Dignity and Privatization: The Dignity-based Case against Outsourcing Violence

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This Article develops a non-instrumental dignity-based argument against privatization of violence. We focus in particular on the privatization of prisons and on the use of mercenaries. This Article maintains that some governmental decisions simply cannot be *executed* by private entities. While private individuals may act in compliance with the state's orders, such compliance cannot count as an execution of the order of the state. We also argue that compliance which does not count as an execution of the state's order is impermissible for dignity-based reasons. Part I distinguishes between two types of fidelity to the public good: fidelity of reason and fidelity of deference. Fidelity of reason is based on an independent judgment of the decision-maker concerning what the public good requires; fidelity of deference is based on subjecting oneself to the judgments of the state concerning the public good. Part II establishes (on dignity-based grounds) that the execution of state's decisions concerning violence ought to be based exclusively on fidelity of deference; and, as private individuals are incapable of acting on the basis of fidelity of deference, it follows that private individuals are incapable of executing the state's decisions with respect to violence. Part III establishes that, in contrast to private individuals, public officials can act on the basis of fidelity of deference. It follows therefore that the execution of state's decisions concerning violence cannot be outsourced to private individuals.

I Introduction

The privatization of government functions involving violence such as that of 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 cast the matter in terms of the trade-off between two forms of executing certain functions or services: public bureaucracy and private entrepreneurship.[1] Proponents of privatization emphasize the benefits of deploying the latter form in the service of executing more efficiently whatever objectives are set by the government. 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 capable of performing this function better. This paper challenges the terms of this debate as it maintains that some governmental decisions simply cannot be successfully *executed* by private entities. While private individuals may comply with the state's decisions such compliance cannot count as an execution of these decisions. Furthermore we argue that mere compliance with state's decisions which does not count as an execution of the state's decision is impermissible for dignity-based reasons.

At the root of our argument stands the claim that that merely announcing that a person *X* performs an act on behalf of the government does not yet imply that this act counts as an execution of the government's decision. There are some conditions—*felicity conditions*, as it were—in virtue of which the actions of agents can be attributed to, and so bear the mark of, the government. Accordingly, at least with respect to some cases of privatization (such as the privatization of punishment), the government does not merely 'transfer' its power of execution to a private entity, but rather *cuts itself off* from the privately-executed acts, rendering them

[1] In due course, we shall add another *private* form of executing government functions, which is the publicly-motivated private entity (typically, a non-for-profit organization seeking to promote the general interest).

fundamentally private ones. The trade-off underlying privatization in such cases is not so much between public bureaucracy and private entrepreneurship forms of performing *government* functions; it is rather between providing government service and relinquishing thereof. We also maintain that relinquishing the *public* provision of these functions is self defeating; the goods resulting from the public execution of such goods must be provided publically as these goods are valuable only if provided by the government.

This observation strikes an intuitive cord, one which instrumental arguments against (and for) privatization cannot but fail to explain. More specifically, it allows us to see that the intuitive dislike of privatization is not a feature of empirical concerns about the desirability of outsourcing;[2] nor is it a feature of the law's (arguably) inadequate regulation of the conduct of private entities in charge of executing government functions.[3] Instead, the persistent hostility to phenomena as diverse as private prisons, shame penalties, the use of mercenaries and Blackwater's involvement in security operations and wars is rooted in the intuition that, at least in some cases, an act (such as punishment) cannot acquire its public nature independently of the identity of the actor.[4] In what follows, we shall seek to unpack this claim, thereby settling a reflective equilibrium between theory and intuition.

Part II distinguishes between two types of fidelity to the public good: fidelity of reason and fidelity of deference. Fidelity of reason characterizes the reasoning of agents who are making a judgment concerning what an impartial pursuit of the public good requires *as judged by them.* Such agents ask therefore the question of what acts are conducive to the public good and act in

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[2] In her comprehensive historical survey, Sarah Percy illustrates that there is a persistent opposition to mercenaries. Yet, the reasons provided for this opposition shift and change in time. Her 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 much deeper resistance which we aim to explicate in this paper. See Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (2007).

[3] These concerns are at the center of a recent essay. See Malcolm Thorburn, *Reinventing the Night-Watchmean State?,* 60 U.T.L.J. 425 (2010). The remedy for inadequate legal standards for supervising the state-like activities of private entities need not be de-privatization. There are different legal doctrines—such as the state-action doctrine—that impose higher legal standards on private entities in these cases, including standards that normally apply to state agencies only. See, e.g., GET CITE TO THE STATE-ACTION DOCTRINE IN A PRIVATE PRISON CASE.

[4] Of course, the identity of the actor—her being a public officer or private employee—may not be sufficient for attributing the act to the government. The point, however, is that this element is a necessary one.

accordance with what is required by the public good as understood by them. In contrast, fidelity of deference requires an agent to endorse the perspective of the state concerning the public good and act accordingly. Part III maintains that private individuals are at times barred from acting out of fidelity of deference; their act must be based on their judgments concerning the public good. Furthermore, this part also maintains that (for dignity-based reasons) it is imperative that certain decisions of the government be performed only by agents who act in accordance with the principles of fidelity of deference; only such actions count as an execution of the state's decisions (rather than mere performance of acts which happen to converge with the state's judgments). Consequently private individuals are barred from implementing such decisions as they are incapable of *executing* them. Part IV explains why there are some agents, namely public officials who are capable of acting on the basis of fidelity of deference and are therefore capable of executing the government's will. In this part we also explore some of the implications of our views concerning contemporary debates on privatization.

II. The Morphology of Privatization

We commence in section A with a brief characterization of the broader political landscape and the space that privatization of governmental functions captures therein. In that, we seek to investigate the precise sense in which privatization cuts the government off 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 dispelling 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 turn then in section B to explore the ramifications of this view.

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 she must complete her task of law enforcement by inflicting the death penalty.

Certainly, it is perfectly correct to say that the outcome is the state's *doing*.[5] 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 her capacity of all-in-one-person government. Subsuming sovereignty into the natural body of Rex renders her "*Joints*" the "*Magistrates*, and other *Officers* of Judicature and Execution" and her "*Nerves*" the offices of "*Reward* and *Punishment*."[6]

To be sure, ascribing this outcome to Rex's *state*, rather than to Rex's natural person, does not follow naturally from a 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 she tells the story of Rex passing a law against rape; presided over a moot court competition finding (for the prosecution) that the accused raped the victim; or shot her 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 she does not reason and act from the *public point of view*[7]—that is, failing to deliberate toward action and, indeed, approach the matter at stake from the standpoint of a state legislator, adjudicator, and executor, respectively. In particular, Rex has failed to identify the relevant public interests (whatever they are), strike the right balance between them, and apply it to the peculiarities of the particular case at hand. Rex's retreat from the public point of view renders each of these cases—the novel, moot court, and neighbor dispute—the doing of a private person.

To briefly return towards 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

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

[6] Thomas Hobbes, Leviathan 9 (Richard Tuck ed., 1991).

[7] As we shall explain in more detail below, the public point of view is not synonymous with the moral or impartial point of view. See part ___.

the privatization of legislation or even adjudication.[8] Similarly the use of mercenaries (or for that matter the services of private security companies such as Blackwater) does not imply privatizing the very decision to go to war; it only implies privatizing the execution of a war declared and decided by the state. It would prove 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 public point of view, and thus of being the doing of the state

Suppose Rex seeks for the assistance of another individual in executing her court decisions and enforcing the laws she gives, more generally. This assistance can take either one of three forms. 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, also 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 human 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 wholesale level (e.g., the very method of execution) or at 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 fidelity-by-reason, the other fidelity-by-deference. We take each in turn.

[8] There are of course those who maintain that legislation and adjudication ought to be privatized. See, e.g., . Our primary target here are those who agree that some primary decisions ought to be made publically and it is merely the execution of these decisions which ought to be privatized.

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, it is important to note, 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 guide the conduct of her 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, say, in deciding what method of execution or which bullet caliber is best overall. These judgments can only proceed from the assistant's point of view, because even an attempt to decide on these matters impartially implies a value judgment (again, by the assistant) concerning what impartiality requires. To this extent, impartially executing the official pronouncements of Rex in fact 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. Indeed, 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 adjudicator.

Thus, by invoking an impartial concern for the public good, assistants necessarily *misfire* insofar as they purport to assimilate their doings into Rex's.[9] On our account, impartiality (and reason, more generally) need not be at threat by privatization, as it is commonly held[10]; to the contrary, impartiality is a *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. And although it does not resort to usurping the hands of another in order to pull the trigger (as the first form of assistance contemplates), it 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 own judgment (concerning execution) and open up to the judgment of Rex, which is the judgment reached from the public point of view. It is a requirement to take *at face value* the judgment of Rex (whatever it is) as an end in itself, worthy of pursuing simply because it is Rex's and she is the sovereign.

On this conception of fidelity, recruiting assistance amounts to increasing the available *means* by which Rex can govern her subjects on the basis of *her*, *and only her*, conception of the general interest and the best ways to bring it about (including, of course, through 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 the public point of view, which is Rex's. And 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 point of view does not implicate the assistant in the misfiring of government actions.[11]

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[9] We do not deny, of course, the possibility of an overlap between the judgment of the assistant and that of Rex. We insist, however, that it 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.

[10] CITE to Reinventing the Night Watchman State

[11] The assistant may, of course, *abuse* his authority if he does not retreat from his point of view.

B. From Hypothetical to Real Outsourcing of Government Functions

Now return to the real world where determining whether an action is the state's doing defies the tautological fashion of submerging the state and its doings in Rex and her doings. The challenge of any form of government claiming legitimacy is to make decisions and perform actions by adopting a *genuinely* public point of view of the issue at stake. Otherwise, such decisions and actions are not at all the doing of the state, but rather of one person or political elite *fictitiously* embodying the rest of society.[12] Meeting this challenge—viz. of approaching the task of governing the polity from a publicly-shared point of view—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 necessity is straightforwardly apparent in the case of a democratic legislature and at the same time it figures as the source of anxiety toward the practice of judicial review by unelected judges.[13] Indeed, some theorists argue that the law governing the democratic political process, ranging from election law to legislation procedures and to the regulation of political parties, seeks to shape political institutions and practices so that they could engender relations of *co-authorship* between citizens and laws enacted by citizens' representatives.[14] Under this view, these laws do not merely reflect the acceptance by citizens of their representatives' choices for them. Nor do they express the aggregated preferences of the citizens, taken severally. They instead reflect the outcomes of deliberation made from a point of view that all persons come to share together, in virtue of engaging one another in a rigorous process of collective decision-making, which is the process of democratic politics.

To be sure, acknowledging the necessity of adopting public courses of action *from* a point of view shared by the public at large is not unique for proponents of democracy. If anything, it is the burden on the part of any government (democratic or otherwise) claiming to act in the name

[12] Were this predicament true, democracy would amount, with Joseph Schumpeter, to no more than the people's entitlement to throw governing elites out of office every few years.

[13] Whether or not this anxiety is in the end justified, the point is that judicial review invites suspicions precisely because the judiciary's conception of the general interest is articulated independently of the democratic process.

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of its subjects—to decide on matters of public concern (including determining what concern is public) from a point of view that all, rather than few, subjects can endorse. To illustrate this point we consider very briefly two examples of government speech act theories provided by the respective accounts of Hobbes and Kant.

On the Hobbesian account, the modern state receives an authoritarian interpretation, according to which the government ought to exercise absolute control over its subjects.[15] And although the absolute state is surely anti-democratic (for any number of obvious reasons), Hobbes insists that the government speaks in the name of its subjects, because it represents them by personating them.[16] Indeed, for Hobbes, the sovereign power *just is* "the Right of bearing the Person of them all."[17] In this way, Hobbes believes, every subject co-authors the "Actions and Judgments of the Sovereigne Instituted."[18] Accordingly, the execution of government services, which is at the center of our argument, can be appropriately said to be the doing of the state, rather than that of the person who happens to do the execution.[19] In fact, the absolutism of the *Leviathan*, we might say, lies in its attempt to meet the challenge of governing from a publicly-shared point of view not so much by adopting the points of view of the subjects, but rather by appropriating them entirely.[20]

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[15] Thomas Hobbes, Leviathan 128 (Richard Tuck ed., 1991) (asserting that any form of government is necessarily preferable over "the miseries, and horrible calamities, that accompany a Civill Warre").

[16] On Hobbes's general theory of representation, see Thomas Hobbes, Leviathan 112 (Richard Tuck ed., 1991) ("to *Personate*, is to *Act*, or *Represent* himself, or an other; and he that acteth another, is said to beare his Person, or to act in his name").

[17] Thomas Hobbes, Leviathan 122 (Richard Tuck ed., 1991).

[18] Thomas Hobbes, Leviathan 124 (Richard Tuck ed., 1991).

[19] "Publique Ministers are also those, that have Authority from the Sovereign, to procure the Execution of Judgments given; to publish the Sovereigns commands; to Suppresse Tumults; to apprehend, and imprison Malefactors; and other acts tending to the conservation of the Peace. For every act they doe by such Authority, is the act of the Common-wealth; and their service, answerable to that of the Hands in a Bodie naturall." Thomas Hobbes, Leviathan 169 (Richard Tuck ed., 1991).

[20] This image is most eloquently illustrated in the drawn title-page of the *Leviathan*'s first edition, portraying the (natural) body of the sovereign man literally inscribed with a very large number of faceless subjects.Thomas Hobbes, Leviathan lxxiv (Richard Tuck ed., 1991). The drawn title-page on the 1910 edition of Leviathan depicts a somewhat similar image, though far less powerfully than the original illustration. See Thomas Hobbes, Leviathan 2 (Richard Tuck ed., 1991).

The Kantian account, by contrast, sanctions a form of government which *partly* shares in democracy's formal features (especially, the separation of powers) but, nonetheless, falls short of acknowledging the freestanding authority of democracy.[21] That said, Kant insists that, in order to speak in the name of the governed, all three branches of the government must adopt an omnilateral, rather than unilateral, point of view and pursue their actions therefrom.[22] The omnilateral point of view does not reflect an attempt on the part of the Kantian state to attend to the actual moral and political disagreements that inform most modern societies. To the contrary, it is a fundamentally pre-political commitment to, or perhaps faith in, reason's ability to determine impartially whether any particular action about to be made by the government *could* be affirmed collectively by the governed.[23]

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[21] We emphasize *partial* overlap between Kant's republican regime and the lived experience of democracy (or, for this matter, any attractive account of democracy). For example, the Kantian form of democracy requires the separation of powers between the three branches of the government. However, it fails to acknowledge that at least the legislature *must be* elected by the people for a regime to qualify as democracy. The Kantian interpretation of democracy allows for the separation of powers to occur between three (unelected) princes, usurping, separately, the powers of legislating, administrating (or enforcing), and judging. Moreover, although the Kantian account acknowledges the need for "clarification and codification" of the pre-political demands of Right in statutory terms, it does so not so much for the sake of democracy, but rather in recognition of reason's limitation. See Arthur Ripstein, *Force and Freedom: Kant's legal and Political Theory* (Cambridge, Mass.: Harvard University Press, 2009). For the discussion of the 'clarification and codification' aspects of public right, see ibid. at 211.

[22] GET CITE & Page No.

[23] For example, in his celebrated essay *On the Common* Saying Kant urges, with respect to the legislature, that:

> "[the social contract] is … only an idea of reason, which, however, has its undoubted practical reality, namely to bind every legislator to give his laws in such a way that they *could have* arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, *as if* he had joined in voting for such a will. For this is the touchstone of any public law's conformity with right. In other words, if a public law is so constituted that a whole people *could not possibly* give its consent to it... it is unjust; *but if it is only possible that a people could agree to it, it is a duty to consider the law just, even if the people is at present in such a situation or frame of mind that, if consulted about it, it would probably refuse its consent*."

Immanuel Kant, 'On the Common Saying: That May Be Correct in Theory but Is of No Use in Practice', in Mary J. Gregor ed. & trans., *The Cambridge Edition of the Works of Immanuel Kant—practical Philosophy* (Cambridge: Cambridge University Press, 1996) (1793) 273 at 297 [8:297] (italics are ours).

It is of course an open question, one which plagues both accounts, whether personating the governed (in the case of Hobbes) or resorting to universal reason (in the case of Kant) is anywhere close to meeting the government's challenge to speak *in* the name of the people, rather than merely *for* them.[24] At any rate, the point of mentioning these two cases from the history of political philosophy is to render clear that the necessity of approaching matters of public concern from the public point of view is not a unique feature of a democratic form of government (although democracy seems to take this necessity most seriously); it is a feature of being a government purporting to speak in the name of the governed.

More importantly, the preceding discussion helps showing that the concern for misfiring raised by outsourcing executive services is not unique to the hypothetical case of Rex. Rather, this concern applies whenever a person is enlisted to assist the execution of official pronouncements, purporting to speak and act in the name of the people. The question of whether a privatized service can be executed *from* a publicly-shared point of view remains the same, regardless of the form of the government at hand. Likewise, it remains the same, irrespective of the specific criteria for determining what counts as a publicly-shared point of view (whatever they are). 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. It is one thing to ask how (in what ways and to what extent) could a particular form of government adopt a public point of view of the general good, or at least of the matter at stake; quite another to ask whether outsourcing government services can be made *consistent with* a commitment to speak and act from the adopted point of view (whatever it is).

We shall therefore 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 to an end the ethnic cleansing of people with *A* ethnicity living in a small area within the territory of *B*. Further

[24] GET CITE TO ? Habermas on kant's emphasis on the unifying role of reason.

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. *A* deploys a task force to conquer the area within *B* in which the ethnic cleansing occurs.[25] And 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 would come to grapple with substantive judgments about how best to proceed (including even at the concrete level, for example, as to whether to fire a missile at an enemy tank standing next to a civilian apartment building). These judgments involve identifying the relevant competing interests, rating these interests according to their relative importance, and striking the right balance between them. A process of practical deliberation of this sort depends at every turn on embracing a conception of what the general good of *A* is, since it serves as a baseline against which to fix the relevant criteria for getting the judgments right.

Now officers serving with the task force may, at least in principle, invoke either conception of fidelity, namely that which depends on reason or on deference, respectively. 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). Their motivation may arise out of ideological identification with *A*'s cause; it may also arise out of pursuit of their narrow, self-interest. However *A* exercises its draw on them, holding fast to their own conceptions of what the general good requires remains fundamentally parochial and, therefore, fails to take the form of a publicly-share point of view.

And 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—that is Rex or Leviathan. This 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

[25] We explicitly do not specify whether the task force consists of public or private agents so as not to pre-judge the analysis.

decisions during war.[26] Instead, the description is notional, seeking to render more vivid what in principle it takes to execute an action 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 an important 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.[27]

In the next stage of the argument we shall seek to show that privatized government services cannot *and* should not invoke the deferential conception of fidelity. Consequentially, these private entities necessarily misfire to the extent they purport to present their actions as those of the government. By contrast, as we shall argue in part III an army run by the state or punishment inflicted by public officials can *and* ought to make deferential fidelity its regulative ideal. In other words, we shall seek to show that being a public entity (in the sense we articulate below) is a felicity condition in virtue of which an act can be a government speech-act.

III Dignity and Agency: The Dignity-Based Argument against Privatization

How does one select an agent for the *execution* of a task or an enterprise? A simple answer is that one ought to select the best agent for executing the task. This however leaves open the question of whether the quality (or success) in executing the task is dependent or independent of the identity of the agent executing the task. Some agents, we establish in this section, are incapable of *executing* decisions of others by virtue of who they are. *Execution* of a decision of another to perform an act X is different than performing X (on one's own initiative) and, at times, execution of X presupposes that the agent purporting to execute X is an appropriate agent – an agent who is capable of executing X rather than merely performing X (on one's own initiative). More specifically we maintain that, at times, execution of a decision made by the state requires endorsing fidelity of deference. Yet, private individuals as we show below are incapable of acting on the basis of fidelity of deference; they are only capable of acting on the basis of fidelity

[26] Indeed, no army can win a war while engaging in literally endless, back and forth consultations.

[27] We elaborate on this claim in infra text accompanying notes ____.

of reason and, such acts (based on fidelity of reason) do not constitute an execution of decisions made by the state.

Note that, under our account, the incapacity of private agents to "execute" the state's decisions, i.e., to act on the basis of fidelity of deference is not a psychological incapacity; a private individual can of course ask herself what would my sovereign decide under such circumstances and act accordingly. It is a conceptual incapacity, i.e., the private agent's action simply does not count as a faithful execution of the state's decision. Precisely as a murder committed by me triggered by your request or command cannot be regarded as merely an execution of your will (even if I intended to execute it faithfully); so the request/command of the state to inflict a punishment addressed to a private individual cannot be regarded as merely an execution of the state's decision even if the agent inflicting the sanction genuinely wanted it to be an execution of the state's command.

At this point one could ask why one should care whether the infliction of punishment counts as a faithful execution of a state's decision. Arguably, criminal sanctions are grounded in retributive or utilitarian concerns. As long as the private agent acts in accordance with the state's will, her act can still achieve these goals and hence the question of whether it properly counts as an execution or not is unimportant. To address this objection we show that dignity-based reasons require that some acts of the state be executed by agents on behalf of the state; more specifically it requires that they be performed by agents who are committed to fidelity of deference. It follows that it is impermissible on the part of the state to privatize the performance of some decisions as privatization frustrates the possibility that such decisions be executed (rather than merely performed). Private agents cannot (as a conceptual matter) *execute* certain decisions made by the state because the “mere execution” on the part of private agents of a state’s decision implies full individual responsibility for the decision itself and, therefore, the decision itself (rather than its mere execution) ought to be attributed to the “mere executer” of the decision. Furthermore the failure of the agent "to execute" the state's decision is a moral failure on its part as it violates the dignity of the person who is subjected to the sanction.

A. Agent-Dependent Execution

It seems evident that some agents a*r*e chosen to perform an enterprise only because of their expected excellence in performing it when excellence in performing the enterprise is evaluated independently of who the agent is. At other times excellence (or even competence) in performing a task is inseparable from the identity of the agent. In the latter cases the quality (or success) of the performance of an enterprise cannot be measured independently of the identity of the agent. As this section argues that private agents cannot (as a conceptual matter) succeed in *executing* the state's decisions let us first establish cases where success in performing an action hinges on who the agent is.

Blood feuds are ritualized ways of seeking vengeance for a wrong by killing or punishing a person belonging to the tribe or clan of the person who committed the wrong. [28] Yet, the tradition is that only a male relative of the person who was wronged may avenge the wrong. A killing by the wrong agent is not merely impermissible; it does not even count as a blood feud and cannot redress the injustice.[29] The power to perform a killing properly classified as a blood feud is an agent-dependent power – a power that can be successfully exercised only by the proper agent. The agent involved in the blood feud is not perceived as a means to perform the (allegedly just) act of killing; instead it is the act of killing that provides an opportunity for the appropriate agent – a male relative of the deceased -- to act in order to redress the injustice.

An even closer example to our concerns here appears in Kant's famous discussion of punishment in the *Metaphysics of Morals*:

> Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.

[28] This example is borrowed from Alon Harel, The Case against Privately Inflicted Sanctions 14 *Legal Theory* 113, 121 (2008).

[29] See Pamela Barmash, Homicide in the Biblical World 24 (2005).

This paragraph is often interpreted as indicating Kant's fanatic retributivism. Under this interpretation what Kant really cared about was that the last murderer be executed rather than freed. Kant believed that it is important that the criminal gets what he deserves and the society has a duty to inflict upon him the sanction he deserves.[30] If society disperses without executing him "blood guilt" clings to the people for not having executed the criminal. Without challenging the traditional interpretation we wish to emphasize a second important premise of this analysis. Kant believes that the last murderer has to be executed *before* the dispersion of the society. An attempt to remedy the great injustice of not executing the murderer *before* the dispersion of the society could not be remedied by killing him *after* the dispersion of the society. For this latter act would constitute a private act of killing rather than a public act of an execution, and, unlike a public execution, a private killing could not be done in the name of the people as a collectivity. The practice of a state-inflicted execution of murderers is thus fundamentally different from a practice in which murderers are killed by non-state agents.

Arguably what Kant cared here was not the identity of the agent performing the killing but the timing of the killing. The killing has to be performed when the polity still has a will of its own, i.e., before the dispersion of the society. Once the state is dispersed killing the murderer cannot count as an execution as there is no polity whose will is being executed. But this interpretation raises the question why could not the polity order an agent to perform the killing after the dispersion of the society? After all, the will of an individual can be effective after his death, e.g., when a will is being executed. Why should not the will of a dead polity (formed before its death) count as much as the will of a dead person?

Perhaps what counts here is not the timing of the killing (before or after the dispersion of the society) but the existence of agents which are capable of executing the will of the state. The death of a polity implies also the death of the agents which are capable of *executing* the will of the state, namely citizens. It is therefore ultimately the difference in the identity of the agents performing the killing that explains why the former act (killing the murderer while the polity is

[30] This is the common interpretation of this paragraph. See, e.g.,

still in existence) counts as an execution (and is consequently required by justice) while the latter act (killing the person after the polity was dispersed) is prohibited and classified as a murder.

If we are right the dispersion of the society without performing the execution is wrong not because such dispersion reduces the chances that the (just) execution be performed (as the individuals composing the society disperse and have no interest or means of performing the execution). Instead, the dispersion frustrates the very conceptual possibility of performing an execution as an execution is an expression of the will of a polity. A dispersed polity has no agents which are capable of executing its will and, consequently, "an execution" performed after the dispersion of the society is not really an execution as such "an execution" counts merely as an act of the individual who injects the poison or operates the electric chair rather than as an execution of the will of a polity. Furthermore, the state cannot overcome the impossibility of executing its will after its own dispersion in the way an individual can overcome this problem by writing a will and appointing the executors of the will. The death of a person who wrote a will does not eliminate the agents which are capable of executing the will. In contrast the death of the polity implies the death of all the agents which are capable of executing the will of the state, namely public officials or, more broadly, citizens. Consequently, a killing of a murderer conducted after the polity disperses cannot be an execution of the will of the polity; it is merely a murder, i.e., an act of private killing, not an execution.

This view contrasts with an alternative view under which the state enjoys full sovereignty in determining who the agents executing its will are. Under this latter view, any act which is triggered by a request or a command of the state and is performed in accordance with its own instructions counts as an execution of its will. Thus, for the performance of the killing in our example to count as an execution rather than as a (private) killing, it is sufficient for the polity to make the decision to execute and to assign the task to an agent who performs the act in a way which accords with the will of the polity. The agent to whom the task was assigned becomes thereby an agent of the state and his acts count as an execution of the state's decisions. An advocate of this view could argue that what really counts is that the execution of the murderer is performed in compliance with the will of the state and the question of who performs it is merely a technicality which does not merit special attention.

Of course, even under this view, the state ought to guarantee that the agent performing the execution is trustworthy and there may be pragmatic limitations aimed at ensuring the suitability of the agent performing the execution. But as long as the agent is sufficiently trustworthy there are no principled limitations on the scope of agents which are capable of executing the state's will. Our challenge is to establish the falsity of this claim, i.e., to establish that the state cannot turn any trustworthy agent into its own agent; some agents are simply incapable of executing the will of the state.

To start our inquiry, take the following analogy. Assume that Arnold tells Betty that he decided to murder Chris and asks Betty to execute the murder. Betty protests as she believes that it is immoral to murder Chris. In response Arnold says to Betty that the decision to murder has been made by him (Arnold): "all I ask you Betty is merely to execute my decision" says Arnold "not to perform the murder." The most natural answer of Betty (other than to point out the immorality of murder) is to assert that that "executing" Arnold's decision to murder ought to be equated with having made a decision to murder Chris. If Betty murders Chris, the murder ought not to be described merely as an execution of a murder (performed by Betty) of Arnold's decision but as a murder performed by Betty (although initiated and triggered by Arnold). Neither Arnold nor Betty can decide that the act of murder performed by Betty is "a mere execution" of Arnold's decision. Arnold of course can also sometimes be described as having made a decision to murder Chris but Betty cannot evade her responsibility for the decision to murder and could not be described as "merely executing" Arnold's decision.

Arguably, this case is radically different than the case discussed by us. After all, Betty's act cannot be regarded as a "mere execution" of Arnold's order since Arnold does not have the power to murder Chris. It is this lack of power on the part of Arnold to murder Chris that implies that Arnold's request (or order) to kill Chris has no normative force and, consequently, a killing performed by Betty is simply a murder committed by her rather than merely an execution of a decision made by Arnold. In contrast the state has (or, so we shall assume here) the power to execute Chris. Given that it has such a power it is unclear why it cannot delegate the

performance to Betty such that the act of Betty counts as an execution of the decision of the state to execute Chris.

A closer analogy requires one to provide an example where a person is authorized to make a decision X, but is constrained in the choice of agents to perform her decision such that not all agents are capable of executing the decision. Take the following case: Arnold is Chris' father and he wishes to (physically) discipline Chris (in a manner which he is authorized to under the law). Arnold however finds it difficult to discipline the child himself and he wishes to delegate the task to Betty. While such a delegation is (sometimes) permissible, it is often impermissible.[31] More specifically under common law there are constraints as to the scope of agents who can execute physical disciplining: only teachers may be authorized by parents to discipline children. Furthermore, if Arnold purports to delegate the task to an agent to whom he cannot delegate it, e.g., Betty the decision to discipline would be appropriately attributed to Betty and not (only) to Chris. The act of disciplining Chris performed by Betty does not count merely as an execution of Arnold's decision; instead, the very decision to discipline Chris is attributed to Betty as much as it is to Arnold.

Note the fact that the distinction between mere execution and performance of the act of physical disciplining has important significance. The physical act of beating Chris counts as (permissible) disciplining only if this act is counts as an execution of the Arnold's decision. The permissibility of the act hinges on the fact that it is an execution of Arnold's decision. Beating is permissible as long as it counts (only) as an execution of Arnold's decision while beating which does not count (only) as an execution of Arnold's will is impermissible precisely because it does not count as an execution. Permissibility hinges in this case on the attribution of the act of disciplining to Arnold.[32] Execution of Arnold's will is permissible and therefore only agents who acts constitute

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[32] We do not wish to speculate here about the reasons underlying the rules of the common law governing the physical disciplining of children. A natural explanation however may be based on the notion of fidelity developed in the last section. Under this explanation teachers perhaps may permissibly endorse the perspective of the parents who hire them to raise their children. By endorsing the perspective of the parents they engage in fidelity of deference rather than fidelity of reason; their act can therefore count as an execution of the decision of the parent. What may facilitate such fidelity on the part of teachers is the complete and comprehensive commitment of teachers to the enterprise of raising the children and providing for their needs.

such an execution are permitted to carry out the act of disciplining. Let us move therefore from disciplining children to the disciplining of criminals.

Assume that you are being approached by a public official and asked to participate in the infliction of criminal sanctions on a convicted criminal. Presumably your first reaction would be (and should be) to investigate what the crime is and what the procedures used for the conviction were. It seems impermissible to inflict a criminal sanction on another person unless such a sanction is justifiable. It is impermissible for you to inflict sanctions unless you are convinced that the sanctions are proportional to the gravity of the offence and that the procedures used are fair and that the infliction of the sanction promotes the public good as you understand it. It is a moral duty on the part of the citizen to scrutinize the appropriateness of the sanction and to judge the appropriateness of the manner in which it is inflicted and the degree to which it promotes the public good. If convinced that the sanction is inappropriate or even if convinced that it does not serve the public good, the private agent ought to refuse to inflict it.

Note that so far what has been asserted is merely that it is impermissible on your part to inflict the sanction without deliberating as to its justness. The question is however what type of deliberation is sufficient to establish that it is just and what form this deliberation should take. As you are asked to execute a political decision made by a polity and, as we assume here, that you are living in a just polity the deliberation is founded on the conviction that the infliction of the sanction promotes the public good of the polity. The judgment that is expected of the agent who is assigned with the task of executing the decision to inflict the sanction is therefore a judgment concerning the public good. Yet as we have seen there are two different types of judgments concerning the public good: those grounded in fidelity of reason and those grounded in fidelity of deference. Which one of those types ought to guide the private citizen?

Note that the relevant judgments that are at stake here are judgments concerning the justifiability of inflicting a sanction on a person. Such a judgment requires the private individual to make judgments concerning the justifiability of having the criminal prohibition in the first place; the justifiability of the sanction imposed on those who violate such a statute as well as the sufficiency of the relevant evidence used in convicting the criminal. Inflicting a sanction

grounded in fidelity of deference means that the citizen uses violence whose justifiability he does not (necessarily) endorse.

But perhaps the use of fidelity of deference may be justified when the sovereign is a just sovereign and consequently one can in general rely on its judgments. Arguably there is already a mechanism in place based on the judgment of the private individual that the sovereign is a just sovereign. Once such a judgment is made, it is permissible and perhaps, at times even required that the private individual defers to the judgments of the sovereign.

We disagree. Judging that the sovereign is just is of course necessary for its legitimacy and, most likely, necessary for any decision to defer to the sovereign's judgment concerning the public good. It is also most likely (although we do not establish it here) that there are decisions with respect to which an agent ought to defer to the judgments of a just sovereign. There are however judgments which simply cannot be based on fidelity of deference even if it is assumed that the sovereign is a just sovereign. Under this view, one's deference to the judgments of a just sovereign is not boundless; there is a type of decisions with respect to which such deference is impermissible.

There may of course be a legitimate controversy as to the scope of judgments that can be legitimately grounded in fidelity of deference to a just sovereign. Yet to the extent that one concedes that there are judgments which cannot be deferred to the sovereign, the use of violence against another person seems to be among these decisions. In fact this type of decisions is among those that most evidently cannot be based on fidelity of deference. Our conclusion is therefore that at least judgments concerning the infliction of violence ought to be grounded in fidelity of reason. A private citizen asked to inflict a sanction ought to make a judgment whether this sanction is conducive to the public good. What implications does this conclusion have on the permissibility of the infliction of the sanction? This issue will be discussed in the next section.

B. Why Dignity Requires Fidelity of Deference

Our conclusion has been that a private individual required by the sovereign to inflict a sanction is barred from basing a decision to inflict the sanction on fidelity of deference. She may consider the question whether the infliction of the sanction is conducive to the public good but she ought

to exercise an independent judgment as to whether the infliction of the sanction (and the manner of its infliction) is indeed conducive to the public good. This conclusion has two main implications: 1) the very performance of the act hinges on a judgment of the agent herself as to whether the act promotes the public good – judgment based on fidelity of reason 2) the form that this act takes, namely how the violence ought to be inflicted is also based on such a judgment. Once we concede that a private individual ought to consider the pros and cons of the case for inflicting the sanction (in terms of the degree to which the infliction promotes the public good) as well as the form, the severity and the mode of the infliction of the sanction on the basis of the agent's own independent judgment with respect to the public good, it is also natural to say that the "compliance" with the request or command of the state is not a mere execution of the will of the of the state. Execution typically implies willingness to comply with an order mechanically or automatically. Yet with respect to the infliction of violence the compliance is neither mechanical nor automatic; it requires the exercise of an independent judgment on the part of the agent concerning the justness of the infliction of the sanction. This is why we maintain that such a performance on the part of the agent ought not to be labeled "execution".

Arguably the fact that the agent inflicting the sanction ought to make such an independent judgment may give rise to one difficulty, namely that the agent may deviate in her behavior from the behavior required by the sovereign. This deviation is a reason for concern as we want the agent's actions to converge with the will of the sovereign. Hence we return to one of the main instrumental arguments mentioned at the outset; a private individual who behaves on the basis of its independent judgment may simply deviate from what is required of him by the sovereign.

Yet this concern – powerful as it may seem -- does not imply that the private infliction of punishment is impermissible. At most it implies that those selected to inflict the sanction ought to be agents who share the convictions of the sovereign with respect to the need of inflicting the sanction and the desirable mode of its infliction. Once they reach such a conclusion the infliction of the sanctions as dictated by the sovereign is permissible as it is grounded in fidelity of reason. The challenge is therefore to establish that the infliction of a sanction grounded in fidelity of reason is impermissible even when the sovereign's judgment and the agent's judgment converge and consequently the agent follows faithfully the commands of the sovereign.

To understand why despite such a convergence, the infliction of the sanction is impermissible, assume that an agent is asked by its sovereign to inflict a sanction. After a thorough investigation the agent is persuaded that the sentencing of the criminal is justified as it promotes the public good. The person was charged for having performed an offence; he benefitted from a fair trial and the sentence inflicted on him is proportional to the gravity of the offence. Furthermore assume also that the agent shares the convictions of the sovereign with respect to the way the sanction ought to be inflicted. There is therefore a complete convergence between the actions resulting from reasoning on the basis of fidelity of reason and those resulting from reasoning based on fidelity of deference. Why should one object to the private infliction of sanctions in such a case?

Our answer to this question is dignity-based. We maintain that the infliction of a sanction which does not constitute an execution of the state's will is detrimental to dignity as in such a case the criminal is subjected not to the will of the state but to the will of another person.

As stated above, the sanction inflicted by an agent guided by fidelity of reason cannot be regarded as a mere execution of a publically-mandated decision. After all, the infliction of the sanction required a judgement on the part of the agent – a judgement which the agent performed as a private citizen. The mere fact that the judgement in this case converged with that of the state is merely a happy coincidence. The contribution to the genesis of the agent's action – the infliction of the sanction -- made by the court's decision to inflict a sanction is, so to speak, superseded by the agent's own judgement that the sanction is appropriate and that it promotes the public good. In short the infliction of the sanction cannot count as a mere execution of the state's will; it is the agent's will that is responsible for it and consequently it is (also) the agent as a private individual that is accountable for it.[33]

This conclusion is crucial as it establishes that the punishment inflicted by a private individual is (also) a private punishment – it is (also) an expression of the will of the person who inflicts it. A

[33] This analysis does not depend on whether the agents as a matter of fact scrutinized the state's decision. It is possible of course that, as a matter of fact, some private agents fail to scrutinize the decision of the state concerning the infliction of the sanction and are willing to carry it out blindly. This fact does not negate their responsibility. Irrespective of what the agent asked to inflict the sanction does or thinks and irrespective of how such an agent reasons his act is attributable to him rather than to the state.

punishment which is not a mere execution of the will of the state hinges on the judgment of an individual agent concerning the public good – judgment based on fidelity of reason. But why would the judgment of such an agent be privileged relative to the judgment of the person upon whom the sanction is imposed? After all, the criminal can also make judgments based on fidelity of reason; she may reason that the public good does not justify the infliction of a sanction. Her judgments with respect to the public good are not of less relevance or significance than those made by agent who inflicts the sanction. The state's judgment concerning what is permissible and what is not permissible is presumably one which legitimately can be executed, e.g., because all citizens participate in forming this judgment. But a judgment of the private agent who inflicts the sanction, (even if the private agent is fully committed to the pursuit of the public good in the way dictated by the sovereign) is not of greater significance than the judgment of another private citizen. Judgments grounded in fidelity of reason made by one private agent are simply incapable of justifying the infliction of the criminal sanction even if they happen to converge with judgments made by the state as granting such judgments any priority over judgments made by another private entity, e.g., the criminal privileges one private judgment concerning the public good over another. Thus, it follows that while it is permissible to inflict the sanction, the infliction cannot be grounded in fidelity of reason; instead, it must be grounded in fidelity of deference. But as an infliction of a sanction by a private individual cannot be grounded in fidelity of deference, it follows that it cannot constitute an execution of the state's will and consequently it violates the dignity of the person who is subjected to the sanction.

IV What is So Special about Public Officials? Public Officials and Fidelity of Deference

The argument has so far advanced two arguments: First, that speaking and acting in the name of the state picks out the deferential conception of fidelity; and second, that acting from this conception undermines the dignity of those who are subjected to the violence. Yet accepting our argument may be too strong as perhaps this argument applies to everybody; in particular, perhaps it applies also to public officials. If this is the case then the so called public executioner or the

regular soldier is as obliged to scrutinize the state's judgements as the private executioner or the mercenary. If so, we encounter a serious difficulty. While there is a sovereign whose will ought to be executed, there is no agent which is capable of executing it. Every act purporting to be an act of the state is equally tainted because every act of an agent (involving violence) ought to be subjected to the scrutiny (based on fidelity of reason) of the agent performing it. So while the will of the state ought to be executed, there is no agent who is capable of executing it. As the state always needs an agent to execute its will; its will is never self-executed, its will simply can never be executed.

We shall now seek to show that a successful reconciliation of these two can be had, but only insofar as government service is provided *publicly*, that is, by public actors (properly conceived). We make this showing in two steps. We Begin by elaborating (in III.A.) the reasons that exist for acting from the deferential conception of fidelity—we argue that the value of dignity may authorize deference on the part of public agents in the execution of government actions. We then proceed (in III.B.) to argue that people cannot simply acquire the public point of view from which to pursue the general interest. Indeed, acting from the deferential conception of fidelity is not generally available to people, including to those who choose to so act. To be deferential (in the appropriate sense) is to engage in a practice capable of articulating a publicly-shared conception of the general interest by virtue of constituting, through ongoing engagements among its participants, a genuinely public point of view of the issues at stake. We shall argue that private entities, including for- and non-for-profit organizations, may not provide the institutional structure required to sustain the requisite practice. The institutional structures that arise in connection with the executive branch of the government, by contrast, may appropriately support a practice in which participants can speak and act in the name of the state. Or so we shall argue.

A. The Possibility of Fidelity of Deference

We have shown that the deferential conception of fidelity conflicts with dignity, it may nonetheless be permissible for *some* people—public officials—to invoke it. The grounds of this permissibility may be explained by reference to a rough analogy to excusing and justifying conditions. We shall seek to show that these conditions apply to some (but certainly not all) members of society, by either excusing or justifying deviations from the ideal of fidelity of reason.

Begin with an uncontroversial observation, according to which complex, modern societies cannot preserve the equal freedom, let alone the dignity, of their respective members in the state of nature. On the account developed above the government can speak and act only insofar as those who claim to speak and act in its name invoke the deferential conception of fidelity in execution. Thus the dignity-based reason for resisting the deferential conception of fidelity leaves sufficient space for some people in particular to display deference in executing governmental functions. This is once again because rather than in spite of the moral significance of dignity given the circumstances surrounding modern complex societies. Now, the move from the ideal of dignity to the actual need for deferential fidelity can be filled out in any number of ways, reflecting various elaborations of the good that arises in connection with this need. We shall briefly illustrate this point by reference to two (initially) plausible ethical accounts of the good of deferential fidelity. Whereas the first takes a form akin to excuse, the second tracks the normative structure of justification.

On the first account, public officials acting from the deferential conception of fidelity play a crucial role in sustaining a political order, the justification of which lies in preserving the dignity of private citizens. Thus, insofar as the dignity of members of modern, complex societies is bound up with a legitimate government, there arises the need for deferential execution of government functions. Certainly, this argument can at most show that acting from the deferential conception of fidelity expresses a necessary evil, not a freestanding moral value. Indeed, it never denies that public officials undermine dignity, but merely legitimizes—or, more precisely, excuses—this moral shortfall on the grounds that it is best overall for persons occupying public positions of executors to behave that way. Montaigne once observed in this regard that "in any government there are necessary offices which are not only abject but also vicious." For this reason, Montaigne maintained that some citizens are morally required to "sacrifice their honor and their conscience ... for the good of their country."[34]

On the second account, invoking the deferential conception is no mere necessary evil, but rather a *virtue*. The virtue that deferential fidelity embodies is associated most famously with Weber's

[34] Michel De Montaigne, Of Husbanding Your Will, in The Complete Essays of Montaigne 600 (Donald Frame ed., 1958).

characterization of the "supremely ethical discipline and self-denial" of public servants.[35] Weber emphasizes that bureaucratic office features at its moral core "a sense of duty [which] stands above [one's] personal preference,"[36] so that an official "takes pride in … overcoming his own inclinations and opinions, so as to execute in a conscientious and meaningful way what is required of him … even—and particularly—when they do not coincide with his political views."[37]

Thus, unlike the former argument, the value of deferential fidelity does not turn on an impartially justified moral cause to excuse the deferring person from the normative hold of her own dignity. Instead, it insists that those who execute each and every particular decision of the government by invoking the deferential conception exhibit the virtue of speaking and acting on behalf of the good of society, rather than of themselves (and their personal or sectarian views of what this good requires). Accordingly, deferential fidelity renders possible a substantive political ideal of legitimate rule by society, rather than by any member of society in particular. This ideal, it is important to note, depends on public officials being deferential *not* for the reason that they must identify, for the purpose of executing government decisions, the relevant considerations at stake *by reference to* the public point of view. Rather, it depends on officials' commitment to identifying these considerations *from* the public point of view, thereby genuinely rendering their executory acts the doings of the *state*.

To be sure, the two arguments just sketched (concerning the excusing and justifying grounds of deferential fidelity) must remain *respectful* of dignity. After all, both begin from dignity and, thus, from the state as a political solution to the otherwise intractable difficulty of preserving dignity in the face of complex, modern societies. By implication, these two arguments may not intrude too excessively on the demands of dignity. To begin with, as noted above, deferential

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[35] Max Weber, The Profession and Vocation of Politics, in Weber: Political Writings 331 (P. Lassman & R. Speirs eds., Cambridge UP 1994). See also Arthur Isak Applbaum, Ethics for Adversaries 238 (Princeton: Princeton UP 1999) who emphasizes the virtues of "humility" and "recognition of the fallibility of one's judgment." See also id. at 64.

[36] Max Weber, The Profession and Vocation of Politics, in Weber: Political Writings 330 (P. Lassman & R. Speirs eds., Cambridge UP 1994).

[37] Max Weber, Parliament and Government in Germany under a New Political Order, in Weber: Political Writings 160 (P. Lassman & R. Speirs eds., Cambridge UP 1994).

fidelity has a point only insofar as there exists a sufficiently large number of private citizens, forming a *civil* society. Moreover, and for the same rationale, the deferential conception of fidelity cannot render excusable or justifiable just about 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 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 sets to one side the sensational cases, focusing instead on the moral concerns that arise in everyday bureaucratic practice.

B. Who is a Public Official?

Although deferential execution of government functions could sometimes be justified (or excused) in spite of its being in violation of persons' dignity, it may not be practically available to persons in general. That is, even if deferential execution can find its moral grounds in the good of legitimate political authority, the mere *choice* of persons to support the government's cause by invoking the deferential conception of executory fidelity is not sufficient. Public officials can be characterized as those individuals who may (or must) act out of deference to the state and its institutions and, furthermore, such behavior on their part does not violate dignity. The challenge is to identify the circumstances under which it is permissible to act in such a way. This section is devoted to identifying 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 close proximity of the community of practice with political authority.

1. 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 above, a person cannot simply choose to approach the world in which she acts from the point of view of the state, *because* this point of view cannot be specified apart from an ongoing practice of executing government decisions. This point is worth emphasizing because, far from being mechanical, execution 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.[38]

Thus, 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. 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 a Nash Equilibrium, according to which each person's act is the best response to what other persons have done. Rather, it expresses 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.[39]

We noted earlier that private individuals (or, for that matter, a plurality of individuals acting *erratically*) cannot but fail to display deference in executing laws even as they wholeheartedly choose 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 sets the baseline against which to determine what deference to the general interest requires in each particular case (assuming, for the moment, that these rules properly express the general interest).[40]

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[38] We assume, as noted above, that no antecedent set of guidelines can fully fix the entire process of executing a government decision. GIVE EXAMPLE

[39] The precise elaboration of the structure and possibility conditions of social practices is not important for our present purposes. Familiar accounts are David Lewis, Convention: A Philosophical Study (1969); Margaret Gilbert, Living Together: Rationality, Sociality, and Obligation (1996); Michael E. Bratman, Faces of Intention: Selected Essays on Intention and Agency (1999).

[40] The next stage of the argument seeks to establish the connection between the practice of execution and the point of which being the general interest. To this extent, the bracketed qualification in the main text above could, eventually, be set aside.

2. 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, as just explained, is that the newcomers—the private agents of execution—cannot approach the task of execution from the perspective of the state merely by so pronouncing. But this shortfall can, in principle, be overcome by forming a practice. This could be a personal practice in the case of an individual person who undertakes to execute government laws or it may otherwise be a more inclusive practice featuring a plurality of individuals jointly committed to defer not to each one's unilateral conception of the general interest, but rather to the conception they come to share in the course of deliberating toward action from one case to another.

But 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. We shall argue that the practice must be able to *integrate* the political offices in charge of the execution into this practice's community. This integration, it is important to note, 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. As we shall seek to argue, 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.

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.[41] 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 the community of practice,

[41] Of course, the rules made by a community of practice, rather than an individual person acting alone, may arguably be more rational and reasonable, but these criteria are insufficient in order to make these rules the state's rules.

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.

To begin with, there are many ways to fill out the content of the integrative form of the practice. British-style Parliamentarism and U.S.-style Separation-of-Powers, for instance, are two systems of government that reflect different ways of doing so.[42] But in spite of the differences, parliamentarism and separation-of-powers are of a piece insofar as they engender a community of practice between civil servants *and* politicians. The rules generated by the practice—the rules that govern moves within the practice and, so, set the baseline against which to determine what deferential fidelity requires in every particular case—are the product of practical deliberation that, in principle, 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 button, so to speak.[43]

Normally, outsourcing the authority to execute laws to private entities is inconsistent with the integrative form that an executory practice must exhibit. Perhaps even the very point 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) and law-executing. On this view, the government is in 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 are). 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

[42] According to the former, the integration of political and civil service occurs at the highest levels on both sides of the equation. It helps to secure the responsiveness and, thus, ongoing involvement of Prime Minister and her Cabinet in formulating rules and policies by which laws are being executed. According to the latter, and unlike the former, integration penetrates the lower levels of civil service as explicated by the mass appointments, including appointments of president's loyalists, made by the President after his or her election.GET CITE TO Statistics on U.S./British appointments. Moreover, and again unlike its Westminster counterpart, a separation-of-powers system of government subjects bureaucrats to two masters simultaneously, the presidency and congress.

[43] To be sure, the integrative form of the practice is not distinctive of democratic governments. Authoritarian rulers, for example, often appoint members of their clan to powerful bureaucratic offices so as to insure the compliance of civil servants with the dictates of the general interest (as seen from the ruler's point of view). Saddam Hussein's Sunni-based regime exemplifies this strategy of establishing a practice (for the purpose of executing laws) that takes an integrative form.

with whatever means, provided that they are consistent with the basic constraints set out by the government. In that, outsourcing (as just described) gives rise to a practice among executors which takes a separatist, rather than an integrative, form.

To fix ideas, consider the case of employees of either for- or non-for-profit organization faced with the task of imprisoning convicted criminals. As observed above, they must decide, as part of determining how to proceed in any particular case, the precise content 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 for-profit organization and, in the case of non-for-profit organization, the vindication of certain values (as construed from the organization's own point of view of what the meaning of these values).[44] None of these 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 an executory practice that takes a separatist form, they 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—it is thus implausible, against the backdrop of the deferential conception of fidelity, to describe their efforts at executing laws 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 a community of practice in the overall non-instrumental argument against privatization, executors

[44] A non-for-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 would be 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.

are "public officials" in virtue of the practice. They are not officials prior to it.[45] Their participation in a coordinated effort (say, of imprisoning convicted criminals) renders the practice possible, to be sure. That said it is the 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 the (fantastic) case if 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.

V. Conclusion

The contemporary debate concerning privatization is grounded in an attempt to identify agents who are more capable of performing a state function, namely promoting the public good. The capacity and excellence in performing the task is in principle independent of the identity of the agent. The fundamental premise 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 hinges on its performance. This paper inverses this reasoning: who can perform the tasks depends on who you are. The instrumentalist rationalizations provided by both advocates and foes of privatization are mere rationalizations. In reality the opposition to privatization is not an instrumental one; it is founded on more foundational principles of political theory.

While we focused our attention on public officials we believe that the same reasoning could apply to other tasks. The dominant instrumentalist outlook cannot fully explain or justify our institutional structures. To fully understand our institutions we ought to pay greater attention to what execution consists of and to differentiating execution from mere acting in compliance with the will of another.

[45] The practice-based account of what is a public official need not apply globally. Indeed, 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).