way, moonlighting may drive wages down, perhaps decreasing the overall quality of police services. Low pay may create a gap that moonlighting can fill, but it may also be true that moonlighting contributes to low pay in the first place.

Moonlighting may also affect officers' actions and decision-making. Off-duty officers who are working for a private employer may interact with the public and take actions that deviate from the actions that an on-duty officer might take in any given scenario. After all, officers are not drones that mindlessly carry out departmental priorities; they are affected by self-interest and are susceptible to conflict. Off-duty officers retain law enforcement powers, but they are working at the pleasure of a private employer who, implicitly or explicitly, may prefer that off-duty officers exercise their discretion in a way that benefits the business' interests without regard to the police mission. Off-duty officers may be more likely to ignore or merely disrupt suspicious activity that they would have investigated had they been on duty, and they may be less likely to engage in enforcement actions against a private business' customers for low-level civil infractions and criminal offenses. For example, an off-duty officer working for a private employer might ignore parking or traffic violations or tell intoxicated nightclub patrons to leave for the evening rather than arresting them for disorderly conduct or public drunkenness. Officers may also find themselves enforcing private employers' rules or exercising

discretion on behalf of a private employer in problematic ways, such as enforcing an employer's dress code when that dress code is facially neutral but has a clear racially discriminatory effect.[132]

An officer's on-duty behavior can also be shaped by off-duty employment. For example, an officer approaching the end of her shift may be reluctant to do anything that would delay her arrival at a moonlighting job, especially when the employer provides an hourly rate of pay that exceeds the officer's normal duty pay.[133] Even when an officer is not an employee of a private venue, her on-duty behavior may be affected if her friends and coworkers are employed there, and even more so if the officer is interested in working there in the future.

Whether on or off duty, an officer's decisions and actions may be affected by some conflict between the police agency's interests, the private employer's interests, and the officer's own personal interests. That was certainly the perception of some police executives who participated in the Hallcrest Report II, which reflected their concerns about "the use or misuse of authority or police records for personal or financial gain, and . . . the provision of selected services that are normally part of an officer's publicly paid responsibilities."[134] Police executives thought these concerns were exacerbated when officers contracted with private employers directly or through a police union and mitigated when private employers had to go through the agency to hire off-duty officers.[135] Concerns may also be exacerbated when a large portion of officers' income is derived from private employment; in some cases, officers make more from moonlighting than they do from their public employment.[136] Even when that is not the case, officers may change their behavior if private employment becomes particularly valuable. Consider that an officer's retirement is often an average of a certain number of their highest-earning years; an officer's retirement benefits, for example, may be 3% (per year of service) of the three highest-paid years in the officer's career. If pay for off-duty work is channeled through the agency, and if it counts as officer pay for retirement purposes,[137] then officers near retirement (when they are already at the top of their pay range) may have a strong incentive to inflate their highest-paid years by working a large number of hours for private employers.

Beyond conscious decision-making, officer behavior can also be affected by fatigue. According to research by the Police Foundation, the

132. *See, e.g.*, Jessica Dickerson, *Minneapolis Restaurant, 'Bar Louie,' Sparks Outrage with 'Jim Crow' Dress Code,* HUFFINGTON POST (July 7, 2014, 4:26 PM), http://www.huffingtonpost.com/2014/07/07/bar-louie-racist-dress-code_n_5564530.html; Chris Gray et al., *Getting Past the Bouncer*, HOUS. PRESS (Feb. 9, 2011, 4:00 AM), http://www.houstonpress.com/news/getting-past-the-bouncer-6587799.

133. *Cf.* LINN, *supra* note 16.

134. CUNNINGHAM ET AL., *supra* note 14, at 286.

135. *Id.*

136. McCarthy, *supra* note 127.

137. This survey did not inquire as to whether pay for private, off-duty employment was counted toward retirement.

length of an officer's shift can affect judgment and behavior; shifts of eight and ten hours do not appear to have any negative affect, but shifts longer than ten hours do.[138] Officers who engage in moonlighting either immediately before or immediately after their regular shifts are effectively extending their working hours, quite possibly beyond the point at which fatigue begins to take some toll. Recall that of the thirty-eight policies that agencies provided, only half limited the number of hours that officers could work in a given period, and none of those had a limit of less than fourteen hours in a single day. An officer who works for a private employer on one of their regular days off might not hit that threshold, but that does not free officers from the potential threat of fatigue. Research on circadian rhythms and differential shift work suggests that fatigue may be a problem. For example, an officer who works a regular daytime shift is more likely to be affected by fatigue if they work an off-duty night shift for a club that closes in the early morning, even if the officer's on-duty and off-duty work are on different days.[139] This may be why off-duty employment has been positively correlated with the likelihood of an on-duty vehicle crash.[140] Moonlighting is not the only source of fatigue, of course—an officer who played video games late into the previous night may be just as tired as an officer who was working at a bar—but agency-approved moonlighting represents an officially sanctioned activity in a way that purely personal entertainment does not.

Off-duty employment also has the potential to shape officers' perceptions in both positive and negative ways by reinforcing or moderating officers' implicit biases. Officers, like everyone else, hold implicit biases that color, at an unconscious level, their interpretation of the world around them. Implicit biases may relate to race, ethnicity, age, apparent social status, religion, and a range of other characteristics. It is those implicit biases that can lead officers to, for example, perceive a group of black teens as more suspicious than a group of white teens, think of Hispanic parties as more boisterous and wild than white parties, question a Muslim person's motivations more closely than a Christian person's, or find an affluent white woman's account of events more credible than a working-class black man's account. Psychological research strongly suggests that implicit racial bias, occurring as it does at a completely unconscious level, creates substantial challenges for modern policing.[141] And

138. KAREN L. AMENDOLA ET AL., POLICE FOUND., THE SHIFT LENGTH EXPERIMENT: WHAT WE KNOW ABOUT 8-, 10-, AND 12-HOUR SHIFTS IN POLICING 37 (2011), http://www.policefoundation.org/publication/shift-length-experiment/.

139. *See id.* at 22–23.

140. Bryan Vila, *Sleep Deprivation: What Does It Mean for Public Safety Officers?* 262 NAT'L INST. JUST. J. 26, 28 (2009); Bryan Vila & Dennis Jay Kennedy, *Tired Cops: The Prevalence and Potential Consequences of Police Fatigue*, 248 NAT'L INST. JUST. J. 16, 19 (2002); *see also* J. Andrew Hansen, Explaining Law Enforcement Officer-Involved Vehicle Collisions and Other Police Behavior (2015) (unpublished dissertation, University of South Carolina) (on file with author) ("It is . . . possible that second jobs are indicative of financial strain due to family illness, spousal unemployment, or some other stressful situation that may contribute to fatigue.").

141. Tracey G. Gove, *Implicit Bias and Law Enforcement*, POLICE CHIEF, Oct. 2011, at 44, 45, http://fairandimpartialpolicing.com/docs/thepolicechief.pdf.

moonlighting may play a role in creating or addressing those challenges. When an officer observes behavior that is consistent with an existing stereotype—that, say, people of a certain ethnicity are loud and disruptive or are unable to consume alcohol responsibly—that observation can reinforce the stereotype, strengthening the officer's implicit bias. The implications are obvious, at least with regard to certain types of off-duty employment; officers who provide security at or outside of a nightclub on Latin Night or Hip-Hop Night might have their biases invisibly but meaningfully reinforced to the detriment of the officer's future interactions with community members. On the other hand, the literature suggests that implicit biases may be tempered by exposure that challenges the stereotype.[142] An officer who, for example, works security at a grocery store in a black neighborhood may have a series of positive interactions that reduces the potency of her racial biases.

Finally, moonlighting also has the potential to negatively affect the balance of power within police agencies. When individual officers work as coordinators for private employers—selecting other officers to work off duty, creating schedules, distributing pay, *et cetera*—they also gain a disruptive measure of social capital within the police agency itself. For example, a review of the New Orleans Police Department (prior to its consent decree) found that off-duty jobs were, in some cases, "coordinated by lower-ranking officers who have their supervisors on the detail payroll."[143] Such an arrangement wreaks havoc in a hierarchical command structure; a supervisor cannot simultaneously manage an employee and rely on that employee for a job.

B. Legal Considerations

The law grants police officers special authority to, *inter alia*, detain, arrest, and use force. It imposes special requirements on the exercise of that authority, recognizing the need to balance the exercise of state power against individual interests. And it creates remedial mechanisms that attempt to strike a balance between limiting governmental overreach and chilling essential government actions. But do those laws apply with full force to off-duty officers? In this Section, I explore the legal issues raised by the private employment of off-duty officers. The threshold question, of course, is whether officers can exercise police powers while working off-duty. Current practice and the overwhelming weight of existing legal authority suggest that an officer is vested with authority by virtue of her position as an officer, not by virtue of her status as on or off duty.[144] Officers can therefore exercise police authority regardless of whether they

142. *Id.* at 49.

143. McCarthy, *supra* note 127.

144. Sawyer v. Humphries, 570 A.2d 341, 345–47 (Md. App. Ct. 1990) (discussing decisions from New York, California, Illinois, Pennsylvania, New Jersey, Georgia, Ohio, and Minnesota); SYDNEY H. ASCH, POLICE AUTHORITY AND THE RIGHTS OF THE INDIVIDUAL 35 (1968).

are working a normal shift or moonlighting.[145] Other questions are less easily answered, and what answers exist are inconsistent and confusing.

1. Reported Litigation

The survey instrument queried whether agencies had been subject to litigation relating to private, off-duty employment. Twenty-one of the 162 agencies (13%) reported that they had, 120 agencies (74.1%) indicated that they had not, and twenty-one agencies (13%) did not answer the question. Agencies that indicated there had been litigation were asked to briefly describe it. Of those twenty-one agencies, six reported litigation related to the use of force by off-duty officers, including one shooting; four reported litigation related to vehicle crashes involving or allegedly caused by an off-duty officer; three reported litigation related to contractual disputes involving a private employer's refusal to pay; one reported litigation involving an arrest; and one reported litigation involving an alleged failure to protect. The remaining agencies either provided no description or a nonresponsive answer.

2. Officer Liability

As public officials, police officers are subject to constitutional constraints, violations of which can expose them to civil liability under 42 U.S.C. § 1983, which creates a cause of action against anyone who violates constitutional rights while acting under color of state law.[146] The Court has adopted a broad reading of "under color of" state law, holding that, in the civil context as in the criminal context,[147] it refers to the exercise of authority "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[148] A public official, in other words, acts under color of law by acting under "pretense of law."[149]

To determine whether a police officer was clothed with the authority of state law at a particular time, courts have referred to a variety of *ad hoc* factors but have not developed a formalized test. This should not be surprising; the vast majority of § 1983 cases likely result from actions taken by on duty officers working their regular shifts or assignments, and thus the question of whether an officer was acting under color of law may

145. An officer's authority may be limited by geographic jurisdiction, however. Stoughton, *Incidental Regulation*, *supra* note 56, at 2198 ("State laws generally recognize the local nature of policing by restricting officers' extraterritorial authority.").

146. 42 U.S.C. § 1983 reads, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

147. *See* 18 U.S.C. § 242 (2012).

148. Monroe v. Pape, 365 U.S. 167, 184 (1961) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

149. Martinez v. Colon, 54 F.3d 980, 987 (1st Cir. 1995).

be taken for granted. But what about when an officer was off duty at the time? Whether an officer is on or off duty is a relevant factor,[150] of course, but simply being off duty does not preclude an officer from using—or misusing—her authority.[151] As a result, courts have had to sift through fact-intensive, totality-of-the-circumstances inquiries to determine whether officers, though off duty, were still clothed with the authority of state law. Courts have framed the test in different ways. The "key determinant" for the First Circuit is "whether the actor . . . purposes to act in an official capacity or to exercise official responsibilities."[152] The Fifth Circuit looks to whether there was a sufficient "nexus between the victim, the improper conduct, and [the officer's] performance of official duties."[153] The Seventh Circuit focuses on "whether [the officer's] actions related in some way to the performance of a police duty."[154] Regardless of how exactly the test is framed, judicial inquiries generally focus on two loosely connected concepts: the apparent status of the officer *as* an officer and the nature of the officer's actions.[155]

Courts have indicated that an officer's apparent status—specifically whether the officer *looked* like an officer at the time—is highly relevant to determining if the officer was acting under color of state law.[156] Courts have recited a range of relevant factors, including whether the officer identified herself as an officer;[157] whether other parties were aware of the officer's official identity;[158] whether the officer was in uniform[159] or dis-

150. Hechavarria v. San Francisco, 463 Fed. App'x 632, 633 (9th Cir. 2011); Greco v. Guss, 775 F.2d 161, 168 (7th Cir. 1985).

151. *See, e.g.*, Bustos v. Martini Club, Inc., 599 F.3d 458, 464 (5th Cir. 2010) ("Whether an officer is acting under color of state law does not depend on his on-or off-duty status at the time of the alleged violation."); Pickrel v. Springfield, 45 F.3d 1115, 1118 (7th Cir. 1995) ("Deciding whether a police officer acted under color of state law should turn largely on the nature of the specific acts the police officer performed, rather than on merely whether he was actively assigned at the moment to the performance of police duties."); Pitchell v. Callan, 13 F.3d 545, 548 (2d Cir. 1994) ("More is required than a simple determination as to whether an officer was on or off duty when the challenged incident occurred."); Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1429 (10th Cir. 1984), *vacated on other grounds and remanded for reconsideration by* City of Lawton, Okla. v. Lusby, 474 U.S. 805 (1985); Traver v. Meshriy, 627 F.2d 934, 938 (9th Cir. 1980); Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975).

152. *Martinez*, 54 F.3d at 986.

153. *Bustos*, 599 F.3d at 464–65.

154. Gibson v. City of Chi., 910 F.2d 1510, 1517 (7th Cir. 1990).

155. In perhaps the most concise and coherent judicial description of the two concepts, the First Circuit has stated: "Even though 'acting under color of law' includes 'acting under pretense of law' for purposes of a state action analysis, there can be no pretense if the challenged conduct is not related in some meaningful way either to the officer's governmental status or to the performance of his duties." *Martinez*, 54 F.3d at 987.

156. Claudio v. Sawyer, 409 Fed. App'x 464, 466 (2d Cir. 2011).

157. Swiecicki v. Delgado, 463 F.3d 489, 496 (6th Cir. 2006), *abrogated on other grounds by* Wallace v. Kato 549 U.S. 384 (2007); Chapman v. Higbee Co., 319 F.3d 825, 835 (6th Cir. 2003) (en banc); Jocks v. Tavernier, 316 F.3d 128, 134 (2d Cir. 2003); Rivera v. La Porte, 896 F.2d 691, 696 (2d Cir. 1990); Traver v. Meshriy, 627 F.2d 934, 938 (9th Cir. 1980); Wahhab v. City of N.Y., 386 F. Supp. 2d 277, 288 (S.D.N.Y. 2005).

158. *Wahhab*, 386 F. Supp. 2d at 288.

159. Hechavarria v. San Fransisco, 463 Fed. App'x 632, 633 (9th Cir. 2011); *Swiecicki*, 463 F.3d at 496, *abrogated on other grounds by* Wallace v. Kato 549 U.S. 384 (2007); Pickrel v. Springfield, 45 F.3d 1115, 1118 (7th Cir. 1995); Hanson v. Larkin, 605 F. Supp. 1020, 1023 (D. Minn. 1985) (holding that an officer was acting under color of law because he was in uniform at the time).

played a badge or official identification;[160] whether the officer possessed or used police equipment such as a police vehicle,[161] handcuffs,[162] a firearm,[163] or other weaponry[164] or equipment;[165] and whether the actions under review occurred on police property.[166]

Courts have also indicated that the nature of the officer's actions is a core consideration in determining whether she was acting under color of state law.[167] Here, too, courts have described a variety of different factors, including whether the officer detained,[168] arrested, ejected,[169] or questioned someone; whether the officer was engaged in a "traditional public safety function";[170] and whether the officer's "primary duty" at the time was to the public police agency or the private employer.[171] Of particular relevance in the context of private, off-duty employment is the nature of the private employment relationship and the way that relationship shapes the officer's actions. When a private employer hires a police officer explicitly "to intervene in cases requiring police action,"[172] for example, the officer's actions may be more readily identifiable as taken under color of state law.[173]

The various factors that different courts have used and the weight that courts have put on those factors show little in the way of consistency. While some courts have held that a single factor—the fact that an officer

160. *Swiecicki*, 463 F.3d at 496, *abrogated on other grounds by* Wallace v. Kato 549 U.S. 384 (2007); *Jocks*, 316 F.3d at 134; *Pickrel*, 45 F.3d at 1118; Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1429 (10th Cir. 1984), *vacated on other grounds and remanded for reconsideration by* City of Lawton, Okla. v. Lusby, 474 U.S. 805 (1985); *Traver*, 627 F.2d at 938; Brandon v. Allen, 516 F. Supp. 1355, 1360 (W.D. Tenn. 1981), *rev'd on other grounds by*, Brandon v. Allen, 719 F.2d 151 (6th. Cir. 1983).

161. *Hechavarria*, 463 Fed. App'x at 633; *Pickrel*, 45 F.3d at 1118.

162. *Rivera*, 896 F.2d at 696.

163. Chapman v. Higbee Co., 319 F.3d 825, 835 (6th Cir. 2003) (en banc); *Jocks*, 316 F.3d at 134; *Pickrel*, 45 F.3d at 1118; Pitchell v. Callan, 13 F.3d 545, 548 (2d Cir. 1994); *Rivera*, 896 F.2d at 696 (revolver); *Brandon*, 516 F. Supp. at 1360, *rev'd on other grounds by* Brandon v. Allen, 719 F.2d 151 (6th. Cir. 1983).

164. *Swiecicki*, 463 F.3d at 496, *abrogated on other grounds by* Wallace v. Kato 549 U.S. 384 (2007); Wahhab v. New York, 386 F. Supp. 2d 277, 288 (S.D.N.Y. 2005).

165. *Hechavarria*, 463 Fed. App'x at 633; Haines v. Fisher, 82 F.3d 1503, 1508 (10th Cir. 1996) (holding that officers who, as a practical joke, staged a fake robbery of a convenience store were not acting under color of law even though they used various pieces of police property).

166. Delcambre v. Delcambre, 635 F.2d 407 (5th Cir. 1981) (holding that a police chief was not acting under color of state law when he assaulted a family member at the police department).

167. *Pickrel*, 45 F.3d at 1118 ("Deciding whether a police officer acted under color of state law should turn largely on the nature of the specific acts the police officer performed.").

168. *Chapman*, 319 F.3d at 835 (en banc).

169. *Swiecicki*, 463 F.3d at 495–96, *abrogated on other grounds by* Wallace v. Kato 549 U.S. 384 (2007).

170. Wahhab v. New York, 386 F. Supp. 2d 277, 288 (S.D.N.Y. 2005). This factor, of course, requires identifying what exactly traditional public safety functions are. Again, there is no clear answer. For example, does working in a security and crowd-control capacity at a musical event constitute a traditional public safety function? At least one state appellate court has answered in the negative. *See* Pardon v. Finkel, 540 N.W.2d 774, 776 (Mich. Ct. App. 1995).

171. Traver v. Meshriy, 627 F.2d 934, 938 (9th Cir. 1980).

172. *Swiecicki*, 463 F.3d at 496–97 (internal quotation marks omitted) (officer hired to work security at a sporting event), *abrogated on other grounds by* Wallace v. Kato 549 U.S. 384 (2007).

173. *Id.* at 495–97; *Traver*, 627 F.2d at 938 (holding that off-duty officer working for a bank was acting under color of state law in part because he responded "as a police officer rather than as a bank employee").

was in uniform at the time[174]—was enough to establish that the officer was acting under color of state law, other courts have held that the same factor was all but irrelevant.[175] Courts generally resist basing their determination on any single factor,[176] but they are often confused about how much weight to give the many factors they recite. As a result, courts have sometimes emphasized the need to focus on the nature of the officer's actions while at the same time discussing factors more closely related to an officer's appearance than the nature of their actions.[177] Further, there is often tension within and between different factors. At the same time that some courts have held the exercise of traditional police authority, such as detaining or arresting a suspected criminal, supports the conclusion that an off-duty officer is clothed with the authority of state law, other courts have held that "the performance of private security functions [that] may entail the investigation of a crime does not transform the actions of a private security officer into state action," even when the private security officer is an uniformed, off-duty police officer.[178]

The characterization of an officer—as a public official, private employee, both, or neither—determines not only whether the officer is potentially subject to constitutional tort litigation under § 1983, but also what defenses the officer can use to defend themselves against state or constitutional tort claims.

Statutory law that waives sovereign immunity from tort liability generally withholds that waiver—thus preserving immunity—in various contexts applicable to police actions.[179] One of the primary exceptions to the waiver of immunity involves the exercise of discretion by government agents in the course of their official duties.[180] Such an exception exists in the Federal Torts Claims Act, which exempts from the waiver of sovereign immunity "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused."[181] State law often es-

174. Hanson v. Larkin, 605 F. Supp. 1020, 1023 (D. Minn. 1985); *see also* Jocks v. Tavernier, 316 F.3d 128, 134 (2d Cir. 2003) ("We have no doubt that when an officer identifies himself as a police officer and uses his service pistol, he acts under color of law.").

175. Redding v. St. Eward, 241 F.3d 530, 533 (6th Cir. 2001) (quoting Stengel v. Belcher, 522 F.2d 438, 440–41 (6th Cir. 1975)) (stating that it is "the nature of the act performed, not the clothing of the actor" that determines whether an officer was acting under color of law).

176. *Id.*; Gibson v. City of Chic., 910 F.2d 1510, 1516 (7th Cir. 1990).

177. *Swiecicki*, 463 F.3d at 495–96 (explaining that the correct focus is on the nature of the actions but relying heavily on the officer's appearance), *abrogated on other grounds by* Wallace v. Kato 549 U.S. 384 (2007); Pickrel v. Springfield, 45 F.3d 1115, 1118–19 (7th Cir. 1995).

178. Chapman v. Higbee Co., 319 F.3d 825, 834 (6th Cir. 2003) (en banc); Sanchez v. Crump, 184 F. Supp. 2d 649, 654 (E.D. Mich. 2002).

179. Jennifer Friesen, *State Constitutions: The Right Ticket for Some Torts*, TRIAL, Dec. 1, 1997, at 38 ("Often state immunity laws, as well as their common law counterparts, are threaded with exceptions to liability for discretionary acts, intentional torts, law enforcement activities, and so forth, any of which could defeat recovery for a constitutional rights claim.").

180. *See, e.g.*, United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 810 (1984); Owen v. City of Independence, 445 U.S. 622, 648–49 (1980) (describing the separation-of-powers concerns that underlie immunity for discretionary actions).

181. 28 U.S.C. § 2680(a) (2012); *see also* Mark C. Niles, *"Nothing but Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1301–35 (2002).

tablishes an analog,[182] and "[a] majority of courts . . . apply the 'discretionary function' test when considering the duties of state and local governmental entities."[183] In the private, off-duty employment context, an officer may be shielded from liability for harms relating to discretionary decisions to detain, to arrest, to investigate, or to use force, but only if such a decision was an exercise of official power. If the decision to detain or arrest was an exercise of private power—the type exercised by citizens or merchants and their employees—then governmental immunity does not apply. The Michigan Court of Appeals, for example, held that governmental immunity did not apply to off-duty deputies who were sued—for false arrest, false imprisonment, malicious prosecution, assault and battery, and the intentional infliction of emotional distress—following an altercation at a musical venue for which they were providing security.[184] Relying on the police agency's contract with the concert promoter, in which the promoter agreed to pay the county a set hourly rate for each off-duty deputy, the court held that the deputies were engaged in "a private security guard situation, . . . a nongovernmental function, thereby precluding the [official] immunity defense."[185]

In addition to official immunity, off-duty officers benefit from common-law defenses when acting in their official capacity. The existence of probable cause, for example, is a complete defense that officers can raise against claims of false arrest, false imprisonment, and malicious prosecution.[186] In some states, any employee of a private merchant may receive similar protection under a "shopkeeper's privilege" law, rendering inconsequential the question of whether an off-duty officer was acting as an officer or as a merchant's employee. In states that provide more protection to officers than private employees, however, the distinction can be critical.

As critical as it is, however, the results of the distinction may not be theoretically sound. When an officer takes action that is functionally identical to the actions that are—or would have been—taken by a private employee or security guard, it is not clear whether anything other than pure formalism justifies exposing the officer to additional liability under § 1983 or providing additional protections under various police-specific defenses. Consider, for example, qualified immunity, "the most important doctrine in the law of constitutional torts."[187] Qualified immunity insulates public officials, including police officers, from constitutional tort suits unless it was clear at the time that their actions violated an es-

182. *See, e.g.*, GA. CODE ANN. §50-21-24(2) (2016); ORE. REV. STAT. § 30.265(3)(c) (2016); S.C. CODE ANN. § 15-78-60(5) (2016).

183. W. Jonathan Cardi, *The Role of Negligence Duty Analysis in Employment Discrimination Cases*, 75 OHIO ST. L.J. 1129, 1155 (2014) (citing DAN B. DOBBS, THE LAW OF TORTS § 270, at 720–21 (2000)).

184. Pardon v. Finkel, 540 N.W.2d 774, 776 (Mich. Ct. App. 1995).

185. *Id.*

186. *See, e.g.*, John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 860 (2010).

187. *Id.* at 852.

tablished constitutional right.[188] That is to say, if a reasonable officer *could have believed* that the actions in question were lawful, qualified immunity shields the officer not just from damages, but from suit.[189] Such protection is necessary, the Court has said, to avoid the many costs of frivolous claims, such as

> the expenses of litigation, the diversion of official energy from pressing public issues, . . . the deterrence of able bodied citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the more resolute, or more irresponsible [public officials], in the unflinching discharge of their duties.[190]

When an officer's actions, taken on duty and solely on behalf of the public, give rise to a § 1983 claim, the justifications for qualified immunity's expansive protections are at least arguably appropriate. But when an off-duty officer acts on behalf of a private employer, the defense is less tethered to its rationales. The officer will face the expenses of litigation and the diversion of their attention from official duties, but that would be true in a real estate dispute or any other private suit completely unrelated to the officer's public authority, from a real estate suit to divorce litigation.[191] As for deterrence, while the courts are appropriately cautious about the risk of driving people away from public employment or chilling public employees in the exercise of their duties, the same need for restraint is not self-evident in the context of the private employment of off-duty officers. Applying qualified immunity in the context of moonlighting suggests that the unflinching discharge of an officer's duties necessarily involves working for a private employer. Indeed, there may be reasons to encourage police officers to weigh carefully the potential risks of accepting off-duty work or to dampen their ardor for using public authority on behalf of private employers.

3. Municipal Liability

Though the Court has rejected *respondeat superior* in the context of 42 U.S.C. § 1983, municipalities may be liable for constitutional deprivations that result from an official custom or policy.[192] For example, a city may be liable when its police agency fails to train or supervise its officers when the lack of training or supervision "amounts to deliberate indifference to the rights of persons with whom the police come into contact."[193]

188. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

189. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

190. *Harlow*, 457 U.S. at 814 (internal quotation marks omitted).

191. An officer engaged in real estate litigation arguably faces *more* expense, given the high rates at which officers are indemnified from the costs of job-related litigation. *See* Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014). It may also be true that purely private litigation may divert an officer's attention away from pressing public issues more than litigation related to an officer's official actions, given the important but under-studied role that purely private factors play in official decision making. LINN, *supra* note 16 at 29–30.

192. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).

193. City of Canton v. Harris, 489 U.S. 378, 388 (1989).

But identifying the requisite level of supervision or training in the moonlighting context may prove difficult. During their regular-duty assignments, officers work within a chain of command with clearly delineated authority: every sergeant, lieutenant, and captain knows whom they are responsible for and when. Officers may be pulled out of their regular duties and given a special assignment, but there, too, the supervisory hierarchy is quite clear: officers are temporarily under the supervision of a different part of the chain of command. Who, then, supervises the off-duty officer? Perhaps there is a centralized supervisor who exercises control over all of the agency's off-duty officers at a given time, or perhaps off-duty officers report to whichever supervisors are on-duty and responsible for the jurisdiction where the private employer is working, or perhaps off-duty officers are under the authority of their regular supervisor (who is, of course, not working at the time). More troublingly, if likely more frequently, perhaps officers turn paperwork into police supervisors, but they report to and work under the day-to-day direction of a private employer.

Similar questions arise in the context of failure-to-train claims. Officers undoubtedly use their police training on behalf of private employers, but the question is whether officers go beyond that training and, if so, whether the municipalities have an obligation to provide additional training. For example, officers may commonly deal with noise complaints, but an officer who, while off duty, handles such complaints at a local apartment complex in exchange for reduced rent—a so-called "courtesy officer"—is far more likely to deal with landlord/tenant disputes, code violations, nuisance abatement issues, and the like. Similarly, officers who moonlight for retail businesses are more likely than their on-duty colleagues to deal with labor and employment issues. Failing to provide officers with guidance on such issues may arguably amount to deliberate indifference to civilians' rights. Additionally, the extent to which municipalities and police agencies can rely on a private employer to provide relevant training remains an unanswered question.

What evidence might tend to establish or disprove an alleged failure to train or supervise off-duty officers? In litigation that reached the Seventh Circuit, one plaintiff argued that a city's indemnification agreement with the private employer—under which the private employer was liable for any judgments against the city—established that the city was aware that off-duty officers engage in constitutional violations.[194] Though the argument was unsuccessful in that case, it illustrates how policies and procedures that regulate moonlighting may be central to the issue of liability.

State law further complicates the picture. Under state tort law, a police agency's vicarious liability depends on whether the officer was acting within the scope of her employment. As with the "under color of law" inquiry, a range of factors may be considered, and courts may well weigh

194. Robles v. Fort Wayne, 113 F.3d 732, 736–37 (7th Cir. 1997).

those factors very differently. An appellate court in Louisiana, for example, held that merely wearing a police uniform not only fails to establish that the officer was acting within the course and scope of their employment, it does not even create a genuine issue of material fact on that question.[195]

4. Private Employer Liability

Private parties can be liable for constitutional violations under § 1983, though they must be acting as a government agent for such liability to attach. In the context of private businesses employing off-duty officers, the Fifth Circuit has held that a private employer acts under color of state law when they have formed a pre-arranged or customary plan with the police. In *Smith v. Brookshire Brothers*, the Fifth Circuit found that the Lufkin, Texas Police Department had a practice of arresting or ejecting individuals at the request of retail store employees without "independently establishing that there was probable cause . . . without a valid complaint having been filed and without knowing the facts to believe that a crime had been committed."[196] This practice, the court held, was sufficient to establish that the retail store was acting under color of law for purposes of § 1983 liability.[197] Different courts have articulated similar concepts, though in different contexts. The Seventh Circuit has held that a private party acts under color of law by conspiring with a public official to effect a constitutional deprivation,[198] while the Tenth Circuit has held a police officer's delegation to a private actor of the duty to independently investigate and make an independent probable-cause determination is sufficient to establish that the private party was acting under color of law.[199] In the context of off-duty employment, a police agency's policies and procedures—particularly those that give the private employer some form of supervisory authority over officers—may advance the argument that the private employer was a state actor.

More common than § 1983 liability, however, is the potential for a private employer to be subject to *respondeat superior* liability for the tortious actions of its employees. As a matter of blackletter law, employers are not vicariously liable for actions committed by an independent contractor, and there is a substantial literature on making that distinction. I raise it here only to note that the finding that an officer is acting under color of law does not necessarily rule out the finding that the officer was also an employee of a private business. Under the "dual master doctrine," an officer's off-duty work might establish them as an employee of both the government *and* the private employer. In *White v. Revco Discount Drug Centers, Inc.*, for example, the Tennessee Supreme Court

195. Luccia v. Cummings, 646 So.2d 1142, 1144 (La. Ct. App. 1994).
196. 519 F.2d 93, 94 (5th Cir. 1975).
197. *Id.*
198. Greco v. Guss, 775 F.2d 161, 168 (7th Cir. 1985).
199. Baptiste v. J.C. Penney Co., 147 F.3d 1252, 1258–59 (10th Cir. 1998).

held that a government agency could be held liable for the actions of an officer who was off duty and privately employed at the time if the officer's actions involved the exercise of a traditional police power, the municipality had actual or constructive knowledge of the officer's actions, the officer's actions served the interests of both the private employer and the municipality, and the interests of the private employer and the municipality were not inconsistent with each other.[200]

5. Criminal Liability

Civil liability, of course, is only part of the puzzle. There is also the potential of criminal liability—which may be imposed on civilians who interact with the off-duty officer—to consider. Crimes, particularly violent crimes, are punished more severely when they are committed against officers. Does that include off-duty officers? If a nightclub patron shoves an off-duty officer who is working for the club at the time, or if an apartment complex visitor runs away from the courtesy officer, can the civilian be arrested for, charged with, and convicted of battery on a law enforcement officer or resisting a law enforcement officer? Here, as with the "under color of law" question under § 1983, the distinction between public officer and private employee is critical.

In 1979, the California Supreme Court held that, in the context of an off-duty officer working for a private employer, "the fact of private employment . . . operates to prevent a police officer from acting in what would otherwise be his official capacity."[201] Because the officer was not acting in an official capacity, he could not be the victim of crime predicated on that official identity, such as battery of an officer. The California legislature rejected the state supreme court's decision, legislating that the battery of an officer was an aggravated offense regardless of whether the officer was on or off duty or working in a private capacity.[202]

Other states have adopted a more nuanced approach. A decision from the North Carolina Supreme Court, for example, held that, in the context of capital-punishment aggravating circumstances, "a police officer retains his official law enforcement officer status even while 'off duty' unless it is clear from the nature of his activities that he is acting *solely* on behalf of a private entity, or is engaged in some frolic or private business of his own."[203] Shortly thereafter, a state appellate court applied that holding to a defendant who had struck two off-duty officers while they were working, in uniform, for a fast-food restaurant. As the court explained:

> [The officers] were working in full police uniform and were carrying sidearms. [T]he officers' [off-duty] employment had been arranged

200. 33 S.W.3d 713, 725 (Tenn. 2000).

201. Cervantez v. J. C. Penney Co., 595 P.2d 975, 980 (Cal. 1979) (internal quotation marks omitted).

202. CAL. PENAL CODE § 243(b) (West 2016).

203. State v. Gaines, 421 S.E.2d 569, 575 (N.C. 1992).

> through the Charlotte Police Department and the officers were required to follow Department mandated rules and guidelines. Furthermore, at the time they were assaulted, Officers Henry and Ferguson were attempting to place defendant under arrest. Making arrests is one of the official duties of law-enforcement officers.

It is not clear whether it was the appearance of the officers, their actions, or both that were the operative facts, but the court upheld the conviction under a statute that provided it was a misdemeanor to "[a]ssault[] a law-enforcement officer, . . . while the officer . . . is discharging or attempting to discharge a duty of his office."[204]

C. Conceptual Considerations

Beyond the practical and legal concerns are the conceptual concerns to which moonlighting gives rise. One such concern is the role and function law enforcement agencies fulfill. Traditionally, police agencies are thought to prioritize public service; maintenance of order; and the prevention, investigation, and resolution of criminal behavior, each of which advances a clear community interest. As recent attention to civil asset forfeiture and the Department of Justice's report on the Ferguson Police Department make clear, police agencies sometimes engage in an additional function—revenue generation. The private employment of officers can be used to increase officer income, generate agency revenue, or both.[205] Indeed, reviewing the answers to the survey instrument, one sees that supplementing officer income was the third most popular justification that agencies offered for permitting private employers to hire off-duty officers.[206] Although it was outside the scope of this research, the Hallcrest Report II's survey of security industry professionals found that "20% of [private] security managers reported receiving 'informal bids' from law enforcement agencies and about 30% from individual police officers."[207] Instead of overseeing officers as they respond to calls for service or proactively seeking to improve quality of life in the communities they serve, such an approach threatens to recast police agencies as hiring halls, challenging the view of police organizations as exclusively or primarily public-service agencies.

Further, police agencies that permit or encourage moonlighting may put themselves in a position of choosing, or at least affecting the selection of, winners and losers in the private commercial sector. Of the agencies that permit moonlighting, supervisors at 105 of the 130 agencies (80.8%) retain discretion to refuse moonlighting requests even if those requests comply with all written policy criteria. There is, of course, the potential for discretion to be exercised for a range of inappropriate reasons. There is also, however, the potential for the exercise of discretion

204. State v. Lightner, 423 S.E.2d 827, 828 (N.C. Ct. App. 1992).
205. At least at agencies that take a cut of what they charge private employers for officers' time.
206. *See supra* Chart 3.
207. CUNNINGHAM ET AL., *supra* note 14, at 292.

to have far-reaching effects. Consider two nightclubs, identical except for a police executive's decision to allow off-duty officers to work at one, but not the other. As a result, off-duty officers handle most of the incidents at one club, but problems at the second require an on-duty officer to be dispatched, meaning that a dispatch record is maintained and more reports and arrests are generated. Over the course of a year or more, the first night club maintains a stellar record with few, if any, formally recorded problems, but the second night club develops a lengthy paper trail documenting numerous incidents and problems. That documentation, or lack thereof, can affect zoning and licensing decisions at the state and local level, such as the renewal of an alcohol sales license. Crime bulletins carried in the local newspaper can affect a business' reputation. That, in turn, can affect its patronage, raising the specter of a negative feedback loop that could result in increasing problems—a venue that becomes known for trouble attracts troublemakers. If this seems far-fetched, consider that one large agency (with well over 1,000 officers) that reported litigation related to the private employment of off-duty officers indicated that it stopped providing officers when a private employer did not pay for services. The agency's explanation continued, "[p]rivate employer lost liquor lic[ense] because of lack of off-duty employment." Admittedly, of course, my more expansive example is a hypothetical; I use it to illustrate how police agencies' discretionary decisions about private, off-duty employment can inadvertently and invisibly change the role they play in the community.

Moonlighting also raises conceptual concerns about democratic legitimacy with regard to the role of the police in the community. Unlike most other government agents and all private employees, uniformed police officers are representatives "not just for their respective agencies, but for government, law, and justice more generally."[208] As one police chief writes, "the public sees the police as community leaders and community ambassadors."[209] The presence of those uniformed community leaders and ambassadors at a private business can send a very different message than the presence of a security guard or un-uniformed employee, suggesting a level of official involvement or endorsement that reflects not just on the private employer, but on the police agency and local government. On the one hand, moonlighting may bring community members greater exposure to and interaction with officers, who would not otherwise be working at a grocery store or nightclub or living at a particular apartment complex. On the other hand, that exposure may be problematic. When a police officer is standing outside of a night club on a Saturday night or stopping traffic so vehicles can leave a church parking on Sunday morning, their presence and actions go far beyond any purely private equivalent. Such problems may occur if, for example, club-goers

208. Stoughton, *Incidental Regulation*, *supra* note 56, at 2188.

209. Del Manak, *Officer Safety Through Offender Management*, POLICE CHIEF, http://www.policechiefmagazine.org/officer-safety-through-offender-management/ (last visited Aug. 21, 2017).

perceive the presence of officers on Latin Night or Hip-Hop Night as an indication of government or community distrust, or if motorists perceive an agency as favoring church-related traffic over other drivers. Recall that the single most common justification for permitting off-duty officers to work for private employers, offered by forty agencies (30.76% of permissive agencies), was the perceived benefit to community relations. That justification may be called into question if moonlighting hurts community relations, or if the benefits are felt primarily or exclusively in the segments of the community that already have strong ties with the police at the cost of other aspects of the community.

V. CONCLUSION

Moonlighting is a common feature of modern police practices, but one that relatively little is known about. Survey responses from the 162 participating agencies, which collectively employ just under a fifth of all state and local officers in the United States, reflect that 80% of agencies permit uniformed officers to work while off duty and suggest that moonlighting may be far more common than previously appreciated. Yet the reasons for permitting or prohibiting moonlighting vary widely, as do the state statutes and agency policies that regulate the practice, suggesting a significant need for future work.

The private employment of off-duty officers may expand existing discussions about policing or raise new issues worthy of consideration. Consider, for example, that almost a quarter of the agencies that permit moonlighting indicated that they do so in part because the private pay supplements officer income. Descriptively, that is undoubtedly true, but it raises a series of additional descriptive and normative questions: are agencies advertising off-duty employment as a benefit to potential recruits? Is that appropriate? If so, would doing so affect recruitment efforts? Separate and apart from recruitment, how many agencies receive pay for private, off-duty employment and channel it to the officer? To what extent, if any, should that private pay affect the calculation of an officer's retirement benefits?

Further, many of the justifications for prohibiting or permitting off-duty employment are open to empirical analysis. A quarter of the agencies that permit moonlighting indicated that they do so in part because it improves agency staffing: off-duty officers can respond to events that would otherwise require an on-duty officer to respond. Future research might examine whether private, off-duty employment has a consistent effect on calls for service or the distribution of on-duty resources. Moonlighting might well drive down the demand for on-duty resources, but the picture may be more complicated. Consider two possibilities. First, if off-duty officers call for back-up in situations where no officer would be involved without moonlighting, that may increase the demand on on-duty resources. Second, if off-duty officers make discretionary arrests and must attend subsequent court proceedings on their days off, they are

compensated for their time (often at an overtime rate) by the police agency, not the private employer for whom they were working at the time of the arrest. When that is the case, the agency may be paying for an off-duty officer's actions, reducing the staffing benefit to the agency. Future research could quantify many other justifications for or against moonlighting, from the effect on police/community relations and public safety to the risk of litigation and liability.

Deeper attention to moonlighting may also encourage an appropriately interdisciplinary approach to police research. There is clearly ample room for legal scholars to address some of the questions raised by private, off-duty employment, but understanding policing also requires the attention of criminologists, social and cognitive psychologists, political scientists, and scholars from other disciplines, who can apply a variety of methodologies to study how moonlighting affects officers, civilians, police agencies, private businesses, communities, the criminal justice system, the legal system, and so on.

More attention to the private employment of off-duty officers is also needed to develop a set of evidence-based best practices. The empirical research suggested above could provide a more informed body of knowledge that agencies and police executives could draw on when deciding whether to allow and how to regulate moonlighting. Even without new research, police executives and scholars can apply existing work to questions about the regulation of moonlighting. The research on shift work and fatigue, for example, suggests that agencies that permit officers to work eighteen hours in a day or 112 hours in a week may be increasing the potential for poor decision making, putting officers and civilians at risk, and increasing the locality's exposure to liability. Not all questions may have easily quantifiable answers, of course, but additional study and attention in this area is critical to the development of best practices for this long-standing and important aspect of modern policing.

APPENDIX A: OFF-DUTY EMPLOYMENT SURVEY

A.	Please provide the name of the agency. (e.g., Nothguots Police Department)	
B.	Which best describes the agency?	□ City Police □ County Sheriff □ County Police □ State Police □ Special Jurisdiction (e.g., transit police, college police) □ Other (explain):_____
C.	Approximately how many total sworn employees does the agency have? ("Sworn employees" refers to employees with arrest powers; please do not include correctional officers)	Full-Time: _____ Part-Time: _____
D.	Does the agency permit sworn employees to work in a private, off-duty employment capacity? (Please refer to the accompanying letter for a more detailed explanation and examples).	□ Yes □ No
E.	Please briefly explain why your agency permits or does not permit private, off-duty employment. (For example, required by collective bargaining agreement, good or bad for community relations, etc.)	_____ _____ _____
F.	Are there any state statutes or regulations or local ordinances concerning private, off-duty employment of sworn employees?	□ Yes □ No If Yes, please identify:_____ _____ _____
G.	Does the agency have any written policies, procedures, directives, or guidelines governing private, off-duty employment?	□ Yes □ No
H.	If your agency has a written policy governing private, off-duty employment, has that policy changed in the last two years?	□ Yes □ No If Yes, please explain why the policy changed _____ _____ _____

I.	Who can submit a request for private, off-duty employment? (check all that apply)	□ Sworn Employees □ Private Employers
J.	What are the minimum requirements for an officer to work in a private, off-duty capacity? (E.g., minimum number of years of experience, training, supervisory approval, etc.)	_____ _____ _____ _____
K	What are the minimum requirements for a private employer to hire an officer to work in a private, off-duty capacity? (E.g., written request, supervisory approval, use of "coordinating officer," etc.)	_____ _____ _____ _____
L.	If supervisory approval is required, what is the lowest-ranking supervisor who can approve the request? (Please draw a line through any ranks that do not exist in your agency.)	□ Agency Head (Chief, Sheriff, etc.) □ Assistant or Deputy Agency Head □ Commander □ Colonel □ Major □ Captain □ Lieutenant □ Sergeant □ Detective/Investigator/Inspector □ Corporal □ Supervisory approval is not required
M.	Assuming a request meets all criteria identified in a written policy or directive; can a supervisor use his or her discretion to refuse a request for private, off-duty employment?	□ Yes, a supervisor may use discretion to refuse a request. □ No, a supervisor must approve any request that complies with written criteria.
N.	If a supervisor can use discretion to approve or deny a request for private, off-duty employment, what considerations should the supervisor take into account before making that decision?	_____ _____ _____ _____
O.	Has there been any litigation relating to private, off-duty employment at your agency?	□ Yes □ No If Yes, please briefly explain the litigation: _____ _____

P.	Approximately how many sworn employees were approved to work in a private, off-duty capacity in 2012, 2013, and 2014? (Regardless of whether or not they actually worked in that capacity.)	2012:_____ 2013:_____ 2014:_____	□ Agency does not track this information.
Q.	Approximately how many sworn employees actually worked, for any amount of time, in a private, off-duty capacity in 2012, 2013, and 2014?	2012:_____ 2013:_____ 2014:_____	□ Agency does not track this information.
R.	Approximately how many total hours did sworn employees work in a private, off-duty capacity in 2012, 2013, and 2014?	2012:_____ 2013:_____ 2014:_____	□ Agency does not track this information.
S.	Approximately how many requests for private, off-duty employment were refused or declined in 2012, 2013, and 2014?	2012:_____ 2013:_____ 2014:_____	□ Agency does not track this information.
T.	If requested, would your agency provide a copy of the written policy, procedure, guideline, or directive that governs private, off-duty employment?	□ Yes □ No □ Not Applicable (no written policy exists)	
U.	Please provide any additional information that you believe is important to keep in mind about your agency's private, off-duty employment _____ _____ _____ _____ _____ _____ _____ _____		

Thank you for your time and attention; it is deeply appreciated.

Seth Stoughton