

# ESSAYS

## PRIVATE POLICE AND DEMOCRACY

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For most people, the police are government incarnate: the street-level embodiment of the state's monopolization of legitimate force. That is why it seemed so natural, in the middle decades of the twentieth century, for Pinkerton guards, private eyes, and the whole, old-fashioned apparatus of private peacekeeping and criminal apprehension to be dwindling away. By the end of the 1960s public law enforcement already employed more people than private security, and it appeared that the disparity would soon be nearly two-to-one.<sup>1</sup> The socialization of order maintenance and crime control seemed almost foreordained, part and parcel of the gradual triumph of the rule of law.

We now know, of course, that there was nothing natural or inevitable about the displacement of private guards and detectives by public police. Starting in the 1970s, growth in public law enforcement slackened, and the private security industry exploded. Today private guards greatly outnumber sworn law enforcement officers throughout the United States, and the gap continues to widen. Increasingly, private security firms patrol not only industrial facilities and commercial establishments but also office buildings, transportation facilities, recreational complexes, and entire shopping districts and residential neighborhoods. Many Americans – particularly wealthier Americans – are more likely to encounter a private security guard than a police officer on any given day. In the words of one industry executive, “[t]he plain truth is that today much of the protection of our people, their property and their businesses, has been turned over to private security.”<sup>2</sup>

The implications of this dramatic development for democracy have received surprisingly little attention. Scholarship on private policing is relatively scant, and it focuses overwhelmingly on issues other than democracy. In a recent, perceptive

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1. See JAMES S. KAKALIK & SORREL WILDHORN, *THE PRIVATE POLICE INDUSTRY* 34 (1971).

2. *Hearings Regarding Private Security Guards: Hearings before the Subcommittee on Human Resources of the Committee on Education and Labor*, 103d Cong. 132 (1993) (statement of Ira Lipman, President of Guardsmark, Inc.). On the growth of private security, see David A. Sklansky, *The Private Police*, 46 *UCLA L. REV.* 1165, 1171-82 (1999). The trend in the United States has been mirrored throughout much of the developed world. See *id.* at 1181.

review of the literature, Elizabeth Joh identifies five persistent themes: the historical pedigree of private policing, the relationship between police privatization and privatization more broadly, the functional characteristics of private policing, the division of labor between public law enforcement agencies and private police, and the exemption of private police from the constitutional rules imposed on public law enforcement.<sup>3</sup> One can quarrel with some of the details, but not with the most conspicuous absence from this list: the ramifications of privatized policing for American democracy. That issue has been doubly marginalized — largely ignored even in the small body of work that focuses on private policing.<sup>4</sup>

One reason for this neglect is that we have learned — too well — not to expect much in the way of democracy from public law enforcement agencies. The police professionalism movement of the 1950s and 1960s succeeded so fully at insulating police departments from political interference that, even today, after nearly two decades of “community policing” reforms, law enforcement often seems to operate outside of the normal processes of local government, accountable to no one. The new orthodoxy of community policing, in fact, has done little to reduce the operational autonomy of the police. The phrase “community policing” remains notoriously ill-defined, but one thing it has almost never meant is giving the “community” true control over law enforcement: virtually all of the varied programs lumped together under the name “community policing” have been implemented unilaterally by the police.<sup>5</sup> Against this backdrop, there does not seem to be much democracy to lose when policing is privatized. In fact, private policing is regularly praised for increasing accountability, as market pressures at least keep private firms attentive to their paying customers.<sup>6</sup>

None of this means, though, that the implications of private policing for democracy can safely be ignored. In the first place, praising private policing for increasing accountability begs some obvious questions: accountability to whom, and for what? Second, even the most autonomous police departments are subject to *some* political oversight — more public supervision, almost certainly, than virtually any private security firm.<sup>7</sup> Third, whatever their day-to-day practices,

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3. Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 578-79 (2005).

4. For a noteworthy exception — albeit one focused on Britain rather than the United States see Ian Loader, *Plural Policing and Democratic Governance*, 9 SOC. & LEGAL STUD. 323 (2000).

5. See, e.g., Michael E. Buerger, *The Limits of Community*, in THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PREMISES 270, 270-71 (Dennis P. Rosenbaum ed., 1994); Gerald Frug, *City Services*, 73 N.Y.U. L. REV. 23, 81 (1998).

6. See, e.g., Ian Loader, *Thinking Normatively About Private Security*, 24 J.L. & SOC'Y 377, 380 (1997); James J. Vardalis, *Privatization of Public Police: Houston, Texas*, 3 SECURITY J. 210, 211 (1992).

7. See, e.g., Loader, *supra* note 6, at 329, 332. The Los Angeles Police Department, for example, enjoys a notorious degree of independence under the city charter, because the civilian commissioners who nominally run the department serve part-time with only modest staff support. The only real leverage the commissioners can exercise is to fire the police chief. That leverage, though, has turned out to be significant — as the two last chiefs of the department, both ousted by the commission, can testify. See Jill Leovy & Tina Daunt, *Parks Hangs Up His*

public law enforcement agencies at least understand their *charge* as protecting everyone within their jurisdiction. Finally, structures of local government can be reconfigured. If we want police departments that are less insulated from politics, we can get them. We had them, after all, before the 1950s.

Of course, strategies of privatization also can be reconfigured. If we want private security forces to behave in particular ways — complying with constitutional restrictions on the police, say, or paying attention to the concerns of people other than their customers — there are legal mechanisms at our disposal. Statutes can be passed; regulations can be promulgated; administrative oversight can be imposed; tort duties can be created. In the not uncommon situation where government itself is the purchaser, “public norms” can be imposed by contract. Moreover, we can be choosy about which police functions we privatize, and under what circumstances. In short, there are ways to make privatization safer for democracy, and there may even be ways to make privatization the friend of democracy.<sup>8</sup>

To devise such responses, though, we need to understand what we are responding to. We need to understand the nature of the challenges and, perhaps, the opportunities, that private policing presents for democracy. This turns out to be a tall task; my main goal here is to explain why. The implications of private policing for democracy, I will argue, are as complex as they are profound. They depend on the particular kind of private policing at issue, on the particular account of democracy we bring to bear, and on the functional relationship we assume between private and public policing. I will explore each of these three levels of complexity in turn, noting some of the ways in which they complicate an assessment of the democratic implications of police privatization.

In the course of this exploration, I will urge attention to two underappreciated ways in which private security threatens democracy. The first is by dampening political support for public law enforcement that is committed, at least nominally, to protecting everyone against illegal violence. The result may be a system of policing even less egalitarian than the one we have today. The second is by aborting the largely unrealized project of democratizing the internal workings of police departments. The result of *that* may be to forfeit a promising set of avenues for making policing more effective, more humane, and more respectful of the democratic process in the broader society.

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*Badge*, L.A. TIMES, Apr. 23, 2002, at A1; Jim Newton, *Panel Votes Not to Rehire Chief*, L.A. TIMES, Mar. 11, 1997, at A1.

8. See MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (Beacon Press 2002); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003).

## I.

Private policing varies widely. That is the first difficulty in assessing its implications for democracy. Elizabeth Joh helpfully divides private policing into four categories, which she calls “protective policing,” “intelligence policing,” “publicly-contracted policing,” and “corporate policing.”<sup>9</sup> Protective policing focuses on the safeguarding of private property; this is the job performed, for example, by armored car drivers, security guards in retail stores, and private patrols hired by homeowners’ associations.<sup>10</sup> These are the kinds of employees we usually think of first when we think of private policing. Intelligence policing is private detective work; it includes corporate spying, insurance investigation, and marital fidelity surveillance.<sup>11</sup> A decade ago, the last time anyone made a careful count, there were more than 70,000 private investigators nationwide, and their ranks were growing rapidly.<sup>12</sup> Publicly-contracted policing involves the outsourcing of law enforcement work by public agencies.<sup>13</sup> According to one estimate, 45% of all local governments were contracting out at least some of their security work by the late 1990s — up from 27% a decade earlier.<sup>14</sup> Much of the outsourcing involved humdrum tasks like data processing or parking enforcement,<sup>15</sup> but it is increasingly common for private firms to patrol government buildings, housing projects, or public parks, and a few municipalities have experimented with even broader reliance on private police.<sup>16</sup> Joh’s last category, corporate policing, consists of security departments that “replicate features of a public department within a private environment,” seeking not just to protect corporate property but to provide physical security for employees and customers, to be “first-response problem solvers,” and to defend the company’s public image.<sup>17</sup> The classic example is the security department at a Disney theme park.<sup>18</sup>

Joh’s useful typology highlights the varied nature of private policing. K-Mart’s

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9. Joh, *supra* note 3, at 609-15.

10. *Id.* at 611.

11. *Id.* at 611-12.

12. See WILLIAM C. CUNNINGHAM ET AL., HALLCREST SYSTEMS, INC., PRIVATE SECURITY TRENDS 1970-2000, 196, 210 (Hallcrest Systems, Inc. 1990). By comparison, the FBI had 10,000 full-time agents assigned to criminal investigation and enforcement, and the federal government as a whole had 40,000. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1995, 57, 58 (Kathleen Maguire & Ann L. Pastore eds., 1996).

13. Joh, *supra* note 3, at 613.

14. See Mercer Group, Inc., 1997 Privatization Survey 14-15 (unpublished study on file with author). The figures are for 1997 and 1987, respectively.

15. See, e.g., MARCIA CHAIKEN & JAN CHAIKEN, PUBLIC POLICING — PRIVATELY PROVIDED 3 (National Institute of Justice June 1987).

16. See Joh, *supra* note 3, at 613-15; Sklansky, *supra* note 2, at 1177.

17. Joh, *supra* note 3, at 615.

18. See *id.* at 615 n.235; see also CARL HIAASEN, TEAM RODENT: HOW DISNEY DEVOURS THE WORLD 27-35 (Ballantine Publishing Group 1998); Clifford D. Shearing & Philip C. Stenning, *Say “Cheese!”: The Disney Order That Is Not So Mickey Mouse*, in PRIVATE POLICING 317 (Clifford D. Shearing & Philip C. Stenning eds., Sage Publications 1997); Elizabeth Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49,

security force is a different animal from the private police at Disneyworld. Private investigators raise different concerns from uniformed guards. And the outsourcing of public law enforcement work presents different challenges, and different opportunities, from the growth of private security employed by private parties. On the one hand, government outsourcing poses, in a particular stark fashion, the danger of public agencies washing their hands of the details of law enforcement; on the other hand, as long as government is paying for law enforcement it retains control of fundamental questions of allocation, and the outsourcing contract may provide a particularly promising vehicle for applying “public law norms” to private policing.<sup>19</sup>

In fact, Joh’s typology considerably simplifies the diverse forms taken by private policing. Take, for example, armored car drivers, store security guards, and private residential patrols — all lumped together by Joh as protective policing. There are large differences between these three groups. Unlike store security guards and residential patrol personnel, armored car drivers typically carry guns. Unlike armored car drivers and store security guards, residential patrol personnel take over a role historically associated with the public police — patrolling a beat. Unlike armored car drivers and private residential patrols, store security guards often work undercover, and they very frequently detain, question, search, and arrest suspects — tasks rarely undertaken by most residential patrols, and never performed by armored car drivers.<sup>20</sup> (Security guards hired to patrol apartment complexes and housing projects are an exception to this generalization: they detain and arrest lots of people, and in fact do much that seems less like property protection than plain old law enforcement.<sup>21</sup>) Then, too, store security guards typically can draw on legal authority beyond the powers of ordinary citizens: “merchant’s privilege” statutes in most states allow store employees to detain suspects in circumstances where a “citizen’s arrest” would be impermissible.<sup>22</sup> Some amusement park employees — including the Disneyland police that Joh classifies as corporate security — have the same power, but armored car drivers and most residential patrol officers do not, and neither do the vast run of corporate security personnel.<sup>23</sup> Unless, that is, the protective policing or corporate policing personnel are moonlighting police officers, which is common but not typical, or

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51-53 (2004). For a wonderful case study of “corporate policing” outside the Disney context, see Joh, *supra*, at 73-90.

19. Freeman, *supra* note 8, at 1286-88; see also Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 947-50, 970-71, 1018 (2004).

20. See Sklansky, *supra* note 2, at 1179-80.

21. See *id.* at 1179 n.63; see also GEORGE S. RIGAKOS, *THE NEW PARAPOLICE: RISK MARKETS AND COMMODIFIED SOCIAL CONTROL*, 49 (University of Toronto Press 2002).

22. See, e.g., 7 STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 27:19 (1990).

23. See Sklansky, *supra* note 2, at 1184.

they are deputized by local authorities, which is less common but far from unheard of.<sup>24</sup>

Not only does “protective policing” (and each of the other three categories, for that matter) sweep together strikingly different activities in strikingly different settings, but the lines between the categories are not always well defined. Take, for example, the distinction between publicly-contracted policing and security personnel hired privately. This looks to be a particularly important distinction for our purposes given the special challenges and opportunities that outsourcing of law enforcement seems to pose for democracy. But on which side of this line should we place the rapidly growing ranks of security personnel employed by business improvement districts? BIDs levy taxes, backed by force of law, but the proceeds are controlled not by the public as a whole but by the business owners who pay the taxes. There are well over a thousand of these entities nationwide, and they spend a large share of their money on private patrols. Calling these expenditures “private” seems misleading, but they do not seem fully “public,” either. The same may be said for the small but growing number of residential communities that pay for private patrols with government-approved special assessments, and the larger group of communities, some gated and some not, that hire private patrols with homeowner fees imposed through property covenants.<sup>25</sup> The divide between public and private funding of private policing may well be important, but it is anything but sharp. Neither is the line between protective policing and corporate policing (how do we classify the security team in a large shopping mall?) or the divide between protective policing and intelligence policing (what do we make of patrol companies that rely heavily on systematic surveillance and recordkeeping?).<sup>26</sup> One of the reasons that Joh’s four-part classification is so helpful is that it makes clear how hard it is to impose a sense of order on the broad array of forms taken by private policing.

## II.

To assess the implication of private policing for democracy, we need to know not only what private policing entails, but also what democracy entails. Here we encounter a second level of complexity.

It will not do simply to treat democracy as a cluster of values: accountability, participation, deliberation, maybe also due process, maybe also human dignity. For one thing, there are familiar conflicts among these values. More participation can mean less deliberation; accountability to voters can threaten due process; and so on. As important, the meaning of each of these values, even standing alone, is

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24. *See id.* at 1176, 1179 n.63.

25. *See id.* at 1173, 1177-78; *see also* Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 368 (1999).

26. *See, e.g.*, RIGAKOS, *supra* note 21, at 98-118.

highly contestable. We have already encountered one example of this: the ambiguity of “accountability.” Giving business owners, rather than the general public, control over security patrols hired with BID revenues can be both attacked and defended on grounds of accountability — it all depends on what kind of accountability we think important. There are similar ambiguities associated with other “democratic values.” Just saying we care about participation, or deliberation, or due process, or dignity, is not saying much.

Giving greater content to these values, and resolving the conflicts among them, requires a working theory of democracy — a theory that includes ideas not only about the characteristic processes of democracy, but also the ultimate goals served by those processes. Is democracy esteemed as a strategy of government stability, a safeguard for individual liberty, a prerequisite for human development, an intrinsically valuable part of the good life — or some combination of all of these? A working theory of democracy also needs to include a sense of how close our current arrangements are to the democratic ideal; this will affect not only what we mean by, say, a commitment to “participation,” but also what institutional implications flow from that commitment. Participatory democracy means something different, and has different ramifications when it is a strategy of critique rather than a rhetoric of apology. Justice Breyer, for example, has recently called for greater attention to “participatory democratic self-government” as a core constitutional value.<sup>27</sup> But, like many others who today endorse participatory democracy, he means something very different from the kind of thing advocated in the Port Huron Statement. Justice Breyer means the “national conversation” that by and large exists already: the “many meetings, symposia, . . . discussions, . . . journal articles and media reports, . . . legislative hearings and court cases” through which “today’s citizen does participate in the democratic self-governing process.”<sup>28</sup>

People committed to this watered-down version of participatory democracy can easily defend private policing as “empowerment at its best:” it brings together business owners in a BID, for example, and allows them collectively “to take on the responsibility that comes with being truly empowered.”<sup>29</sup> But if we mean something more radical by participatory democracy — if we mean something like

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27. Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 248 (2002).

28. *Id.* at 248-49, 263; *see also* Ring v. Arizona, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring); Board of Education v. Earls, 536 U.S. 822, 841 (2002) (Breyer, J., concurring); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 70-71 (2005). Regarding the Port Huron Statement, *see, e.g.*, JAMES MILLER, DEMOCRACY IS IN THE STREETS: FROM PORT HURON TO THE SIEGE OF CHICAGO 329 (Simon and Schuster 1994). I have explored elsewhere how different working theories of democracy — theories that include ideas not only about the processes of democracy, but also democracy’s underlying purposes, the proximity of current arrangements to the democratic ideal, and the exceptionalism or typicality of American democracy in all these regards — have found reflection over the past half-century in changing notions about policing. *See* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1701 (2005).

29. James P. Murphy, *The Private Sector and Security: A Bit on BIDs*, 9 SECURITY J. 11, 13 (1997); *see also* Sklansky, *supra* note 2, at 1190-91.

allowing every individual to “share in those social decisions determining the quality and direction of his life” and organizing society “to encourage interdependence,” bring people “out of isolation and into community,” and give them the “means of finding meaning in personal life”<sup>30</sup> — well, then the notion of BID patrols as “empowerment at its best” begins to sound like a weak joke.

There is a final layer of complexity associated with democracy. Democracy is not just an approach to governance but a tradition of resistance; it includes what Ian Shapiro has called “the spirit of democratic oppositionalism.”<sup>31</sup> This aspect of democracy has less to do with collective sovereignty than with continued hostility to arbitrary domination. It is what Tocqueville had in mind in contrasting American democracy with old-world aristocracy, what Lincoln meant when he defined democracy in opposition to slavery, and what led W. B. Gallie to locate the core meaning of democracy in “a long tradition (perhaps a number of historically independent but sufficiently similar traditions) of demands, aspirations, revolts and reforms of a common anti-inegalitarian character.”<sup>32</sup>

The spirit of democratic oppositionalism seems particularly important when exploring the democratic implications of private policing because it helps to explain the widespread intuition that policing has a special pertinence for democracy. Why do law enforcement policies matter more for democracy than garbage collection policies? Why are private police departments more troubling than private sanitation services? Once democracy is understood to involve ongoing opposition to patterns of unjustifiable hierarchy, the special salience of the police immediately becomes clear: the public police are both a uniquely powerful weapon against private systems of domination and a uniquely frightening tool of official domination. The ordinary challenge of democratic policing, from this perspective, is to make the police as effective as possible in combating unjustified patterns of private domination and unthreatening as possible as a tool of official domination. Private police forces change the calculus. They may weaken the threat

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30. Port Huron Statement, *reprinted in* MILLER, *supra* note 28, at 329, 333.

31. Ian Shapiro, *Three Ways to Be a Democrat*, 22 POL. THEORY 124, 139 (1994); *see also* IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 3-4, 50-52 (2003); IAN SHAPIRO, DEMOCRATIC JUSTICE 1, 30 (1999).

32. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 3-6 (Harvey C. Mansfield & Delba Winthrop trans. & eds., University of Chicago Press 2000) (1835); 2 COLLECTED WORKS OF ABRAHAM LINCOLN 532 (Roy Basler ed., Rutgers University Press 1953) (“As I would not be a *slave*, so I would not be a *master*. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy.”); W. B. Gallie, *Essentially Contested Concepts*, in THE IMPORTANCE OF LANGUAGE 121, 136 (Max Black ed., 1962) (reprinted from 56 PROC. ARISTOTELIAN SOC’Y 167 (1955-56)). Regarding Tocqueville’s use of old-world aristocracy as the “contrast-model” for democracy, *see, e.g.*, William E. Connolly, *The Challenge to Pluralist Theory*, in THE BIAS OF PLURALISM 3, 22 (William E. Connolly ed., 1969). On the rhetorical tradition invoked by Lincoln’s definition of democracy — a tradition that saw slavery less as the antithesis of freedom than as “the antipode of democratic equality,” *see* David Brion Davis, *American Equality and Foreign Revolutions*, 76 J. AM. HIST. 729, 744-46 (1989). There was a muted echo of that tradition, and of Lincoln’s invocation of it, in President George W. Bush’s second inaugural address: “Across the generations, we have proclaimed the imperative of self-government, because no one is fit to be a master, and no one deserves to be a slave.” WASH. POST, Jan. 21, 2005, at A24.

of official domination — or then again they may not, depending on the nature of the relationship between the private police and their public counterparts. And they may exacerbate or ameliorate illegitimate patterns of private domination — depending in part, again, on how they change the role and effectiveness of the public police.

### III.

What *is* the functional relationship between private and public policing? This is the third and final source of difficulty in assessing the implications of private policing for democracy. Three different relationships are possible, which I will call *augmentation*, *displacement*, and *transformation*. It is likely that all three exist, but in different places, at different times, and to different degrees.

Augmentation is the relationship that the private security industry has traditionally claimed to have with public law enforcement. Industry executives long have sought to mollify concerns over the expansion of private security by arguing that their employees just provide another layer of protection on top of public policing: “an additional set of eyes and ears.”<sup>33</sup> The public police are left as they were before, but with some new allies.

If private policing serves merely to augment public policing, the implications it raises for democracy are largely limited to the danger that, by abusing their power (perhaps with the government’s explicit or tacit encouragement), private police will threaten the “democratic values” of due process and human dignity. Of all the possible implications of private policing for democracy, this is the danger raised most frequently. Part of the reason for this focus is that critics of private police, like the industry’s boosters, have tended to assume that the functional relationship between private and public policing is largely additive.

But there is good reason to question that assumption. In the short run, of course, private policing usually does augment public law enforcement. It may even assist neighborhoods too poor to afford private security services by freeing up public law enforcement resources in areas that can afford private security. Over the long term, though, private policing can wind up displacing public law enforcement rather than simply augmenting it. Why should Bel Air residents vote for higher taxes to pay for policing throughout Los Angeles, when they can — and do — hire private patrols for their own neighborhood?<sup>34</sup> Private policing easily can become part of the “secession of the successful.”<sup>35</sup>

We have grown accustomed to thinking that policing and democracy operate in hydraulic opposition: the more resources and leeway we give to the police, the

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33. Sklansky, *supra* note 2, at 1178, 1178 n.57.

34. There is evidence, in fact, that the widespread reliance on private security in wealthier areas of Los Angeles has already dampened support for increased city-wide expenditures on public policing. See Sklansky, *supra* note 2, at 1224 n.342.

35. Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6, at 16.

more democracy is imperiled. But policing is among other things “a form of redistribution.”<sup>36</sup> It redistributes resources in the same way as other government-funded services, from fire protection to social security, and — going beyond those other programs — it uses the redistributed resources to reallocate power, by curbing the private use of coercive force. Murray Kempton once described the supplanting of the Pinkerton Detective Agency by the FBI as “the only episode in our social history to realize Marx’s prescription for the transformation of capitalist private property into social property.”<sup>37</sup> But the episode is better understood as part of the broader socialization of law enforcement in the late nineteenth and early twentieth century.<sup>38</sup> The displacement of public policing with private security puts that process into reverse.

In some cases, of course, market-supplied policing may redistribute power downward in ways that public law enforcement has failed to do. Private patrols hired by a business improvement district, for example, may make the streets safer and more welcoming for the physically frail. But the interests of merchants depart in predictable ways from the interests of their poorest neighbors, at least in anything but the very long term, and private security firms focus, understandably, on the interests of the people who hire them.

Leave aside the ugliest ways in which that kind of accountability can manifest itself — harassment of deviants, physical assaults of the homeless, etc.<sup>39</sup> Those kinds of problems could be addressed, at least in theory, by strengthening the legal restrictions on private policing, importing to the private sector the “public law norms” of due process and dignity.<sup>40</sup> The more fundamental problem is that private police are not even nominally committed, as public police are, to the egalitarian project of protecting all citizens from private violence; the defining characteristic of private policing is its “client-driven mandate.”<sup>41</sup> Take, for example, the more than 100 private guards now employed by BIDs in downtown Los Angeles. The president of the largest of these groups brushes off calls for stronger public oversight of the guards: “If people are saying more accountability, than I say

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36. Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 *YALE L.J.* 2281, 2315 (1998) (book review).

37. Murray Kempton, *Son of Pinkerton*, *N.Y. REV. OF BOOKS*, May 20, 1971, at 22.

38. See, e.g., Steven Spitzer & Andrew T. Scull, *Privatization and Capitalist Development: The Case of the Private Police*, 25 *SOC. PROBS.* 18, 23 (1977).

39. See, e.g., WILLIAM KER MUIR, JR., *POLICE: STREETCORNER POLITICIANS 73-77* (1977) (discussing tactics employed by private police in Oakland’s skid row in the early 1970s); Heather Barr, *More Like Disneyland: State Action*, 42 *U.S.C. § 1983, and Business Improvement Districts in New York*, 28 *COLUM. HUM. RTS. L. REV.* 393, 400-03 (1997) (describing similar tactics by private security personnel in midtown Manhattan in the 1990s); William Wan & Erin Ailworth, *Flak Over Downtown Security Guards*, *L.A. TIMES*, June 8, 2004, at B1, B10 (reporting allegations of similar conduct by private guards patrolling downtown Los Angeles).

40. See Freeman, *supra* note 8, at 1285; Rosky, *supra* note 19, at 947-50.

41. Joh, *supra* note 18, at 62.

accountability to whom? It's not the city's money; it's the property owner's money."<sup>42</sup>

Rhetoric like this gives credence to the concern that privatization can make policing less egalitarian in two ways: by reducing the demand for public policing officially committed to protecting everyone, and by reducing the political pressure on public police forces to comply with norms of due process and dignity. The result may be a two-tiered system of policing worrisomely congruent with broader patterns of social hierarchy. Here is how two leading police scholars have described the prospect: "The rich will be increasingly policed preventively by commercial security while the poor will be policed reactively by enforcement-oriented public police," with both the public and private sectors working to "protect the affluent from the poor — the one by barricading and excluding, the other by repressing and imprisoning."<sup>43</sup>

This kind of bifurcation of the policing function is one way the private police could wind up transforming the public police, in addition to augmenting or displacing them. But there are other ways, as well. One possibility, for which there is already some evidence, is that the public police may find themselves copying the strategies, rhetoric, and self-conception of the private police — much as Henry Fielding's Bow Street Runners brought the entrepreneurial spirit of thief-taking to the eighteenth-century London magistracy, and J. Edgar Hoover later mimicked the marketing tactics of Alan Pinkerton.<sup>44</sup> Instead of public norms being extended into the private sector, private norms may be imported into the public sphere. Borrowing terms from Philip Selznick, Elizabeth Joh suggests that at bottom the difference between private policing and public policing may be the difference between "management" and "governance" — between organizations that emphasize "efficiency and goal achievement," and organizations that "take[] into account broader values such as integrity, the accommodation of interests, and morality."<sup>45</sup> Selznick wanted governance to supplant management, to some extent, in the internal operation of large scale private organizations, and he was reasonably optimistic that this could happen. But the opposite is also possible: public agencies can gravitate away from governance toward management.

Some police departments may already be drifting in this direction, pulled along by the mounting tendency for the public and private police to see themselves as

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42. Wan & Ailworth, *supra* note 39, at B10 (quoting Carol Schatz, president of the Downtown Center Improvement District).

43. David H. Bayley & Clifford D. Shearing, *The Future of Policing*, 30 L. & Soc'y REV. 585, 594, 602 (1996).

44. See Sklansky, *supra* note 2, at 1199-1200, 1216-17, 1217 n.305.

45. Joh, *supra* note 18, at 65-66; see PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 75-120 (1969) [hereinafter SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE]; PHILIP SELZNICK, THE MORAL COMMUNITY 289-318 (1978).

partners, “with similar goals but different approaches and spheres of influence.”<sup>46</sup> In principle the expanding cooperation between public law enforcement and the private security industry, and the growing feeling of affinity between the two sectors, could facilitate a transfer of norms in either direction. In practice, though, there is little evidence so far of private security firms becoming more mindful of values beyond efficiency and the achievement of narrowly-defined goals. It is easier to find signs of police departments becoming more “managerial,” both in their practices and in their sense of organizational mission. Probably the best example is Compstat, the New York Police Department’s statistics-based system of performance evaluations for mid-level supervisors, now emulated throughout the nation.<sup>47</sup> But the growing managerialism of police departments is a much broader phenomenon.<sup>48</sup> Even the “client-driven mandate” of private security firms may be crossing over to the public sector: one of the many plausible definitions of “community policing” is “police treating a neighborhood the way a security guard treats a client property.”<sup>49</sup>

That definition, though, misses an important, countervailing feature of many “community policing” reforms. In many departments, “community policing” has meant reducing organizational insularity by opening new channels of communication and cooperation with a variety of outside groups, both governmental and nongovernmental.<sup>50</sup> Officers in these departments have been forced, regularly and systematically, to confront and to accommodate conflicting views of their mission and conflicting notions of how best to balance liberty and security.<sup>51</sup> They have been pushed away, in other words, from a single-minded focus on a narrow set of performance goals; they have been driven from management toward governance.

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46. INT’L ASS’N OF CHIEFS OF POLICE, NATIONAL POLICY SUMMIT: BUILDING PRIVATE SECURITY/PUBLIC POLICING PARTNERSHIPS TO PREVENT AND RESPOND TO TERRORISM AND PUBLIC DISORDER 1 (2004) [hereinafter BUILDING PRIVATE SECURITY/PUBLIC POLICING PARTNERSHIPS]. On the proliferating links between private security firms and public law enforcement agencies, see, e.g., *id.* at 7-8; Joh, *supra* note 18, at 83-95; Robert Block, *In Terrorism Fight, Government Finds a Surprising Ally: FedEx*, WALL ST. J., May 26, 2005, at A1.

47. See, e.g., William F. Walsh & Gennaro F. Vito, *The Meaning of Compstat: Analysis and Response*, 20 J. CONTEMP. CRIM. JUST. 51, 57-61 (2004).

48. See DAVID GARLAND, *THE CULTURE OF CONTROL* 114-17, 188-90 (2001); cf. Ian Loader, *Democracy, Justice and the Limits of Policing: Rethinking Police Accountability*, 3 SOC. & LEGAL STUD. 521, 521-22 (1994) (discussing the “managerialist turn” in British policing).

49. Lawrence W. Sherman, *The Police*, in CRIME 327, 338-39 (James Q. Wilson & Joan Petersilia eds., Institute for Contemporary Studies 1995); see also Sklansky, *supra* note 2, at 1180 & n.67. Unsurprisingly, private security firms have welcomed the comparison. Intelligarde International, a large Canadian firm supplying private patrols, says it provides “community-based policing” — although it is quick to stress that it does not replace public law enforcement, but merely provides “a para-police function that assists and segues into and is used by the public police who still maintain their exclusive access to all Criminal Code enforcement.” RIGAKOS, *supra* note 21, at 155 (quoting Intelligarde president Ross McLeod). For their part, American security companies, along with their public counterparts, praise “[p]ublic-private cooperation” as “an important aspect — indeed, a potent technique — of community policing.” BUILDING PRIVATE SECURITY/PUBLIC POLICING PARTNERSHIPS, *supra* note 46, at 4, 19.

50. See David Thacher, *Conflicting Values in Community Policing*, 35 LAW & SOC’Y REV. 765, 765, 768 (2001).

51. See *id.* at 772, 792-95.

There is no corresponding trend in the private security industry.

Three caveats are appropriate. First, managerialism is not all bad. Compstat, for example, has been widely heralded in part because there are good reasons to think that it worked — not only in reducing crime, but also in bringing a new kind of accountability to policing.<sup>52</sup> Second, the commitment of public law enforcement agencies to values like fairness, equal treatment, and so forth has often been notoriously weak. Third, there are grounds for skepticism about how strongly the official ethos of a police organization, public or private, shapes the behavior of officers out on the streets. Private security guards hired to patrol a housing project can wind up thinking and acting, in certain respects, much like public law enforcement officers engaged in similar work.<sup>53</sup>

Still, even nominal commitments are important. Walking the talk begins with talking the talk. Moreover, some aspects of organizational style depend quite heavily on decisions made at the top. Among those aspects, ironically, is the treatment of the organization's employees, including the degree to which employees are given a collective voice in the shaping of their vocation. Matters of this kind are very far the issues normally stressed in debates over public policing, but they deserve a good deal more attention. Explaining why requires a brief detour.

#### IV.

Workplace democracy was Selznick's chief concern in initially developing the distinction between management and governance. He was part of a broad intellectual movement in the late 1960s and early 1970s that saw workplaces as particularly promising sites for participatory democracy.<sup>54</sup> For a few short years around that time, it looked as though workplace democracy might become a prominent theme of efforts at police reform, too. A number of scholars argued that rank-and-file police officers would be less alienated, more effective, and more invested in democratic values if they were allowed to participate meaningfully in departmental decisionmaking.<sup>55</sup> Isolated experiments were conducted along these

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52. See, e.g., Mark H. Moore & Anthony A. Braga, *Measuring and Improving Police Performance: The Lessons of Compstat and Its Progeny*, 26 POLICING 439 (2003); Walsh & Vito, *supra* note 47. For less enthusiastic assessments of Compstat, see Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000); Steven Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSPECTIVES 163 (2004); Richard Rosenfeld, Robert Fornango & Eric Baumer, *Did Ceasefire, COMPSTAT, and Exile Reduce Homicide?*, 4 CRIMINOLOGY & PUB. POL'Y 419 (2005); David Weisburd et al., *Reforming to Preserve: Compstat and Strategic Problem Solving in American Policing*, 2 CRIMINOLOGY & PUB. POL'Y 421 (2003).

53. See, e.g., RIGAKOS, *supra* note 21, at 119-46.

54. See, e.g., DAVID JENKINS, *JOB POWER: BLUE AND WHITE COLLAR DEMOCRACY* (Doubleday & Co., Inc., 1973); JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 278-302 (1980); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 109-10 (Cambridge University Press 1970); SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE*, *supra* note 45, at 75-120.

55. See, e.g., GEORGE E. BERKLEY, *THE DEMOCRATIC POLICEMAN* 29-39 (1969); EGON BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY: A REVIEW OF BACKGROUND FACTORS, CURRENT PRACTICES, AND POSSIBLE*

lines, and the results were promising.<sup>56</sup> But the frightening forms that police activism took in the late 1960s and early 1970s — intransigent opposition to civilian review, active participation in reactionary organizations, organized brutality against political protesters, open defiance of civilian authorities, vigilante attacks on black militants, and so on<sup>57</sup> — soon dulled the appetite of scholars and police reformers alike for bringing any kind of participatory management to law enforcement. By the end of the 1970s, the idea was dead, and it has never really been revived.<sup>58</sup>

In other ways, though, democratic values *have* been brought into the internal operations of police workforces. Over the past three decades, police departments have become heavily unionized, and police officers have been given, by statute and court decision, a robust range of due process protections against adverse employment decisions.<sup>59</sup> Police workforces are also far more diverse than they were thirty years ago. Minority officers, female officers, and openly gay and lesbian officers are slowly but dramatically transforming a profession that until recently was virtually all white, virtually all male, and overwhelmingly homophobic.<sup>60</sup> The changing demographics of police departments, along with the expanded proce-

ROLE MODELS (1970), *reprinted in* EGON BITTNER, ASPECTS OF POLICE WORK 89, 162-68 (1990); MUIR, *supra* note 39; WILLIAM A. WESTLEY, VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY xvii (1970); John E. Angell, *Toward an Alternative to the Classic Police Organizational Arrangements: A Democratic Model*, 9 CRIMINOLOGY 185, 187, 193-95 (1971); John M. Jermier & Leslie J. Berkes, *Leader Behavior in a Police Command Bureaucracy: A Closer Look at the Quasi-Military Model*, 24 ADMIN. SCI. Q. 1, 16-19 (1979). For further discussion, see Sklansky, *supra* note 28, at 1774-78.

56. *See, e.g.*, HANS TOCH, J. DOUGLAS GRANT & RAYMOND T. GALVIN, AGENTS OF CHANGE: A STUDY IN POLICE REFORM (John Wiley & Sons 1975).

57. *See, e.g.*, ROBERT M. FOGELSON, BIG-CITY POLICE 239-42 (Harvard University Press 1977); CHRISTOPHER LASCH, THE AGONY OF THE AMERICAN LEFT 206 (Alfred A. Knopf 1969); JEROME H. SKOLNICK, THE POLITICS OF PROTEST 274-78 (U.S. Printing Office 1969).

58. *But cf., e.g.*, Loader, *supra* note 48, at 538 (hesitantly suggesting that line police officers in Britain “may provide a potential resource upon which deliberative problem-solving mechanisms can draw”); Monique Marks, *Democratizing Police Organizations from the Inside Out: Police-Labor Relations in Southern Africa, in* COMPARATIVE AND INTERNATIONAL CRIMINAL JUSTICE: TRADITIONAL AND NONTRADITIONAL SYSTEMS OF LAW AND CONTROL 109, 110 (Charles B. Fields & Richter H. Moore Jr. eds., Waveland Press Inc., 2005) (linking “internal” and “external” democratization of the police in Southern Africa); Monique Marks, *Transforming Police Organizations from Within: Police Dissident Groupings in Southern Africa*, 40 BRIT. J. CRIMINOLOGY 557, 557 (2000).

59. *See, e.g.*, John Thomas Delaney & Peter Feuille, *Police, in* COLLECTIVE BARGAINING IN AMERICAN INDUSTRY: CONTEMPORARY PERSPECTIVES AND FUTURE DIRECTIONS 265, 301 (David B. Lipsky & Clifford B. Donn eds., 1987).

60. In 1970, Blacks made up somewhere around 6% of sworn officers in the 300 or so largest American police departments; today the figure is around 18%. In cities with populations over 250,000, 20% of sworn officers are Black, and 14% are Latino — up from figures of 18% and 9%, respectively, in 1990. In some major metropolitan departments, white officers are now a minority. Women were 2% of sworn officers in large police agencies in 1972; today they are close to 13%. Again, the figure in some departments is significantly higher, although it tops out around 25%. It is much harder to estimate the number of gay and lesbian officers, or even those who are open about their status. But the mere fact that there are *any* openly gay officers, let alone gay police executives, is a sea change from the situation thirty years ago. San Francisco had no openly gay officers as late as 1979; Chicago had none as recently as 1991. *See* Sklansky, *supra* note 28, at 1823-24; David Alan Sklansky, *Not Your Father's Police*

dural protections that officers enjoy, has helped to replace the “unified occupational subculture” of policing with a workforce marked by “variation,” “division,” and “segmentation” — far less monolithic, far less insular, and far more open to dissent and disagreement.<sup>61</sup> The limited democratization of police departments has made them safer places for broader experiments in workplace democracy — and it may well have played a role in the progress police departments have made on other fronts: making peace with civilian oversight, building bridges to historically marginalized communities, growing less resistant to reform more generally, and all the while sustaining extraordinarily high levels of employee loyalty, in both the rank-and-file and the command staff. Police officers may grumble about their jobs, but they rarely leave. The annual quit rate in most departments is around 4% — two orders of magnitude lower than what is common in the private security industry.<sup>62</sup>

Police privatization threatens the unfinished project of democratizing the internal operations of police departments — especially if private security firms do not just take over some work previously performed by public law enforcement agencies, but actually transform public policing by making it more about management and less about governance. In a recent, illuminating study of a large Canadian security firm, George Rigakos found a workplace marked by extraordinary efforts at monitoring, controlling, and disciplining employees, and by levels of alienation and cynicism remarkable even in comparison with what we have come to expect from public law enforcement officers.<sup>63</sup> There is no reason to think other security firms would look strikingly different in these regards.

It may be possible, of course, to bring public values of employee due process and participatory decisionmaking to the private security industry. The industry is currently the target of a major organizing campaign,<sup>64</sup> and workplace democracy could be imposed by statute on private security firms — just as on any other private firm.

At bottom, though, what a private security firm offers its customers is, as Rigakos puts it, “a management system for hire.”<sup>65</sup> This will likely make public

*Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY (forthcoming Spring 2006).

61. Robin N. Haarr, *Patterns of Interaction in a Police Patrol Bureau: Race and Gender Barriers to Integration*, 14 JUSTICE Q. 53, 53, 80 (1997); see also, e.g., DAVID E. BARLOW & MELISSA HICKMAN BARLOW, POLICE IN A MULTICULTURAL SOCIETY 205 (2000); STEVEN MAYNARD-MOODY & MICHAEL MUSHENO, COPS, TEACHERS, COUNSELORS: STORIES FROM THE FRONT LINES OF PUBLIC SERVICE 64-76 (2003); Susan E. Martin, 'Outsider Within' the Stationhouse: The Impact of Race and Gender on Black Women Police, 41 SOC. PROBS. 383 (1994).

62. See Justin McCrary, *The Effect of Court-Ordered Hiring Quotas on the Composition and Quality of Police* 9 (Nov. 30, 2003) available at <http://www-personal.umich.edu/jmccrary/mccrary2004.pdf>; Service Employees International Union, *Security Officers Uniting*, available at <http://www.seiu.org/property/security/uniting>.

63. See RIGAKOS, *supra* note 21, at 98-146.

64. Service Employees International Union, *Security Officers Uniting*, *supra* note 62.

65. RIGAKOS, *supra* note 21, at 148.

norms regarding the *internal* operation of police forces the hardest to export to the private sector. Their internal operations — overwhelmingly nonunion, unburdened by civil service rules and “police officers’ bills of rights,” relentlessly focused on efficiency and narrowly drawn performance goals — are precisely what the private firms have to offer. It is what distinguishes one firm from another, and what still, despite the spread of public sector managerialism, most strongly distinguishes private policing as a whole from public law enforcement. If the current trend toward police privatization has any single point, after all — other than retreating from a collective commitment to equalitarian protection against illegal force — the point is to escape, to circumvent, or to limit the domain of the organizational styles associated with public law enforcement, and to move the internal operations of policing some distance from governance toward management.

## V.

I have tried to show two things. First, assessing the democratic implications of police privatization is complicated — because private policing can take various forms; because democracy can mean different things; and because private policing can wind up displacing and transforming public law enforcement instead of just augmenting it. Second, two particular threats posed by private policing deserve more attention than they have received: the danger that private security firms, by drying up support for public law enforcement expenditures, will make policing less egalitarian; and the danger that the managerial logic of private security, increasingly copied by public law enforcement, will block democratization of police workforces.

Each of these dangers can be reduced, in theory, by shaping the form of police privatization. The first, in particular, would be greatly minimized if privatization chiefly took the form of government outsourcing, so that decisions about the allocation of law enforcement resources remained in the public sphere;<sup>66</sup> it might also be reduced if constitutional protections were developed against underpolicing.<sup>67</sup> The second danger could be alleviated by government regulations imposing elements of workplace democracy on private security firms — and by public law enforcement agencies, for their part, guarding against creeping managerialism by forcing themselves to look beyond the short-term bottom line.

In practice, though, most police privatization has not taken the form of outsourcing, meaningful constitutional protections against underpolicing do not exist and are unlikely to emerge anytime soon, and there is virtually no political support for extending to private security firms even the limited elements of industrial democracy now commonplace in public law enforcement. Nor is any of this entirely accidental. The central idea of private policing is to bring the

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66. See Rosky, *supra* note 19, at 932-34.

67. See Sklansky, *supra* note 2, at 1280-87.

disciplined mindset of business to the problems of order maintenance and crime control — and perhaps also, in the bargain, to relieve the government of some costly obligations. At some point, bringing public values to private policing is like redesigning the Hummer to make it lighter and more fuel-efficient: you can do it, but if what you really care about is gas mileage, you may be better off with a different prototype. Understanding the complicated implications that private policing pose for democracy can help us privatize more wisely. But it should also make us rethink how much policing we want to privatize at all.