

War and Privatization

*A Moral Theory of Private Protective Agencies,
Militias, Contractors, Military Firms, and Mercenaries*

William Brand Feldman
Nuffield College

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Abstract

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This thesis investigates the moral permissibility of military privatization. My analysis focuses on two distinct concepts: the *authorization* of war and the *supply* of war. Entities that authorize war decide that military force will be used and by whom; entities that supply war then execute the various tasks that have been authorized for performance. Part I argues that private actors may *not* justifiably authorize war. The reason is that, in so doing, they would impose considerable risks on individuals who lack a say in authorization—particularly fellow countrymen who may suffer from retaliatory military action—and we ought not to impose considerable risks on individuals who lack such a say. Public actors have a right, and indeed a duty, to prevent private actors from authorizing military force. Moreover, public actors have a further duty to authorize military force when their constituents are threatened. Part II then seeks to show that public actors who authorize military force may rely upon private contractors *to an extent* in military supply. Public actors may *not* rely upon private contractors to exercise command. The reason is that commanders must be able to punish their subordinates in intrusive ways (e.g. imprisonment) to ensure the prosecution of just wars. Such intrusive forms of punishment should only be dispensed by public actors. In addition, public actors may *not* rely upon private contractors to serve above commanders on the chain of command. Such high-ranking military officers exercise substantial political power over civilian decisions of military authorization and supply; moreover, these officers make weighty decisions in battle that substantially affect the well-being of others. Public actors, however, *should be* permitted to rely upon private contractors to serve below military commanders on the chain of command in rank-and-file military roles so long as these contractors are properly constrained and regulated.

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The mistakes in this thesis are all mine.

Contents

1.	Introduction	1
	The Middleman State	1
	The Boundaries of Procurement	3
	The Project and Argument	6
	‘War’ and ‘Privatization’	8
	Why <i>War and Privatization</i> ?	13
	Societal Arrangements for the Provision of Military Force	18
	<i>Describing Arrangements</i>	20
	<i>Endorsing Arrangements</i>	25
	The Chapters	29
 PART I: AUTHORIZING WAR		
2.	Free Market Economies of Military Force	35
	Why Free Market Economies of Military Force?	36
	Authority	38
	Four Anarcho-Libertarian Arguments	40
	Natural Rights	42
	Paternalism	48
	Taxation	54
	Consequentialism	58
	Conclusion	66
3.	Mixed Market Economies of Military Force	68
	Militias: Minutemen, Israeli Settlers, and Bill Gates	72
	The Negative Libertarian Strategy	74
	<i>Public Monopolization</i>	74
	<i>Natural Rights, Take Two</i>	77
	<i>Paternalism, Take Two</i>	80
	<i>Taxation, Take Two</i>	84
	<i>Consequentialism, Take Two</i>	87
	The Positive Libertarian Strategy	93
	Conclusion	101

4.	Public Monopolies Over Military Force, I: All Affected Fundamental Interests	103
	Five Just War Arguments for Public Monopolization	108
	The Risk-Prevention Argument	115
	All Affected Fundamental Interests (P_1)	120
	Fundamental Interests (P_{1i})	125
	Participation in Private Risk-Imposing Decisions (P_{1ii})	127
	<i>Risk</i>	127
	<i>The Entitlement of Abstention</i>	129
	<i>From Abstention to Participation</i>	130
	Withdrawal of Decisions from the Private Sector (P_{1iii})	135
	Conclusion	139
5.	Public Monopolies Over Military Force, II: The Risk-Imposition of War	140
	Direct-Risk-Bearers	144
	<i>Immunity from Risk-Imposition as a</i>	
	<i>Venn Diagram</i>	146
	<i>Civilian Immunity from Risk-Imposition</i>	146
	<i>Military Immunity from Risk-Imposition</i>	147
	<i>From Civilian and Military Immunity to</i>	
	<i>Participation</i>	149
	Indirect-Risk-Bearers: Heightened Probability	154
	<i>Current International System</i>	156
	<i>Alternative International Systems</i>	161
	Indirect-Risk-Bearers: Moral Relevance	162
	<i>The Alternative-Participation Objection</i>	164
	<i>The Prohibited Response Objection</i>	167
	<i>Moral Relevance</i>	171
	Precautionary Principle	173
	<i>Massive Losses</i>	177
	<i>Likelihood</i>	179
	<i>Costs</i>	180
	<i>Precaution, Risk-Prevention, and Global Justice</i>	181
	Public Military Authorization and Compensation	183
	Argument for Emergency Authorization	187
	Delegation Argument	189
	Conclusion	192

PART II: SUPPLYING WAR

6.	Outsourced Public Monopolies Over Military Force, I: The Governance Argument	194
	Privatization Revisited	198
	Independent Contractors, Private Military Firms, and Mercenaries	202
	Weapons and the Army	206
	The Governance Argument	213
	<i>High-Ranking Military Officers</i>	215
	<i>Public Officers</i>	217
	<i>Civilian Legislators</i>	220
	The Defense from Political Power	222
	<i>Military Power in Civilian Decisions of Authorization</i>	225
	<i>Military Power in Civilian Decisions of Continuation</i>	230
	The Defense from Military Decision-Making	235
	<i>Legislative and Military Decisions</i>	236
	<i>Military Decision-Making in Bello</i>	238
	Conclusion	241
7.	Outsourced Public Monopolies Over Military Force, II: The Punishment Argument	243
	The Command Deficit	245
	Discipline (P ₁)	252
	<i>Non-Judicial Punishment</i>	255
	<i>The Need for Non-Judicial Punishment</i>	261
	<i>Maximal Permissible Deterrence</i>	262
	<i>Physically Removing Soldiers</i>	266
	<i>Investigation of Military Crimes</i>	268
	Penal Authority (P ₂)	270
	<i>The Contingent Argument</i>	272
	<i>The Liberty Forfeiture Argument</i>	274
	<i>The Conflict-of-Interest Argument</i>	279
	Argument for Emergency Supply	286
	Conclusion	290

8.	Partially Outsourced and Comprehensive Public Monopolies Over Military Force	291
	The Weapons-Claim, Moral Hazard, and Adverse Selection	296
	The Problem of Shirked Discretion	302
	The Revised Weapons-Claim	308
	War and the Withdrawal of Discretion	310
	<i>Direct Democracies</i>	311
	<i>Representative Democracies</i>	312
	<i>The Chain of Command</i>	316
	Non-Combat Personnel	318
	Objections to A_{4ii} and Endorsements of A_5	320
	<i>Contingent Objections</i>	321
	<i>Chickenhawks</i>	323
	<i>Markets</i>	324
	<i>Communal Ties</i>	327
	<i>Contractual Limitations</i>	329
	<i>Motivations</i>	330
	<i>From A_{4ii} to A_5</i>	331
	Conclusion	333
9.	Conclusion	334
	Bibliography	339

1

Introduction

When the stomach that is hungry is in Paris and the wheat that can satisfy it is in Odessa, the suffering will not cease until the wheat reaches the stomach...For thirty-six million to depart for Odessa to get the wheat that they need is obviously impracticable...The consumers cannot act by themselves; they are compelled to turn to middlemen, whether public officials or merchants.

-Frédéric Bastiat (1995 [1848]: ch. 1.6)

The Middleman State

In 2005, the US Federal Government employed 14.6 million people: 1.9 million civil servants, 770,000 postal workers, 1.44 million military personnel, 7.6 million contractors and 2.9 million grantees (Light 2006).¹ These figures tell a number of intriguing stories, but probably none is more conspicuous than the magnitude of government outsourcing. Less than a third of federal jobholders, or just over four million employees—the civil servants, postal workers, and military personnel who constitute the first three groups—are *directly* employed by the government. The remaining ten million, a so-called ‘shadow government’, are contractors and grantees who work alongside federal officials in nearly every government sector and perform many of the tasks that they perform, ranging from

¹ Light (2006) uses the US Federal Procurement Data System and the Federal Assistance Data System to draw estimates of government size.

tax collection and budget preparation to software development and cattle husbandry, but who are not themselves government officials.

The explosion of these shadow employees reflects a simple political philosophy in Washington: ‘the business of government is not to provide services, but to see to it that [services] are provided’ (US House Committee on Government Reform: 1).² President Clinton called it ‘reinventing government’ and President Bush ‘the managerial revolution’ (Frank 2008: 134-135). Meanwhile, President Obama, while critical of the excesses of outsourcing—its ‘massive cost overruns, outright fraud, and the absence of oversight and accountability’—has affirmed the core commitments of his predecessors to such a ‘reinvented’ or ‘managerial’ government (see Zeleny 2009).³

Well-regulated private companies, the thinking goes, can inject efficiency into a notoriously unmanageable system and yet still provide citizens with the same, if not better, services, driving governmental operating costs down without jeopardizing individual entitlements. On the one hand, this approach eschews what has been dubbed the Nanny State, a traditionally ambitious mixture of bureaucratic largesse and expansive policy agendas. Yet, on the other hand, it refuses to endorse the kind of wholesale minimalism that we might associate with the Nanny State’s foil, the so-called Night Watchman State, which is defended by some libertarians. The new model straddles these two prototypes, combining small bureaucracies with far-reaching policy agendas. The result, we might say, is a Middleman State, one that itself furnishes little but through others procures a great deal.

² This is a quote from Mitch Daniels, former head of the US Office of Management and Budget.

³ Upon taking office, President Obama called for an overhaul of federal contracting in an effort to cut just \$40 billion from total annual expenditures of \$500 billion.

The realm where Middleman tendencies are most pervasive is the military. Of the 7.6 million contractors hired by the US federal government, 5.2 million are hired by the Department of Defense. This means that roughly one in every three employees hired by the federal government is a contractor tasked with enabling the use of military force. Moreover, the total proportion of the federal workforce allocated to the provision of military force, once the 1.44 million regular military personnel are added to the 5.2 million defense contractors, is more than forty-five percent. The Middleman State thus functions largely to furnish a capacity for war, and it furnishes this capacity with a military that itself reflects Middleman ideology.

The Boundaries of Procurement

Many military functions, of course, are carried out away from the battlefield: on munitions factory floors, for example, or in shipyards where a disproportionate ratio of contractors to regular personnel would be expected. Militaries throughout history have relied upon the private sector for *some* support, if only to grow the food its soldiers eat or sew the uniforms they wear, and a number of outsourced services, like munitions production and ship construction, may be hard to distinguish from tasks that fulfill these more inescapable dependencies.

But battlefields have come to display ratios inching towards the three and a half to one ratio of non-uniformed to uniformed military personnel that we see with contractors on the whole. In Iraq and Afghanistan, more than one contractor serves for every one member of the military, up from one in ten during the initial invasions and one in twenty-

five during the Gulf War (US Congressional Research Service 2011; Risen 2007; Percy 2007a: 206).⁴ Contractors drive truck routes, clean latrines, perform interrogations, cook meals, train police, wash clothes, repair vehicles, build bases, protect diplomats, translate interviews, and gather intelligence (Fainaru 2007; Pan 2004). Often, they also engage in killing. Employees of Blackwater, for instance, one of the more than three hundred private security firms that has operated in Iraq, resorted to an ‘escalation of force’, which is to say a discharge of weapons, on a hundred and ninety-five separate occasions from 2005 to 2007 (Glanz 2008; DeYoung 2007). Though much of the killing by Blackwater and other firms remains shrouded in secrecy, reports increasingly paint a picture of contractors engaged in combat—of decisively militarized Middleman functionaries.⁵

The simple puzzle is where to draw lines. When are Middleman practices no longer permissible? Perhaps a boundary should be drawn around the entire battlefield, or rather where the sound of gunfire can be heard.⁶ Perhaps the appropriate restriction is not on physical proximity to combat, but on participation in combat, or not on participation but on participation in ‘offensive’ (as opposed to ‘defensive’) combat (Runzo 2008: 68). Some have even questioned whether lines should be drawn at all (Fabre 2010). Is there a morally relevant distinction between hiring private ground controllers and renting an air force or between defending an installation and driving away its assailants? What if the Middleman State were to simply procure its entire military from the private sector? We

⁴ The contractor-to-soldier ratios on the battlefield across US wars for which statistics are available are: the Revolutionary War, 1:6; the Mexican-American War, 1:6; the Civil War 1:5; WWI, 1:24; WWII, 1:7; Korea, 1:2.5; Vietnam, 1:5; the Gulf War, 1:25; Bosnia, 1:1. See US Congressional Budget Office (2008: 13).

⁵ Blackwater changed its name to Xe Services in 2009 amid controversy. To avoid confusion, I will continue to refer to this private military firm as Blackwater throughout this thesis.

⁶ For similar language, see Blizzard (2004).

see no problem when the Middleman State asks the private sector to provide its citizens with newly constructed roads. Why should it behave differently on the battlefield?

Beneath these questions about military combat is a still more heretical set of questions about the very enterprise of war. Why, we might ask, should states be involved in war in the first place? What if the Middleman State were cut out entirely and the initiation of war left to the private sector? In one of the more disturbing manifestations of private military action in the last decade, a group of entrepreneurs from Britain and South Africa, one of whom was Margaret Thatcher's son, hatched a plot in 2004 to overthrow the ruling power of Equatorial Guinea for the purpose of securing oil.⁷ The planned overthrow bizarrely mirrors a fictionalized coup depicted by Frederick Forsyth (1974) in his novel *The Dogs of War*, in which a group of business operatives overthrow an African dictator (Polgreen 2008a). Ultimately, the real coup was derailed before being launched: as Simon Mann, the coup's mastermind, and seventy others prepared to board a plane stocked with weapons headed for Equatorial Guinea, they were arrested at the Harare airport.⁸ But the plans provide a provocative glimpse into an application of private military force that goes beyond the outsourcing upon which US forces have relied in Iraq, pushing the debate past the mere limits of the Middleman State to include the prospect of fully privatized war.

⁷ For an account of the planned coup, see Roberts (2006).

⁸ Mann was later extradited to Equatorial Guinea and, in July of 2008, sentenced to thirty-four years in prison. Sir Mark Thatcher pled guilty to unwitting financial contributions to the coup. See Polgreen (2008b).

The Project and Argument

The thesis that follows takes up this debate. The aim is to deliver a comprehensive moral theory of privatization in war: that is, to delineate the *full* spectrum of justifiable military action for private agents. In service of this goal, I ask about the kind of wars that private actors might wage apart from the state, as Mann hoped to wage in Equatorial Guinea, and about the kind of wars that private actors might wage as functionaries of the state, as firms like Blackwater have waged in Iraq.

The first set of wars, we might say, serves to probe the question of military *authorization* and the second set of military *supply*. This distinction—between authorization and supply—is at the center of this thesis and so merits a brief elaboration. The provision of any good, including military force, consists in these two discrete undertakings.⁹ The entity that undertakes authorization decides both that military force will be supplied and by whom. The entity that undertakes supply then executes the various tasks that have been authorized for performance. The same entity, of course, may assume these roles together, as the US largely did in the Gulf War (and most previous wars), but the roles may also be divorced, as we now see with US action in Iraq and Afghanistan. If an account of privatization in war is to be rigorous and capable of providing guidance in the world that we face, it must be carefully attuned to the myriad ways that a government might involve or fail to involve itself in the use of military force, particularly when variations in these modes of involvement substantially effect the nature

⁹ By the ‘provision of goods’, I mean to include all welfare-enhancing provisions, be they the provision of material resources or services. Occasionally, I will examine services alone, leaving materials to the side. In particular, see Chapter 6, p. 202-203. When I do so, however, I clearly flag that my analysis is concerned with services and not the broader category of ‘goods’.

of war—which, we will see, is a view widely shared by scholars across the ideological spectrum on questions of both authorization and supply. As such, authorization and supply will each be treated in detail.

The cases that drive my analysis are largely drawn from the rich and complicated history of private military action, stretching back centuries to the Italian city states whose mercenaries were reviled by Machiavelli and even to Ancient Persia, where a coup attempt made famous by Xenophon's *Anabasis* relied upon the contracted service of Greek irregulars.¹⁰ Occasionally, I examine the hypothetical examples conjured by philosophers—the private protective agencies of Robert Nozick's *Anarchy, State, and Utopia*, for example, and the private armies of Thomas More's *Utopia*. All is with an eye towards fleshing out a theory of privatization that retains currency not only in assessing current military engagements, but past and future ones as well. The width of this investigation means that a multitude of actors with an array of names, historical and otherwise, fall into its purview: *condotierre*, contractors, freedom fighters, guerillas, insurgents, joint-stock companies, *landsknechts*, mercenaries, militias, pirates, private military companies, private protective agencies, private security companies, privateers, revolutionaries, terrorists, and *tuaths* to name some. What all have in common is their participation in the private provision of war, whether in its authorization, supply, or both.

This thesis advances two central lines of argument. (I) Public entities have a right, and indeed a duty, to monopolize the authorization of military force. Thus, private authorization, in the mold of Simon Mann's plot on Equatorial Guinea, is morally

¹⁰ The historical bookends of this thesis—the Persian coup by Cyrus the Younger in 400 BC and the US wars in Iraq and Afghanistan—share a common fate that is noteworthy if only for the testimony that each provides to pragmatic concerns expressed by skeptics of privatization. The Greeks that Cyrus had hired, in their retreat from battle, crossed the very spot along the Euphrates where four Blackwater employees were publicly hanged twenty-five hundred years later.

unjustifiable. Only public military authorization, I argue, is justifiable. (II) Once military force has been publicly authorized, authorizing entities have a further duty to supply military force under the direction of *public* military leaders (defined as commanding officers and their superiors on the chain of command). By contrast, public entities may hire private agents to discharge the responsibilities of rank-and-file personnel (those who serve below commanding officers on the chain of command). Groups like Blackwater therefore may engage in the supply of military force on behalf of public entities so long as they do so within the parameters of public command (and thus serve in rank-and-file positions). Part I will argue for the first set of claims, and Part II for the second set.

Before turning to these claims, I want to briefly sketch four sets of preliminary remarks that should help clarify the chapters to come. The remainder of this chapter presents these remarks. First, I provide working definitions for two key terms of the thesis (and its title): ‘war’ and ‘privatization’. Second, I explain in further detail why a thesis on the privatization of war is valuable. Next, I defend a framework for analyzing the privatization of war. Finally, I outline how each chapter fits into the framework for analysis that I propose.

‘War’ and ‘Privatization’

Let us begin with the meaning of ‘war’. The conception that I want to defend largely follows the conception that C.A.J. Coady (2008: 4-8) offers. According to Coady, ‘war is the resort by an organized group to a relatively large-scale act of violence for political purposes to compel an enemy to do the group’s will’.

The only amendment that I want to suggest is that the phrase ‘for political purposes’ be removed. The notion that wars are necessarily political, which is extracted from Karl von Clausewitz’s (2008 [1832]: 28) famous dictum that war is the ‘mere continuation of policy by other means’, is not a description of what war *is* but rather a prescription for what it *ought* to be.¹¹ Wars, we must acknowledge, have been fought for a multitude of reasons, some of which are purely financial and many of which, to make a more general point, are a function of the drives and even the culture that constitute human nature. As John Keegan (1994: 3) eloquently puts this latter point, warfare

is almost as old as man himself, and reaches into the most secret places of the human heart, places where self dissolves rational purpose, where pride reigns, where emotion is paramount, where instinct is king. “Man is a political animal,” said Aristotle. Clausewitz, a child of Aristotle, went no further than to say that a political animal is a warmaking animal. Neither dared confront the thought that man is a thinking animal in whom the intellect directs the urge to hunt and the ability to kill.

The mistake that Coady makes in following Clausewitz and Aristotle risks not only foreclosing potentially instructive lines of moral thought but also jeopardizing the rules that we endorse by smuggling in assumptions that have not been defended. If our aim is reduce the hellishness of war through reason and argumentation, we must try to reason and argue about all mechanisms of constraint, including the institutional constraint of relegating war to the political realm.

But, the remainder of Coady’s language, which seems plausible, will be preserved. ‘Organized groups’ rather than ‘states’ are kept as the subjects of analysis. Any rendering to the contrary would exclude a host of conflicts that we typically recognize as wars: revolutionary and secessionist wars like the American Revolution and Civil War, client wars like the joint US-Mujahideen action against the Soviet Union in

¹¹ For this point, see Keegan (1994: 5) and Avant (2005: 3).

Afghanistan, tribal wars like Native American resistance to European colonization, genocidal wars like the Hutu slaughter of Tutsis in Rwanda, terrorists attacks like the bombings of September 11 on the Pentagon and World Trade Center, and the subsequent US-led ‘war on terror’ aimed largely at non-state actors.¹² Moreover, in using the phrase ‘organized groups’, we also capture the exclusion of disorganized violence committed by isolated individuals; wars are coordinated efforts, not spontaneous outbursts.

Finally, the phrase ‘relatively large scale’ is preserved to qualify the act of violence since, as Coady rightly points out, wars are more than just coordinated efforts. The upshot of this clause is not that wars are necessarily fought according to the sort of ‘narrowly defined forms’ of ‘siege, pitched battle, skirmish, raid, reconnaissance, patrol, and outpost duties’, which Keegan (1994: 5) underlines, but that they are fought on a scale that exceeds conflicts like criminal conspiracies, feuds, riots, assassinations, disturbances, skirmishes, fomentations, plots, fracas, scuffles, gang fights, brawls, and clashes. Any attempt to cleanly quantify the ingredients of magnitude that are sufficient to motivate the label ‘war’, say by counting the number of dead or gunshots fired or the duration of hostilities, will surely ring false. We must be prepared to debate specific cases and acknowledge that our judgments about these cases may sometimes diverge. But wars are elaborate endeavors, which may be examined apart from more circumscribed cases of violence that Michael Walzer (2006a: 107-108) helpfully labels ‘force-short-of-war’.¹³

¹² For this list of excluded wars bar one, see Coady (2008: 4). Coady calls the Rwandan genocide a tribal war. The difficulty is that Hutus and Tutsis were ethnic groups, not tribes. For a lucid critique on how the sort of mistake that Coady makes frustrated efforts of foreign assistance during the genocide, see Power (2003: 355-356). To avoid this mistake, I supplement Coady’s list with the further category of genocidal war, under which I include the Rwandan genocide.

¹³ For a further discussion of this concept, see Coady (2008: 5-7).

To be clear, this is not to endorse a bifurcated morality that applies one set of standards to war and a different set of standards to activities other than war. I share the sentiment of many contemporary political theorists who defend a strict continuity between the morality of war and the morality of everyday life—a morality that nevertheless must be unstintingly cognizant of the profound deviance that war represents, of its exigencies and of its savagery.¹⁴ Rather, the application of a ceiling below which conflicts constitute force-short-of-war simply enables a faithfulness to everyday language and a pragmatism about the limits of what a single philosophical work can accomplish. That said, since some conflicts are harder to characterize than others, I analyze straightforward instances of war to the extent possible and restrict my conclusions accordingly.¹⁵

As for the concept of ‘privatization’, it will connote, simply speaking, a trend away from publicly provided goods towards privately provided goods. According to the distinction that I will employ between publicly and privately provided goods (which is admittedly crude), the former are goods that are provided by governments, and the latter are goods that are provided by entities other than governments. As with so many distinctions in political theory, challenging examples fit poorly into both categories. A guerilla movement, for instance, that develops government-like political mechanisms for decision making but is not itself a governmental entity may strike us as public rather than private. So too might its soldiers if they fight to advance the movement’s cause.

Conversely, governmental leaders who authorize military force in exclusive furtherance

¹⁴ For proponents of a bifurcated morality, see Walzer (2006*b*) and Shue (2008). For an alternative view, see McMahan (2006; 2008).

¹⁵ Unless otherwise specified, I use the phrases ‘military action’, ‘use of force’, ‘provision of military force’, and ‘provision of force’ as synonymous with war.

of their own business interests, say, oil executives who take control of a government to fight wars for the sake of expanding drilling sources, may more closely resemble private actors engaged in authorization than public actors. And soldiers who are supplied to a war effort in exchange for large payments to a government's leadership—as, for example, the 'Hessians' were supplied during the American Revolution by Frederick II in exchange for vast payments from the British—may be better categorized as private than public.¹⁶ For now, I will ignore these complexities; the public-private distinction, understood simply as a distinction between governmental and non-governmental provision, should be sufficiently crisp to satisfy the needs of my analysis until an account of who may justifiably exercise military force is better elaborated.

To sum up then, my project investigates whether and to what extent non-governmental actors, as part of some organized group, may participate in relatively large-scale resorts to violence that compel their enemies to the group's will, whether these actors participate by deciding that the resort to violence will be undertaken and by whom (authorization) or by undertaking the various tasks that have been slated for performance (supply). All moves that deviate from the public provision of military force—that is, from public authorization and public supply—will be assessed and thus each stage of a shift from public provision towards private provision analyzed.¹⁷ The yield is a moral account of *war and privatization*.

¹⁶ The lease of Hessian soldiers, as they came to be known, was so profitable that it funded, almost entirely, the Hesse-Kassel annual budget, serving as their primary source of internal revenue. It also subsidized Frederick's extravagant lifestyle. See Singer (2003: 33).

¹⁷ More details about the various phases of privatization will be sketched in detail below.

Why War and Privatization?

A comprehensive work on war and privatization is needed for several reasons. The first broad value of this thesis is that it helps answer two questions, one at the heart of political theory and one that should be wrenched from its periphery: (a) what are the goods that a government ought to provide its citizens and (b) which of these must be furnished by the government itself? Governments around the world guarantee their citizens a varying range of provisions, including military force, law enforcement, education, welfare, health care, roads, economic regulation, waste disposal, and postal delivery. The provision of some of these goods is almost inseparable from what it means to govern (would we even use the term ‘government’ for an entity that did not enforce any laws?). Others could more plausibly be defended as discretionary. We may not chastise a government that abstained from collecting its citizens’ garbage or delivering their mail in the way that we would condemn a government that chose not to educate its citizens or feed those in poverty. Whether governments have a responsibility to ensure the provision of certain goods, and not others, depends upon the value of those goods and upon the appropriate role of government in securing values of that sort. In questioning whether the provision of military force is an essential governmental responsibility, this thesis seeks to pin down the role of government in one important sphere.

And in asking whether and to what extent, in the military sphere, a government must furnish the good itself, this thesis, instead of neglecting perplexing questions about the full nature of public provision in a given realm, attempts to develop it. Just as the public responsibility to ensure that certain goods are provided varies depending upon the

nature of the good in question, so too will the duty for a government to furnish the good itself. We may not balk at the practice of outsourcing garbage collection, but we would likely recoil at the prospect of the government outsourcing criminal justice, say by hiring private companies to decide court cases and issue prison sentences. Is the provision of military force more like mail delivery or more like criminal adjudication? Though this thesis cannot speak to outsourcing in all spheres, it will arrive at a conclusion about outsourcing in one important, if commonly public, sphere of activity.

While the ambition of determining the appropriate role of government in the authorization and supply of only one good, military force, may seem modest, there is no particularly compelling alternative. To know whether the government has an obligation or right to provide a good will depend upon the nature of that good, and the nature of a good like military protection is very different from the nature of a good like garbage collection (still further from goods, not yet mentioned but often provided publicly, like arts sponsorship and space exploration). Rather than concoct abstract principles to generate a list of every good that a government may or must provide, we are better off examining the full particularities of a single good and then turning to others. Privatization poses a wealth of complications for war, hardly capable of being fully addressed even in a manuscript of this length (perhaps other goods will require a treatment far less extensive). Only a piecemeal approach can, I think, pay sufficiently close attention to the uniqueness of war while still theorizing with substance.

This is a methodological point not to be confused with substantive contextualism (e.g. Walzer's 'spheres of justice').¹⁸ I am not suggesting that principles of justice deviate

¹⁸ For perhaps the most cited example of substantive contextualism, see Walzer (1983). For an instructive examination of alternative variants of contextualism, see Miller (2002).

from sphere to sphere. Rather I am only suggesting, more modestly, that the abstract determination of which goods a government must guarantee its citizens and which must be provided by the government itself will be less effective, as a piece of political theory, than a careful examination of one good, in this case military force, because of the complex minutiae involved.

That said, the contribution of this thesis to the question of public provision in general goes beyond the specific slice that I carve out and analyze. Its structure delivers a method for analyzing the provision of any good that a government might undertake. As we will see, the tactic that I chart is to identify why a government should see to it that a good is provided (authorization), be it military force or any other provision, and then analyze whether such a rationale coheres with a logic of outsourcing (supply). This strategy will, I hope, serve as a model for future research on parallel questions concerning other goods. The thesis also articulates a language and set of concepts that, in conjunction with the methodology that I present, may further facilitate investigation of similar topics. Finally, since and insofar as, some of our reasons for valuing military provision match our reasons for valuing the provision of other goods, the substantive conclusions that I defend regarding war may, in some instances, be applied to other goods. Where relevant, I draw the reader's attention to these implications.

In addition to the value generated by this thesis for understanding one realm of public provision (be it any realm) and, in so doing, advancing a more general account of public provision, the second broad value of this thesis is a product of the fact that the practice of contemporary war is *particularly* desperate for a theory of privatization. When the Iraq and Afghanistan Wars draw to their final conclusion and scholars and

practitioners begin to reflect with some remove about what transpired and how we are to learn from these troubled invasions and occupations, I doubt that any topic will be more central to these reflections than the topic of privatization. As the wars and indeed the many Middleman examples that will be explored indicate, the moral injunction against military privatization has eroded. And yet despite the crumbling, perhaps unsustainable boundaries that we tend to draw between core military functions and peripheral military functions, a norm against wholesale privatization remains. The idea that states would hire men and women from outside of their own armed forces to pursue and kill enemies in war continues to repel many. To see this, we need only look at the market shift away from purportedly combat-oriented private military companies (PMCs) to support-oriented private security companies (PSCs).¹⁹ As Sarah Percy (2007a: 227) shrewdly argues, we could not make sense of this shift without a norm against some forms of privatized combat, for in the absence of such a norm, companies and states would have no obvious reason to emphasize the defensive, non-combative nature of their operations.

Yet, these norms are neither specific nor obviously correct (perhaps they are too weak, perhaps too strong). The lack of specificity results in a general confusion about what our norms actually require. The possibility that these norms lack a satisfactory *moral* grounding leaves us hesitant about whether we should even care what these norms require. And the increased prevalence of activity that might contradict these norms makes us (or at least should make us) anxious to find the specificity and justification that is missing. If, as I believe to be the case, one of the goals of political theory is to question *how* and *whether* unspecified or poorly specified norms in society should be held,

¹⁹ I follow Singer (2003: 89-91) who refers to both as private military firms (PMFs). Distinguishing the supposedly non-military operations of PSCs from the military operations of PMCs is confusing, and for my purposes unnecessary.

particularly when practices seem to be deviating from our broad, even if vague, instincts about what the norms demand, then a philosophical examination of privatization in war is essential.

Despite such a need, contemporary theorists who study war have produced little on the subject.²⁰ This is surprising first because of the resulting disconnect between academic concerns and the struggles of policymakers and practitioners. But it is also surprising because of the neglect that it reveals for compelling philosophical puzzles that are raised by the question of military privatization in its own right—questions that have long been at the center of just war theory and which might benefit from reappraisal via the lens of privatization. These puzzles include, as we will see, the demands of command responsibility, the scope of military punishment, the republican and communitarian ideals of military service, and the fair distribution of military burdens and benefits in a society. This thesis will begin to fill in these scholarly gaps. Hopefully, in so doing, it will say something of interest to the political leaders, military commanders, and even the informed citizens and soldiers who must confront these kinds of moral questions with the knowledge that the resolutions they reach may bear on outcomes no less fundamental than who lives and who dies in war.

²⁰ In Part I, I catalogue and analyze the moral literature on private authorization in war, much of it written by anarchists and libertarians. In Part II, I examine the normative literature on supply, which is far less extensive than the work on authorization. To my knowledge, the contemporary normative literature on supply consists of: Baker (2008; 2011); Coady (1992; 2008: ch. 10); Fabre (2010); Frost (2008); Hedahl (2009); Kasher (2008); Kinsey (2008); Lynch and Walsh (2000); Pattison (2008; 2010a, 2010b); Percy (2007b); Sandel (1998); Singer (2003: ch. 14); Steinhoff (2008); and Walzer (2008).

Societal Arrangements for the Provision of Military Force

Having explicated the concepts of war and privatization and given a rationale for this enquiry, we may now turn to the framework that will be used to structure my analysis. Recalling the two sets of distinctions above, between authorization and supply and between public and private provision, there are four distinct variants for the provision of military force, or indeed for the provision of any good, that one can specify. First is what we may call the *pure private variant*, which entails both private authorization and private supply: the war-making of the Dutch East India Company, for example, who ultimately amassed a private army of more than 100,000 troops and enjoyed a Charter, which, according to the *Universal Dictionary* of 1751, thrived because it possessed ‘a kind of sovereignty and dominion’ and could make ‘peace and war at pleasure, and by its own authority’ (Singer 2003: 35). The second variant, what we may call the *privately outsourced* variant, entails private authorization but public supply.²¹ This variant is well-illustrated by the recent move of British Petroleum (BP) to hire a battalion of Colombian soldiers from the government for more than \$50 million to protect its oil installations (see Schemo 1996; Singer 2003: 14).²² The third variant, the *publicly outsourced variant*, entails public authorization but private supply. The contractors stationed in Iraq and

²¹ It should be noted that, colloquially, we sometimes say that a private company has outsourced its business to other private companies by hiring them for the provision of certain goods (‘Delta has outsourced its call-center operation to Sykes Enterprise’). We also say, more loosely, that a private company has outsourced its business to another country when a part of the business is relocated there (‘Delta has outsourced its call-center operation to India’). In this thesis, neither usage will be employed. Similarly, I leave aside questions to do with public agencies outsourcing work to other public agencies. My interest in outsourcing is in the interplay between public and private and whether this interplay is morally troubling. With this in mind, the fourfold classification of military force should be clear: either the provision of military force will be private, privately outsourced, publicly outsourced, or public.

²² Note, however, that these soldiers may not be engaged in action on behalf of BP that we would classify as war. However, to the extent that they are, this example will suffice.

Afghanistan, discussed above, fall into this category. Finally, the *pure public variant*, for which an abundance of combat operations in most wars during the last several centuries are representative, entails both public authorization and public supply.²³

Of course, when we ask about the provision of some good *g*, it may be the case that all of *g* is provided according to one variant or that *g* is provided according to several variants. We could imagine the provision of military force in a given society, for example, entirely according to the public variant, if the government were not to contract any military functions to the private sector, or entirely according to the publicly outsourced variant, if the government were to contract *every* military function to the private sector. We could also imagine a combination of the two, if the government were to authorize military force and supply certain military functions itself while hiring contractors for others, as the US now does—or a tripartite combination, if the US were to stand aside as private groups authorized wars of their own (the prospect of humanitarian action by groups like Blackwater in places like Darfur may not be so farfetched).

Outside of military provision, we see different combinations of these variants with a number of goods. The provision of mail delivery in the US, for example, is in part private (private companies like Microsoft hire FedEx to deliver their mail), in part privately outsourced (Microsoft also hires the US Postal Service to deliver its mail), in part publicly outsourced (some government agencies hire FedEx to deliver their mail) and in part public (some government agencies hire the US Postal Service). Similarly, the provision of secondary education in the US is undertaken publicly, privately, and through public outsourcing. Private schools exist alongside public schools, and both exist

²³ The pure private and pure public variants will henceforth be referred to simply as the private variant and the public variant.

alongside the burgeoning array of charter schools, which are publicly established but privately run. Finally, to take one last example, health care in the UK is provided both publicly and privately; the state-operated National Health Service (NHS) provides all citizens with health care, but some citizens choose to receive supplemental coverage from private firms, whom they pay for service.²⁴

Describing Arrangements

Generally, for any good g , whatever g might be, including military force, provision may be undertaken according to one of the four variants or some combination of the four (or, of course, not at all). Consequently, for any good g , there are sixteen possible paths that a society may chart in providing g (Table 1.1). These sixteen paths, which will be referred to as *sub-arrangements* (S_{0-15}), are simply the sixteen potential scenarios that result whenever an entity is presented with four discreet items and allowed to select up to four of these items (including zero and four).²⁵ One and only one of these sub-arrangements must be true, descriptively speaking, of any good g .

²⁴ Whether it turns out that some good g is provided according to one variant or according to several will depend in part on the generality with which we speak of the good in question. If, for example, we were to ask about the provision of *Seinfeld* DVDs in the US, only the private variant would be operative. But if we were to ask about the provision of visual art, the public variant would be present as well since the government run Public Broadcasting System (PBS) also produces television DVDs.

²⁵ The number of available paths will simply be the number of discreet items squared (two distinct items will give four distributions, while three distinct items will give nine, and so on).

TABLE 1.1. Different possible sub-arrangements
(S_n) for the provision of some good g .

S₀. No g is provided.	S₈. Some g is privately provided. Some g is publicly outsourced.
S₁. All g is privately provided.	S₉. Some g is privately provided. Some g is privately outsourced. Some g is publicly outsourced. Some g is publicly provided.
S₂. Some g is privately provided. Some g is privately outsourced.	S₁₀. Some g is privately outsourced. Some g is publicly outsourced.
S₃. All g is privately outsourced.	S₁₁. Some g is privately outsourced. Some g is publicly provided.
S₄. Some g is privately provided. Some g is publicly outsourced.	S₁₂. Some g is privately outsourced. Some g is publicly outsourced. Some g is publicly provided.
S₅. Some g is privately provided. Some g is publicly provided.	S₁₃. All g is publicly outsourced.
S₆. Some g is privately provided. Some g is privately outsourced. Some g is publicly outsourced.	S₁₄. Some g is publicly outsourced; Some g is publicly provided.
S₇. Some g is privately provided. Some g is privately outsourced. Some g is publicly provided.	S₁₅. All g is publicly provided.

While different sets of sub-arrangements may be of special interest in the investigation of different goods, six sets of sub-arrangements are particularly important for the investigation of war. Each set of sub-arrangements will be referred to as an

arrangement (A_n). Contained in these six arrangements are all sixteen sub-arrangements ($S_0 - S_{15}$). The first arrangement is the *non-provision of military force*, which describes the state of affairs envisioned by pacifist theories of war (and is constituted by S_0 from Table 1.1). Second is what we may call a *free market economy of military force*, usually defended by anarcho-libertarians, in which individuals privately authorize military force to the full exclusion of governmental authorization (the sub-arrangements $S_1 - S_3$). Such a model is embodied by the state-of-nature protective associations that philosophers like Nozick have imagined but also by a real-world example beloved by anarcho-libertarians: the Irish *tuath*, a purely voluntary association for the settlement of disputes and the authorization of war in medieval Ireland.²⁶ Third is a *mixed market economy of military force* (the sub-arrangements $S_4 - S_{12}$) where the government functions as one agent who authorizes war, but alongside private agents who do the same. In those areas where the Dutch East India Company provided military force for some while local governments provided military force for others, a mixed market economy was operative. The history of militias in the US, particularly in the early formation of the Union, where private armed groups were seen as a check on the danger of standing armies, also offers a glimpse into this possibility.²⁷ The fourth arrangement, what we may call an *outsourced public monopoly over military force*, involves governmental authorization but fully private supply—the possession of a military, in other words, but one that is fully leased (S_{13}).

The fifth arrangement, what many countries now have,²⁸ is a *partially outsourced public*

²⁶ At any given time in medieval Ireland, there were between 80-100 tuaths. On tuaths, see Binchy (1970); Rothbard (1973: 220); Peden (1977).

²⁷ In Chapter 3, these militias are explored in detail. As we get more in depth, we will see that these militias cannot be straightforwardly characterized as private groups who operate in mixed market economies of universal coverage. But they are close.

²⁸ Private military firms, for example, now operate in more than fifty countries across six continents. See Singer (2005).

monopoly over military force, under which the government hires out some of its war-making efforts to the private sector but not all (S_{14}). Finally, *a comprehensive public monopoly over military force* entails both governmental authorization and governmental supply; it is the model towards which the international community seemed to long aspire (S_{15}).²⁹ As the six arrangements together capture the sixteen possible sub-arrangements for any good g , we may that these six arrangements represent an exhaustive list of possible paths for the societal provision of military force (see Table 1.2).

TABLE 1.2. Different possible sets of arrangements (A_n) for the provision of military force in a society.

A₀.	Non-Provision of Military Force (S_0).
A₁.	Free Market Economy of Military Force ($S_1 - S_3$).
A₂.	Mixed Market Economy of Military Force ($S_4 - S_{12}$).
A₃.	Outsourced Public Monopoly over Military Force (S_{13}).
A₄.	Partially Outsourced Public Monopoly over Military Force (S_{14}).
A₅.	Comprehensive Public Monopoly over Military Force (S_{15}).

With this schematic in mind, the concept of *privatization* may now be elaborated with further clarity.³⁰ Privatization refers to the downward trend from higher-level arrangements to lower-level arrangements on the spectrum $A_1 - A_5$ and, within each arrangement, to the trend away from public provision of military force towards privately

²⁹ Perhaps the best analysis of how the norm against private authorization and private supply developed can be found in Percy (2007a).

³⁰ Above, I noted that privatization refers to the shift from public provision towards private provision. The rendering that I give here is consistent with that rendering. Here, I clarify the shift further.

outsourced, publicly outsourced, and ultimately private provision.³¹ Conversely, *nationalization* refers to the upward trend from lower-level arrangements to higher-level arrangements on the spectrum $A_1 - A_5$, and, within each arrangement, to the trend away from private provision of military force towards privately outsourced, publicly outsourced and ultimately public provision.³² Military force may be thought fully privatized when private entities enjoy a complete absence of government in a free market economy of military force and fully nationalized when some public entity, be it the state or a sub-state or supranational organization, enjoys a comprehensive monopoly over the provision of military force.³³

Given this account, it would be a mistake to think that privatization might refer to strategies that, without increasing the share of privately provided goods to publicly provided goods, make the public provision of goods function *more like* the private provision of goods. Such strategies instead constitute what we may call *marketization*. The use of school vouchers is a quintessential example: by issuing vouchers for education and compelling public schools to compete with one another for these vouchers (or indeed

³¹ As we can see, privatization may involve a shift towards increased private authorization *or* towards increased private supply. But imagine two societies: Society 1 has more private authorization than Society 2, and Society 2 has more private supply than Society 1. Which society, we might ask, has further privatized its military forces? According to my definition, Society 1 has further privatized its military forces. Private authorization is taken to be a weightier indicator of privatization than private supply. This is why I insist that, within a given arrangement ($A_1 - A_5$), privatization refers to the ‘the trend away from public provision of military force towards privately outsourced, publicly outsourced, and ultimately private provision’. Recall that the ‘privately outsourced’ variant refers to private authorization and public supply, while the ‘publicly outsourced’ variant refers to public authorization and private supply.

³² The non-provision of military force in A_0 is left to the side as it counts neither as privatization nor as nationalization. The considerations that were raised in the previous footnote about privatization also apply to nationalization (though, of course, nationalization refers to the opposite trend).

³³ Nationalization does not correspond, necessarily, with increased autonomy for the government over the provision of a good g . A government that has fully nationalized g , for example, may be handcuffed by its people from outsourcing the good to contractors or from extricating itself altogether from the provision of the good. Conversely, a free market economy for g may actually be the preference of government and trends of nationalization, burdensome and unwelcome. In short, we must not conclude that a government’s position at one level on the spectrum $A_1 - A_5$ correlates with a capacity for the government to alter its position on the spectrum; proximity to the top does not necessarily correspond with the potential to climb (and vice versa).

with private schools if the vouchers may be redeemed there), the government can dispose its own schools to behave more like private schools. But, in issuing these vouchers, the government does not, in some unavoidable way, cede services to the private sector. Particularly if we restrict the redemption of vouchers to public schools alone, we might wholly endorse school vouchers without supporting a decrease in the number of schools under government operation or any other diminishment in the government's role as the educator of its citizens—i.e. we need not simultaneously defend privatization while endorsing marketization.³⁴

This is not to deny that there are critical links between privatization and marketization. As Thomas Frank (2008: 8) describes, markets have been 'boring ever deeper into the tissues of the state'. Privatization and marketization both represent avenues by which the state, as traditionally understood, has atrophied. Undoubtedly, detailed philosophical research is needed into the whole of this atrophying process. My thesis, however, will focus exclusively on privatization, leaving these further questions for later research.

Endorsing Arrangements

As the previous subsection should make clear, the arrangements $A_0 - A_5$ enable us to readily describe how a society provides military force. The concepts of privatization and

³⁴ We should note, however, that the voucher system will be a way for the government to have some influence over what goods get produced. If the government begins issuing vouchers for individuals to purchase some good g from either the public sector or the private sector, companies may be far more likely to begin producing that good. This, in turn, may promote or detract from privatization within a given arrangement, since private firms may be better placed to produce the good for which the government voucher is distributed than public agencies. Thus, marketization might have an effect on privatization and/or public monopolization, but the two nevertheless remain distinct.

nationalization, moreover, permit us to classify change along this spectrum $A_0 - A_5$. But the great benefit of this proposed conceptual architecture goes beyond its applications for descriptive analysis and instead concerns its suitability for normative theorizing. The architecture has been constructed so that moral endorsement must be accorded to *one and only one* of the arrangements $A_0 - A_5$. This simple feature of the architecture will be exploited throughout the analysis that follows. For that reason, and because its *prima facie* validity betrays an unforeseen complexity, I want to briefly offer a defense of this feature before moving forward.

Each arrangement $A_0 - A_5$, as we have seen, contains one or more sub-arrangements, and each sub-arrangement $S_0 - S_{15}$ is comprised of particular combinations of variants for the provision of military force. The arrangement A_1 , for instance, contains the sub-arrangements S_1 , S_2 , and S_3 . S_1 is comprised of the pure private variant (private authorization and private supply). S_2 , by contrast, is comprised of the pure private variant (private authorization and private supply) and the privately outsourced variant (private authorization and public supply). S_3 is comprised of just the privately outsourced variant (private authorization and public supply). To *endorse* (or *defend*) a sub-arrangement is to claim that the variants included in that sub-arrangement are morally justifiable. Thus, one who endorses S_1 claims that the pure private variant is morally justifiable; one who endorses S_2 claims that the pure private variant and the privately outsourced variant are morally justifiable; and one who endorses S_3 maintains that the privately outsourced variant is morally justifiable.³⁵

³⁵ The endorsement of a sub-arrangement should be contrasted with an acknowledgment that some sub-arrangement successfully describes how a society provides military force. To describe the manner by which a society provides military force is to claim that the variants included in that sub-arrangement are, in fact, the variants upon which a society relies. We might thus observe that a society fights privately authorized

We must endorse *at least* one sub-arrangement $S_0 - S_{15}$ for a simple reason. S_0 represents the non-provision of military force, and its endorsement constitutes an assertion that none of the variants for military provision are justifiable. By contrast, the sub-arrangements $S_1 - S_{15}$ represent all possible combinations according to which a society might provide military force; endorsing one of these sub-arrangements $S_1 - S_{15}$ means asserting that at least one of the variants for military provision is justifiable. Because we must either reject all forms of military provision or embrace at least one, we must either reject $S_1 - S_{15}$ and endorse S_0 or reject S_0 and endorse $S_1 - S_{15}$.

Yet we cannot endorse any more than one sub-arrangement $S_0 - S_{15}$. Consider the example of S_2 . To endorse S_2 , as we have seen, is to affirm the view that military force may be justifiably provided according to both the purely private variant *and* the privately outsourced variant. We cannot then assert that military force may be justifiably provided *only* according to the purely private variant, as an endorsement of S_1 would maintain, or *only* according to the privately outsourced variant, as an endorsement of S_3 would maintain. By the same token, we cannot endorse a sub-arrangement that lacks either the purely private variant or the privately outsourced variant ($S_0, S_4, S_5, S_7, S_8, S_{10}, S_{11}, S_{13}, S_{14}$, and S_{15}). Nor can we claim that military force may be provided according to some further variant *in addition to* the purely private and privately outsourced variant—for instance, these two variants *and* the publicly outsourced variant (S_6); these two variants and the purely private variant (S_{12}), or all four variants (S_9). As these considerations make clear, if we are to endorse S_2 , we must *only* endorse S_2 . I trust that the way in which this

wars with only privately employed soldiers and claim correctly that the society provides military force according to the purely private variant (S_1). But that would be a descriptive assessment of the society. Whether the purely private variant is a *justifiable* variant for military provision in that society or any other—rather than the only variant by which military provision is actually undertaken—is a concern for moral assessments of war, such as this one.

reasoning may be applied to all sixteen sub-arrangements is sufficiently clear to obviate the need for further elaboration. $S_0 - S_{15}$ is an exhaustive list of possible sub-arrangements for the societal provision of military force, and any one sub-arrangement may be defended only to the exclusion of all others.³⁶

One final step is needed to relate this feature of $S_0 - S_{15}$ to the arrangements $A_0 - A_5$. Since the sixteen sub-arrangements $S_0 - S_{15}$ have been distributed into six umbrella arrangements $A_0 - A_5$, the discretion with which might endorse (or withhold our endorsement) of each arrangement $A_0 - A_5$ is restricted in a similar way to the restriction on $S_0 - S_{15}$. However, the nature of this restriction is *slightly* different from the restriction that was just analyzed for $S_0 - S_{15}$. As we just saw, to endorse a sub-arrangement (S_n) is to affirm the claim that the variants included in that sub-arrangement are justifiable. But since arrangements consist of multiple sub-arrangements (on occasion) and since one and only one of these sub-arrangements can be endorsed, the endorsement of an arrangement cannot mean that all of the sub-arrangements within that arrangement are justifiable. For my purposes then, to endorse an arrangement (A_n) will be to claim that one of the sub-arrangements within that arrangement is justifiable.

Despite this subtle difference between the endorsement of a sub-arrangement and the endorsement of an arrangement, it should be clear that, just as our endorsement must be accorded to one and only one of the sub-arrangements $S_0 - S_{15}$, our endorsement must be accorded to one and only of the arrangements $A_0 - A_5$. We cannot withhold our endorsement of all arrangements $A_0 - A_5$, for this would be to insist that all sub-

³⁶ When I write that the sixteen sub-arrangements $S_0 - S_{15}$ are an exhaustive list of all possible sub-arrangements, I do not of course mean that no other schematic could be developed to categorize the various provisions of military force that a society might undertake. I mean that, *given* the breakdown that I have chosen, the sixteen sub-arrangements $S_0 - S_{15}$ include all possible paths for the societal provision of military force.

arrangements $S_0 - S_{15}$ are indefensible, which, as we saw above, entails a contradiction. Moreover, we cannot defend any more than one arrangement since to do so would be to necessarily defend two sub-arrangements $S_0 - S_{15}$, and no two sub-arrangements may be defended together.

The Chapters

With this framework for the societal provision of military force in mind, let us finally turn to the specific structure of this thesis. Part I, which is comprised of Chapters 2 – 5, argues against private military authorization and in favor of exclusively public military authorization. Chapter 2 considers and challenges anarcho-libertarian arguments for exclusively private military authorization (A_1). Chapter 3 then considers and challenges libertarian arguments for private military authorization that permit some public military authorization (A_2). Neither endorsements of A_1 nor endorsements of A_2 , I argue, succeed.

To fill the gap that is left by these unsuccessful defenses of A_1 and A_2 , I present what is dubbed the *risk-prevention argument*. Public actors, I seek to show, must prevent private actors from authorizing military force (public *monopolization*). I defend two premises to support this position. The first, which is labeled the *all affected fundamental interests premise*, is defended in Chapter 4. This premise claims that a decision must be withdrawn from the private sector and reserved for public discharge when one course of action under consideration imposes risk, above some threshold level, to the fundamental interests (e.g. physical security) of enough individuals. Fundamental interests are defined as those interests that are sufficiently weighty so as to be protected by rights. The second

premise, which is labeled the *risk imposition of war premise*, is defended in Chapter 5. This premise maintains that the private decision to authorize military force *does* impose risk, above an acceptable threshold level, to the fundamental interests (particularly in physical security) of enough individuals. From these two premises, we may conclude that the decision to authorize military force must be withdrawn from the private sector and reserved for public discharge. Military authorization, in other words, must be publicly monopolized, and A_1 and A_2 must be rejected.

Once this theory of public *monopolization* is finalized, I turn to give a theory of public military *authorization*. The need for a defense of public military authorization *after* a defense of public monopolization may seem nonsensical. For some, public actors who monopolize the authorization of military force would, by definition, *both* prevent private actors from authorizing military force and authorize military force themselves. But this thesis understands the term ‘monopolization over military authorization’ in a slightly different fashion. On my account, public actors who monopolize the authorization of military force prevent private actors from authorizing military force but without *necessarily* authorizing military force themselves. Because public actors can, in theory, bar private actors from authorizing military force using methods other than war—for instance, intelligence gathering, policing, and imprisonment—a defense of public military monopolization, understood in the second sense, need not constitute a defense of public military authorization. While linguistic convention might favor the first understanding, I will adopt the second. It is more suitable to my analysis and not so divorced from ordinary language as to be unrecognizable. The *public monopolization of military authorization* then, to be precise, will refer to the withdrawal of decisions of

military authorization from the private sector and the reservation of these decisions for public discharge.

We should observe that the public monopolization of military authorization, defined in this way, is consistent with pacifist endorsements of A_0 , which advocate the government-enforced prevention of private military authorization, *and* with just war endorsements of $A_3 - A_5$, which advocate the government-enforced prevention of private military authorization alongside public military authorization. Whether public entities that monopolize the authorization of military force must institute A_0 or one of the arrangements $A_3 - A_5$ will simply depend upon whether the public authorization of military force can be justified.

Thus, after finalizing the risk-prevention argument in Chapter 5, I consider whether public monopolization ought to be accompanied by a prohibition on public military authorization (A_0) or instead by an endorsement of public military authorization ($A_3 - A_5$). I argue that, once military force has been publicly monopolized, governments have a further obligation to protect individuals who have been disarmed. To do so, governments must sometimes authorize military force on their behalf. This argument, referred to as the *compensation argument*, rules out A_0 .³⁷

Having completed rejections of A_0 , A_1 , and A_2 in Part I, I shift my attention in Part II to A_3 , A_4 , and A_5 . What distinguishes these arrangements is the place that each affords to private military supply—whether an exclusive place (A_3), some place (A_4), or no place (A_5). In Chapters 6 and 7, I argue that *some* military supply must be public. First, in Chapter 6, I present what is dubbed the *governance argument* to show that

³⁷ The compensation argument follows a position that Nozick (1974: 110-113) developed to address a different problem.

militaries may not outsource the responsibilities of *high-ranking officers* to the private sector. To define high-ranking officers, I borrow from the common quadripartite distinction in military discourse between flag grade officers (generals), field grade officers (colonels and majors), company grade officers (captains and lieutenants), and non-commissioned officers (corporals, sergeants, and petty officers). High-ranking military officers refer to flag grade and field grade officers.³⁸ These officers, I argue, exert political power over civilian decisions of military authorization and supply. Moreover, they make weighty strategic and tactical decisions *themselves* on behalf of a citizenry in battle. For each of these reasons, the decision-making responsibilities of high-ranking military officers must be publicly discharged.

In Chapter 7, I supplement the governance argument with what I dub the *punishment argument*. The punishment argument aims to show that not only must governments refrain from outsourcing the responsibilities of high-ranking military officers to the private sector, but they must also refrain from outsourcing the responsibilities of commanding officers to the private sector. Commanding officers are the company grade and non-commissioned officers who serve below high-ranking military officers (flag grade and field grade officers) but above rank-and-file personnel, over whom they exercise command.³⁹ I seek to show that commanding officers must possess a responsibility to punish disobedient soldiers—sometimes with methods that severely restrict individual freedoms (like imprisonment)—and that these methods ought to be reserved exclusively for public discharge. Taken in conjunction, the governance argument and the punishment argument provide what I take to be a full account of those

³⁸ More will be said about ‘high-ranking military officers’ in Part II. See Chapter 6, pp. 215-217.

³⁹ What it means to exercise command will be elaborated in Chapter 7, pp. 244-245.

functions in military supply that must be publicly performed. Neither the responsibilities of commanding officers nor their superiors, high-ranking officers, may be outsourced. The *military leadership*—a term that I use to identify high-ranking military officers and commanding officers together—must remain public.

Finally, Chapter 8 seeks to show that a government may privatize those responsibilities that are discharged by *rank-and-file personnel*, taken to be the set of individuals who serve below the military's leadership. On the theory that I develop, it is the discretion of the military leadership, rather than killing *per se*, that must remain public. Thus, rank-and-file personnel, even if they engage in killing, may be private actors. Together, the three chapters of Part II offer a simple theory of private military supply: commanding officers, and their superiors on the chain of command, must be public personnel (the military leadership); those who are lower than the commanding officer on the chain of command may be private personnel, whether these individuals directly engage in killing or not (the rank-and-file). In light of my analysis in Part II, A₃ and A₅ must be rejected and a version of A₄ embraced.

With the structure and primary concepts that animate this thesis in place, we may now turn to Part I and consider private military authorization.

PART 1

AUTHORIZING WAR

2

Free Market Economies of Military Force

But how could a libertarian society defend us against the Russians? ... [The answer is easy.] Those Americans who favor Polaris submarines, and fear a Soviet threat, would subscribe toward the financing of such vessels. Those who prefer an ABM system would invest in such defensive missiles. Those who laugh at such a threat or those who are committed pacifists would not contribute to any "national" defense service at all. Given the enormous waste in all wars and defense preparations in all countries throughout history, it is certainly not beyond the bound of reason to propose that private, voluntary defense efforts would be far more efficient than government boondoggles. Certainly these efforts would be infinitely more moral.

-Murray Rothbard (1973: 248, 250)

Ought governments to be the ultimate arbiters in decisions about war or should some of these decisions be left to private actors? A number of philosophers have advanced powerful reasons for the restriction of *all* such decisions to the dominion of private groups. According to proponents of this view, private groups are *alone* justified in authorizing the horrific, if sometimes necessary, enterprise of war. This view, entailed by the anarcho-libertarian tradition of war, has been defended by a long line of thinkers, dating back (at least) to Lysander Spooner (1886) and Benjamin Tucker (1897), who, while active in the nineteenth century, still rank among the most eloquent and thoughtful expositors of comprehensive military privatization. When Nozick famously took on the anarcho-libertarian position in *Anarchy, State and Utopia*, it was these two, in addition to Murray Rothbard, who formed, as one commentator (Paul 1981: 5) called it, the

‘American triumverate’ of Nozick’s ‘invisible collective antagonist’.¹ Together, these thinkers offer a striking, comprehensive alternative not only to the pacifist and just war traditions, but also, as we will see in the next chapter, to the profound revision of just war theory demanded by strains of libertarianism that permit some, but not the exclusive right to, public military authorization.

In this chapter, I argue that the anarcho-libertarian tradition of war, rendered in its most plausible form, is misguided. At best, anarcho-libertarian premises, which aim to justify free market economies of military force (A_1), deliver conclusions that still permit public authorization. The anarcho-libertarian position on military force can thus only function to support mixed market economies of military force (A_2). Whether this position can succeed in establishing A_2 will be considered in the next chapter. For now, our focus will be fixed on arguments for A_1 .

This chapter proceeds as follows. First, I explain why a consideration of anarcho-libertarian arguments for the private authorization of military force is helpful. Second, I further elaborate a conceptual language for discussions of military authorization. Finally, I examine and reject four arguments that are commonly defended by anarcho-libertarians.

Why Free Market Economies of Military Force?

The free market economies of military force defended by anarcho-libertarians are examined for several reasons. First, the values from which anarcho-libertarians build their theories of privatization are values that we ordinarily endorse. These values, each of

¹ It may be noted that while proponents of A_1 have not, to my knowledge, investigated arrangements involving private-outsourcing (i.e. private authorization but public supply), the arguments that I offer apply to these arrangements as well, which are also examples of A_1 . See Table 1.2 in Chapter 1, p. 23.

which will be explored below, include a right to self-defense, a rejection of paternalism, a concern over wartime taxation (particularly for wars that may be objectionable to much of the populace), and a desire to minimize the amount and destructiveness of war.

Because the seemingly radical conclusions that anarcho-libertarians reach begin from (many) premises that we support, we at the very least ought to consider if the conclusions that they reach perhaps better serve our values than the conclusions that we reach in service of these values.

Second, even if the anarcho-libertarian position is untenable, a refutation of this position is itself instructive. The deep weakness of anarcho-libertarianism that I hope to highlight is a failure to conceptualize the state as an entity that is consistent with anarcho-libertarian values. In considering such a state and thereby challenging anarcho-libertarianism, we move towards an account of the state that *can* authorize and perhaps monopolize military force on broadly shared, ecumenical grounds.

Finally, and perhaps most fundamentally, the task of normative political theory, I believe, is both (i) to defend propositions about political processes and (ii) to enable future scholars to criticize and elaborate upon the propositions that are being defended. This second objective (ii), while true of all academic discourse, is particularly critical in the case of normative political theory, where conclusions are perhaps more tentative than in other disciplines (*justification* for propositions in normative political theory may lack the degree of finality that they possess in, say, chemistry or biology). Because of this inconclusiveness, it behooves a political theorist to highlight each place where her arguments might be challenged, each claim that might be attacked if an alternative position is to be advanced. By facilitating such attacks, philosophical work on the

proposition in question becomes useful even if ultimately mistaken. Both this chapter and the remaining chapters aim to identify and assess the expansive gamut of arguments that might be made in favor of and against the propositions that I defend so as to highlight how my position might be strengthened or refuted.

Authority

Before analyzing the anarcho-libertarian defense of free market economies of military force, a few remarks should be made about the concept of authority and its role in discussions of military authorization. These remarks will help situate this chapter, and indeed Part I as a whole, in the philosophical literature on war.

One set of wartime worries that we must resolve are what Arthur Isak Applbaum (2007: 360-361) calls our ‘first-order moral considerations’: to plumb these before going to war, we ask (as the entity considering war) ‘how much death, destruction, and misery will be inflicted on their soldiers and ours, for what reasons and for whose benefit, and for how long and at what cost and with what prospects of success?’. A second set of considerations mulls not over the substance of arguments for war but over who may assess and act upon the substance of these arguments—the entity, in other words, ‘who is to *decide* upon the first-order moral judgments’. It is this second set of considerations that this chapter, and Part I more generally, addresses. Can private entities justifiably decide and act upon first-order moral judgments regarding war? Or should we reserve such decisions and actions for public entities? Substantive scrutiny of first-order moral judgments will be left aside.

To be more precise, we may say that Part I probes the *moral authority* of private and public actors to authorize military force. On my account, an entity that possesses the moral authority to authorize military force has both a liberty-right to authorize military force *and* a claim-right that those who lack such a liberty-right refrain from forcefully stymieing their efforts.² A liberty-right to perform some action *x* entails that the right-bearer has no duty not to perform *x*; by contrast, a claim-right to perform *x* entails that others are under some sort of duty with respect to the performance of *x* (Hohfeld 1917). Note that the duty under which one is placed by a claim-right may be a duty to perform some action *or* a duty to abstain in the performance of some action—as we can see, the duty that is generated by the claim-right to authorize military force is of the latter variety (Wenar 2010). To sum up then, an entity with the moral authority to authorize war has no duty *not* to authorize war (a liberty-right), and such an entity is owed a duty of forbearance by those who lack such a liberty-right to refrain from forcefully obstructing their war efforts (a claim-right).

Of course, with some restrictions, flowing from our further just war commitments, *other moral authorities* may indeed seek to forcefully obstruct their war efforts. After all, a war just is the forceful obstruction of the enemy's war efforts. But those who lack a liberty-right to authorize war are precluded from forcefully obstructing the war efforts of those who possess the moral authority to authorize war.

As I have defined it, the moral authority to authorize war may be recognizable as a conception of *legitimate authority*. In what follows, the two terms will indeed be used

² In referring to authority as involving both a claim-right and a liberty-right, I follow Buchanan (1999; 2002; 2004). See also Raz (1985: 6).

interchangeably.³ But my terminological equation of these phrases must not be taken to entail a substantive inclusion of stipulations (or normative requirements) of ‘legitimate authority’ as understood by the just war tradition. This tradition tends to maintain that ‘legitimate authority’ is something possessed by states—or at least, as C.A.J. Coady (2008: 98) puts it, by ‘political agents who might be expected to exercise more responsibility than private agents or criminal groups’. Yet, if such a view were taken, and ‘legitimate authority’, by definition, could only be possessed by states (or political agents), then an inquiry into the *private* possession of legitimate authority would be foreclosed. This thesis therefore adopts a different understanding of legitimate authority, one that, to the extent possible, empties the concept of the linguistic and substantive baggage that has accrued over centuries in the just war tradition. It refers instead to a more barren concept—specifically, to the liberty-right and claim-right specified above.⁴

Four Anarcho-Libertarian Arguments

Having outlined the concept of legitimate authority, we may now turn to the anarcho-libertarian account of military privatization. Anarcho-libertarians give four major arguments to show that private entities alone possess the legitimate authority to authorize military force. These four arguments represent alternative defenses of A_1 .

First is the *natural rights* argument: individuals have a natural right to join with others and use military force, whether in preventing certain wrongs *ex ante* or addressing them *ex post*, and any government that impedes the exercise of this right behaves

³ For similar interchangeable use, see Finlay (2010).

⁴ On occasion, I will use the abbreviated term *authority* in place of moral authority or legitimate authority. The meaning remains the same.

wrongfully.⁵ Spooner (1886: 7) put it this way: our ‘natural, inherent, inalienable, *individual* rights...by which any man can protect his own property, liberty, or life against any one who may be disposed to take it away...are not things that any set of either blockheads or villains, calling themselves a government, can rightfully take into their own hands, and dispose of at their pleasure’.⁶ Notice that, for the natural rights argument to function as a defense of A₁, it must be that the governmental authorization of war inevitably undermines the private right to authorize war.

The second and third endorsements of A₁ are dubbed, respectively, the *paternalism argument* and the *taxation argument*. According to the paternalism argument, governments, unlike private actors, unavoidably provide force on behalf of individuals who have not tendered their express approval for this force and thus behave paternalistically. According to the taxation argument, governments, unlike private actors, end up wrongfully levying coercive taxes to provide military force for individuals who may not wish to be so taxed. ‘How is it possible’, Tucker (1897: 25) asks ‘to sanction, under the law of equal liberty the confiscations of a man’s earnings to pay for protection which he has not sought and does not desire?’⁷ This argument, unlike the paternalism argument, which gains its force from the wrong done to those who receive the benefits of military provision, gains its force from the wrong done to those who pay. On both arguments, however, a one-to-one match between commissioning and receiving

⁵ The anarcho-libertarian natural rights argument often follows Locke (2002 [1690]). The *ex ante* right is ‘a right to destroy that which threatens me with destruction’ (sec. 16). The *ex post* right includes a deterrent right to ‘punish the transgressors of that law to such a degree, as may hinder its violation’ (sec. 7) and a retributive right to punish criminals ‘so far as calm reason and conscience dictate, what is proportionate to his transgression, which is so much as may serve reparation and restraint’ (sec. 8). The right to use force will refer to *both* the *ex ante* right and the *ex post* right.

⁶ Note that Spooner has in mind all forms of force, not just military force. My concern, of course, is just with military force.

⁷ See also Tucker (1897: 14). For a more general critique of taxation, see Spooner (1886: 91-112).

protection is sought whereby only those who commission protection from the government receive it and only to an extent correspondent with the price they or others have chosen to pay. According to anarcho-libertarian thought on war, any governments that authorize military force violate this match.

Finally anarcho-libertarians push a *consequentialist* argument: a free market economy of military force is the arrangement that promotes optimal outcomes. These four arguments may be leveled independently of one another or in tandem, as each is sufficient to ground a free market economy of military force, yet none necessarily to the exclusion of others. Each argument will be taken in turn.

Natural Rights

The natural rights argument, as we have seen, maintains that the individual right to prevent and/or redress harm permits the private authorization of war.⁸ Such natural rights are constituted by a liberty-right to use force when necessary and a claim-right to be free from obstruction by *governments*. The difficulty is that, even if we assume that individuals do possess these natural rights and that governments who monopolize the exercise of these rights do behave wrongfully, still since private authorization is compatible with public authorization (a mixed market economy), these rights may nevertheless be respected without a prohibition on public authorization. The public authorization of military force, in other words, does not *necessarily* obstruct private actors from exercising their natural rights to authorize military force. Both private and public actors may be legitimate authorities in authorizing military force (while the natural

⁸ I use 'prevent harm' to denote uses of force *ex ante* and 'redress harm' to denote uses of force *ex post*.

rights argument is left in tact). We may thus conclude that, while the natural rights argument may be capable of requiring that individuals have *some* recourse to private military authorization, it is incapable of requiring that they have *exclusive* recourse to this authorization. Because anarcho-libertarians who want to defend A₁ must defend the prohibition of public authorization, the natural rights argument cannot suffice to substantiate A₁—nor the exclusive moral authority of private actors to authorize military force that such a defense entails.

Two kinds of public authorization are worth noting as examples of the kind of arrangements that anarcho-libertarians concerned with natural rights ought to find suitable. The government might, first of all, function as one protective agency among many.⁹ In this system, some individuals would commission the government to provide military force on *their* behalf, while others would commission private companies (or no one at all) to provide military force on theirs—just as some individuals in the US employ the government to mail packages while others employ Federal Express.¹⁰ A second option is that the government would provide military force on behalf of everyone in a society, as the NHS does with health care for all UK residents, but individuals would retain the private right to authorize force on their own, as British residents retain the private right to secure health care on their own. According to systems of either *non-universal coverage* (the first possibility) or *universal coverage* (the second possibility),

⁹ The term ‘protective agency’ is taken from Nozick (1974: 14). I will use the term to refer to organizations that may be hired for the provision of military force. Note that, on this understanding, agencies that provide non-military force are excluded. We should also note that the military force that is undertaken may go beyond mere protection—for example, to retributively punish if such punishment is thought justifiable. Therefore, the term ‘protective agencies’ is a slight misnomer, but it will nevertheless be used in what follows.

¹⁰ Consider the admonition by Tucker (1897: 14-15) that ‘the right of every individual to be or select his own priest’ and the ‘right to be or select his own doctor’ should be left to the market: ‘No monopoly in theology, no monopoly in medicine. Competition everywhere and always...’ What Tucker misses is that the government might be one competitor like all others; provision is not the same as monopolization.

governments, it seems, at least conceptually, could authorize force without violating any individual's natural right to use force.

At least two counter-arguments to my position should be considered, what we may call the *inevitability argument* and the *personal exercise argument*. According to the inevitability argument, no matter how methodically the government restricts itself from encroaching upon private authorizing entities and no matter how attentively it strives to respect the natural rights that private authorization can alone protect (we are assuming), it simply *cannot* allow individuals to privately exercise their rights to use force. Conflicts will arise between public and private authorizations of force, and these conflicts will compel governments to impose indefensible limits on the private sector, as they will be unable to restrain themselves.

But, while intrusion seems likely, given the history of governmental behavior, this intrusion is by no means inevitable. It is certainly not the case that merely because governments in the past have proven incapable of some form of restraint that governments in the future will also necessarily be incapable of such restraint. Nor is it the case that public protective agencies would somehow be psychologically incapable of restraint (as perhaps a mother might be almost psychologically incapable of restraint when her child is endangered). In short, governmental interference into the private authorization of force does not seem to *necessarily* follow from the public authorization of force.¹¹

A second reason why the natural right to authorize military force might be incompatible with the practice of public authorization, and hence why individuals might

¹¹ The *difficulties* of maintaining such a system pose a different challenge, which will be considered in our examination of A₂.

possess the sole right to authorize military force, is that these rights may only be coherently or properly exercisable by the rights holder. According to this argument (the personal exercise argument), substantial moral loss is suffered by individuals if the government, or any third party, exercises *their* right to use military force.

The thrust of this position should be familiar from other realms—gift-giving being a particularly illuminating example. Imagine that we have a right to gift-giving that is entailed by our right to freedom of expression. Essential to the very motivation of this right would be a requirement that individuals be permitted to exercise the right on their own, that they be able to give others the gifts that *they* have chosen. Were the government to prohibit private gift-giving and instead select and provide gifts on behalf of their citizens, the right itself would be devalued. Of course, the flavor of the right may be partially preserved since part of the justification for a right to gift-giving might depend upon the interests that all people have in receiving gifts—interests the government would still promote. But certainly much would be lost, morally speaking, if the government were to exercise a right of gift-giving on behalf of their citizens. Perhaps then the same could be said of the right to authorize military force.

To start, we should notice that such a concern with participation must either be a concern that individuals participate in the supply of military force or that individuals participate in its authorization. If the concern is with supply, the personal exercise argument is unpersuasive, because the private personal exercise of a natural right to use military force is possible outside of free market economies of military force. Governments might authorize war, and indeed even monopolize its authorization, without keeping individuals or groups of individuals from privately supplying war. Thus, the

moral advantages of individual wartime participation under an arrangement that permitted even exclusive public authorization would be indistinguishable from the moral advantages of individual wartime participation under an arrangement of exclusively private authorization.

Moreover, we are assuming that participation in private supply is somehow morally preferable to participation in public supply, but this is by no means obvious. Even if the government were to wholly monopolize authorization *and* supply, still it is not clear why participation in public supply would fail to suffice for proponents of the personal exercise argument. When a democracy engages in warfare, *each* member of that democracy could conceivably participate in the exercise of his or her right to use military force.¹² This is perhaps part of the motivation for a citizens' military.¹³

Turning then from the concern that individuals participate in the supply of war to the concern that they participate in its *authorization* (i.e. what matters is voting, not fighting), the critique fails in a similar way. As with fighting, individuals may *all*

¹² The same is true of outsourced or partially outsourced monopolies. The only difference is that participation in the supply of military force in these cases will be through private firms or in private units rather than as a member of the government's military. But the same reasoning will apply.

¹³ Granted, not all individuals may actually participate on the battlefield. Non-combat personnel are required for every war; and some individuals, even in the most comprehensively participatory militaries, will be unable or unwilling to participate. But the challenges posed by these groups—(a) non-combat participants, (b) those who are unwilling to serve, and (c) those who are incapable of serving—are not worrying. For the non-combat participants, we have no reason to think that the moral gains of exercising one's own right to use military force actually requires *battlefield* participation. Participating in any fashion seems to be the crucial ingredient. For those who are unwilling to serve (i.e. who do not wish to participate in the exercise of their rights), we may certainly regard non-participation as a moral loss. But if the moral loss were thought great, individuals could be compelled to participate in the exercise of their rights. Far more likely, the moral loss that an individual would suffer because of her non-participation would be thought preferable to the moral loss of forcing this person, and *all* who are unwilling, to participate. For those who are simply unable to participate, such as children and the elderly, the moral loss of non-participation seems to be less problematic still. They *cannot* participate in the exercise of their rights, and the question becomes one of assistance: is a community obligated to provide for the rights of those unable to provide for themselves? The universal exercise of the right to use force by participating in its supply thus seems to be not only consistent with the public authorization of force but also with its full public supply.

participate in the authorization of war by casting a vote, bar the unable.¹⁴ If the claim is not that individuals must be permitted merely to participate in the authorization of war but to *exclusively* participate in its authorization, we should keep in mind that, if indeed a moral gain is to be enjoyed through participation in the authorization of war, all individuals would be equally entitled to such a moral gain, and thus my right of participation would be limited in scope by the rights of others to participate. I could not lay claim, in other words, to the moral gains of authorization whilst denying it to others. Since war is collective in the sense that wars are fought between groups of individuals, joint authorization of war would be required rather than individual authorization. The only remaining position to hold would be that participation in private authorization somehow entails a greater moral gain than participation in public authorization. But this is difficult to envisage (and at least requires defense). If anything, it would seem that, as civic-republicans would argue, participation in the enterprise of public decision-making constitutes a *greater* moral gain than participation in the enterprise of private decision-making (Skinner 2002; Pettit 1997).

Therefore, to sum up, the anarcho-libertarian natural rights argument can neither be rescued by the inevitability argument nor the personal exercise argument. The putative right to privately authorize war is not necessarily jeopardized by the public authorization of war and is thus not threatened in a mixed market economy of military force. Any moral gains, moreover, that might be enjoyed in a free market economy of military force through participation in wars that have been privately authorized can also be enjoyed in a mixed market economy of military force. If these moral gains exist, they may accrue to individuals who participate in wars as private suppliers or public suppliers and whether

¹⁴ These individuals do not pose a challenge for the reason cited in the footnote above.

the war has been authorized by private entities or public entities. Thus, the natural rights argument cannot serve to ground free market economies of military force.

Paternalism

Let us move then to the second anarcho-libertarian argument for A₁. This argument is that governments who authorize war will end up authorizing war on behalf of individuals who would prefer for military force not be authorized on their behalf (*independents*) or who have failed to explicitly express a preference one way or the other (*the undeclared*), and these authorizations may be unjustifiably paternalistic. If such paternalism is sufficiently problematic and yet *someone* must have the authority to authorize military force (when necessary), then private actors may possess the exclusive authority to authorize military force that anarcho-libertarian endorsements of A₁ envisage.

Given the flood of literature on paternalism, and the abundance of competing concepts that have been endorsed, we must be clear about how anarcho-libertarians understand the term.¹⁵ Paternalism may be regarded as either ‘an attribute of reasons for action’ or ‘an attribute of actions themselves’ (Applbaum 2007: 371-372). The former understanding, often termed motive-based or motivationalist paternalism, takes the position that ‘A paternalizes B when A restricts B’s liberty for B’s own good’ (2007: 372). The latter understanding maintains that whether the restriction is for B’s own good or merely happens to benefit B is beside the point; what matters is the outcome for B rather than the intention of A.

¹⁵ See, in particular, Dworkin (1972; 2005); Gert and Culver (1979); Husak (1981); Shiffrin (2000); De Marneffe (2005); Clark (2006); Applbaum (2007).

Few are explicit about their methods for selecting a motive-based rather than an action-based account, but a common technique seems to be one that Seana Shiffrin (2000: 212) explicitly defends. She writes:

It is difficult to know how to adjudicate between competing characterizations of paternalism. One plausible approach, I would suggest, involves not merely testing formulas against intuitions, but also testing formulas with an eye to arriving at a conception of paternalism that fits and makes sense of our conviction that paternalism matters. That is, it seems worthwhile to assess what is central to our normative reactions to paternalism and to employ a conception of paternalism that complements and makes intelligible our sense of paternalism's normative significance.

Shiffrin, to summarize, is asking us to utilize a definition of paternalism that delivers the normative judgment that paternalism is problematic (and indeed problematic for the specific reasons that we tend to associate with paternalism).

Using this method, a compelling argument for the motive-based account of paternalism can be given, which Shiffrin provides. Imagine that person B asks person A to help him build a set of shelves, and A refuses. 'It is one thing', Shiffrin (2000: 215) argues, 'for A to refuse to help with the shelves because she is busy or resents being taken advantage of. It is quite another if she refuses in order to force B to challenge himself.' We have the very same action, a refusal to assist another person with shelves, and yet the second set of motivations strikes us as problematic for paternalistic reasons while the first does not. So, it seems that paternalism *must* be motive-based—it must be an attribute of reasons for action rather than an attribute of the actions themselves.

While Shiffrin supplies a compelling method that forcefully yields the motive-based account of paternalism, I believe that another method, which yields the alternative account, is more applicable here. Call it the *charity method*. Simply put, we should, in defending a position, consider counter-arguments that are cast in their most compelling

form. On the motive-based account, the paternalism argument can be dodged by public authorizing entities so long as the government merely seeks to benefit those (and only those) who have endorsed public authorization; the service of authorization may benefit independents or the undeclared, in other words, so long as the benefits that they enjoy are not the *reason* for authorization. To avoid dismissing the paternalism argument too quickly, we should at least leave open the possibility that an agent who bestows benefits unknowingly or unavoidably may behave paternalistically. This in turn requires that we use the action-based account.¹⁶

Using this more expansive understanding, the public authorization of military force seems quite paternalistic. On the universal variant of coverage, where the government exercises military force on behalf of each member of a political community but alongside private firms, the ranks of independents and the undeclared would seemingly swell. Unlike, say, health care, where the NHS might undertake provision for all UK residents while skirting charges of paternalism if individuals can still choose not to see a doctor or go to the hospital, governments who provide force for an entire political community almost inevitably assist independents and the undeclared: once force is employed on behalf of all, individuals cannot exactly excuse themselves from benefits.¹⁷

Even on the non-universal variant, where governments authorize military force as one

¹⁶ The motive-based account of paternalism, of course, might very well be the correct account. My point is only that a different account must be employed in the analysis that follows.

¹⁷ One might argue that merely offering health care is paternalistic. Perhaps the offer unjustifiably inclines individuals to choose health care. Or perhaps the availability of health care unjustifiably inclines friends or family members, in times of medical emergency, to choose health care for others. I am not convinced that the *offer* in this case is paternalistic, though, of course, offers may sometimes be paternalistic (e.g. when a woman says to her seat-belt hating husband who can never turn her down, ‘honey, are you sure you don’t want to me to buckle your seat belt?’). The offer of health care by the state, unlike the offer to our seat-belt hating husband, seems to lack the kind of coercion that we typically find problematic about paternalism. But, if this is thought unconvincing, we may simply conclude that the provision of health care is paternalistic in just the same way as the provision of military force.

protective agency alongside other private agencies, independents and the undeclared may be physically intermixed with subscribers, making the benefits bestowed upon them almost impossible to withhold. In this way, military force looks to be what George Klosko (1987: 242) calls a ‘non-excludable good’: one that simply cannot ‘be provided to some members of a given community while being denied to specified others’.¹⁸ More challengingly still, even with no intermixing, the public authorization of force may benefit individuals in other political communities. We might say, for example, that Irish citizens benefited from UK fighting in WWII if we think, quite reasonably, that Nazi success would have threatened states like Ireland who did not participate in the war (and that UK fighting helped prevent Nazi success). This example suggests a kind of global non-excludability in the provision of military force: the ‘specified others’ to which Klosko refers would include not only members of the community that provides force but also members of other communities. All of these benefits to independents and the undeclared would seem to sustain charges of paternalism.

But if we take the non-universal variant of public provision on its own, leaving aside the universal variant against which accusations of paternalism may enjoy more traction, we see that, as with the natural rights argument, the paternalism argument is

¹⁸ Klosko, we should note classifies national defense as a non-excludable good. Indeed, national defense, along with the rule of law and environmental relief, function as his paradigm examples of non-excludability. But Klosko (1987: 242, fn 6) acknowledges that the distinction he draws is sometimes difficult; goods that we often think of as being non-excludable, like ‘access to public roads and sidewalks’ could indeed ‘be conceivably denied to specified people’. As a solution to these more difficult cases, Klosko stipulates that ‘in cases in which denying access would be prohibitively expensive or inconvenient, the goods in question should be viewed as non-excludable’ (1987: 242, fn 6). As I will explain, the good of military force (which includes national defense) lacks excludability in one way: deciding who precisely will benefit from the provision is often impossible. But the good is far more excludable than we are often willing to acknowledge. And, more importantly, non-excludability need not entail unjustifiable paternalism. These points will be defended in the paragraphs that follow.

incapable of precluding public military authorization altogether and is thereby incapable of grounding a free market economy of military force.

Key to the anarcho-libertarian's precise worry about paternalism is the threat it poses to individual autonomy. So we must ask why precisely individual autonomy is undermined by certain bestowals of benefit. The worry cannot be—to follow Douglas Husak (1981: 36)—that the capacity to exercise meaningful choice is undermined: military force used on behalf of independents or the uncommitted may prevent serious injury to them and 'clearly persons who are seriously injured have less meaningful opportunity to exercise their capacity to make choices'. Nor can the concern be that the *mere* capacity to exercise choice is undermined (in the sense that one's cognitive capacity to make choices is threatened): '[i]f a paternalistic interference is efficacious in protecting the physical well-being of the agent, his capacity to choose is actually preserved by the interference' (1981: 37). It must be that, a person who is treated paternalistically is disrespected in some way: 'his choice is made *for* him, and to this extent he is treated *as if* he lacked the capacity to choose', which undermines the agent's dignity or self-worth (1981: 37).¹⁹

We should note, of course, that, in line with the analysis above, dignity and self-worth may be undermined even if the benefactor has no illicit intentions. When an eighty year-old mother tells her forty-five year-old son to be sure to wear a sweater, she may undermine his dignity and self-worth despite having the best of intentions. This is not to say that intentionality is wholly irrelevant. One action may, according to a certain set of intentions, undermine dignity or self-worth but not according to another (dumping milk

¹⁹ Husak ultimately dismisses this characterization on a few grounds, one of which is that it seems to require anarchism. But it seems to be precisely the kind of argument that an anarcho-libertarian would require to challenge public military authorization for reasons of paternalism.

on a friend to embarrass him is different from dumping milk on him by accident). But intentionality will not wholly determine whether dignity and self-worth are undermined sufficiently to justify accusations of unjustifiable paternalism.

What then are we to say of military force that benefits individuals who do not wish to be benefited? Three sorts of considerations apply. First, even on an understanding of paternalism most conducive to the anarcho-libertarian argument, it may be that charges of paternalism are simply inappropriate when a government inadvertently benefits individuals through the use of military force. In providing this force, the government does not challenge the decisions of those who have chosen to be defended by another agency or by no agency at all. Indeed, the government may very well regret that these recipients are benefited. We could imagine a society whose use of force benefits individuals that the government truly abhors, as German national defense would have inadvertently benefited certain Jews in Germany during WWII. Calling German defense paternalistic would seem to be a perversion; more generally, calling military action that was carefully designed to avoid benefiting those who do not wish to be benefited paternalistic may misunderstand the worry of paternalism.

Second, leaving these considerations aside, it is difficult to see how the inadvertent benefits that would originate from public protective agencies would deviate in any way from the inadvertent benefits that would originate from private protective agencies.²⁰ Private agencies would be no less likely, as such, to encounter intermixing nor

²⁰ Tucker (1897: 340-341) writes that a private protective agency 'deprives the non-member of any title to the benefits of the association, *except such as come to him incidentally and unavoidably*' (my emphasis added). The assumption here is that incidental and unavoidable benefits are not problematic, whether on the grounds of paternalism or anything else. It is to this position that the second argument I offer here applies. Tucker's observation is no less true for a system with both public and private protective associations than for a system of just private protective associations.

to undertake fighting that benefits individuals who are not physically intermixed with subscribers. A paternalism argument would thus be ineffective as a justification for free market economies of military force even if the force provided for the sake of independents or the undeclared is thought paternalistic.

Third, even if the inadvertent benefits resulting from public military action *are* paternalistic and are somehow more problematic than the benefits resulting from private military action, still the paternalism would be so minimal, it seems, as to not outweigh whatever cause has justifiably motivated war. In other words, if war is justifiable against some threat T, the repercussions of not defending against T will be considerable, and the standard for prohibiting a response to T would be rather high. Thus, even if a public entity does behave paternalistically, the value of averting T may simply outweigh the wrongs caused by their paternalism.

Taxation

We have now seen that the natural-rights arguments and the paternalism arguments are incapable of ruling out the public authorization of military force—even if the private authorization of military force is taken to be justifiable. These arguments are therefore incapable of demonstrating that private actors alone have the moral authority to authorize military force, which is required for a successful defense of A₁. I now wish to consider a third anarcho-libertarian attempt to ground A₁. According to this argument, the taxation argument, individuals ought not to be *required* to provide financially for others. If such

sacrifices are unavoidable in public military authorization but not in private military authorization, then the latter may alone be justifiable, in which case A_1 may be affirmed.

But the taxation argument confronts a number of problems. For the moment, I want to leave aside critiques from fairness and egalitarianism. The taxation argument can be refuted as a justification for free market economies of military force without invoking principles that an anarcho-libertarian would reject. Doing so is useful, not only for the sake of exhaustiveness, but because the risk-prevention argument that I offer in Chapters 4 and 5 for the public monopolization of military authorization is one that I believe anarcho-libertarians must accept (according to their own principles). Therefore, an examination of how anarcho-libertarian arguments fail, internally, may help motivate support for the propositions that I later defend.

The difficulty with the anarcho-libertarian taxation argument is that if individuals *choose* to provide for others, say by paying for their protection, the taxation argument loses applicability; the argument itself requires that individuals ought to be able to do with their property as they please. Of course, to avoid any hint of paternalism, individuals may be required to refrain from using force to assist anybody who does not wish to be assisted. But an individual will not be precluded from *choosing* to use force on behalf of others by the taxation argument.

This means that a system of non-universal coverage where governmental protective agencies authorize military force alongside private protective agencies would be perfectly compatible with the anarcho-libertarian conception of fair taxation so long as the protective services provided by these agencies were purchased by their recipients. On this model, the state would simply provide a good for which it charged people. Perhaps

less obviously, the same would be true for a system of universal coverage so long as support for the system came from voluntary contributions or from some source other than taxation: it may be that a government forgoes taxing its citizens altogether, funding governmental services with donations or alternative revenue sources like oil production or lotteries (to use two relevant examples); or the government might tax its citizens for the provision of certain services but fund its military entirely through other sources. Thus in cases of both universal and non-universal coverage, the taxation argument would fail to ground a free-market economy of military force.

One possible retort to this position, put succinctly by Tucker, is what we might call the *radical taxation argument*. In responding to the claims that (a) governments might fund their protection through donations and (b) that this protection might actually be defensive in all cases, which Tucker believes is necessary (on account of other principles), he writes: ‘Why, the very first act of the State, the compulsory assessment and collection of taxes, is itself an aggression, a violation of equal liberty, and, as such, vitiates every subsequent act, even those acts which would be purely defensive if paid for out of a treasury filled by voluntary contributions’ (Tucker 1897: 25). Any governmental taxation, in other words, jeopardizes all future governmental action. If this argument were sound, *only* governmental protective agencies that were run by governments who engaged in zero taxation—not even in the past—could be vindicated.

In this case, of course, the taxation argument would still fail to ground A_1 since public agencies would be permitted to authorize force so long as they met this criterion. But the radical taxation argument has further problems. Can one unjustifiable action negate the *possibility* of any claim to future justifiability? As a practical matter—not a

knock-down argument but one that is worthy of consideration—this position would seem to stifle the kind of governmental downsizing that anarcho-libertarians advocate. A government whose legitimate authority is nullified by the commission of a single wrong may be less likely to reform its practices than a government for whom legitimate authority remains possible.

More substantively, the radical taxation view assumes a transcendental quality to governments that, I want to suggest, lacks plausibility, *particularly* on anarcho-libertarian accounts of responsibility. Tucker's claim, to be sure, is not that governments who commit wrongs and continue, in one way or another, to uphold a system that perpetrates these wrongs are unjustifiable. The claim is that these governments are unjustifiable even when all wrongs have ceased. Ordinarily, compensation (perhaps through punishment) would be thought sufficient to restore moral balance for wrongs that have been committed so that if governments make amends for past transgressions, they might become justifiable. To conclude that successor groups are not only responsible for the misdeeds committed by their predecessors but *irretrievably* responsible so that no course of action could restore their claims to legitimate authority seems to fly in the face of our individualist views about responsibility—and certainly in the face of anarcho-libertarian views about individual responsibility. Even as individuals cooperating with one another to maintain a government, it cannot be that, solely because of the actions of another set of individuals, who were trying to maintain this same government, that they would be inescapably unfit for governance (and hence blameworthy for these wrongs).

Consequentialism

The final argument presented by anarcho-libertarians is that the free market economy of military force embodied in A_1 will foster optimal outcomes. Private actors, in other words, alone have the moral authority to authorize war because such a restriction will produce better consequences than alternatives.

As illustrated by the quote with which this chapter began, one problem with public monopolies over military authorization, at least of the sort that now pervade our international system, is that, if bloodshed is any measure, they do not seem to be very successful. The killing and destruction perpetrated by states in the last century alone should make any observer wonder if a system whose track record includes nuclear deployment, genocide, firebombing, torture, and countless other horrendous *state*-led war crimes is really the best system available. It may be. But a plausible skepticism has led some anarcho-libertarians to argue otherwise and maintain that private actors should alone have the moral authority to authorize military force (as A_1 envisions).

One strand of the consequentialist argument given by anarcho-libertarians focuses on the *quality of protection* that individuals would receive within such an arrangement. Tucker (1897: 33) writes that ‘competition prevailing’, if ‘five or six “States” were to hang out their shingles, the people, I fancy would be able to buy the very best kind of security at a reasonable price.’²¹ This point is echoed by Rothbard (1973: 220): ‘A drive for efficiency would be insured, as it always is on the market, by the compulsion to make profits and avoid losses, and thereby to keep costs low and to serve the highest demands of the consumers’.

²¹ For further discussion, see Tucker (1897: 32-33, 326).

For these arguments to succeed, a further claim is required to demonstrate that we have an obligation to support whichever arrangement secures the best military protection for individuals. But, of course, such a claim, in order to avoid fetishizing martial power, must show that a free market economy promotes some broader good, like individual well-being or physical security. Why would we care about effective military prowess alone? The argument then cannot be that a free market economy of military force will foster the best militaries for those who have access ('Cadillac militaries for the rich') nor even the best militaries for the most people ('Oldsmobile militaries for all'). A global system with militaries that are, on the whole, more effective than any alternative, may yield suboptimal outcomes for whatever value we aim to maximize.

From this conclusion, a second strand of consequentialist argumentation gains traction: wars will be less bloody than they would be in alternative arrangements.

Rothbard (1973: 225-226) puts the argument in his characteristically compelling language, which is worth quoting at length here. In an anarchic world, he writes,

since there would no overall State, no central or even single local government, we would *at least* be spared the horror of inter-state wars, with their plethora of massive, superdestructive, and now nuclear, weapons. As we look back through history, isn't it painfully clear that the number of people killed in isolated neighborhood 'rumbles' or conflicts is nothing to the total mass devastation of inter-State wars? ... A libertarian world, then, even if anarchic, would *still* not suffer the brutal wars, the mass devastation, the A-bombing that our State-ridden world has suffered for centuries. Even if local police clash continually, there would be no more Dresdens, no more Hiroshimas.

What is critical to the Rothbard line is that free market arrangements scale back the brutality of war, and, presumably, any maximandum worth defending would be fulfilled by a reduction in such brutality.

But Rothbard's argument, we might say, problematizes catastrophes to the neglect of skirmishes. A system that produces a few, exceedingly bloody wars may be preferable to a system that produces many, relatively tame wars. Indeed, on certain realist conceptions of war, it is war's brutality that cows international players into bargaining peacefully with one another (and moral rules are rejected precisely because they make war incapable of cowing international players in this way).²² What is needed for a consequentialist argument is some metric that accounts for both the number of wars and their severity.²³ Call this the *destructiveness metric* (DM).

Ultimately, the only coherent consequentialist position is a strand of argumentation in which the DM features. Only the DM, it seems, could speak to the kind of broad maximandum like well-being or physical security that is required for an effective consequentialist argument. But to do this persuasively, a mechanism is required to explain why precisely free market economies of military force would satisfy the maximandum, and thus account for the DM, more effectively than any arrangement that permits governmental authorization. Needed, in other words, is an explanatory model of why consequentialist maximanda are uniquely fulfilled by free market economies of military force.

The most compelling reconstruction of such a position (to my mind) starts with the premise that: (a) Markets alone promote optimally rational behavior. Notice that whereas the first strand of consequentialist argumentation that we analyzed above relies upon competition to stimulate optimal outcomes, in that case unsurpassed levels of military effectiveness, this argument relies on rational behavior more broadly, understood

²² For a helpful discussion of this point, see Caney (2005: 216).

²³ I do not want to suggest that the two ought to somehow be given equal weight only that both must be considered by consequentialists.

as economists traditionally understand rational behavior (to include the maximization of complete and transitive preferences). I choose to focus on rationality since it seems to be the broadest encapsulation of what generates the market outcomes that anarcho-libertarians have in mind, or could have in mind, when defending free market economies of military force (competition being just one element).

To this premise, we would then simply add one further premise, and the argument will be complete—the argument presupposes that any maximandum worth defending would aim for a reduction in the number and intensity of wars²⁴: (b) Optimally rational behavior entails a system that minimizes the DM. These two premises constitute an argument for the conclusion that the market alone best minimizes the number of wars and the bloodiness of these wars.

I will not rehash the well-worn but powerful arguments against consequentialism.²⁵ Instead, I highlight the ways in which the particular subject in question, in my case the authorization of war, is distinctively difficult for consequentialists to explain. In this way, the arguments below, and indeed in the thesis as a whole, strike a few more blows against the doctrine of consequentialism.

First, markets may actually be quite ineffective in promoting rational behavior. Much work in behavioral economics has demonstrated the ‘irrationality’ of markets.²⁶ Second, it is not obvious why even optimally rational behavior would entail a system that minimizes the DM. Through the market, some protective agencies are likely to become more effective than others. Where a few protective agencies become particularly adept,

²⁴ This assumption, I believe, would be extremely difficult to challenge given the awful nature of warfare.

²⁵ For these, see volumes by Williams and Smart (1973) and Scheffler (1988).

²⁶ The explosion of work in behavioral economics makes any set of references here highly inadequate. For a helpful review by the field’s pioneer, see Kahneman (2003).

making highly asymmetric warfare possible, these agencies may find wars rather cost-efficient. Quick, harsh strikes with great frequency for the enforcement of cooperation may be rational, which could engender a more warlike international system.

Third, the consequentialist position may be assuming an unsustainable equilibrium. Free market economies only promote *optimally* rational behavior, not perfectly rational behavior—a seemingly impossible criterion to meet—and so small deviations from rational behavior must be accommodated. But as countless game-theoretic studies show, in a free market, when actors begin to deviate from what may be rational behavior by attacking one another, the calculus of rationality changes so that a response-strike is advised.²⁷ Thus, consistent with a free market model, small deviations might lead to response strikes, and systems of rational cooperation may descend into systems of chaos.

But even if we grant that the market does promote optimally rational behavior and that optimally rational behavior entails the minimization of the DM, it may be that the market does not *alone* promote optimally rational behavior. As with the previous arguments, if a governmental protection agency exists alongside many private protection agencies (our non-universal variant), the market mechanism which discourages war ought still to be applicable, thus making the public authorization of war immune from criticism on this ground. One might argue that the very participation of a government in the market necessarily yields sub-optimal rational behavior: how, for example, could governmental agencies not redistribute in ways that flout the market by providing to the less fortunate while compelling assistance from the more fortunate, or by authorizing defense even when the market would counsel retreat? But, as argued above, surely, on a reconceived

²⁷ See, for example, Ross (2010).

notion of governmental protection, we may envisage a governmental protection agency that functions within a system of private protection agencies and just like them. The question is simply one of institutional design.

We might ask at this stage, however, what all of this hoop-jumping delivers. Were a government to shed the *entirety* of its non-market character in the authorization of war, if this were possible, would this entity not be governmental in name only? To counter previous anarcho-libertarian arguments, we imagined governmental protective agencies that permitted private entities to privately exercise their natural rights to use force (this, against the *natural rights argument*), or that provided services only to those who chose these services (against the *paternalism argument*) or paid for these services (against the *taxation argument*). In these scenarios, the government doffed much of its non-market character, depriving the anarcho-libertarian arguments of their force. But in the case at hand, governmental protection is *fully* marketized, compelling us to ask: what value is added philosophically to a position that permits governmental authorization of military force but only fully marketized governmental authorization? If the answer is none, then the concessions we make to the anarcho-libertarian position render our mixed market arrangement *morally indistinguishable* from the free market arrangement now under consideration.

While challenging, this line of thought is confused if for no other reason than that the justifiable participation of a government in some realm R, irrespective of its mode of participation, means that R is a realm into which governmental activity may justifiably stretch. And this is morally significant. In some realms, like the construction and operation of churches, synagogues, and mosques, only private enterprise is thought

permissible. Government participation in these realms, in other words, is, for many, inherently objectionable, regardless of the way that governments participate. The concession then that governments may authorize war if they behave in accord with market principles means that the authorization of war is one realm in which governments may justifiably act, unlike the realm, say, of religious goods, where the only justifiable arrangement is commonly thought to exclude governmental participation. Because a free market arrangement fails to capture this moral fact and alternative arrangements succeed, we must at least acknowledge that, regardless of how the government must behave in authorizing military protection, a free market economy of military force is objectionable because of its prohibition on governmental involvement. This leaves us to conclude, at a minimum, that fully marketized governmental protection will be justifiable alongside private protection and therefore that the exclusion of public entities from the authorization of war cannot be defended.

But all of these points aside, we must note, still further, that governments might not only promote optimally rational behavior by participating in and emulating the market, but they may also promote optimally rational behavior outside of the market. Many realists in international relations believe that governments—not just the kind of fully marketized governments discussed above, but all governments—rationally pursue power and self-interest. The realist position, of course, may be flawed, which I believe is the case, but we cannot easily discount the idea that *if* markets are thought to promote rational behavior, the international system might promote rational behavior as well. At least, why the former would be optimal but the latter suboptimal must be demonstrated.

Finally, even if markets alone promoted optimally rational behavior, and this optimally rational behavior were effective in discouraging war, we have no reason to doubt that other systems, which may severely fail to promote optimally rational behavior, might be as effective in discouraging war as markets. An all-powerful, all-benevolent world-dictator may control a system that by no means cultivates rational behavior (in the sense meant by anarcho-libertarians), and yet the world-dictator may be highly effective at thwarting war—say, in her attempt to honor god. The all-powerful, all-benevolent world-dictator is, of course, a fanciful example, but we might make similar remarks about a strengthened international legal system with more deeply embedded moral norms. Perhaps, in such a system, actors would feel obligated to obey laws, and thus not authorize war, even when such restraint runs counter to the self-interest that characterized anarcho-libertarian rationality. In this way, we might grant the anarcho-libertarian all of her assumptions about the unique rationality of markets but deny that this rationality is alone equipped to minimize DM.

Conclusion

This chapter has argued that the positions traditionally leveled for free market economies of military force do not succeed. In addition to specific problems with the natural-rights, paternalism, taxation, and consequentialist arguments, each argument fails to conceptualize the existence of a state that avoids undermining the values that the anarcho-libertarian seeks to promote. We can imagine states that do not infringe upon natural rights, behave paternalistically, tax unfairly, or generate negative consequences in

a way that is objectionable to proponents of a free market economy of military force.

Thus, these arguments fail to establish the exclusive authority of private actors to authorize military force as envisioned by A_1 .

Of course, the concessions to anarcho-libertarianism required by such a state come at a substantial cost. Though these concessions concern only war and not other spheres of governmental provision, they nevertheless entail a form of war-making that looks very different from the form of war-making now characteristic of most states. Moreover, each raises the immediate concern that, while the value in question is being preserved, other values are being violated. For instance, by aiming to protect the natural rights of some individuals to wage war, we may be endangering the lives of other individuals; in our attempts to avert paternalistic behavior, we may fail to provide for those in need; by rejecting wartime taxation, we may be shirking our responsibilities to the state; by deviating from the status quo, we may be unjustifiably risking negative consequences. Each concession to the anarcho-libertarian, in other words, is itself potentially problematic and requires further defense.

In the next three chapters, these concerns are addressed in more detail. Chapter 3 considers arguments for the justification of *some* public authorization (A_2). Chapters 4 and 5 consider arguments for the justification of *exclusively* public authorization (which, of course, is a feature of A_3 , A_4 and of A_5). What Chapter 2 has aimed to do is begin identifying the precise role that states can, and perhaps ought to, play in the authorization of war by starting from a position of anarchy in which the state is entirely absent. In so doing, (1) we have challenged the possibility that free market economies of military force, despite some resonance with our values, are justifiable; (2) we have established

some of the ways that an ecumenical argument for public authorization, and indeed public monopolization, might cater to skeptics; and (3) and we have highlighted what precisely an advocate of private military authorization is required to show if her case is to be improved. We now turn to mixed market economies of military force, where some of the concessions to anarcho-libertarianism that were identified in this chapter are examined further.

3

Mixed Market Economies of Military Force

... if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens. This appears to me the only substitute that can be devised for a standing army, and the best possible security against it, if it should exist.

-Alexander Hamilton (1996 [1788])

We have now seen that the arguments deployed by anarcho-libertarians in support of free market economies of military force (A_1) function, at best, as arguments for mixed market economies of military force (A_2). The question that naturally follows is: if authorization cannot be wholly reserved for the private sector, must *some* place be reserved? Perhaps *both* private and public actors possess legitimate authority in authorizing military force. Certain libertarians endorse such a position, and it is to this tradition that we now turn. Broadly speaking, a libertarian defense of A_2 may take one of two forms: one adopting a positive strategy and the other a negative strategy.

To understand how these strategies differ, we should briefly reconsider how the conceptual architecture of this thesis functions. Recall from Chapter 1 that only six possible arrangements ($A_0 - A_5$) of military force exist.¹ As these six sets of arrangements are constituted by the sixteen possible arrangements that may characterize

¹ See Chapter 1, pp. 18-29 for a detailed explanation.

the provision of any good—which together are exhaustive—these six arrangements are also exhaustive. As such, we must not abstain from tendering an endorsement of at least one arrangement; to do so would be to both reject the non-provision of military force *and* to reject all forms that the provision of military force might take. Moreover, we are barred from endorsing any more than one arrangement. We cannot, for example, endorse A_1 , and thereby assert that variants with private authorization, and only variants with private authorization, are justifiable ($S_1 - S_3$), while also endorsing A_2 and thus asserting that variants with private authorization *and* public authorization—and only such variants—are justifiable ($S_4 - S_{12}$). The arrangements $A_0 - A_5$ are such that normative support for one and only one must be accorded.

The *positive libertarian strategy* defends the justifiability of private military authorization. Because the only two sets of arrangements in which private military authorization is permissible are A_1 and A_2 —free market and mixed market economies of military force—private military authorization must take place as part of A_1 or A_2 if it is to be justifiable. To the extent that my challenges of A_1 in Chapter 2 are compelling, then an argument that successfully verifies the justifiability of private military authorization will establish A_2 as the solely defensible arrangement for the provision of military force in a society. If, in other words, private military authorization is deemed justifiable, and yet we lack good reasons to bar *public* military authorization, then we are pushed to embrace A_2 . What I shall call the positive libertarian strategy adopts such an approach.

The second libertarian strategy, by contrast, which will be referred to as the *negative strategy*, gains its force not from an affirmation of private military authorization

but rather from a rejection of public military monopolization over authorization.² Recall the meaning of such monopolization: public actors who monopolize the authorization of military force prevent private actors from authorizing military force (though they do not necessarily themselves serve as military authorizing entities).³ The negative libertarian strategy thus aims to show that public actors may *not* prevent private actors from authorizing military force.

Because the mere rejection of public military monopolization cannot affirm A_2 , the negative libertarian strategy must then rely upon one of two further moves. The first move provides a justification for public authorization. As the negative libertarian strategy rejects $A_3 - A_5$, all of which involve public military monopolization, a demonstration that public authorization is justifiable serves to ground A_2 (since A_2 is the only remaining arrangement where public authorization is justifiable). The second move simply argues that pacifism (A_0) is unjustifiable. If A_1 is untenable, as I suggested in Chapter 2, and $A_3 - A_5$ are untenable, as the negative libertarian strategy suggests, then only A_2 remains so long as A_0 can be shown problematic. Therefore, by way of either an affirmation of public authorization or a rejection of pacifism—in addition to a rejection of public monopolization—the negative strategy can serve to sustain a case for A_2 .

Of course, because our endorsement must be tendered to one and only one arrangement, we must hold the position that A_0 , A_1 , A_3 , A_4 and A_5 are all unjustifiable, no matter how we arrive at an affirmation of A_2 (if we do). This means that, according to both the positive and negative libertarian strategies, and indeed according to both variations of the negative strategy, a rejection of public monopolization and an

² The terms ‘military monopolization’ and ‘military monopolization over authorization’ are treated as equivalents. Questions about the public monopolization of military supply are left for Part II.

³ See Chapter 1, pp. 30-31.

affirmation of private authorization are entailed. What distinguishes the two strategies is not the positions that the strategies are required to endorse but the way in which the positions are defended and thus A_2 grounded. The two strategies, we may say, reflect different starting points, though they converge on the same conclusion.

This chapter argues that according to neither of the libertarian strategies is A_2 successfully defended. Libertarian affirmations of *private authorization* fail, thus jeopardizing the positive strategy, as do libertarian rejections of *public monopolization*, thus jeopardizing the negative strategy. Since neither strategy succeeds, our endorsement of A_2 must be withheld.

The chapter proceeds in three parts. First, I discuss the kind of private organizations that might authorize military force within the mixed market economies of A_2 . Second, I analyze the negative libertarian endorsement of A_2 . The negative strategy is analyzed before the positive strategy largely for the sake of structural ease. We should note further, however, that, because the tradition of libertarianism developed within the context of states (rather than anarchy) and grew out of a mistrust for the scope of state activity, the approach taken here may parallel the intellectual outgrowth of libertarianism more faithfully than an alternative approach. My consideration of the negative libertarian strategy begins with an account of how precisely private military authorization may come to conflict with military monopolization. I then consider the four negative arguments commonly given for A_2 . As might be expected, these negative libertarian arguments for A_2 tend to mirror the anarcho-libertarian arguments for A_1 —libertarians rely upon their own versions of the natural rights argument, paternalism argument, taxation argument, and consequentialist argument. The difference is that, whereas anarcho-libertarians use

these arguments to challenge public authorization, libertarians use them to challenge public monopolization. I consider and reject the four negative libertarian arguments in turn. Finally, in the third part of this chapter, I turn to the positive libertarian defense of A_2 , arguing that this strategy too fails. The end result is a refutation of both the negative and positive libertarian endorsements of A_2 .

Militias: Minutemen, Israeli Settlers, and Bill Gates

Let us start by considering how exactly private warfare might function in the mixed market economies of A_2 . If the units into which individuals privately organize themselves for war in a free market economy are private protective agencies, we might say that the units into which they privately organize themselves in a mixed market economy are *private militias* (henceforth *militias*).⁴

As with private protective agencies, militias may function to prevent harm *ex ante* or address wrongs *ex post*. Groups like the Minutemen, for example, a burgeoning private group of armed volunteers who patrol the US-Mexico border aim to thwart illegal infiltrations *ex ante*.⁵ These groups by no means claim a right to authorize war, nor do they behave as if they possess such a right, but they illustrate how militias that did authorize war might function. In contrast to *ex ante* responses, the rapid response units of Jewish settlers in Israel exemplify how private violence might also address wrongs *ex*

⁴ For my purposes, both are simply private organizations that authorize military force, distinguishable from one another only by the arrangement in which they operate.

⁵ The group has thousands of members and organizations in twenty states. See Minutemen (2011). For a chilling report on their activities, see Holthouse (2005).

post.⁶ These units, usually incapable of responding to an ongoing attack, engage in forms of collective punishment after the attacks have ended. There is an ‘expected, almost customary aftermath to every attack’ against settlers, as Amos Harel writes: ‘Every injury or murder of a settler in the West Bank is responded to by burning Palestinian fields and houses, beating passerby, attacking journalists, and occasionally’ shooting (in Dudai 2001: 5).

While the Minutemen and Israeli settler groups engage in action short of war and therefore function only as a heuristic for us to understand the spirit of militia activity in a mixed market economy (rather than as examples of private military authorization), recent discussions by J. Cofer Black, a former Vice President at Blackwater, about private force in Darfur raise the prospect of a more paradigmatic example. About the possibility of intervention, Black said at a conference (in Weiner 2006): ‘We’re low cost and fast... The question is, who’s going to let us play on their team?’ By ‘team’, of course, Black was referring to a state, but it does not require a great leap of imagination to envisage a team that was financed and led by an individual, like Bill Gates, or by a non-profit, like The Gates Foundation, or even by a private company, like Microsoft (if, for example, the company had business interests in Darfur or simply wanted to boost its image by undertaking community work abroad). The ‘Gates Justice Militia’, or either of the other two variants of ‘Gates militias’, would, like the Minutemen or the Israeli settler groups, authorize violent action, but, unlike these groups, would do so on a scale that would more clearly constitute war.⁷

⁶ This action does not rise to the level of war, though we could easily imagine how it might.

⁷ For the most comprehensive analysis of such humanitarian deployments, see Pattison (2010b).

The Negative Libertarian Strategy

To begin assessing the justifiability of these sorts of groups, we may turn first to the negative arguments that libertarians depend upon in support of A₂. The negative strategy, as mentioned above, relies first upon a case for the *indefensibility* of public monopolization; it then either affirms the permissibility of public authorization or denies the permissibility of pacifism. To clarify this strategy, I will briefly expand upon the discussion of public monopolization in Chapter 1.⁸ I will then turn to the challenges that are presented by the negative libertarian strategy against the practice of public monopolization. In rebutting these challenges, I seek to show that the negative libertarian endorsement of A₂ may be rejected before its further claims about public military authorization or pacifism become relevant.

Public Monopolization

Imagine that some government *does* possess a right to monopolize the authorization of military force within some specified territory. What does this mean? Let me briefly make two remarks about what it does not (necessarily) mean. First, this right of monopolization is neither entailed by nor does it entail the right to monopolize the authorization of *all* force. A government, for example, might lack what John Locke (2002 [1690]: ch. 12) calls the *federative right* to monopolize the authorization of force—this is an exclusive right to prevent the private authorization of force against *non-citizens*—but possess the exclusive right to prevent the private authorization of force against citizens. Just as the

⁸ For this previous discussion, see Chapter 1, pp. 30-31.

governing board of a neighborhood association might be entitled to issue sanctions *only* against those who choose to build their homes in that neighborhood, so too might a state be entitled to prevent force by citizens only against citizens of *that* state. And attempts by the state to prevent citizens from authorizing force against foreigners may be no less out of place than attempts by the neighborhood association to keep residents from interacting in certain ways with non-residents. Both organizations, though it may sound otherworldly today, may be charged solely with governing relations between members, remaining impotent in the governance of all other relations. Many, of course, following in the tradition of Max Weber (2004 [1919]: 33), have defined the state by its capacity to monopolize the use of *all* force, thus encouraging an analysis of federative power alongside, and often as indistinguishable from, non-federative power. But we must not allow this common conflation to blind us from the very simple point that the two are not necessarily possessed or lacked in tandem.

Perhaps less obviously, we may ask—even of groups who lack the federative right to monopolize the authorization of force—whether they may monopolize the authorization of all *forms* of force between group members or only of some forms of force. It may be that a group is permitted, for instance, to monopolize the authorization of punishment for homicides committed by and against group members but not to monopolize the authorization of war by and against group members. This point must be made since, as the recent global spate of civil wars reminds us, military force is not always authorized against foreigners, and thus the right of military monopolization may contain non-federative as well as federative elements. Of course, a position that endorses

a public monopoly on the use of non-military force but not military force may be normatively indefensible.⁹ But the conceptual possibility should be acknowledged.

With this in mind, we may now say with further specificity that the public monopolization of military authorization is the withdrawal of decisions of military authorization—*both federative and non-federative*—from the private sector and the reservation of these decisions for public discharge. The *moral authority* to monopolize the authorization of military force within some jurisdiction is a conjunction of the liberty-right to prevent *all* others within that jurisdiction from authorizing military force and the claim-right held against those within this jurisdiction to refrain from forcefully undermining this monopoly and from authorizing military force.

Whether public monopolizing entities are themselves justified in authorizing military force is a further question, which need not concern us at this stage. The question that must concern us is whether public actors are justified in prohibiting private actors from authorizing military force against insiders (the non-federative question) and from authorizing military force against outsiders (the federative question). According to libertarians, they are not justified. Individuals, or groups of individuals, must retain a choice about whether to authorize military force. Libertarians, however, are not committed to the further, quite radical claim that public monopolies over all forms of force are impermissible. A libertarian may fully endorse public monopolies over non-military force by supporting, for example, police forces charged with the protection of

⁹ By non-military force, I mean to include all forms of force short of war. For the definition of war that I use, see Chapter 1, pp. 8-11. Granted, the military may be involved in the use of force short of war. For the purpose of this thesis, however, military force refers only to war, while non-military force refers to all forms of force besides war.

citizens, but reject all public monopolies over military force (of both the non-federative and federative varieties).

Natural Rights, Take Two

Having outlined the nature of public monopolization against which libertarians who apply the negative strategy argue, we may now turn to the first of four arguments commonly given by proponents of the negative strategy who defend A₂. The natural rights argument maintains that the claim-rights of individuals to authorize military force are violated by a government that monopolizes the authorization of military force.¹⁰

Two points of clarification must be made at the outset. First, a positive natural rights argument will be considered later, and so we should be clear at this stage about how the negative natural rights argument is distinct from the positive natural rights argument (after all, if the negative natural rights argument is successful, the positive natural rights argument becomes unnecessary). The difference between the two is that, whereas the negative natural rights argument tries to show that public monopolization is incompatible with individual rights, the positive argument aims to show that individuals *do* have the specific natural right to authorize military force. The conclusion of each strategy, of course, is the same, namely that mixed market economies of military force are alone justifiable. But in rebutting each strategy, different challenges must be raised.

The second point to clarify is that the negative natural rights argument claims that public monopolization is *normatively* indefensible, not that instances in which individuals

¹⁰ From here forward, when I refer to the 'right to authorize military force', I refer to the authority to do so (which entails a claim-right).

happen to refrain from authorizing military force are indefensible. We can imagine a society where the government has what seems to be a monopoly over the use of military force merely because individuals who possess private rights to authorize military force choose not to exercise these rights—though *if* they were to take up arms on some occasion, the government would not be entitled to interfere. In this case, what appears to be a public monopoly over the authorization of military force is not in fact a public monopoly in the relevant sense. Public entities would still lack the authority to prevent private entities from authorizing military force, and, thus, normatively speaking, the system may be one in which both private and public entities are entitled to authorize military force.

Keeping these two points of clarification in mind, the question for a libertarian who wants to defend A₂ according to the negative strategy is: why would governmental monopolization jeopardize whatever the right to private military authorization is designed to protect? Perhaps the most plausible answer concerns *safeguarding*: individuals must be entitled to safeguard their own rights. Beginning from a proposition advanced by Mill (1958 [1861]: 43) and later Robert Dahl (1989: 76) that rights-possessors can alone properly safeguard their own rights, we might construct a compelling argument by adding the claim that public monopolies over the authorization of military force would jeopardize such safe-guarding.¹¹ From these two propositions, we may conclude that rights-possessors must not be deprived of a permission to authorize war. Spooner (1886: 12-14) puts this argument in this way:

The only possible way, in which any man can be protected in his rights *is to protect them in his own actual possession and exercise of them*. And yet our

¹¹ The Mill/Dahl line only supports the proposition just mentioned. I should note that this position is not one that I endorse. Right-possessors *often* require the assistance of others to safeguard their rights.

government is absurd enough to assume that a man can be protected in his rights, after he has surrendered them altogether into other hands than his own. This is just as absurd as it would be to assume that a man had given himself away as a slave, in order to be protected in the enjoyment of his liberty.

But three points should decide against the Spooner line. First, we have little reason to think that, even in many of today's flawed democracies, individuals can *more effectively* look after their own rights under an arrangement that permits private authorization. Given the logistical immensity of coordination, we have strong reason to believe that rights may actually be better protected in an arrangement of public authorization and democratic control. Second, and more importantly, the notion that individuals can *only* look after their rights in an arrangement with private authorization is dubious. The more modest claim seems plausible that governments may not monopolize the authorization of war insofar as this monopolization undermines individual rights. But this would not then rule out monopolies—at least monopolies with a certain degree of effectiveness. Finally, and most importantly, it is not clear that our concern should be with the individual protection of her own rights rather than simply with rights protection. Once we are concerned with the latter, the question largely becomes one of institutional design. What arrangements will most effectively ensure the protection of rights (assuming reasonable costs and minimal tradeoffs)? That private arrangements would win out over public arrangements is by no means clear, and certainly not clear enough to rule out public monopolies.

Paternalism, Take Two

Let us turn then away from the rights-based negative libertarian argument to the paternalism argument. In the previous chapter, I argued that the paternalism argument could not exclude public military authorization, and therefore that it could not ground A₁. The argument was that if public protective agencies were to authorize military force alongside private protective agencies, charges of paternalism could either not be leveled in the first place or, if leveled, would have no more force against public agencies than private agencies—and probably not enough anyhow to outweigh the cause that justified war. All of this was to deny that the mere authorization of war by public entities entailed objectionable paternalism. I now wish to argue for the stronger claim that the public monopolization of military authorization is similarly immune to the critique from paternalism.

To avert confusion, we should note the precise difference between two forms of paternalism in question. The first form of paternalism, which was rejected in the previous chapter, is a paternalism of military authorization. The worry was that public military force authorized on behalf of some set of individuals would unjustifiably benefit another set—that, for example, if Canada invaded the US, individuals who objected to or who had not explicitly endorsed their own defense would nevertheless be protected by the US government. The second form of paternalism, which is the subject of this subsection, is a paternalism of military monopolization. The worry here concerns the benefits bestowed on individuals by the enforced prohibition of private military authorization. If the US government were to prevent private parties in its territory from authorizing war, as it

does, it may be acting paternalistically if either the parties who are prevented from authorizing military force benefit from this prohibition or individuals who object to or have not explicitly endorsed monopolization will benefit.

Note that charges of paternalism, on the second understanding, may be leveled against a public entity that does not itself authorize war but simply bars private entities from doing so. Highly effective internal intelligence gathering and policing may be sufficient to prevent all private parties from authorizing military force, which is what we see today in those countries that lack militaries (and thus the capacity to authorize military action) but that nevertheless monopolize military force within. Of course, laws and policing may be paternalistic. The important point is simply that the two forms of paternalism—of authorization and monopolization—are distinct. And while these two forms of paternalism are simultaneously applicable to the public monopolies of $A_3 - A_5$ that libertarian proponents of A_2 reject, it is the paternalism of monopolization that must be addressed here. After all, the libertarian endorsement of A_2 permits the public authorization of military force, just not the exclusive right to do so (i.e. monopolization).¹²

On first glance, the public monopolization of military authorization appears to be highly paternalistic. Public monopolizing entities withdraw decisions of military authorization from the private sector and reserve these decisions for public discharge. Imagine if a government were to insist upon withdrawing other decisions from the private

¹² We should also keep in mind that my challenge in the previous chapter to the alleged paternalism of public military authorization may be applied to the negative libertarian critique of military authorization when undertaken by public monopolizing entities.

sector, for instance the individual decision to select his shirt-color.¹³ This would unquestionably constitute unjustifiable paternalism—the person’s ‘choice is made *for* him’ and he is thereby ‘treated *as if* he lacked the capacity to choose’, undermining his dignity or self-worth (Husak 1981: 37).¹⁴ If a government were to make decisions about shirt-color for its citizens, it would be treating these citizens as if they lacked such a capacity to make simple, personal choices. Why should the private decision to authorize military force be any different?

The reason, it seems, is that, unlike private shirt-color decisions, the private decision by members of a state (or other community) to authorize military force is likely to affect members of that community in profound ways. It may be that private actors authorize war against those very members, in which case some will likely be killed or injured. Alternatively, it may be that private actors authorize war against non-members and that a response-strike by these non-members may end up killing or injuring members.¹⁵ Regardless, when a democracy insists upon the collective resolution of decisions that affect members of the demos, it does not disparage the capacity of any one individual (or set of individuals) to make choices. The democracy simply insists that everyone be permitted to participate in those choices that affect them.¹⁶ As such choices

¹³ The specific example of a minimal freedom to choose our shirt-color is mentioned and analyzed in an interesting discussion in Sen (2002: 421).

¹⁴ See Chapter 2, pp. 52-54 for an elaboration of this.

¹⁵ The risks imposed by private actors who authorize military force are the subject of Chapters 4 and 5—there I seek to show that these risks are sufficient to justify public military monopolization. Here, I use these risks for a different purpose, namely to challenge the critique from paternalism.

¹⁶ This response becomes less compelling, of course, if a dictator monopolizes decisions of military authorization. It seems that the dictator *would* be treating those who have been disarmed as if they lacked the capacity to choose. But when a democracy withdraws decisions of military authorization from the private sector and insists that everyone receive a say in those decisions, it is *not* treating those who have been disarmed as if they lack the capacity to choose. To the contrary, the democracy would be treating citizens as if they *all* possess an *equal* capacity to choose.

come to affect others, governments come to possess a reason why individuals ought to be prohibited from making choices, which need not invalidate their capacities as choosers.

A similar line of argumentation is applicable to another illuminating context: that of smoking bans. If second-hand smoke did *not* cause harm, then smoking bans may be quite paternalistic. But these bans cease to be paternalistic (at least, to a large extent) if, as is the case, second-hand smoke *does* cause harm. In light of what we know about second-hand smoke, public smoking bans need not treat smokers as if they lack a capacity to choose (especially when the smokers themselves are permitted to participate in democratic decisions related to smoking). Instead, these bans may simply treat smokers as potential sources of harm.

My point, to be clear, is not that the alleged paternalism of public military monopolization and smoking bans ought to be trumped by other commitments, like a commitment to the harm-principle. My point is that public military monopolization and smoking bans are not necessarily paternalistic. The potential harm posed by military authorization and smoking gives public entities a reason to ban these practices, which undercuts accusations of paternalism. Democratic monopolization of decisions that may substantially affect constituents can simultaneously acknowledge that individuals *do* have the capacity to choose while also acknowledging that the only way to equally respect individuals as moral agents who possess such a capacity is by giving them all an equal say in decisions that affect them. Because public actors might monopolize military authorization without behaving paternalistically, we ought to conclude that the negative libertarian strategy from paternalism falters.

Taxation, Take Two

Having challenged negative libertarian versions of the natural rights and paternalism arguments aimed at grounding A_2 , let us turn now to the taxation argument. In the previous chapter, I argued that governments could authorize military force in a mixed-market economy without violating the taxation argument—which, we will remember, posits that individuals ought not to be compelled to pay for *any* military force that they do not choose to purchase. On the question of whether private entities may justifiably authorize war, the taxation argument is silent. But, in service of the negative libertarian strategy, which aims to defend A_2 by challenging public monopolization, the taxation argument is indeed relevant. The question is whether governments may not only authorize military force without subverting the libertarian position on taxation but whether they may monopolize military authorization as well.

One way that a government that monopolizes military authorization might avoid violating the taxation argument is through voluntary contributions, as discussed in the previous chapter in the context of financing public military authorization. The government might fund its ban on private authorization (and indeed its occasional turn to military authorization) through individual donations. An alternative, also mentioned, would be for the government to raise revenues on the open market for domestic enforcement and military authorization—say by selling oil or lottery tickets.

Perhaps more interestingly, a government might levy *punishment fines* on those agents who violate a public monopoly over authorization. These fines, levied *post hoc*, could then be used to fund public monopolization. The two hitches are (a) if there are no

lawbreakers, in which case the government would lack revenues with which to prepare for violations, and (b) if lawbreakers are unable to afford payment. (a) may be an overly optimistic claim. But (b), on the other hand, would likely pose a perpetual challenge, particularly since groups who violate public monopolies may be quite poor.¹⁷ We should conclude, however, that if nothing else, punishment revenues may supplement revenues from other sources, lending further credibility to a system of public monopolization that remains consistent with the libertarian position on taxation.

Let us assume *arguendo*, however, that these various, unpredictable forms of revenue collection are impracticable (revenues will be too small or too difficult to collect). Still, I want to suggest that a further compelling challenge to the taxation argument is available. As we saw in the previous chapter, the anarcho-libertarian argument against *all* public military authorization failed. The libertarian position now under consideration permits *some* public military authorization but simply rejects its monopolization. For the libertarian, the existence of a public body (such as a state) is not problematic; it is the existence of an overly robust public body that is problematic. By the same token, a libertarian may accept *some* taxation to finance a skeletal state, just not unduly burdensome taxation.¹⁸ The skeletal state that a libertarian might deem permissible is sometimes dubbed the ultraminimal state (Nozick 1974).¹⁹ Without making many assumptions about such an ultraminimal state, we may simply presuppose that this

¹⁷ Lawbreakers may be particularly bereft of cash once we remember that compensation may be owed to victims.

¹⁸ The anarcho-libertarian may be unwilling to concede this point. The previous chapter compelled anarcho-libertarians to recognize that their arguments could at best support libertarian positions. But the anarcho-libertarian may still retain firmer objections to taxation than the libertarian. The point that I make here may therefore ring hollow to the anarcho-libertarian. But the other points remain applicable.

¹⁹ Such a state is also referred to on occasion as the Night-Watchman State. See Nozick (1974: 26) for the contrast between an ultraminimal state and the Night-Watchman State.

public body performs *some* functions (at least one) and does so through the collection of *some* taxes.

What I wish to suggest is that, if such a public institution is to fill *any* tax-funded role, surely, for a libertarian, that role would be domestic policing—not necessarily the policing of interactions between community members and outsiders but simply the policing of interactions between insiders. The reason is that, for a libertarian, our freedom to live unmolested and to move about unhindered are of the utmost importance—and *limited* domestic policing would seem to constitute the public practice that best promotes these freedoms (if any exist).

But once *some* tax-funded domestic policing is permissible, tax-money may no longer be needed to finance the public monopolization of military authorization. The very same institutional structures that are required for domestic policing—prisons, police officers, and so on—may be used by public bodies to prevent private actors from authorizing military force. Such a monopoly over military authorization may be less effective than a better financed monopoly. But the monopoly may nevertheless function to prevent private actors from authorizing military force without depending upon the extra resources that proponents of the taxation argument find objectionable. Libertarians, in short, cannot entirely rule out public monopolies over military authorization according to the taxation argument once they allow for the existence of even the most skeletal of states.

None of this is to affirm the libertarian position on taxation, which I believe is misguided. Any liberal egalitarian, for example, would reject an unassailable right to property. My aim, to the extent possible, is to leave the libertarian position in tact,

making the argument that I give for public monopolization in Part I of this thesis compelling even to proponents of a philosophical position as skeptical to public monopolization as libertarianism.

Consequentialism, Take Two

Finally, let us look at the consequentialist critique of public monopolies. At least two critiques are available to the consequentialist, one aimed at just war theorists and one aimed at pacifists. The critique aimed at just war theorists maintains that a state of affairs in which public actors monopolize and authorize military force is worse than a state of affairs in which private actors and public actors both authorize military force. By contrast, the critique aimed at pacifists maintains that a state of affairs in which public actors prevent private actors from authorizing military force (monopolization) but do not themselves authorize military force is worse than a state of affairs in which public and private actors both authorize military force.²⁰

I will not analyze the critique that is aimed at pacifists. I am willing to accept that a state of affairs with *some* permissible military authorization is preferable to a state of affairs with *no* permissible military authorization. I will instead focus my attention on the

²⁰ At the outset of this chapter, I noted that the negative libertarian strategy rejects the monopolization of military authorization. Since the rejection of monopolization is insufficient to ground A_2 , the negative libertarian strategy must then rely upon one of two further moves to ground A_2 . The first move provides a justification for public military authorization, and the second move provides a rejection of pacifism (A_0). See pp. 69-71 above. We should not be surprised that a consequentialist, who must be attuned to states of affairs all things considered, would treat the rejection of public monopolization in conjunction with one of the two further moves. The consequentialist will criticize systems (1) with public monopolization and public authorization, and (2) with public monopolization and no public authorization. The first criticism is directed at just war theorists, and the second criticism is directed at pacifists. As we can see, the two criticisms correspond to the two negative libertarian moves that were identified at the outset. The two criticisms simply conjoin the rejection of public monopolization with either the endorsement of public military authorization or the rejection of pacifism. This consolidation better facilitates the outcome-oriented approach of consequentialists.

first critique, which is aimed at just war theorists. But, while I neglect the second critique, we must remember that consequentialism is interested in states of affairs, all things considered. As a result, the consequentialist argument that is endorsed in service of the negative libertarian strategy must show that a system without public monopolization is preferable to (i) a system with public monopolization and public authorization *and* to (ii) a system with public monopolization and no authorization. If it can be shown that *either* of these systems—(i) or (ii)—is superior to a system that lacks public military monopolization, then the consequentialist position fails as a negative libertarian defense of A₂. Therefore, my conclusion—which challenges the consequentialist pair-wise ranking of a system with no public military monopolization ahead of (i)—should suffice to challenge the consequentialist embrace of A₂.

Let us turn then to this pair-wise ranking. The standard motivation of this ranking is that militaries may be needed to defend public interests but that centralized militaries are inimical to the very interests that these militaries are erected to protect. According to this instantiation of the negative libertarian strategy, public monopolies over the authorization of military force are problematic for the dangerous outcomes that they will likely foment.

Alexander Hamilton, in the ratification debates over the US Constitution, expressed a close relative of this position, arguing that while the federal government must have authority over state militias, state militias should function as protection against the potential excesses of a federal military. These militias, of course, were themselves public, controlled by various state governments, and so the Hamiltonian consequentialist argument favored a decentralization of rights among public entities rather than a

decentralization among both private and public entities. But the grounds for Hamiltonian decentralization are no different from the grounds that we might employ for a form of decentralization among private actors. The important point is that *some* organizations be prepared for protection to counteract an unchecked public monopoly. Such organizations, of course, may not be wholly licensed to authorize war in the same way that the central government might be licensed, but they would nevertheless be trained, armed and entitled to do so if needed.

While this consequentialist rejection of public monopolies over the authorization of military force may seem implausible, we should pause to consider the current structure of the international system. If decentralization is problematic, how could we justify our system of states instead of a centralized global state with a single military? Some cosmopolitans do accept such a state, and so this question will be immaterial for them. Many, however, recoil at such a possibility. To them, a world with one military seems rather dangerous. At least with decentralization, entities are able to prevent others from gaining ascendancy and limit their capacity to perpetrate the kind of atrocities that may be unimaginable in a decentralized system. But the difficult question to then confront is, why pursue decentralization at the global level but not at the local level? Why is the state an ideal locus for military centralization and not a sub-state entity?

Some of the most astute arguments against the Hamiltonian consequentialist position are provided by John Jay (1996 [1787]: 10-12), who was concerned to show that federal control over the militias was necessary and that an arrangement of unified military authorization rather than state-by-state authorization was needed. The arguments provided by Jay against the Hamiltonian strands that, according to a negative libertarian

strategy, reject public monopolization will be considered. The consequences of a system where Jay's critique of Hamilton is circumvented will then be considered against a system where Hamilton's critique of public monopolization is circumvented.²¹

We may recall from the previous chapter that any sound consequentialist argument must account for what I have termed the destructiveness metric, or DM, which represents both the number of wars that will be fought and their severity. Jay offered a variety of arguments to suggest that, contra Hamilton, centralization rather than decentralization would minimize the DM. The contours of Jay's argument may be reconstructed as follows: (a) the multiplication of entities who may authorize war will result in increases of the DM; because (b) only public consolidation can effectively reduce the number of entities who may authorize war (i.e. markets tend to promote and ensure consolidation less effectively than the government), (c) we must favor public consolidation.

Jay offers an ecumenical set of reasons in support of (a). First, if several entities that authorize war are consolidated into one, the pool of talent for those who are in charge of authorizing war will be superior to the pool of talent among any of the pre-consolidated entities. Decisions will be more 'wise, symmetrical, and judicious' as 'more general and extensive reputation for talents and other qualifications will be necessary to recommend men to offices' (1996 [1787]: 10). Second, through consolidation, we will have fewer people interpreting laws, which will promote less confusion and more consistency (1996 [1787]: 10-11). Third, smaller, less diverse groups are more likely to

²¹ The debate surveyed here between Hamilton and Jay is not the only consequentialist debate that one could have regarding mixed market economies of military force. It does, to my mind, however, capture (at least many of) the most compelling consequentialist positions on offer and will therefore be taken as representative.

share the interests that lead to war than larger, more diverse groups. Violence, Jay writes, ‘is more frequently caused by the passions and interests of a part than of the whole; of one or two states than of the Union’; in a large body politic ‘wisdom and prudence will not be diminished by the passions which actuate the parties immediately interested’ (1996 [1787]: 11-12). Fourth, consolidated entities may better deter war: ‘it is well known that acknowledgments, explanations and compensations are often accepted as satisfactory from a strong united nation, which would be rejected as unsatisfactory if offered by a State or confederacy of little consideration or power’ (1996 [1787]: 12). For reasons then of talent, legal consistency, moderation, and the capacity to deter, we might expect to find something like a direct correlation between the number of actors who may authorize wars and minimization of the DM.

Though Jay does not provide an argument for (b)—that public consolidation is needed if the number of authorizing wartime entities is to be limited—the thought is straightforward and plausible. Without public consolidation, we are unlikely to see a sustained willingness by private groups to renounce wartime authorization. Rather, a familiar prisoner’s dilemma takes hold: while small groups in a market might enjoy optimum tranquility through disarmament, they face the prospect of radical losses if their disarmament is met with non-cooperation. So they remain armed, foregoing the possible benefits of cooperation but averting the catastrophes of disarmament.

If this is right, then Jay’s consequentialist argument in favor of centralization will be forceful. But the ultimate question is whether the helpful aspects of private entities checking government power are sufficient to outweigh the helpful aspects of decreasing the number of entities who are permitted to authorize war. Are the benefits that Jay

envisions of centralization sufficient to outweigh the benefits that Hamilton envisions of decentralization?

Once we see that the advantages of Hamiltonian decentralization can be realized *within* the centralized system that Jay envisions, the answer I want to suggest is clearly yes. So long as public monopolies are conditional, private entities may check public entities without themselves having license to authorize war. If a public entity is entitled to monopolize the authorization of war so long as they satisfy some set of conditions S (over which they themselves have control) *and* citizens are capable of terminating the public monopoly if any condition S is violated, then we may conclude that citizens are capable of checking public monopolies over the authorization of war despite themselves lacking the right to authorize war. They, of course, would gain the right once any condition S is violated. But, before this, they would not.²²

Moreover, we should not forget that the checks a citizenry might place on the government (to uphold the conditions S upon which military monopolization is justifiable) may be non-military in nature. Term limits on military command are an example—of which many exist. Given the possibility then of controls, both military and non-military in nature, and the advantages of limiting the number of entities who may authorize war, it seems that a consequentialist position in favor of a mixed market economy of military force would be implausible.

²² A worry is that, unless private citizens are actually trained and prepared to enforce S militarily, they cannot constitute an effectual check on centralized power. But the possibility of a *public* militia system that is similar to the one ultimately endorsed in the *Federalist Papers* should neutralize this worry. Public militias, under the command of a centralized government, can, if sufficiently representative of the citizens on behalf of whom the centralized government is licensed to authorize military force, function as the instrument by which citizens terminate public monopolies when needed.

The Positive Libertarian Strategy

I have now criticized four negative libertarian strategies for grounding mixed market economies of military force (A_2). None of these arguments succeed in showing that public actors lack the moral authority to monopolize the authorization of military force. I will now turn to the positive libertarian strategy. Cécile Fabre (2008: 969), who is not a libertarian but presents a concise version of the positive libertarian argument, puts the position as follows:

I submit that the right to protect oneself is a *human* right, in the sense that it is a right to a freedom (to wit, the freedom to defend oneself without interference, against others), which we need in order to lead a minimally flourishing life. By extension, the right to wage a war in defence of one's human rights should also be conceived as a human right. If that is so, it cannot be denied to some groups of individuals on the grounds that they lack some characteristic or others, when lacking or possessing those characteristics is irrelevant to their fundamental interest in being able to protect their rights. Whether or not a group is a national liberation movement or a state, or is organized into a supranational institution, is precisely one such characteristic.²³

This two-step approach, though pitched here to cosmopolitans, seems to be the hallmark of any positive libertarian account: The first step is the *individual-claim*: individuals have rights to authorize deadly force under certain conditions (for example, in self-defense); the second step is the *military-claim*: the grounds upon which individuals are entitled to authorize deadly force permit private groups of individuals (or single individuals) to authorize deadly force on the scale that wars are fought. Few, of course, would deny the individual-claim. Though the list of permissible instances of private force are debated—whether, for example, the right to punish is attributed to and is exercisable by individuals

²³ This rendering of the positive libertarian position has a distinctly cosmopolitan phrasing. For a similar cosmopolitan position, see Moellendorf (2002). Fabre cites Vitoria and Grotius as early advocates of her position. Vitoria, for instance, writes that 'any person, even a private citizen, may declare war and wage a defensive war' (in Fabre 2008: 970).

is by no means obvious—the existence of *some* instances is not. By contrast, the notion that an individual right to authorize deadly force entails a right to authorize *military* force is far less intuitive.

Four objections may be raised against the military-claim. Only the final objection, I will argue, is ultimately decisive—but each should be considered so that we can understand precisely why the final objection is damaging. The first objection is taken from David Rodin’s work on self-defense (2003; 2006). Rodin argues that the permissions granted in the current international system by the right to wage war go far beyond the permissions granted by individual rights to self-defense. First of all, under current international law, militaries may kill soldiers on the other side who are not engaged in combat and may, after being attacked, stage counteroffensives; as a result, the right to wage war cannot easily be reduced to the right of individuals to defend themselves.

One potential retort for a defender of the military-claim conceives of military force not simply as ‘a lot of people exercising the right of self-defense at the same time and in an organized fashion’ but rather as a group of soldiers fighting on behalf of other individuals (Rodin 2003: 140). Yet, as Rodin would argue, the military-claim still looks problematic. States are entitled to fight wars in defense against bloodless invasions, and they are entitled to fight wars when the threat of fighting is actually greater to their own citizens than a choice not to fight. In both cases, the right of states to wage war is far more expansive than the right of individuals to engage in self-defense. The result, according to Rodin, is that states cannot possess the right to wage war that they are

currently granted under international law if the justification for these rights is individual self-defense.

But do these arguments show that the military-claim is false—that the grounds upon which individuals are entitled to authorize deadly force do not entail a permission for private groups of individuals to authorize deadly force? They do not. First, Rodin's argument applies only to wars fought on the grounds of self-defense, excluding other potential rationales like humanitarian intervention and law enforcement. Second, and the first point notwithstanding, Rodin's argument, as he acknowledges, shows only that states, as they currently operate, cannot authorize military force according to arguments from self-defense. Were the system to change, the arguments might no longer apply.

Finally, even if no state could meet the conditions that Rodin requires for a right to wage war, still it seems that private groups very well might. It is the disconnect between the individual exercise of force in an interpersonal context and the group exercise of force in the context of war that gives Rodin's argument so much force. But the context of private authorization may share more properties with the interpersonal context in which force is justifiable than the context of public authorization. For a start, private entities authorizing war may not possess territory in the way that states tend to possess territory, thus eradicating one distinction between self-defense in the interpersonal context and self-defense in the context of war. The bloodless invasions to which states now respond and which diverge from the threats that are thought to permit self-defense in an interpersonal context may then not be applicable. The point here, to be sure, is not that private entities are alone capable of sidestepping Rodin's criticism. The point is that private authorization may be more easily accommodated into the framework

required of Rodin's position than public entities. With all of this in mind, we must conclude that Rodin's position is not capable of defeating the military-claim.

A second promising objection to the military-claim proceeds with reference to weapons ownership. An individual right to self-defense may justify the ownership of guns. But just as such a right does not entail the further right to stockpile certain weapons, the argument goes, the individual right to self-defense does not entail the further right to undertake the preparations that would be necessary for military authorization. Hugh LaFollette (2000: 268) persuasively reminds us that the individual right to self-defense may be robust, but not sufficiently robust to accommodate the further individual right to prepare for confrontations by, say, accumulating tactical nuclear and biochemical weapons. Even if we could imagine extreme scenarios in which the private deployment of a tactical nuclear or biological weapon would be justifiable in self-defense (if that were possible), private citizens should not be permitted to anticipate those scenarios by taking the precaution of obtaining such weapons.²⁴ Weapons are extremely dangerous, and '[t]okens of fundamental rights may be restricted to protect others from serious harms arising from the exercise of those rights' (2000: 265).

An argument structured precisely along these lines is available to the critic of private military authorization. Private actors require weapons and training if they are to have a reasonable prospect of success when authorizing military force (which, of course, is demanded of just wars). A state that instituted a ban on weapons—on tactical nuclear weapons, biological weapons, perhaps even grenades and guns—would seemingly be a state whose residents were incapable of privately authorizing military force. Similarly, a

²⁴ These weapons, of course, might also be off-limits for *public* possession on the same grounds. But I leave aside this more challenging question here.

state that instituted a ban on military training—on the formation of organizations designed to authorize military force (i.e. private protective associations and private militias), the further organization of members into cells or units, and the implementation of disciplinary regiments to prepare members for combat—would also be a state, it seems, whose residents were incapable of privately authorizing military force.²⁵ If the substance of our right to self-defense may be limited to protect others from harm, as LaFollette correctly argues (I believe), then the tools and preparation upon which private military authorization is dependent, both empirically and morally, may be outlawed. This, in turn, may obviate the need to query private military authorization.

At least two related difficulties, however, confront this position. First, governments may never be capable of outlawing the totality of weapons and training that are needed for war. Second, even if the prohibition on conventional weaponization (assault rifles and training camps) were successfully implemented, enterprising militants may rely upon unconventional strategies. We need only recall the destruction that commercial airliners, transformed into precision guided missiles, caused on September 11 to see how conventional tools, which should not be banned, may be converted into unconventional weapons for the authorization of war. An airplane, we might say, is a *dual-use* machine, which may be used for peaceful purposes and war-making purposes.²⁶ By the same token, the training that is required for war may be dual-use training. A computer software engineer may develop the skills that are needed to initiate cyber-attacks, which take down electrical grids. But, of course, a government ought not to prohibit the education of computer software engineers. Because a morally permissible

²⁵ This may or may not rule out the sort of *public* militias that might operate in a federalist system.

²⁶ The term dual-use is typically used to describe facilities that are targeted in war with both civilian and military functions. See, for example, Shue and Wippman (2002). But the term should also be suitable here.

government prohibition on weapons and training cannot rule out dual-use weapons and training, such a governmental prohibition will be incapable of grounding public monopolies over military authorization.²⁷

A third potential objection to the military-claim is that arguments for public military monopolization are *institutional*, not *interpersonal* propositions. As LaFollette (2000: 270) writes about gun control, it ‘does not concern what private individuals should do but what governments should allow private individuals to do’. Perhaps we should say the same of public military monopolization—that it concerns what governments should allow private individuals to do, not what private individuals ought to do. While this view, I believe, is largely correct, it camouflages a complexity that, once acknowledged, resuscitates the military-claim.

Consider a quintessential example that is used to justify propositions like the military-claim: the Warsaw Ghetto uprising. As Rodin (2003: 140) remarks, when the Jews trapped in the Warsaw ghetto resisted Nazi aggression, they ‘were quite literally fighting for their lives’ in a way that it becomes possible ‘to understand their actions as justified wholly within the conceptual scheme of individual rights’.²⁸ Surely, individuals in such a position are justified in privately authorizing military force. Call this position

²⁷ This analysis of the second retort is even stronger when we remember that the agent who authorizes military force need not be the agent who supplies military force. A private authorizing entity does not have to *itself* possess the weapons and training that are needed to prosecute war. So long as *someone* possesses these weapons and training and are willing to use them on behalf of the private authorizing entity, then the private authorizing entity may be capable of authorizing war. Forces like the ‘Gates Justice Militia’ that were introduced at the start of this chapter may be hired from abroad, and thus the existence of a single territory with an ineffectual ban over single-use weapons and training (or a single territory where dual-use weapons and training are available) is enough to demand further analysis of private military authorization.

²⁸ Rodin proposes this example not to endorse the view that private military authorization is sometimes permissible but to underscore the point that *group-defense*, in contrast to national-defense, is sometimes permissible on grounds of self-defense.

the *argument for emergency authorization*.²⁹ The deep challenge for any critic of the military-claim, it seems, is to show that even in situations of emergency, like confinement in the Warsaw Ghetto, private military authorization is *still* impermissible.

The claim that arguments for public military monopolization are institutional, rather than interpersonal propositions, purportedly skirts this challenge. But while the argument for emergency authorization certainly may press an interpersonal question about whether private individuals are ever permitted to authorize military force, it also presses an institutional question that, in a way, precedes the interpersonal question. The question concerns the mechanism by which private actors, like members of the Warsaw Ghetto, must authorize military force. Should they do so as independent private actors or in some other fashion, perhaps even as a public actor? I noted in Chapter 1 that, while ‘public authorization’ may be equated with ‘governmental authorization’ until more could be said, non-governmental authorization is not always private—for instance, when guerilla movements authorize military force.³⁰ The argument for emergency authorization does not simply ask whether residents may authorize military force. It asks whether residents, *as private individuals*, may authorize military force. If they were able to authorize military force publicly—in the way that non-state actors like guerilla movements authorize military force publicly—then the argument from emergency may be less forceful.

Supposing then that there are *some* steps available to residents of the Warsaw Ghetto that could transform a private military authorization into a public military authorization, then residents are confronted with institutional concerns like any public

²⁹ In Part II, I will examine an argument for emergency supply.

³⁰ See Chapter 1, pp. 11-12.

actor. Should the insurgency, for instance, monopolize the authorization of military force by Ghetto residents? Or might private individuals in the Ghetto be justified in authorizing their own wars of liberation without consulting other Ghetto residents? Once we recognize that the decision to authorize military force by Ghetto residents may be public or private, we must determine whether the private authorization of war would be justifiable or whether public, but non-governmental actors, are permitted to withdraw decisions of military authorization from the private sector and reserve them for public discharge. In other words, the military-claim remains alive as an institutional proposition and cannot be sidestepped, as LaFollette does in the context of gun control, merely by shelving interpersonal concerns.³¹

The final, and I believe decisive, retort to the argument for emergency authorization, and thus to the military-claim, is that it is not at all obvious that individuals in emergency circumstances, like the Warsaw Ghetto, should be permitted to authorize military force without consulting other members (and potentially authorizing military force publicly). The military-claim relies upon the strong intuition that members of the Warsaw Ghetto must not be allowed to perish so that a bullheaded prohibition on private military authorization can be preserved. But, as I have pointed out, a prohibition on private military authorization does not demand that the Warsaw Ghetto residents perish. It may only demand that, when authorizing military force, they do so in an institutionally defensible way. Wars, after all, have the potential to cause widespread death and

³¹ One final point is worth noting. Even if the institutional worry just raised were set aside and all Warsaw Ghetto residents were treated as private actors, at least one further institutional question remains. How should governments around the world respond to an uprising by Warsaw Ghetto residents? Should these governments, in the name of public military monopolization, seek to thwart the private authorization of military force? Or should they instead remain neutral or offer assistance? For this reason, in addition to the reason defended above, emergency cases like the Warsaw Ghetto uprising cannot be treated merely as interpersonal cases.

destruction. The thought that an individual in the Warsaw Ghetto who chooses to unleash this death and destruction on behalf of residents but without consulting them is acting permissibly—so much so that argumentation is unnecessary—is too quick.

I do not mean to claim yet that such action *would be* impermissible. Much more needs to be said. In particular, a full-fledged theory of public military monopolization is demanded (the ambition of the next two chapters). But, even without such a theory, we may object to the positive libertarian strategy of defending A_2 , as the military-claim has not been successfully demonstrated. Recall the proposition of the military-claim: the grounds upon which individuals are entitled to authorize deadly force permit private groups of individuals (or single individuals) to authorize deadly force on the scale that wars are fought. For the reasons that I have outlined, this claim lacks the intuitive plausibility that is needed for a confident embrace of A_2 . Without further argumentation then, our endorsement of A_2 should be withheld.

Conclusion

This chapter has aimed to reject libertarian endorsements of A_2 . First, I demonstrated that the negative libertarian defense of A_2 , which maintains that the public monopolization of the military authorization is unjustifiable, fails. Negative libertarian arguments from natural rights, paternalism, taxation, and consequentialism all proved unpersuasive. Next, I showed that the positive libertarian defense of A_2 , which maintains that private military authorization *is* justifiable, also fails. In the next two chapters, I will provide a full

defense of public monopolization and thus finalize rejections of A_1 and A_2 . I will also make a case for public military authorization and hence a rejection of A_0 .

4

Public Monopolies Over Military Force, I: All Affected Fundamental Interests

...is [there] not after all some wisdom in the half-serious comment of a friend in Latin America who said that his people should be allowed to participate in our elections, for what happens in the politics of the United States is bound to have profound consequences for his country? Do not dismiss his jest as absurdity. In a world where we all have a joint interest in survival, the real absurdity is the absence of any government where the joint interest is effectively represented.

-Robert Dahl (1990: 51)

Part I has thus far challenged critiques of public military authorization and the public monopolization of military authorization. As we saw in Chapter 2, the anarcho-libertarian endorsement of free market economies of force (A_1) fails to successfully rule out public military *authorization* and, as a result, collapses into an endorsement of mixed market economies of force (A_2). As we then saw in Chapter 3, the libertarian endorsement of A_2 , whether endeavored via the negative strategy or the positive strategy, fails to successfully rule out the public *monopolization* of military authorization.

The next two chapters, Chapter 4 and Chapter 5, offer a positive case for these two practices—public military monopolization and public military authorization.¹ I aim to show first that public entities must prevent private entities from authorizing military force (monopolization). In light of this argument, A_1 and A_2 must be rejected. I then seek

¹ Recall our definition of public monopolization of military authorization: the withdrawal of decisions of military authorization from the private sector and the reservation of these decisions for public discharge. As with the last chapter, the terms ‘public monopolization of military authorization’ and ‘public monopolization’ will be used synonymously.

to show that public monopolizing entities have a responsibility to authorize military force when the security of those who have been disarmed (their constituents) is threatened. The upshot of the second argument is that A_0 , the non-provision of military force, must be rejected. If my analysis in these two chapters is sound and public institutions must monopolize the authorization of military force, and indeed authorize military force when needed, then only three arrangements will remain as candidates for our potential endorsement: A_3 , A_4 , and A_5 . In order to assess these arrangements, which is the goal of Part II, we must shift our attention away from questions of military authorization to questions of military supply—specifically to the question of whether public monopolizing entities may justifiably *outsource* military functions to the private sector. Now, however, we should finalize our commitment to the exclusive authority of public entities to authorize military force.²

Before initiating an argument for this right, let me briefly make a few remarks about the terminology and structure that I adopt. This chapter presents the first part of a two-part case for public military *monopolization* (public military *authorization* is defended after monopolization). The position that I defend for public monopolization is referred to as the *risk-prevention argument*. According to the risk-prevention argument, private military authorization is impermissible and public military monopolization permissible, because private military authorization would impose considerable risks on individuals who lack a say in authorization (and we ought not to impose considerable risks on individuals who lack such a say). Individuals who are affected by decisions of military authorization must have an opportunity to voice their input.

² When I refer to ‘exclusively public military authorization’, I am referring to the combination of public monopolization over military authorization and public military authorization.

Which individuals, we may wonder, ought to have such an opportunity? One set of individuals who should *not* have this opportunity, I argue, are the enemy combatants under attack by private actors who have forfeited their freedom from substantial imposition. But two further sets of individuals, I seek to show, both of whom are subjected to risk by private decisions of military authorization, *do* deserve a say. One set (perhaps counter-intuitively) are members of the community against whom private force is authorized who have *not* forfeited their freedom from substantial risk-imposition and who lack a meaningful voice in their own government. The second set are members of the international community—especially those who reside in geographic locations that are close in proximity to or may *become* close in proximity to the theater of hostilities—who have not forfeited their freedom from substantial risk-imposition. According to my analysis, private actors who authorize military force without the input of these groups subject them to unjustifiable risks. Consequently, both groups may be entitled to participate in any private decisions of military authorization.

I should note that one important class of individuals who are included in the second group are the *affiliates* of private authorizing entities: the co-nationals, coreligionists, and others who may become targets of retaliation on account of their shared group membership with, or proximity to, private authorizing entities. The unjustifiable risks imposed by private actors authorizing military force may be imposed *directly* (when *their* military harms those with immunity) or *indirectly* (for instance, when they cause the enemy to harm those with immunity). It is the latter variety of risk—indirect risk—that typically plagues affiliates. A paradigm example was the Al-Qaeda authorization of military force against the US, which caused the US to retaliate against

Afghanistan. Al-Qaeda, on my view, subjected its affiliates (the Afghani people) to unjustifiable risks by authorizing force against the US.³ In light of these indirect risks, the affiliates of private authorizing entities must be included in private decisions of military authorization. And because, according to the risk-prevention argument, this inclusion can only be assured publicly, decisions of military authorization must in the end be withdrawn from the private sector and reserved for public discharge—which is to say that decisions of military authorization must be publicly monopolized.

Versions of the risk-prevention argument have been sketched by several political theorists, some registering their support for its conclusion (McMahan 2010; Pattison 2007) and others expressing opposition (Fabre 2008). Though the versions that other theorists have sketched provide a helpful starting point for analysis, they are either too narrow for our examination—speaking, for instance, only to the need for public authorization in the context of humanitarian intervention—or are ineffectively framed. I will construct a version of the risk-prevention argument that includes the full range of wars under the reach of its conclusion and that attempts to shore up the weaknesses that challenge alternative versions. In developing my argument, I borrow insights from a variety of literatures, including work on the boundary problem in democratic theory, risk-assessment in decision theory, the precautionary principle in environmental theory, and retaliation in internal relations theory. No single premise (or sub-premise) that I offer is particularly novel. However, the argument as a whole, I think, represents a promising but insufficiently charted approach to the authorization of war.

³ This example, on first glance, will undoubtedly raise a number of questions and concerns. I cannot address these questions and concerns at this stage but will do so in due course.

The risk-prevention argument for public military monopolization will be presented in the two broad premises: the *all affected fundamental interests premise* and the *risk imposition of war premise*.

- P₁. *All Affected Fundamental Interests*: A decision must be withdrawn from the private sector and reserved for public discharge when one course of action under consideration imposes risk, above some threshold level, to the fundamental interests (e.g. physical security) of enough individuals. Fundamental interests are interests that are sufficiently weighty so as to be protected by rights.
- P₂. *Risk Imposition of War*: The private decision to authorize military force imposes risk (directly and indirectly), above an acceptable threshold level, to the fundamental interests of enough individuals. Specifically, the private decision to authorize military force imposes such risks to our fundamental interests in physical security.

Chapter 4 will defend P₁, and Chapter 5 will defend P₂. If these two premises are correct, then the decision to authorize military force must be withdrawn from the private sector and reserved for public discharge. According to the conclusion of the risk-prevention argument then, the authorization of military force must be publicly monopolized, and A₁ and A₂ must be rejected. As we can see, however, the risk-prevention argument does not support the further claim that public entities may authorize military force when needed. To defend that claim and hence a rejection of A₀, I develop a second argument, referred to as the *compensation argument*, which will be presented in Chapter 5 once the risk-prevention argument is complete.

The current chapter proceeds as follows. In the first section, I briefly consider and dismiss five prominent arguments for the public monopolization of military authorization. In the second section, I introduce the risk-prevention argument as an alternative to these arguments by presenting versions that have been put forward by Jeff McMahan, James Pattison, and Cécile Fabre. With these versions (and their limitations)

in mind, I take up P_1 . In the third section, I elucidate the principle from which P_1 is derived—the all affected interests principle—and specify three sub-premises that together constitute P_1 . The fourth, fifth, and sixth sections go on to defend these sub-premises. Once my defense of these sub-premises and hence P_1 is finalized, I move on to consider P_2 in Chapter 5.

Five Just War Arguments for Public Monopolization

Five compelling arguments for the public monopolization of military authorization will be considered to contextualize the risk-prevention argument and to underscore the challenges that must be met in advancing it. Each of these five arguments presumes that public monopolizing entities will also themselves authorize military force. We must remind ourselves, however, that the public monopolization of military authorization does not necessarily entail public military authorization.⁴ A public actor may possess the right to withdraw decisions of military authorization from the private sector but lack the right to authorize military force.⁵ Public monopolization, in other words, is consistent *both* with endorsements of A_0 *and* with endorsements of $A_3 - A_5$.

In this section, I analyze the public monopolies that have been pushed by theorists writing in the just war (or ethics of war) tradition and hence in defense of $A_3 - A_5$. I leave aside pacifist theories of public monopolization for the moment, largely because my own position aims to fill a gap in the just war tradition. But, in Chapter 5, once the risk-

⁴ See Chapter 1, pp. 30-31 for more on this point.

⁵ The presumption, of course, is that public actors can withdraw decisions of military authorization from the private sector without using military force.

prevention argument is complete, I will consider how my position compares with a pacifist position on public monopolization (and authorization).⁶

Let us turn now to the five prominent just war endorsements of public military monopolization. The first is offered by Simon Caney (2005: 206), who follows Aquinas in arguing that private entities, at least in the current international system, must be prohibited from authorizing military force, because they have an available alternative to rectify their grievances: the state. As Aquinas (1988 [1266-73]: 221) writes, ‘it is not the business of a private individual to declare war, because he can seek redress of his rights from the tribunal of his superior’.⁷ The problem with this position, as Cécile Fabre (2008: 971-972) points out, is that it will not suffice when individuals lack access to legal recourse, ‘whether because their aggressor is their own state, or because their state, which is supposed to defend against their foreign aggressor is unable or unwilling to do so’. Moreover, the position fails to identify *why* deference must be paid to public bodies in those cases where individuals do possess legal recourse for their grievances. Why must private individuals avail themselves of legal channels and appeal to the tribunal of their superiors rather than simply authorize military force as they see fit?

A second argument, also offered by Caney (2005: 207), is that private entities must not be permitted to authorize military force, because individuals reasonably disagree about when and how military force should be authorized—and private military authorization would subvert the fair resolution of such disagreement. While I believe (and will argue) that reasonable disagreement over the authorization of war *should* factor into our rejection of private military authorization, I do not believe that it can alone

⁶ There, I challenge the pacifist rejection of public military authorization that accompanies their embrace of public military monopolization.

⁷ This is quoted in Caney (2005: 206).

constitute a rejection of private military authorization. Countless decisions in a society are characterized by reasonable disagreement, and yet we do not prevent private actors from making all of these decisions. For instance, people disagree about which religion is most credible, but we do not insist that decisions about religion be withdrawn from the private sector and made by public institutions. If reasonable disagreement is to motivate such a withdrawal in the context of military authorization but not in the context of religious belief, a further argument is needed to show why reasonable disagreement in the context of military authorization is the kind of reasonable disagreement that demands public monopolization. I have no doubt that it does; indeed, the risk-prevention argument provides the further argumentation needed to demonstrate as much. But the important point for now is that reasonable disagreement is not alone sufficient to reject private military authorization.

A third argument against the private authorization of military force is offered by James Pattison (2008: 150).⁸ Pattison presents two formulations of the argument, a stronger formulation and a weaker formulation. According to the stronger formulation, public monopolization over military authorization is *necessary* for the regulation of war. He writes: in ‘restricting which particular agents can use force’, monopolization ‘makes it possible to establish legal and political instruments that govern and regulate warfare’, which in turn ‘help to provide a common framework to reduce the horrors, and frequency of military force’ (2008: 150). To the credit of this position, it is certainly true that contemporary international humanitarian law depends upon the public monopolization of military authorization. But the existence of legal and political instruments that govern

⁸ Pattison (2008: 150) is careful to note that his arguments do not seek to show that public military authorization is a necessary condition for the permissibility of a given war. Rather, public military authorization ‘is an important...factor in the overall justice of war’.

warfare is not *necessarily dependent* upon the public monopolization of military authorization. Under international commercial law, another realm of regulation, private entities engage in business exchanges with one another and with states. But these business exchanges are nevertheless effectively regulated by mechanisms like the World Trade Organization (WTO). The WTO does not require the public monopolization of trade in order to function. It would seem that similar regulatory schemes could apply to war if private entities were permitted to authorize military force against one another and against states. Laws governing private transactions are not, in any obvious way, necessarily inapplicable to war. Seemingly then, the public monopolization of military authorization is not defensible on the grounds that it is necessary for the regulation of war.

A weaker formulation of this argument is that the public monopolization of military authorization is *advantageous*, not necessary, for the regulation of war: '[a] more permissive international system in which a wide variety of actors use force makes it more difficult to sustain effective legal and political instruments to govern warfare' (Pattison 2008:150). The problem with this line of reasoning is that even if the public monopolization of military authorization would make the regulation of war easier, the enhanced ease could not sustain an argument for public monopolization. Imagine an international system where only states whose capital city begins with the letter A were permitted to authorize military force. This norm, which limits the number of actors who may justifiably authorize military force, could make the regulation of war far easier than alternatives. Yet, if a state whose capital city started with the letter B were attacked, the norm would not provide a good reason for this state to forego authorizing military force.

The simple point is that a norm may be questionable even if it facilitates enhanced regulatory efficacy. In the example just given, the norm may violate the rights of states whose capital cities start with B when these states are forced to suffer their demise. To all but the committed consequentialist, a defense of public monopolization that relies upon the promotion of enhanced regulatory efficacy will be unsatisfying.

Having now considered and challenged three arguments against the private authorization of military force, let us turn to a fourth. The fourth argument for public monopolization, also presented by Pattison, maintains that democratic control is better preserved by public military monopolization than any alternative. According to Pattison (2008: 153), we have reason to preserve democratic control both because democracy is ‘instrumentally valuable, since it leads to more peaceful behavior, particularly in relation with democracies’ and because democracy is ‘intrinsically valuable for reasons of self-government and individual autonomy’. I will leave aside the former justification, as I believe it is vulnerable to the same deontological challenge that was just raised against the argument from enhanced regulatory efficacy.

The difficulty with the latter justification is, first of all, that the private authorization of military force is not obviously at odds with the intrinsic values of self-government and individual autonomy. To see this, consider a contrasting example in which a private decision *does* seem to be at odds with these values. When a state is set to make a decision as a collective on whether to build highways, and a private actor supplants public judgment with her own judgment, then the values of self-government and individual autonomy are undoubtedly undermined. Citizens are excluded from deciding whether or not *their* state will build more highways. But when a private

individual authorizes military force on her own accord (and not on behalf of her state), she is not preventing citizens from deciding whether or not *their* state is going to authorize war.⁹ Citizens may still decide for themselves whether or not to authorize war.¹⁰

Moreover, even supposing *arguendo* that the values of self-government and individual autonomy *are* undermined by the private authorization of military force, still it is not clear that these values are sufficient to ground public military monopolization.¹¹ Consider an example proposed by Pattison in which a government makes undemocratic decisions but always promotes its citizens' interests. Pattison (2007: 577) writes correctly, I think, that while 'such a government would not be *that* objectionable because it would be promoting its citizen's interests, something morally important is still missing'. This morally important, missing piece is not one that Pattison believes can alone ground public military monopolization.¹² Rather, it is pitched as one consideration among several that weigh against the justifiability of private military authorization. But the argument from democratic control may nevertheless be assessed for its stand-alone plausibility (particularly since all other arguments have so far been challenged). When considered in this way, it seems inadequate to ground public military monopolization.

The fifth and final argument to take up against private military authorization concerns distributive justice. According to this argument, only through the public

⁹ One worry, which I will analyze at great length, is that private actors may drag their states into war. In that sense, these actors may make it difficult for citizens ultimately to choose a course of action besides war. However, values of self-government and individual autonomy, it would seem, are still realized in those circumstances in which citizens democratically authorize wars since individuals are still making a choice.

¹⁰ Of course, the regrettable loss may be that citizens who do not monopolize military authorization will be engaged in one less collective enterprise, namely the collective enterprise of preventing private actors from authorizing military force. But this does not seem to be the worry at stake.

¹¹ For a powerful critique of the value of self-government, see Valdman (2010).

¹² See footnote 8 at p. 110 above for more on this point.

monopolization of military authorization can a society ensure that military protection will be provided equally, or even sufficiently, to all members. In many societies today, like the US and the UK, where economic and social inequalities are colossal, one good that is truly enjoyed more or less equally by all citizens is military protection. Bill Gates is protected by the US military to roughly the same extent as a homeless person in New York City. Since neither Bill Gates nor the homeless person are currently entitled to authorize military force on their own, we must conclude that Bill Gates and the homeless person are *similarly vulnerable* to situations that require the authorization of military force.¹³ And when military authorization is required, Bill Gates and the homeless person will either be protected together or not at all.

While this argument is compelling on its face, it suffers from a simple problem: societies need not monopolize military force to ensure the proper distribution of military protection. They may ensure such a distribution by issuing vouchers to be redeemed with private firms, which are permitted to authorize military force. These vouchers may serve sufficientarian conceptions of distributive justice: just as food stamps are issued to feed the poor, protection stamps may be issued to safeguard the vulnerable. Vouchers may also be distributed to neutralize the effects of bad brute luck—to those who live in dangerous areas and those who are naturally fearful of foreign attack (if ‘expensive tastes’ are accommodated). More generally speaking, vouchers may be conjoined with the redistribution of other goods (including health care, education, and so on) to ensure that one’s total bundle of goods will correspond to the demands of *any* favored distributive principle, whether sufficientarianism, luck egalitarianism, or something else.

¹³ It is true that individuals in a given polity may receive varying amounts of protection. But national defense today is *largely* perceived by advanced democracies as holistic. Any breach is thought to be a threat to all.

It might be argued that individuals must not simply receive military protection according to a justifiable distributive principle but that they must receive the *very same* military protection. But it is not clear why, on egalitarian grounds, or any other distributive grounds, individuals must receive protection from the same agency; what matters for egalitarians is they receive equal protection, and what matters to proponents of other distributive principles is that they receive protection according to those principles. Any further requirement that the *same* agency provide protection would seem to go beyond questions of distributive justice.

The Risk-Prevention Argument

Having dismissed five just war rationales for the public monopolization of military authorization, I will now consider the risk-prevention argument as an alternative to these rationales. According to the risk-prevention argument, the reason why private entities must not be permitted to authorize military force is, at root, because such authorization would impose substantial, un-chosen risks upon others. Before presenting my own version of the risk-prevention argument, I want to briefly outline versions that have been offered by Jeff McMahan, James Pattison, and Cécile Fabre. I consider these versions to extract several compelling claims that I later endorse.

McMahan (2010) and Pattison (2007) each present versions of the risk-prevention argument in the context of humanitarian intervention. In particular, both claim that, because humanitarian interventions impose risks upon the intended beneficiaries, these

intended beneficiaries must have a say in military authorization.¹⁴ McMahan (2010: 50) writes: humanitarian intervention ‘can seldom promise rescue without also endangering its beneficiaries’, and we must not ‘expose people to the risk of such harm in the absence of compelling evidence that they are willing to accept that risk for the sake of the promised benefits’. If the individuals on behalf of whom an intervention is authorized genuinely do not *want* the intervention to proceed, then, on the view of McMahan and Pattison, it ought not to proceed.

We should note that whereas McMahan requires interveners to seek the *consent* of intended beneficiaries, Pattison demands that interveners attempt to *represent* them. Yet, while this distinction may seem consequential, it belies an essential congruity between the two views. McMahan acknowledges that the acquisition of consent from all who are subjected to risk, which would be ideal, is nearly impossible given the time pressures of humanitarian intervention. Moreover, even if it were possible, those subjected to risk are almost never in unanimous agreement (or unanimous opposition) to the proposed intervention. For these reasons, McMahan (2010: 47) takes consent to be ‘something more like a widespread or general desire for intervention’. This acknowledgment thus renders the consent that McMahan advocates nearly identical to the representation that Pattison advocates. As Pattison (2007: 579) insists, representation requires that interveners ‘establish the opinions’ of intended beneficiaries by, first, attempting to ‘obtain direct access to them’ and, if that is not possible, using ‘secondary sources or indicators of these citizens’ opinions, provided, for instance, by intermediaries’. For both

¹⁴ Pattison refers to ‘burdens’, while McMahan refers to ‘risks’. Since there is a chance (albeit slim) that a humanitarian intervention will not *actually* harm intended beneficiaries, I prefer a language of ‘risks’ to ‘burdens’. But it is clear that Pattison is concerned with risks just like McMahan. He (2007: 581) worries, for example, that the intended beneficiaries ‘might have to suffer civilian and military casualties, damage to vital infrastructure, increased levels of insecurity, and other costs associated with being in a war zone’.

McMahan and Pattison, would-be interveners must seek to ascertain the preferences of intended beneficiaries, whether through consultation or some other means, and act upon these preferences.

In at least one crucial respect, however, Pattison's version of the risk-prevention argument is superior to McMahan's version. Pattison maintains that bystanders who are subjected to risk in an intervention, and not just intended beneficiaries, must be included in the decision of authorization. To expand upon the relevant group of individuals who are granted input, Pattison borrows a distinction from Fernando Tesón between the accomplices (and collaborators), bystanders, and victims of a humanitarian crisis.¹⁵ Whereas McMahan restricts his analysis to victims (which I have been calling intended beneficiaries¹⁶), Pattison endorses consultation with both bystanders and victims. His rationale is simple: 'we should include the opinions of those bystanders who are likely to be burdened by intervention precisely because they are burdened bystanders: they are not (directly) responsible for the humanitarian crisis but might suffer in its resolution' (2007: 582). If risk-imposition is what dictates input, as it does for both McMahan and Pattison, then *all* who are subjected to risk must be entitled to input.

Once this claim is taken on board, however, a third group of individuals demands our attention. Suppose that an intervening entity were to consult with the foreign risk-bearers of an intervention before going into a state that was likely to retaliate with force against the intervening state. It may be that the relevant group of risk-bearers must include not just the humanitarian victims and not just bystanders in the target-state or

¹⁵ Note that Tesón (2003) rejects the need for consultation with the first two groups, endorsing only consultation with the third.

¹⁶ Of course, interveners may intend to benefit victims of a humanitarian catastrophe *and* others. But the analysis remains unchanged.

nearby states but also a third group of individuals: citizens of the intervening state. Call these citizens *retaliation-risk-bearers* (or *indirect-risk-bearers*).

A key difference between these risk-bearers and those analyzed by Pattison is that the risks imposed upon retaliation-risk-bearers are not *directly* imposed by the intervening state, as they may be on victims and bystanders, but are *indirectly* imposed. In other words, the intervening entity itself would not be killing or harming retaliation-risk-bearers but would rather be provoking third parties to kill or harm retaliation-risk-bearers. But if indirect risk could be shown problematic in the way that direct risk is problematic, then the group of risk-bearers who would be entitled to participate in decisions of humanitarian intervention may include retaliation-risk-bearers in addition to the bystanders and intended beneficiaries who are subjected to risk.

In any case, the conclusion reached by Pattison and McMahan in the context of humanitarian intervention is seemingly pregnant with one further critical implication. If risk-bearers are entitled to participate in and potentially exercise veto power over humanitarian military authorization, why should they not be entitled to participate in *all* forms of military authorization? More to the point, if these individuals are entitled to participate in and potentially exercise veto power over military authorization, perhaps military authorization must *necessarily* be a public endeavor. Much more needs to be said (and will be said in due course) about whether the collective participation of risk-bearers truly transforms, or ought to truly transform, a potentially private decision into a public one. But we should note at least that the character of private military authorization would be dramatically altered by the guaranteed participation of these risk-bearers.

Despite this suggestive line of reasoning, neither McMahan nor Pattison apply the risk-prevention argument beyond the context of humanitarian intervention, and neither considers possible connections to military privatization. Indeed, Pattison explicitly advances an alternative set of rationales for the public monopolization of military authorization.¹⁷ Cécile Fabre (2008: 972-974), by contrast, considers an extension of the sort that I have in mind, even underscoring retaliation-risks, but she ultimately deems the extension unpersuasive. Fabre imagines a scenario in which a private individual from State B authorizes military force against State A:

[These] actions would in all likelihood lead A to inflict greater harms on B, for example, by way of reprisals. Even if the harms occasioned by this particular war would not violate the principle of proportionality, the objection would press, a lone individual does not have the authority, and thus lacks the right, to bring about...[such] consequences, at least if he does not have the consent of the individuals on whose behalf he acts—a consent which, as a lone individual, he is not in a position to secure. (2008: 973)¹⁸

Fabre offers a number of objections to this version of the risk-prevention argument. Rather than rebut each of these objections, I want to make two brief points before moving forward. The first is that, while the argument effectively identifies the indirect-risk-bearers that McMahan and Pattison neglect, it neglects the sort of direct-risk-bearers that they identify. Not only might individuals from State B possess a right of participation in the decisions of private authorizing entities operating out of State B against State A (because of potential reprisals), but individuals from State A (the enemy)

¹⁷ See the third and fourth arguments in the preceding section. To my knowledge, McMahan does not offer a detailed treatment of legitimate authority in the broader context of war.

¹⁸ The view on offer by Fabre should be distinguished from a related view. The related view claims that private individuals must not authorize military force against State A, because this would be to act on *behalf* of individuals without their license. Pattison (2007: 576-578; 2010b: 13-14) presents this argument in the context of humanitarian intervention, and Christopher Finlay (2010) presents it in the context of political liberation. To distinguish between the risk-imposition argument and these views, suppose that the people on behalf of whom an authorizing entity acts will *not* be risked by an intervention. They will remain perfectly safe. Still, according to Pattison and Finlay, the authorizing entities commit a wrong.

might also have a right of participation in these decisions. Individuals from State A are the direct-risk-bearers of any military authorization taken against them. Perhaps (at least some) potential victims of war in State A may be entitled to participate in the decisions of military authorization that are taken against their state just as the risk-bearers of a humanitarian intervention may be entitled to participate in decisions of military authorization that are taken against theirs. Of course, such an entitlement must be fleshed out *much* further—and several caveats introduced—if it is to be plausible.

The second point to note is that Fabre targets much of her criticism at the perceived requirement of consent in the risk-prevention argument. But, as we have seen, consent, strictly speaking may not be necessary for the argument's success. Both McMahan and Pattison persuasively insist upon something short of consent: democratic input. If they are correct, then the risk-prevention argument may stand as defense of public monopolization (without suffering from the vulnerabilities that tend to confront consent-based theories).

All Affected Fundamental Interests (P₁)

With these two points in mind, it should be clear that Fabre's account of public military monopolization may not represent the most compelling version of a *generalized* risk-prevention argument (one that applies to all wars). I will now attempt to construct such a generalized argument. As outlined above, my argument is built from two general premises, the all affected fundamental interests premise (P₁) and the risk-imposition of war premise (P₂). In this section (along with the next three), I defend P₁, which claims

that a decision must be withdrawn from the private sector and reserved for public discharge when one course of action under consideration imposes risk, above some threshold level, to the fundamental interests (e.g. physical security) of enough individuals. In the next chapter, I will defend P_2 , which claims that the private decision to authorize war *does* impose risk as specified by P_1 . To defend P_1 , I will present the principle from which the premise is derived: ‘the all affected interests’ principle. This presentation will direct us towards three sub-premisses into which P_1 may be broken. I will then defend the three sub-premisses in turn.

According to common renderings of the all affected interests principle, individuals whose interests are likely to be affected by the decisions of a government ought to be included in the decisions of that government (e.g. as voters).¹⁹ The principle is typically deployed as a solution to the so-called boundary problem in democratic theory.²⁰ The boundary problem asks which individuals ought to be included in a *given* *demos*—who, in other words, ought to have a say in this democracy or that democracy. The rub is that the answer cannot be decided democratically. As Robert Goodin (2007: 43) writes, ‘[u]ntil we have an electorate, we cannot have an election’, and it would be ‘incoherent to constitute the electorate through a vote among voters who would be entitled to vote only by virtue of the outcome of that very vote’. Needed is a theory that determines the make-up of electorates *before* the first election. The all affected interests principle stands as such a theory. It claims that individuals who are likely to be affected

¹⁹ For key works on the boundary problem, Dahl (1979); Whelan (1983); Goodin (2007); Miller (2009); List and Koenig-Archibugi (2010).

²⁰ The problem has also been dubbed the problem of ‘constituting the demos’ and ‘the problem of inclusion’.

by the decisions of an electorate are the individuals who ought to be included in the decisions of an electorate.

In elucidating the potential scope of the all affected interests principle, Goodin draws our attention to an example, which will be frequently revisited in my defense of P₁.

Imagine a German law that requires polluting factories there to build chimneys tall enough to ensure that their emissions fall to the ground only in Scandinavia: legally, that law binds only manufacturers in Germany; but it clearly affects Scandinavians, and is indeed designed to do so. (2007: 50)

Excluding Scandinavians from a vote on this law would be problematic for proponents of the all affected interests principle, because the law would so thoroughly harm Scandinavians. As this example illustrates, the all affected interests principle may endorse expansive forms of inclusion. State decisions often harm people from afar and, for that reason, may entitle individuals beyond its borders to participate in its decisions.

But, as typically used, and as just presented, the all affected interests principle does not straightforwardly apply to the private authorization of military force. It explains *who* must be included in public decisions (all who are affected) without explaining why some decisions must be public in the first place—why these decisions must be withdrawn from the private sector and reserved for public judgment. To connect the all affected interests principle, as presented, to a restriction on private decision-making, at least two further claims are needed. Keep in mind that, in presenting these two claims, I am not yet defending the all affected interest principle; I am only identifying how the principle, if sound, might be extended to the question of private military authorization.

The first claim is that *if* some public decisions require the inclusion of affected parties in the decision-making (the contention of the all affected interests principle as presented thus far), then surely some private decisions would also require the inclusion of

affected parties in decision-making. The reason is that private decisions may exert effects that are no less profound than public decisions. Consider, for example, a German pharmaceutical company that, on their own accord, instituted a new industrial process for drug manufacturing that resulted in the release of harmful pollutants, which affected Scandinavians. If, according to the all affected interests principle, we insist that Scandinavians must have a say in laws that require German factories to spew harmful pollutants in their direction, then we must insist that Scandinavians have a say in private decisions that result in *these very pollution patterns*. The fact that a government severely affects Scandinavian interests in the first instance while a private company severely affects these interests in the second seems to be arbitrary if the Scandinavian entitlement to participation derives from disaffected interests. This simple point merely reflects the fact that, while governmental decisions often exert large-scale affects on individuals, private decisions may exert the identical affects.

The second claim is that, when enough people are affected by a private decision, it must at some point become a public decision. For some, the idea might seem dubious that Scandinavian input into the decisions of a German pharmaceutical company might demand the conversion of these private decisions into public decisions (though I do not believe this to be dubious at all). So suppose instead that the German pharmaceutical company decides to release its harmful pollutants over German towns rather than Scandinavian towns. Because the pharmaceutical company, we may assume, has factories dotted all over Germany, all German residents will be affected by the decision. All will therefore have a strong interest in setting the level of pollution that is going to be released by the pharmaceutical company. It simply becomes difficult to imagine how German

residents could meaningfully enjoy a say over this level of pollution unless the decision over pollution levels were to become public—unless, that is, the German government, as a representative of the German people, were to *regulate* how much pollution will be permitted by the pharmaceutical company (and other companies). Only in this way, it would seem, can those who are affected by the pollution of German companies collectively decide how much pollution they are willing to tolerate.

The difficulty, of course, even if this much is plausible, is in determining *which* private decisions must be transformed into public decisions on account of the all affected interests principle and which may (or must) remain private. A German pharmaceutical company that failed to consult with German citizens ahead of a small price-hike would probably be justified in doing so.²¹ Yet, as we just saw, the company may not be justified in releasing harmful pollutants without public approval.²²

To sidestep the difficult challenge of identifying *every* interest that may activate the all affected interests principle, I will restrict my analysis to (what I am dubbing) *fundamental interests* (hence the appellation of P₁ as the all affected fundamental interests principle). Fundamental interests are those interests that are so important as to be protected by rights. P₁ claims that private decisions that substantially affect *fundamental interests* must be withdrawn from the private sector. Whether decisions that affect other, non-fundamental, interests must be similarly withdrawn is left aside. The authorization of war, I argue, affects *fundamental* interests. Thus, my conclusion that public actors must

²¹ For the same example used in the context of supermarket price-hikes, see Miller (2009: 217).

²² Notice, however, that the identical difficulty confronts the all affected interests principle when applied to the boundary problem. We might think that the German decision to direct pollution at Scandinavian countries would require the inclusion of Scandinavians in the demos for pollution-related decisions but not in the German decision to raise tariffs by one percent. Such a decision would affect the interests of Scandinavians—at least those who trade with Germany—but presumably not in such a way that would entitle them to participation.

withdraw decisions that affect fundamental interests will be sufficient to show that public actors must withdraw decisions of military authorization from the private sector.

While these considerations should all lend *prima facie* plausibility to P₁, a principled defense of the premise is needed if the risk-prevention argument is to persuade. A close look at P₁ will reveal that it contains several potentially objectionable claims. To guard against any criticism, and to strip the premise of ambiguity, I will defend three separate sub-premises (P_{1i}, P_{1ii}, and P_{1iii}).

P_{1i}. *Fundamental Interests*: We have interests that are sufficiently weighty to be protected by rights (fundamental interests), one of which is our fundamental interest in physical security.

P_{1ii}. *Participation*: When one course of action under consideration in a private decision will impose risk, above some threshold level, to my fundamental interests, then I am (or my representatives are), at a minimum, entitled to participate in that decision.

P_{1iii}. *Withdrawal*: When *enough* people are entitled to participate in a private decision, the decision must be withdrawn from the private sector and reserved for public discharge.

Taken together, these sub-premises form the claim of P₁: a decision must be withdrawn from the private sector and reserved for public discharge when one course of action under consideration imposes risk, above some threshold level, to the fundamental interests (e.g. physical security) of enough individuals.

Fundamental Interests (P_{1i})

Let us start then with P_{1i}. The claim that we *do* have interests that are sufficiently weighty to be protected by rights is in keeping with an interest theory of rights.

According to interest theories, a ‘necessary but insufficient’ condition for the ‘holding of

a right by a person X' is that the right 'preserves one or more of X's interests' (Kramer 2000: 62). If an interest is ultimately to prove suitable for protection, further argumentation must show that it is sufficiently valuable to warrant protection. Joseph Raz (1986: 166) captures this further point in his suggestion that 'X has a right if and only if' some 'aspect of X's welling being (his interest) is a sufficient reason for holding some other person to be under a duty'.²³ The risk-prevention argument utilizes this Razian formulation of a right.

While some interests do not merit the protection of rights, one interest that certainly *does* merit the protection of rights, it seems, is our interest in physical security—and our interest in not being killed or disabled in those way that make one a casualty of war. Following Henry Shue (1996: 21), the reason why our interest in physical security must be protected by a right is that it is necessary for the enjoyment of all other rights: '[n]o rights other than a right to physical security can in fact be enjoyed if a right to physical security is not protected'. For instance, without a right to physical security, rights that may protect our interests in receiving an education, forming close bonds with others, speaking and believing freely, and pursuing activities that lead to self-actualization and fulfillment are vulnerable. Thus, if we have a right to anything, we must have a right to physical security (the right to physical security is a *basic right* in that sense). And surely, in virtue of our human dignity and moral worth, we must have a right to *something*.²⁴ If this reasoning is sound, which I believe it is, then we may conclude that

²³ Raz also points out that X must be able to possess rights.

²⁴ Note that, on my understanding, fundamental interests are not always protected by basic rights (among which Shue includes the rights to physical security, subsistence and liberty). They may be protected by other, non-basic rights. Note also that Shue's argument for basic rights is not dependent upon an interest theory of rights.

the interests of human beings in physical security are fundamental interests, because they warrant protection by rights (and indeed, they warrant protection by *basic* rights).²⁵

Participation in Private Risk-Imposing Decisions (P_{1ii})

Having now seen that individuals possess a fundamental interest in physical security, let us turn to the second sub-premise of the all affected fundamental interests premise (P_{1ii}). This sub-premise maintains that, when one course of action under consideration in a private decision will impose risk, above some threshold level, to my fundamental interests (and thus my rights), then I am, at a minimum, entitled to participate in that decision.

Risk

The reason why P_{1ii} is framed in terms of risk-imposition, as opposed to, say, harm-imposition is a conceptual rather than normative one. If I were entitled to participate only in those decisions that *actually* affected my fundamental interests, rather than decisions that *might* affect my fundamental interests, then I would be entitled to participate in

²⁵ Typically, interest theories of rights, like the one embraced here, are contrasted with will theories. For a powerful defense of will theories, see Steiner (2000), who relies to an extent on Hart (1982). For helpful comparisons of interest and will theories, see Wenar (2005; 2010) and Kramer and Steiner (2007). Unfortunately, a defense of interest theories is much beyond the scope of this thesis. But even a committed will theorist ought to be persuaded by my position. Will theorists neither reject the possibility of rights protecting interests, nor do they dismiss the deep value of human interests. They only object to the notion that rights *necessarily* protect interests. The will theorist is therefore free to acknowledge that human beings have a profound interest in physical security—which may be protected by a right, just not in virtue of that fact—and that, in the end, such a profound interest may demand the withdrawal of decisions from the private sector that affect this interest (if, of course, P_{1ii} and P_{1iii} are sound). No mention of rights is required. To put this point differently, the term ‘rights’ has *only* been used in my argument to describe a set of deeply valuable interests. In foregoing this term, the interests do not become any less valuable. They simply go by a different name.

decisions according to a criterion that could be determined only after the decisions were already made. As Goodin (2007: 52) reminds us, those ‘whose interests are “affected” by any actual decision depends upon what the decision actually turns out to be’, and ‘what the decision actually turns out to be depends, in turn, upon who actually makes the decision’. To restrict participation to those who are actually affected by a decision would therefore be incoherent: the very effects that would entitle one to participate in a decision would depend upon who actually participated in that decision.²⁶ For the sake of coherence then, we must maintain more modestly that those who *may* be affected by a future decision are entitled to participate in that decision.

That said, a focus on probabilistic rather than certain harm should not be thought normatively problematic. Moral blame is regularly assigned to those who not only inflict harm on others but also to those who inflict chances of harm on others. To borrow a famous example from Robert Nozick (1974: 74), we are barred from firing a partially loaded revolver at a passerby just as we are barred from firing a fully loaded revolver at the passerby. The *degree* of wrongdoing that one has committed in cases of probabilistic harm is typically captured by the *risk* of that act, understood as the magnitude of potential harm multiplied by its likelihood. More specifically, risk is the ‘the statistical *expectation value* of an unwanted event which may or may not occur’, where the expectation value is ‘the product of its probability and some measure of severity’ (Hansson 2007). Measures of severity might include the number of deaths that occur or, for a discussion of war, the casualty count (the number of military and non-military personnel who die or are injured

²⁶ On this problem of circularity, see also Miller (2008: 215).

as a result of war). The important point is that risk not be mistaken for a mere probability, as colloquial language might encourage.²⁷

The Entitlement of Abstention

With this understanding of risk in mind, the following should be uncontroversial: when one course of action under consideration in a private decision will impose risk, above some threshold level, to my fundamental interests, then I am entitled to *something* vis-à-vis that decision. It cannot be, for instance, that the violation of my fundamental interest in physical security may proceed just as it would proceed if I lacked a fundamental interest in physical security. By the same token, it cannot be that the substantial imposition of risk, above some threshold level, to my fundamental interests in physical security may proceed just as it would proceed if I lacked a fundamental interest in physical security. The existence of a fundamental interest in physical security demands that decision-making be responsive, *in some sense*, to that fundamental interest. The difficult question is: in what sense should it be responsive? To what does a fundamental interest in physical security entitle an individual when a decision that may affect her fundamental interest in physical security is under consideration?

One promising response, which is also an objection to P_{1ii}, is that we are simply entitled to *not have our fundamental interests affected*. In other words, we possess a much more muscular entitlement than the modest demand of participation suggests. We ought to be free altogether from substantial risk-impositions. To see why, consider again

²⁷ We should observe that the threshold level of risk that is included in P_{1ii} is also a magnitude multiplied by a probability. In particular, it is a product of the extent to which one's fundamental interests will be violated by an act and the likelihood of that violation.

the confrontation between a gunman wielding a partially loaded revolver and a passerby. When the passerby is threatened, she does not wish to consult with the gunman. She wishes for the gunman to hold fire. Similarly, in the private pollution example above, it seems that the German pharmaceutical company should simply *refrain from polluting* rather than include German residents in pollution-related decisions. If so, then perhaps P_{1ii} ought to be re-written: when one course of action under consideration in a private decision will impose risk, above some threshold level, to my fundamental interests, then that course of action must be renounced. If re-written in this way, the risk-prevention argument would not demand that private decisions of war be publicly undertaken; it would demand that decisions of war not be undertaken at all.

This objection to P_{1ii} is most compelling when the harm that violates our fundamental interests may be avoided with ease. Suppose, for instance, that the German pharmaceutical company faces a choice between releasing pollutants that will harm German residents and not releasing any pollutants that will harm German residents. When the costs of abstention are low and the benefits that are forfeited (due to abstention) are minimal, the company should undoubtedly choose to forego releasing harmful pollutants. In this case, a mere insistence that affected parties be included in decisions is too weak. We must go further and demand that parties not be affected.

From Abstention to Participation

But as the drawbacks of avoiding these effects mount—when it becomes extremely problematic for the German pharmaceutical company to refrain from producing

pollution—then the objection becomes less persuasive. Two particular kinds of drawbacks are worth noting. The first is *financial cost*. When the cost of foregoing pollution is steep, a difficult decision is needed about how much money will be spent in order to avoid the release of pollutants. The second kind of drawback is *competing risk*. If, when the pharmaceutical company cuts down on pollution, it produces less (or less effective) medication, a difficult decision is needed about the tradeoff between pollution and health care.²⁸ The decision *to* pollute will pose a risk to the fundamental interests of German residents, but the decision *not to* pollute will also pose a risk to the fundamental interests of German residents—if we suppose that our interest in health is a fundamental interest and that a disruption to the supply of medicine may violate that interest.

The existence of either form of drawback, costs or competing risks, calls the objection in the previous subsection into question. When a risk is imposed upon my fundamental interests, the entitlement that is generated in the face of high costs or competing risks cannot be a simple abstention from risk-imposing behavior. The results of abstention will be unpalatable if the costs of abstention are sufficiently high, for instance if the *full* renunciation of pollution would debilitate the German economy. Even worse, the results of abstention may be counter-productive and thus harmful to our fundamental interests if the competing risks of abstention are sufficiently high, for instance if the renunciation of *all* emissions would debilitate Germany's pharmaceutical industry. These considerations underscore the simple point that we are not always entitled to abstentions from risk-imposing behavior. At times, we are entitled to something less.

²⁸ It is worth noting here that the decision to authorize war is particularly vulnerable to the second kind of drawback. If war is *not* authorized by a group under threat, the risks to that group may be high. And if war *is* authorized by a group under threat, the risks to that group may be high. This consideration becomes relevant in the next chapter.

But these considerations merely push back the question under consideration: why are we entitled to participate in decisions that affect our fundamental interests rather than have our fundamental interests respected in some other fashion *besides* an abstention from risk-imposition? The fact that German residents will be affected by the release of pollution from German pharmaceutical companies may just mean that the interests of affected parties must be reflected in pollution-related decisions. If so, then risk-imposing entities could simply factor the interests of affected parties into their decisions about pollution without the participation of these parties. The ultimate burden of defending P_{1ii}, it seems, is to explain why such private risk-imposing entities must not be permitted to make decisions on behalf of those whom they are likely to affect.

At least three reasons, I believe, may be given to justify the entitlement of participation that is promised by P_{1ii}.²⁹ First, risk-imposing entities like private companies are simply unlikely to promote the interests of those whom they affect on a purely voluntary basis. The individuals who will be affected by decisions will be more sensitive to any potential effects and more vigilant about steering decisions away from these effects.

A second, more fundamental, reason is that the individuals whose interests may be affected by a decision may disagree about the levels of risk that should be tolerated, all things considered. There may be ‘reasonable disagreement about what constitutes an acceptable risk, or an acceptable trade-off between risks and benefits’ (McMahan 2010: 53). Given this reasonable disagreement, consultation with individuals about what levels

²⁹ These reasons, we should note, apply both to public and private decisions. I refer only to private decisions here since they are the decisions with which P_{1ii} is concerned. But we might apply each of these reasons to public decisions—for instance, to argue that the German decision to export pollution to Scandinavia ought to include Scandinavians in their decisions.

of risk will be tolerated at a given moment and for a given enterprise is demanded. If there were some known level of risk that would always be acceptable given the benefits and tradeoffs, the inclusion of potentially affected parties in the decision may be unnecessary. But there is no such common risk-tolerance that human beings possess. Instead, individuals must be given the opportunity to express their risk-tolerance on a case-by-case basis.

One might object that private actors, like the German pharmaceutical company, could simply conduct polls to determine the risk-tolerance of Germans on a case-by-case basis. But a decision that actually reflected the poll numbers and followed its dictates may still be a decision in which affected parties participated in the relevant sense. The nature of participation that must be ensured is elaborated further in my defense of P_{1iii}.

The third reason why individuals must be entitled to participate in decisions that affect their fundamental interests is that individuals have ill-defined risk-preferences. Participation must be guaranteed so that individuals can *develop* their risk-tolerance in a given context. This rationale neither presupposes that individuals possess the same levels of risk-tolerance, nor even that they possess a stable, well-defined level of risk-tolerance. Instead this third rationale gains its force from the recognition that individuals have notoriously unstable, even irrational, preferences regarding risk.³⁰ Individuals are poor at identifying how much risk is imposed upon them by a given course of action (Dejoy 1989). We are poor at deciding whether that course of action imposes more or less risk than commonly performed tasks—like driving (Slovic 1987). Perhaps most troublingly, our preferences are easily manipulated by changes in the language with which risk-related questions are framed, even when that risk is made explicit. Behavioral economists

³⁰ See, for example, Kahneman (2003).

(see Kahneman 2003: 1455; Maple et. al. 2010) famously note divergent responses, for instance, when risk is framed as an 80% chance of living versus a 20% chance of dying.

Given our clumsy command of risk, individuals, I wish to suggest, must be entitled to participate in decisions that affect their fundamental interests in order to develop an informed view on that decision (which is then registered as a preference for or against the decision). Put differently, private risk-imposing entities must not be permitted to make decisions on behalf of individuals who may be affected by those decisions, because this would prevent individuals from developing well-formed preferences in the first place. Why should we care about the development of well-formed preferences? Given the stakes of decisions that affect our fundamental interests, like pollution and war, a refusal to grant individuals an entitlement to develop well-formed preferences is simply a failure to adequately respect their fundamental interests. Our deep interests, for example, in physical security demands that we be given an opportunity, through participation, to develop well-formed preferences on decisions that may pose such profound implications for our welfare as war and pollution.

Thus, while individuals may sometimes lack a right for would-be risk-imposing agents to abstain altogether from the imposition of risk, they at least possess a right to participate in the decisions of these agents. This is why, in my statement of P_{1ii}, I was careful to note that individuals are, *at a minimum*, entitled to participate in decisions that impose substantial risks upon our fundamental interests. In some instances, individuals may be entitled to more, namely to not have their fundamental interests subjected to risk. But, for any decision that may impose risk above a threshold level, individuals should at least be entitled to participation.

One last objection to P_{1ii} , which ought to be considered before moving forward, is that P_{1ii} seems to rule out the delegation of risk-related decisions to political representatives (and we have strong reasons to embrace representative government). If the reasons just given in support of P_{1ii} are sound, perhaps individuals must *themselves* participate in decisions that affect their interests. While this objection may be plausible on its face, P_{1ii} is not ultimately at odds with political representation. The claim of P_{1ii} is that individuals whose fundamental interests may be affected by a decision should be entitled to participate in that decision. The reasons for such participation are that individuals, through participation, will be able to effectively safeguard their interests, resolve reasonable disagreements about the appropriate course of action, and develop well-formed preferences about the decision in question. None of these reasons precludes the possibility of electing political leaders to represent our fundamental interests. Within the confines of a representative democracy, I am still able effectively safeguard my interests; political representatives may sort through the reasonable disagreement of risk-related decisions; and, through elections and political engagement, I may be able to develop well-formed preferences on complex risk-related decisions. In short, the participation that is demanded of P_{1ii} is consistent with and possible within a representative democracy.

Withdrawal of Decisions from the Private Sector (P_{1iii})

My defense of P_{1ii} aimed to show that individuals may be entitled to participate in private decisions that impose risks upon them. The next sub-premise (P_{1iii}) maintains that, in

certain circumstances, private decisions must actually be transformed into public decisions. Specifically, P_{1iii} maintains that when *enough* people are entitled to participate in a private decision, the decision must be withdrawn from the private sector and reserved for public discharge. To see the force of P_{1iii} , consider again the German pharmaceutical company with factories dotted around Germany. Decisions by the pharmaceutical company will affect the fundamental interests of all German residents. These German residents could be guaranteed participation in the company's decisions in two ways: one in which the decisions remain private and one in which the decisions become public.

To a proponent of the former option, three responses may be given. While the first response is unpersuasive, the second and third should decisively verify the plausibility of P_{1iii} . The first response is that, when all German residents are entitled to participate in the pharmaceutical company's decision, the decision has already become public. In other words, a sufficient condition of public decisions is that *many* individuals are entitled to participate in that decision. Perhaps to call this decision private is to misunderstand the nature of private decisions—private decisions are those in which only a select group of individuals are entitled to participate. The difficulty with this response is that, empirically speaking, many private decisions *are* decisions in which many private individuals are entitled to participate. When Microsoft makes its decisions, for example, anybody possessing one of its more than eight billion shares of stock is entitled to participate (Microsoft 2011). The sheer quantity of participation does not seem to transform private decisions into public decisions.

A second response is that, even if the decisions do not simply become public as the *number of entitlements* expands, the decision does become public in virtue of the

guaranteed enforcement of those entitlements. Consider what happens when the pharmaceutical company excludes those private individuals who have a right to participate in company-decisions regarding pollution. What recourse do these individuals have? Presumably, the government of these individuals (i.e. the institution that promotes their collective interests) is entitled to coercively ensure compliance with the requirement of participation. Where the government uses its coercive power to guarantee individual entitlements to participation—for instance, by holding votes at the company, organizing forums for conversation and deliberation, setting rules related to campaign finance, and so on—the decision will have taken on the character of public decisions. Moreover, the threat of this coercion will likely force companies to adopt these measures in decision-making ahead of actual coercion. Thus, it would seem that the threat of public coercion would mold ‘private’ decisions into public decisions.

The third response is that, even if decisions do not become public by a mere increase in the number of entitlements or by the threat of coercion, they *ought to* become public as the number of entitlements expands. When many individuals are entitled to participate in the decisions of the pharmaceutical company, participation will only be *fair* through the adoption of standards that we typically associate with public (and not private) decisions. For instance, individuals may be entitled to equal votes, not votes that are proportionate to financial shares in the company; they may be prohibited from selling their votes; secret ballots may be demanded; precincts may be needed so that rural-dwelling Germans can express their views. In short, the mechanisms that govern public decisions must be instituted.

These mechanisms are an important factor that distinguishes public decisions from private decisions. Certainly, the sheer numbers of participants is one factor that may distinguish public decisions from private decisions (*response one*). But the mechanisms that govern public decision-making, which set high standards for fair, egalitarian participation, are another factor. Private decisions, by their very nature, lack the safeguards that public decisions possess. The public threat of coercing private companies to institute these safeguards may transform private decisions into public decisions, descriptively speaking (*response two*). But, regardless, private decisions *ought to be* transformed into public decisions—which is to say that the full menu of safeguards, which distinguish public decisions from private decisions, ought to be instituted—to ensure fair participation (*response three*). When the number of parties likely to be affected by a private decision is small, the safeguards that are needed for fair participation may be minimal. But as the number grows, the likelihood that some will be wrongfully excluded from meaningful participation increases. For that reason, democratic mechanisms of public decision-making must be instituted.

To sum up, when many individuals are entitled to participate in a private decision, the decision must become public and, more specifically, democratic (P_1iii). Because our fundamental interest in physical security (P_1i) entitle us to participate in decisions that affect this interest in particular ways (P_1ii), the all affected fundamental interests premise (P_1) must be embraced: a decision must be withdrawn from the private sector and reserved for public discharge when one course of action under consideration imposes risk, above some threshold level, to the fundamental interests (e.g. physical security) of enough individuals.

Conclusion

I began this chapter by challenging five just war theories for the public monopolization of military authorization. To supplant these theories, I then sketched a two-premise defense of the risk-prevention argument for public monopolization, which built upon the work of McMahan, Pattison, and Fabre. After sketching these two premises, I devoted the remainder of the chapter to a justification of the first premise: the all affected fundamental interests premise (P_1). This premise borrows a principle that is familiar to theorists of the boundary problem—the all affected interests principle—and applies it to debates on privatization. For the sake of argumentative ease, I focused specifically on *fundamental interests* (those interests that are protected by rights), and I presented three claims. First, we possess fundamental interests in physical security (P_{1i}). Second, these fundamental interests entitle individuals to participate in private decisions that pose considerable risks to these interests (P_{1ii}). Finally, under certain circumstances, decisions that activate P_{1ii} must actually be withdrawn from the private sector and reserved for public discharge (P_{1iii}). Together, these three claims require us to endorse P_1 .

In the next chapter, I ask whether the decision to authorize military force is in fact the sort of decision that must be withdrawn from the private sector and reserved for public discharge (on account of its risk-imposition). Do P_{1i} , P_{1ii} , and P_{1iii} , in other words, apply to the authorization of war? The second premise (P_2) of the risk-prevention argument maintains that they do. It is to a consideration of P_2 that we now turn.

5

Public Monopolies Over Military Force, II: The Risk-Imposition of War

In an interdependent world, in which security depends on a framework of stable sovereign entities, the existence of fragile states, failing states who through weakness or ill-will harbor those dangerous to others, or states that can only maintain internal order by means of gross human rights violations, can constitute a risk to people everywhere.

-ICISS, Responsibility to Protect (2001: 5)

The previous chapter defended the first premise of the risk-prevention argument: the *all affected fundamental interests premise* (P_1). According to this premise, a decision must be withdrawn from the private sector and reserved for public discharge when one course of action under consideration imposes risk, above some threshold level, to the fundamental interests (e.g. physical security) of enough individuals. I will now seek to show that the private decision to authorize military force *does* impose risk, above an acceptable threshold, to the fundamental interests of enough individuals. I dub this proposition the *risk imposition of war premise* (P_2). If P_2 is sound, then the decision to authorize military force must be withdrawn from the private sector and reserved for public discharge. The successful completion of the risk-prevention argument thus solidifies our rejections of A_1 and A_2 by affirming the public responsibility of military *monopolization*.

The argument does not, however, affirm the public permission of military *authorization*. As certain pacifist theories of war require, public actors may possess a duty to prevent private actors from authorizing war but lack a duty to authorize war themselves. I will therefore supplement the risk-prevention argument with what I have dubbed the *compensation argument* to defend the public permission of military authorization. According to the compensation argument, public monopolizing entities must authorize military force when their constituents are threatened, because these entities would otherwise violate a duty of care that is owed to those who have been disarmed. This argument mirrors a position developed by Robert Nozick (1974: 110-113). If this position is sound, then A_0 , the non-provision of military force, must be rejected. Together, the conclusions of the risk-prevention and compensation arguments leave only three remaining arrangements for our potential endorsement: A_3 , A_4 , and A_5 .

My analysis in this chapter proceeds as follows. The first three sections aim to show that the private decision to authorize military force imposes risks to the fundamental interests of *many* individuals. If my reasoning in these sections is correct, the task remains to show that the fundamental interests of *enough* individuals are risked above an acceptable *threshold* to merit an embrace of P_2 . The early sections, we might say, contribute to P_2 by providing the arguments that are necessary to identify the individuals whose interests count when tallying the overall affects. The first section specifies a set of direct-risk-bearers whose fundamental interests are affected by private decisions of military authorization and argues that some possess an entitlement to participate in these private decisions.

The second and third sections then turn to the indirect-risk-bearers of private military authorization. Recall the distinction between *direct-risk-imposition* and *indirect-risk-imposition*.¹ Direct risk-imposition occurs when an agent *herself* subjects others to heightened risk, while indirect-risk-imposition occurs when an agent causes *someone else* to subject others to heightened risk. Thus, in the context of war, we would say that an authorizing entity directly imposes risks upon the fundamental interests of individuals when its military is deployed to kill and injure those individuals. By contrast, an authorizing entity indirectly imposes risks upon the fundamental interests of individuals when it provokes the deployment of other militaries to kill and injure those individuals. All who are exposed to direct risk are dubbed *direct-risk-bearers*, and all who are exposed to indirect risk are dubbed *indirect-risk-bearers* (or *retaliation-risk-bearers*).

The second and third sections together identify a set of indirect-risk-bearers whose fundamental interests are affected by private decisions of military authorization. I argue, that like direct-risk-bearers, some indirect-risk-bearers possess an entitlement to participate in these private decisions. Specifically, I defend two claims: the *heightened probability claim* and the *moral relevance claim*. The former is defended in the second section and the latter in the third (remember that the *affiliates* of private authorizing entities are those who may become targets of retaliation on account of their shared group membership with, or proximity to, private authorizing entities):

- (1) *Heightened Probability*: The private decision to authorize military force heightens the probability (and hence risk) that the fundamental interests of the authorizing group's affiliates will be contravened (via the mechanism of indirect risk-imposition).
- (2) *Moral Relevance*: The fact that the private decision will not *directly* impose risk upon the affiliates but will only *indirectly* impose such risk

¹ This distinction was introduced in Chapter 4, pp. 105-106 and pp. 117-118.

(by causing a third party to directly impose risk upon them) is not sufficient to eliminate the affiliates' entitlement of participation.

If these claims are successfully defended, I will be in a position to confirm a close approximation of P_2 : the private decision to authorize military force imposes direct and indirect risks to the fundamental interests of *a lot* of individuals, and it does so in a sense that is relevant for application of the all affected fundamental interests principle (P_1).

The fourth section then argues for a final proposition that converts this approximation of P_2 into a full-fledged endorsement. The final proposition is that, given the nature of war, the magnitude of potential contraventions to the fundamental interests of direct-risk-bearers and indirect-risk-bearers is sufficiently high (and for enough individuals) to place the heightened probability of contravention beyond a threshold of risk that would be acceptable for military authorization to proceed privately. If this is so, then P_2 must be endorsed, and the decision to authorize military force must be withdrawn from the private sector and reserved for public discharge.

Once the risk-prevention argument is complete, the final three sections tie up several loose ends. The fifth section presents the compensation argument against A_0 , thereby finalizing our dismissal of $A_0 - A_2$. The sixth and seventh sections then consider and challenge two objections to the conclusion of Part I. The successful rebuttal of these objections will allow us to move from Part I (and its analysis of $A_0 - A_2$) to Part II (and its analysis of $A_3 - A_5$) with the confidence that *only* public actors may justifiably authorize military force.

Direct-Risk-Bearers

Let us begin our consideration of P_2 by examining the direct-risk-bearers who may be entitled to participate in private decisions of military authorization. As specified above, the goal of these early sections is simply to show that many individuals merit a say in the risk-imposing decisions of private military authorization. Once this task is completed for both direct and indirect-risk-bearers, we may then turn to the difficult question that remains: are *enough* individuals so *severely* affected by private decisions of military authorization that these decisions must be removed from the private sector and reserved for public discharge?

We should observe from the start that one set of direct-risk-bearers who should certainly *not* be entitled to participate in decisions of military authorization are those direct-risk-bearers who have forfeited their immunity from military attack—which is to say, from substantial risk-imposition. If a general from State A leads an unprovoked invasion into State B, and State B responds with military force against State A in self-defense, State B may subject the general from State A to substantial risks (by, for instance, trying to kill him). But the general should not be entitled to participate in the decisions of State B. This is because he has forfeited his immunity from substantial risk-imposition by attacking State B, and such immunity is necessary for any inclusion in the state's decisions. Without immunity from substantial risk-imposition, one has no grounds upon which to invoke the all affected fundamental interests principle and thus no grounds upon which to demand the recognition of rights (e.g. to physical security) that generate the entitlement to inclusion.

The first task then for anyone seeking to specify which direct-risk-bearers may be entitled to participate in decisions of military authorization is to explain which individuals retain their immunity from attack in war. Not all such individuals ultimately merit an entitlement of participation, as I will argue in a moment. But the retention of immunity is a necessary condition for the entitlement of participation.

Unfortunately, our views about who retains their immunity from attack will depend upon our views on (i) the moral equality of soldiers and (ii) non-combatant immunity—whether, to be more specific, we opt for a traditionalist just war account pushed by theorists like Michael Walzer (1977; 2006*b*) or we opt instead for a revisionist account pushed by theorists like Jeff McMahan (2004; 2006*a*; 2006*b*; 2008). According to the traditionalist account, soldiers are typically liable to attack in war, while civilians are immune. According to the revisionist account, some soldiers may in fact be immune from attack, while some civilians may be liable. Traditionalists, in short, embrace principles of moral equality and strict non-combatant immunity that revisionists reject.²

To circumvent this debate—one that reflects perhaps the most intractable gulf among political theorists now writing about war—I want to suggest modestly that, for both traditionalists and revisionists, a number of direct-risk-bearers will retain their immunity from substantial risk-imposition in war. Whether these direct-risk-bearers merit a further entitlement to participate in decisions of military authorization will be addressed after the topic of immunity has been treated.

² From here forward, when I refer to ‘traditionalists’, I refer to those who accept the moral equality of soldiers and non-combatant immunity (as conventionally rendered). When I refer to ‘revisionists’, I refer to those who reject the moral equality of soldiers and non-combatant immunity (as conventionally rendered).

Immunity from Risk-Imposition as a Venn Diagram

The ecumenical approach that I employ imagines the set of individuals who retain their immunity in war as a Venn diagram—with one circle representing immune direct-risk-bearers according to traditionalists (call these individuals *Group T*) and one circle representing immune direct-risk-bearers according to revisionists (call them *Group R*). At the intersection of these two circles will be a large group of individuals, both civilians and military personnel, who are immune direct-risk-bearers according to both accounts. Let us call those direct-risk-bearers who retain their immunity according to *both* traditionalists and revisionists *Group $T \cap R$* . It is Group $T \cap R$ that is taken to be the relevant set of immune direct-risk-bearers who may merit entitlements of participation according to P₂. I will trust that the analysis in this section enables sufficient visualization to obviate the need for inclusion of a physical Venn Diagram.

Civilian Immunity from Risk-Imposition

The members of Group $T \cap R$ will include both civilians and military personnel. Let us first consider the civilian members of the group and then consider the military members. For both traditionalists and revisionists, the vast majority of civilians are immune from substantial risk-imposition in war. For traditionalists, who embrace a strict principle of non-combatant immunity, *all* civilians retain their immunity. For revisionists, all civilians except those who contribute to the creation of unjust threats retain their immunity. Thus,

the civilians who are in Group $T \cap R$ include all civilians on the just side and all civilians on the unjust side who avoid contributing to unjust threats.

These civilians, we should note, not only become direct-risk-bearers in military confrontations where the principles of *jus in bello* are violated. They become direct-risk-bearers in almost every war, even wars fought in strict accordance with international law and morality. Wars are fought in physical spaces, and because the spaces that civilians occupy are never fully sheltered from the spaces that wars occupy, civilians are always threatened, and almost always killed or injured, in every war, despite the level of due-care that is exercised. This is how wars go and part of what makes them terrible: they pull civilians who inhabit spaces off the battlefield into spaces where battle occurs.

This point should also remind us that some civilians who become direct-risk-bearers in war (and perhaps even some military personnel) are neither on the just side nor the unjust side but are simply *near* one of the sides. For both traditionalists and revisionists, these physically proximate individuals would retain their immunity from substantial risk-imposition. To sum up then, we may conclude that a wide set of civilian direct-risk-bearers, both on (or near) the just and unjust side, retain their immunity from substantial risk-imposition according to *both* traditionalists and revisionists (and may thus be included in Group $T \cap R$).

Military Immunity from Risk-Imposition

Like civilians, the military personnel in Group $T \cap R$ are similarly abundant. But a slightly more nuanced analysis is required to parse the complexity of disagreement between

traditionalists and revisionists over the moral equality of soldiers. On a simplified understanding of this disagreement, no military personnel would be included in Group $T \cap R$, because no military personnel retain their immunity from substantial risk-imposition in war for traditionalists. Revisionists, by contrast, insist that *many* military personnel retain their immunity from attack, namely all those military personnel who serve on the just side. Because traditionalists, according to this simplified picture, classify even military personnel on the just side as liable combatants, they deplete Group $T \cap R$ of potential members.

But this simplified picture, I believe, is problematic. Traditionalists do not maintain that all military personnel forfeit their immunity from attack vis-à-vis the entities that authorize military force. Consider the private authorization of military force by Al-Qaeda on September 11 against the Pentagon, where military personnel were housed.³ Though the soldiers of authorizing entities may not commit wrongs when targeting other soldiers, according to traditionalists, the *authorizing entity* certainly commits a wrong against soldiers when it initiates a war against them without just cause. Walzer (1977: 28, 31), for instance, writes that those who aggress, like Al-Qaeda, ‘are responsible for the pain and death that follow from their decisions, or at least for the pain and death of all those who do not choose war as a personal enterprise’—choosing, he continues, ‘effectively disappears as soon as fighting becomes a legal obligation or a patriotic duty’. In other words, many military personnel, particularly those who have been conscripted or who have joined the military out of patriotic obligation, have done nothing to forfeit their immunity from substantial risk-imposition imposed by the

³ Needless to say, we are not interested in *legal* immunity but in *moral* immunity. The fact Al-Qaeda is a non-state actor that is incapable of qualifying as a legal belligerent should not distract us.

authorizing entity (nor have the civilian leaders of these soldiers done anything to jeopardize that immunity) according to traditionalists. For traditionalists then, these military personnel would not relinquish any potential entitlement to participate in decisions of military authorization on account of having forfeited their immunity from risk-imposition vis-à-vis the authorizing entities that make these decisions.

What do revisionists say about such military personnel, who traditionalists are willing to include in Group $T \cap R$? For traditionalists these military personnel who have done nothing to forfeit their immunity may be on the just side or the unjust side. As we have seen, for revisionists, all such military personnel on the just side will retain their immunity from substantial risk-imposition in war—and thus ought to be included in Group $T \cap R$. But, even for revisionists, those military personnel who are *involuntarily* on the unjust side (perhaps in the way that Walzer identified) also retain their immunity from substantial risk-imposition in war. Group $T \cap R$ will therefore include many military personnel, on the just side and unjust side, who have not chosen, in the full sense of the term, to fight in the military.⁴

From Civilian and Military Immunity to Participation

We have now seen that many civilians and military personnel retain their immunity from substantial risk-imposition in war. The question is whether all (or any) of these direct-risk-bearers should be entitled to participate in decisions of private military authorization

⁴ If one objects to my analysis of military direct-risk-bearers, we should keep in mind that civilian direct-risk-bearers who populate Group $T \cap R$ may alone be sufficient to validate the public withdrawal of military authorization from the private sector, as envisioned by P_2 . I highlight the military personnel in Group $T \cap R$, in part, because we often lose sight of the *political* rights of military personnel.

that are directed against them. After all, these decisions nevertheless involve the use of military force against *their* compatriots and geographical neighbors. When Al-Qaeda was considering the authorization of military force against the US, we must ask, were they really required to consult with direct-risk-bearers in the *US*? Should private authorizing entities consult with citizens of *the very state that they plan to attack*? The idea that military decisions must include individuals on the “enemy” side may seem counter-intuitive, if not mistaken.

But I do not believe that this idea is mistaken, even if it is counter-intuitive. Assuming risk-imposition of a certain severity, direct-risk-bearers who have done nothing to forfeit their immunity from substantial risk-impositions ought to be included in such private decisions of military authorization *with one caveat*. The one caveat is that those direct-risk-bearers who are able to meaningfully voice their input with the group against whom private military force is authorized should not be included in such private decisions—despite the fact that these individuals have done nothing to forfeit their immunity from substantial risk-impositions.

Suppose, for instance, that a powerful group of private actors is set to authorize massive military force against an unjust threat, and the unjust threat is a democratic state. The citizens in that state, we may presume, voted in elections and participated in the democratic process that resulted in the formation of the unjust threat, though they themselves were opposed to its creation. Should these individuals, who have had a meaningful say in the decision of their government, then get a second say in private decisions directed against their government?

The answer, I think, is no. But we are assuming *meaningful* democratic participation. One way that a citizen might lack a meaningful chance to protect her fundamental interests is if she is shut out (say, by an autocratic government) of the decision that prompts private military authorization. A second way is if there is no decision that prompts private military authorization—if the private actor authorizes military force without specific provocation. When individuals lack a fair chance to protect their fundamental interests through political participation at home, then these individuals, it seems, *should* get a say in decisions that are directed against them by private actors, decisions in which they *are* able to protect their fundamental interests.

This was precisely the upshot of the arguments considered in Chapter 4 that were offered by McMahan (2010) and Pattison (2007) in the context of humanitarian intervention. During humanitarian crises, individuals in the target-state are shut out of the political process by their own government as the government commits human rights violations against them. These individuals, who become the direct-risk-bearers of humanitarian intervention, *should be* entitled to participate in decisions of humanitarian military authorization according to McMahan and Pattison. Here, I simply push the point further to suggest that direct-risk-bearers may be entitled participate even in non-humanitarian military authorizations that may expose them to risk.

Any reasons that might prompt us to think otherwise look implausible. Neither physical location nor national association should be sufficient to eliminate the individual entitlement to participate in risk-imposing decisions. As we saw in Chapter 4 when considering the all affected fundamental interests principle, Scandinavians were plausibly entitled to express a say in pollution-related decisions made by the German government

when these decisions affected their interests. Indeed, because pollution-related decisions affect the interests of far-flung individuals, the demos for such decisions may be required to significantly expand. The same should be said of risks in the context of military authorization. If the all affected fundamental interests principle is taken seriously, then we must conclude that *all whose fundamental interests are affected* by a decision of military authorization—bar those who have forfeited their immunity from substantial risk-imposition or who have enjoyed a meaningful say elsewhere—be included in that decision regardless of where the individuals reside.

Similarly, whether the decision of military authorization is public or private should be incapable of preventing application of the all affected fundamental interests principle. As we have seen, the all affected fundamental interests principle applies to *all* decisions that affect our fundamental interests.⁵ The fact that an entity is private rather than public is insufficient to absolve such an entity from demands that are generated by the all affected fundamental interests principle. The inclusion of direct-risk-bearers who are immune from risk-imposition in private decisions of military authorization should depend upon the risks that are imposed upon their fundamental interests (with the one caveat underscored above). It should *not* depend upon the nationality or location of the risk-bearers, nor upon whether the risk-imposing entity happens to be a private rather than public agent.

The final point to highlight regarding the direct-imposition of risk is that the number of individuals who are entitled to participate in private decisions of military authorization may balloon when targets of private military authorization are unknown or

⁵ See Chapter 4, pp. 122-124 for a discussion of how the all affected interests principle concerns private decisions as well as public decisions.

uncertain. I have assumed that the direct-risk-bearers in the September 11 attacks on the US were limited to US residents since it was these individuals who were eventually attacked. But, whenever members of Al-Qaeda choose to authorize military force, the potential targets of attack unfortunately abound. One might argue then that, in contemporary international relations, the direct-risk-bearers of a *given* private decision of military authorization ought to include individuals located around the world. As a UN High Level Panel (2004: 14) recently put the point: '[t]oday, more than ever before, threats are interrelated and a threat to one is a threat to all'. This language is somewhat hyperbolic. But it underscores the sense in which the risk-prevention argument may call for the entitlement of numerous individuals to participate in decisions of military authorization.

Of course, such a proposition may seem radical. But if we pause for a moment to reflect upon the payoff of this proposition, we will see that it is actually somewhat modest (and is indeed a common refrain in international political discourse). Because wars are unpredictable and because they have the potential to spread and spiral out of control, the direct-risk-bearers in a given decision of military authorization may be so wide that the decision must not only be withdrawn from the private sector but must actually be transformed into a *public international decision*.⁶ If so, the risk-prevention argument would necessitate strengthened international institutions like the UN. My conclusion, however, would only be radical insofar as current UN ambitions, which aim to 'take effective *collective* measures for the prevention and removal of threat to the peace', are radical (UN 1945: art. 1.1). All that may be required by a rigorous application

⁶ In the next section, we will see that the indirect-risk-bearers who may be entitled to participate in decisions of military authorization are numerous just like direct-risk-bearers. This only amplifies the point now under consideration.

of the all affected fundamental interests principle is further international cooperation to guarantee the input of risk-bearers.

But we are getting ahead of ourselves. Let us consider indirect-risk-bearers in war before reflecting any further on the global implications of the risk-prevention argument. These implications will be considered after the risk-prevention argument has been finalized.

Indirect-Risk-Bearers: Heightened Probability

I have shown that a number of direct-risk-bearers may be entitled to participate in private decisions of military authorization. Neither civilians nor military personnel can be disqualified from participation according to the all affected fundamental interests principle on the ground that either *necessarily* forfeits their freedom from substantial risk-imposition. Both, in other words, may be members of Group $T \cap R$. And unless members of Group $T \cap R$ possess a meaningful voice in political decisions that result in the threat to which private actors respond, then members ought to be included in the military decisions of these private actors if such decisions impose risks of a sufficient severity. Whether the risks imposed by private military authorizations are indeed of a sufficient severity (and for enough people) to warrant their public monopolization is a further question.

Before considering this further question, I wish to argue that a second type of risk-bearer may be similarly entitled to participate in decisions of military authorization: indirect-risk-bearers. Once the full list of risk-bearers has been specified, requisite considerations of severity and scale may be treated all at once. Private authorizing

entities, as we have seen, impose indirect (or retaliation) risk on individuals when these authorizing entities provoke the deployment of other militaries that in turn directly impose risk upon them. Thus, when Al-Qaeda authorized military force against the US, it imposed indirect risk upon the Afghani people by prompting the US to deploy military forces to Afghanistan. This section and the next suggest that, in addition to the direct-risk-bearers in the US who were entitled to participate in decisions of military authorization by Al-Qaeda (as defended in the previous section), Afghani residents may also have been entitled to participate in such decisions.

I will defend two claims connected to the imposition of indirect risk. The first is the heightened probability claim. According to the heightened probability claim, the private decision to authorize military force heightens the probability that the fundamental interests of the authorizing group's affiliates will be contravened via the mechanism of indirect-risk-imposition. The second claim is the moral relevance claim: the fact that a private decision will not directly impose risk upon the affiliates but will only indirectly impose such risk is insufficient to eliminate the affiliates' entitlement of participation in that decision. I will defend each claim in turn.

A mechanism that validates the heightened probability claim will be presented with the current state-based international system in mind. However, we should note that the claim is meant to apply even to stateless international systems; for that reason, such systems will briefly be considered after the current state-based international system is considered. Whereas the indirect-risk-bearers in the current international system are typically *residents of the state* from which private military force is authorized, the indirect risk-bearers in a stateless international system will share some other form of

group membership with private authorizing entities—or will merely be proximate to them. The full class of indirect-risk-bearers, which includes residents of the state from which private military force has been authorized (in the current international system) and fellow group members and/or physically proximate individuals (in any international system) are the *affiliates* of private authorizing entities, as I have dubbed them. The heightened probability claim applies to all such affiliates.

Current International System

In the current international system, the mechanism for the heightened probability claim is this:

Current International System: When the coordination required of private military authorization is undertaken by group G in some physical location L against the residents $s_1 - s_n$ of state S, the state T in which L is located becomes the target of increased probability for attack, which imposes a heightened probability that the fundamental interests of T's individual residents $t_1 - t_n$ will be contravened.

A useful illustration of this mechanism, and indeed a piece of empirical evidence for its credibility, is the US response to Al-Qaeda following the attacks on September 11. If we plug in the relevant actors from this response to the purported mechanism of risk-imposition, we may simply rewrite the statement above using events that actually transpired. When Al-Qaeda (G), based in the Safed Koh Mountain range (L), coordinated the authorization of military force against residents (s_1-s_n) of the US (S) in 2001, Afghanistan (T), where the Safed Koh Mountains are located, became the target of increased probability for attack, which imposed a heightened probability that the fundamental interests of Afghani residents (t_1-t_n) would be violated. As we now know,

the attack *did* occur and many Afghani residents, both military and civilian, *were* killed. Many of these residents had no association whatsoever with Al-Qaeda. Many, in other words, never forfeited their immunity from substantial risk-imposition by attacking, or helping to attack, the US. Yet, these residents suffered at the hands of the US military.

The heightened probability claim begins to explain why groups like the Afghani government might have a responsibility to monopolize decisions of military authorization within their territory. A failure to do so endangers Afghani residents. But while the actions of Al-Qaeda undoubtedly led to this increased risk, two objections immediately arise. The first is that Al-Qaeda did not actually impose risks upon Afghani residents. The US did. Therefore, questions about the responsibility of Al-Qaeda for the individuals who were ultimately harmed—or about the moral failure of the Afghani government to keep Al-Qaeda from imposing risks upon these residents—are the wrong questions to ask. We should probe *US responsibility* if we are concerned with the military and civilian death toll that mounted at the hands of US soldiers. In other words, the heightened probability claim may be true, but so what? While this objection is, I think, powerful, it does not undermine the proposition at hand. The heightened probability claim is simply an empirical premise whose normative import is defended with a second claim (the moral relevance claim). For now, these normative worries may be set aside.

The second objection that the heightened probability claim must confront is an empirical objection. Perhaps the case that I have chosen to illustrate the mechanism of indirect risk-imposition—the US response to Al-Qaeda—is an exception rather than the rule. It may be that states do *not* tend to authorize military force against private actors who authorize military force against them.

While I cannot offer a full rebuttal of this objection, it appears particularly suspect once we recognize that the response-attacks that drive the mechanism of heightened risk may be undertaken by *anyone*. Whether it was the US that authorized military force against Al-Qaeda, the UN Security Council, NATO, or even the Afghani government itself is irrelevant. So long as the private authorization of military force is likely to prompt a military response by *someone*, then the fundamental interests of those who reside in the state from which private military force was launched will be subjected to heightened risk. In order for one to object to the heightened probability claim, one must demonstrate that the probability of military response to private military authorization remains constant after attack—that neither the state that was attacked, the allies of that state, the international community, nor the host-state are any more likely to authorize military force against private authorizing entities than they were before the attack. If the risk of a military response by *any* of these actors increases, the heightened probability claim must be endorsed.

Given the wide range of actors who may respond in a way that would validate the heightened probability claim, I believe that it is plausible on its face and requires little, if any, further defense. However, I will sketch a brief argument to assure the skeptical. The ideal piece of data to cinch the heightened probability claim would be a simple proportion of instances in which private actors authorized military force to instances that resulted in a military response. This piece of data could then be compared to the baseline probability of military authorization when private actors have *not* authorized military force. To my knowledge, however, no such data exists.

The argument that I push instead relies upon data from *state-to-state* responses—in particular, on so-called ‘interstate militarized disputes’.⁷ These are ‘united historical cases of conflict in which the threat, display, or use of military force short of war by one member state is explicitly directed towards the government, official representatives, official forces, property, or territory of another state’ (Jones, Bremer, and Singer 1996: 163). My argument is this: (a) the data from militarized interstate disputes suggest that the heightened probability claim applies to public authorizing entities, and (b) we have no reason to forecast a wholesale abatement of such heightened probability when the entity that opens with military authorization is a private actor.

Regarding (a), of the 2,333 militarized interstate disputes that were catalogued from 1816 to 2001, 110 (roughly 5%) ended in war, and hundreds more ended in the use of force just short of war (Militarized Interstate Dispute Database 2007). This statistic, of course, severely underestimates the number of instances in which the *authorization of war* by one state would result in the authorization of war by another. Presumably, such a statistic would significantly outpace the 5% of militarized interstate disputes that result in war. But even using the more conservative estimate, the probability of states authorizing military force against one another is substantial when the target-state takes hostile military action. Because the baseline probability of military authorization in the absence of military provocation is unknown (and may be too complex for meaningful prediction), we cannot conclude with certainty that a 5% chance of war is greater than the usual probability of war. But, given the relative infrequency of war, we should be confident.

⁷ This data comes from Correlates of War Project, a database that is widely used among political scientists and international relations scholars as a tool for understanding the escalation of war between states. For a testament to its importance in political science and international relations, see Goodman (2006: 119).

The question is whether the up-tick in probability will disappear when a private actor is substituted for one of the public actors. The most plausible reasons why it *would* disappear, it seems, are (i) if states somehow lacked an interest in responding to private actors with force (which they possess when responding to other states), or (ii) if, assuming that they possessed such an interest, they were stymied somehow from responding by the international system.

But we must remember that a response to private military authorization by *anyone* would validate the heightened probability claim. If any actors responded to the Al-Qaeda attacks with force (even the Afghani government), the heightened probability claim must be embraced. And it seems that an international system in which *no one* responded with force against private actors that authorized military force would not be an international system that states would wish to preserve. Perhaps this is why international laws and norms have long permitted states to respond with force at home in order to quell private violence.

Furthermore, international laws and norms increasingly permit states to respond with force *abroad* to quell private violence, assuming that they respond in states that do not themselves take adequate measures against such violence. The embraced reason is that ‘failing states who through weakness or ill-will harbor those dangerous to others...constitute a risk to people everywhere’ (ICISS 2001: 5). Sovereignty entails responsibility, as the mantra goes, and the dereliction of responsibility increasingly permits outside military responses. On account of the threats that private actors pose to the international system—coupled with the internal responses to such violence that have long been permitted and the external responses that are increasingly permitted—(i) and

(ii) appear unpersuasive. Actors in the international community *do* have an interest in responding to private violence and are *not* stymied from doing so by other actors. For these reasons, we ought to embrace (b): the heightened probability of attack that accompanies public military authorization does not dissolve in the case of private military authorization.

Alternative International Systems

Supposing that this is correct, one might argue that, while the heightened probability claim may be a compelling account of the current international system, it is not a compelling account of alternative international systems. If the applicability of this claim is limited, then the risk-prevention argument may similarly be limited. But I want to suggest that the mechanism that governs heightened probability in the current international system would seemingly be no different (or scarcely different) from the mechanism that governs heightened probability in alternative, even stateless, international systems. If pre-Westphalian history is any indication, groups that are attacked by others are likely to respond with military force (Gat 2006: 147-673). The reason is that such responses are taken to be, and have long been taken to be, the only sure-fire mechanism for self-defense and the deterrence of future attacks.

When military responses are authorized against private actors, even in stateless international systems, these responses will occur in physical space (as in state-based systems), where individuals who are proximate to the attacks become risk-bearers. In addition, groups of individuals with whom the private authorizing entities are associated

may be subjected to risk. After all, the formation of such groups, political or otherwise, is certainly possible (and indeed probable) in alternative international systems. The indirect-risk-bearers in a state-less international system—those who are physically proximate to private authorizing entities and who are fellow group members—will likely be affected according to a mechanism that is almost identical to the mechanism that operates in the current international system. Groups that have been attacked are likely to respond with force, whether for reasons of self-defense or punishment (or perhaps other-defense or norm-enforcement). Otherwise, they are likely to expect another group to respond (perhaps the group that ‘governs’ the private actors who attacked). Even in an international system without states, it is difficult to envision a different empirical reality.

Indirect-Risk-Bearers: Moral Relevance

The previous section showed that the private decision to authorize military force heightens the probability that the fundamental interests of the authorizing group’s affiliates will be contravened via the mechanism of indirect-risk-imposition, whether in the current international system or alternative international systems. But should such heightened probability entitle affiliates to participate in decisions of private military authorization? An affirmative answer to this question is needed if indirect-risk-bearers are to be included with direct-risk-bearers as individuals who may be entitled to participate in private decisions of military authorization according to the all affected fundamental interests principle.

But an affirmative answer is by no means obvious. First of all, we might think that affected parties possess an entitlement to participate in the decisions of those who have been attacked by private actors, *not* in the decisions of private actors themselves. Perhaps Afghani residents, for instance, merited a say in the US response to Al-Qaeda, not in Al-Qaeda's prior decision to authorize military force against the US. After all, it was the US who ultimately imposed *direct risks* upon Afghanis. Why not simply apply the rationale of the previous section to conclude that Afghanis—more specifically, those Afghanis who meet the criteria regarding immunity and democratic participation—should have been granted input in the US decision to authorize war in Afghanistan? That way, we need not concern ourselves with purported entitlements springing from indirect-risk-imposition. Call this the *alternative-participation objection*.

Secondly—and notwithstanding the first objection—we might think that, at least in many cases, groups have a responsibility to refrain from responding with military force in the territory from which private actors have launched their attacks. For instance, it may have been that the US had a responsibility to *forego* invading Afghanistan in response to Al-Qaeda's military actions. If so, then Al-Qaeda would not have caused the US to subject Afghanis to *justifiable* risks. Al-Qaeda would have caused the US to subject Afghanis to *unjustifiable* risks. And perhaps private actors ought to have the freedom to authorize military force without consulting indirect-risk-bearers so long as the risks that are ultimately imposed upon these indirect-risk-bearers by third parties would be unjustifiable. Call this the *prohibited-response objection*.

In this section, I deny both the alternative-participation and prohibited-response objections. In so doing, I seek to place the moral relevance claim on firm ground.

According to the moral relevance claim, the fact that a private decision will not directly impose risk upon the affiliates but will only indirectly impose such risk is insufficient to eliminate the affiliates' entitlement of participation in that decision. Even if the risk is indirect, I argue, the private decision to authorize military force *does* impose risk in the relevant sense—and may thus trigger application of the all affected fundamental interests principle. Once my analysis in this section is complete, we may finally consider whether the risks (direct and indirect) imposed by military authorization are sufficiently severe and far-reaching to necessitate their withdrawal from the private sector.

The Alternative-Participation Objection

According to the alternative-participation objection, the affiliates of private authorizing entities do not merit an entitlement to participate in private decisions of military authorization that provoke direct-risk-impositions. They should simply merit an entitlement to participate in decisions that respond to such provocation—decisions that *directly* impose risk upon them. As I asked above, why insist that Afghanis be permitted to participate in Al-Qaeda decisions against the US, which do not actually affect them, when we could just insist that they be permitted to participate in US decisions, which *do* affect them?

The reason, I want to suggest, is that our fundamental interests are too valuable to demand that the affiliates of private authorizing entities (the Afghanis in this case) forego preventive measures aimed at limiting their risk-exposure by waiting until an invasion of their territory is under consideration. First of all, it may be that participation in the private

decision to authorize military force is the *only* way for individuals to protect their fundamental interests. The Afghanis may not have been able to gain a meaningful say in the US decision to invade Afghanistan. Secondly, even if Afghanis were granted a meaningful say in the US decision to invade Afghanistan, Afghanis may have been able to *more effectively* protect their interests through participation at an earlier stage—in the decision that provoked the US response. If the affiliates of potential private authorizing entities are entitled to participate in a political process with these authorizing entities, all contributors are likely to speak the same language, operate under similar cultural norms, understand relevant political procedures, and so on. This may facilitate a richer protection of one's fundamental interests than participation at a later stage would facilitate (for instance, by Afghanis in US decisions).

Most importantly, the affiliates of private authorizing entities are not likely to know ahead of time whether, or to what extent, they will be able to gain access to later decisions that will affect them. These almost inevitable conditions of uncertainty, coupled with the disastrous consequences of later exclusion, demand sensitivity to the need for anticipatory measures *now*. In particular, we ought not to insist that the affiliates of private authorizing entities sit back and hope that they will gain meaningful participation at a later stage in the risk-imposing process. They ought to be permitted to take reasonable measures of preventive action through participation in decisions of private military authorization at an early stage if the potential risks are sufficiently robust.⁸

Of course, as I mentioned in the previous section, when such meaningful participation is not possible, then the affiliates of private authorizing entities *should* get a say in later decisions that directly impose risk upon them. Given the exclusion of so many

⁸ What counts as reasonable preventive measures is addressed in the next subsection.

Afghanis from the political process and the fact that so many did not contribute to the threat posed by Al-Qaeda, many Afghanis *should* have had a say in the US decision to authorize military force against Afghanistan since the risks that were imposed upon them were so pronounced. Fundamental interests are sufficiently valuable to warrant back-up participation, even in multiple decisions, when one is denied opportunities to safeguard these interests.

Jeremy Waldron offers an analogy that is particularly apt here. He (1989: 510) describes rights as imposing not just single duties but ‘waves of related duties’, which ‘back it up and root it firmly in the complex, messy reality of political life’:

We talk about rights when we think that some interest of an individual has sufficient moral importance to justify holding others to be under a duty to serve it. But if a given interest has that degree of importance, it is unlikely that it will justify the imposition of just one duty. Interests are complicated things. There are many ways that a given interest can be served or disserved, and we should not expect to find that *only* one of those ways is singled out and made the subject matter of a duty.

As we have already seen, the right to physical security sometimes generates a duty of abstention by the risk-imposer *and* sometimes, according to all affected fundamental interests principle, a duty to include risk-bearers in decisions of risk-imposition.⁹ The point that I offer here, following Waldron, is that *multiple* risk-imposers may become duty-bound to include risk-bearers in decision-making. The all affected fundamental interests principle, in other words, may generate entitlements to participate in waves of successive decisions insofar as these decisions affect our fundamental interests.

⁹ Chapter 4, pp. 129-135.

The Prohibited-Response Objection

Having shown that the alternative-participation objection is incapable of denying indirect-risk-bearers access to the all affected fundamental interests principle, I now wish to consider a more challenging objection: the prohibited-response objection. According to the prohibited-response objection, the affiliates of private authorizing entities may be entitled to participate in decisions of private military authorization but *not* when such decisions provoke responses that constitute *unjustifiable* risk-impositions. Consider how the paradigm example explored thus far—the Al-Qaeda attack on the US and the subsequent response by the US in Afghanistan—may have elided a crucial nuance. Many do not fault the US (and certainly the international community did not fault the US) for invading Afghanistan. For most, the private actors (Al-Qaeda) lacked a just cause, and the responder (the US) possessed a just cause. But what if the private actors possessed a just cause, and the responder lacked one? Are we willing to blame the private actor, in possession of a just cause, for not consulting with affiliates? Should we not forego blaming the private actor and simply demand that the responder *refrain from* authorizing military force? If so, then affiliates may only be entitled to participate in private decisions of military authorization (on account of the indirect risks that are imposed) when authorizing entities lack a just cause. Needless to say, this would substantially undermine the force of my argument.

Since the US response to Al-Qaeda is much debated, it will be more useful to consider an unequivocal case in which the private actor possesses a just cause and the responder lacks one. That way, we can effectively assess whether the moral relevance of

indirect-risk-imposition depends in *any way* upon our background assumptions regarding the justice of the two belligerents—whether, to be more specific, private actors still must include affiliates in decisions of military authorization when they unquestionably possess a just cause and the responder unquestionably lacks one (when the responder certainly *ought not* to respond).

Consider the following such case. A private actor from State A launches a pre-emptive attack on State B because State B has aggressively mobilized its forces and is menacing its neighbors. We should assume that the pre-emptive strike on State B meets every just war criterion (barring the one of legitimate authority now under consideration) and that it therefore possesses a just cause. Any response by State B will be entirely unjustified—but will be massive in scale, let us assume.¹⁰ Should a private actor from State A be permitted to launch an attack on State B without consulting fellow residents despite the fact that such an attack imposes substantial indirect risks upon these residents?

The answer, it seems, is *no*. What matters is not whether private actors authorize military force against an entity that *should* respond but whether private actors authorize military force against an entity that *will* respond. Even if private actors possess a just cause, affiliates may simply not be willing to accept the risks that war entails. The residents of State A, for instance, may decide, if given the opportunity, that potential retaliation by State B would make preventive action unworthy of the risks and therefore ill-advised. For that reason, private actors of State A may indeed be wronging fellow

¹⁰ Some just war traditionalists may be unwilling to grant that a response by State B *would be* unjustified. Perhaps State B is *justified* in responding. To proponents of such a position, however, my case for indirect-risk-imposition will be even stronger. Private actors that authorize military force with a just cause cannot bank on the fact that the enemy will refrain from responding. It is therefore particularly imperative that such private actors consult with affiliates.

residents in attacking State B. Private actors owe it to their affiliates to include them in the risk-imposing decisions of a certain severity even if a response is unjustified (which, of course, is just another way of saying that private actors are entitled to participate in such decisions).

A proponent of the prohibited-response objection may wish to press further, however, and insist that, if affiliates exercise their entitlement of participation and keep private actors from authorizing military force, then the affiliates would now be wronging the private actors. This (perhaps surprisingly) delivers us squarely into the literature on ‘innocent bystanders’. If residents of State A prevent private actors from authorizing military force against State B (and thus monopolize the decision of military authorization), they would be protecting themselves from risk to their fundamental interests. But the private actor that they block is innocent in the sense that it has done nothing to make it morally liable to preventive action; the private actor possesses a just cause and is *in the right*. Just as we ask whether individuals are permitted to curtail the liberty of innocent bystanders (and perhaps harm them) to protect themselves from the risk-imposition of an attack, we may ask whether the residents of State A are permitted to curtail the liberty of (and perhaps harm) innocent private actors to protect themselves from the risk-imposition of an attack. The liberty curtailment (and possible harm) that would be involved is the enforced insistence that such decisions be undertaken collectively.

But the liberty-curtailment imposed on the innocent bystander in this case—the private authorizing entities that possess a just cause—is mitigated by two factors. First, the force that will be required to prevent private actors from authorizing war will rarely

rise to the level of killing. Much of the way that a citizenry will monopolize the authorization of military force will involve intelligence gathering, policing, imprisonment, and other forms of non-lethal force. These non-lethal methods of reserving decisions of military authorization for public bodies are much less problematic than lethal methods in considerations of innocent bystanders.

Second, and perhaps more importantly, the all affected fundamental interests principle allows all individuals, including those wishing to authorize military force, to decide *together* whether the risks of military authorization are tolerable. Shared decision-making appears to be the only fair way to proceed in cases like military authorization. Whether private actors like it or not, their decision to authorize military force may have negative consequences for affiliates. By the same token, the decision by affiliates to take preventive action may have negative consequences for the private actors wishing to authorize military force. A way (perhaps the only way) to fairly resolve these competing positions is to include both sides in a decision about military authorization rather than allow either side to take unilateral action.

Indeed, these considerations point us to a resolution of one difficult challenge that often pops up in discussions of innocent bystanders. While I have portrayed private actors as innocents whose actions may endanger affiliates, I might also have portrayed affiliates as innocents whose actions may endanger private actors. In other words, from the perspective of private actors who are considering the authorization of military force (with a just cause), *the affiliates* are the innocents who may suffer as a result of their efforts to protect themselves. Thus, private actors who wish to authorize military force must take account of affiliates who are innocent bystanders, while affiliates wishing to monopolize

military force must take account of private actors who are innocent bystanders. Which side gets to be the one that ultimately thwarts the interests of (and potentially harms) the other (an innocent bystander)? Nozick (1974: 35) first pointed out this tension in his discussion of innocent shields (who I am calling bystanders) and threats:

If one may attack an aggressor and injure an innocent shield, may the innocent shield fight back in self-defense (supposing that he cannot move against or fight the aggressor)? Do we get two persons battling each other in self-defense? Similarly, if you use force against an innocent threat to you, do you thereby become an innocent threat to him, so that he may use additional force against you (supposing that he can do this, yet cannot prevent his original threateningness)?

Nozick does not venture an answer to these complicated questions. But one answer, which is applicable to the authorization of military force (though perhaps inapplicable elsewhere), is that innocent bystanders must enter into a democratic process to determine risk-allocation. Since the authorization of military force by a private actor would impose risks upon one innocent bystander (the affiliates who may be attacked in response), and the prevention of this authorization would impose risks upon another (the private actors who believe that military force ought to be authorized), the two must decide together how to proceed.

Moral Relevance

I have now challenged two objections to the view that indirect-risk-imposition is excluded from applications of the all affected fundamental interests principle: the alternative-participation objection and the prohibited-response objection. Both objections failed to appropriately acknowledge the ways in which our fundamental interests might go unprotected in the absence of an entitlement to participate in indirect-risk-imposing

decisions. The indirect-risk-imposing decision may be the only adequate avenue for our participation. And future direct-risk-imposers cannot always be trusted to include risk-bearers. For these reasons, if we take risks to our fundamental interests seriously, indirect-risk-imposition ought to be sufficient to invoke the all affected fundamental interests principle. In other words, the moral relevance claim must be embraced: the fact that a private decision will not directly impose risks upon the affiliates but will only indirectly impose such risks is not sufficient to eliminate the affiliates' entitlement of participation in that decision.

That the two most compelling objections to the moral relevance claim did not succeed is, upon reflection, perhaps unsurprising. The indirect imposition of risk is really just an imposition of a risk that some further risk will be imposed—it is the risk of a direct-risk-imposition. Consider that, from the perspective of a single Afghani, whenever the US invades Afghanistan, there is chance of being killed. Let's say that the individual in question faces a 10% chance of death as a bearer of *direct-risk* by the US when it invades. But when a private group like Al-Qaeda authorizes military force against the US, there is some probability that the US will respond. Suppose that there was a 50% chance that it would invade Afghanistan. The individual in question thus faces a 5% chance of death as a bearer of *indirect-risk* by Al-Qaeda when it attacks the US (a 50% chance of invasion by the US, which, if undertaken, imposes a 10% chance of death). Because the all affected fundamental interests principle is responsive to *risks*, it would be odd if it were not responsive to both sets of risks—if, in other words, the US was expected to account for the 10% chance of death that followed from its decision but Al-Qaeda was not expected to account for the 5% chance of death that followed from its

decision. Both types of risks, it seems, should be of concern for the all affected fundamental interests principle.

Supposing then that the moral relevance claim is plausible, as I have tried to show, then indirect-risk-bearers, like direct-risk-bearers, may be entitled to participate in private decisions of military authorization. Whether the risks that are imposed upon these risk-bearers (direct and indirect) are of a sufficient severity and for enough people to warrant the removal of decisions of military authorization from the private sector is the question to which we now must turn. Only if this question can be answered in the affirmative can we endorse P_2 and thereby affirm the risk-prevention argument against A_1 and A_2 .

Precautionary Principle

The probability that the fundamental interests of certain direct-risk-bearers and indirect-risk-bearers will be violated escalates when private actors authorize military force. But if this escalation is to ground P_2 , two questions must be answered. First, is the heightened risk sufficiently severe to warrant guaranteed participation in private military authorization? Second, is the heightened risk spread out across enough individuals to require that decisions of military authorization ultimately be withdrawn from the private sector and reserved for public discharge? The answer to these two questions, we might say, depends upon the *magnitude* of war. How many people will be harmed, and to what extent, if war occurs? Or, to put these two questions together in a somewhat crude approximation, what will the casualty count be?

We may recall that risk is defined by the magnitude of potential harm multiplied by the probability of that harm. One way to demonstrate high risk would focus on both magnitude and probability. A second strategy is available when the harm in question is positively catastrophic, for instance in considerations of climate change and global epidemiology, where the result of certain actions (or inactions) may be massive losses of life and widespread suffering even though the probability of such catastrophic losses is low or unknown. According to this second strategy, high risk is demonstrated by focusing primarily on magnitude.

In this section, I apply this second strategy to the authorization of war. Specifically, I argue that, given the nature of war, the magnitude of potential contraventions to the fundamental interests of risk-bearers (direct and indirect) is sufficiently high to place the heightened probability of violation beyond a threshold of risk that would be acceptable for military authorization to proceed privately. Because the risks of private military authorization are beyond this threshold, and in light of P_1 , decisions must be withdrawn from the private sector and reserved for public discharge.

The principle upon which my analysis draws is a precautionary principle: when the probability of a catastrophic event is low or unknown, we should err on the side of preventive action rather than inaction. This principle has affinity to what has become known in military circles as the *one percent doctrine* (or *Cheney doctrine*). Referencing the US-led war on terror, Ron Suskind (2006: 62) describes the doctrine in this way: ‘if there was even a 1 percent chance of terrorists getting a weapon of mass destruction—and there has been a small probability of such an occurrence for some time—the United States must now act as if it were a certainty’.

For my analysis, I will rely upon the precise formulation of precaution that Henry Shue has offered. According to Shue (2010: 148), when the risk of an event possesses three features, the probability of that event ought to be ignored ('beyond a certain minimum level of likelihood'):

(1) massive loss: the magnitude of the possible loss is massive, (2) threshold likelihood: the likelihood of the losses is significant, even if no precise probability can be specified, because (a) the mechanism by which the losses is well understood, and (b) the conditions for the functioning of the mechanism are accumulating; and (3) non-excessive costs: the costs of prevention are not excessive (a) in light of the magnitude of possible losses and (b) even considering the other important demands on our resources.

If private military authorization possesses these three features, then we have good reason, it seems, to insist that such authorization be prohibited and military force publicly monopolized, even when the probability of harm (direct and indirect) is low or unknown.

Before considering whether private military authorization *does* possess these three features, however, I want to offer a brief moral justification of the principle and propose one amendment. The principle, I believe, captures a deeply held, morally defensible, intuition that we tend to universally espouse with respect to loss. As Shue puts it, there are 'losses that would be utterly intolerable, especially "losses" involving massive deprivations of necessities to which all people, regardless of individual identity, have rights simply as human beings' (2010: 148). To frame this point in the language of this chapter, if we are to take our fundamental interests in physical security seriously, we must not allow even a small chance that these interests will be so exhaustively violated in the way that catastrophic events like global warming and unnecessary war entail. This much, I expect, should be uncontroversial. The hard question is whether a given practice,

like the private authorization of war, *does in fact* satisfy the conditions that activate the principle.

The one amendment that I wish to suggest before arguing that they do concerns 2*b*. Shue elaborated the precautionary principle for application to debates on global warming, where the documented accumulation of greenhouse gasses (the demand of 2*b*) helps allay concerns about the unknown probability of catastrophic climate change. But to speak of an accumulation in the context of war—for instance, an arms buildup that must be identified if efforts to prevent private actors from authorizing military force are to be justifiable—is to misunderstand the nature of military monopolization. Individuals can rapidly acquire destructive weapons, and preventive measures are needed to limit private military authorization *ahead* of such buildups. We therefore cannot demand a documented accumulation of arms to defend the practice of public military monopolization (as 2*b* demands). Instead, we ought to demand something less stringent.

What I suggest will be dubbed 2*b** and will replace 2*b*. According to 2*b**, actors capable of initiating the conditions for the functioning of the mechanism must be capable of initiating these conditions and have demonstrated a desire to do so. Aside from this replacement, the remaining criteria will be unchanged. Each will be considered in turn. What these considerations show is that the precautionary principle should apply to the direct and indirect-risk-bearers who may suffer as a result of private military authorization.

Massive Losses

The *massive losses* of war include death and bodily trauma of every imaginable variety. Aside from such harms to our physical security, wars also cause include fear, economic undoing, food shortages, forced migrations, post-traumatic stress, homelessness, and political unrest. To borrow General William Sherman's now hackneyed phrase, wars are hellish.

But they are not just hellish in the way that Sherman understood them to be. Wars, with each passing generation, are increasingly hellish. Four generations after Sherman, John Hersey (1985: 1, 18) would describe the 'noiseless flash' of Hiroshima and the 'thick, dreadful miasma' that followed. Two generations after Hersey, a UN High Level Panel (2004: 16) would warn that 'with fifty kilograms of highly enriched uranium (HEU), an amount that would fit into six one-litre milk cartons' an individual 'could level a medium-sized city'. Hundreds of thousands of people may now die horrific deaths at the hands of an adept cadre of private individuals who procure a few milk cartons worth of enriched uranium.¹¹

And any military response to such an attack, though hard to envisage, would surely affect countless indirect-risk-bearers. If the US response in Afghanistan to private military authorization by Al-Qaeda is any indication, 2,537 Afghani civilians died in 2009 and 2010 alone, eight years after the response had been authorized—5,594 were wounded in these two years (Bohannon 2011). This is not to mention the military personnel who have died in great numbers every year or the deaths and injuries that

¹¹ For a powerful depiction of this threat, see Allison (2004).

resulted from war (which is to say that they would never have occurred in the absence of war) but are not part of the official casualty count.

A critic might wish to argue that not *all* private wars are hellish in this way. Perhaps only *unjust* private wars (like the September 11 attacks) have such catastrophic consequences. If private actors were permitted only to authorize *just* wars with *minimal* force, then the precautionary principle may not apply. But, of course, the justice of private attack has little to do with the response. Even when private actors have a just cause, the military response may be severe. Moreover, even when private actors have authorized ‘minimally destructive’ military force, they are still authorizing war, which may provoke a substantial response. In short, the limited private authorization of military force may affect a narrow set of direct-risk-bearers but, particularly given the totalizing tendencies of war, it may affect a wide set of indirect-risk-bearers. As a result, the precautionary principle may apply even to those private actors who operate with restraint.

More to the point, the fact that only some wars unleash the kind of hellishness of September 11 or a nuclear detonation is enough for us to invoke the precautionary principle. The risk-prevention argument aims to show that decisions of military authorization must be withdrawn from the private sector and made by public bodies. But, in order to remove particular kinds of decisions of military authorization from the private sector, a public body must *monitor* private decisions of military authorization. In particular, the public body must determine whether a given private decision of military authorization would impose unjustifiable risks for direct and indirect-risk-bearers (and the kind of hellishness of September 11 or nuclear detonation). Only then can it prevent actors from authorizing military force of a particular variety. We might say then that, if

there are certain kinds of wars that private actors must not authorize, public bodies must have the final say over which wars qualify. But this just *is* public monopolization over military authorization.¹²

Likelihood

With the massive losses of war specified and an objection to those losses challenged, we may now turn to the second criterion of the precautionary principle: the likelihood of massive losses. The likelihood of massive losses resulting from private military authorization is certainly not known with any great specificity. Moreover, if estimates were available, the likelihood of these losses, at least of the indirect-variety, would be low.¹³

Yet, as *2a* demands, the mechanism of losses that result from private military authorization is very well understood. This mechanism was elaborated in great detail above.¹⁴ And, as *2b** demands, actors capable of initiating the conditions for the functioning of the mechanism *are* capable of initiating these conditions and have demonstrated a desire to do so. Wars have already been privately authorized that at least

¹² In the event that a public body ‘signs off’ on private military authorization, they are, by definition, authorizing war. They are deciding that a war may be fought and by whom (i.e. the private actors). The question of whether this practice is justifiable is a question about whether military outsourcing is justifiable (a question of *military supply* that is analyzed in Part II). The important point for now is just that the monitoring and judgment that is inherent in removing some decisions of military authorization from the private sector *is* public monopolization over military authorization. If we can show then that there are some private decisions of military authorization for which the precautionary principle may be successfully applied (and thus some decisions that must be withdrawn from the private sector), we will have demonstrated that public entities must monopolize the authorization of military force—that public bodies must have the final say over and sign off on decisions of military authorization.

¹³ What sorts of losses precisely count as ‘massive’ is left aside. I assume that while the concept is contestable, there are some losses that we all tend to recognize as massive.

¹⁴ See pp. 144-154 for the mechanism of direct-risk-imposition and pp. 155-162 above for the mechanism of indirect-risk-imposition.

have come close to initiating the conditions of massive loss. And these wars have been authorized in an international system of states, which takes extensive measures to publicly monopolize the authorization of military force. In a system without such public monopolization, we have reason to believe that privately authorized wars would continue and perhaps proliferate. Moreover, private actors have clearly demonstrated a willingness to use weapons of mass destruction and a capability of doing so; states around the world have clearly demonstrated a willingness to respond with significant military force. Without public monopolization, the evident desire of private actors to bring about catastrophic destruction and the ever-enhancing technology that enables such destruction should support application of *2b** to private military authorization.

Costs

Finally, the costs of withdrawing decisions of military authorization and reserving them for public discharge are minimal.¹⁵ Unlike the costs of climate-regulation, which must often be borne without immediate benefit, the costs of military monopolization are borne by societies that directly experience the benefits of monopolization. Indeed, the purely short-term financial costs of *not* monopolizing the authorization of military force may be greater than the costs of monopolization, given the severe financial strains of war. This is particularly apparent when we realize that the monitoring required of military monopolization (e.g. intelligence gathering, policing, imprisonment) is a kind of

¹⁵ I am assuming the existence of well-functioning public institutions here. On pp. 187-188, I will examine emergency circumstances in which well-functioning public institutions do not exist.

monitoring that domestic law enforcement requires regardless (which societies are likely to institute for reasons that go beyond this thesis).

Precaution, Risk-Prevention, and Global Justice

We may conclude then that the private authorization of military force does meet the criteria for application of the precautionary principle: massive losses, threshold likelihood, and non-excessive costs. Moreover, the precautionary principle itself is quite plausible. Are we to then conclude that the direct and indirect risks imposed by private authorizing entities sit above the threshold that must be met if these decisions are to remain private? I believe, and have tried to show, that we should. Given the horrors of war, the imposition of risk to the fundamental interests of both direct and indirect risk bearers simply entails *too much* danger.

Let us take stock then of our analysis. Chapter 4 argued that a decision must be withdrawn from the private sector and reserved for public discharge when one course of action under consideration imposes unduly high risks to the fundamental interests of enough individuals (P_1 of the risk prevention argument). We have now seen in this chapter that the magnitude of potential contraventions to the fundamental interests of direct and indirect risk-bearers is sufficiently high for enough individuals to place the heightened probability of violation beyond an acceptable threshold of risk (P_2 of the risk prevention argument). Therefore, decisions of military authorization must be withdrawn from the private sector and reserved for public discharge.

At various places in my analysis, I have suggested that entitlements of participation, which are generated by the risk-prevention argument (P_1 and P_2), may demand public international cooperation through institutions like the UN. Given the increasingly menacing capacities of advanced weaponry, individual risk-bearers may be quite geographically isolated from one another. Decisions of military authorization may thus require a global input, and it may be that monopolizing institutions must be international in scope. To conclude my presentation of the risk-prevention argument, I wish to reflect briefly on the relationship of my argument to contemporary debates on global justice.

My approach to public monopolization is consistent with many cosmopolitan approaches to international normative theory that seek to capture the enhanced interconnectedness of human interactions. Granted, at least one cosmopolitan theorist, Cécile Fabre (2008) explicitly rejects the sort of argument that I give for public military monopolization. Others, including but certainly not limited to Simon Caney (2005: 205-207) and Fernando Tesón (2003), neglect it. But it seems that cosmopolitan thinkers should be quite receptive to the potentially global reach of the risk-prevention argument, especially since many have explicitly endorsed the all affected interests principle (Pogge 2002: 190; Held 2004: 100; Cohen and Sabel 2006: 169).¹⁶

Christian List and Mathias Koenig-Archibugi (2010: 76) eloquently summarize the relationship between global interconnectedness and international cooperation:

¹⁶ Note, however, that application of the risk-prevention argument does not depend upon the application of comprehensive principles of distributive justice to the global realm. It depends only upon more minimalist applications of justice. Remember that we are interested in *fundamental interests* in physical security, which are protected by rights. Consequently, the potentially global push of the risk-prevention argument should not trouble those who insist upon the presence of states for the application of comprehensive principles of distributive justice. For such a 'statist' view, see Nagel (2005).

The world is increasingly characterized by transnational interdependence, cross-border policy externalities, and the widely perceived need to provide global collective goods and to avoid global collective bads. Consider, for example, the problem of climate change and the need to limit greenhouse gas emissions; the problem of global refugee flows and the commitment to protect the human rights of forced migrants; and the problem of controlling and eradicating infectious diseases that can spread very fast, such as new forms of influenza. In all these cases, the need for “global governance,” that is, the challenge to make good collective decisions and to coordinate actions transnationally, is more pressing than ever.

My analysis in Part I may simply add the authorization of war to this list of global collective bads. The effects of war, like climate change, refugee migrations, and infectious diseases, tend to ripple across the globe now more than ever (and certainly in the previous century more than all prior centuries). As a result, they demand, at a minimum, more *public international cooperation* and thus more robust efforts aimed at public international monopolization.

Public Military Authorization and Compensation

The conclusion of the risk-prevention argument, as we have seen, is that public bodies ought to monopolize the authorization of military force to ensure that private actors do not impose undue risks upon one another. Thus, A_1 and A_2 may now be conclusively rejected. We have not yet seen, however, whether public bodies, when making decisions of military authorization (decisions that they alone are permitted to make) are ever justified in deciding positively to authorize military force. It may be that decisions of military authorization must be withdrawn from the private sector and reserved for public discharge but that, once withdrawn, public bodies must *not* authorize military force. In other words, without further argumentation, the foregoing might simply stand as a

pacifist argument for A_0 , the non-provision of military force. In this section, I will challenge such a pacifist endorsement of A_0 and propose what I have dubbed the compensation argument to stand in its place.

A pacifist that embraces public monopolization of the sort envisioned by the risk-prevention argument insists upon a distinction between the policing required of public monopolization and the military deployment required of public authorization (Teichman 1986: ch. 5). This distinction has been pressed in my own analysis and so will not be elaborated further.¹⁷ From this distinction, a pacifist extension of the risk-prevention argument may be constructed. The pacifist, like the just war theorist, would demand the public policing of military monopolization in light of the risks to which direct and indirect-risk-bearers are subjected by private decisions of military authorization. But the pacifist may insist further that *no* decisions of military authorization, whether public or private, are in fact capable of adequately reflecting the preferences of risk-bearers. Strengthened international institutions might successfully enable the satisfactory representation of risk-bearers in war. But current institutions do not. Thus, wars, whether public or private, may not be justifiably authorized *now*. If, in the future, it turns out that strengthened international institutions are capable of better representing risk-bearers, and wars are perhaps rendered more like acts of domestic policing (which pacifist advocates of public military monopolization embrace), *then* public military authorization may be justifiable.

But a careful reflection on the implications of the risk-prevention argument indicates that, *contra* the pacifist endorsement of A_0 , wars must be justifiable now, even in the absence of strengthened global institutions. When a public monopolizing entity is

¹⁷ See, in particular, Chapter 1, pp. 30-31.

faced with a threat, the entity must make a decision about *competing risks*. Were the government to refrain from authorizing military force, those who have been disarmed (i.e. its constituents) may be exposed to acute risks on a massive scale—say, at the hands of an invading army. Yet, were the government to authorize war, it would expose others to substantial direct-risks and may perhaps expose their constituents to substantial indirect-risks.

Supposing that risk-bearers have been properly consulted, *sometimes* a government faced with this choice must be entitled to authorize military force for the very reason that military force must be monopolized in the first place: to prevent unchosen risk. The proper weighting of competing risks will never be easy. But there will be times when the risks that are imposed by the authorization of military force are *much less* than the risks that are imposed by holding fire. Public actors must not be denied the opportunity to authorize military force in these instances, for such a denial would subject constituents to risks in precisely the way that I have sought to combat.

Another way to frame the position that I take here is in terms of compensation. Individuals who have been disarmed by public monopolizing entities must be compensated in some way. As Nozick (1974: 114) puts it: ‘those who act in self-protection in order to increase their own security’ must ‘compensate those they prohibit from doing risky acts which might actually have turned out to be harmless for the disadvantages imposed upon them’. One form of compensation, which is preferred by Nozick, is protection in kind. Those who disarm individuals to prevent them from engaging in risky behavior ought to provide them with protective services. Nozick’s argument is pitched at private protective agencies in a state of nature, but it may also be

pitched at public actors. When public actors prevent private actors from protecting themselves on the grounds that these private actors expose others to risk through such efforts at protection, then the public actors incur a duty to prevent others (e.g. enemies in war) from exposing them to risk.

The compensation argument, as we can see, ultimately gains its force from the same principles that underlie the risk-prevention argument. According to the risk-prevention argument, the reason why decisions of military authorization must be withdrawn from the private sector is that the fundamental interests of risk-bearers can only be protected in this way. But if, after withdrawing decisions of military authorization from the private sector, a public body were barred from authorizing military force itself, the fundamental interests of those who have been disarmed would be left vulnerable. The very considerations that motivated us to advocate military monopolization must motivate us to support a permission of military authorization. Whether a particular war ought to be authorized will depend upon the risks of that war and the risk-tolerance of those who will likely be affected. But public bodies owe it to their constituents, who have been disarmed, to authorize military force when the fundamental interests of these constituents are threatened and the risks of war are tolerable to them. To deny this would be to deny the principle upon which the risk-prevention argument was based: individuals must be able to protect their fundamental interests. In light of this reasoning, A_0 must be rejected.

Argument for Emergency Authorization

Having now rejected A_0 (according to the compensation argument) and A_1 and A_2 (according to the risk-prevention argument), I will conclude this chapter by considering two objections to my analysis. The first is that, while private military authorization may typically be unjustifiable, it cannot be unjustifiable in situations of emergency. This objection—the *argument for emergency authorization*—is one that was first considered in Chapter 3 as a positive libertarian defense of A_2 .¹⁸ There, I raised doubts about the success of this rationale. The ‘Warsaw Ghetto challenge’ was considered in great detail. The question was: would Warsaw Ghetto residents, who faced confinement and ultimately persecution by the Nazi regime, have been justified in *privately* authorizing military force? I suggested that Warsaw Ghetto residents may in fact *not* have had a right to privately authorize military force but that, instead, the residents, as a collective, were justified in preventing private actors from authorizing military force. I now wish to marshal insights from the risk-prevention and compensation arguments to explain why and thus deliver a decisive rebuttal of the argument for emergency authorization.

A Warsaw Ghetto resident who refuses to consult with his neighbors and instead authorizes military force alone subjects his neighbors to unjustifiable risks according to the all affected fundamental interests principle. If the risk-prevention argument is correct, this resident has an obligation to consult with those whose fundamental interests will be affected by military authorization. Supposing that Warsaw Ghetto residents *do* consult with one another in a fair and meaningful way, then the authorization of military force by

¹⁸ See Chapter 3, pp. 97-101.

residents *would* be justifiable. Such consultation transforms private decisions of military authorization into public decisions.

The troubling case that remains is the Warsaw Ghetto resident who simply cannot consult with neighbors in a way that would render the decision to authorize military force public. Suppose that this resident were imprisoned or that confinement within the Warsaw Ghetto made communication impossible. Could a citizen or group of citizens who managed to secure advanced weapons move forward with the military authorization without the input of Jewish residents in the Ghetto? This question is certainly difficult, but I believe that the answer is no. Such individuals can seek to defend themselves. But they cannot *authorize war*. The risks of retaliation on Jewish residents, who may have preferred to take their chances in the Ghetto, demand the input of risk-bearers.

Of course, the democratic process that is required by the risk-prevention argument may be *very* informal given the limitations on association. And the Warsaw Ghetto is the type of place where human beings are *very likely* to accept whatever risks may be imposed by military authorization on their behalf. But the important point is that individuals in the Warsaw Ghetto must attempt to access the preferences of residents. This, of course, is what actually occurred in the uprising (Guttman 1994). Consequently, the residents themselves, operating as a democratic collective, were undoubtedly justified in their armed insurrection. By the same token, these residents may have been justified in preventing fellow residents from acting contrary to the will of the ghetto collective on the question of military authorization given the risks that were involved.

Delegation Argument

Having considered one objection to the conclusion of Part I, let us turn to a final objection. This objection maintains that my case for exclusively public military authorization fails to rule out *all* instances of private military authorization. In particular, it fails to prohibit public actors from *outsourcing decisions of military authorization* to the private sector. Such outsourcing might enable political officials to focus on other pressing political problems while ensuring that citizens receive effective and efficient service when military authorization is needed. This position does *not* claim that private entities should necessarily be hired to prosecute wars (*military supply*). Nor does it claim that private actors are free to authorize war in whatever fashion they desire. Rather, the objection insists that public actors may hire private actors to make decisions of military authorization for them and, in so doing, represent the interests of citizens. Call the public officials who delegate decision-making authority *public legislators* and the private officials who are granted such authority *private legislators*.¹⁹

I consider this objection not only because it is important in its own right but also because my response sets the stage for the claims that are defended in the next chapter. There I show that an insistence upon public legislative control over military *authorization* entails a further demand for the public discharge of responsibilities that are carried out by high-ranking military personnel in *military supply*. I dub this the *governance argument* for partially public military supply.

¹⁹ In this section and indeed in Part II, I use the term ‘legislator’ to refer to those officials who make decisions of military authorization on behalf of a collective. The term is somewhat of a misnomer since these officials may include members of the executive branch as well. But, for the sake of stylistic ease, I simply take legislators to be the representatives of citizens who make decisions of military authorization on their behalf. Further nuance about the relationship between the legislature and the executive is not explored.

Let us suppose that a great deal of legislative outsourcing is justifiable. Public legislators may hire private legislators to draft legislation, give advice, conduct polls, meet with constituents, and so on.²⁰ What I wish to suggest is that, even if a great deal of legislative outsourcing is justifiable, public legislators must ultimately retain a final say over the legislative decisions if the decisions are to remain public. Public legislators, in other words, must, at a minimum *oversee*, private legislators. By *oversee*, I mean that public legislators must manage the contracts of private legislators—by writing them, assuring compliance, terminating them when necessary—and must monitor their decisions so as to exercise final decision-making authority over the course of action that will be pursued. If, for instance, private legislators were to reach the decision that military force ought to be authorized, public legislators must review that decision and sign off on it (or not). For public legislators to turn over *all* decision-making responsibilities to private legislators, without the power to review or veto their decisions and revoke their authority, would be to transform decisions of public military authorization into decisions of private military authorization.²¹

When, by contrast, public legislators *do* adequately oversee private legislators, then we ought to say that public legislators are the entities that authorize war; *they* are the ones who exercise a final say over such decisions, thereby relegating private legislators to advisory roles. Needless to say, the oversight must be substantial: as oversight becomes nominal and the ‘advice’ of private legislators begins to dictate decisions of military authorization, then public legislators cease to retain exclusive authority over military

²⁰ We should observe that political officials today seem to regularly outsource legislation in this manner, allowing lobbyists and special interest groups to exert influence over lawmaking and even draft provisions of legislation.

²¹ Political representatives typically retain such control. In theory, the citizens of a direct democracy could also retain such control by reaching decisions through referenda.

authorization. But what I am suggesting here is that, for military authorization to remain public, some *minimal* control by public legislators is demanded.

A critic might press further, however, and demand a more satisfying explanation of what it *means* to be a public legislator. This critic is willing to agree that affected risk-bearers must be able to participate in decisions of military authorization and that such decisions must therefore be public. She is even willing to agree that public decisions of military authorization must be decisions in which the interests of risk-risk-bearers are adequately *represented*. But why are private legislators incapable of providing such representation? The notion that public military authorization entails public legislative control seems to presuppose some important difference between public legislators and private legislators. The question is: what exactly is the difference?

The answer is that public legislators are *elected*, while private legislators are *not elected*. According to the risk-prevention and compensation arguments, risk-bearers are entitled to participate in decisions of military authorization. This participation, of course, is possible by referendum, in which case legislators are excluded from the process altogether and the objection under consideration becomes moot. But, supposing that a representative government is desirable, the representatives of risk-bearers ought to be elected officials. This is the best way to ensure that the decisions of the representatives are aligned with the interests of the collective. To say then that public legislators must make decisions of military authorization (and not outsource these decisions to private legislators) for the decision to remain public is to say that *elected* representatives must make decisions of military authorization for the decision to remain public. Elected

representatives must retain final decision-making authority according to the risk-prevention and compensation arguments.²²

Conclusion

In this chapter I have demonstrated that public entities must monopolize the authorization of military force (*risk-prevention argument*) and that these entities must authorize military force when the individuals who have been disarmed are threatened (*compensation argument*). In addition, I have objected to two lines of criticism that could potentially undermine my arguments. This chapter therefore stands as a rejection of A₀, A₁ and A₂. With Part I now complete, the remaining arrangements for our potential endorsement are A₃, A₄ and A₅. To assess A₃ – A₅, we must move away from military *authorization* to consider questions of military *supply* and ask: assuming that public entities are alone justified in authorizing military force, to what extent, if at all, are they justified in outsourcing the supply of military force? It is to this question that we now turn in Part II.

²² The reader may notice that, in the current international system, some risk-bearers who merit a say in decisions of military authorization will not have participated in the election of those who represent them. For instance, if Aghani residents were entitled to participate in the decision of US military authorization against Afghanistan, they would not have been represented in the US Congress by individuals whom *they* elected. This is certainly not ideal according to the risk-prevention and compensation arguments. However, we may note that US Congressmen were at least elected by many of the risk-bearers who they represented. In that sense, they were *public* legislators in the decision of military authorization against Afghanistan.

PART II

SUPPLYING WAR

6

Outsourced Public Monopolies Over Military Force, I: The Governance Argument

In Utopia...[citizens] hold their own people dear, and value one another so highly that they would not willingly exchange one of themselves for an enemy's prince. But gold and silver, all of which they keep for this purpose alone, they spend without hesitation...they hire mercenary soldiers from everywhere.

-Sir Thomas More (2002 [1516]: 88)

Part I asked whether private military *authorization* is morally justifiable and argued that it is not. Public actors must prevent private actors from authorizing military force (monopolization) and use military force when the circumstances demand (authorization). Public actors, in short, possess the exclusive authority to authorize military force. Part II now turns to the question of whether private military *supply* is morally justifiable. Recall the difference between authorization and supply. An entity that undertakes military authorization decides both that military force will be supplied and by whom, and an entity that undertakes military supply then executes the various tasks that have been authorized for performance.¹ Whereas Part I delivered a conclusion about the role of private actors in initiating wars, Part II will deliver a conclusion about the role of private actors in fighting wars.

¹ See Chapter 1, pp. 6-7. These two functions may be carried out by the same entity or by different entities.

This thesis began with six possible arrangements for the societal provision of military force: $A_0 - A_5$. Because A_1 and A_2 both include private military authorization and because Part I offered a rejection of private military authorization, A_1 and A_2 were eliminated as potentially justifiable arrangements. Moreover, because A_0 entails *no* military authorization and Part I defended the authority of public actors to authorize military force, A_0 was eliminated as a potentially justifiable arrangement. As we move into Part II, the list of potentially defensible candidates for military provision thus stands at three arrangements: A_3 , A_4 , and A_5 . The aim of Part II is to appraise these arrangements and, in so doing, to round out a theory of military privatization.

The characteristic of each arrangement $A_3 - A_5$ that distinguishes one from the next is the place afforded to private military supply. While public actors authorize wars under all three arrangements, the militaries upon which these public actors rely in $A_3 - A_5$ differ: under A_3 , publicly controlled militaries are composed entirely of private personnel;² under A_4 , publicly controlled militaries are composed of some private personnel and some public personnel;³ and under A_5 , publicly controlled militaries are composed entirely of public personnel. To assess the moral merits of each arrangement, we must develop an account of which military functions ought to be publicly undertaken and which may be justifiably outsourced. Such an account enables judgments about the responsibilities of a society in instituting one arrangement over another.

Part II argues that publicly controlled militaries may *not* justifiably outsource all military functions to the private sector. In particular, a government may not privatize its

² A 'publicly controlled military' is just a military that prosecutes wars on behalf of a public actor. It fights only the wars (and all wars) that the public actor has authorized.

³ It might also be that, in a partially outsourced public monopoly over force (A_4), publicly controlled militaries are composed of public personnel in some wars but private personnel in others.

military leadership, taken to be that group of military personnel who serve as commanding officers or who serve as the superiors of commanding officers on the chain of command. One (partial) explanation for this restriction is dubbed the *governance argument*—and it is furnished in the current chapter. According to the governance argument, some officers, such as generals, exercise substantial power over civilian decisions of military authorization and supply. Moreover, these officers make weighty decisions in battle that affect the fundamental interests of those whom they protect and those whom they attack. For these reasons, I argue that the responsibilities of high-ranking military officers must be publicly discharged. Their political power and decision-making authority make it implausible to insist upon public military authorization while allowing for *wholly* private military supply.

Yet, while the governance argument demonstrates that high-ranking military officers must be public actors, it is not addressed to all members of the military leadership. In Chapter 7, I supplement the governance argument with what I have dubbed the *punishment argument*. The punishment argument claims that all commanding officers must possess a responsibility to punish disobedient soldiers—sometimes with methods like imprisonment that severely restrict the freedoms of individual soldiers—and that these methods ought to be reserved for public discharge. Without robust penal authority, private military personnel are ill-equipped to effectively ensure compliance with orders and must therefore be prohibited from exercising command. Taken in conjunction, the governance argument and the punishment argument provide what I take to be a full account of those military functions that are *inherently governmental*.⁴ Inherently

⁴ The term ‘inherently governmental’ is one that is employed in US policy on outsourcing. See, for example, US White House (2003). The term is somewhat of a misnomer since, as we saw in Part I, the

governmental functions are functions that must be fulfilled by public agents and therefore may not be outsourced to private agents. On the theory that I develop of inherently governmental functions, it is the discretion of military leaders, rather than killing *per se* (as one might be tempted to think), that ought not to be outsourced.

In Chapter 8, to complete what aims to be a comprehensive theory of supply, I finally offer a positive case for why those functions performed by individuals serving under commanding officers may be outsourced. There, I seek to show that a government may privatize its *rank-and-file personnel*, taken to be that group of military personnel outside of a military's leadership—those who *receive* orders but do not exercise command.⁵ Together, Chapters 6 – 8 offer a simple theory of private military supply: the responsibilities of commanding officers and their superiors (who together form the military leadership) must be reserved for public discharge, while the responsibilities of those subordinate to commanding officers (the rank-and-file) may be outsourced.

The chapter at hand proceeds as follows. First, I specify how the considerations of Part II fit into the organizing schematic of this thesis (the arrangements $A_0 - A_5$). An addition is made to this schematic, which will help us to both examine the nuanced gradations of outsourcing and digest the argumentative strategy of Part II. After supplementing my schematic, I define the various suppliers that animate Part II: *independent military contractors*, *private military firms*, and *mercenaries*. In the third section, I consider and challenge a prominent defense of private armies that is given by Cécile Fabre (2010). According to this defense, all military functions may be outsourced

terms 'public' and 'governmental' are not equivalent. A more precise term than 'inherently governmental' would be 'inherently public'. But I will proceed with 'inherently governmental' because of its place in political discourse.

⁵ Notice that all military personnel are either part of the military's leadership or are rank-and-file personnel.

to the private sector. After criticizing Fabre, I then propose the governance argument as a means of limiting the scope of permissible military outsourcing. The fourth section defines the key terms of the governance argument. The fifth and sixth sections then offer two independent rationales for its conclusion. If my analysis is sound, we may conclude that private armies are objectionable and that the responsibilities of high-ranking military personnel ought not to be privatized.

Privatization Revisited

To reacquaint ourselves with the conceptual architecture of this thesis and to gain greater purchase on the argument of Part II, we should return to a principle that will again be wielded to facilitate analysis: normative support must be accorded to one and only one of the arrangements $A_3 - A_5$.⁶ Since $A_0 - A_5$ represent an exhaustive list of arrangements, one of which must be endorsed, and $A_0 - A_2$ have been dismissed, we must endorse at least one of the arrangements $A_3 - A_5$. And since $A_0 - A_5$ represent a mutually exclusive list of arrangements, we must endorse only of the arrangements $A_3 - A_5$.

To remove a potential source of conceptual confusion in Part II, a final element will be added to this schematic. Advocates of A_4 maintain that governments *may* outsource military functions to the private sector. Such advocates reject the notion that *all* military functions must be outsourced to the private sector (A_3); they also reject the notion that *no* military functions may be outsourced to the private sector (A_5). Governments, in other words, are free to pursue military outsourcing if they choose, though they are also free to forego outsourcing. Given this discretion, militaries that

⁶ See Chapter 1, pp. 18-29 for an elaboration of this schematic.

operate justifiably according to A_4 may pursue a variety of compositional configurations for military supply, including an all-private force, an all-public force, and a mixed force of private and public personnel. The important point to extract is that an affirmation of A_4 does not call for a state of affairs in which military outsourcing occurs. Rather, it bestows a permission upon governments to bring about a state of affairs in which military outsourcing occurs. Governments acting justifiably under A_4 therefore need not positively ensure that some military supply is private and that some is public. Governments may pursue just private supply, just public supply, or both.

A defense of A_4 may thus be usefully divided into two distinct categories, which I will refer to as A_{4i} and A_{4ii} . The reason that I divide A_4 into these two categories of A_{4i} and A_{4ii} is that I endeavor in Part II to defend only A_{4ii} (and to reject A_{4i}). Defenders of A_{4i} maintain that a government would be justified, if it so chose, in fielding an all-private force. Defenders of A_{4ii} , by contrast, maintain that a government would *not* be justified in fielding an all-private force. According to defenders of A_{4ii} , a government must reserve at least some military functions for public performance.⁷

Since an affirmation of A_4 necessitates an affirmation of either A_{4i} or A_{4ii} , an exhaustive list of arrangements that contains A_4 will remain exhaustive if A_4 is replaced on such a list with A_{4i} and A_{4ii} . The requirement that we endorse at least one of the arrangements $A_0 - A_5$ will thus remain unchanged when A_{4i} and A_{4ii} replace A_4 : to reject A_0 and $A_1 - A_5$ is *still* to reject the non-provision of force and all forms that the provision

⁷ Notice that the defender of A_4 who subscribes to the second view allows for either an all-public military or a military composed of both public and private personnel. It should be clear that the binary distinction that I have drawn is not the only way to categorize defenders of A_4 . We might draw an alternative binary distinction between those who permit all-public militaries and those who do not permit all-public militaries. Or we might draw a tripartite distinction between those who permit all-private militaries but not all-public militaries, those who permit all-public militaries but not all-private militaries, and those who permit both. However, the binary distinction that I have drawn is the most helpful for the ensuing analysis.

of force might take. Similarly, the requirement that we endorse only one of the arrangements $A_0 - A_5$ is unchanged with the substitution of A_{4i} and A_{4ii} for A_4 . We might summarize the permissions and prohibitions that are entailed by endorsements of A_3 , A_{4i} , A_{4ii} and A_5 as follows:

- A_3 : Military force *may only* be supplied privately (hence *not* publicly).
- A_{4i} : Military force *may* be supplied privately *or* publicly. If supplied privately, military force *may* be supplied to the exclusion of public personnel.
- A_{4ii} : Military force *may* be supplied privately *or* publicly. If supplied privately military force *may not* be supplied to the exclusion of public personnel.
- A_5 : Military force *may only* be supplied publicly (hence *not* privately).

As we can see, each arrangement is incompatible with the next (and, of course, with $A_0 - A_2$). Consequently, Part II must tender an endorsement to one and only one of the arrangements A_3 , A_{4i} , A_{4ii} , and A_5 (from here forward, when I refer to $A_3 - A_5$, I will be referring to all four arrangements A_3 , A_{4i} , A_{4ii} , and A_5).

With this in mind, we may now see how the governance argument and the punishment argument fit into the schematic of $A_0 - A_5$. The two arguments demonstrate that some military functions must be discharged publicly. Thus, together they constitute a rejection of A_3 and A_{4i} . The fully private militaries demanded by an endorsement of A_3 and permitted by an endorsement of A_{4i} are both unjustifiable if at least some military personnel must remain public. The governance and punishment arguments therefore leave only A_{4ii} and A_5 as candidates for our potential endorsement: either publicly controlled militaries, which must possess a public corps of military leaders, *may* hire private rank-and-file personnel (A_{4ii}) or they may not hire private rank-and-file personnel (A_5). In Chapter 8, I defend the former position, thus completing an affirmation of A_{4ii}

and a rejection of A₅. The theory of privatization on offer in the next three chapters should therefore be understood as a defense of A_{4ii}.

A challenge to consider at this stage is whether framing a theory of military privatization against the backdrop of A₃ – A₅ is really necessary, particularly given (what many would claim is) the *prima facie* implausibility of A₃, A_{4i}, and A₅. Perhaps an alternative framework for analysis would be more fruitful. But at least two considerations weigh in favor of using the arrangements A₃ – A₅ to structure an analysis of military supply. First, the schematic enables a careful consideration of positions that are opposed to the one that I defend, thus facilitating a comprehensive treatment of *many* arguments for and against military outsourcing.⁸ As we will see, several prominent political theorists have recently defended close approximations of the various arrangements A₃ – A₅.⁹ Though the mere existence of these defenses lends little substantive support to the respective arrangements, it does, at a minimum, invite responses from those pushing alternative theories of privatization (like myself).

Moreover, even if A₃, A_{4i}, and A₅ are thought to be straw men—and only A_{4ii} plausible—the philosophical work required to mount rejections of each arrangement is precisely the philosophical work that is demanded by a theory of military privatization. A theory of military privatization must specify which military functions, if any, ought to remain public, as any rejection of A₃ and A_{4i} must specify. In addition, it must specify which military functions, if any, may be outsourced, as any rejection of A₅ must specify. Both tasks are necessary for a complete theory of military privatization. The schematic

⁸ See Chapter 2, pp. 37-38 for more on the methodological point that normative political theorists should aim to engage arguments for and against the propositions that they defend.

⁹ These include Fabre (2010), Baker (2008; 2011), Lynch and Walsh (2000), Walzer (2008), Pattison (2008; 2010a), Coady (2008), Kasher (2008), Ryan (2009) and Sandel (1998).

A₃ – A₅ may thus retain its value as a convenient organizing tool for arguments that are compulsory even if A₃, A_{4i}, and A₅ are thought implausible.

Independent Contractors, Private Military Firms, and Mercenaries

With the framework that will structure Part II now fully elaborated, I will briefly define the cast of private military suppliers that animate Part II: *independent contractors*, *private military firms*, and *mercenaries* (all of which may be active in A₃, A_{4i}, and A_{4ii}).¹⁰ These three types of private actors are not mutually exclusive—and all are potentially justifiable according to my analysis in Part II. The reason for this threefold distinction is that it will facilitate a nuanced analysis of common objections to privatization, particularly to corporate participation on the battlefield (which is embodied in private military firms) and to private killing in war (which is carried out by mercenaries).

Before distinguishing between these three types of private actors, we should note that all private personnel who supply military services to entities that have authorized military force are referred to as *military contractors* (independent contractors, employees of private military firms, and mercenaries).¹¹ More specifically, to borrow from Cécile Fabre (2010: 540), military contractors are taken to be those individuals who supply military services to ‘belligerent[s], against payment, outside the state’s military

¹⁰ The title of this thesis listed five private actors who would be analyzed. In Part I, I analyzed two of these private actors: *private protective agencies* (the private organizations that authorize military force in the anarchic context of A₁) and *militias* (the private organizations that authorize military force alongside public actors in the mixed market of A₂). The remaining three private actors are analyzed in Part II.

¹¹ For a critical view of the terminology that I employ, see Coady (2008: 223). Coady believes that the ‘term “contractors” both symbolizes and adds to the confusion’; the confusion, according to Coady, stems from the ‘bewildering variety of tasks’ that contractors perform. But it is precisely this bewildering array of tasks that makes the term ‘contractors’ helpful. I am interested in the full range of private military actors in war.

recruitment and training procedures, either directly to a party in a conflict, or through an employment contract' with a private firm.¹² Contractors perform a range of functions: interrogating prisoners, building bases, delivering ammunition, killing enemy combatants, flying sorties and, in general, providing whatever services are required by militaries for success in war. On my account, however, they do not include those who simply supply *materials* (food, weapons, uniforms, and so on) to militaries.¹³ Instead, military contractors supply military *services* to militaries.¹⁴

Military contractors fall into one of two classes: *independent contractors* and *non-independent contractors* (the latter of which are also dubbed *private military firm employees*). Mercenaries, as I will explain in a moment, function as either independent or non-independent contractors. The difference between independent contractors and non-independent contractors is that the former contract directly with the entity that has authorized war, while the latter serve as employees of a private military firm (PMF), which, in turn, contracts directly with the entity that has authorized war.¹⁵ A less formal way of understanding this distinction is that independent contractors receive their

¹² Note that Fabre (2010) applies this definition to mercenaries. But I believe that the definition effectively captures common understandings of the term 'military contractor'. More will be said about this below.

¹³ Throughout this thesis, I have referred to military protection as a *good* that societies provide to members according to one of the arrangements $A_0 - A_5$. In the context of a society providing some good g to its members—whether g is military protection, health care, education, etc.—I was careful to note that 'the provision of goods' included the provision of both materials and services. See Chapter 1, p. 6, fn. 9. These considerations should not be neglected. 'Goods' refer to both 'materials and services'. Whenever the term 'military contractor' is used, however, I am referring specifically to those private agents who supply services rather than materials. In other words, military contractors are those entities that participate in the provision of some good g , namely military force, through the contribution of their services.

¹⁴ Private entities who provide *both* materials and services to public entities, like weapons manufacturers who maintain and operate missile systems that they sell, will be referred to as military contractors. Providing military services is necessary and sufficient for classification as a military contractor.

¹⁵ Labeling such enterprises has become the subject of much scholarly debate. As explained previously (Chapter 1, p. 16, fn. 19), I follow Singer (2003: 89-91) who uses the term PMF (rather than PMC, PSC, or PMSC). PMFs refer specifically to collections of individuals that supply military services to belligerents—'against payment' and 'outside the state's military recruitment and training procedures' (again borrowing the language of Fabre [2010: 540]). In other words, PMFs on my account are simply groups of military contractors (i.e. two or more).

paychecks from the belligerents whom they serve while non-independent contractors receive their paychecks from PMFs.

We should be careful to note that a ‘firm’ that supplies military services for financial payment to belligerents is just ‘a collection of individuals’ that supplies military services for financial payment to belligerents. Firms include companies, corporations (for-profit or not-for-profit), partnerships, and any other enterprise of more than one individual that supplies military services to belligerents for payment.¹⁶ Thus, the *only* difference, on my account, between a PMF and an independent military contractor is that the former is a group of individuals while the latter is a single individual. Because non-independent contractors include all (and only those) who are employed by such military firms, all non-independent contractors are PMF employees. As such, all military contractors must either be classified as independent contractors or PMF employees.

Given that military contractors—independent contractors and PMF employees—comprise *all* private entities that receive payment for services in war, the term ‘mercenary’ must either refer to some subset of military contractors or be synonymous with the term ‘military contractor’. In what follows I use the term ‘mercenary’ to refer to a *subset* of military contractors. In particular, they will refer to those military contractors (independent contractors and PMF employees) that directly engage in killing. Direct engagement entails the use of weapons (knives, guns, grenades, missiles, and so on) for

¹⁶ If companies that do not seek profit should be thought somehow to stand outside of deliberations on military privatization, we must remember that military contractors, by definition, receive *some* payment, if not a lucrative payment. These not-for-profit companies therefore remain within our purview. By contrast, those entities that receive *no* payment are taken to be *volunteers* (not military contractors), and are beyond the purview of our investigation into privatization.

the purpose of causing enemy casualties.¹⁷ To the extent that military contractors use weapons and thereby cause enemy casualties, these military contractors are mercenaries. To the extent that they do not use weapons in this way, they are not mercenaries.¹⁸

Other political theorists, including both advocates of privatization like Cécile Fabre (2010) and critics like Cheyney Ryan (2009), opt to label all private participants on the battlefield as mercenaries. But considerations of ordinary language should decide against this all-inclusive classification. Private actors in war who drive trucks, clean latrines, cook meals, and perform other non-combat tasks are not typically recognized as mercenaries, though they *are* typically recognized as military contractors. Of course, one might argue that, while the term ‘mercenary’ may indeed be unsuitable for support personnel, the term ‘military contractor’ is equally unsuitable for those who engage in combat. But these hired killers are also under contract with belligerents. It seems that they may appropriately bear the moniker of ‘military contractor’ *while also* bearing the moniker of ‘mercenary’. By contrast, military support personnel like truck drivers, custodians, and cooks do not easily bear the moniker of mercenary *while also* bearing the moniker of some further mercenary sub-class. For this reason, mercenaries are defined as a *type* of military contractor, namely the type that directly engages in killing.

¹⁷ Notice that, on my account, mercenaries are not assumed to be motivated by financial gain or possess a foreign affiliation. For accounts that insist upon one or both of these further conditions, see Steinhoff (2008: 22) and Coady (2008). For a criticism of such views, see Fabre (2010: 540).

¹⁸ The definition that I offer may seem unsatisfying since it allows for reasonable debate about whether a given military contractor is indeed using weapons to cause enemy casualties. For instance, we might ask whether the pilots of helicopter gun-ships are *using* weapons. Certainly, it seems that such pilots, if not firing weapons like the gunmen, are intimately involved in killing. Yet, some might wish to argue that only so-called trigger-pullers are using weapons. The definition that I offer cannot resolve this disagreement and so may be unsuitable for certain moral investigations into military privatization. But, as we will see, the definition is suitable for my investigation. On my view, the fact that one engages directly in killing is not the decisive consideration that renders one an unjustifiable private participant in war. Whether the helicopter pilot is a mercenary like the gunmen is thus ultimately irrelevant. Both the pilot and the gunmen, according to my argument (Chapter 8), may participate in war so long as they do not command soldiers.

Weapons and the Army

Having clarified the three different private actors who animate Part II, let us turn now to an influential argument that defends wholesale military outsourcing. According to this argument, private armies, in which military contractors populate *all* positions on the chain of command, are justifiable.¹⁹ In such private armies, independent contractors may populate these positions, or PMF employees may populate these positions, whether from a single PMF or multiple PMFs.²⁰ The important feature of private armies is that they consist not only of private combat personnel and private support personnel (mechanics, medics, and so on) but also private commanders.

Fully private armies, as we saw in the quotation with which this chapter began, were the armies of choice for Thomas More's (2002 [1516]) Utopians. They also have historical precedent. They operated, for instance, in the Thirty Years' War (1618-1648), where 'almost all battles were fought completely by hired units' (Singer 2003: 29). Modern PMFs like Blackwater might count as private armies if deployed alone to conflict zones, as some commentators (Walzer 2008; Pattison 2010*b*; Baker 2011) have imagined for hotbeds like Darfur.

In this section, I consider a case for such private armies. If such a case were to function as support for A₃, a further claim would be needed to demonstrate that public armies or mixed public and private armies are sufficiently different from private armies

¹⁹ Throughout this thesis, the term 'army' is used synonymously with the term 'military'. As such, private armies may include individuals who not only perform military operations on land but also at sea and in the air. We must be careful to note that private militaries may be publicly controlled *or* privately controlled. However, unless otherwise specified, when I use the term private army, I mean to connote a publicly controlled private army.

²⁰ Regardless, all military contractors that serve in a publicly controlled private army take orders *in bello* from other military contractors—the only exception being those commanders atop the chain of command that receive direct orders from the political leaders who have authorized military force.

such that only private armies are justifiable. By contrast, if an argument for private armies were to support A_4i , then a further claim would be needed to demonstrate either that public armies are justifiable or that mixed public and private armies are justifiable. However, if it can be shown that private armies are objectionable, as I will seek to show, then A_3 and A_4i may be dismissed before these further claims become germane.

I will develop a case against private armies by first challenging Cécile Fabre's justification for their permissibility. The objections that are raised against Fabre should be taken as representative objections that would confront any defense of private armies. These objections will then direct us towards the governance argument for the public discharge of at least one set of military functions: those of high-ranking military officers. If this argument is correct, then fully private armies would be prohibited from waging war, and A_3 and A_4i may be rejected.

Before delving into Fabre's position, however, I must briefly call attention to an argument that will *not* be addressed at this stage. I mention this argument now (which will be dubbed the *argument for emergency supply*) only to shelve a set of concerns that may otherwise prove distracting. According to the argument for emergency supply, many wars are waged for a purpose so valuable, for example the preservation of a political community or the cessation of genocide, that the outright prohibition of private armies from the battlefield ('until the heavens fall') is simply untenable. The argument for emergency supply, we should notice, is distinct from the argument for emergency authorization (considered in Part I).²¹ According to the argument for emergency authorization, individuals, like Jewish residents of the Warsaw Ghetto who were being confined and persecuted by the Nazis, must be entitled to *privately authorize* military

²¹ See Chapter 3, pp. 98-101.

force when circumstances demand. In Part I, I insisted that authorization would indeed be justifiable but that it must be undertaken publicly. The argument for emergency supply, by contrast, maintains that private actors must be permitted to at least hire private armies to fight on their behalf when circumstances demand. Supposing that members of the Warsaw Ghetto were to have collectively decided upon military authorization, accepting the risks that were entailed (as they did), surely, one might argue, they should have been permitted to hire private armies to fight if they were unable to do so.

The argument for emergency supply will be considered in Chapter 7, once the governance and punishment arguments have been defended. There, I seek to show, following an argumentative strategy employed by Hugh LaFollette (2000), that the availability of private armies for emergency scenarios presupposes a set of institutional preparations that are themselves morally problematic. As we saw in Chapter 3, a publicly enforced ban on certain weapons (e.g. assault rifles, grenades and so on) may be justifiable despite the existence of scenarios in which individuals are permitted to use such weapons in self-defense. Similarly, I argue, a publicly enforced ban on private armies is justifiable (and indeed obligatory) despite the existence of scenarios in which public actors may be permitted to hire private armies.²² But in order to make this case, I must first demonstrate why private armies are objectionable, which will be the task of this chapter and (most of) the next.

Let us turn then to the work of Fabre (2010). Fabre argues that private armies are justifiable so long as they satisfy the just war criteria of just cause, proportionality, and non-combatant immunity. She relies upon two fairly uncontroversial presuppositions to

²² My challenge to the argument for emergency supply deviates from the argument for emergency authorization in that the door is left open for private actors to hire private armies if they are available (recall that I closed the door on private military authorization). More will be said about this in Chapter 7.

motivate her argument. First, states require weapons and armies for just defensive killings—namely for national defense, defense of others, and the enforcement of international norms. Secondly, in order to carry out just defensive killings, states are entitled to purchase weapons from private manufacturers (as they ubiquitously do). From these two presuppositions, Fabre (2010: 544) constructs the following argument by analogy:

[S]tates need the wherewithal to have acts of killing carried out in their name and with their authorization, in self-defence as well as in defence of others. Now, if a state is at liberty to buy guns from private manufacturers for the aforementioned purposes—as it surely is—then it is also at liberty to buy soldiering services from those willing to provide them. Moreover, if a state has a right to pay for a standing army—as it surely does—then it also has a right to pay for a private army.

To be clear, there are two claims on offer in this argument. The first claim is that the purchase of guns from private entities is sufficiently analogous to the purchase of military services from private entities such that the justification for the former applies to the latter. Call this the *weapons-claim*. The second claim is that the purchase of private military services (and perhaps the formation of public armies) is sufficiently analogous to the formation of private armies such that the justification for the former applies to the latter. Call this the *army-claim*. The first claim posits that buying *some* private military services is justifiable, while the second posits that buying *exclusively* private military services is justifiable.

In defending the weapons-claim, Fabre borrows from her analysis of mandatory rescue killings (2007).²³ The position that she defends begins by positing the individual right to receive material resources for survival and then moves step-wise towards a

²³ Fabre (2010: 544, fn 9) writes that ‘giving a gun to someone who needs it in self-defence, and killing (for free) that person’s attacker, are relevantly analogous’—and this, she claims, ‘applies *mutatis mutandis* to the act of selling a gun and the act of killing against payment’.

purported right to purchase killing services. The progression may be reconstructed as follows.²⁴ If (a) one is entitled to receive food from a third party in order to avoid starvation, as one must be, then (b) one is entitled to receive a gun from a third party in order to defend oneself. In both cases, a material resource is needed for continued survival. But if one is entitled to receive a gun from a third party, then (c) one must also be entitled to receive assistance from a third party to thwart attack. The rationale that would permit (b) would also permit (c)—namely that material resources and services are both ‘fungible and scarce’ and sometimes necessary ‘to pursue our ends’ (Fabre 2007: 366). Finally, if (d) one is entitled to offer incentives like money to garner assistance—for instance, in the way that patients typically pay surgeons for operations (Fabre 2010: 544)—then one should be entitled to pay private killers to garner assistance. In light of (a) – (d), assuming that each step is justified, the weapons-claim may be affirmed: the purchase of guns from private entities *is* morally analogous to the purchase of military services, and private killers may therefore be hired.

For the sake of brevity, I will assume here that the each step (a) – (d) is indeed justifiable and that the weapons-claim may thus be affirmed.²⁵ I will instead focus my criticism upon the army-claim. The army-claim, in some sense, seems to build upon the weapons-claim, though the relationship between the two is not fully specified. I take the army-claim to maintain that the purchase of military services is comparable to the purchase of a private army in such a way that the rationale for the former applies to the

²⁴ A reconstruction is needed, because the theory that Fabre defends in the context of mandatory rescue killings concerns the *sale* (or *donation*) of weapons rather than the *purchase* (or *receipt*) of weapons. This subtle difference is not particularly important here and will therefore not be addressed.

²⁵ Perhaps the most vulnerable place in Fabre’s argument is the move from (b) to (c). This move will be considered further in Chapter 8, where I examine private killings.

latter (just as the rationale that we might offer for the employment of a public combat soldier may be used to ground the employment of a public standing army).²⁶

The difficulty is that an argument for private killing simply does not suffice as an argument for the private performance of *all* military functions. It is true that the *raison d'être* of the military is killing. Thus, on first glance, the notion that a justification for private killing could serve as a justification for private armies should seem rather intuitive. But the fact that a state may permissibly outsource a single military role does not mean that it may outsource *all* military roles.

Fabre might object and insist—in line with the weapons-claim—that killing and support (non-killing) services are both ‘fungible and scarce’ and sometimes necessary to pursue our ends. Perhaps the blanket prohibition of certain killing services *or* support services would constitute an unjustifiable infringement of the individual right to self-defense and other-defense. If this objection were correct, then a move from the endorsement of private killers to an endorsement of private armies would be sound.

But, as we have seen, the content of a right may be limited by competing values. To know whether competing values *do in fact* limit the right of self-defense, we must consider the full gamut of military roles, not just killing services. Militaries require interrogators, cooks, psychologists, lawyers, builders, engineers, drivers, chaplains,

²⁶ One might think that the army-claim is making a far more innocuous point—which is that the private military personnel who serve a state need not be hired specifically for a single war or part of a single war. Just as a state may employ public military personnel during peacetime, so too may the state hire private personnel during peacetime—to train them, preserve readiness, ensure availability, and so on. I certainly believe that this more innocuous claim is correct. If a state is justified in hiring some set of private contractors to fight in war, then it would seemingly be justified in hiring *that set* of contractors before war begins and after war has ended. But this does not mean that a state could hire a full private army of contractors; it may still be that some military services are off-limits to contractors—whether the contractors are hired to perform these services before, during, or after a war. I take Fabre to mean that *no* military services are off-limits to contractors. She writes (2010: 539-540) that ‘there is nothing inherently objectionable about mercenarism’ and defines mercenarism to include not just killing in war but participation broadly speaking. I therefore do not think that the interpretation of the army-claim under examination in this footnote is the correct one.

doctors, and so on. Indeed, the jobs that are essential to a military are jobs that are essential to almost any community of individuals. In that sense, the military functions as a microcosm of society—the very concerns that are aroused by outsourcing in civilian society may apply to the military. If any such functions must remain public, then the content of our right to self-defense will be limited to the enjoyment of military protection that is undertaken by armies with public personnel in those roles.

Given our concerns about privatization outside of the military, such functions may indeed abound. Chapter 1 indicated that some roles in civilian society, like garbage collection, are uncontroversial candidates for potential outsourcing, while others, like criminal adjudication, seem to be off-limits.²⁷ Something similar may be said of garbage collection and criminal adjudication in the military. Outsourcing garbage collection in a war zone may be uncontroversial, but populating military courts with judges who work for private companies would certainly raise concern. This simple point—that the privatization of some military functions, like criminal adjudication, are potentially problematic for the very reasons that the privatization of these functions in civilian society is problematic—forces us to look inside of the military black-box and acknowledge that *many* values may be compromised by military privatization, just as we acknowledge this much in civilian society. The content of our right to self-defense and other-defense may thus be far narrower in a military context than is initially supposed.

To sum up then, Fabre’s advance from the weapons-claim to the army-claim in defense of military privatization without further argumentation is unjustifiable. It is akin to concluding that, in domestic society, if an argument against the privatization of police forces can be mustered, then an argument against the privatization of all other societal

²⁷ See Chapter 1, pp. 13-14.

roles can similarly be mustered. That a society's police work—and any killings associated with that work—might be justifiably outsourced does not mean that the work carried out by the society's legislature, judiciary, and foreign office may also be outsourced. Our reasons for restricting the scope of outsourcing, in military and civilian contexts, may go beyond, and even have little to do with, killing.²⁸ In light of these considerations, and the doubts cast on private armies, we must withhold our endorsements of A_3 and A_4i —as each depends upon the defensibility of private armies.

The Governance Argument

It is with an eye towards the broad spectrum of military services that we may now turn to the governance argument, the first of two arguments aimed at rejecting the justifiability of private armies (and hence of A_3 and A_4i). According to the governance argument, the political power and decision-making authority of high-ranking military personnel in war are both sufficient to demand that high-ranking military personnel must be public agents. My defense of this view seeks to exploit a simple principle: our commitments to public legislative control over authorization, as developed in Part I, entail *certain* commitments to public military control over supply. For that reason, I begin this section by reminding the reader why civilian legislators who make decisions of military authorization must be public agents. Then, I argue that, for similar reasons, civilian legislators who make decisions of military supply—for instance, whether to continue fighting a war or not—

²⁸ Of course, unlike most domestic roles, the purpose of the military is to kill. Moreover, any killing perpetrated in domestic society deviates from killing perpetrated by militaries (as military personnel, unlike other society members, are engaged in the large-scale killing of non-citizens). Nevertheless, many of the responsibilities that must be discharged in a military are precisely the responsibilities that must be discharged in civilian society.

must also be public agents. These propositions give birth to two distinct defenses of the governance argument, which are defended in the next two sections: the defense from *political power* and the defense from *military decision-making*. Each defense is sufficient to show that high-ranking military officers must be public agents. The two defenses are as follows:

Defense from Political Power:

- P₁. If the decisions made by some set of individuals must be publicly discharged, then the responsibilities of those who exercise sufficient political power over such decisions must also be publicly discharged.
- P₂ *Military Power*: High-ranking military officers exercise sufficient political power over public civilian decisions of military authorization and military supply for us to insist that the responsibilities of these officers must be publicly discharged.
- C_G. High-ranking military officers must be public agents.

Defense from Military Decision-Making:

- P₃. If the decisions made by one set of individuals must be publicly discharged, then the decisions made by a second set of individuals must also be publicly discharged if the two sets of decisions are sufficiently similar in some morally decisive sense.
- P₄. The decisions of high-ranking military officers in military supply *are* sufficiently similar to the public decisions of civilians in military authorization in a morally decisive sense. The morally decisive sense in which they are similar is that both have the potential to cause extensive destruction on the scale that wars are fought.
- C_G. High-ranking military officers must be public agents.

As we can see, the defense from political power and the defense from military decision-making both arrive at the conclusion of the governance argument (C_G). But they do so through a reliance upon different commitments. The next section will build support for the defense from political power, and the following section will build support for the

defense from military decision-making. If my analysis in these two sections is sound—indeed, if analysis in *either* section is sound—then the private armies of A_3 and A_{4i} must be rejected, and *public* agents must be installed by governments in high-ranking positions in the military.

The remainder of this section offers three sets of preliminary remarks to facilitate a careful presentation of the arguments that follow. First, I will define the term ‘high-ranking military officer’. Second, I will explain what it means for a high-ranking military officer to be public. Finally, I will set forward the two propositions from which both defenses of the governance argument build (mentioned above): (i) civilian legislators who make decisions of military authorization must be public agents; (ii) civilian legislators who make certain decisions of military supply must be public agents. My elaboration of (i) will simply be a reminder to the reader of what has previously been defended in Part I. My elaboration of (ii) will provide new argumentation. Once these preliminary remarks are complete, we will be in position to consider a formal defense of the governance argument via the strategies of political power and military decision-making.

High-Ranking Military Officers

Who counts as a ‘high-ranking military officer’? As specified in Chapter 1, I borrow from the common quadripartite distinction in military discourse between flag grade officers (generals), field grade officers (colonels and majors), company grade officers (captains and lieutenants), and non-commissioned officers (corporals, sergeants, and

petty officers).²⁹ ‘High-ranking military officers’ refer to flag grade and field grade officers. They are what Colin Powell calls ‘the action officers connecting the military forces to the political system and the political system back to the forces’ (Bland 1999: 15).³⁰ In particular, these officers contribute to civilian decisions of military authorization and supply and have wide discretion to make strategic and tactical decisions in battle.

To some, the definition that I offer of high-ranking military personnel will seem objectionably imprecise. There may be company grade officers and non-commissioned officers, for instance, who exert political power over civilian decisions. While this is certainly true, the argument of this chapter does not require specificity in identifying a list of high-level officers. We may reject A_3 and A_{4i} according to the argument that I provide so long as we identify *some* military personnel whose positions ought not to be outsourced on the basis of their role in decision-making. Moreover, a theory of inherently governmental functions is primarily valuable not because it enables us to identify *every* example of such functions—there will always be difficult cases—but because it provides a rationale for analyzing difficult cases. Lastly, my argument in the next chapter, when combined with the argument in this chapter, results in a very specific set of individuals whose roles cannot be outsourced: *all* commanding officers and their superiors. Therefore, even if the specificity enabled by analysis in this chapter is thought lacking, the analysis of Chapter 7 should answer any criticisms stemming from weaknesses of inapplicability.

As these considerations make clear, the governance argument is pitched towards public actors (e.g. states) who possess standing armies. Yet, as we have seen, non-

²⁹ See Chapter 1, p. 32.

³⁰ Powell was originally quoted in Woodward (1992: 154).

governmental actors, like members of the Warsaw Ghetto uprising, might *publicly* authorize military force, thus potentially challenging the governance argument. Such public actors (uprisings, resistance movements, guerillas, and so on) will seemingly lack ‘officers’, much less ‘high-ranking officers’ of the sort that I have in mind. Still, the governance argument, I wish to suggest, may be applied to these more loosely organized, unconventional public actors. Even non-state entities that authorize military force will possess a command structure (of some sort), with certain contributors atop that command structure. Consequently, some individuals, to use Powell’s language, will function to connect the military forces to the political system and the political system back to the military forces. The governance argument insists that the responsibilities of *these* individuals must not be privatized—a formal command structure with officers and rank-and-file personnel is not necessary. For the sake of ease, I direct the governance argument at state-like actors that possess militaries with a formal command structure, but this is not meant to take away from the argument’s wider applicability.

Public Officers

Having defined high-ranking military officers, the next question to ask if the conclusion of the governance argument (C_G) is to be understood is: what does it mean for high-ranking military officers to be public agents? We saw in the previous chapter that public legislators are those who have been *elected* to office. But high-ranking military officers, of course, are not elected officials. They are typically appointed by elected officials or promoted by those who have been appointed by elected officials. Thus, it may not be

clear what the governance argument aims to show by claiming that high-ranking military officers must be public agents.

To arrive at a clearer understanding of the conclusion that I seek to defend, I wish to suggest that at least two sufficient conditions (neither of which are necessary) are available for us to classify officials as public. The first sufficient condition is election to political office. But, if such elections were necessary, the vast majority of civil servants who work in government would not count as public employees, which ought to strike us as implausible. According to a second sufficient condition that I wish to propose, one is a public official (and not a private contractor) if, in one's governmental employment, one is constrained by a set of maximally precautionary institutional strictures to ensure the furtherance of collective interests. For instance, when a *public* high-ranking military officer is appointed to serve by an elected official, the high-ranking military officers will be subject to the full menu of safeguards that her government employs to ensure proper representation: the military official who is appointed may receive a salary instead of a fee-for-service; she may serve at the pleasure of elected officials and thus face potential dismissal at their discretion without fear of breaching contract; it may be that the appointed official is not personally liable (legally) for actions that are undertaken in her auspices as a governmental representative; she may receive a pension and health-care; she may be eligible for awards and honors that are reserved for governmental employees; she may have to wear a special uniform. In short, when elected representatives appoint public officials, they employ the full range of tools at their disposal to guarantee that the decisions of these officials match the interests of the electorate.

Private agents, by contrast, are constrained by something less than such maximally precautionary strictures. Elected representatives may pay private agents a fee-for-service instead of a salary; they may hire individuals to serve according to the dictates of a contract rather than the pleasure of elected officials; they may hold individuals who have been hired personally liable for their actions; they may not offer a pension or health-care benefits; they may exclude such individuals from the awards and honors that are bestowed by the government; they may prohibit these hired individuals from wearing special uniforms. All such practices should be familiar manifestations of what, in everyday political discourse, we typically call ‘privatization’. The important point is that private high-ranking military officers would be those who discharge the responsibilities of governance that I sketch in this chapter but who are held accountable by some set of constraints that are less robust than the maximizing constraints that are employed to bind public representatives.

Of course, this definition may seem *ad hoc* and philosophically wanting, particularly since governments that employ some of these practices and not others should not always be thought to *lack* publicly appointed employees. On some level, this criticism presents a challenge. This thesis is not in a position to offer an empirical analysis of which institutional practices *do* ensure that public officials—like individuals who now occupy the roles of high-ranking military officers in most states—serve collective interests and then argue that these are the institutional practices that must constrain high-ranking military officers. What I *do* suggest, however, is that high-ranking military officers must be public agents in the sense that they ought to be held to these maximal institutional strictures, whatever they may be, rather than the more minimal strictures that

are associated with private contracts. This is what is meant when the governance argument concludes that high-ranking military officers must be public agents (C_G). They must be held to a set of institutional strictures that aims to maximally ensure sound representation.³¹

Civilian Legislators

With the terms ‘high-ranking military officer’ and ‘public agent’ specified, the demand that high-ranking military personnel be public agents (C_G) should be clear. I will now present the two propositions that are used to motivate initial support for this conclusion. The first proposition (*i*) is that civilian legislators who make decisions of military authorization must be public agents. The second proposition (*ii*) is that civilian legislators who make decisions of military supply must be public agents. Since the two defenses that I offer for the governance argument would fail if civilian legislators could be *private agents*, we must be sure to understand the plausibility of (*i*) and (*ii*).

Let us begin then with a reminder about (*i*).³² As I argued in Part I, military force must be publicly authorized in light of the risk-prevention and compensation arguments.

³¹ This thesis does not probe questions of representation. If the governance argument is correct, a perfectly reasonable question to ask is in what sense must high-ranking military personnel represent the interests of those whom they serve? It is the same question that must be asked about public legislators. What I urge is simply that favored theories of political representation, as developed for legislators, be applied to military personnel. There are, of course, many differences between the two, the most important of which is that legislators are elected and high-ranking military officers are not. Consequently, certain modes of political representation that may be particularly applicable to legislators may not be so applicable to military officers. But, if my argument is correct and high-ranking military officers *do* discharge responsibilities that are similar in some morally relevant respect to the responsibilities that are discharged by legislators, then these military officers may be asked to represent citizens in the way that legislators are asked to represent citizens (to an extent). For literature on legislative representation, see Pitkin (1967); Beitz (1989: ch. 6), Dahl (1989), Urbinati (2000), Young (2000), Mansbridge (2003; 2009), Hardin (2004), Saward (2009), and Pettit (2010). See Dovi (2006) for a helpful review.

³² See Chapter 5, pp. 189-192.

This means that those serving in a legislative capacity who exercise a final say over decisions of military authorization must be public agents.³³ It might seem, as I acknowledged, that one could endorse exclusively public military authorization while allowing for public representatives to outsource *all* decisions of military authorization to the private sector. If so, then decisions of military authorization could be delegated to *private legislators* (and *public legislators* excluded from the process altogether).

But I argued that, even if a great deal of legislative outsourcing were justifiable, public legislators must ultimately control the legislative process—at least in decisions of military authorization—by circumscribing the decision-making flexibility of private legislators. Public legislators, in other words, must *at a minimum* oversee private legislators. If, for instance, private legislators were to reach the decision that military force ought to be authorized, public legislators must review that decision and sign off on it (or not). For public legislators to turn over *all* decision-making responsibilities to private legislators—without the power to review or veto their decisions and revoke their authority—would be to transform decisions of public military authorization into decisions of private military authorization in an unjustifiable fashion.

When, by contrast, public legislators *do* adequately oversee private legislators, then we ought to say that public legislators are the entities that authorize war; *they* are the ones who exercise a final say over such decisions, thereby relegating private legislators to advisory roles. Needless to say, the oversight must be substantial: as oversight becomes nominal and the ‘advice’ of private legislators begins to dictate decisions of military authorization, then public legislators cease to retain exclusive authority over military

³³ Note again that ‘legislators’ refers to political officials who make decisions about war, whether in the executive or legislative branch.

authorization. The important point is that, for military authorization to be public, some *minimal* control by public legislators is demanded.

Supposing then that (i) is correct, an argument for (ii) readily follows. Once a war is authorized, regular decisions are required to determine whether and how the war should be continued—and, at some point, a decision will be required to determine whether and how the war should be terminated.³⁴ Call these *decisions of continuation*. It would seem that the requirement of public legislative control over decisions of authorization must also demand public legislative control over decisions of continuation. Like decisions of military authorization, decisions of continuation are decisions about whether (and how) the large-scale resort to arms for some cause is to be prosecuted. Consequently, it would be difficult to insist that military authorization must be public but that decisions of continuation and termination may be *entirely* private. Any reason that we might propose to justify the former would apply to the latter. As a result, we ought to conclude that public legislators must retain ultimate control over at least *some* decisions of continuation.

The Defense from Political Power

With (i) and (ii) in mind, we may proceed to the political power defense for the governance argument. The first premise of this defense is a conditional whose antecedent is affirmed by the two propositions above: if the decisions made by some set of

³⁴ We should not forget that, as Gary Bass (2004: 386) reminds us in his helpful examination of *jus post bellum*, decisions about war are required even after hostilities have been terminated since judgments must be made about ‘the content of peace treaties, the terms of surrender, and permissible reparations’ (to name a few).

individuals must be publicly discharged, then the responsibilities of those who exercise sufficient political power over such decisions must also be publicly discharged (P_1). (i) and (ii) showed that the responsibilities of civilian legislators who make decisions of military authorization and continuation must be publicly discharged. The question that we must then answer is whether high-ranking military officers exert political power over these civilian decisions to an extent that is sufficient to demand the public exercise of this power. But first, a defense of the connection between the antecedent and consequent of P_1 is needed. Why must those who exercise certain forms of power over public legislators be public agents?

My understanding of political power follows that of Robert Dahl (1957: 202-203): ‘A has power over B to the extent that he can get B to do something that B would not otherwise do’. Thus, when I claim that high-ranking military personnel exercise political power over the decisions of civilian legislators, I mean that high-ranking military personnel are capable of getting civilian legislators to make decisions that they would otherwise not make. Of course, *many* actors may exercise power over public legislators, and yet we may not want to insist that all such individuals be public agents. For instance, the spouse of a public legislator may exercise power over her decisions, and yet we do not want to insist that the spouses of civilian legislators must be public agents. For this reason, I refer specifically to *political* power. My analysis is restricted to those agents who exercise power over legislators *in their capacity* as government employees or private contractors. The claim of P_1 is that individuals who exercise political power over a legislative decision must be public agents if the legislative decision itself must be publicly undertaken.

The plausibility of P_1 should be straightforward. We cannot simultaneously care about the public discharge of decisions while also being content if private actors are able to dictate these decisions. On any account of why legislative decisions ought to be public, private actors must not be permitted to co-opt the legislative process by substituting their judgments for the judgments of public legislators—to allow them to do so would just be to acknowledge that legislative decisions need not be public. This is precisely why we demanded that the advisory role of private legislators not be over-inflated. As the ability of private legislators begins to direct decisions of military authorization and continuation, the requirement of public military authorization/continuation seems to be violated. Surely then, we ought to conclude that *some* exercises of political power over public decisions are sufficient to demand that such exercises be public (the claim of P_1).

Our question is whether certain *military* contributions to civilian legislative decisions ought to be public or whether all such contributions may be private. Should high-ranking military personnel who participate in the shared enterprise of civil-military relations and thus exercise political power over decisions of military authorization and continuation be public officials? Or are we justified in restricting our attention to the civilian participants?

The second premise of the political power defense (P_2) insists that attention be paid *both* to civilian exercises of power and military exercises of power. More specifically, it claims that the exercise of political power by high-ranking military officials is indeed enough to demand that these officials be public agents. Such power is

exercised both in civilian decisions of military authorization and civilian decisions of military continuation. Each will be considered in turn.

Before turning to these considerations, however, a caveat must be acknowledged. Even if I am correct about the power exercised by high-ranking military personnel in decisions of military authorization (the first set of considerations), *still* military supply may remain wholly private while public agents serve as high-ranking military officers. Only the second set of considerations, which concerns the exercise of military power in civilian decisions of continuation, speaks to military *supply*. The first set of considerations simply sharpens my accounts of military authorization and monopolization (as defended in Part I). But because this added depth is crucial for a complete understanding of military contributions to war—and thus for a theory of military privatization—I will provide an elaboration. Such an elaboration appears in the current chapter rather than Part I only because of its affinity to the second set of considerations that motivates the political power defense of the governance argument. I trust that the benefit of this approach will become clear as the discussion unfolds.

Military Power in Civilian Decisions of Authorization

My contention is that high-ranking military personnel, like civilian legislators, have the power to drag states into wars that they should not fight and keep them out of wars that they should fight. In this sense, I argue, the political power of high-ranking military personnel in decisions of military authorization is substantial. Yet, traditional approaches to civil-military relations might argue otherwise. The prevailing presupposition from

which explorations of civil-military relations begin is *civilian control*.³⁵ Civilian control, as traditionally understood, requires that civilians determine the policies of war, while soldiers implement the orders that follow. To be more precise, civilians in democratic regimes elect political leaders to represent their interests, and political leaders then issue judgments that are transmitted to high-ranking military officers down the chain of command. To the extent that civilian control accords with this model, military authorization is *entirely* civilian-determined; military leaders are not involved in decisions of governance *ad bellum*. They simply execute the will of the civilian populace on the battlefield—the requirement of public military authorization has little bearing on the privatization of military personnel.

But few, if any, scholars of civil-military relations endorse this simplistic model. Civilian control ‘in the old sense’, as it has been dubbed, is embraced neither as an empirical assessment of how militaries function nor as a normative prescription for how they should function.³⁶ The first problem that confronts the doctrine of civilian control in the old sense—two others will also be explored—is military influence over decisions of authorization. Civilians must rely upon military personnel for information and advice about war. If such input should not be privatized, then the ranks of high-ranking military officers, who provide this input, should not be privatized. This, of course, is precisely what the first leg of P₂ maintains (in the political power defense of C_G).

The plausibility of this position becomes evident once we recognize that certain military contributions to civilian decisions of military authorization are *necessary* for such decisions to be justifiable (we may then readily see how these necessary

³⁵ For helpful texts in civil-military relations, upon which the governance argument relies, see Huntington (1959); Janowitz (1960); Bland (1999); Feaver (1996; 1998; 1999; 2003); Burk (2002); Cook (2002-2003).

³⁶ The term ‘civilian control in the old sense’ is quoted in Ben Meir (1995: 10). See Lovell (1974: 13).

contributions can be *decisive* in altering the course of military authorization one way or another). The need for military contributions to decisions of authorization stems first from the fact that military personnel are better positioned than civilian personnel—and are usually exclusively so positioned—to identify the threats that are capable of rendering decisions of military authorization just. As Walzer (1977: 74) reminds us, whenever war is considered, our initial questions must be ‘questions of fact, not of judgment’: ‘who started the shooting? Who sent troops across the border?’ High-ranking military personnel are often the entities that are best equipped to answer these questions.

Furthermore, military personnel must instruct civilian leaders about the implications of war for military capability. Not all threats that permit the authorization of military force are sufficient to motivate authorization. Military personnel are uniquely capable of assessing concerns that transform permissible military authorizations into advisable military authorizations. In particular, high-ranking military officers are able to assess whether the military is ready for war, whether the deployment of forces will have a detrimental affect on the efficacy of other military efforts, whether readiness for future wars will be undermined by military authorization, whether a war is likely to pose long-term problems for troop morale and recruiting, and whether military action is capable of meeting the goals that a government wishes to achieve.

Most importantly, military personnel are positioned to assess the *jus ad bellum* criteria of probability of success and proportionality. In order for military authorization to be morally justifiable, the likelihood of success in military operations must be sufficiently high, and the harm inflicted upon enemy combatants must be proportionate to the motivating offense. Military officials, it would seem, are uniquely able to estimate the

likelihood of success in military authorization. Likewise, though they should not alone judge whether a response is proportionate—as such a determination must ultimately hinge upon the values of civilian legislators—military officials are uniquely able to predict the potential harms that will be inflicted by military action, which is necessary for calculations of proportionality. The reasons for their unique positioning with respect to considerations of success and proportionality are threefold. First, civilian leaders typically lack the training that high-ranking military officers receive for approximating these probabilities and harms. If they do possess this training, say because they served as high-ranking military officers before entering politics, civilian leaders lack the time and resources to remain fully cognizant of the technology, budgetary concerns, mobilization patterns, troop levels and training that impinge upon the success and proportionality of war. Finally, even if civilian politicians are up to speed on these matters, military officers, because of their expertise and efficiency, must be entrusted to plan combat operations (subject, of course, to civilian approval for large operations). Since probability of success and proportionality are so intimately linked to the nuances of combat, it must be the planners who advise on the probability of success and proportionality of war. Only in this way will assiduous attention to detail be paid and proper respect for enemy combatants and non-combatants shown.³⁷ In light of these requisite military contributions to civilian decisions of military authorization—which derive from the civilian need for military assessments of threats, military capability, and the *jus ad bellum* requirements of success

³⁷ For a similar point, see Cook (2002-2003: 26): ‘among the moral tests use-of-force decisions must meet is that there be a reasonable hope of success. In practice, this means that the use of force will be successful in bringing about the desired result with an acceptably proportionate amount of destruction. Professional military officers possess expertise in judging the capabilities of the military instrument of power.’

and proportionality—high-ranking military officers cannot be excised from the political process.

As I hope will be self-evident, these necessary contributions are capable of driving states into the wrong wars and keeping states from the right ones. High-ranking military personnel may ignore or overestimate threats; they may provide misinformation about the variables that transform a just war into an advisable war (troop-readiness, morale, and so on); and they may indicate that wars without a reasonable chance of success will succeed (or vice-versa) and may portray *disproportionate* wars as proportionate (or vice-versa). In short, though legislators possess the final say over military authorization, military officers control several empirical desiderata that help determine decisions of authorization. On occasion, these empirical desiderata may be *decisive*: information about the nature of threats, military capability, the chances of success, and the harms that will likely result *all* may tilt the scales of authorization one way or the other. Since high-ranking military personnel control such information, they are capable of supplanting their own judgments for the judgments of civilian legislators. In extreme circumstances, morality may even dictate that military officers refuse to mobilize troops (say, for a patently unjust war).

Given the power of high-ranking military personnel in decisions of military authorization, it does not seem that one can easily endorse the view that military authorization must be decided upon by public legislators while also maintaining the view that *all* military officers who exercise power over such decisions may be private agents. How could one care that the decision-makers in military authorization be public agents if one did not also care that a set of individuals who could overtake the decision-making

process also be public agents? To do so, I think, would be to fetishize final-decision making authority *ad bellum*. On this point, I agree with Yehuda Ben Meir (1995: 17), who writes that the issue for civil-military relations ‘is not who ultimately decides but rather the relative input of the armed forces and the civilian bureaucracy’.

This point should be particularly compelling when we remember that no single legislator has the authority herself to authorize military force; she has the authority to cast a vote for military authorization.³⁸ While high-ranking military personnel do not cast a formal vote in this sense, they do (and must), like legislators, sign off on decisions of military authorization—confirming that the threat to which such a decision responds exists, that the military is ready to deploy, and that they will be successful and will not inflict harm above some magnitude that civilians have dubbed proportionate.

Military Power in Civilian Decisions of Continuation

We have now seen that, according to the first case for P_2 in the political power defense of the governance argument, the responsibilities that are discharged by high-ranking military personnel in decisions of military authorization must be publicly discharged. However, this view does not speak to military *supply*. Indeed, the military advisory role that is formally institutionalized by many governments—as the Joint Chiefs of Staff in the US, the Chiefs of Staff Committee in the UK, the Joint Chiefs of Staff Committee in Pakistan, and so on—is often divorced from operational command. Members of the US

³⁸ In some states, of course, like the US, the executive branch is permitted to initiate war without a legislative vote. Typically, however, such permission is limited in temporal scope. More to the point, I have argued that decisions of military authorization must be collective—for that reason, these decisions *ought* to be made by a vote of public legislators.

Joint Chiefs of Staff, for instance, do not issue orders but rather stand outside the chain of command (US Joint Chiefs of Staff 2011). It may be then that the high-ranking military officials who consult with civilian entities in authorizing war must be public agents but that the military personnel who participate in the supply of war need not be public agents.

The second leg of P_2 insists that the political power exercised by high-ranking-military personnel in civilian decisions of military supply is also sufficient to demand that these personnel be public agents. We saw above that civilian legislators must control decisions of continuation just as they must control decisions of authorization. Yet, once we acknowledge the need for public control over decisions of continuation, constraints over military contributions to these decisions follow in just the same way that they did in the previous subsection. There, we identified a demand for public military contributions to public legislative decisions of authorization that followed from a demand for public legislative decisions of authorization. Here, we identify a demand for public military contributions to public legislative decisions of continuation that follow from a demand for public legislative decisions of continuation. My position is that high-ranking military personnel, like civilian legislators, have the power to keep states in wars that they should exit and exit wars in which they should remain. For that reason, the political power defense of the governance argument must be affirmed as a limitation on private military supply.

The political power of high-ranking military officers over civilian decisions *in bello* gains its force from the need for civilians to rely upon military personnel to provide ongoing and accurate empirical assessments of how a war is proceeding. Specifically, military officers in the field must provide civilians with information about whether

military objectives are being fulfilled, whether the fulfillment of these objectives is being achieved with ease or difficulty, and whether further objectives may be fulfilled given the material resources and troops that are available. Military officers, in other words, must describe realized outcomes *in bello* and provide feedback to civilian personnel that will enable informed decisions about continuation.

These contributions underscore the second problem with civilian control ‘in the old sense’ that was alluded to above. Whereas the first problem focused upon the inability of civilians to make decisions of authorization in the absence of military input, the second problem focuses upon the inability of civilians to conduct a war in the absence of military input. Without military input, civilians simply have no sound basis upon which to continue or terminate a war. The first two problems of civilian control ‘in the old sense’ together highlight the role of military personnel in shaping civilian policy decisions and hence constructing the orders that flow from civilian leaders down the chain of command. Military personnel do not merely take orders from civilians; they inescapably contribute to the orders that are dispensed.

But are the necessary contributions of high-ranking military personnel to decisions of continuation as controlling as their contributions to decisions of military authorization? As I hope will be clear, they are certainly capable of keeping states in wars that they should exit and driving them out of wars in which they should remain. Through misrepresentation of ‘facts on the ground’, high-ranking military officers can shift civilian policy to suit their commitments. Under certain circumstances, they may be obligated to refuse to go along with civilian policy *in bello*. Marybeth Ulrich and Martin Cook (2006: 171) capture this point well:

[D]isagreements may...arise when the policy or strategic goals are believed to be unwise and imprudent—or, in the extreme case, unattainable by use of the military instrument of national power. It is the latter case that is potentially most troubling as an ethical matter. Even though their subordination clearly requires execution of legal orders, surely there is some ethical obligation of the most senior military leaders not to soldier on in pursuit of a policy they sincerely believe to be doomed to failure.

Through both a control over the empirical desiderata that are necessary for the continuation (or termination) of war and through the capacity of high-ranking military officers to refuse to carry out such policies (and instead carry out the policies that they believe are alone morally defensible), these officers exercise substantial control over the direction of war.

In some ways, the contributions of high-ranking military personnel to civilian decisions in military supply may be more significant than their contributions to military authorization. This is because civilian leaders have long showed a deference to military expertise *in bello* that seems to go beyond the deference that is showed *ad bellum*.

Consider a conversation that President Bush had with high-ranking military officials after the invasion of Iraq. As Bush reported:

I remember asking [the generals]...do we have the right plan with the right troop level? And they looked me in the eye and said, yes, sir, Mr. President. Of course, I listened to our generals. That's what a President does. A President sets the strategy of war and relies upon good military people to execute that strategy (in Ulrich and Cook 2006: 173).

Given the troubled US invasion and occupation of Iraq, this quote serves to remind us how civilian officials must not grant military officers *too much* discretion *in bello*.

Civilians must exercise the final say over troop levels and over many other questions of continuation and termination. But the quote also reminds us how much power high-ranking military officers may exert over civilian policy *in bello*.

In light of this power, our insistence that civilian decisions *in bello* must be public should compel us to insist that certain military contributions to these decisions—namely those provided by high-ranking military personnel—should also be public. Any motivation that one might have for demanding public civilian control over decisions of continuation should also demand the public discharge of *some* military contributions to these decisions. With this in mind, the second leg of P₂, which is the leg that concerns military supply, is complete: high-ranking military officers *do* seem to exercise sufficient political power over public civilian decisions of military authorization and military supply for us to insist that the responsibilities of these officers must be publicly discharged. The conclusion of the governance argument (C_G)—that high-ranking military officers must be public agents—has now been demonstrated via one strategy: the defense from political power, according to both *ad bellum* and *in bello* considerations.

Before moving to the defense from military decision-making, one objection should be considered. The objection is that the defense from political power has claimed too much. After all, foreign office officials, civilian intelligence agents, and many others may exercise the power to keep us out of the right wars and drive us into the wrong wars. Indeed, private technical experts may exercise so much influence over civilian legislators that they too have the power to dictate decisions of military authorization.

But the governance argument would gladly embrace each of these observations. The power of foreign office officials and civilian intelligence agents may simply provide a good reason why *they too* must be public agents. Alternatively, perhaps the power of private technical experts may provide good reason why, in contrast to foreign office officials and civilian intelligence agents, their influence over military authorization

should be limited. The governance argument, in other words, may generate a set of entailments that go beyond high-ranking military officers to include civilians outside of the legislature who are intimately involved in the governance of war. This much should only strengthen the governance argument by widening its application to other plausibly core governmental functions.

The Defense from Military Decision-Making

We have now seen that, because high-ranking military officers exercise such great political power over civilian decisions of military authorization, they too, like civilian legislators, must be public agents. I now wish to consider a second defense of the governance argument: the defense from military decision-making. This defense concerns not the contributions of high-ranking military personnel to civilian decisions but to the decisions that these high-ranking military personnel *themselves* make in the field. Recall the first premise of this defense (P₃): if the decisions made by one set of individuals must be publicly discharged, then the decisions made by a second set of individuals must also be publicly discharged if the two sets of decisions are similar in a morally relevant sense. In the first subsection below, I will motivate support for this premise by distinguishing between two ways in which decisions might be similar to one another in a morally relevant sense. I then seek to show that the decisions of high-ranking military personnel in military supply *are* similar to the decisions of civilians in military authorization in each of these senses (P₄)—though it is the second sense that is emphasized for its pluralistic appeal.

Legislative and Military Decisions

Civilian decisions of military authorization (D_A) and military decisions of supply (D_S) may be similar to one another in at least two morally relevant senses. According to the first morally relevant sense, the *specific normative principles* that are developed to govern one may govern the other. Consider the theory of D_A that I offered in Part I: private military authorization imposes grave risks upon others (*risk imposition of war premise*) and, when such grave risks are imposed, decisions must be withdrawn from the private sector and reserved for public actors (*all affected fundamental interests premise*); these public actors, in turn, have a further responsibility to protect individuals who have been disarmed (*compensation argument*). This theory of exclusively public military authorization, like any such theory, is constructed from facts (F) and principles (P). The risk-imposition of war premise is a fact, while the all affected fundamental interests premise and the compensation argument are principles.³⁹

While the principles of the risk-prevention and compensation arguments were developed to theorize about D_A , the principles may nonetheless remain apposite for theories of D_S . Suppose, for instance, that high-ranking military personnel were charged with decisions that imposed grave risks upon others. Depending upon the scale of these risks, the all affected fundamental interests premise may be applied so that decisions of military supply must be removed from the private sector and reserved for public discharge. A principle that accompanies one set of facts pertaining to civilian decisions of authorization, in other words, is potentially serviceable for a new set of facts pertaining to

³⁹ My discussion here draws on Cohen (2003), but the substance of my point is not contingent upon his. Cohen argues that some principles are fact-independent. Whether the principles that I identify here are fact-independent or fact-sensitive is ultimately tangential to my discussion.

military decisions of supply. These considerations underscore one morally relevant sense in which civilian decisions of authorization may be similar to military decisions in supply: the specific normative principles that govern D_A may be activated by the facts of military supply to generate a requirement about D_S . Call this a *particularized similarity*.

But there is a second potential morally relevant similarity between D_A and D_S —one that is independent of the specific theory on offer and, by extension, is independent of the principles and facts underpinning that theory. Imagine that several theories of exclusively public D_A are defensible. All of these theories conclude that private military authorization is unjustifiable and that D_A must be withdrawn from the private sector and reserved for public discharge. In other words, one set of principles (P_X), corresponding with a set of facts (F_X), requires that we withdraw D_A from the private sector and reserve it for public discharge; but other theories of authorization—including a second theory derived from P_Y and F_Y , a third derived from P_Z and F_Z , and so on—also require that we withdraw D_A from the private sector.

Without reference to any of these particular theories, it may be that a requirement for the public discharge of D_A is also applicable to D_S . The reason is that the decisions *themselves* may be sufficiently similar so that any theory of D_A would apply to D_S . The supply of war, in other words, may consist of mini-authorizations (of sorts)—for instance if generals make decisions in supply that look just like decisions of authorization.

Whether our insistence upon the public discharge of D_A is derived from P_X and F_X , P_Y and F_Y , or P_Z and F_Z is unimportant; our *conclusion* about D_A —as opposed to our specific *rationale* for the derivation of any such conclusion about D_A —may generate conclusions about D_S . Call this a *generalized similarity*. The military decision-making defense of the

governance argument relies primarily upon generalized similarities for ecumenical reasons. But I also point out how particularized similarities are capable of grounding the argument.

Military Decision-Making in Bello

Having motivated some support for P_3 of the military decision-making defense, let us turn to P_4 . P_4 claims that the decisions of high-ranking military personnel in military supply are sufficiently similar to decisions of civilian legislators in military authorization that a commitment to the public performance of the latter entails a commitment to the public performance of the former.

This premise— P_4 —speaks to the final problem of civilian control ‘in the old sense’. An understanding of why should begin to motivate support for the plausibility of this premise. The preferences of civilians are not, and cannot be, seamlessly transmitted from citizens to soldiers down the chain of command. Citizens must delegate decision-making powers to political leaders in the government, and political leaders must delegate decision-making powers to military leaders on the battlefield (who, in turn, must occasionally delegate decision-making powers to still lower-ranking personnel in the field). Thus, the battalion commander who is ordered to withdraw his troops from a confrontation is not acting *only* on the preferences of the government or the citizenry that he defends. He is also acting on the preferences of military officers who have themselves determined that a battalion-retreat would best serve the interests of the government and citizenry. In other words, not every order that an enlisted soldier receives *originates* from

a political body or even from the generals atop the military's chain of command. Instead, many orders originate with military officers who operate lower down—military officers who must make decisions about which weapons should be used, how attacks will proceed, which cities should be occupied, how many men and women ought to be deployed, and, more generally, what tactical objectives should be pursued.

We should observe that the decisions of military officers on the battlefield differ from their policy contributions in two fundamental ways. First, military officers must often use their *sole discretion* when making decisions in the field. By contrast, in policy deliberations, military officers provide information and advice to political leaders who then make final decisions. Of course, the decisions of military officers in military supply are always made within the constraints of civilian-determined policies of engagement. But, on the battlefield, both because quick decisions are often required and because communication between civilians and military personnel is sometimes impossible, military leaders must assume a more complete responsibility for these decisions than for policy decisions. As Walzer (1977: 316) powerfully puts the role of officers in military supply:

Officers take on immense responsibility...for they have in their control the means of death and destruction. The higher their rank, the greater the reach of their command, the larger their responsibilities. They plan and organize campaigns; they decide on strategy and tactics; they choose to fight here rather than there; they order their men into battle.

And, while they may assume these responsibilities with civilian input, they must often bear the burden of risking their own troops and risking the lives of enemy combatants alone, when the reach of civilian policy has been exhausted.

The second critical point to note regarding military decision-making is that, while military officers must exercise great discretion in decisions of military supply, these decisions *typically* have far less potential for destruction than decisions of military authorization. Thus, when we speak of the sub-authorizations of military commanders, we must not overstate the similarities to most military authorizations.

Yet, it seems that if we are committed to public military authorization, we must be committed to the public discharge of *certain* decisions in the field. The reason—according to a generalized account—is simply that wars vary tremendously in scale, and sub-authorizations by military commanders may be larger than the very authorization of war in the first place. A small war might see the deployment of 5,000 soldiers upon authorization. But, in larger wars, where societies authorize the deployment of, say, 200,000 soldiers, many high-ranking military personnel command groups of soldiers that exceed 5,000 in number. This is not to claim that there are no differences between a state that authorizes an invasion, say, with 5,000 soldiers and a colonel who commands 5,000 soldiers to take a city. There are many differences. But it would seem misguided to insist that legislators who make decisions of military authorization must always be public agents but high-ranking military officers who make decisions in the field need *never* be public agents when the decisions made by the latter sometimes entail *more* destruction than the decisions made by the former.

With this generalized constraint in mind, we might also observe how the particularized constraints imposed by the risk-prevention and compensation arguments apply: high-ranking military commanders have the potential to escalate the risks imposed in war by a level of magnitude that compares to the risks that are imposed by the

authorization of small-scale wars. Put differently, the risks that high-ranking military officers might themselves impose upon direct and indirect-risk-bearers through their decisions on the battlefield surely may outpace the risks of *some* private military authorizations. This point should be particularly compelling when we remember that, unlike private actors, military personnel will typically possess access to sophisticated and extremely destructive technology that private actors often lack.

Thus, in light of both generalized and particularized constraints, we ought to affirm P₄ of the defense from military decision-making. The decisions of high-ranking military officers in military supply *are* similar to the public decisions of civilians in military authorization in a morally decisive sense. The morally decisive sense in which they are similar is evidenced both by generalized and particularized considerations. The governance argument must therefore be embraced according to the defense from military decision-making: high-ranking military officers must be public agents.

Conclusion

We saw at the start of this chapter that the challenge for theories of military privatization is to recognize that militaries are heterogeneous collections of individuals who fill both combat *and* non-combat roles. The governance argument represents a first step towards developing a nuanced theory of military privatization. Two defenses of this argument were provided. First, high-ranking military personnel exercise considerable political power over civilian decisions of military authorization and military supply. Secondly, high-ranking military personnel make decisions in military supply that are similar to

decisions of military authorization in a morally relevant way. According to both defenses, the responsibilities that are discharged by high-ranking military personnel must be publicly discharged. The end result is that private armies may be rejected, and A_3 and A_{4i} may be foreclosed as justifiable arrangements for the provision of military force.

7

Outsourced Public Monopolies Over Military Force, II The Punishment Argument

He didn't have a job with us anymore. We, as a private company, cannot detain him. We can fire, we can fine, but we can't do anything else.

- Eric Prince, former CEO of Blackwater, on an employee who killed a civilian¹

The previous chapter argued that public, rather than private, military personnel must populate positions in the officer corps atop the chain of command. This argument, dubbed the governance argument, enabled us to reject the deployment of private armies. To defend my position, I showed that high-ranking military officers both exert political power over civilian decisions and make weighty decisions themselves in battle. For each of these reasons, high-ranking military officers must be public agents. Thus, having rejected $A_0 - A_2$ in Part I, I rejected A_3 and A_{4i} in the first chapter of Part II.

But, as it stands, my account of inherently governmental functions—and hence my rejection of A_3 and A_{4i} —is incomplete. We must ask whether there are other military positions besides the positions of high-ranking military officers that ought to be reserved for public performance. The vast majority of military personnel are charged with decision-making responsibilities that are insufficiently weighty to invoke the argument of

¹ The employee in this quote was intoxicated when he killed the civilian. See *Saleh et al. vs. Titan et. al.*, Brief of *Amici Curiae* Retired Military Officers in Support of Petitioners (2010: 23). References to this brief will henceforth be referred to as *Saleh* Brief (2010).

Chapter 6. If the only limitations imposed upon military outsourcing derive from the governance argument, then a state would be free to privatize much of its officer corps and all of its rank-and-file personnel. This chapter presents an argument, dubbed the *punishment argument*, that aims to further curtail the scope of permissible military outsourcing. According to the punishment argument, all commanding officers must be public agents. The reason is that commanding officers are required to issue intrusive forms of punishment, such as imprisonment, to ensure the prosecution of just wars, and such intrusive forms of punishment should only be dispensed by public actors.

In defending the punishment argument, I will define ‘command’ according to US military law.² To exercise command over a unit is to ‘be the individual chiefly responsible for maintaining discipline in that organization’ (US Army 2002: 5). The largest unit over which commanding officer exercise command is the company, which is typically an organizational unit of between 48 and 250 soldiers (or 3 and 5 platoons). Recalling the quadripartite distinction between flag officers, field officers, company officers, and non-commissioned officers, we may say that commanding officers will either be company grade officers or non-commissioned officers. Above these commanding officers are flag and field officers—the high-ranking military personnel that were examined in Chapter 6—and below them are the rank-and-file. We should note further that, while the unit over which officers exercise command may be as large as a company, it may also be as small as a squad (just 8 or 9 soldiers). It will depend upon whether the unit is attached or detached to a larger organizational unit. For instance, if a squad is attached to the company, then the company leader will be the commanding officer, while the squad leader will be his subordinate. If the platoon is detached from the

² See Chapter 1, pp. 32-33 for an introduction to my definition of command.

company, then the leader of the platoon will be the commanding officer. As the US Army (2002: 5) summarizes, ‘whether an officer is a commander is determined by the duties that he she or performs, not necessarily the title of the position occupied’.³ This chapter argues that those who discharge the responsibilities of commanders must be public agents.

The chapter will proceed as follows. First, in order to contextualize and introduce the punishment argument, I will briefly consider how current military practices have exposed a gaping deficiency in military contracting. This gaping deficiency is referred to as the *command deficit*, and it is a problem that the punishment argument seeks to correct. In the second and third sections, I defend two different premises that together form the punishment argument. In the fourth section, I consider an objection to the punishment argument (which also stands as an objection to the governance argument) that was alluded to in the previous chapter: the *argument for emergency supply*. But I seek to show that the argument for emergency supply fails to challenge the punishment argument. My discussion of inherently governmental functions in this chapter will then continue in the next, where I provide a positive argument to show that rank-and-file military functions in publicly controlled militaries may indeed be privatized.

The Command Deficit

To introduce the punishment argument, it is helpful to begin by reflecting on a shortcoming in modern military discipline, which I have labeled the command deficit. The command deficit is a failure by both militaries and private military firms to exercise

³ I use the terms ‘commanding officer’ and ‘commander’ interchangeably.

command responsibility over private contractors. A case now before the US Supreme Court—*Saleh et. al. vs. Titan et. al.* (henceforth *Saleh*)—illustrates precisely how the US military and private military firms in Iraq have failed to exercise command responsibility. The case also points to a deep-rooted moral problem that *any* permissive stance on military outsourcing must confront.

Saleh involves employees of two private military firms, Titan Corporation and CACI International, who, alongside regular US military personnel in Iraq, abused prisoners at the Abu Ghraib prison.⁴ The two firms were hired to provide interrogation and translation services to US forces at the prison. From October to December of 2003, the firms' employees committed 'numerous incidents of sadistic, blatant, and wanton criminal abuses' (*Saleh Writ* 2010: 6-7).⁵ Several detainees were killed. Though the horrors of the human rights violations that occurred will receive insufficient attention in this chapter, they should, at a minimum, continue to serve as an aggressive indictment of current practices in the private security industry.

At the heart of *Saleh* is a question about whether the employees of Titan and CACI were under the command of the companies' corporate managers or whether they were under the command of US military officers. If the employees were under the command of corporate managers, then these managers and ultimately Titan and CACI are subject to civil liability for the abuses that their employees perpetrated. If on the other hand, the employees were under the command of US military officers, then Titan and CACI are *not* subject to civil liability for these abuses. The assignment of civil liability becomes muddled if the US government is found to have exercised command over the

⁴ For the most detailed account of this case, see *Saleh et. al. vs. Titan et. al.*, Writ of Certiorari (2010). References to this writ will henceforth be referred to as *Saleh Writ* (2010).

⁵ This is according to an internal US military investigation.

employees of Titan and CACI. The reason is that the US government claims sovereign immunity in civil court, which means that no party can sue for actions taken by its regular military personnel or by individuals under the command of its regular military personnel. Thus, the assignment of legal responsibility is *asymmetric* in the sense that the US government would enjoy immunity for the very exercise of command that would result in the attribution of civil liability to Titan and CACI.

But the assignment of *moral responsibility*, of course, will be symmetric. It will track, at least to an extent, our determination of who was in command of the private firms' employees. If the corporate managers of Titan and CACI were in command, then it will be these managers who are subject to the attribution of moral responsibility; if the military officers of the US government were in command, then it will be the officers who are subject to the attribution of moral responsibility. Whether, of course, we actually assign moral responsibility to the entity charged with command over the Titan and CACI employees will depend upon the specifics of how command was exercised.

Underpinning either assignment would be a principle that is familiar to just war theorists—that of command responsibility, which has historically been applied to regular military personnel but may seamlessly be applied to military contractors. According to the principle of command responsibility, a military commander may be morally (and legally) responsible for human rights violations that are committed by soldiers under his charge. He may be responsible for these violations even if the soldiers act without his license.⁶ In other words, a military commander must *actively* ensure that his soldiers comply with just war standards. As Walzer (1977: 317) elaborates, he must 'see to their

⁶ This point is not to suggest that US military commanders were unaware of the abuses that were being perpetrated at Abu Ghraib or that military commanders did not participate in these abuses. The opposite was true. See Hersh (2004: 1-73).

training in this regard, issue clear orders, establish inspection procedures, and assure the punishment of individual soldiers and subordinate officers who kill innocent people'. Because both military officers and corporate managers may exercise command over private contractors, both entities, in principle, may be charged with command responsibility. That one entity is public and one private should not keep us from insisting that *whichever* entity exercises command on the battlefield (whether public or private) must accept the requirements enshrined in the principle of command responsibility.

But the *Saleh* case underscores the difficulties that recent efforts at privatization have introduced. Military contractors, like the employees of Titan and CACI, seem to operate within two chains of command, that of the military and that of the corporation. On the one hand, these employees may take orders from military officers, who are ultimately directed by the political leaders and citizens who have authorized war. On the other hand, these employees may take orders from corporate managers, who are ultimately directed by the executives and stock-holders who have contracted to help supply the war.⁷ The result is confusion over who is ultimately responsible for the control and discipline of military contractors.

The depth of this confusion underscores a theoretical dilemma that lies at the heart of military outsourcing—and this is the key point that I want to bring out. The US government claims that military contractors are *not* under their chain of command. A US Army Field Manual insists:

Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees); only contractors manage, supervise, and

⁷ See Hedahl (2009: 24-25) for worries about bringing contractors under the military's chain of command and worries about leaving them outside.

give directions to their employees...Maintaining discipline of contractor employees is the responsibility of the contractor's management structure (*Saleh Writ*: 77-78).⁸

Thus, whereas military officers are charged with command responsibility over all regular soldiers serving in the US military, military officers are not charged with exercising any command responsibility over private contractors.⁹ This delegation of command responsibility may not be troubling if private military firms took responsibility for the discipline of their employees. However, while firms like Titan and CACI could undoubtedly have taken further measures to effectively supervise their employees (to severely understate the point), these firms possess limited tools when disciplining contractors and aiming to ensure compliance with just war requirements. Eric Prince, the former CEO of Blackwater, highlighted this very point in his testimony regarding an employee who, while intoxicated, killed an Iraqi civilian: 'He didn't have a job with us anymore. We, as a private company, cannot detain him. We can fire, we can fine, but we can't do anything else' (*Saleh Brief* 2010: 23). Private military firms lack the apparatus of punishment (for instance, detainment) that states typically reserve for themselves.

The paradox then is that, according to US policy, military officers 'have *no* penal authority to compel contractor personnel to perform their duties' while corporations exercise only a *highly circumscribed* penal authority owing to the limitations that states place (and, I will argue, *should place*) on private punishment. The consequence is a deficit in which the state neither punishes military contractors nor permits private entities to effectively punish military contractors.

⁸ Note that the accuracy of this picture is under debate. The private military firms claim that the employees *were* under the military's chain of command. But, according to US policy, they were not.

⁹ The implications of this point must not be overdrawn since Abu Ghraib proved to be an instance in which officers grossly failed to appropriately discharge their command responsibility over *regular soldiers*.

If the US government is to eliminate the command deficit but retain private firms in military supply, it may avail itself of two strategies. The first strategy is to preserve the current policy under which military firms are charged with disciplining their employees but grant these private military firms greater penal authority. If Prince, for example, were granted a right to detain his employees in Iraq, he could not so easily maintain that the behavior of these employees was beyond his control. The second strategy is to dispense with current policy and insist that the US government exercise greater penal authority over military contractors. According to this second strategy, the US military would fully place contractors like Titan and CACI employees under the military chain of command and ensure that military officers were assigned command responsibility for each employee. The state must either relinquish its hold on the monopolization of certain forms of punishment (the first strategy) or relinquish its commitment to the exclusion of military contractors from the chain of command (the second strategy).

This chapter argues in favor of the second strategy. What I term the *punishment argument* insists that private contractors must serve under the command of regular military personnel, not private contractors. The reason is that only regular military personnel may *justifiably* punish those under their command, and such punishment is necessary for the prosecution of just wars. The primary implication of this argument is that *all* commanding officers must be regular military personnel. If military privatization is to be justifiable, it will only be justifiable for the men and women below commanding officers on the chain of command. This chapter, along with the previous chapter, constitutes a rejection of A₃ and A_{4i}. Together, these two chapters provide a theory of which military functions are inherently governmental

The conclusion that I defend, we may note, is very close to a conclusion that TX Hammes, a retired US Marine Corps officer, defends. I will quote his conclusion (2010: 14) at length here for its clarity and specificity:

If contractors are required, they must be under direct supervision of a U.S. Government employee. While the government is making strenuous efforts to increase the number of contracting officers and to become more specific in writing contracts, the fact remains that the government cannot control contractor actions without direct supervision... The degree of supervision will vary with the type of work being done. Routine maintenance work in a secure facility would require only normal contracting oversight. Armed escorts or drivers who are in regular contact with civilian populations would require constant supervision in the form of a government employee riding with each vehicle and commanding each convoy.

Four differences between Hammes' argument and my argument should be recorded.

First, the rationale behind direct supervision on his view is the perception of unsupervised contractors rather than their inherent moral problems. Whereas Hammes gives a *strategic argument*, I will give a *moral argument*. Second, I argue that public military personnel must alone 'exercise command' over private contractors rather than 'directly supervise' them. This term, I believe, better captures the needed depth of control (though Hammes, I believe, has this same degree of control in mind). Third, I focus upon the specific need for punishment as a driving motivation for the public exercise of this control. Finally, my argument is directed at all militaries, not just the US military. These differences notwithstanding, Hammes' clear-eyed policy prescription is precisely what would follow from the punishment argument if my defense is successful.

My defense will proceed according to two premises:

- P₁. *Discipline Premise*: Military commanders must issue orders in war and must be able to discipline soldiers who disobey these orders (or who, in some other way, transgress), in order to ensure the prosecution of just wars. Such discipline will sometimes require the imposition of severe constraints on the soldiers' freedom.

- P₂. *Penal Authority Premise*: The severe constraints on the soldiers' freedom that are sometimes required to preserve military discipline are not constraints that a private agent may justifiably impose. Only public agents have the moral authority to impose such constraints.

Because private agents may not justifiably impose the constraints on individual freedom that are required for military discipline (P₂) and because military discipline must be assured by those issuing orders in war (P₁), private agents, I argue, may not exercise command in war. Only public agents may serve as commanders. The two premises will be defended in turn in the two sections that follow.

Discipline (P₁)

The discipline premise (P₁) aims to show that any military officer who exercises command must be able to punish soldiers under his command, whether these soldiers disobey orders or misbehave in a way that falls short of explicit disobedience. Moreover, the required punishments may justifiably impose severe limitations on the misbehaving soldiers' freedom. The necessity of intrusive forms of punishment has both normative and empirical components.¹⁰ The coupling of these normative and empirical judgments in decisions of military punishment may be viewed as an equilibrium between three variables: the importance of military efficacy (normative), the relationship between military efficacy and a given form of punishment (empirical), and the moral permissibility of that form of punishment (normative).

¹⁰ 'Intrusive forms of punishment' are understood simply as forms of punishment that impose severe limitations on the transgressing soldiers' freedom. The nature of such punishments will be spelled out in the first subsection that follows.

Consider each variable. First, all societies must make value-laden judgments about the extent to which they will pursue military efficacy—for instance, how much money will be spent on combat training and which advanced weapons systems will be purchased. Once these normative judgments about military efficacy are made, a second set of judgments, are then required to determine the empirical necessity of intrusive forms of punishment for the achievement of established goals. Societies, for instance, may be content with levels of military efficacy that are realized through disciplinary structures that eschew intrusive forms of punishment. By contrast, they may prefer levels of military efficacy that demand more intrusive forms of punishment. A third and final consideration, this one normative, must then determine whether the chosen forms of punishment are *too* intrusive.

But while different levels of military efficacy may be morally superior to others (the first variable), there is a *minimum* standard of military efficacy that must be met for the prosecution of just wars. Militaries, to give one example, must be capable of discriminately killing combatants and sparing non-combatants if they are to possess an adequate level of efficacy. Given this crucial link between efficacy and the justice of wars, the dictum of P₁—that a military commander *must* be able to discipline soldiers (sometimes with intrusive forms of punishment)—should be understood as a claim about the minimal efficacy for the prosecution of just wars. Intrusive punishment is not just a necessary tool for military commanders in the most efficacious, well-functioning militaries. It is a necessary tool for the minimal efficacy that is demanded of just wars. This is why P₁ stipulated that military commanders must be able to discipline soldiers ‘in order to ensure the prosecution of just wars’.

The requirements of just war that I have in mind when considering the minimal efficacy that is demanded of militaries are limited in scope.¹¹ In addition to the principle of discrimination, militaries must be able to respect basic *jus in bello* standards of proportionality. Militaries must also be able to act upon the objectives set by the civilian leaders that have authorized war in the first place, and they must be able to avoid the implementation of practices that cripple reasonable chances of success. Lastly, they must ensure a *reasonable* level of safety for their own soldiers. The precise claim of P₁ then is that militaries must grant their commanders the right to impose intrusive forms of punishment if they are to respect even these skeletal just war provisions. To assess this claim, we must probe the relationship between minimal military efficacy and a given form of punishment (an updated rendering of the second variable) and the permissibility of that form of punishment (the third variable). In presenting my argument for P₁, I aim to strike an appropriate balance between these two variables.

My defense of P₁ proceeds as follows. In the first subsection, I offer a case study of punishment in the US military to guide our discussion. The punishments that US military commanders are permitted to issue—and indeed that military commanders around the world are permitted to issue—are intrusive in the sense that they impose severe limitations on the transgressing soldiers’ freedom. But these forms of punishment, I argue, are not too intrusive as to be impermissible. In the remaining subsections, I argue for the claim that the penal authority granted to US commanders and to commanders around the world are indeed needed for the minimal efficacy that is demanded of just wars. This claim is introduced in the second subsection. In the third, fourth, and fifth

¹¹ This is not to claim that these requirements are sufficient for the prosecution of just wars, only that they are necessary.

subsections, I then present three independent rationales for its validity (and thus P₁). Once these considerations are complete, I ask whether private actors ought to be permitted to dispense (otherwise permissible) intrusive forms of punishment. P₂, which is presented in the section that follows this one, claims that they should *not* be so permitted.

Non-Judicial Punishment

US military law, specifically, the Uniform Code of Military Justice (UCMJ), enshrines a distinction between three different forms of discipline that I will borrow for my analysis: *judicial punishment*, *non-judicial punishment*, and *non-punitive disciplinary action*. The discipline premise (P₁) focuses specifically on the second of these forms of punishment: non-judicial punishment (henceforth *NJP*).¹² To understand why P₁ focuses on NJP, we must understand the character of judicial punishment and the character of non-punitive disciplinary action. Judicial punishment is reserved for the most serious offenses and requires legal proceedings in the form a court-martial. By contrast, both NJP and non-punitive military action enable commanders to discipline their soldiers without formal legal proceedings. What distinguishes NJP from non-punitive disciplinary action is the severity of each form of punishment. NJP includes penalties such as imprisonment and hard labor, while non-punitive military action includes less intrusive measures like counseling and corrective training. As the lawyer David Schlueter (2008: 123) remarks, NJP ‘serves as a middle ground in the military justice process’, providing ‘sanctions less onerous than a court-martial, yet more severe than non-punitive measures’.

¹² NJP is known as ‘Article 15’ in the Air Force, ‘Office Hours’ in the Marine Corps, and ‘Captain’s Mast’ in the Navy and Coast Guard. It is known as summary punishment in militaries outside of the US. See Schlueter (2008: 123).

The punishment argument will take NJP to be a representative form of intrusive punishment that private entities ought to be barred from imposing. Needless to say, my argument entails that private entities ought to be barred also from imposing judicial punishment (for which the prison sentences are longer and repercussions greater than for NJP). The reason why I leave judicial punishment aside is that private contractors, such as PMF managers, could in theory refer its employees to the very courts-martial to which regular military personnel are referred. In such instances, private commanders would not be required to adjudicate and sentence personnel within their unit. Instead, they would simply turn over cases to public military judges in just the way that public commanders now turn over cases to public military judges.

The possibility that PMF managers might turn over cases of NJP to third parties, by contrast (as opposed to judicial punishment), misunderstands the nature of NJP. NJP is premised on the notion that commanders must *themselves* be entitled to punish military personnel in their unit. If this claim is to be plausible, much more needs to be said. I must explain why a third party, such as a military judge or even a commander outside of the unit in question, could not issue punishments to members of that unit and thereby ensure the necessary discipline for the prosecution of just wars. Why, in other words, must rank-and-file soldiers be disciplined by a member of their *own* unit (namely, *their* commanding officer) rather than by someone outside of their unit? This question will be addressed in due course.

For now, I simply wish to stress a definitional point about NJP. Private military personnel serving in positions of command, like PMF managers, could not refer its employees to NJP by public officers, because NJP is *necessarily* (by definition) a

punishment that commanders, public or private, issue to members of their own unit.¹³ If a PMF manager serving as a commanding officer wished to have a member of his unit punished by a third party, the punishment would not qualify as NJP (the punishment would only be NJP if the PMF manager himself issued it). Given these considerations, NJP will fall within the purview of P_1 , while *judicial* punishment will not.

The reason why non-punitive disciplinary action is excluded from my analysis is different. Non-punitive disciplinary action is issued by military commanders to members of their own unit (just as NJP is issued by military commanders to members of their own unit). But I leave aside such disciplinary action, because the mildness of its penalties mean that their dispensation by private entities is much less objectionable than NJP (if it is objectionable at all). We might say that non-punitive disciplinary measures are scarcely different from the penalties that a football club might impose upon its players for showing up late to training or for misbehaving during a match—for instance, extra running or chores. Since the aim of this chapter is to identify a set of harsh punishments that militaries enable their commanders to impose but that private entities must not be permitted to impose, NJP will serve as the focal point of analysis, and non-punitive disciplinary action and judicial punishment will be left aside.

Before we consider whether NJP is necessary for minimal military efficacy, three features of NJP should be specified: (i) the scale of permissible punishment, (ii) the precise set of individuals who are permitted to issue such punishments, and (iii) the

¹³ Under US military law, NJP is reserved for public military officers. But, of course, since this chapter probes whether private commanders ought to be permitted to issue NJP (or NJP-like punishments), the possibility is left open that both public and private commanders might be entitled to issue NJP. Private military personnel, in other words, are not, *by definition*, prohibited from issuing NJP.

procedures by which these punishments are issued. A clear understanding of these features of NJP will enable a proper discernment of the argument that follows.

Beginning with (*i*), four types of NJP may be issued according to Article 15 of the UCMJ: reduction in grade, forfeiture of pay, censure, and deprivation of liberty (Schleuter 2008: 152). Since the first three forms of punishment are akin to punishments that are routinely dispensed in the private sector, and unobjectionably so, only the final form of punishment should be further clarified (only it will concern P₁).

Deprivations of liberty include correctional custody, extra duties, restriction, arrest in quarters, and confinement on bread and water. Each form of liberty-deprivation entails a specific set of permissions. Correctional custody may be issued for up to seven days by commanding officers and is defined as physical restraint. Physical restraint requires that the accused be ‘committed to a designated correctional custody setting’ and ‘placed under the supervision of a monitor’ on the understanding that ‘he or she is not to leave except under specified circumstances’ (Schleuter 2008: 152).

Such periods of imprisonment, we may note, also include ‘extra duties, hard labor, or other fatigue duties’ if so chosen (UCMJ 2011, art. 15). Military courts, unfortunately, have not clearly specified what is meant by ‘extra duties, hard labor, or fatigue duties’. But in practice, these duties include a range of tasks. At the Camp Lejune correctional facility, for example, US Marines serve time on the ‘rock pile’, where they ‘break big rocks into small rocks’, which are then used ‘for area beautification, such as building and replacing walkways’ (Berger 2004: 9). Marines may be compelled to participate in ‘log drills’, which require different manipulations of fourteen to eighteen foot telephone polls (Berger 2004: 9). Other legally permissible assignments include

‘repetitively emptying and filling sandbags’ and ‘moving large piles of dirt or heavy rocks for no other purpose than to keep the Soldier working’ (Berger 2004: 9).

In addition to correctional custody and such extra duties, NJP may include the liberty-deprivation of ‘restriction’, which means that soldiers are confined to a specific location that is designated by the commander rather than an established correctional facility. When the location of confinement is one’s quarters, one is said to be ‘arrested in quarters’. The final type of liberty-deprivation that may be imposed upon soldiers is confinement on bread and water, or diminished rations, for three days. This punishment can only be given to soldiers who are ‘attached to, or embarked upon, a vessel’ (Schleuter 2008: 154). During such confinement on a vessel, soldiers are permitted to communicate only with authorized personnel.

These intrusive forms of punishment that are embodied in NJP may be imposed by any commanding officer upon his soldiers (UCMJ 2011: art. 15). As I have specified, the largest unit over which an officer exercises command is a company of 3-5 platoons—the ‘company, whether or not separate or detached, is considered to be a command’ (See US Army 2002: ch. 3). But the commanding officer may be a platoon leader with two-dozen men under his command if the unit is detached—for example, on a convoy of the sort that Hammes identified. The important point is that even military commanders who are low down on the chain of command may issue NJP. Indeed, for a detached unit, even as small as a squad (8-9 soldiers), the commanding officer of the unit may issue such punishments.¹⁴

¹⁴ Note also that the right to issue NJP ‘is an attribute of command and therefore devolves upon an officer temporarily in command of a unit’. See Miller (1965: 66).

Having now considered the nature of NJP (*i*) and the individuals who are permitted to issue NJP (*ii*), we may finally consider the procedures that govern NJP (*iii*). According to these procedures, commanders take on the role of judges, conducting hearings in which the defendant is advised of his rights—including the rights to remain silent, demand trial, appeal, ‘confront witnesses, examine adverse evidence, and submit matters in defense, extenuation, and mitigation’ (US Army 1992: 4.0; Wilde 2007). The accused may have a spokesman at the hearings, and the commander must arrange to have witnesses present according to the requests of the accused (and considerations of practicability). Note that the accused may appeal non-judicial punishment but that, during appeal, he may nevertheless be held in custody.¹⁵

The institution of NJP, dubbed summary punishment in many Anglo-speaking militaries, is not unique to the US (Fidell 2000). In Canada, summary tribunals issue punishments at the level of the unit (National Defence and Canadian Forces 2011; Alleman 2006: 169). The French have a system of NJP but ‘authorize the local commander considerably more power’ than what is given in the US (Gaynor 1953-1954: 325). For example, whereas a US unit commander can impose confinement for only seven days, his French counterpart may do so for fifteen. In the UK, summary punishment by commanding officers may include up to 28 days of detention (UK Army 2011).

¹⁵ Non-judicial punishments are issued for violations of the UCMJ. These include a wide variety of offenses, ranging from ‘absence without leave’ and ‘contempt towards officials’ to being ‘drunk on duty’ and ‘failure to obey [an] order or regulation’ (UCMJ 2011).

The Need for Non-Judicial Punishment

We have seen thus far that military commanders issue intrusive forms of punishment known as NJP (or summary punishment). I now wish to argue that NJP is necessary for the minimal efficacy that is demanded of just wars (P_1). If this can be shown, then all that remains for my argument is to show that private agents ought to be barred from issuing NJP (P_2). In that case, military command must be reserved for public exercise (the conclusion of the punishment argument).

To demonstrate that NJP *is* necessary, we must rule out the possibility that non-intrusive forms of punishment and motivating practices other than punishment are capable of producing the minimal efficacy that is required for the prosecution of just wars. The difficulty is that militaries throughout history have punished transgressing soldiers in a fashion that is similar to, if not more intrusive than, contemporary applications of NJP. We are therefore forced to ask a hypothetical question: could military commanders motivate their troops to follow commands and behave justly without the ability to impose relatively severe forms of punishment?

Of course, just because militaries have disciplined soldiers in a certain way throughout history does not make these practices uniquely effective. Nor does it make these practices morally justifiable. The point is just that a comparison of two systems—one in which the commander has a right to discipline soldiers in intrusive ways and one in which the commander has no such right—is rendered difficult by the lack of data from any system like the second. My conclusion that NJP is necessary for the prosecution of just wars will therefore be somewhat tentative. The conclusion may be overturned if

empirical evidence for the efficacy of an alternative approach is found (in which case NJP will *not* represent a necessary tool for the exercise of military command). But the considerations that I offer suggest that, so long as human nature remains as it is, such evidence is not likely to be forthcoming.

In defending NJP, I assume, first of all, that militaries must secure *some* discipline in their ranks through a functional chain of command (for the minimal efficacy demanded of just wars).¹⁶ I will also assume that if discipline is to be ensured and the chain of command rendered functional, *some* amount of punishment is needed. If militaries were not permitted to punish disobedient soldiers at all, they would lose a critical deterrent for the obedience of orders. The hard question for P₁ is not whether some forms of punishment are needed but whether intrusive forms of punishment, like NJP, are needed and whether military commanders (rather than, say, judges) must be permitted to issue these intrusive punishments. In the three subsections that follow, I will defend three independent rationales for the proposition that intrusive forms of punishment like NJP must be available for military commanders to discipline members of *their* unit.

Maximal Permissible Deterrence

The first rationale concerns the importance of effective deterrence. Specifically, I wish to suggest that the need for military discipline (and hence the minimal efficacy demanded of just wars) requires *maximal permissible deterrence* by military commanders. Militaries

¹⁶ Without a functional chain of command, it is difficult to see how the skeletal just war requirements presented above could be met. Such a chain of command is seemingly necessary for militaries to carry out the will of their citizenry, enjoy a reasonable chance of success in battle, respect the principles of *jus in bello*, and ensure an adequate level of safety for their own soldiers.

must be able to deter soldiers from disobeying orders for numerous reasons: representation of civilian preferences, a reasonable chance of success, respect for principles of *jus in bello*, and the protection of fellow soldiers. Moreover, stronger deterrence is preferable to weaker deterrence, and intrusive forms of punishment are better deterrents than non-intrusive forms of punishment. So we have good reason to prefer intrusive forms of deterrence.

But what I am suggesting is something stronger. Given the grave consequences of military disobedience, *particularly* the potential human rights violations that may occur when the moral demands of military discipline are ignored, we ought to insist upon maximal permissible deterrence—i.e. punishments that are maximally intrusive without violating the rights of the punished. Militaries that do not pursue maximal permissible deterrence do not adequately respect the interests of citizens who are being represented, the soldiers who serve, and the enemy combatants and non-combatants who will otherwise suffer. Of course, some punishments will be *too* intrusive, and so the question arises about whether NJP is problematic on account of its severity. If so, then both public and private entities would be barred from issuing NJP. But if NJP is *not* too intrusive, then militaries have a right and where necessary a responsibility to utilize it as a deterrent.

The debate thus hinges upon whether NJP *is* indeed permissible.¹⁷ One criticism of the practice would challenge the magnitude of sentences that military commanders may issue. But we must acknowledge that such sentences would not be impermissible for

¹⁷ It may be, of course, that forms of punishment that are more intrusive than non-judicial punishment are permissible and that they should be preferred to NJP to achieve maximal permissible deterrence. But this only strengthens my argument. To the extent that harsh forms of punishment (e.g. long prison sentences) are permissible, we have a class of punishments that may be particularly problematic for private entities to impose—though permissible for public entities.

all crimes. States regularly imprison criminals for more than seven days (the sentence that is permitted by non-judicial punishment in the US), and prisoners are regularly required to perform onerous tasks while in prison.¹⁸ The criticism would have to be that NJP is unjustifiable (*a*) given the nature of the offense for which such punishments are issued (a proportionality question) or (*b*) given the fact that military commanders are permitted to issue such punishments rather than judges (an authority question). With respect to (*a*), it is certainly true that militaries issue NJP for seemingly minor offenses—inebriation, absence without leave, failing asleep on duty, and so on. But, in a military context, these offenses are *not* minor. Small mistakes in a war zone may hinder a war effort and endanger fellow soldiers and enemy non-combatants. The margin for error is small.

With respect to (*b*), judges may be preferable to military commanders for the dispensation of punishments. And the rigid procedural rules of judges may be preferable to the more flexible rules of military commanders (who, in the vast majority of cases, lack legal training). The problem is that judges cannot accompany military units wherever they go. Moreover, the rigid procedural rules that govern domestic punishment (regarding the collection of evidence, the examination of witnesses, etc.) would likely be too slow and burdensome for discipline in war zones. So, while judges, according to strict procedural rules, should perhaps be charged with issuing *most* of the punishments that ensure military discipline, particularly intrusive punishments whose penalties are akin to NJP, they do not always represent feasible or practicable alternatives to the dispensation

¹⁸ One might think that the unpleasantness of tasks that are performed in prison pales in comparison to the unpleasantness of tasks that are performed in the military. Still, few would maintain that the ‘hard labor’ required in the military—filling up sandbags, digging ditches, and so on—would be impermissible to impose upon, say, mass murderers. It’s just that these punishments may seem inappropriate in the context of domestic punishment, where discipline is not an end under pursuit like in the military.

of punishments by military commanders. Military commanders are often uniquely positioned to issue these important and otherwise permissible punishments. Though they may not adjudicate as effectively or fairly as judges, the question is whether the value of deterrence that is served by their adjudication outweighs the likely shortcomings. It would seem that they do. If a military commander is unable to threaten NJP and, for reasons of practicality, is incapable of relying upon military judges to issue these punishments, soldiers subordinate to them will have wide latitude for misbehavior. This latitude, I think, would be troubling, to say the least.

A final objection to consider before moving to the second rationale for NJP is that permissible deterrence does not require that the commanding officer of the misbehaving party issue punishment; *some other* commanding officer may issue punishment. If military commanders could achieve maximal permissible deterrence by referring their soldiers for punishment outside of the unit, then private military personnel could serve in positions of command without having to themselves issue NJP. But the bureaucratic obstacles for punishment outside of the unit are likely to impinge upon swift and effective punishment and hence maximal permissible deterrence. In addition, the military commander himself, who is familiar with troops in his command, is likely to have a better grasp than outside commanders over the personalities of the unit and the forms of punishment that are most likely to succeed. Given these considerations, the need for maximal deterrence should prompt us to embrace P_1 .

Physically Removing Soldiers

But let us assume that the deterrent effect of non-judicial punishment issued by military commanders is insufficient to justify the practice. A second defense of P₁ focuses not upon the need to deter soldiers from violating the rationale for military discipline but upon the need to remove soldiers from battle who are likely to further violate the moral demands of military discipline. In particular, military commanders must be able to imprison soldiers in the way that NJP permits. Soldiers who, through aberrant behavior, come to pose a danger to their military's mission, to their unit, to enemy combatants and non-combatants, or even to themselves must be removed from battle. And, on occasion, the only way for militaries to assure that this happens when needed is to license military commanders to order the physical detainment of *their* soldiers when he deems fit.

The challenge for this position is to show that (a) the power of a military commander to merely fire (rather than detain) transgressing soldiers is insufficient and that (b) it must be that military commanders—not just judges or other military commanders—require this power to order imprisonment.

Beginning with (a), the reasons why we do not want a system in which the military commander possesses the power to fire a misbehaving soldier but not the power to imprison the soldier are numerous. First of all, evacuating a soldier from war rather than detaining him in the war zone may be impossible or imprudent. Evacuations may be financially burdensome and sometime too dangerous for those who must undertake the evacuation. Secondly, even when soldiers can be easily evacuated, most militaries cannot afford to lose misbehaving soldiers. To retain a capacity for the prosecution of just wars,

militaries may need to keep those soldiers who have committed minor offenses but who can function effectively after being briefly removed from battle. Thirdly, the military relies both upon teamwork and respect for commanding officers. If people were simply evacuated from a war zone for misbehavior, teamwork may be undermined. NJP is a way to preserve unit cohesion while still ensuring that the imprisoned soldier does not pose a danger. Fourthly, a military that evacuated misbehaving soldiers from war zones may be providing soldiers with an easy way to get out of combat duties. If all that was required to leave a combat zone was to violate military rules, then militaries may be incapable of effectively retaining and disciplining soldiers. Fifthly, war zones are places where soldiers who pose a threat to other members in the unit have, throughout history, been subject to internecine killings—the intentional killing of fellow soldiers. NJP, particularly imprisonment, represents a way to limit this practice. A military commander who lacks the power to punish misbehaving soldiers may not be able to convince those under his command that he will do everything that he can to ensure the preservation of their lives and interests.

But supposing that this is all true, why are judges and other military commanders incapable of detaining soldiers? After all, if such judges or outside military commanders could be counted on to issue punishments similar to NJP, then private military personnel could serve in positions of command and simply refer personnel under their command (whether public or private) to other commanders for such punishments.

Let us first consider judges and then outside commanders. Regarding judges, as I pointed out above, they cannot accompany all military units into battle. Moreover, even if judges could travel with military units, there is often insufficient time and insufficient

resources to have court proceedings in a war zone. Finally, even if court cases for military transgressions were possible, the military expertise of a commander might count as a reason to have the commanding officer be the entity that is permitted to decide whether the soldier must be removed from battle. Military judges may not be good arbiters of whether a soldier is a danger to his fellow soldiers or enemy non-combatants. Those who must bear the costs of this danger—the soldiers who suffer when a fellow soldier disobeys orders or misbehaves—may be better attuned to these dangers. If so, the military commander, who is himself risking death and the death of his soldiers, may be preferable to a judge for making decisions about whether a given soldier should be removed from battle or not.

A similar set of concerns applies to military commanders outside of the unit in which punishment is dispensed. The commander of a unit is often detached from other military commanders (just like judges), and he is therefore sometimes the sole entity in position to make determinations regarding punishment of members in his unit. Moreover, the reliance upon outside military commanders to issue punishments like detention will sometimes be burdensome and impracticable (even if possible). Lastly, it will be military commanders themselves who are typically best positioned to determine whether the soldiers under their command ought to be removed from battle, not outside commanders.

Investigation of Military Crimes

Having presented two independent rationales for P_1 , we may consider one final grounding, which relies neither upon the need to deter soldiers from misbehaving

(rationale one) nor upon the need to remove soldiers from battle (rationale two). A final justification of P_1 depends upon the need for investigation into *past misbehavior*. Military commanders must be able to quickly imprison their soldiers when legal investigations into the conduct of these soldiers are underway. In a war zone, when forces are fighting away from home, there are no accessible jails with jurisdiction over these forces except those on military bases, no lawyers immediately available to issue arrest warrants, and no police to detain suspects. If military commanders do not have the power to detain *their* soldiers who have committed crimes—while evidence is being gathered, witnesses are being questioned, and so on—the criminal justice system will be undermined. This is one of the reasons why Eric Prince’s statement cited above is so troubling. Blackwater failed to detain an employee who drunkenly killed a civilian and, as a result, evidence was lost (*Saleh* Brief 2010: 23). For a criminal justice system to function in the military, commanders need the power to move forward with imprisonment until lawyers, judges, and perhaps even higher-ranking military officers are in a position to hear evidence and move forward.

To sum up, the need for NJP, and hence the validity of P_1 , may be grounded in three ways. The first account relies upon the value of deterrence and the role of intrusive forms of punishment at the level of the military unit to ensure such deterrence. The second account relies upon the value of removing soldiers from the battlefield when they represent dangers to the success of a mission or to other individuals. The third account relies upon the value of detention at the level of the military unit for a functioning criminal justice system. The power possessed by military commanders to issue NJP serves each of these values and therefore ought to be permitted in war. As the discipline

premise (P₁) insists: a military commander must be able to discipline soldiers under his command who disobey his orders or who, in some other way, transgress. Such discipline will sometimes require the imposition of severe constraints on the soldiers' freedom, even including imprisonment. These severe constraints, we have seen, are necessary for the minimal efficacy required in just wars.

A slightly alternative way to render the position that I have advanced is that, in war, *someone* must be assigned command responsibility for all military personnel, and command responsibility can only be properly exercised when a punishment mechanism like NJP is permissible. From the perspective of the commanding officer, who may be morally and legally liable for the transgressions of his subordinates, it is vital that he possess the authority to punish. Without NJP, the commander may find himself unable to create the sort of culture in his unit that is demanded in order to protect human rights and the safety of fellow soldiers. Though NJP may be abused, the alternative, I think, opens the battlefield up to far more intolerable abuses. Having now provided a set of considerations to support the first premise of the punishment argument, I will turn to the second premise.

Penal Authority (P₂)

Why must private entities be barred from imposing the intrusive forms of punishment (like NJP) that are necessary for minimal efficacy in the prosecution of just wars? If private military contractors *were* permitted to impose such punishments, then these contractors would be equipped to effectively exercise command (so far as my account is

concerned). The punishment argument would thus fail to prohibit private commanders from serving on the battlefield.

In this section, I argue that private military contractors should *not* be permitted to impose intrusive forms of punishment like NJP. In particular, I seek to show that the severe constraints on the soldiers' freedom that are sometimes required to preserve military discipline are not constraints that private agents may justifiably impose (P₂). Only public agents may justifiably impose such constraints. If my analysis is correct, then military command must not be outsourced to the private sector.

I will present three arguments for P₂—the first two of which fail but the third of which succeeds. The first argument reasons by analogy, comparing the punishment of military commanders to the punishment of civilian judges. While this argument relies upon a robust set of intuitions, it ultimately lacks a satisfying theoretical rationale. The second argument fleshes out a deeper commitment to underpin these intuitions. In particular, it presses the position that certain forms of consensual liberty forfeitures—e.g. agreeing to future imprisonment by private agents—are inherently problematic. But I show that this argument also encounters problems. The third argument claims that punishment by private commanders in war is problematic because of the conflicts-of-interest that undermine the capacity of private agents to fairly adjudicate offenses. It is this third argument that decisively affirms P₂ and thereby pushes us to endorse the punishment argument.

The Contingent Argument

The first potentially compelling argument for P_2 is a contingent argument. This argument gains its roots from certain intuitions outside of war. The power to imprison individuals outside of war is reserved exclusively for public institutions (specifically, for judges and juries). Though the management of prisons in states like the US and the UK is increasingly outsourced to the private sector, adjudication and sentencing are not. Robust intuitions seem to underpin the popular insistence that imprisonment—understood as the decision to imprison rather than the actual housing of prisoners—should be reserved for public discharge. If the government must supply *any* services itself, then it seems that the government must furnish a criminal justice system. Put differently, a state that did not alone enforce the law through the adjudication and sentencing of citizens would hardly be recognizable as a state. Our intuitions strongly suggest then that states ought not to hire private companies to adjudicate court cases and sentence those who are found guilty of wrongdoing to prison.

If, according to the contingent argument for P_2 , private entities must not be hired to dispense prison sentences outside war, then private entities must not be hired to dispense prison sentences in the military, whether as judges or as military commanders. In both civilian and military contexts, imprisonment severely curtails individual freedom. Insofar as the severe curtailment of freedom is what drives our worry that adjudication and sentencing should not be privately undertaken in a civilian context, it must drive a similar worry in the military context.

That the severe curtailment of freedom *is* what drives our worry about private imprisonment seems plausible. Imprisonment is one of the most substantial liberty deprivations that human beings can impose upon one another. And it seems that there are some liberty deprivations that only states ought to impose (e.g. taxes, conscription, etc.). By contrast, less severe liberty deprivations may be privatized without objection—for instance when a private firm that has been hired by the government to perform road maintenance decides to close down a side street for two hours. According to the contingent defense of P_2 then, the similarity of judges in a civilian context to judges and commanders in a military context (vis-à-vis the liberty deprivation of imprisonment) is sufficient to object to private military commanders.¹⁹ The assumption is that our intuitions regarding the rejection of private civilian judges are correct.

It is because of this assumption, however, that the argument under consideration for P_2 is ultimately unsatisfying. Perhaps adjudication and sentencing in the domestic context *need not* be publicly undertaken. Why precisely should we care if private entities were permitted to impose substantial liberty deprivations? If the government were to outsource criminal justice and hire private firms to decide court cases—private firms that specialized in adjudication and sentencing—perhaps fairer decisions would be reached. The first argument for P_2 thus appeals to strong intuitions but does not explain why the ‘publicness’ of criminal adjudication is so important.

¹⁹ A related contingent objection would focus on military judges. *If* military judges must be public agents, which seems plausible, then surely military commanders must be public agents since both must issue punishments within the same criminal justice system.

The Liberty Forfeiture Argument

Having attempted to ground P_2 with an argument that is contingent upon robust but undefended intuitions, let us turn to an argument that aims to defend these intuitions. The liberty forfeiture argument claims that there are some liberties that *only* public actors may justifiably curtail, and the liberty deprivations of NJP, particularly imprisonment, are examples of such liberty curtailments. To see the force of this argument, we ought to distinguish at the outset between two types of liberties that are often taken to be inviolable: liberties that *nobody* may justifiably curtail and liberties that *nobody but public actors* (e.g. states) may justifiably curtail.

Those who insist upon the existence of the first type of liberty often point to practices like slavery and sado-masochism as paradigmatic examples. Their contention is that individuals are neither permitted to sell themselves into slavery nor agree to extreme forms of bodily harm at the hands of others, because to do so would entail a violation of *inalienable* rights. For proponents of this view, there are certain acts X that are wrongful if committed against an individual *even* when that individual has consented to X. Many, by contrast, will be tempted to insist that, so long as individuals consent to such practices under fair bargaining conditions, then they *are* justified in submitting to severe liberty deprivations. The resolution of such questions is difficult. Ultimately, however, the liberty deprivations that they probe are less germane to our analysis than the second set of liberty deprivations—after all, we typically think that *some* actors, namely states, are permitted to imprison people.

Deprivations of the second kind of liberty take the following form: there are certain acts Y that are wrongful if committed against an individual by a private entity, even when that private entity has consented, but are *not* wrongful when committed by a public entity. Here, the two paradigmatic examples are imprisonment and indentured servitude. The way in which imprisonment is often thought to be justifiable if publicly imposed but unjustifiable if privately imposed should be clear from the analysis thus far (such a divergence, of course, is what P₂ aims to demonstrate).

The way in which indentured servitude counts as an example of Y is perhaps less clear. So, I will briefly elaborate. Individuals, we tend to think, cannot justifiably contract with private parties to work for fixed periods of time when the penalties for non-compliance are physical punishment or forced performance. Put differently, private parties cannot ordinarily force individuals to satisfy the terms of a contract; they can collect financial damages for the breach of a contract, but they cannot coerce the performance of services specified in the contract. Yet, individuals *can* contract with the government to work for fixed periods of time with the penalties for non-compliance being physical punishment or forced performance. This is precisely what happens in the military. Soldiers sign up to serve for a set number of years, and governments can force these soldiers to satisfy the terms of their agreement (soldiers cannot get out of the agreement merely by paying damages). If they refuse to fight, they will be imprisoned and may indeed be required to serve prison sentences for much longer periods of time than were required in the initial terms of enlistment.

If P₂ is to be defensible according to the liberty forfeiture argument, it must be shown that consent to future NJP is an example of Y: individuals are justified in joining

the military and thereby consenting to future imprisonment by public actors but not in joining, say, a PMF and consenting to future imprisonment by PMF employees. The question is: why? Assuming that all of the usual requirements of consent are satisfied—that it is freely given, according to fair procedures, with sufficient information, and so on—why would it be wrong for PMF employees and PMF managers to sign a contract that permits the PMF to imprison its employees? This question becomes even more difficult to answer once we remember that all private commanders would serve in a chain of command under *public* high-ranking military officers (according to Chapter 6) in *publicly* authorized wars (according to Chapters 1-5). Why not simply insist that governments must regulate the punishments that are dispensed by private commanders and thereby protect the rights of those who are punished?

Perhaps the most promising approach to distinguish between the individual who consents to public punishment and the individual who consents to private punishment focuses upon the right to democratic participation that can be exercised by the prisoners of a government. When an individual consents to future imprisonment by private contractors, that individual is, in a sense, *wholly* giving up her liberty. Once imprisoned by a private contractor, this individual would lack a guaranteed say in the terms of her imprisonment. By contrast, if this person were to consent to future imprisonment by public agents, she would not be *wholly* giving up her liberty. So long as the public actor was a democratic government, she would still retain a vote in collective decisions about how citizens (including her) are punished. Thus, if I were to join the US military and be imprisoned under the UCMJ, I would still be able to vote in US elections and thereby

voice a say over the terms of my imprisonment (and the terms of all other imprisonments).

An immediate objection to raise against this view is that prisoners in many jurisdictions are often denied the right to vote. Those who commit certain crimes in many states forfeit this right. Perhaps it should be the same for military personnel. If so, then the extent to which one would forfeit her liberty when imprisoned by private actors would be no more permanent than the extent to which one would forfeit her liberty when imprisoned by public actors. In both cases, the prisoner would have no recourse to participate in the political decision-making process, which governs her imprisonment.

Let us suppose, however, that prisoners *ought not to* forfeit their right to vote. Would the argument under consideration then be compelling? An opponent might maintain that private contractors simply do not give up their liberty in the way that I have described. If, for instance, I owned stock in a publicly traded PMF and was commanded by an employee of that PMF, then I would retain a say in how the PMF punished me as a stockholder (whether I was an independent contractor, an employee of the PMF in question, an employee of a different PMF, or a publicly employed soldier). So long as I owned stock, then I would have a right to contribute at shareholders meetings about how the PMF should punish.

However, I would lack a *guaranteed* say in the decisions of the PMF. An important difference between being a stockholder and a voting citizen is that one always retains a democratic vote as a citizen (we are now assuming). One is precluded from giving up the meta-liberty of alienating input over the liberty deprivations that may permissibly be imposed upon oneself and other citizens. By contrast, stockholders can

always sell their shares. Moreover, stockholders may be bought out without their consent (for instance, if the publicly traded company were transformed into a privately traded company). Thus, as a PMF stockholder, since I might unavoidably lose my shares, there are no guarantees that I will retain a say over the terms of my imprisonment. Perhaps then, it is the guaranteed say that distinguishes private imprisonment from public imprisonment.

But three responses decide against this position—and therefore against the liberty forfeiture argument for P_2 . First, a government might simply legislate against the undemocratic nature of private punishment. For instance, the government might require that all private contractors serve in PMFs that are democratically run (e.g. worker cooperatives) and be punished only by other members of the PMF. In this case, one would retain a say over the terms of one's imprisonment.

Secondly, even if we assume that all prisoners retain their right to vote in a democratic state (contra the first objection) and that such a right to vote can only be truly *guaranteed* in a public institution (contra the second objection), it is still not clear whether retaining the right to vote in prison really safeguards one's liberty. Does a prisoner who casts a vote in elections retain *meaningful* control over the terms of her imprisonment in a way that individuals who are imprisoned by private actors, operating in the context of a well-regulated legal system, lack?

Finally, even assuming such meaningful control, the libertarian will rightfully press us to explain why individuals should not be free to consent to future forms of punishment in which they forfeit a meaningful say over the terms of their punishment. Perhaps the notion that an individual would be permitted to sell himself into permanent

slavery or agree to irreparable bodily harm would (and should) continue to make us uneasy. But the sorts of liberty-deprivations under consideration—the imprisonment and hard forms of labor of NJP—are *temporary*. Any serious offense, which might entail years in prison or even a lifetime, would be referred to a court-martial or civilian court and would not be adjudicated by military commanders. As we saw above, the prison sentences of NJP are on the order of days, not months or years. Thus, the libertarian critique of the liberty forfeiture argument for P₂ remains unanswered. Why should individuals not be free to consent to private NJP-like punishments by military commanders? And why should governments who wish to rely upon private commanders not be permitted to honor such contracts and permit private commanders to punish?

The Conflict-of-Interest Argument

The final, and I believe decisive, argument for P₂ turns away from the problems of consensual liberty forfeitures in private punishment and focuses instead upon conflicts-of-interest as a source for discrediting private judges and commanders. The principle that underpins the third argument is encapsulated in the legal doctrine of *nemo judex in sua causa*. No man, as Alexander Hamilton (1996 [1788]) summarized, ought ‘to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias’.

One of the most important applications of this principle in contemporary legal systems is to financial interests. A judge who possesses a legal stake in a business that comes before her court is typically disqualified from hearing the case. For instance, if I own even a single share of stock in Microsoft, then, as a judge in most jurisdictions, I

would be prohibited from deciding cases in which Microsoft was involved. But financial interests do not just include legal ownership (Shaman 1989-1990: 281). A judge who lacks stock in Microsoft but sits on its board or who is employed by Microsoft may possess financial interests in the success of Microsoft that preclude her from hearing a case that involves Microsoft. The worry, of course, is that a judge who stands to benefit financially from a given decision will be more likely to make that decision than a judge who does not stand to benefit. The mechanism by which bias infiltrates is complex—whether the judge consciously promotes her own financial interests or sub-consciously interprets evidence in such a way that her financial interests are promoted. Regardless, the tendency for this to occur should be sufficient for a society to insist that its judges *not* have financial interests in the cases that they must adjudicate.

The problem of outsourced judges in the civilian context extends readily to commanders in a military context. Private contractors who are permitted to exercise military command would seemingly possess conflicts-of-interest when punishing soldiers under their command. In particular, they would possess incentives to punish in ways that increased their likelihood of winning future contracts—in contrast to regular military commanders who do not have to vie for future contracts. Because these conflicts-of-interest undermine military discipline and justice, private commanders, I argue, must not be employed.

To understand the potential conflicts-of-interest that may arise for private contractors in war, we should remember that all military contractors are either independent contractors or PMF employees.²⁰ The former refer to those who contract directly with the entity that has authorized war, while the latter refer to those who serve

²⁰ See Chapter 6, pp. 202-204.

as employees of a private firm, which, in turn, contracts directly with the entity that has authorized war.²¹ In serving as military commanders, independent contractors might exercise command over public military personnel, other independent contractors, or PMF employees. Similarly, PMF employees might exercise command over public military personnel, independent contractors, or PMF employees (whether in their own firm or other firms). With each command relationship, different conflicts-of-interest may apply.

Such conflicts-of-interest may be usefully broken down into two categories. The first concerns the command relationship between PMF employees and other members of their own PMF. The second concerns all other command relationships. Regarding the first class, PMFs like Blackwater have strong incentives for *their* employees to be spared punishment. A PMF whose employees were regularly being punished for disobedience or violations of military code is unlikely to win future contracts. Thus, a Blackwater manager who commands other Blackwater employees in war is likely to be unduly lenient, even when severity better serves military discipline and justice. Through lenience, the manager would preserve the reputation of his PMF.

This criticism, however, only applies to PMF employees who are commanding individuals from *their* PMF. It does not apply to PMF employees who command employees of other PMFs, regular military personnel, or independent contractors. Nor does it apply to independent contractors who exercise command, whether over PMF employees, regular military personnel, or other independent contractors. In these cases, the military commander would possess no disincentive to punish soldiers in his unit on account of joint-allegiance to the same PMF.

²¹ PMFs refer collections of individuals (two or more) that supply military services to belligerents—specifically, ‘against payment’, and ‘outside the state’s military recruitment and training procedures’. The terms in this definition are taken from Fabre (2010: 540).

But other conflicts-of-interest would exist. On the one hand, it may be that private contractors who command individuals from outside of their PMF—a necessary condition to keep contractors from being lenient on employees in furtherance of their PMF's reputation—will be unduly severe in punishing subordinates. After all, subordinates may be competitors in the future, whether in winning future contracts (if the soldiers are PMF employees or independent contractors) or gaining future work (if the soldiers are regular military personnel). Supposing that severity in punishment would indicate errant behavior in the same way that leniency in the case above would indicate good behavior, then private commanders may use harsh forms of punishment to diminish the reputations of subordinates. To the extent that military contracting functions as a zero-sum game, in which case the diminished reputation of one private contractor would translate into the enhanced reputation of the next, the problems of competition may be particularly corrosive to military discipline and justice.

On the other hand, it may be that these incentives will point in the opposite direction, compelling private contractors to collude with one another rather than compete. Military contractors may believe that excessive punishment will reflect poorly on *all* private contractors and may thus exercise undue leniency. Just as the indictment of a politician for fraud is often seen as indictment of all politicians, the misbehavior of some private contractors may be viewed as an indictment of the private security industry as a whole. For that reason, private contractors that command other private contractors may be hesitant to punish one another—and, by the same token, *eager* to punish regular military personnel. These incentives of competition and collusion may point in one

direction in some circumstances and in the opposite direction in other circumstances. Regardless, the incentives will undermine military discipline and justice.

At least three objections to this argument must be addressed. The first two will be treated together. First, the incentives that have just been identified of collusion and competition must be thought to *balance out* with one another. Since the commander possesses both incentives and disincentives to punish, any potential conflicts-of-interest seem to dissolve. The commander would have no reason to punish one way or another. A second way to criticize the conflict-of-interest argument is to maintain that, regardless of the balance between incentives and disincentives for punishment, militaries could, in a sophisticated way, manipulate these incentives. To prevent leniency, militaries could reward punishment with money, benefits, or future contracts. To prevent stringency, military could do the opposite.

The problem is that both of these criticisms miss the corrosive nature of conflicts-of-interest. We do not want military commanders to be *thinking about* the financial incentives or disincentives of punishment. Commanders should punish fairly, as they see fit, to facilitate the prosecution of just wars. To assure this, financial interests should be divorced from the dispensation of punishment. This is why, in the civilian context, a judge who owns stock in Microsoft would be disqualified from a case even if certain incentives pointed in a direction that would *disadvantage* Microsoft—for instance, if the opponent of Microsoft in the case were the judge’s best friend. Judgment may be clouded despite the fact that financial incentives cancel out, so to speak. It is also why, in a civilian context, governments do not offer incentives to judges who exhibit fairness in

cases where a conflict-of-interest exists. Instead, governments simply insist that judges recuse themselves.

A third criticism of my argument is that regular military personnel *also* have financial interests in doling out appropriate levels of punishment. They are seeking to rise up through the ranks of the military (much like private contractors are trying to win future contracts). Indeed, in both civilian and military contexts, judges must decide court cases knowing that their decisions may hinder or harm their careers as judges. Those judges who punish in one way may be promoted to a higher court, while those that punish in a second way may not be promoted. Judges therefore have a strong incentive to punish in a way that would enable them to be promoted to a higher court.

To see how this third objection misses the mark, however, we must recall the distinction between public agents and private agents. Public agents are bound by a set of maximizing institutional strictures to *ensure* that they promote the collective interests of those whom they serve, while private agents are bound by something less.²² The difference between public judges and private judges is that public agents are constrained by the full menu of safeguards to *ensure* fair adjudication in furtherance of collective interests: as I outlined before for public legislators, public judges are typically paid salaries; they are not personally liable for actions taken in their judicial auspices; they receive pensions and health-care; they are eligible for awards and honors that are reserved for governmental employees; they wear special uniforms. All such efforts help alleviate conflicts-of-interest.

Thus, I do not deny that public judges face certain conflicts-of-interest—after all, judges are also people in the world with careers to pursue (though I would contend that

²² See Chapter 6, pp. 218-220.

these conflicts are far less acute than those faced by private judges). But public judges are shielded from these conflicts by a set of maximizing constraints that ensure sound decision-making. And justice, I believe, requires that every effort be made to neutralize the potential for conflicts-of-interest. Otherwise, the severe liberty constraints that result from such decisions look to become illegitimate and the rights of the accused violated.

Based upon this rationale, military commanders must not be private agents. To ensure fair adjudication by commanders, military authorizing entities must apply the full menu of safeguards to their commanders, just as they would apply them to judges. The rights of the accused demand fairness and objectivity in judgment that would go unprotected if commercial interests were permitted to shape the punishment-practices of commanders. Moreover, the rights of *enemy non-combatants* may be undermined: lax or poorly functioning punishment mechanisms, which would exist to the extent that conflicts-of-interest clouded the judgment of commanders, could jeopardize effective command responsibility and hence the achievement of *jus in bello*. To adequately protect the rights of military personnel who are accused of misbehavior and to protect enemy non-combatants who must often bear the horrific costs of malfunctioning military command, governments must make every effort to remove conflicts-of-interest from its commanders and thereby facilitate just and effective punishment.

If this is correct, as I believe it is, then the punishment argument is complete: only public agents may serve as military commanders in war. Because private agents may not justifiably impose the constraints on individual freedom that are required for military discipline (P₂)—due to their conflicts-of-interest—and because military discipline must be assured by those issuing orders in war (P₁), private agents may not issue orders in war

and are therefore precluded from serving as commanders in war. The punishment argument, together with the governance argument (Chapter 6), allows us to prohibit privatization in the military leadership: if privatization is to be justifiable at all, it will only be justifiable in the rank-and-file; military commanders and their superiors (the high-ranking military personnel who were examined in the previous chapter) must be public agents.

Argument for Emergency Supply

Before considering whether privatization in the rank-and-file *is* justifiable, I wish to consider one objection to the conclusion of Chapters 6 and 7: *the argument for emergency supply*. According to this argument, many wars are waged for a purpose so valuable, for example the preservation of a political community or the cessation of genocide, that the outright prohibition of private armies (with private high-ranking officers and private commanders) from the battlefield (‘until the heavens fall’) is simply untenable. The argument for emergency supply is distinct from the argument for emergency authorization (considered in Part I). According to the argument for emergency authorization, individuals, like Jewish residents of the Warsaw Ghetto who were being confined and persecuted by the Nazis, must be entitled to *privately authorize* military force when the circumstances demand. In Part I, I insisted that authorization would indeed be justifiable but that it must be undertaken publicly.²³ The argument for emergency supply, by contrast, maintains that private actors must be permitted to at least hire private armies to fight on their behalf, even if the argument for emergency

²³ See Chapter 3, pp. 98-101.

authorization is correct. Supposing that members of the Warsaw Ghetto were to unanimously accept the risks of military authorization and vote to proceed, surely they should be permitted to hire private armies to fight if they are unable.

If this example seems too unrealistic, we need only turn to the events that transpired in Sierra Leone just fifteen years ago to further probe our intuitions. The government of Sierra Leone, in 1995, procured the services of Executive Outcomes (EO) to assist in its civil war with the Revolutionary United Front (RUF). The RUF insurrection had gained rapid momentum. Its techniques were particularly grotesque, among them the use of child soldiers, the incineration of villages, and a terror-inducing routine of civilian limb-severance (Bergner 2005). As these practices intensified and the RUF drew close to Freetown, close enough that embassies began evacuating, the Sierra Leone government called upon EO (Singer 2003: 112). In a ‘morality-twisting appearance’, as one commentator (Bergner 2005) termed it, two hundred EO operatives thwarted the RUF advance, driving around ten thousand insurgents almost a hundred miles inland from atop helicopter gunships in a virtuoso exercise of asymmetric warfare.²⁴ In the wake of this success, 300,000 refugees who had fled to Guinea were able to return, and within a year, presidential elections were held for the first time in twenty-eight years (Rubin 1999). To morally condemn state-actors, like the government of Sierra Leone, or even non-state actors, like the Jews of Nazi Germany, were they to rely on private armies would seem to be misguided, if not inhumane.

²⁴ All told, in Angola and Sierra Leone (where EO had also been active), according to World Airnews Magazine, EO flew ‘two Boeing 727’s as supply planes, bought for \$550,000 each from American Airlines’ in addition to ‘Soviet Mi-17 armed transport helicopters, Mi-24 Hind gunships, MiG-23 jet fighter bombers and a squadron of Swiss Pilatus training planes converted to fire air-to-ground rockets’ (McNeil 1997).

Michael Walzer and James Pattison, both opponents of extensive military privatization, each concede this much to the argument for emergency supply. Walzer (2008) does not believe that ‘private armies run by commercial companies, political parties, or governments-the-sly are *everywhere* and *always* a bad idea’ even if ‘they are mostly a bad idea’. Similarly, Pattison (2010a: 427) acknowledges in work that is critical of private military firms that his objections do not ‘require there to be an absolute prohibition’ on the use of PMFs. For Pattison (2010a: 427), there are cases, like genocide, where the use of PMFs (and presumably private armies) would be permissible ‘because the potential benefits of their use outweigh the potential drawbacks’.

While the concessions that Walzer and Pattison make are, on some level, necessary, an argumentative strategy employed by Hugh LaFollette (2000) should ease the worry that such cases undermine the prohibition on private armies that has been defended thus far in Part II. As we saw in Chapter 3, a publicly enforced ban on certain weapons (e.g. assault rifles, grenades and so on) may be justifiable despite the existence of scenarios in which individuals are permitted to use such weapons in self-defense.²⁵ It seems that a publicly enforced ban on private armies is similarly justifiable (and indeed obligatory) despite the existence of scenarios in which public actors may be permitted to hire private armies.²⁶

The reason why a publicly enforced ban on certain weapons is justifiable, as LaFollette (2000: 65) argues, is that our rights to self-defense must be limited when the means that we employ to protect these rights expose others to great risks. For that reason,

²⁵ See Chapter 3, pp. 96-98.

²⁶ Notice that my challenge to the argument for emergency supply deviates from the argument for emergency authorization in that the door is left open for private actors to hire private armies if they are available (recall that I closed the door on private military authorization).

we may be entitled to possess knives and perhaps handguns but not assault rifles and tactical nuclear weapons. Yet, the existence of private armies poses precisely the same risks as the individual possession of dangerous weapons, only more so. Private armies are groups of individuals who possess dangerous weapons *and* have been trained and organized to use these weapons in coordination with one another. Given the risks posed by the existence of such armies, it would seem that governments are justified in prohibiting them, even if we could imagine instances in which their deployment might be justifiable. To the extent that such bans are effective, private armies will not be available for hire in situations of emergency.

This, of course, places a great deal of responsibility on governments to act when humanitarian crises emerge. Such a duty to act abroad is very much akin to the duty of compensation that governments possess at home when they have disarmed citizens. As we saw in the previous chapter, states that limit the risk exposure of their citizens by preventing them from authorizing military force incur a duty to protect these citizens when necessary. In the same vein, we might say that states that limit the risk exposure of their citizens by preventing the existence of private armies at the expense of individuals abroad (who might wish to hire these private armies for peacekeeping) also have a duty of compensation: to assist with peacekeeping. None of this, of course, means that public actors are precluded from calling upon private armies that happen to exist in the event of a humanitarian crisis (perhaps because of poor regulation). Nevertheless, our worries about the implications of such a permission should be alleviated by the view that has been defended here: even if such armies could, in extreme circumstances, be hired,

governments still have a right, and indeed a duty, to prevent the existence of such armies in order to limit the risks to which such armies subject citizens.

Conclusion

In this chapter, we have seen that, in light of the punishment argument, military command must not be outsourced to the private sector. P_1 demonstrated that a military commander must issue orders in war and must be able to discipline soldiers who disobey these orders (or who, in some other way, transgress)—sometimes using severe forms of punishment embodied in NJP. P_2 then showed that punishments like NJP must not be issued by private agents. For reasons then of discipline and punishment, military commanders must be public agents. When the punishment argument is tethered to the governance argument, the scope of impermissible outsourcing is wide: the responsibilities of commanding officers *and* their superiors must be publicly discharged. In the next chapter, we will consider the remaining military personnel: those subordinate to commanding officers (i.e. the *rank-and-file*).

8

Partially Outsourced and Comprehensive Public Monopolies Over Military Force

[Mercenaries] have neither fear of God nor dependability with men, and one's ruin can be held off only as long as an assault can be deferred. In peace, one is despoiled by the mercenaries, in war by one's enemies.

-Machiavelli (2007 [1515]: 48)

The previous two chapters have advanced a theory of inherently governmental functions in military supply. The responsibilities undertaken by the *military's leadership*—consisting of commanding officers and their superiors on the chain of command—must be publicly discharged. But we have yet to examine the roles that are occupied by the vast majority of men and women who serve in the military: the *rank-and-file* personnel.

The rank-and-file consist of those individuals who operate below the military leadership on the chain of command. They include lower-level military officers who lack command responsibilities (when, for instance, these officers are attached to a larger organizational unit) and enlisted personnel (since none exercise command).¹ Typically, the rank-and-file vastly outnumber the military leadership. As an approximation of this disparity, consider the ratio of enlisted military personnel to officers in the US military, which is 5 to 1 (US Department of Labor 2011); in the British army, it is 6 to 1 (Kirkup

¹ See Chapter 7, pp. 244-245 for more.

2008); in the Israeli military, it is 9 to 1 (Senor and Singer 2009: 45).² These numbers are merely approximations of the ratio of rank-and-file personnel to military leaders since lower-level officers who do not exercise command are counted as members of the rank-and-file on my account. Thus, the ratio of rank-and-file personnel to military leaders will be even greater than these numbers suggest—which should only underscore the point that the previous two chapters addressed a very circumscribed set of military functions and neglected difficult questions about the vast majority of military personnel.

In this chapter, I shift attention to this more expansive group. Rank-and-file military personnel certainly lack the governing responsibilities of high-ranking officers and the disciplinary responsibilities of commanders. Yet, many are charged with tasks that are commonly taken to be inherently governmental. In particular, rank-and-file military personnel do most of the killing in war.³ If the function of killing is one that ought not to be outsourced, then the theory of inherently governmental functions that I have put forward in the previous two chapters is incomplete. More generally, if any further moral commitments, besides those that were wielded in Chapters 6 and 7 to challenge military outsourcing, are inconsistent with privatization in the rank-and-file, then my account will be wanting.

In this chapter, I argue that the responsibilities discharged by rank-and-file military personnel are *not* inherently governmental and may therefore be privatized. But I seek to show that this permission assumes the presence of a *sufficiently robust, publicly operated* chain of command. Here, I build on the work of Cécile Fabre (2010). We should

² In the Israeli military, these numbers refer to conscripts rather than enlisted personnel. But, for the sake of ease, I refer to all members of the rank-and-file who are not officers as enlisted personnel.

³ Outsourcing such killing responsibilities runs counter to US policy, for instance, which demands that roles not be privatized if they ‘significantly affect the life, liberty, [and] property’ of other persons (US White House 2003).

recall from Chapter 6 that Fabre's position on military privatization is a conjunction of two claims: the weapons-claim and the army-claim. According to the weapons-claim, 'if a state is at liberty to buy guns from private manufacturers' in order to carry out just defensive killings, then 'it is also at liberty to buy soldiering services from those willing to provide them' (2010: 544). According to the army-claim, a state is at liberty to buy more than just individual soldiering services; it may purchase an entire private army to provide soldiering services. Up to this point, I have challenged the army-claim by identifying a set of inherently governmental functions that are performed by military leaders. But I have left the weapons-claim in tact. The question that I now take up is: might the weapons-claim at least permit the privatization of rank-and-file functions, even if cannot permit the privatization of functions outside of the rank-and-file?

I will argue that, *if properly amended*, the weapons-claim *can* serve as a justification for privatization in the rank-and-file. In the first two sections, I explain why the weapons-claim must be amended at all. The first section identifies a weakness in the weapons-claim as Fabre presents it. The weakness is framed in terms of agency theory and is dubbed (by me) the *problem of shirked-discretion*. In the second section, I underscore precisely how the problem of shirked-discretion undermines Fabre's weapons-claim. According to the problem of shirked-discretion, the purchase of weapons is *not* like the purchase of killing services when private killers are given a great deal of discretion over killings. When such expansive discretion is granted, the individual who hires the killer fails to take proper moral responsibility for the killing. If, by contrast, the individual were to purchase a weapon and carry out the killing in question himself, then he *would* take proper moral responsibility. Because there are some killings that an

individual is justified in performing himself that he is not justified in paying another person to perform, the weapons-claim therefore breaks down in a subset of cases. In this way, the claim is incomplete.

In the third section, I suggest a revision to the weapons-claim that makes it complete: *if* the discretion of hired killers is adequately removed, *then* the purchase of weapons is sufficiently similar to the purchase of killing services that a justification for the former is suitable as a justification for the latter. With this revised version of the weapons-claim in tow, I show in the fourth section that it is capable of grounding the privatization of killing services in the rank-and-file. So long as militaries institute a robust, publicly operated chain of command to control private contractors, they may hire private contractors to perform killing services in war. In the fifth section, I further demonstrate that the revised version of the weapons-claim is capable of justifying the privatization of *non*-killing services in the rank-and-file. This fifth section thereby finalizes our endorsement of A_{4ii} : militaries are *not* free to hire private contractors to serve as high-ranking military officers or commanders (Chapters 6 and 7), but they are free to hire private contractors to serve under public commanders in the rank-and-file, whether in killing roles (section four) or non-killing roles (section five).

In section six, having completed my defense of A_{4ii} , I will then consider and rebut six sets of objections to my analysis. These objections maintain that at least some (perhaps even all) responsibilities that are shouldered by rank-and-file military personnel must be publicly discharged. Given the restrictive stances of these objections to privatization, they also serve as endorsements, or kernels of endorsements, of A_5 . After all, endorsements of A_5 insist that military supply ought to be fully public. Like the

objections to *A_{4ii}* that I consider, these endorsements claim that at least some of the rank-and-file military functions that I have judged to be *non*-inherently governmental are in fact inherently governmental. The only difference between endorsements of *A₅* and objections to *A_{4ii}* (of the variety that I will consider) is that the former claim that *all* rank-and-file military functions must be public—such an endorsement must therefore examine a set of rank-and-file functions that the latter has no need to examine. With this point in mind, we may conclude that a successful rebuttal of the six objections to *A_{4ii}* will stand as a rebuttal to endorsements of *A₅*. At the end of this chapter, I show further that, even if the six objections were sound, a transformation of the objections into a full-fledged endorsement of *A₅* would still be problematic. The outcome of my analysis is a comprehensive rejection of *A₅*, which will supplement my endorsement of *A_{4ii}*.

This chapter, by proceeding as it does, completes the exhaustive examination of *A₀ – A₅* that was promised at the outset of this thesis. Endorsements of *each* arrangement will have been considered by the chapter's end: *A₀* in Chapter 5; *A₁* in Chapter 2; *A₂* in Chapter 3; *A₃* and *A_{4i}* in Chapter 6; *A_{4ii}* in Chapters 4 – 8; and *A₅* in Chapter 8. The theory of military privatization that emerges is simple: military force must be publicly authorized (and indeed monopolized); once military force has been publicly authorized, the responsibilities of commanding officers and their superiors must be publicly discharged, while the responsibilities of those who serve under commanding officers may be outsourced. The plausibility of this position should be fortified by my comprehensive attempts to examine the full spectrum of counterarguments—some of which will have insisted that my defense of *A_{4ii}* allows for too *little* privatization (*A₁*, *A₂*, *A₃* and *A_{4i}*) and others of which will have insisted that my defense of *A_{4ii}* allows for *too much* (*A₅*).

One final point to record before moving forward is that my argument here does not show that governments *ought to* outsource any military functions.⁴ First of all, as my discussion makes clear, current institutions—which regulate training, command structures, accountability, and so on—are not adequate for military outsourcing to be justifiable. Secondly, even with dramatically improved regulation of the sort envisaged by this thesis, other considerations, I believe, speak against military outsourcing. In particular, as many scholars have argued, governments have strategic (Hammes 2011; Hedahl 2009: 24), economic (Markusen 2003; US House of Representatives 2006; Hedahl 2009: 23-24), and legal reasons (Minow 2005; Verkuil 2007; Dickinson 2011) to forego extensive military outsourcing. Lastly—these first two points aside—military outsourcing simply may not cohere with the values of many societies. Certainly, as a US citizen, I believe that military outsourcing contradicts principles that the US has long embraced (Ryan 2009).⁵ Just as free speech may entitle individuals to spout racial epithets that are nevertheless inappropriate, so too might the permission defended in this chapter (and this thesis more generally) entitle governments to outsource functions in their rank-and-file that should nevertheless remain public. I am simply defending the *right* of governments to outsource rank-and-file responsibilities, not its advisability.

The Weapons-Claim, Moral Hazard, and Adverse Selection

Let us begin then with a positive argument for military outsourcing in the rank-and-file.

As mentioned above, my argument builds upon the weapons-claim that Fabre (2010) has

⁴ For similar caveats in the philosophical literature on privatization, see Fabre 2010 (541; 545-546).

⁵ This is why I believe that we should elect political leaders who are opposed to extensive military outsourcing, even though governments may have a right to engage in the practice.

advanced. Thus, before I identify a weakness in her position, which gives birth to the amendment that I suggest, we should recall her four-step argument. *If* (a) one is entitled to receive food from a third party in order to avoid starvation, as one must be, then (b) one is entitled to receive a gun from a third party in order to defend oneself. In both cases, a material resource is needed for continued survival. But if one is entitled to receive a gun from a third party, then (c) one must also be entitled to receive assistance from a third party to thwart attack. The rationale that would permit (b) would also permit (c)—namely that material resources and services are both ‘fungible and scarce’ and sometimes necessary ‘to pursue our ends’ (Fabre 2007: 366). Finally, if (d) one is entitled to offer incentives like money to garner assistance—for instance, in the way that patients typically pay surgeons for operations (Fabre 2010: 544)—then one should be entitled to pay private killers to garner assistance. As we can see from (a) – (d), the weapons-claim maintains that we are justified in receiving, and indeed purchasing, killing services in the same way that we are justified in receiving and purchasing food and guns. If this justification for private killing (mercenaries) could *further* motivate a justification for the private performance of other, non-combat rank-and-file military functions (non-mercenary contractors), then outsourcing in the rank-and-file would be justifiable.

The difficulty is that the weapons-claim, as stated, does not proceed unobjectionably from (b) to (c). In one crucial respect, the purchase of guns seems to be *very* different from the purchase of killing services. When an individual purchases a gun, she retains control over how the gun will be used and hence how the killing will proceed. By contrast, when she purchases a killing service, she loses (at least some) control over how the killing will proceed. Of course, if this loss of control is to undermine the

weapons-claim, it must be a *morally problematic* loss of control. Otherwise, the permission to purchase a gun could still ground the permission to purchase a killing service. But it should prompt us to reflect upon the moral implications of discretion that may be sacrificed when one hires a service-provider to use material tools (e.g. guns) on one's behalf rather than using the material tools oneself.

To facilitate this reflection, I will borrow a set of concepts from the now-ubiquitous literature on agency theory in microeconomics and political science. Agency theory, at its core, is concerned with buyer-seller relationships. In such relationships, 'one member, "the buyer" of goods or services is designated "the principal," and the other, who provides the goods or service, is "the agent"—hence the term "agency theory"' (Perrow 1986: 224).⁶ The principal-agent relationship can then be studied as a strategic game of players with competing motivations: the 'employer (principal) would like to hire a diligent worker (agent), and, once hired, would like to be certain that that the employee is doing what he is supposed to be doing (working) and not doing something else (shirking)' (Feaver 2003: 55).

The worry that I have raised about the weapons-claim may be understood as a worry about the difference between two types of principal-agent relationships: the principal-agent relationship in (b), where the gun-purchaser is the principal and the gun-buyer is the agent, and the principal-agent relationship in (c), where the purchaser of killing services is the principal, and the hired killer is the agent. On my view, the principal-agent relationship in (c) is morally troubling in a way that the principal-agent relationship in (b) is not.

⁶ This quote is in Waterman and Meier (1998: 174).

Because agency theory aims to identify mechanisms—contracts, monitoring schemes, and so on—that correct for deep-rooted obstacles, which inevitably confront principals, it offers a wide-ranging set of concepts to facilitate the investigation of principal-agent relationships in the move from (*b*) to (*c*). Furthermore, agency theory is well suited, not just for discussions of *individuals* who hire *single* killers (as in the weapons-claim), but also for discussions of *states* that hire *groups* of killers (like militaries). One very prominent approach to civil-military relations, which has been developed by Peter Feaver (1996; 1998; 1999; 2003), uses agency theory in precisely this fashion. Civilians are designated as principals and military personnel as agents. Deane-Peter Baker (2011: 85-143) has even adapted Feaver's approach to an analysis of civilian principals and *private military agents*—one in which he defends extensive military privatization of the sort that Fabre envisions. Agency theory thus provides a convenient language with which to challenge the weapons-claim while simultaneously helping to situate my position in the emerging normative literature on military privatization.

Two general obstacles confront all principal-agent relationships: *adverse selection* and *moral hazard*. Neither, I will argue, unavoidably damages the weapons-claim (at least not insofar as the two problems are traditionally couched). However, a careful appreciation of both is necessary for a precise rendering of what I shall term the shirked-discretion critique that I level against the weapons-claim. The problem of adverse selection is that a principal can never 'know for certain about the true preferences and capabilities' of the agent; indeed, 'the very act of hiring creates perverse incentives for the agent to misrepresent himself, which thereby increases the chances that the principal will hire a lout' (Feaver 2003: 73).

But, for two reasons, the problem of adverse selection is not particularly detrimental to the weapons-claim. First, the problem of adverse selection applies no less forcefully to the purchase of guns in (b) as it does to the purchase of killing services in (c). One cannot know, before purchasing a weapon, whether the weapons-manufacturer is, for instance, honest and meticulous, just as one cannot know, before purchasing a killing service, whether the killer is skilled and patient. In both cases, the principal must, *on some level*, trust that the agent will act as expected. Secondly, whether in purchasing guns or hiring killers, the principal can easily mitigate the problems of adverse selection. The principal might run background checks on the agent, get references, complete interviews, conduct personality tests, inspect prior work records, and, ideally, rely upon a licensing system that performs assessments centrally (and regularly) so that all licensees meet a threshold of reliability. In these ways, a buyer may be able to purchase weapons or killing services without fear that adverse selection will necessarily invalidate the killings that these purchases facilitate. It may even be, assuming proper safeguards, that the prospect of an individual purchasing a weapon and carrying out a killing himself is *more* worrying than the prospect of this individual simply hiring a professional—the individual may be a very incompetent killer. In other words, the problem of adverse selection may be *less alarming* than the problem of an incompetent principal (with regard to his capacity for killing).

In contrast to the problem of adverse selection, the problem of moral hazard appears to be more troubling for the weapons-claim. Moral hazard ‘refers at a general level to the problem that the principals cannot completely observe the true behavior of the agent and so cannot be certain whether the agent is working or shirking’ (Feaver 2003:

74). Of course, desirable action for our purposes is *moral*, not cost-effective, action, which distinguishes this utilization of agency theory from others. But the challenge remains. The principal can never be sure that his agent will behave in accord with his (the principal's) moral commitments.

The reason why the problem of moral hazard looks to threaten the weapons-claim is that principals have methods of neutralization at their disposal in (b) that simply cannot be wielded in (c). It is true that the principal in (b) will encounter *some* moral hazard since he cannot know whether the gun-seller will produce the weapon according to specification. This could jeopardize the success of just killings; it could potentially endanger bystanders, if the gun's accuracy was sufficiently distorted; and it could compromise the proportionality of the killing, if the gun's firepower was over-amplified. But the principal has an easy way to counteract such moral hazard: test the gun before use. That way, the errors (or wrongs) of the gun-seller are detected *ahead* of any killings, and the gun-seller is rendered somewhat (though not entirely) impotent to act in opposition to the moral commitments of the principal vis-à-vis the killing. By contrast, for the principal in (c), no such tests are available. Whereas the 'behavior' of a gun can largely be assured ahead of its use, the behavior of a hired killer, even one chosen scrupulously to avoid adverse selection, cannot. Hired killers possess autonomy, which guns lack, and may thus act in opposition to the moral commitments of the principal in a way that guns cannot.

Still, for the vast majority of imaginable killings, such a concern is unlikely to be decisive in distinguishing the killing in (c) from the killing in (b) such that only the latter is justifiable. The reason is that, like adverse selection, moral hazard may be counteracted

with thick regulation. Principals may draft detailed and clearly specified contracts that outline the obligations of the agent. The principal may monitor the agent, whether himself or via a third-party. Breaches of contract may result in financial penalties, loss of eligibility for future contracts, and other forms of punishment.⁷ In these ways, the principal in (c) may be able to ensure that the agent acts in accord with his (the principal's) moral commitments and desires with respect to the killing.⁸ If we are to forcefully challenge Fabre's version of the weapons-claim, we must look beyond adverse selection and moral hazard.

The Problem of Shirked-Discretion

What I wish to suggest is that, assuming the neutralization of adverse selection and moral hazard—and hence optimal regulation—*still* there are some killings that the gun-buyer would be permitted to carry out himself in (b) that he would not be permitted to outsource to a hired killer in (c). The killings that I have in mind are ones in which the killer has a great deal of discretion. Now, if I am correct about the moral implications of expansive discretion, then this conclusion will have the further implication that the purchase of a gun will *not* be like the purchase of a killing service in these cases—the former will be justified and the latter unjustified.

⁷ Note that contracts, monitoring, and punishment are, of course, also available to the gun-buyer in (b) when making a purchase from a gun-seller.

⁸ Indeed, as we saw above with adverse selection—where a professional killer might be better qualified than the principal himself when it comes to killing—it may be that a professional killer is *better equipped* to follow the moral commitments of the principal than the principal himself. Weakness of will is no small matter in killing. As a result, we should recognize that even the principal in (b), who purchases a weapon to perform the killing, may act in opposition to his own considered preferences and moral commitments.

To be clear, my goal in this section is to show that the weapons-claim requires revision, not that it should be rejected altogether. In the next section, I offer the revision that is needed: once discretion *is* properly removed, then the purchase of weapons is morally equivalent to the purchase of killing services. Such an amended claim, I seek to show, is capable of successfully justifying the privatization of killing and non-killing services in the rank-and-file. Because my strategy for argumentation in defending military privatization depends upon the shirked-discretion challenge—as it is leveraged to improve upon Fabre’s weapons-claim, which, in turn, is used to justify the privatization of killing services in the military—I will give a somewhat protracted discussion of the shirked-discretion challenge. But this discussion should enable us quickly to see the force of the revised weapons-claim in the next section.

To motivate support for the shirked-discretion challenge to Fabre’s version of the weapons-claim, I wish to consider two examples in which the agents who kill have a great deal of discretion in making moral judgments. These examples may seem unnecessarily evocative. But I present them precisely because the weapons-claim attempts to say something about war, where difficult moral judgments are commonplace. My first example proceeds as follows. Suppose that I, the principal, pay an agent to visit my grandfather who is in a coma, make a decision about whether euthanasia is justifiable, and then proceed with the killing (or not) accordingly. Consider now a second example. In this one, I pay an agent to gain access to a school-house where my attacker is hidden, make a decision about the level of justifiable risk to which the schoolchildren ought to be subjected, if any, and then proceed with the killing (or not) accordingly. In these cases, our intuitions suggest that I would *not* be justified in hiring a killing service, as in (c), but

may be justified in purchasing a weapon and proceeding with the killings myself, as in (b). The reason, it seems, is that, in hiring the killing service, I would fail to take ownership for a killing that is conducted in my name by insisting that the *agent* make moral decisions for me that are inextricably linked to the killing.

The putative moral wrong of the principal in such cases of expansive discretion is what I am dubbing *shirked-discretion*. Note that shirked-discretion resembles moral hazard in the sense that agents are likely to act in opposition to the moral commitments of the principal when given expansive discretion. But it will not be because the agent is shirking. It will be because the *principal* is shirking. We must be careful to note, moreover, that the reason why the principal is shirking is not simply because regulation has failed. We are assuming optimal regulation. The reason why the principal is shirking is that he has failed to take moral responsibility for acts of killing that are carried out on his behalf and with his money—even though the contracts that govern the delegation of discretion, we may suppose, are well-regulated. My contention is that the weapons-claim ought to be restricted in application to those killings in which the principal *does* take moral responsibility for the killing (where he does not turn over excessive discretion to the agent).

Now, one might immediately object that I have employed a sleight of hand here by claiming to have assumed ‘optimal regulation’ while still granting the agents expansive discretion. Reducing the discretion of agents *is* how principals regulate them; once optimal regulation is assumed, the removal of discretion should also be assumed. If such an accusation were correct, then my argument would simply be that Fabre’s

weapons-claim is problematic to the extent that hired killers are poorly regulated.

Needless to say, this is not a philosophically potent criticism (even if it is true).

But this challenge misunderstands the difference between regulation and the removal of discretion. Though the two are deeply related, they are distinct concerns that govern contracts. Contracts with a great deal of discretion may be well-regulated, and contracts with little discretion may be poorly regulated. In the killing examples above—at the hospital and schoolhouse—I am assuming the best available regulations to ensure that the agent makes every effort to act in accordance with good practice. For instance, the contract might specify that the agent must spend at least fifteen minutes making his decision and must write down the reasons for his decision so that, if the agent acts in opposition to these reasons, the principal may sue. Likewise, the monitoring and punishment mechanisms may be extremely robust to ensure that the agent fulfills the terms of the contract (even if these terms are expansive). The question that we must answer is: have the killers in these two examples been granted too much discretion even *with such optimal regulation*? To put this question in perhaps more penetrating language, if we assume that each killer ends up acting in precisely the same way as two other killers who have been given less discretion—because regulatory practices have succeeded in constraining them all in different ways—do we still have reason to object to the killings with expansive discretion? The answer, I think, is yes. Given two killing contracts with equal regulatory efficacy that result in identical outcomes, Fabre's weapons-claim is only persuasive if the killer lacks discretion, *not* if the killer possesses discretion.

How might we explain this? The first point to be made is that, if killing is to be justifiable, *someone* must take responsibility. The dignity of the victim and potential

bystanders requires such a basic minimum level of respect (Sparrow 2007: 68). But, supposing then that someone must take responsibility for the killing, it would be odd to release the individual who commissions and funds the killing from *all* responsibility. After all, without the principal, the agent would never be dispatched to kill on his behalf in the first place (the victim and any potential bystanders will remain unharmed). This is by no means to deny that the killer himself must accept responsibility—whether for the moral success or failure of the killing, breaches of contract, or misbehavior that goes beyond any stipulations that are set forward in the contract. But this cannot absolve the principal of *all* responsibility.

With this in mind, it seems that, if the principal is to accept even a bare minimum of responsibility for the killing, he must make *some* effort to resolve the moral judgments that are inextricably linked to it. The principal, in other words, cannot properly take ownership over a killing conducted on his behalf if he gives the agent wholesale discretion over whether and how to proceed—as the agents were given in the hospital and schoolhouse examples above. Instead, the principal must reflect upon his own moral commitments and ensure that these commitments dictate (to an extent) the actions that he is paying the agent to perform. To do so, he must remove some discretion from the agent when hiring him to kill. How much, of course, is a further question. But if the principal is to properly respect the victim (even unjust victims) and any potential bystanders who may be subjected to risk, he must assume responsibility for the killing and must therefore curtail the scope of the agent's choices according to *his own moral commitments*.

One might wonder why we ought to be concerned with the moral commitments of the principal rather than with morality *simpliciter*. Morality applies to everyone,

principals and agents alike, and thus an agent must behave according to the dictates of morality, whether he is bound by a contract with expansive discretion or is bound by a contract with minimal discretion.⁹ But the difficulty is that, for many killings, there may be reasonable disagreement about how the killing out to proceed and perhaps even whether it ought to proceed. For instance, thoughtful people might disagree about how much risk, *if any*, is justifiable to impose upon schoolchildren in defense of oneself—or, in war, upon enemy non-combatants in defense of the collective. Rather than shelve these difficulties, we should ask how the principal must behave *given that* he may not be in agreement with the agent over the moral questions at stake. And it would seem that, if the principal is to take responsibility for killings that are conducted on his behalf, he must make an effort to resolve these difficulties and make the crucial decisions himself.¹⁰

At a minimum then, the principal must communicate his moral commitments to the hired killer and be sure that the hired killer acts on these commitments (to some extent). If contingencies are likely to arise, the principal must perhaps accompany the killer—or at a minimum remain in close contact with him—so that he can help to resolve moral questions that become relevant. In this way, the principal *would* seem to take

⁹ Fabre herself seems to take something like this for granted (2010: 541). She stipulates that the weapons-claim, and her argument more generally, apply only to private killings that *are indeed just*: meaning with a just cause and in a discriminate and proportionate manner. Perhaps we may then neglect questions about the curtailment of discretion by principals; the agents have a responsibility to behave in accord with morality regardless. To put the point differently, assuming that an agent with a great deal of discretion (as in the hospital and schoolhouse examples above) ends up acting in the same moral fashion as an agent without much discretion, little seems to be lost. But, we should acknowledge, *something* seems to be lost.

¹⁰ One might agree that the principal must participate in the moral decision-making of killing but object to my analysis and claim that the principal is able to do so simply by ensuring that his moral commitments are in line with the moral commitments of his hired killer before attack. In other words, if the problem of adverse selection is truly solved, then the problem of shirked-discretion falls away. The principal can probe the agent's views—for instance, on euthanasia or the imposition of risk—and in that way take responsibility for a killing by hiring the right person to conduct it on his behalf. The problem, however, is that unforeseen contingencies may arise in which the agent is forced to make difficult judgments. The principal cannot always anticipate which of the agent's views must be known ahead of time. If there is a good chance that such contingencies might arise, then the principal must not dispatch the attacker if he is to retain proper moral ownership over the killing.

ownership for actions that are carried out in his name. We may conclude then that the move from (b) to (c) in Fabre's weapons-claim is ultimately unpersuasive. It is unpersuasive because, as I have shown, there are some cases—like the hospital and schoolhouse examples—where someone would be permitted to buy a weapon and carry out killings oneself but would *not* be permitted to hire someone else to do it. Only if individuals can take responsibility for the *judgments* that killings require might they be permitted to hire agents to carry out those killings.

The Revised Weapons-Claim

The previous two sections have demonstrated that Fabre's weapons-claim is incomplete. I now wish to suggest a revision of the weapons-claim, which accommodates the shirked-discretion challenge and is capable of plausibly showing that militaries may purchase killing services from private providers (just as they are permitted to purchase weapons from private manufacturers). The revised version of the weapons-claim is this: *if* the discretion of hired killers is adequately removed, *then* the purchase of weapons is sufficiently similar in a morally relevant sense to the purchase of killing services that a justification for the former is a suitable justification for the latter. The amount of removal that is necessary to render the analogy plausible is a difficult question. But some amount of removal should suffice. Fabre is correct to say that material resources and services *are* both 'fungible and scarce' and sometimes necessary 'to pursue our ends' (Fabre 2007: 366). The principles that govern the purchase of the former—in the context of killing—

may also govern the latter so long as the discretion that is inherent in the latter is adequately removed.

Such a revised analogy between weapons and killing services must, in some sense, speak for itself. As we have seen, one crucial difference between weapons and killers is that, to borrow the otherwise objectionable slogan of the US National Rifle Association: ‘Guns don’t kill people. People kill people.’ If autonomy is a key difference between guns and killers, then the removal of autonomy, as demanded by the revised version of the weapons-claim, certainly renders killers more like weapons. But the full extent of these similarities can only be drawn out so far. This is a limitation of analogical reasoning. Rank-and-file military personnel are not like machines in all respects. What they have in common is simply that neither exercises the kind of discretion that we ought to find problematic. To an extent, I must trust that the connection between the two in this respect is sufficiently clear and plausible for the claims that I defend regarding the privatization of military killing services (in the next section) to be compelling.

Two points, however, are worth noting before moving ahead. First, at the risk of straying too far into the unhelpful (for our purposes) fantasies of science-fiction, we may observe that, when *all* discretion has been removed from a hired killer, the killer looks to be increasingly similar to a weapon. Following an example from Mikhail Valdman (2010: 777-779), we might imagine that the actions of a killer have come to be entirely controlled by a third party through the implementation of a silicon chip in the killer’s brain. The action of releasing such a cyborg, over which one retains full control, appears to be similar (in *some* respects) to the release of bullets from a gun. My point, of course, is not to validate the use of cyborg killers; the act of rendering individuals into cyborgs

would be morally objectionable, to say the least. But the example reminds us of the role that discretion plays in maintaining a distinction between weapons and killing services in the first place. As discretion is removed from private killers, the distinction between private killers and weapons begins to break down.

The second point to note is that, even if the analogy between weapons and killing services is considered dubious at this stage, it should become more plausible as the privatization of military killing is examined. This chapter has aimed to bring our intuitions about the relationship between weapons and killings into resonance with the commitments of the weapons-claim. Thus far, interpersonal examples have been used to suggest a principled revision of the weapons-claim. This principled revision should gain further appeal if it is able to equilibrate with our intuitions regarding military privatization.

War and the Withdrawal of Discretion

Having suggested what I take to be a plausible revision of the weapons-claim, I will now seek to apply this revised version of the weapons-claim to show that militaries may indeed hire private contractors to serve as killers in the rank-and-file. This section, along with the next, which focuses upon non-killing services in war, completes the final leg of *A_{4ii}*: though outsourcing in the military leadership is objectionable, outsourcing in the rank-and-file is not. I begin this section by imagining an application of the revised weapons-claim to direct democracies at war. I do so to avoid smuggling in any assumptions that might make the leap from interpersonal considerations to military

considerations too large and thereby problematic. In the second subsection, I apply the revised version of the weapons-claim to representative democracies. I show that the revised weapons-claim *should* permit the employment of private killing services. So long as discretion is properly removed, then private agents may be hired by states to carry out killings in battle. In the final sub-section, I show that military command structures *are* capable of adequately removing the discretion of hired killers. In the next section, I then turn to non-killing services in war.

Direct Democracies

Let us start by imagining a collective of 1000 individuals and supposing that the collective would be permitted to purchase 1000 guns for each member of the collective, who coordinate to use these guns in a war of collective defense. Minimal permissions of self-defense would seem to allow this. If so, then the collective would seemingly be permitted to enter into a principal-agent relationship with some group of individuals whom they pay to defend the collective. Perhaps the agents will be members of the collective or perhaps non-members; nothing so far speaks to the types of agents that ought to be employed, whether public or private. The point is that the collective would be justified in hiring some set of agents to undertake collective defense on their behalf.

Of course, in view of the shirked-discretion challenge, the collective must not grant the agents excessive discretion. To take proper moral responsibility for the killings that it commissions, the collective must make decisions about whether and how the war will be fought and ensure that the agents are responsive to its decisions. Otherwise, the

collective would be acting just like the shirking-principal in the hospital example above who delegated his decision-making about euthanasia and like the shirking-principal in the schoolhouse example who delegated his decision-making about permissible risk-exposure. The only difference is that, because of the countless moral questions that arise in war, the shirked-discretion challenge may even be more difficult to avoid for a collective at war.

Representative Democracies

The same line of reasoning may be applied to representative democracies. Based on our analysis thus far, we ought to conclude that a collective is permitted to choose representatives to form a government that makes decisions on its behalf *so long as* the representatives are properly constrained. A collective would *not* be permitted to choose representatives in the absence of all constraints—just as the collective would not be permitted to directly hire agents to prosecute its wars without constraints. In both cases, the collective (the principal) must remove some of the discretion of their agents. Only in this way can it avoid the problem of shirked-discretion.

Supposing then that the 1000-person collective above selects a set of representatives to make properly constrained decisions on their behalf, the weapons-claim may again be applied. Here, of course, the representatives function in a dual-role: they are the *agents* of the collective on the one hand and the *principals* of the agents who are employed to defend the collective on the other. It is their latter role as principals that is now relevant for our discussion of representative governments. We may say that

properly constrained representatives would be permitted to purchase weapons to fight a war of collective defense themselves (just as the collective would *itself* be permitted to purchase weapons to fight a war of collective defense themselves)—this is the analogue of (b). Likewise, the representatives would be permitted to hire a set of agents to fight a war of collective defense on their behalf—the analogue of (c). Needless to say, the problem of shirked-discretion remains germane. Representatives would only be permitted to hire agents to fight on their behalf and on behalf of the collective if they properly removed the discretion of hired agents.

All of this demonstrates that governments are justified in hiring *some* set of agents to fight wars on their behalf. Whether these agents must be public agents or may instead be private agents is a further question. But to be clear about the narrowness of this question before tendering an answer, we must not lose sight of how the scope of permissible outsourcing has *already* been constricted by the analysis in previous chapters. The governance argument insisted that, when a collective selects representatives to make decisions about war, the relevant set of representatives includes *both* civilian legislators and high-ranking military personnel. In other words, from the perspective of agents who are hired by a representative democracy to kill on its behalf, the relevant principal is a collection of both civilian legislators and high-ranking military officers. This deviates from the prominent view in civil-military relations developed by Feaver (1996; 1998; 1999; 2003) in which civilians are dubbed the principals and military personnel are dubbed the agents. On my view, given the governing functions of high-ranking military officers *ad bellum* and *in bello*, we should think of civilian legislators and high-ranking military officers *together* as principals. Another way to say this is that, when a collective

relies upon representatives according to some set of constraints, they must bind legislators and high-ranking military personnel by an equally robust set of constraints—legislators and high-ranking military personnel must both be *public* employees. The question now under consideration is whether the public principals in a representative democracy—civilian legislators and high-ranking military personnel together—are justified in hiring *private* agents to kill just as they would be justified in purchasing weapons themselves from private manufacturers to kill in defense of the collective.

The punishment argument, however, has narrowed this question still further. As I demonstrated, any minimal set of constraints that representatives must apply to their agents in the field requires the dispensation of punishment by military commanders. Since we have reasons to insist upon the public dispensation of punishment that are independent of the governance argument, we have independent reasons to ensure that military commanders are also public employees. Thus, when a principal—consisting of civilian-legislators and high-ranking military personnel—hires agents to fight on behalf of a collective, the principal must rely upon public employees to serve as military commanders in the field (whom of course they properly constrain). In light of the punishment argument then, the question under consideration is this: is a public principal, who relies upon public commanders in the field, justified in hiring private agents to serve below these commanders (in the rank-and-file) and kill just as they would be justified in purchasing weapons themselves from private manufacturers to kill in defense of the collective?

The answer, I think, is yes, and the reason derives from the shirked-discretion challenge. To the extent that discretion is removed from killing, it does not matter

whether the principal hires public agents or private agents to kill (nor would it matter if the principal were to buy weapons from public manufacturers or private manufacturers since these manufacturers lack discretion vis-à-vis the killing). We might imagine that if the discretion of killers was *not* sufficiently removed by principals, then there *might* be a difference between the employment of public agents and the employment of private agents. For instance, some of the features that define public agents—e.g. a salary instead of a fee-for-service—might better dispose them to act in accord with the moral commitments of the principal (perhaps not).

Regardless, once discretion *has* been removed, which is required by the shirked-discretion challenge to the weapons-claim for the employment of *both* public agents and private agents, then it seems that any differences between public agents and private agents would become less consequential. The way in which such differences might become manifest on the battlefield would be minimized. So long as we assume that private contractors are not inherently depraved, which I think is safe—or, if they are inherently depraved, that such depravity is insufficient to keep them from the battlefield (which will be explored later)—then we ought to conclude that both public and private agents may be hired to fight in battle.¹¹

¹¹ Another way to make this point comes from the emerging literature on military robotics. Ethicists who study the trend towards ‘warbots’ are concerned that humans be ‘kept in the loop’ on the decisions of artificial machines. See Sparrow (2007); Sharkey (2008); Singer (2009); Royakkers and van Est (2010); Sharkey (2010). But to the extent that discretion has been removed in the performance of some task, we tend not to care whether a human or a robot fulfills that task. Whether, for instance, a human kills in war with his bare hands, a gun, a missile, or a UAV of the ‘fire and forget’ variety seems to be beside the point *so long as* the killer retains control over the weapons that he employs—in other words, so long as the discretion of the weapon has been removed. Yet, if we do not care whether a human or a robot fulfills some task, then why should we care about whether different types of humans, such as public or private agents, fulfill the task? I am assuming, of course, that discretion will have been *substantially* curtailed. Otherwise, any differences between public agents and private agents might become germane, in which case the comparison to military robotics would fall apart. But certainly, as a military commander exercises increasing discretion over his unit so that *he* is making combat-related decisions, then our concern for what kind of agent, public or private, carries out the will of the commander should recede.

The Chain of Command

We have now seen that a revised version of the weapons-claim is capable of grounding the employment of private killers when discretion has been properly removed. To complete a positive case for A_{4ii}, however, two further points are required. The first is that, with a properly functioning chain of command, discretion *can be* sufficiently removed to ensure that any differences between public and private agents in the rank-and-file become unimportant. The second is that the weapons-claim is applicable not just to killing in war but also to other support services that are provided by rank-and-file personnel. If these two further claims can be defended, then we may affirm the right of governments to outsource jobs that are performed by rank-and-file soldiers and thus embrace the theory of military supply that I have proposed: while the responsibilities of military leaders must be publicly discharged, the responsibilities of rank-and-file personnel may be privately discharged.

Given the exigencies of war, the removal of discretion from agents in the field will always be a tremendous challenge. This removal, of course, will never be complete. Nor should it be; soldiers in the field must take some responsibility for the killings that they perpetrate, and this is only possible if they retain some minimal amount of discretion over the killings.¹² But a robust, publicly operated chain of command of the sort that is demanded by the governance and punishment arguments is capable of removing a great deal of discretion from rank-and-file personnel.

¹² It was precisely in this way that I insisted above that principals must retain *some* discretion over killing if they are to take proper responsibility for their role in the action. See pp. 305-306.

Within such a chain of command, public commanders must accept command responsibility for all members of their unit. To do so, a commander must ensure that members of his unit fire only when commanded and, in general, that *his* judgments, which reflect the judgments of civilian and military principals, dictate killings, *not* the individual judgments of rank-and-file soldiers. This is the obligation of all commanding officers, whether they command public agents or private agents. Only if such an obligation is fulfilled will the superiors of commanding officers (the civilian and military principals) maintain proper discretion over war of the sort that is demanded by the shirked-discretion challenge. The institutions that are needed to solidify the link between the judgments of civilian and military leaders and the actions of rank-and-file military personnel must therefore be robust, perhaps even more robust than current militaries have established. The key point, however, is that they must be robust to control *even* public agents. In other words, militaries have a responsibility to establish command structures for reasons that have nothing to do with military privatization. Incidentally, these command structures remove discretion in a way that renders military privatization justifiable.

One might object by pointing to instances in which the discretion of individual rank-and-file soldiers is wide. If my analysis is sound, such discretion must never be too wide. Still, however, rank-and-file personnel may sometimes be entrusted with the performance of sensitive operations that call my argument into question. Consider the recent raid by US Navy SEALs on the compound of Osama bin Laden. Given the gravity of decisions that were required during the operation (and expectedly so), surely it was not just commanders in the SEAL team who were required to be public agents. The thought

that privatization in the ‘rank-and-file’ of SEAL teams would be justifiable is implausible.

My analysis cannot hope to resolve all such difficult cases. But we should observe that, when individual soldiers are required to make sensitive and challenging moral judgments on behalf of a people as were required in the capture of Osama bin Laden, the classification of ‘rank-and-file soldier’ may no longer be appropriate. The more appropriate classification might instead be ‘high-ranking military officer’. Of course, the special forces of many militaries do possess high ranks. But I offer this caveat with my own terminology in mind. Included among high-ranking military officers, on my account, are those who must make substantial decisions on behalf of a citizenry in battle. The paradigm example of such high-ranking military personnel is the field grade officer (a colonel or major) who commands hundreds and sometimes thousands of enlisted personnel. But it may be that certain military personnel like Navy SEALs who carry out sensitive missions perform a similar representative function that field grade officers must perform. In that case, the position that I offer stands: outsourcing in the rank-and-file is justified. If such an amendment is thought implausible, however, we may at least conclude that outsourcing in the rank-and-file is justifiable *to the extent* that discretion has been removed.

Non-Combat Military Personnel

The final point to make in order to wrap up a defense of A_{4i} is that non-combat personnel who serve in the rank-and-file may also be private agents according to the

revised version of the weapons-claim. As we have now seen, the withdrawal of discretion from killing services reduces the importance of *who* performs the killing. By the same token, it would seem that, for any task, the withdrawal of discretion from that task would reduce the importance of who performs it. The harder question is whether there are some tasks in the rank-and-file where the removal of discretion is not possible. It certainly seems, however, that if discretion can properly be withdrawn from *combat* tasks, then it could surely be withdrawn from *non-combat* tasks. Commanders that oversee the performance of non-combat tasks have more time to monitor agents; they encounter less danger in doing so; and, in general, they have a greater ability to dictate precisely how tasks are to be accomplished. My argument here requires that the military not burden commanders with too many soldiers to supervise, even in the performance of non-combat tasks. But, again, this would be required by the challenge from shirked-discretion for both public and private agents.

To sum up, I have used agency theory, following Peter Feaver, to articulate a revised version of the weapons-claim, initially proposed by Cécile Fabre, and concluded that such a revised version is capable of grounding military privatization in the rank-and-file. Another political theorist whose work has influenced mine and who similarly relies upon agency theory to analyze military privatization is Deane-Peter Baker (2011: 85-143). Baker and I reach different conclusions—perhaps most notably, he neither excludes the military leadership from privatization, as I have demanded (according to the governance and punishment arguments), nor does he insist upon the wholesale inclusion of military contractors within the chain of command, as I have demanded (in accommodation of the shirked-discretion challenge). But, despite his more permissive

conclusions, Baker and I both embrace a language for discussing military privatization that, I believe, is helpful for examinations of the topic: the language of agency theory. Having used this paradigm to make a positive case for privatization in the rank-and-file, my defense of A_{4ii} is now complete. Though outsourcing among the military leadership is not justifiable, outsourcing among the rank-and-file *is* (so long as discretion has been sufficiently curtailed).

Objections to A_{4ii} and Endorsements of A_5

The remainder of this chapter considers six sets of prominent objections to my endorsement of A_{4ii} . These objections insist that *at least some* of the responsibilities carried out by rank-and-file military personnel—particularly the responsibilities of killing in war—must be publicly discharged. We must remember that the conclusion pushed by each—that the rank-and-file personnel of a military ought to be at least partially public—is a necessary claim for any defense of A_5 . According to A_5 , *all* military responsibilities, including killing, must be publicly discharged. Thus, the six objections that are considered may be taken as competing, if preliminary, attempts to ground A_5 . My challenge to these objections will therefore serve to show how endorsements of A_5 stumble from the start. At the conclusion of this section, I identify a further difficulty of endorsing A_5 that exists even if the various objections to A_{4ii} that I dismiss are sound.

Contingent Objections

Let us move then to the first set of objections to my endorsement of A_{4ii}. James Pattison (2010a: 426) draws a helpful distinction between contingent objections to privatization and deeper objections. Whereas proper regulation may neutralize contingent objections, deeper objections apply *even in the presence of* perfect regulatory efficacy. Because contingent objections cannot easily decide against privatization in moral examinations of war like this one, the bulk of my analysis in the next five subsections will concentrate on deeper objections. But a few prominent contingent objections should briefly be canvassed to dispel the worry that a set of potentially damaging objections has been overlooked. I treat these objections all together—i.e. as a single set of objections, thus leaving five remaining deeper objections to examine in the next five subsections.

Machiavelli (2007 [1515]) offered two of the earliest and most infamous contingent objections to military privatization. First, mercenaries, according to Machiavelli, are not sufficiently ruthless. Instead, they do ‘their utmost to keep themselves and their soldiers out of the way of fatigue and danger’ (2007 [1515]: 51). The difficulty with this position is that Machiavelli was either wrong, in which case the view must be rejected, or he was right, in which case the gentility of mercenaries would speak *in their favor* (Coady 2008: 213; Baker 2008: 33; Lynch and Walsh 2000: 143).

A second contingent objection proposed by Machiavelli (2007 [1515]: 48-49) is that mercenaries cannot be trusted. Here, the problem is that mercenaries are not *inherently* untrustworthy (at least not more than regular military personnel). As Coady (2008: 213) puts it, ‘in the contemporary world, the difference between mercenaries and

other successful military leaders with regard to the temptation to abuse their office for political purposes may normally be insignificant'. Baker (2011: 137) takes this point one step further: 'given that their motives tend to be pecuniary rather than political, it may even be thought that there is less of a danger of this sort of behavior from private warriors'.

Other, perhaps more plausible, contingent objections have become apt in recent wars, particularly in Iraq and Afghanistan. Pattison (2010*a*: 426) identifies several of these: military contractors are more likely to commit war crimes; they are not legally accountable for their actions (Runzo 2008: 64); and they stand outside of the democratic system in many states (for instance, in the US, the military is not required to report contractor deaths to citizens for their consideration in continuing a war). Moreover, military privatization has given contractors and their lobbyists substantial influence over public policy (Fabre 2010: 556). While these objections are certainly worrisome, they would likely dissipate if governments were to apply the same legal instruments to contractors that they apply to regular soldiers and were to make these contractors democratically accountable (while limiting their lobbying influence). For objections to my endorsement of A_4ii to succeed, and A_5 to be at all plausible, problems must be identified that are ultimately unresponsive to institutional accommodation. Five such objections will now be considered.

Chickenhawks

The first problem has been advanced by Cheyney Ryan (2009). He dubs it the chickenhawk argument. According to Ryan, military privatization undermines a dictum that must govern warfare: ‘You should endorse a war only if you would be willing to fight in, even die in, the war yourself (or have your loved ones do so)’ (Ryan 2009: 4). The validity of this argument depends upon the following: (i) the justifiable endorsement of public military authorization requires, *at a minimum*, that the individual proffering his or her endorsement be willing to participate in military supply; and (ii) one cannot fulfill the requirement of (i) through a willingness to participate in *private* supply (only in public supply). Thus, individuals who authorize war must be willing to participate in public supply. Moreover, (iii) individuals, and the states they constitute, who hire private entities to supply military force demonstrate an *unwillingness* to participate in public supply. Thus, individuals, and the states they constitute, must not hire private entities to supply military force.

While (i) raises a number of questions, I wish to assume for the sake of argument that it is correct. It is (ii) and (iii) that are most problematic. According to (ii), individuals who endorse a war must sign up for regular military service rather than contracted service. Yet, an individual who decides to endorse a war and serve her country as a private contractor encounters all of the risks that regular military personnel encounter and contributes to all of the benefits to which they contribute. The chickenhawk argument does not seem capable of dictating the *kind* of military service that one who endorses a war ought to undertake. What is important for proponents of the chickenhawk argument

is that individuals make *some* kind of military contribution to the wars that they endorse. Indeed, in at least one respect, proponents of the chickenhawk argument ought to favor military privatization. Because military contractors are capable of choosing individual wars for service—in contrast to regular military personnel who must typically serve in all wars—military contractors are able to participate in only the wars that they endorse (thus satisfying the chickenhawk dictum) while sitting out of wars that they oppose.

Yet, even if (ii) were correct and service in regular militaries was required, this does not mean that states must be prohibited from hiring private contractors—the claim of (iii). Suppose that everybody in a society who supported a given war served in the military to help prosecute that war. Why would the society then be prohibited from supplementing their war efforts with military contractors? The proponent of the chickenhawk dictum demands that *all* who support a war should fight, not that *only* those who support a war should fight. Given the problems of (ii) and (iii), the chickenhawk objection to A_{4ii} must be rejected.

Markets

Having challenged contingent objections (the first argument) and chickenhawk objections (the second argument), let us turn to a third argument against military privatization, this one advanced by Michael Sandel (1998). Sandel argues that the infiltration of monetary exchange into certain human services, like military service, corrupts the values that these services aim to promote. Sandel distinguishes this argument from a different argument, which he labels the *argument from coercion*. The argument from coercion

‘points to the injustice that can arise when people buy and sell things under conditions of severe inequality or dire economic necessity’ (Sandel 1998: 94). Thus, many become military contractors because they have no other viable options for work and must support themselves and their families. Such arguments from coercion may be set aside as contingent; fair bargaining practices could be instituted to ensure that military contractors are not coerced into service.

The more threatening challenge, which is the one that Sandel defends, is the *argument from corruption*. This argument maintains that, regardless of the background conditions under which money is exchanged, still ‘certain moral and civic goods are diminished or corrupted if bought and sold for money’ (Sandel 1998: 94). Hiring military contractors, on this account, would be problematic even if such contractors were wealthy individuals who enjoyed expansive job prospects and negotiated under fair conditions. The reason is that markets corrupt the good that military service aims to promote. Specifically, according to Sandel (1998: 108), it corrupts the good of republican citizenship: ‘to be free is to participate in shaping the forces that govern the collective destiny’, and only on the battlefield does one come to acquire the civic virtues that are needed for effective participation.

On this point, Sandel draws a helpful comparison to commercial surrogacy. He argues, following Elizabeth Anderson (1990), that the good of pregnancy is to promote an emotional connection between two intrinsically valuable beings, the child and mother. Commercial surrogacy violates this good by ‘requiring the surrogate mother to suppress whatever parental love she feels for the child’ and thereby converting ‘women’s labor into alienated labor’ (Anderson 1990: 81). We might say that, just as the good of

pregnancy promotes an emotional bond between the mother and her child, the good of military service promotes a communal bond between the collective and its citizens.¹³ By allowing markets to govern military service and individuals who serve to profit financially, the state severs the bond that would form on the battlefield between the citizens and the community for which they fight.

The difficulty with this view is threefold. First, it is not clear why citizens must serve in the military in order to develop the appropriate civic bonds to the state that are necessary for the protection of their freedom. The debate among republicans about the need for military service in republican polities stretches back to Machiavelli, who thought that military service was critical (Skinner 2002: 195-212). But others have plausibly argued that what matters is not military service but rather some kind of *national* service (Dagger 2002: 7-12). The key is that citizens do something ‘for other members of the community in return for the protection of the law and the other benefits that one hopes to continue to receive’ (Dagger 2002: 5). Thus, the reliance upon private contractors by the state may not be worrying so long as citizens are able to do national service outside of the military.

Moreover, even assuming that military service is required, the two problems that confronted the chickenhawk argument are again relevant here. First, individuals could maintain strong civic bonds to the state by serving in war as private contractors.

Certainly, the bond that is built between military contractors and the state is likely to be

¹³ Another sphere of activity that is compared to private military contracting (in addition to commercial surrogacy) is prostitution. See Deane-Peter Baker (2008: 38) for the view, similar to Sandel’s, that the relationship undermined by military contracting is between the citizen and the state: ‘just as prostitution and other forms of adultery or fornication are violations or disruptions of the morally appropriate sexual relationship, so mercenarism is a disruption of the morally appropriate martial relationship.’ Baker calls this view into question.

weaker than the bond that is built between regular military soldiers and the state. But it seems that a contractor who risks life and limb to support a military effort would grow attached to that effort and to the authorizing entities in whose name he serves. Secondly, even if republican bonds could only be preserved through military service as a regular soldier (rather than private contractor), it is not clear that supplements to this national military service in the form of private contractors would be inconsistent with the good of republican citizenship. The state would not sever the bond between the citizen and the state; it might simply enhance the bond of others to the state.

Communal Ties

A fourth argument suggests that communal bonds are important, but not for the reasons that civic-republicans like Sandel espouse. Pattison (2010a: 437-438), for example, argues that, with military privatization, the ‘potential benefits in terms of communal identity that come from having citizens defend their community are lost’; as with other familiar community-building practices like voluntary blood donation, military service ‘strengthens communal ties and fosters a general sense of concern for other members of the community’. But, as Pattison’s comparison to voluntary blood donation indicates, a community might achieve strengthened identity in a number of ways. The question is: why might it be particularly important to achieve via the military?

The most plausible answer, it seems, is that such strengthened collective identity is helpful for the prosecution of just wars. In this vein, Jessica Wolfendale (2008: 223-229) argues that the symbolism of national defense—the war memorials, parades, and so

on—enhance public dialogue about war by focusing attention on the those who suffer. Pattison (2010a: 438) also reminds us that the commodification of military service ‘could affect recruitment in the regular military since new potential recruits will not see soldiering as an honourable, patriotic, and valiant career, but something for which they should receive financial remuneration’ (2010a: 438). In this way, states may become less capable of prosecuting just wars—whether because they get too few recruits or because they begin to get undesirable recruits.

But, while such views are plausible, they do not undermine the *right* of states to hire private contractors. Certainly, states that hire private contractors may be less cohesive than states that rely upon national militaries. But any diminishment of communal bonds that results from the employment of military contractors in a limited fashion would not seem to keep states from prosecuting wars in a just manner. Indeed, we might think that patriotic spirit in war leads to harsher fighting and the *increased* likelihood of *jus in bello* violations (Pattison 2008: 146). More to the point, as Lynch and Walsh note, the communal bonds that *do* facilitate effective and just fighting tend to be bonds between military personnel rather than between the soldier and citizen. As they write, ‘[o]ne is committed to the fellows in one’s patrol or unit or company or army—that is, those whom one fights *with* rather than fights *for*’ (2000: 139). Because these bonds in the military may develop among private contractors and regular military personnel alike, many of the benefits that accrue through communal bonds with regard to the justice of wars may also accrue in a system with military privatization.

Contractual Limitations

A fifth argument against military outsourcing focuses upon the limitations of contracts. Pattison (2010a: 440) argues, for instance, that a heavy reliance on private contractors ‘might jeopardise their ability to fight just wars because private contractors cannot be required to make the ultimate sacrifice’.¹⁴ But the difficulty with this view is that governments could simply write contracts with private actors in a way that *would* permit them to order contractors to make the ultimate sacrifice. As discussed in Chapter 7, the notion that two private parties could sign a contract in which one was permitted to inflict grave harm on the other is certainly discomforting (though not easily challenged).¹⁵ But the case in question is not an example of that—and is thus not similar to the examples of private parties agreeing to enslave one another or commit sado-masochistic harm against one another. The case under question is an agreement between the state and a private party. For that reason, it is particularly unclear why such a contract would be problematic. If a state is permitted to enter into such contracts with regular military personnel, why should they not be permitted to do so with private military personnel? By the same token, if individuals are permitted to enter into contracts with the state in which they can be commanded to make the ultimate sacrifice, why should they not be permitted to do so as private contractors?

This point should be especially persuasive in light of the requirement that I have defended for public command. Not only would the state be a signatory to the contract, but agents of the state would alone be permitted to order private contractors to make the

¹⁴ See also Krahmann (2008: 255) and Baker (2011: 61-63) for this view.

¹⁵ See Chapter 7, p. 274.

ultimate sacrifice. This is because only public agents are permitted to exercise command (according to the punishment argument). Seemingly, the state could sanction public commanders to impose the same punishments (specifically, NJP-like punishments) upon private contractors that they impose upon regular military personnel who refuse to make the ultimate sacrifice when commanded to do so. For these reasons, the argument from contractual limitations is incapable of damaging my case for privatization in the rank-and-file according to A_{4ii}.

Motivations

One final objection to consider concerns the motivations of private contractors. Tony Coady (2008: 15) argues, for instance, that an individual ‘who hires his gun to the highest bidder or, less dramatically, fights predominately for money will typically lack the motive appropriate to war, as specified by just war theory’. Pattison (2010a: 435) similarly argues that, although the problematic motive of a contractor ‘may not figure highly in the calculations of the overall justice of a war’, such a motive ‘still does *some* work’ in our judgment about the morality of a war.¹⁶ Call these objections *motivationalist objections*.¹⁷

At least two points may be raised against motivationalist objections, both of which assume that motives *do* matter in war and that private contractors are more likely

¹⁶ See also Pattison (2008: 144-149). Pattison (2010a: 432) offers a helpful distinction between intentions and motives, where the former refer to the goals of an action, while the latter refer to the underlying reason for that action. We shall assume that private contractors act with the right intentions. The question under consideration here is whether they have the wrong motives in killing and, if so, whether these motives should preclude them from fighting.

¹⁷ For this term, see Lynch and Walsh (2000: 135). Machiavelli (2007 [1515]: 48) offered a motivationalist argument as well. For a helpful discussion, see Coady (2008: 211-216).

to have objectionable motives (e.g. financial greed, bloodlust, and so on). The first point is that private contractors do not, as a class, possess such motives.¹⁸ There will be at least some—or could be at least some—private contractors who lack objectionable motives. Thus, we would not say that private military contractors must be banned from war, but only those who possess the wrong motivations should be banned from war. If so, we must say the same of regular military personnel.

More importantly, as Pattison acknowledges, even if *all* military contractors possessed objectionable motives, it is unlikely that these motivations would be capable of rendering their service unjustifiable. The reason is that we would not want to punish those who would otherwise be protected by military contractors in war. Fabre (2010: 553) makes a similar point about individuals who become doctors for financial reasons: ‘Even if it is wrong (*arguendo*) for someone to enter the medical profession mostly out of financial motives, and even if it is wrong for a patient to hire him, surely the patient’s interest in surviving is important enough to grant him a right to do so.’ The same must be true of individuals who are being defended in war. If the war is just, we would not want to penalize those who are being attacked by insisting that defenders have all of the right motives. Thus, it seems that the motivationalist argument cannot succeed in keeping private contractors from the battlefield in the way that *A_{4ii}* allows.

From A_{4ii} to A₅

Having now considered and challenged six objections to my endorsement of *A_{4ii}*, I wish to briefly assess the implications of these objections for endorsements of *A₅*. Some who

¹⁸ See Fabre (2010: 551) for a similar point.

push the objections considered above—whether contingent objections, chickenhawk objections, civic-republican objections, communal identity objections, contractual objections, or motivationalist objections—not only maintain that *some* members of the rank-and-file must be public agents (which I have sought to challenge) but that *all* members of the rank-and-file must be public agents. Those who push such a view endorse A₅. A₅, we will recall, demands that *all* military supply must be public.

Of course, I have just challenged the claims upon which proponents of A₅ tend to rely. But let us suppose, for the sake of argument, that one or more of these claims was sound. What I wish to suggest (to conclude this section) is that any transformation of objections to A_{4ii} into endorsements of A₅ would be profoundly difficult. *Even if* the six objections to my case for A_{4ii}, which I criticized, were all in fact sound, arguments would then be needed about why support personnel, in addition to combat personnel, must be barred from battle. For such arguments to succeed, proponents of A₅ must be able to explain why all private actors ought to be prohibited from participating in war but not from *contributing* to war (for instance, in sewing the uniforms that soldiers wear or growing the food that they eat). Because a rejection of all private contributions to war is implausible—to push the point further, what are we to say about those who sell the military yarn for uniforms or seed for crops?—the proponent of A₅ must somehow erect a morally meaningful line between private participation in war and private contributions to war (which fall short of participation) such that only the latter are permissible. How such a case might be formulated is not immediately obvious, nor is the conclusion intuitively plausible. Endorsements of A₅, it seems, would therefore have trouble for reasons that go beyond the arguments that were considered in this section.

Conclusion

In this chapter, I have attempted to show that the functions performed by rank-and-file military personnel are *not* inherently governmental functions and therefore may be privatized—so long as they are privatized within a sufficiently robust, publicly operated chain of command. In light of this analysis and the analysis of previous chapters, *A_{4ii}* has been endorsed: military force *may* be supplied privately or publicly, but, if supplied privately, may *not* be supplied to the exclusion of public personnel. After my case for *A_{4ii}* was finalized, several arguments that aimed to undermine my position were considered. The end result is a completed theory of military privatization: military force must be publicly authorized (Part I); once publicly authorized, the responsibilities of commanding officers and their superiors must be publicly discharged, while the responsibilities of those who serve under commanding officers may be outsourced (Part II).

9

Conclusion

Our people have died, lost their limbs, their eyes and their properties for these elections. If we employ a service to protect our hard-won democracy, why should it be viewed negatively?

-Former Defense Minister of Sierra Leone¹

This thesis will conclude with a reconsideration of the concept with which I began: the Middleman State. Defined by small bureaucracies and ambitious policy agendas, the Middleman State ensures that its citizens are provided with goods: military protection, education, health-care, domestic policing, garbage collection, space exploration, and many others. But the Middleman State does not *itself* furnish these goods. Instead, it relies upon private contractors for their supply.

Middleman practices have become particularly pronounced in war. As we have seen of US efforts in Iraq and Afghanistan, governments continue to authorize military force, but they rely upon private contractors to do much of the fighting (US Congressional Research Service 2011; Risen 2007; Percy 2007a: 206). Governments, we should recognize, may be motivated to adopt Middleman practices for a number of reasons. The quote that headlined this chapter reminds us that the Middleman State may simply lack the military power that is required for the protection of its citizens. By contrast, the Middleman State may possess such military power but lack the political will

¹ Quoted in Rubin (1999).

to authorize war—say, to intervene abroad to stop genocide. More audaciously, it may be that members of the Middleman State ‘would not willingly exchange one of themselves for the enemy’s prince’, as Thomas More (2002 [1516]: 88) declared of his Utopians. Or the Middleman State may be ready and eager to sacrifice but convinced that military privatization is economically advantageous. For each of these reasons, and many others, states have been tempted by the prospect of becoming middlemen for their citizens in war, not their primary suppliers of goods.

This thesis has offered a comprehensive investigation of the moral foundations of the Middleman State in matters of war. Part I showed that public actors have a right, and indeed a responsibility, to prevent private actors from authorizing military force. The Middleman State, in other words, must not relinquish its exclusive right to *authorize* military force. Chapters 2 and 3 considered and rejected a series of arguments in favor of private military authorization. Chapters 4 and 5 then turned from critiques of arguments for private military authorization to positive arguments in favor of public military monopolization. According to what I termed the risk-prevention argument, public actors must monopolize the authorization of war, because private military authorization would impose considerable risks on individuals who lack a say in authorization (both direct-risk-bearers and indirect-risk-bearers). And we ought not to impose considerable risks on individuals who lack such a say. In light of the risk-prevention argument, A_1 and A_2 were rejected. I then supplemented the risk-prevention argument with what was termed the compensation argument: this insists that public monopolizing entities must authorize military force when their constituents are threatened. On account of the compensation argument, A_0 was rejected. Together, the risk-prevention and compensation arguments

established the need for public actors—even those who may be described as Middleman States—to monopolize and authorize war.

Part II turned from military authorization to military supply and asked about the freedom of the Middleman State to privatize its military. Chapter 6 considered Middleman practices at their extreme: the employment of a fully *private army* to prosecute a publicly authorized war. I provided the governance argument to show that high-ranking officers in militaries with Middleman aspirations must be public agents. These officers exercise substantial power over civilian decisions of military authorization and supply. In addition, they make weighty decisions in battle that have profound implications for those whom they protect and those whom they attack. For these reasons, I argued that Middleman States must not privatize the responsibilities that are discharged by high-ranking military officers.

In Chapter 7, I supplemented the governance argument with the punishment argument to show that military commanders, who serve below high-ranking military officers on the chain of command, must also be public agents. Commanders must possess a responsibility to punish disobedient soldiers in order to prosecute just wars—sometimes with methods like imprisonment that severely restrict the freedoms of individual soldiers—and these methods ought to be reserved for public discharge. Taken together, the governance argument and punishment argument offered a substantial restriction on Middleman practices in war. The military leadership, which consists of commanders and their superiors (high-ranking military officers), must not be privatized. Even a Middleman State that undertakes extensive military privatization must *itself* furnish the military leadership of war.

Finally, Chapter 8 considered whether the Middleman State could privatize its rank-and-file personnel. I argued for an affirmative answer to this question. Following an argument defended by Cécile Fabre, I showed that the purchase of weapons from a private manufacturer is morally analogous to the purchase of killing services from private contractors *if the discretion of killers has been sufficiently removed*. Moreover, the purchase of other military services (non-killing services) is justifiable so long as sufficient discretion is similarly removed. The Middleman State therefore has a right to hire private contractors to populate its rank-and-file, but it must only do so under a robust, publicly operated chain of command.

The mantra of the Middleman State is simple: ‘the business of government is not to provide services, but to see to it that [services] are provided’ (US House Committee on Government Reform: 1).² In some sense, this thesis has affirmed the core commitment of the Middleman State in matters of war. When our basic rights are threatened, what is most important, in the end, is that *somebody* fights just wars on our behalf and that *somebody* thereby defends us. Yet, this thesis has also posed a challenge to the Middleman mantra. I have insisted that, in order for a government to properly see to it that services are provided in war, the government must provide *some* of these services itself. In some cases, the business of government *is* to provide services. Most fundamentally, governments must retain the choice over which wars to fight; they cannot outsource the responsibilities of civilian legislators. Furthermore, once wars have been chosen, governments must not outsource the responsibilities of high-ranking military officers or commanders. Only by preserving the public character of the civilian legislature and the military leadership can a government ensure that the service in

² This is a quote from Mitch Daniels, former head of the US Office of Management and Budget.

question—war—is being properly provided. Middleman practices are thus permissible only assuming the adequate performance of inherently governmental functions.

But so long as governments retain control over wars—as specified by the risk-prevention argument (Chapters 4 and 5), the compensation argument (Chapter 5), the governance argument (Chapter 6), the punishment argument (Chapter 7), and the shirked-discretion challenge (Chapter 8)—Middleman practices cannot be ruled out. States must not be denied the right to protect the fundamental interests of their citizens.

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