The Case Against Privatization

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Abstract

This article develops a non-instrumental argument against privatization of certain forms of political violence. Its primary foci are the privatization of prisons and the use of mercenaries in wars. The article maintains that some governmental decisions simply cannot be executed by private entities. While private individuals may act in conformity with the state’s orders, such conformity cannot count as an execution of the order of the state and cannot be attributed to the state. Conformity that does not constitute an execution of the state’s order, in turn, fails to realize the ends for the sake of which the infliction of force is justified, i.e., condemnation of the criminal behavior (in the case of punishment) and fighting for the polity’s public good (in the case of wars).
THE CASE AGAINST PRIVATIZATION

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I. INTRODUCTION

The privatization of government functions involving violence, such as waging a war or running a prison, 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 fidelity 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, 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. 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 can be realized only if the state performs these tasks; and second, execution by the state requires the direct involvement of public officials. The conjunction of these two claims implies that some decisions must be executed by public officials and should not be privatized. The privatization of these decisions would undermine the very possibility of providing their consequent good since the provision of these goods hinges on the public execution of the decision (e.g., the decision to punish a criminal or 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/ordered to perform a task by the state and complies with this request/order does not 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,

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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 Indeed, as Alexander Volokh notes, even when participants in the debate purport to make non-instrumental arguments, closer scrutiny reveals that such arguments rest on instrumental considerations. See, e.g., Alexander Volokh, “Prisons, Privatization and the Elusive Employee-Contractor Distinction” (unpublished article, 2012), pp. 37-49.

3 This presupposes identifying who the public officials are and what distinguishes them from private individuals. See Part III.
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 from 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 public execution of such functions must be provided publicly as these goods are valuable only if provided by the state. We demonstrate these claims with particular emphasis on the cases of criminal punishment and war.

Our argument seeks to strike an intuitive cord, which instrumental arguments against (and for) privatization necessarily fail to explain. It allows us to see that the intuitive dislike of privatization (echoed in the legal doctrine classifying certain functions as “inherently governmental functions”) is not a feature 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, 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 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.

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 the privatized

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4 In her comprehensive historical survey, Sarah Percy illustrates that there is a persistent opposition to mercenaries, but the reasons provided for this opposition shift and change over time. Percy’s survey indicates that while most reasons provided for this opposition are instrumental, the sense of discomfort is deeply entrenched and cannot be explained in instrumental terms. The instrumental reasons are mere rationalizations of a deeper resistance that we aim to explicate in this paper. See Sarah Percy, Mercenaries: The History of a Norm in International Relations (New York: Oxford University Press, 2007).


6 Of course, the status of the actor—as a public officer or a private employee—may not be sufficient for attributing the act to the government. Public servants may at times perform acts that ought not to be attributed to the state. The point, however, is that status is a crucial element.
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 explore the ramifications of this view in section
B.

A. Fidelity as Reason; Fidelity as Deference

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

It is perfectly correct to say that the outcome 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."8

Ascribing this outcome 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 that. Rex,
after all, could have published a novel in which he tells the story of Rex passing a law
against rape; presided over a moot court competition finding that the accused raped
the victim; or shot his neighbor (who happens to be the actual rapist) 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 may have incidentally identified the relevant public
interests (whatever they are), struck the right balance between them, and applied it to
the idiosyncrasies of the particular case at hand. Yet Rex’s words or acts lack the
appropriate normative force because the conditions for acts of sovereignty were not
satisfied.

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7 Whether or not this outcome is just or legitimate (or both) is, of course, an entirely different question.
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 decision made by a judge. The privatization of punishment does not typically refer to the privatization of legislation or even adjudication.\textsuperscript{9} 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 run afoul of invoking the sovereign or public point of view, and thus of being the doing of the state.

Suppose Rex seeks the assistance of another individual in executing his court decisions and enforcing the laws he gives, more generally. This assistance can take different forms. In the discussion below we focus attention on three forms 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 rapist (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, as it always has been, 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) derived from the public point of view, Rex’s doing and the state’s doing are one and the same.

The remaining two forms of assistance differ from the preceding form in that they involve enlisting other persons as agents, that is, as creatures 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 is for them an upshot of a reflective process of deliberation with respect to administrating the nuts and bolts of the capital punishment. 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

\textsuperscript{9} There are of course those who maintain that legislation and adjudication ought to be privatized. Our primary targets here are those who agree that some 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. Our contention that certain functions can only be done by public actors is challenged by the possibility of private legislators and adjudicators, but our argument can be applied to undermine their legitimacy.
conceptions of fidelity: one features *fidelity by reason*, the other *fidelity by deference*. We take each in turn.

On the former form of assistance, 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). This requirement does not turn on the assistant's motive for acting impartially. Indeed, the motivation for displaying impartial concern 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 thwarts, 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 (recall) 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 rapist 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.

Thus, by invoking an impartial concern for the public good, assistants necessarily misfire insofar as they fail to replicate the public interest 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

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10 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.
source of the discontinuity that privatization might generate between the state and the outsourced services.

The third form of assistance picks out a 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 contemplates), 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 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, instrumental or otherwise.

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, 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 reference to the assistant's success in retreating from his point of view and in adopting Rex's public point of view. Unlike the rational pressure that displaying impartial concern for the general interest exerts toward misfiring, an assistant who meets the deference requirement by successfully retreating from his or her point of view does not implicate himself or herself in the misfiring of government actions.

B. From Hypothetical to Real Outsourcing of Government Functions

In the real world, determining whether an action is the state’s doing defies the tautological fashion of submerging the state and its doings in Rex and his doings. The challenge of any form of government claiming legitimacy is to make decisions and perform actions in the name of the polity – decisions and actions that can be attributed to the state. Otherwise, such decisions and actions are not at all the doing of the state, but rather of one person or political elite fictitiously pretending to be those of the polity. Meeting this challenge is necessary in order to conceive of the sovereign as one body, 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

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11 This exposition of the deferential conception of fidelity does not seek to specify the conditions under which deferential execution of government decisions can be possible or justified. We take up this question in Part III.
government purporting to speak in the name of the polity.\textsuperscript{12} Indeed, the two conceptions of fidelity (by reason and by deference) mentioned above characterize ways of approaching the task of providing service for another entity independently of the theory that informs this entity's shape and content.

We shall now seek to complete the first stage of the argument by returning to the two conceptions of fidelity in order to investigate, against the backdrop of privatizing government services, the challenge of ascribing actions to the doing of the state, rather than of certain private natural or artificial persons. 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 may be—indeed, there likely 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, they can make the necessary judgments by reference to their conceptions of $A$’s general good, in which case deliberation and action depart from the public point of view as explained above. This is so, it should be recalled, even when the officers are highly motivated to promote $A$’s general interest (as they see it). Second, officers can alternatively 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 executive — Rex.

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

\textsuperscript{12} 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, \textit{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 \textit{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.
without forgoing the aspiration to do so on behalf of the state and, thus, in the name of the governed. After all, the deferential conception of fidelity is, to a large extent, embodied in the structure of army organization (as well as in other non-military organizations) so that the procedures by which officers arrive at decisions may involve suppression of their own judgments and opening up to the judgments of higher ranking officers, and so on.

In the next stage of the argument we will demonstrate that an army run by the state or punishment inflicted by public officials can (and ought) to make deferential fidelity its regulative ideal. By contrast, as we shall argue in Part IV, privatized government services cannot invoke the deferential conception of fidelity. Consequently, these private entities misfire to the extent they purport to present their actions as those of the government.

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 performing what they are designed to perform, they must satisfy certain conditions; such acts must count as “deferrential” 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 essential for the very ability to perform certain tasks that need to be done “in the name of the state.”

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13 Our account of what deference to the state consists of has descriptive and normative implications. Descriptively, we seek to account for the lived experience of public service. Normatively, our analysis embodies certain values underlying fidelity of deference. It can be rationalized as embodying a commitment to certain ideals; in particular, it is essential for the very possibility of legitimate rule.

14 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—for- and not-for-profit organizations included—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 pursue public purposes.
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 convicted criminals. This person—any 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.15

Given the under-specified nature of the “guidance”, it would be presumptuous to attribute the act performed by the agent to the state. There are many ways of performing this act and the choice between the different ways of performing the act reflects the personal choice of the agent and not that of the state. The different ways of performing the act have different consequences; they affect people’s well-being and impact their rights. Choosing among the different ways of performing the act must 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.16

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

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15 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. However, as mentioned above in connection with the case of Rex pressing the fingers of another person against the gun’s trigger, the absence of discretion on the part of the executing individual means that the act of execution can be attributed to the state.

16 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 or reinforces immoral acts performed by private individuals.
elicited.\textsuperscript{17} 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 of the 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?

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 actually do—an active role in determining what acts are done in the name of the state.\textsuperscript{18} 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 he 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 (\textit{qua} participants in the requisite practice) concerning what choices deference by them dictates. To this extent, a community of practice properly conceived overcomes the difficulty of assessing what impartial pursuit of the public good requires by establishing an intersubjective framework through which the enforcement of the law could proceed.

More specifically, we argue that 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. Thus, we develop an account of fidelity of deference, the centerpiece of which is the claim that speaking and acting in the name of the state requires the existence of a practice which takes a distinctive form, namely, one which integrates the political and the bureaucratic in the execution of the relevant functions. This practice, because of the integrative form that it takes, 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

\textsuperscript{17} 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.

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—on the basis of the balance of the interests at play—how to proceed with the concrete implementation of government policy or decision against the backdrop of the case at hand and its surrounding circumstances.

Under this 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.19

As noted earlier, private individuals (or, for that matter, a plurality of individuals acting erratically) necessarily fail(s) to display deference in executing laws even as they wholeheartedly try to do that. The existence of a community of practice, by contrast, 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 to the general interest requires is determined in each particular case.

19 The precise elaboration of the structure and possibility conditions of social practices is not important for our present purposes. A plausible theoretical framework is developed in Michael E. Bratman, Faces of Intention: Selected Essays on Intention and Agency (New York: Cambridge University Press, 1999).
(assuming, for the moment, that these rules properly express the general interest). 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.

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. The challenge is that the newcomers—the private agents of execution—cannot approach the task of execution from the perspective of the state simply by aiming to execute the state’s commands faithfully. 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. Can an action dictated by a practice developed by private agents 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 between 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. This integration 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. Rather, integration enables political officials to exercise their draw beyond the get-go stage to influence the ongoing deliberations and everyday actions performed by bureaucrats within these boundaries. A practice of public officials that takes the integrative form does not merely operate among

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20 It is important to note that integration stands in opposition not only to a private community of practice, but also to a purely political community of practice. Our discussion in the main text emphasizes the necessity of the practical integration between politics and bureaucracy—we do so in response to the threat posed by privatization. The opposite threat, one which we shall leave to another occasion, concerns the politicization of the community of practice. Indeed, excessive involvement of politicians in and around the execution of government functions might reduce this practice into mere politics (in the pejorative sense of the word, associated with blatant sectarianism). For more on the latter threat, see Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, Mas.: Belknap Press of Harvard University Press, 2010).
bureaucrats (with politicians taking the back seat), but rather includes among its engaging participants both politicians and bureaucrats.\(^{21}\)

The question of whether a particular practice is, in fact, an integrative one is a matter of degree; a practice can be more or less integrative. The more integrative the practice is, the more it is open in principle to be guided by politicians. To be a state’s practice, namely a practice that is properly understood to be the doing of the state, the practice needs to be sufficiently integrative.

An integrative practice is crucial, we argue, because otherwise the rules of conduct generated by a practice are no less private (in the appropriate sense) than the rules that a private individual happens to adopt when asked by the government to imprison a convicted murderer in her basement. The inclusion of politicians in the practice of execution is necessary to forge a connection between the rules generated by it and the general interest (as seen from the public point of view). 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 firm—access to the conception of the general interest as articulated from the publicly shared point of view. The rules generated by the 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 spans 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.

Normally, outsourcing the authority to execute laws to private entities is inconsistent with the integrative form that a practice must exhibit to count as a practice of the state. Perhaps even the intended consequences of outsourcing in this area is to break with the political-executive integration and, in its stead, to embrace a strict institutional and functional division of labor between law-making (or law-applying by the judiciary) and law-executing. On this view, the government is in

\(^{21}\) The question of whether a particular practice is, in fact, an integrative one is a matter of degree; a practice can be more or less integrative. The more integrative the practice is, the more it is open in principle to be guided or controlled by politicians. To be a state’s practice, namely a practice that is properly understood to be the doing of the state, the practice needs to be sufficiently integrative.

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. Moreover, and again unlike its Westminster counterpart, a separation-of-powers system of government subjects bureaucrats to two masters simultaneously, the President and Congress. 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.
charge of setting the desired ends and of imposing basic constraints on the means that the private executor can deploy in pursuit of these ends (whatever they may be). It then steps back to make room—an arena of 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 government. In that, outsourcing gives rise to a practice among executors which takes a separatist, rather than an integrative, form.

Consider the case of employees of an either for- or not-for-profit organization faced with the task of imprisoning convicted criminals. As observed above, the employees must decide, as part of determining how to proceed in any particular case, the nature of the competing interests at stake and their relative weights. Deferring to the rules generated by the practice in which they—qua private employees—act may fall short of deferring to the general interest (as seen from the public point of view). They can, of course, defer to their superiors—the chief executives of the employer-organization. Moreover, they can appeal to the basic principles to which they are committed by virtue of joining the organization—the maximization of stockholders' wealth in the case of a for-profit organization and the vindication of certain values (as construed from the organization's own point of view) in the case of a not-for-profit organization. Neither an appeal to one's superiors nor to principles or values can transform the character of the acts of execution made by participants in this practice into the acts of the state.

Indeed, insofar as they participate in a practice that takes a separatist form, the employees may be unable to engage the relevant political offices in an effort to determine what the general interest, properly conceived, requires. Against this backdrop, there is no reason to believe that private employees can act on rules and policies that are articulated from the public point of view simply by virtue of participating in an ongoing practice. The practice that they follow is not adequately integrative in the sense that it does not provide politicians sufficient opportunity constantly to shape its contours. It is thus implausible, against the backdrop of the deferential conception of fidelity, to describe their efforts in executing laws or judicial decisions as the doings of the state.

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

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22 A non-profit organization can surely seek to promote the state's interests, but insofar as this commitment depends on the organization's conception of these interests, it remains fundamentally sectarian. This is true even when the organization takes an impartial stance toward the realization of these interests as it depends on the question of what (from the organization's point of view) impartiality requires.
of the practice. They are not officials prior to it. Their participation in a coordinated effort (say, to imprison 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 in this stage of the argument—that of participation in a practice which takes an integrative form.

The deferential conception of fidelity cannot render excusable or justifiable every instance in which public officials suppress their own respective judgments (concerning how one ought to proceed). Serving the Nazi regime is one obvious example, though other small-scale cases of blatant immorality on the part of the government may be sufficient to count as a compelling reason against displaying the otherwise virtuous commitment to deferential fidelity. The argument developed so far, as well as the one going forward, sets to one side the sensational cases, focusing instead on the moral concerns that arise in everyday bureaucratic practice. Indeed, even though all cases of inflicting punishment or waging war bear heavily on questions of justice, it would be wrong to allow the extraordinary ones to exert undue influence on the analysis of the rest of the cases. Of course, there exists a separate question—about which people would surely disagree—concerning the grey area that lies between the sensational and the ordinary cases.

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 may 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.

IV. WHY SHOULD WE CARE: PRACTICAL IMPLICATIONS

As we observed at the outset, many 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

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23 The practice-based account of what is a public official need not apply globally. Arguably, there may be compelling reasons to invoke the formal definition of public officials in other contexts (say, for resolving disputes governed by labor law, torts, and so on).
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. Once again, 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.

However, the argument above demonstrates that privatization of certain government functions is not merely an instance of relocating state power of execution from public to private entities. For privatization in this context transforms this power into a purely private one. Accordingly, private entities that are formally vested with “state” powers of execution nonetheless act in their own name, and thus, to an important extent perform a fundamentally different function than the one performed by a public entity. More specifically, such bodies inflict their own punishment on a convicted criminal, wage their own war, and maintain their own (private) order. By contrast, public officials, acting under the necessary conditions specified above, can display fidelity of deference to the state, in which case their acts of execution are, in fact, those of the state.

Thus, to the extent that the goods resulting from the acts of public officials depend on their being done in the name of the state, it follows that such goods cannot be realized by private agents. The rest of this section defends the claim that these goods do hinge on the public nature of their provision and that given our analysis in the last section, these goods must be provided by public officials.

That privatization cuts the government off from the privately-executed activities carries two important implications. First, the private provision of sanctions, national defence, and public order dramatically changes the character of these activities, rendering them unable to redeem the values immanent in them. Second, privatization may be detrimental to core liberal and democratic commitments to human dignity and political legitimation. In what follows we shall take up these implications, focusing on the cases of (a) punishment and (b) war. It is important to note, before we begin, 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. Indeed, the infliction of “punishment” by a private entity is inherently defective. 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 conventional goals of punishment, public 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

24 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 tort-feasors. The argument in the main text picks out the case of punishment for crimes (public wrongs).

25 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 connect the wrongdoer to the value in a way “that value qua value has a significant effect in the criminal’s life, as significant as his own flouting of correct values.” See Robert Nozick, Philosophical Explanations (Cambridge, Mass.: Harvard University Press, 1981), p. 370. Joel Feinberg believes that: “Punishment is a conventional device for the expression of attitudes of resentment and indignation and, of judgments of disapproval and reprobation”. See Joel Feinberg, “The Expressive Function of Punishment,” in Doing and Deserving: Essays in the Theory of Responsibility (Princeton: Princeton University Press, 1970), p. 95, 98. Anthony Duff argues that punishment is a “communicative enterprise” designed to communicate to offenders the censure or condemnation that they deserve. See R. A. Duff, Punishment, Communication, and Community (New York: Oxford University Press, 2001), p. 92.

26 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.
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, as we show below, 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), as it is necessary for the punishment to communicate a judgment (concerning the wrongfulness of the act) by the state, i.e., by the political community it embodies.

Moreover, 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 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. 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. Alternatively, 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. We argue that 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.\footnote{28} Since, as we argued above, 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.\footnote{29}

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 this private individual 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.

\section*{B. War}\footnote{30}

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

\footnotetext[28]{The warden surely engages her 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 (such as the selection of the ketchup brand that inmates could get at lunch).


\footnotetext[30]{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-relative 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 executed 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.}
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.

The close nexus between war and sovereignty even led some influential thinkers, as diverse as Cicero and Carl Schmitt, to the notorious proposition, according to which inter arma silent leges.


Ibid., P. 35


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 in War*, p. 94.
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. 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.

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 only 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. 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,” 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 servitude” between them. Other proponents of the traditionalist approach pursue a contractarian

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37 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.


39 Ibid., p. 37.
approach. They, too, proceed by denying the application of general morality to the war context while embracing the freestanding morality of professional role.\textsuperscript{40}

The most immediate 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.

The revisionist approach (most famously associated with the work of McMahan), by contrast, 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{41} 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 who happens to serve in the army ought to do. 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 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


\textsuperscript{41} 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., 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.
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.

It seems natural at this final stage to connect the preceding discussion to the broader context of the non-instrumental argument against privatization. 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

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42 Recall that our characterization of fidelity of deference does not imply limitless deference, especially in sensational cases. More generally, there are reasons to believe that traditionalists can recognize this fact.
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 in rushing to guarantee the realization of these respective ends they fail to take seriously the concern for political legitimation.

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.