The Case Against Privatization

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I. INTRODUCTION

The privatization of government functions has for the most part given rise to instrumental questions concerning the desirable ways of providing for these functions. In particular, current discussions typically frame the issue as a trade-off between two forms of executing certain functions or services: public bureaucracy and private entrepreneurship. Proponents of privatization emphasize the benefits of deploying the latter in the service of more efficiently executing government objectives. Opponents of privatization, by contrast, insist that the private form of executing government functions is a liability, rather than an asset, due to the loose commitment on the part of private entities to the promotion of the public good. The shared assumption of both advocates and opponents of privatization is that the service or the function in question can, in principle, always be performed by either private or public bodies and that the choice of an agent to perform the function must be based on addressing the question of who is more capable of performing this function.

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1 See, e.g., Paul R. Verkuil, Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What Can Be Done About It (Cambridge: Cambridge University Press, 2007), p. 1. In due course, we shall add another private form of executing government functions, which is the publicly-motivated private entity (typically, a non-profit organization seeking to promote the general interest). Our argument against privatization applies to for-profit and not-for-profit private organizations.
2 The major instrumental concern raised by opponents of privatization is the concern about lack of accountability on the part of private agents. For an influential critique of privatization on these grounds, see Martha Minow, Public and Private Partnerships: Accounting for the New Religion, Harvard Law Review 116 (2003): 1229-70, p. 1260. For other instrumental concerns against privatization, see Jon D. Michaels, Privatization's pretensions, University of Chicago Law Review 77
This article challenges the terms of this debate as it defends two claims: First, some governmental decisions simply cannot be successfully executed by private entities as the goods resulting from these decisions—what we call “inherently public goods”—can be realized only if the state performs these tasks; and second, execution by the state requires performance by public officials. The conjunction of these two claims implies that some decisions must be executed by public officials and should not be privatized as private actors would inevitably fail in performing these tasks. The privatization of the execution of these decisions would undermine the very possibility of providing their consequent goods. Indeed, because they are inherently public goods, their provision hinges on the public execution of government decisions. We demonstrate this claim with respect to the execution of the decision to punish a criminal and to wage a war.

At the root of our argument (in Parts II and III) stands the claim that the mere fact that a person X was asked/orderd to perform a task by the state and complies with this request/order does not always imply that this act counts as an execution of the state's decision. There are some conditions—felicity conditions—by virtue of which the actions of agents can be attributed to, and so bear the mark of, the state. Accordingly, at least with respect to some cases of privatization, such as the privatization of punishment, the state does not merely 'transfer' its power of execution to a private entity, but cuts itself off the privately-executed acts, rendering them fundamentally private ones. The trade-off in the privatization debate in these cases is not so much between forms of performing state functions (public bureaucracy or private entrepreneurship), but between providing state services and relinquishing them.

We further maintain that relinquishing the public provision of the state’s functions in question is sometimes self-defeating; the goods resulting from the execution of such functions must be provided publicly as these goods are inherently public goods, that is, they are valuable only if provided by the state. We illustrate this claim with particular emphasis on the cases of criminal punishment and war.

Our argument seeks to strike an intuitive chord, which instrumental arguments for and against privatization necessarily fail to explain. It allows us to see that the intuitive dislike of privatization is not merely a byproduct of instrumental concerns about the desirability of outsourcing or of the law’s (arguably) inadequate/ineffective...
regulation of the conduct of private entities in charge of executing government functions. Instead, the persistent hostility to phenomena as diverse as private prisons or the use of mercenaries in security operations and wars is rooted in an unarticulated conviction—the conviction that, at least in some cases, an act (such as punishment) cannot acquire its public nature (i.e., judgment made by the polity concerning the wrongfulness of an act) independently of the identity of the actor. In what follows, we seek to unpack this claim, thereby settling a reflective equilibrium between theory and intuition.

Our non-instrumental case against privatization does not seek to capture the entire range of privatized services. It need not apply to a government decision to privatize the provision of electricity, postal service, or even to some controversial cases such as education and health (although other, compelling instrumental arguments may apply in these cases). Indeed, in some cases, it is sufficient for the state to guarantee the provision of certain goods (by deploying either public or private agents).

However, no such leeway is available for the state in cases involving the provision of what we shall call "inherently public goods." There, execution by a public agent becomes necessary. To identify these cases, we develop in Part II and Part III the background theoretical framework against which to determine what public provision of a good could mean and why public provision requires the direct involvement of public officials. Part IV applies this framework to two case studies: private prisons and private military forces, i.e., mercenaries. It shows by way of illustration that public provision may be necessary for the possibility of realizing inherently public goods.

II. THE MORPHOLOGY OF PRIVATIZATION

Section A starts with a brief characterization of the broader political landscape and the space that privatization of governmental functions fills therein. It seeks to investigate the precise sense in which privatization cuts the government off from the privatized services. This investigation is best carried out through a hypothetical case of a one-person government, which is the authoritarian government's logical extreme. This
hypothetical helps to dispel the thought, implicitly shared by friends and foes of privatization on instrumental grounds, that, in principle, anyone can execute a decision in the name of the state. We argue that this thought obscures the distinction between that which is the doing of the state and that which is done for the state. Moreover, we show that the traditional worry about privatization, namely that private entities are likely to pursue narrow or sectarian interests, rather than public ones, is not the only, or even the most troubling one. An action done for the state, even with the public's interest in mind, might fail to count as the doing of the state.

We explore the ramifications of the proposed characterization of privatization in section B.

A. Fidelity as Deference; Fidelity as Reason

Suppose that Rex, the governing person, enacts a criminal prohibition against murder coupled with a threat of capital punishment for its violations. Rex promulgates this new norm and seeks its enforcement. Rex is also in charge of prosecuting and convicting murderers, in which case he must complete his task of law enforcement by inflicting the death penalty.

It is perfectly correct to say that the execution is the state's doing. This may be so because each and every single element in the sequence of events beginning in legislation and ending with punishment has literally been executed by Rex, acting in his capacity of all-in-one-person government. Subsuming sovereignty into the natural body of Rex renders his "Joints" the "Magistrates, and other Officers of Judicature and Execution" and his "Nerves" the offices of "Reward and Punishment."

Ascribing the execution to Rex’s state, rather than to Rex’s natural person, does not follow from a mere causal inquiry concerning the question of whether Rex brought this outcome about (in the appropriate sense). Indeed, an ascription of this kind could not be had merely on the ground that Rex—the person—said this or made

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8 To illustrate, consider the privatization of law-making by analogy. Suppose that the legislature contracts out its power to enact laws in the area of road safety to a group of leading professors at a Road Engineering Department of an Ivy League University. The shift in lawmaking powers from the legislature to the Professors tracks the distinction between the laws we give to ourselves and having others enacting laws for us.

9 The reason we use the example of capital punishment is to emphasize that the proposed characterization of privatization applies even to acts of execution which are, technically speaking, relatively simple to administer and leave little discretion to the agent which executes the decision (compared, say, to the administration of a long-term incarceration).

10 Whether or not this outcome is just or legitimate (or both) is, of course, an entirely different question.

that. Rex, after all, could have published a novel in which he tells the story of Rex passing a law against murder; presided over a moot court competition finding that the accused murdered the victim; or shot his neighbor (who happens to be the actual murderer) over a parking space dispute. In all these cases, the agency of Rex—the official legislator, adjudicator, or executor, respectively—is not manifested in the world. Rex the sovereign misfires in these cases because he does not approach these cases from the point of view of a sovereign, but from that of an individual person. That is, Rex does not reason and act within the proper institutional settings—settings that grant his words and acts the normative force characterizing the words and acts of a sovereign. In each of these cases, Rex’s words or acts lack the appropriate normative force because the conditions for acts of sovereignty were not satisfied.

To briefly return to privatization, most disagreements over privatization focus on the execution of prior decisions reached through legislation or adjudication. Thus, punishment is inflicted in accordance with a legislative decision (criminal law) and in accordance with a particular judgment made by a judge. The debates concerning privatization of punishment do not typically refer to the privatization of legislation or even adjudication. Similarly, the use of mercenaries (or, for that matter, the services of private security companies such as Blackwater) does not imply privatizing the decision to go to war; it only implies privatizing the execution of a war declared and decided by the state. It would be helpful, therefore, to exploit the case of Rex in order to explore the precise ways in which privatizing executive powers may fail to count as being the doing of the state.

Suppose Rex seeks the assistance of another individual in executing court decisions and enforcing the laws it gives, more generally. This assistance can take different forms. In the following discussion we identify three forms of assistance that are relevant to our discussion. First, and least importantly, Rex may simply grab the hand of another, forcefully deploying it in the service of executing a convicted murderer (say, by pressing the fingers of this person against the gun’s trigger). Certainly, this form of "assistance" makes no practical or moral difference, and the execution remains Rex’s doing. To the extent that this execution is administered on the basis of reasons (including the reasons for the particular way in which the execution is performed e.g., by using bullets of .22 caliber, rather than .3 caliber)

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12 There are of course those who maintain that legislation and adjudication ought to be privatized—a recent case in point is the creation of mandatory arbitration schemes that are, in essence, systems of private adjudication. Our primary targets here are those who agree that primary decisions ought to be made by public bodies and it is merely the execution of these decisions that can be privatized. The privatization of legislative or judicial decision-making is thus beyond the scope of this paper although our argument can be applied to challenge the legitimacy of privatizing these functions.
derived from the public point of view, Rex’s doing and the state’s doing are one and the same.\textsuperscript{13}

The remaining two forms of assistance differ from the preceding form in that they involve enlisting other persons as agents exercising their capacities to reason, intend, and judge. Assisting persons, on this view, are not just human instruments whose fingers are being hard pressed against the trigger of a firearm as though they are the natural extensions of Rex’s human body. Instead, the act of pulling the trigger in these cases is an upshot of a reflective process of deliberation on the part of the assisting agent. Whether this process involves making decisions at the wholesale level (e.g., the method of execution) or at the retail one (e.g., concerning the bullet caliber to be fired), the point is that these persons perform the act of pulling the trigger for reasons they come to embrace. These two forms, however, differ from one another in their underlying conceptions of fidelity: one features \textit{fidelity by deference}, the other \textit{fidelity by reason}. This difference gives rise to a distinction between an act being the \textit{doing of the state} and an act which is done \textit{for the state}, respectively. We take each in turn.

The former form of assistance picks out a \textit{deferential} conception of fidelity. It does not resort to usurping the hands of another in order to pull the trigger (as the first form of assistance contemplated), but insists that assistants defer to the judgments of Rex in fixing the contours and details of executing official pronouncements. The deference requirement demands that, for the purpose of administrating the execution of official pronouncements, an assistant must suppress his or her own judgment (concerning the method of execution) and open up to Rex’s judgment. It is a requirement to take Rex’s judgment at face value and pursue it either because Rex is the sovereign or for any other reason, including even for a self-serving one.\textsuperscript{14}

On this conception of fidelity, recruiting assistance amounts to increasing the available means by which Rex can govern his subjects on the basis of his, and only his, conception of the general interest and the best ways to bring it about (including, of course, setting appropriate punitive responses to crimes). Unlike fidelity of reason (on which more below), deferential fidelity is assessed not by reference to the general interest as impartially identified from the assistant's own point of view, but rather by

\textsuperscript{13} In this hypothetical, the public point of view picks out Rex’s conception of the public interest. As noted earlier, we assume (for the sake of exposition) that the institutional settings of the polity in question are such that Rex possesses the normative powers of a sovereign.

\textsuperscript{14} On this account, acting from the deferential conception of fidelity depends on the commitment, (rather than the motivation), of the agent to defer to Rex's judgments. For this reason, the deferential conception is, in principle, available for natural as well as for artificial persons (such as organizations) as long as they are willing to act deferentially. In practice, however, organizations almost always commit themselves to private purposes (either self- or other-regarding) that are likely to conflict with those of the state and those purposes inevitably determine the decisions of its officers.
reference to the assistant's success in retreating from his point of view and in adopting Rex's point of view. Indeed, unlike the pressure that displaying impartial concern for the general interest exerts toward failing to act from Rex’s judgment, an assistant who meets the deference requirement by successfully retreating from his or her point of view can approach the task of execution from Rex’s unfiltered conception of the general interest.

The third form of assistance operates on the notion of fidelity by reason. There, the enlisted person undertakes to execute the official pronouncements of Rex the legislator and/or judge impartially. The underlying conception of fidelity, fidelity by reason, underwrites a requirement on the part of the assistant to display an impartial concern for the interest of society, that is, to perform the task in question in a way that is most conducive to, or, at the very least, compatible with, the general good (whatever it is). Whether or not the act succeeds in displaying an impartial concern is assessed by reference to the question of whether thus acting conforms to the demands of right reason. This requirement does not turn on the assistant's motive for acting impartially. Indeed, displaying impartial concern may be predicated upon either self or other-regarding motives. In particular, it may arise from sincere patriotism, though it may equally be the upshot of Rex setting the right structure of economic incentives to influence the conduct of his assistant. Rather, the impartiality requirement reflects a commitment to decide what to do and how to act in connection with the execution of an official pronouncement by reference solely to concerns that, from an impartial point of view, merit appropriate consideration.

Crucially, the challenge on the part of the assistant is not just to set aside irrelevant concerns, such as his private whims, but rather to make value judgments—to reason—about the precise content of the concerns at stake and the best way to balance them against one another and decide on this basis what method of execution or which bullet caliber is best overall. These judgments proceed from the assistant’s point of view because even an attempt to decide on these matters impartially implies a value judgment (by the assistant) concerning what impartiality requires. To this extent, impartially executing the official pronouncements of Rex thwart’s, rather than reinforces, the possibility of identifying the execution with the state’s doing. This is because the assistant, whose deliberation toward action proceeds from his own conception of the general interest, does not approach the task of execution from Rex’s point of view, which is the public point of view. Fidelity by reason opens a critical gulf between the judgment of the state (concerning the need to execute the convicted murderer and the method of execution) and that of the executor (concerning whether and how to administer the execution) precisely because it demands that the latter attend to the general interest as he (impartially) sees it, but not as it is seen from the point of view of Rex, the legislature or the adjudicator. Rather than describing the execution by the assistant as Rex’s doing, it would therefore be more precise to say that the act of execution is done for Rex.
Thus, by invoking an impartial concern for the public good, assistants necessarily fail to replicate the public interest as seen from Rex’s point of view. In contrast to the commonly held view, impartiality (and reason, more generally) need not be threatened by privatization; to the contrary, impartiality is a source of the discontinuity that privatization might generate between the state and the outsourced services.

The preceding development of the two conceptions of fidelity does not entail general prescriptions for or against either one. It provides a characterization, rather than a justification (or repudiation), of a form of assistance founded on either fidelity of reason or deference. Indeed, the characterization in question can admit different normative implications, depending on the particular function that is being considered for outsourcing.

In some cases, the goods produced by the execution of a government decision is best provided for by fundamentally apolitical bodies whose agents adopt the reason conception of fidelity. These cases are best exemplified by independent election commissions in both post-authoritarian and democratic states authorized to enforce campaign finance laws, redraw election districts, and insure the integrity of the election process, more generally. At least with respect to some such commissions, whose structure insures their formal and substantive independence of political influence, it is apt to say that the tasks they perform are done for the state, not that their doings are the state’s doing. The only act that is an act of the state in such cases is the giving of authorization to one commission rather than to another. In some other cases, the good in question may in principle be provided by following either conception of fidelity, though the quality of the provision may of course vary depending on contingent factors such as workforce productivity, motivation and skill. Thus for instance, it seems plausible that the provision of electricity can, in principle, be done either for the state (by a private company) or by the state itself. There may be instrumental reasons why one possibility is superior to the other. Yet, the provision of electricity does not seem to belong in the class of activities whose resulting goods depend on the adoption of the deferential conception of fidelity.

15 We do not deny, of course, the possibility of an overlap between the judgment of the assistant and that of Rex. However, such an overlap is at best coincidental. There is nothing in the impartiality requirement that can ensure a systematic convergence between the two persons, especially in matters pertaining to justice and political morality, more generally.


17 Note that the mere fact that some action is done for, rather than by, the state, does not imply that the state may not be held liable for it. We say more on this point in n. 23 below.
However, as Part IV illustrates there exist government functions, the provision of which requires the rejection of the reason conception of fidelity and the adoption of the deferential conception in its stead. For this reason, it will be apt to pursue further the characterization of the latter conception, especially the ways it could be invoked by agents operating under the circumstances of the modern state.

B. From Hypothetical to Real Outsourcing of Government Functions

In the real world, determining whether an action is the state’s doing, rather than something which is done for the state, defies the tautological fashion of submerging the state and its doings in Rex and his doings. To the extent that the legitimacy of providing certain goods (such as the goods associated with the institution of criminal punishment) depends on the provision being done in the name of the polity, the challenge of any form of government claiming legitimacy is to make decisions and perform actions that follow the deferential conception of fidelity. Otherwise, such decisions and actions are not at all the doing of the state, but rather of one person or political elite making their decisions and actions for the state. Meeting this challenge is necessary in order to conceive of the sovereign as one body, a body politic rather than body natural, whose distinctive signature is written all over the acts of its various organs.

This challenge is straightforwardly apparent in the case of a democratic government, but it is not distinctive thereof since it arises in connection with any government purporting to speak in the name of the polity. Indeed, the two conceptions of fidelity (by deference and by reason) characterize ways of approaching the task of providing service for another entity independently of the theory that informs this entity’s shape and content. Different political regimes may feature institutional settings that express different accounts of the public point of view through which the general interest is identified and pursued. The two conceptions of fidelity (by reason and by deference) characterize two contrasting ways of

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18 Evidence for this proposition can be discerned from the Hobbesian account of the state. According to Hobbes, the normative power of the sovereign is cast in terms of “the Right of bearing the Person of them all.” Hobbes, Leviathan, p. 128. In this way, Hobbes believes, every subject co-authors the “Actions and Judgments of the Sovereigne Instituted.” Ibid., p. 124. To this extent, the absolutism of the Leviathan lies in its attempt to meet the challenge of governing a polity not so much by adopting the points of view of the subjects, but rather by appropriating them entirely. This image is most eloquently illustrated in the drawn title-page of Leviathan’s first edition, portraying the (natural) body of the sovereign man literally inscribed with a very large number of faceless subjects. Ibid., p. lxxiv. It is, of course, an open question whether personating the governed is anywhere close to meeting the government’s challenge to speak in the name of the people, rather than merely for them.

19 For instance, the authoritarian state of Rex, a representative democracy, and an Athenian direct democracy introduce three different interpretations of the appropriate institutional setting through which decisions and actions are properly considered the state’s doing.
approaching the task of executing government decision given the institutional setting that happens to be in place.

We shall now seek to complete the first stage of the argument by illustrating the difference between the doing of the state, and acts done for the state. Consider military operations by way of illustration. Suppose state A has decided to launch a war against state B, the purpose of which is to bring an end to the ethnic cleansing of people with A ethnicity living in a small area within the territory of B. Further assume that the decision comports with the necessary procedural and substantive requirements that renders the act of going to war the doing of the state. Although A’s secretary of defense sees to it that this force gets a detailed guidance concerning appropriate conduct at war, there will be numerous situations in which officers of the task force need to grapple with substantive judgments about how best to conduct the war.

Officers serving with the task force may, at least in principle, invoke either fidelity of reason or fidelity of deference. First, officers can reach the necessary judgments by conceding authority to the judgments made by their superiors. The superiors, in turn, come to decide the matter by a similar process of suppressing their own judgments and opening up to the judgments of their superiors and so on until the deferring persons reach the top echelon of the polity — Rex. Second, they can make the necessary judgments by reference to their own conceptions of A’s general good, in which case deliberation and action depart from the public point of view as explained above. By adopting the reason conception of fidelity, the decisions and the actions made by the officers should be conceived as decisions and actions made for the state.20

The rather tedious process of bottom-up deference just outlined is not meant to be an actual, minute-by-minute description of how an army committed to deferential fidelity makes all of its decisions during war. Indeed, no army can win a war while engaging in literally endless, back and forth consultations. Instead, the description is notional, seeking to render more vivid what it takes in principle to execute an action without forgoing the aspiration to do so on behalf of the state and, thus, in the name of the governed, rather than merely for them.

The obvious challenge to this analysis is that the deferential conception of fidelity is impractical. In reality, the execution of any task leaves ample room for discretion: the agent responsible for executing the task ought inevitably to use her own judgment to realize the goals for the sake of which the task was assigned to her. Decision-makers often use vague and open-ended standards that invite the deployment of

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20 Whether or not the interests promoted by the war can be successfully realized by such reasoning is a different question, one which turns on a substantive account of the practice of waging a war and the good that it seeks to produce. See Part IV.
judgment by those who execute these decisions. To the extent that our analysis precludes such forms of exercise of judgment, it is both impractical and, further, even if practical, undesirable insofar as the use of vague standards is desirable for various reasons. However, the next part shows that, on closer examination, no such adverse implications follow from our characterization of fidelity of deference. We shall argue, then, that fidelity of deference properly conceived need not be inconsistent with the pervasiveness of discretion and judgment in and around the execution of government decisions.

III. PUBLIC OFFICIALS, COMMUNITY OF PRACTICE, AND FIDELITY OF DEFERENCE

A. Introduction

What are the conditions required for an agent “to act in the name of the state”? This Part defends the claim that being a public official is a condition in virtue of which an act can be attributed to the state. For certain acts to succeed in being acts of the state, they must satisfy certain conditions; such acts must count as “deferential” and to be deferential, only individuals with certain characteristics – “public officials” – can perform them. Being a public official is therefore not merely contingently conducive to the execution of a task which, in principle, can be performed by anybody; it is conceptually required for the very ability to perform certain tasks that need to be done “in the name of the state.” This Part does not defend the claim that there are indeed tasks that ought to be done “in the name of the state.” It merely establishes that for a task to be done “in the name of the state”, it must be executed by public officials (and public officials have certain characteristics that can be rigorously defined). Part IV defends the normative claim that there are certain tasks that need to be done in the name of the state.

Of what precisely does deference consist? Two initially plausible answers should be dismissed from the outset. First, the government cannot simply make a private citizen its agent by asking him to undertake some government tasks, say, imprisoning 21 Arthur Ripstein, in describing Kant, observes that “a rightful condition can give authority to laws rather than human beings, so that the actions of particular human beings in making, enforcing, and applying laws can be exercises of public rather than private power, and so are instances of an omnilateral will.” Arthur Ripstein, Force and Freedom: Kant’s Legal and Political Philosophy (Cambridge, Mass.: Harvard University Press, 2009), p. 191. On Ripstein's Kantian account, public officials can speak and act in the name of the omnilateral will of the state insofar as they act for the public purposes defined by the relevant legal mandates. See ibid., pp. 192-193. As our argument in the main text below will show, the Kantian account thus interpreted does not render the connection between omnilateral will and public officials sufficiently precise. Under this view, in principle anyone can satisfy the threshold requirement to refrain from pursuing private purposes in the course of enforcing the law. In contrast, under our view, only public officials can (at least sometimes) pursue public purposes.
convicted criminals. A person cannot merely approach the performance of the task at stake from the point of view of the state—there is no such ready-made perspective lying out there. The reason that the government cannot turn a willing individual into its agent simply by asking the individual to perform “a task” is that, in reality, the tasks dictated by the state are typically underspecified such that they leave broad margins of discretion.  

22 Given the under-specified nature of the “guidance,” it would be presumptuous to attribute the act performed by the agent to the state. The different ways of performing the act may have different consequences; they may affect people’s well-being and impact their rights. Choosing among the different ways of performing the act must (at least in some cases) be guided in ways that could render it the doing of the state. Once again, since the guidance of the state is under-specified, an act performed by a private individual is a private act, representing at best the agent’s own view as to what the public good dictates. It cannot therefore be attributed to the state.  

23 For a similar reason, deference to the modern state cannot simply mean deference to the actual will of an identifiable natural person, e.g., the sovereign. In this respect, the image of Rex is misleading, as in his case what deference is was determined by recourse to the actual mental state of Rex. In reality, no such guidance can be elicited.  

24 Surely, however, if there is no fact that one can point out which determines what deference requires, it follows that fidelity of deference cannot be required by agents who execute the orders of a modern state. Should we not then turn to fidelity of reason to solve the mystery of what it takes to act in the name of the state?

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22 We say "typically underspecified" in recognition of the (theoretical) possibility that the state could provide the executor with comprehensive guidance as to how to proceed with the task in question. In such hypothetical cases we acknowledge the permissibility of outsourcing the execution of the task as in such cases the state fully controls the manner of execution, in which case the execution remains the doing of the state.  

23 The fact that the act is not a state action, properly conceived, does not imply that the state cannot be held responsible for it. The state could be held responsible for acts that are not attributed to it. Moreover, there are a number of reasons for doing so. For instance, the very act of delegating its power in certain matters (such as that of waging a war) may give rise to such reason. Another example concerns the immoral or illegitimate nature of the delegated act (such as the act of punishment when inflicted by a private entity), in which case the state ought to prevent it anyway. The state could also be held responsible as it aids, reinforces, or fails to prevent immoral acts performed by private individuals.  

24 On the will or mental-state account, an agent who operates in the name of the state defers to the actual judgments of the sovereign – Rex. There are however reasons to believe that the mental state account of fidelity of deference fits uncomfortably with the reality of the modern state. To begin with, the mental state account presupposes the existence of an identifiable mental state of a sovereign, but typically the agent whose mental state ought to count (the sovereign) has no identifiable mental state. Additionally, the types of tasks typically performed by public officials, such as imprisonment of criminals, waging wars, and maintaining public order, require the constant exercise of discretion on the part of the agent who performs these actions. There is no single agent whose “will” (understood as a mental state) can be fully specified in advance for the purpose of guiding the operation of public officials.
We reject this conjecture. The deferential conception of fidelity can be reconstructed so as to render it perfectly available to modern state agents insofar as they assume—as they inevitably do—an active role in determining what acts are done in the name of the state. On this view, deference requires the existence of a practice that satisfies certain conditions in order to count as deference to the state. The deferring agent defers to a community of practice to which she belongs—a community which collectively determines what the public interest dictates—and takes this determination as a base-line against which to measure what fidelity of deference requires in each particular case. Perhaps ironically, therefore, deference to the state involves collective determination by the deferring agents themselves (qua participants in the requisite practice) concerning what choices deference by them dictates.

Two conditions must be satisfied in order for persons successfully to act in the name of the state: The existence of a practice and its institutional form. More specifically, speaking and acting in the name of the state requires a practice which takes a distinctive form, namely, one which integrates the political and the bureaucratic in the execution of the relevant functions. An integrative practice is characterized by its principled openness to ongoing political guidance and intervention. Under this view, political offices ought to be able not only to set the practice into motion but also to determine its content, guide its development and steer its course. We therefore maintain that the practice in question is crucial for acting from fidelity of deference to be possible. It does not merely help to identify governmental courses of action that, in principle, can be specified apart from that practice; rather, the practice partially constitutes what fidelity of deference dictates. We take each of the two conditions (existence of a practice and the institutional form of the practice) in turn.

B. Community of Practice

The first condition involves the existence of an institutional structure in which the general interest as seen from the public point of view is articulated. As mentioned in the last sub-section, a person cannot simply choose to approach the world in which she acts from the point of view of the state since this point of view cannot be specified apart from an ongoing practice of executing government decisions. Execution is never mechanical. It requires ongoing practical deliberation on the part of public officials when determining how to proceed with the concrete implementation of government policy.

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Under the proposed view, approaching the task of execution from the perspective of the state depends on there being an ongoing framework or coordinative effort in which participants immerse themselves *together* in formulating, articulating, and shaping a shared perspective from which they can approach, systematically, the implementation and execution of government decisions, thus tackling questions such as how one should proceed in general and in the particular instance. The process takes a coordinative form in the sense that participants are responsive to the intentions and actions of one another as they go along with the execution of government policy and decision. To this extent, a practice of the requisite kind can potentially place a freestanding constraint on the practical deliberations of its participants. For instance, what an official does in a particular case depends on the ways her co-officials have approached the matter in similar cases. This form of responsiveness on the part of officials should not be confused with persons being strategically reactive to the acts of others, as in Nash Equilibrium, according to which each person's act is the best response (from his point view) to what other persons have done. Rather, it is founded on a joint commitment to support the practice of executing laws by taking the intentions and activities of other officials as guide to their own conduct.

The existence of a community of practice renders deferential fidelity by executors possible. This is because the rules generated through engaging one another in this practice set the baseline against which what deference requires is determined in each particular case.

But what if there is absolutely no ongoing practice and, further, the execution of the law in question requires value judgments concerning the best application of underspecified terms (such as reasonable accommodation) to concrete situations? Suppose a chief state official gives her low-level official the task of deciding how to implement a legal norm in a concrete case in the absence of the requisite practice (say, a case in which an entry-level official must determine whether a particular program meets a statutory requirement to provide "reasonable accommodation" for people with physical disabilities). In this case, the only conception of fidelity to the public interest available to this official is the reason conception. Would that mean that the official in question cannot act in the name of the state? We think not. Displaying fidelity of reason, subject to the chief official's power to override the decisions reached by her inferior officers, is sometimes the best, perhaps the only, proxy for an agent to act from fidelity of deference in such a case.\textsuperscript{26} The next stage of the argument seeks to establish the conditions that the practice ought to satisfy in order to be not merely a practice but a practice of the state.

\textsuperscript{26} And even the resort to reason in cases that are not settled by existing practices as a proxy to deference can be overridden by the polity insofar as it decides that officials ought not to rely on their judgments in such cases.
C. The Integrative Form of the Practice: Politics Redux

Privatizing the execution of government functions poses a serious challenge even with respect to private entities seeking faithfully to take on the role of public bureaucracy. As noted above, there are simply too many cases where the state’s commands are underspecified. This shortfall can, in principle, be overcome by forming a practice. This could be a personal practice, in the case of an individual who undertakes to execute government laws, or a group practice featuring a plurality of individuals jointly committed to defer not to each one’s unilateral conception of the general interest but to the conception they come to share in the course of deliberating toward action from one case to another in a way that is consistent and intelligible. Moreover, the formed practice could then be subject to close supervision by state officials. Can an action dictated by a practice developed by private agents and duly supervised by state officials count as an action done in the name of the state? A positive answer would undermine our primary claim; it would imply that privatization is compatible with acting from the public point of view.

We believe it cannot; even given that a community of practice can arise among private individuals, its mere existence is not sufficient for the purpose of speaking and acting in the name of the state. The practice must be able to integrate the political offices into this community. It must be open to the possibility that politicians change the practice, guide its mode of operation and re-evaluate the norms governing it.

To understand what counts as integrative practice, it is important to begin by observing that an integrative practice is a range property. It seeks to extend its reach to capture some hyper-politicized agencies (such as the Department of Justice under George W. Bush’s presidency or the Environmental Protection Agency at least since Al Gore’s vice-presidency) as well as some professional or semi-academic institutions (such as the Federal Reserve’s Board of Governors). That is, it can be more or less

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28 On the phenomenon of hyperpoliticianized executive agencies, see David E. Lewis, The Politics of Presedential Appointments: Political Control and Bureaucratic Performance (Princeton, N.J.: Princeton University Press, 2008); Bruce Ackerman, The Decline and Fall of the American Republic (Cambridge, Mass.: Belknap Press of Harvard University Press, 2010). With respect to the Federal Reserve, while some measure of insulation from political influence is certainly the point of entrusting monetary policymaking in the Fed’s hands, it is nonetheless structurally open to political supervision and intervention at least over the long run. This is especially manifested through appointment mechanism as well as through Congress’s power to determine the Fed’s goals and the means by which it may achieve them. Moreover, political influence can also be exerted over the short run. As Princeton economist and former vice Chairman of the Fed’s Board of Governors, Alan Blinder, has recently observed, “Congress has both the right and the duty to oversee the Fed's operations, which it does through periodic hearings and in other ways.” Alan S. Blinder, “How Central Should the Central Bank Be?”, Journal of Economic Literature 48 (2010): 123-33, p. 125.
integrative, by which we mean more or less open to the deference conception of fidelity to political officials. We shall argue that a private community of practice falls outside the requisite range; and this is true even in cases where state officials supervise the private practice. This is so because the interaction of participants in a private practice with state officials is mediated through a contractual agreement whose effect is the replacement of fidelity by deference with fidelity by reason.

A practice of public officials that takes the integrative form does not merely operate among bureaucrats (with politicians taking the back seat), but rather includes among its engaging participants both politicians and bureaucrats.\(^{29}\) Thus, the integration of the political offices into the community of practice does not limit the role of politicians to that of setting the practice among bureaucrats in motion by determining the basic rules of conduct and the boundaries of the framework within which bureaucrats deliberate toward action. Nor does it limit their role to that of monitoring and supervising the participants (either directly or indirectly through other state officials). Rather, integration enables political officials to guide, within the limit of their legal powers, the ongoing deliberations and everyday actions performed by bureaucrats. In that, political officials can exert their influence on the other participants directly (which is the mirror view of the deference bureaucrats owe them).

The exerted influence is direct in the sense that it is not mediated through, and thus contingent upon, the particular terms of the agreement between the state and the private organization hired for the task in question.\(^{30}\) An integrative practice featuring this notion of direct influence is qualitatively different from a private community of practice, including even a private practice duly supervised by state officials.

To see that, consider a typical privatization agreement under which the government is in charge of setting, usually in general and underspecified terms, the desired ends and of imposing basic constraints on the means that the private executor can deploy in pursuit of these ends.\(^{31}\) It then makes some room—an arena of

\(^{29}\) To fix ideas, British-style parliamentarism and U.S.-style separation-of-powers are two systems of government that reflect different styles of integration. According to the former, the integration of political and civil service occurs at the highest levels on both sides of the equation. According to the latter, and unlike the former, integration penetrates the lower levels of civil service as manifested by the mass appointments, including appointments of president’s loyalists, made by the President after his or her election. Despite these differences, parliamentarism and separation-of-powers are arguably of a piece insofar as they engender a sufficiently integrative community of practice between civil servants and politicians.

\(^{30}\) Of course, public officials, with the exception of mandatory army service, are also employed on a contractual basis. However, their contractual obligation requires them to concede authority to other public officials who occupy higher places on the governmental hierarchy.

\(^{31}\) As with statutory provisions, the vague and underspecified content of the contract is not coincidental. It reflects different considerations (such as uncertainty and the bounded rationality of the parties) that
permissibility, as it were—for the private entity so that the latter could meet the
designated ends with whatever means, provided that they are consistent with the basic
constraints set out by the contract in accordance with government's guidelines.32

Now, the decisions and rules generated by a community of private practice
striving to act within the arena of permissibility necessarily falls short of what
deferece to the general interest (as judged from the point of view of the relevant
political officials) requires. A formally defined arena of permissibility just is an
authorization for private contractors to act according to the reason conception of
fidelity—that is, to pursue the general interest as filtered through their own
viewpoints of what impartial concern for this interest requires.

Indeed, insofar as they participate in a practice that takes a separatist form, the
participants in a private community of practice do not incur an obligation to engage
the relevant political offices deferentially in an effort to determine what the general
interest requires. They may incidentally be disposed to do so but only because, and
only insofar as, thus “deferring” serves the purposes of the (for-profit or not-for-
profit) organization to which they belong. Unlike public officials participating in an
integrative practice, no such deference to political officials is required from them
simply by virtue of being in charge of performing government functions. Were they
required to display the requisite deference, participants would in essence become
public officials, regardless of their formal title (e.g., private contractors).

Accordingly, the private community of practice is not integrative in the sense that
it does not provide politicians adequate opportunity constantly to shape its contours
by commanding the unmediated deference of those who are in charge of the execution
of the relevant tasks. Privatization, insofar as it cuts political officials off from the
community of practice, denies the remaining members of this practice—e.g.,
employees of a private firm—access to the conception of the general interest as
articulated from a point of view shared with the relevant political officials.33 It is thus

render it natural to leave the language of the contract sufficiently airy to accommodate foreseeable and
unforeseeable future events.

32 This typical scenario can accommodate a case where state officials are authorized by the state to re-
negotiate the terms of the agreement with the other party insofar as circumstances change and
modifications become necessary. These modifications (if accepted by the private entity) merely
change the scope of the arena of permissibility, but it does not eliminate it. The only way to eliminate
it (or even to come close to its elimination) is to require the private entity to defer to state officials in
all matters. However, this will be tantamount to converting the participants in the practice to public
officials properly conceived.

33 The relevant political offices, as a leading administrative law scholar has observed, may also include
top-level bureaucrats who work under conditions that render them highly responsive to the elected
officials. See Jerry L. Mashaw, “Accountability and Institutional Design: Some Thoughts on the
Grammar of Governance”, in Public Accountability: Designs, Dilemmas and Experiences, ed. Michael
implausible to describe their efforts in executing laws or judicial decisions as the doings of the state.

The inclusion of politicians in the practice of execution, then, is necessary to forge a connection between the rules generated by it and the general interest (as seen from the public point of view). The rules generated by the integrative practice—the rules that govern moves within the practice and set the baseline against which to determine what deferential fidelity requires in every particular case—are the product of practical deliberation that can span the entire range of governmental hierarchy, which is to say all the way up to the highest political office and all the way down to the lowest-level civil servant who happens to push the proverbial button.

Note that the argument does not focus on how much, and to what extent, do politicians make actual use of their power to influence the practice. In some cases and with respect to some spheres of state action, politicians seldom use their powers. That said, it is the combination of the potential for intervention in and guidance of the practice, on the one hand, and the readiness of politicians to intervene whenever they are unsatisfied with the ways in which the practice operates, on the other, that counts. Accordingly, the realization of this potential is not in and of itself crucial to determine whether the political offices are sufficiently integrated into the community of practice. Instead, what is crucial is the participants' Hohfeldian liability to the power of political officials to place them under a duty to act in certain ways and the willingness to exercise this power whenever they are unsatisfied with the ways in which the practice operates.

To forestall misunderstanding, it is important to note that nothing in this argument turns on a formal definition of "public official" or "private employee"; as a result, the specter of tautology in this respect is groundless. Consistent with our insistence on the constitutive place of an integrative community of practice in the overall non-instrumental argument against privatization, executors are "public officials" by virtue of the integrative practice. They are not officials prior to it. Their participation in a coordinated effort, like imprisoning convicted criminals, renders the practice possible, but it is the integrative practice that makes them officials. Accordingly, it is in principle possible that private employees of a private firm would be considered, for our purposes, public officials. This may be so in the (fantastic) case in which they satisfy the two conditions we have articulated: that of participation in a practice which takes an integrative form. For such a case to arise, the for- and not-for-profit organizations must turn their backs on the private purposes that provide the grounds for their operations—to withdraw from their basic commitment to maximize profits or vindicate certain ideals, respectively—and display fidelity of deference to the
judgment of state officials in all matters pertaining to the execution of the contracted-for task.\textsuperscript{34}

\textbf{D. Summary}

Deferential execution of government functions is not available to persons in general. The mere choice of persons to support the government’s cause by invoking the deferential conception of fidelity is not sufficient. Public officials can be characterized as those individuals who act out of deference to the state and its institutions. This section identified two conditions which must be fulfilled for a person to be a public official, i.e., to be capable of reasoning deferentially and therefore to be capable of acting successfully in the name of the state: the existence of a practice and the intimate proximity of the community of practice with political authority, i.e., the existence of an integrative practice.

To be sure, the deferential conception of fidelity cannot render excusable or justifiable every instance in which public officials suppress their own respective judgments concerning how one should proceed.\textsuperscript{35} In fact, our analysis so far does not evaluate the morality of deference; it is merely designed to capture the difference between a group of vigilantes and the police or between an army and a group of people using brute force against another country. At times this difference has important normative implications but these do not necessarily follow from the mere classification of an act as a private or a public one.

\textsuperscript{34} Our analysis implies that some contemporary regulatory schemes that are commonly associated with Max Weber’s influential account of bureaucracy and public office are contingent only; they do not capture what is genuinely distinctive and valuable about public officials. (The main themes of Weber’s account appear in Max Weber, \textit{Economy and Society}, eds. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978) at pp. 220-21, 235-36, 958-79, 988, 1028-38; cf. Nicholas Parrillo, ”Testing Weber: Compensation for Public Services, Bureaucratization, and the Development of Positive Law in the United States”, in \textit{Comparative Administrative Law}, eds. Susan Rose-Ackerman and Peter L. Lindseth (Cheltenham, UK: Edward Elgar, 2010) 47.) For instance, neither the fixed-salary-based structure of official compensation nor the procedural due process and the legal protection against termination of civil service except for cause is necessary for sustaining a community of practice among public officials. It is of course possible that employment stability and security associated with the Weberian picture of public office plays an important role in sustaining a viable community of practice that takes an integrative form. Other contemporary aspects of public office, such as qualified immunity, may be tightly connected to acting on behalf of the state. However, as we explain in the main text above, such aspects may be conducive to the sustaining of a community of practice but they are not defining features of such a community.

\textsuperscript{35} Serving the Nazi regime is one example even though less dramatic cases of immorality may be sufficient to count as a compelling reason against displaying the otherwise virtuous commitment to deferential fidelity.
IV. WHY SHOULD WE CARE: NORMATIVE IMPLICATIONS

As we observed at the outset, proponents and opponents of privatization (implicitly) hold in common the assumption that the execution of government functions can in principle be performed by either private or public bodies. From their perspective, the only live question is who, between the two bodies, is capable of performing these functions better. In that, they implicitly keep separate the question concerning the quality of performing the function at stake from the one concerning the identity of the agent performing this function. Any agent can, at least in principle, perform the relevant function so that determining who is more capable of performing it turns on purely contingent considerations.

This instrumental approach to the question of privatization may be appropriate whenever the successful provision of the good in question does not turn on the identity of the agent who provides it. That is, the relevant good makes no essential reference to the state and, in particular, to those who can speak and act in its name. Whether or not a particular function fits the instrumental approach depends on the understanding of the nature of the underlying good. For instance, it seems fair to assert that the provision of road repair services makes an appropriate candidate for instrumental considerations concerning the desirability of privatization. This is so because the goods associated with maintaining roads in a reasonable condition can be realized by virtually any skilled repairperson, regardless of the question in whose name this person is acting. This is not true, however, with respect to all goods; some goods can only be produced by certain agents.

The rest of this section defends the claim that some goods—what we call inherently public goods—do hinge on the public nature of their provision and that (given the analysis in the previous section) these goods must be provided for by public officials.

36 While our analysis focuses on the execution of law and policy, it may also shed light on other debates, e.g., the debates concerning the legitimacy of judicial review. The concern raised by judicial review is that judges impose their judgments and preferences on self-governing citizens, and thus not only fail to speak and act in the name of these citizens, but rather against their collective will. This charge is famously associated with Alexander Bickel’s observation that the legitimacy of judicial review is undermined by a “counter-majoritarian difficulty.” See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics, 2nd ed. (New Haven: Yale University Press, 1986), p. 16. Leading proponents of judicial review, by contrast, defend judicial review by arguing that, properly conceived, judges do speak and act in the name of the polity. Under this view, judicial review is designed to protect the decisions made by “We the People” at the constitutional level from ordinary laws enacted by the government in defiance of those decisions and in the absence of massive participation and mobilization on the part of the people. See 1-2 Bruce Ackerman, We The People (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1991, 1998); Jed Rubenfeld, Revolution by Judiciary (Cambridge, Mass.: Harvard University Press, 2005).
Inherently public goods are those goods that cannot be fully specified and realized apart from state institutions providing these goods. For this reason, we focus on criminal punishment and war since, given some standard theories of punishment and war, the goods these practices are designed to achieve can be realized only when provided by the state. Public provision is therefore essential; it is impossible to provide these goods privately. These two cases, however, are mere examples. We do not argue that the infliction of political violence in furtherance of public purposes exhausts the entire range of activities whose resulting goods are inherently public.

More generally, determining which function falls in the category of inherently public goods depends on the nature of the relevant good and whether its successful provision requires that it be publically provided. To the extent it is, the previous section has shown that execution by public officials becomes necessary since they alone can speak and act in the name of the state. The following discussion of criminal punishment and war will help to unpack these claims.

37 That is, we do not defend the underlying standard justifications of punishment and war used in the main text below. We merely show that given these justifications it is only the state that can provide these goods.

38 Another potential example of an inherently public good involves the power to change the normative status of individuals in ways that subordinate these individuals to new obligations. For instance, the doctrine of numerus clausus in property law expresses the thought that the state cannot outsource its power to create new types of property right—say, a mortgage form of property right where none exists—to private individuals acting through economic markets. Contrary to the dominant account of this doctrine, which rests on instrumental considerations involving market externalities, the restriction is better understood as grounded in the non-instrumental restriction on private legislation of novel legal rights and correlative obligations among non-consenting persons. See Avihay Dorfman, “Property and Collective Undertaking: The Principle of Numerus Clausus”, University of Toronto Law Journal 61 (2011): 467-520.

39 This approach to determining what counts as “inherently public good” rejects the Lockean theory of legitimation without thereby necessarily endorsing its Kantian counterpart. On the Lockean theory, the authority of the state should be understood as the mere extension of a supposedly moral authority that individual persons possess over each other in the state of nature. The Kantian theory of legitimation, by contrast, begins from the opposite approach, insisting that the authority of the state is special in that it alone can secure the equal freedom of a plurality of persons living in proximy to each other. Contrary to Locke, our non-instrumental argument against privatization defends the claim that at least certain goods—inhernently public goods—depends on the distinctive authority of the state to provide for them. And, unlike Kant, we do not derive an account of what counts as inherently public goods from a basic commitment to an idea of freedom as independence from being constrained by the choice of another (on which see Ripstein, Force, esp. pp. 13-14). Rather than developing an account of these goods at a wholesal level, we focus on the retail level—that is, whether or not the value of each particular activity hinges on public provision.

40 Our argument in Part II and III, therefore, identifies what public provision means and what it takes to establish that a good is "publically provided". It does not determine whether a particular good ought to be publically provided. Thus, whether or not the provision of civic education (or welfare benefits for the poor or monetary policy, etc.) must be left to public officials depends on the question of whether
We shall seek to show that the provision of sanctions and national defence by private entities changes dramatically the character of these activities. That privatization cuts the government off from the privately-executed activities of inflicting punishment and waging a war carries two important normative implications: a negative and a positive one. The negative implication is that private entities that are formally vested with “state” powers of execution fail to inflict state or public punishment or wage the war in the name of the state. The positive implication is that such bodies inflict their own punishment on a convicted criminal, wage their own war, and maintain their own (private) order. We shall take up these implications in connection with (a) criminal punishment and (b) war. It is important to note that our present ambition is merely to identify, rather than pursue or fully develop, these implications. The latter task deserves a study of its own.

A. Punishment

We begin by observing the radical change in the character of public goods associated with a morally deserved punishment once their provision is handed over to private entities. Certainly, private entities can accomplish a variety of desirable goals by exerting violence on their addressees. Thus, for example, privately-run prisons can promote deterrence by subjecting convicted criminals to harsh treatment. Other desirable goals such as rehabilitation, incapacitation, and even retribution can also be adequately served by private prisons. Indeed, to the extent that retribution involves the infliction of suffering on criminals, private bodies can contribute to the promotion of retributive justice. Lastly, with the right structure of incentives in place, a humane treatment of prisoners can also be provided for by private bodies.

There nonetheless exists one respect in which the private provision of violence runs afoul of being what it purports to be, namely, punishment for the public wrong done. After all, sanctioning a wrongdoer is an expressive/communicative act of condemnation. It is a public manifestation of condemnation and disapprobation of the criminal deeds. Unlike deterrence and perhaps other goals of punishment, public

civic education is best characterized as giving rise to an inherently public good. The latter question, in turn, depends on articulating the best substantive theory of civic education and its underlying good.

41 We do not argue that the exertion of violence by non-state actors can never count as “punishment.” Parents are able to punish their children and even the law, in certain cases, allows for victims of torts (private wrongs) to exert punitive damages from tortfeasors. The argument in the main text picks out the case of punishment for crimes (public wrongs).

42 Many contemporary philosophers of criminal law share this view. On this view, punishment differs from the mere infliction of harm on the criminal. It is a practice that is meant to convey certain judgments and, in this respect, it differs from other practices used by the state to induce individuals to behave in a desirable manner. An early articulation of this claim was developed by Robert Nozick who believes that “[r]etributive punishment is an act of communicative behaviour” and that retribution achieves two goals. The first is “to connect the criminal to the value qua value” and, the second is to
condemnation is possible in the first place only if it emanates from the appropriate agent (who is, on our account, a public official participating in a community of integrative practice). Condemnation, understood broadly to capture the process of carrying out a sentence, is ineffective unless done by an agent who is in a privileged status to that of the one subjected to the condemnation, viz. one whose judgments concerning the appropriateness of behaviour are worthy of attention or respect. Otherwise, the infliction of "a sanction" amounts to an act of violence that cannot express or communicate censure for the culpable and wrongful acts done. Punishment is distinguished from mere violence by the fact that the state is a legitimate authority not only for the purpose of judging the wrongfulness of our actions but also for inflicting the punishment for the right reasons.

To see this, recall that on our account, the privatizing state cuts itself off from the privately-executed activities (of inflicting “punishment,” waging a “war,” or maintaining “public” order). These privatized activities are not the doings of the state since private entities vested with the formal authority to execute the activities in question cannot speak and act in the name of the state. However, the ability to speak and act in the name of the state is crucial for justifying a violent act (say, that of incarcerating a person or determining the conditions of incarceration, the means of disciplining the inmate etc.). It is necessary for the punishment to communicate a judgment (concerning the wrongfulness of the act) of the state, i.e., a judgment made in the name of the political community it embodies.

The intimate connection between punishment and censure arises in connection with the idea that the infliction of punishment on convicted criminals is inseparable from the rest of criminal law's practice of condemnation. By ‘criminal law,’ we mean the legal enterprise of determining through public laws what kinds of behaviour warrant public condemnation; judging whether particular persons under particular circumstances deserve to be so condemned; and, finally, communicating the

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43 We do not judge whether the respect that is owed to these judgments is because they are more likely to be correct or for other reasons. The likelihood of correctness may be relevant but it need not be the only relevant consideration.

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appropriate public condemnation, which is to say inflicting punishment, rather than merely violence. Thus, all three branches of the government—law-making, law-applying, and law-enforcing, respectively—are separately necessary and jointly sufficient to get the legal practice of condemnation going.

Another way to put the point is to observe that just as a war, to play on Clausewitz’s famous observation, is “the continuation of policy by other means,” punishment is the continuation of condemnation conveyed through judicial conviction by other means.44 By disengaging itself from practicing these “other means,” the privatizing state renders the sought-for continuation impossible. On this view, the private provision of "punishment" amounts to the mere imposition of pain and suffering by one private person on another and necessarily fails to convey condemnation for public wrongs. Instead, the person inflicting the sanction conveys his own judgment concerning the act, not that of the state, but his own judgment deserves no greater attention than that of the person who is subjected to the sanction.

The second implication of our argument is straightforwardly related to the previous one, though working out its details requires more attention than we could offer in these pages. Conferring upon private entities an official mandate to subject other private persons (be they convicted criminals, residents of an enemy state, or persons threatening to disrupt public order) to physically violent treatment is impermissible on the part of the state.

Since, on our account, criminal punishment is designed to convey condemnation, rather than merely to inflict pain or to deter, the activity of a private individual incarcerating a convicted criminal violates the criminal's dignity. This is because the private warden, who seeks to give effect to the state’s condemnation of the inmate, speaks and acts in his name (or his employer's name). His condemnation therefore presupposes the privilege of subjecting the inmate to the private warden’s judgment concerning how to proceed with expressing condemnation, including judgments concerning what treatment is due at any given moment and in response to every given situation. After all, the warden surely engages his inmates in virtually everything. The engagement ranges from substantially invasive searches and disciplining measures to everyday routine and down to the most technical matters of living behind bars. Since fidelity to the public good depends in the case of the private warden on his own view of what the public good requires, subjecting the inmate to private powers of "condemnation" offends the moral equality that exists between the two by virtue of their shared status as private persons lacking the moral standing to speak and act in the name of the state. Whereas a public warden, by virtue of participating (in the right way) in the relevant community of practice, can claim that he acts in the name of the state and “his” judgments are not his but fundamentally those of the state, a

private warden cannot make such a claim, as his judgment emanates from his reasoning and not from that of the state.\textsuperscript{45}

To make this case even worse, consider the implication of the state’s official endorsement of wardens acting in conformity with the reason conception of fidelity. Indeed, by siding with the private warden in the case just mentioned, the state indicates that it presumes the superiority of the warden by giving priority to his judgment over the judgment of the inmate (or, for that matter, of any other member of the political community). To this extent, the privatizing state not only allows for the violation of the dignity of its citizens by their peers; by outsourcing its special power of inflicting criminal punishment, it actively stamps the moral inferiority of those subject to the rule of private entities with a public seal.

This analysis does not imply that the state cannot contract out catering, food supplies, or other tasks insofar as they involve regulating the technical aspects of living in a prison.\textsuperscript{46} Unlike the decision to search or discipline a prisoner, decisions as to who provides the food do not involve the sorts of judgments that ought to be made by the state. In other words, they do not involve the provision of inherently public goods. More particularly they do not directly involve judgments concerning the wrongfulness of the actions performed by prisoners.\textsuperscript{47}

\textbf{B. War}\textsuperscript{48}


\textsuperscript{46}Of course, privatization of technical concerns may well be objectionable on instrumental grounds.

\textsuperscript{47}Determining what counts as a ”non-technical” concern depends on the substantive theory of criminal punishment which makes the provision of the good of punishment an inherently public one in the first place. The question is whether, and to what extent, any given aspect of imprisonment is sufficiently connected to the punishment’s goal of expressing or communicating the status of prisoners \textit{qua} convicted criminals. Delineating the boundary between technical and non-technical in each and every case is not always clear. However, not all cases are, so to speak, hard cases. For instance, aspects of imprisonment that ought to be executed by public officials involve acts of disciplining the prisoners and conducting invasive searches. By contrast, other aspects, such as the choice of the Ketchup brand, can be provided by either public or private agents.

\textsuperscript{48}To forestall misunderstanding, our claim that fighting a war ought to be done out of fidelity of deference does not apply to every conceivable case of warfare. Instead, our primary interest concerns wars that are justified on the grounds that they promote a legitimate state interest such as the case of waging a war in self-defence. Thus, our account does not seek to capture wars that are grounded in state-independent ends. For they can (and, perhaps, must) be fought regardless of the identity of the agent who acts for the sake of these ends—the paradigmatic case being wars justified by reference to the demands of humanitarian intervention.
Conventional wisdom suggests that waging a war in furtherance of the state’s legitimate interest reflects a special case of inflicting deadly violence on a large scale. Unlike many other instances of mass killings, war is a quintessential expression of political sovereignty. Indeed, war-making of this kind is about asserting the very existence of sovereignty. The state purports to regain or preserve its very sovereignty, at least with respect to some areas within its pre-war territory, while the other state seeks to establish sovereignty in its stead. War is therefore “essentially a relation between or among collectives and in particular states.” The practice of war is a political manifestation of force in the service of promoting the general interest as judged from the public point of view.

This, however, requires us to explain how the individual act of the agent killing in war could be justified. In his reductionist challenge of the political or collectivist approach, Jeff McMahan rejects the plausible claim that wars are fundamentally different than private or individual violence. He particularly challenges a distinction drawn by Christopher Kutz between the moral and the political permission to kill in a war, asking “How could it be that merely by acting collectively for political goals, people can shed the moral constraints that bind them when they act merely as individuals?”

We seek to address this challenge and argue that the fundamental difference is in the notions of public office and, in particular, fidelity of deference. Accordingly, every act taken in the process of waging a war can and should, in principle, be attributed to the sovereign. To the extent that the troops deployed by the state act from fidelity of deference, the judgments of the troops concerning the means that are both necessary and appropriate to deploy, in general and in any particular instance in the war, count as judgments made by the state itself.

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49 The concept of sovereignty that we employ, i.e., a supreme authority within a territory, is broad enough to capture different conceptions of it. It is not necessary for the present argument to discuss these conceptions in detail. For such a discussion, see Dan Philipott, “Sovereignty”, in Stanford Encyclopedia of Philosophy, ed. Edward N. Zalta (http://plato.stanford.edu/entries/sovereignty/).


51 Ibid., at p. 35


53 Interestingly, McMahan himself attributes some significance to the status of the soldier as distinguished from a private individual. When he speaks of the duty of soldiers not to disobey a decision of the state not to go to war, he maintains that “Nothing that I have said thus far implies that it is impermissible for individuals to fight in wars without authorization from their state. I have argued only that individuals may not fight without authorization in their role as soldiers—that is as individuals who act officially as agents of the state in its military conflicts. If there is a war in which a soldier believes that he is morally required to fight and his government refuses to authorize the state’s military to fight, then he must somehow extricate himself from his role as a soldier.” McMahan, Killing, at p. 94.
By contrast, the privatization of the armed forces, as we argued above, opens a critical gulf between the judgments that can be made by members of these forces and those actually made by the state. This is just another way to say that a privatized task force that purports to give effect to the state's decision to go to war in fact speaks and acts in its own name. Its various operations, taken severally and as a whole, cannot express the judgment of the state with respect of their justness. Thus, participants in this private military subject their potential victims to their judgments of how to proceed with the war—what violent measures to apply in every given situation against potential victims—in the light of what they judge to be the overall balance of reasons behind the state's decision to go to war. It follows that private soldiers—mercenaries, really—assume a normative power that individual persons normally lack, namely, the standing to subject other human beings to their private judgments, including judgments concerning the justness of killing and maiming them. Perhaps, in some extraordinary cases, there may arise good reasons to excuse (or even justify) these apparently flatly criminal acts (e.g., violence necessary in cases of humanitarian intervention). The point of our argument, however, is that such considerations cannot be grounded in the law (and ethics) of war, but rather in the law (and ethics) of criminal law simpliciter.54

The preceding analysis bears directly on one of the most profound debates between non-pacifist accounts of the ethics of war. We shall first introduce in a stylized fashion the terms of the debate; we will then identify the distinctive way in which our account can illuminate this debate. To begin with, there exist two different approaches to the morality of war.55 On the traditionalist approach (most famously associated with Michael Walzer), the practice of engaging in a war picks out a special moral practice irreducible to ordinary morality; troops are morally governed by principles of action that are qualitatively different from the principles that would apply to them in their non-military, private lives. Accordingly, traditionalists consider the content of soldiers’ moral practice by reference to the question of what soldiers think soldiers ought to do in war circumstances. Walzer, for one, takes on a first-person perspective to argue that “I [i.e., the soldier] find in them my moral equals,”56 by which he means that soldiers normally conceive of themselves as governed by rules that are either the upshot of “mutuality and consent” or of “shared

54 As with the case of punishment, one ought to differentiate between “technical” aspects that can be outsourced and “non-technical” aspects of fighting a war that cannot. See the discussion in the text accompanying note 53.

55 For a critical survey of the contemporary debates, see Seth Lazar, “The Morality and Law of War,” in The Routledge Companion to Philosophy of Law, ed. Andrei Marmor (New York: Routledge, 2012), pp. 364-379. It would be worth emphasizing that most disagreements revolve around the morality, rather than the legality, of the just war doctrine. Thus, moral critics of the traditional approach to just war doctrine can (as some of them actually do) concede that this doctrine may be the best second-best legal regime we can furnish at this point. See McMahan, Killing in War, pp. 109-110.

servitude” between them.\textsuperscript{57} Other proponents of the traditionalist approach pursue a contractarian approach. They, too, proceed by denying the application of general morality to the war context while embracing the freestanding morality of professional role.\textsuperscript{58}

The implication of the traditionalist approach is twofold: First, there exists a strict separation between the morality of deciding to go to war (\textit{jus ad bellum}) and the morality of fighting the war (\textit{jus in bellum}); second, as noted above, soldiers are morally equal so that just and unjust combatants share precisely the same moral permissions and restrictions in connection with fighting wars.

In contrast, the revisionist approach (most famously associated with the work of McMahan) insists that there is nothing morally significant about the practice of war that could detach it from the rest of morality, especially ordinary morality. Thus, in a typical statement, revisionists criticize the traditionalist approach for putting forward a “normative structure that is fundamentally incoherent with the structures that govern our lives in the realm of private violence.”\textsuperscript{59} Accordingly, for revisionists, soldiers are people too and the moral rules of engaging in a war are set by reference to the question of what a private individual ought to do under similar circumstances. This way of approaching the morality of war leads revisionists to deny the two basic tenets of traditionalists’ just war theory—that \textit{jus ad bellum} and \textit{jus in bellum} are independent and that combatants, just and unjust, are morally equal. The basic thought here is, once again, that the practice of war should be assimilated into ordinary, individual morality. Soldiers can never leave behind, as it were, their basic responsibility of acting from a morally impartial point of view of the matter at stake (be that the execution of war or the keeping of a promise).

Here is the problem of this view. The insistence on moral impartiality gives rise to a counter-intuitive result: the revisionist approach seems to be making the strongest (i.e., non-instrumental) case for the privatization of militaries. We do not argue that revisionists are self-consciously aware of this possibility, but rather that this is the logical implication of holding the revisionist view. Our point is that there is a head-on collision between the application of personal morality to the war context, on the one hand, and the ability of soldiers to speak and act in the name of the state, on the other. Indeed, to say that soldiers are morally obliged to approach the world impartially (as

\textsuperscript{57} Ibid., p. 37.


\textsuperscript{59} Christopher Kutz, “Fearful Symmetry,” in \textit{Just and Unjust Warriors: The Moral Status of Soldiers}, ed. David Roden & Henry Shue (Oxford: Oxford University Press, 2008), 69, p. 70. Kutz further asserts that “Since killing and destruction ordinarily require very grave justification, the [moral equality between soldiers] seems in contradiction with any rational aspiration of political morality.” Ibid., at p. 69. The existence of contradiction, however, depends on the reductionist assumption that political morality, and especially concerns of political legitimation, are fixed by individual morality.
they would ordinarily do outside the context of war) is just another way to say that they are required to act from fidelity of reason. As established above, however, those who pursue the execution of government decisions out of fidelity of reason to the public interest in fact speak and act in their private names, rather than that of the state. A war, including in particular just war, whose execution is done by private individuals, as opposed to soldiers who are public officials, can only be governed by the moral rules that govern private violence, which is to say the moral rules behind criminal law *simpliciter*. To put it bluntly, this view turns the soldiers—including soldiers who are formally drafted and employed by the state—into mercenaries and the war into private acts of killing. Furthermore, even if the war could otherwise be considered just, the very act of deploying private soldiers might render the “war” unjust because these soldiers would be engaged in private killings.

Whereas our attack on the revisionist approach provides novel reasons for preferring the traditionalist approach, part of our critique of the former may be relevant with respect to the latter approach as well. Consider the basic commitment that revisionists and traditionalists hold in common: that the morality of war should best be accounted for by recourse to morality—ordinary morality in the case of the revisionist and professional morality in the traditionalist case. We do not deny the relevance of morality, ordinary or professional, to persons’ overall considerations of what to do. However, our approach begins from a distinctively different view—soldiers (like wardens and public officials, more generally) are also political creatures who assume an important role in the political order. Indeed, they hold a distinctive position in the process of resolving political disagreements among sovereigns. War is no mere exertion of deadly violence (although it surely is that as well); it also constitutes an assertion of sovereignty and so belongs to a set of political institutions that purport to regulate the practical affairs of states and their citizens despite, and indeed because of, the deep moral disagreements that arise between them. A successful reconstruction of the practice of war (as well as that of punishment) must account for the irreducibly political nature of this practice.

**CONCLUSION**

The contemporary debate concerning privatization is grounded in an attempt to identify agents who are more capable of performing a state function in the furtherance of the public interest. The success and failure conditions against which the performance is measured are, in principle, independent of the identity of the agent. The basic premise of this debate is that determining who is more capable of performing the function is grounded in answering the question of who is better capable of doing it. The identity of the best agent to perform the task is purely contingent on the agent’s performance. This paper inverses the order of this reasoning: who can perform the tasks partly depends on who you are. The instrumentalist
rationalizations provided by both friends and foes of privatization are mere rationalizations of non-instrumental considerations. In reality, however, the intuitive resistance to privatization is not an instrumental one; it is founded on more foundational principles of political theory.

Inversing the reasoning in the way suggested, namely acknowledging that the success of performing a task sometimes hinges (conceptually) on the identity of the agent performing it, exposes a primary flaw in dominant instrumentalist reasoning. Political practices such as punishment and war promote a variety of desirable ends (such as deterrence and security), but the realization of these ends often depends on the agent who performs the task and, further, turns on the ability to attribute the realization of these ends to the agent whose distinctive will counts. The trouble with instrumentalist theories of punishment and war is that they fail to identify some of the important ends of these practices, in particular those ends that can only be realized by public agents.

While we focused our attention on public officials in the contexts of punishment and national security, we believe that the same reasoning could apply to other political contexts and (perhaps) even beyond state-based political practices. The dominant instrumentalist outlook cannot fully explain or justify institutional structures, by which we mean the existence of a group of persons who, nonetheless, purport to speak and act in name of someone. To fully understand our institutions we ought to pay greater attention to what execution consists of; we must not reduce execution (properly conceived) to mere acting in conformity with the will of another.