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Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States

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Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States

CLIFFORD J. ROSKY*

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INTRODUCTION

Should our punishment, policing, and military institutions be public, private, or both? Is there a special link between the project of government and the exercise of force? These two questions have vexed philosophers for several centuries, and lately, they have begun to present more practical problems as well.

In the past three decades, private punishment, policing, and military markets have blossomed and boomed in liberal states.¹ Private prisons, police, and armies have been popping up around the world, punishing criminals, fighting crimes, keeping peace, and waging war. The use of force has generated unprecedented profits, and the boundaries between public and private uses of force have become increasingly blurred. Observers of these trends expect them to continue and accelerate. This Article brings these three trends under one rubric: the privatization of force.

Lately, the privatization of force has stirred up some big news in liberal states. In the United States, the Supreme Court has issued two rulings on the liability of private prisons,² Congress has eliminated private baggage and passenger screening in airports,³ and the Department of Defense has employed private security firms to protect the Coalition Provisional Authority in postwar Iraq.⁴ In Britain, apparent links between the British Foreign Office and private military corporations have provoked a political

¹ For a more detailed description of the trends mentioned in this paragraph, see discussion *infra* Part II.B.

² See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001) (holding that companies operating private correctional facilities are not subject to civil rights suits under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971)); *Richardson v. McKnight*, 521 U.S. 399, 401, 412 (1997) (holding that private prison guards cannot claim qualified immunity in § 1983 suits); discussion *infra* Part IV.E.2 (placing *Richardson* and *Malesko* in the context of the public policy debates over the privatization of force).

³ See James Glanz, *Modern Mercenaries on the Iraqi Frontier*, N.Y. TIMES, Apr. 4, 2004, § 4, at 5 (describing activities of private security firms in postwar Iraq).

⁴ See Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597 (codified as amended in scattered sections of 5, 26, 31, and 49 U.S.C.); discussion *infra* Part IV.C (evaluating the public policy arguments for and against the Aviation and Transportation Security Act).

scandal, and Parliament has resolved to regulate the government's future dealings with such corporations.⁵

Over the past several years these events have attracted considerable attention in newspapers, magazines, and academic journals.⁶ In separate disciplines, there have been vibrant public policy debates over the privatization of punishment, policing, and military force. In this Article I collect and critique these public policy debates. I identify the most essential themes in each argument and discover that each one fails to engage our most basic ideals. When we talk about the privatization of prisons, police, and armies, we talk in the same generic, mundane terms that we use to describe the privatization of schools, hospitals, welfare systems, and the like. By resorting to clichés, we have missed the special problems presented by the proliferation of private prisons, police, and armies. As a result, we have failed to articulate any fundamental critiques.

The time is ripe to assume a more profound perspective vis-à-vis the privatization of force. Private armies, police, and prisons are not only objects of public policy to which we can apply our customary arguments from the left and the right; they are also challenges to one of our most fundamental, venerated axioms of liberal thought—the idea that “the state” has, must have, or should have a “monopoly of force.” Unlike past scholars, I take the privatization of force as an invitation to revisit an old feud over the appropriate relationship between government and force. Should the liberal state have a “monopoly of force”? If so, what should such a monopoly state look like, in institutional terms? These are the two central questions that this Article raises and answers via quirky couplings of economic and political concepts.

The Article proceeds in five parts. Parts I and II hang the theoretical and factual backdrop for my analysis. Part I recounts the story of the state of nature and defines a few basic terms: “liberal,” “force,” “public,” and “private.” This Part sets forth the monopoly thesis: the liberal idea that the state has, must have, or should have a monopoly of force. Part II provides a brief history of force. It gives a quick glimpse of the earlier monopolization and recent privatization of punishment, policing, and military force in liberal states.

⁵ See Michael Evans, *Government Urged to License Mercenaries*, TIMES (London), Feb. 13, 2002, LEXIS, News Library, Ttimes File; Michael Evans, *Sandline Chief Insists He Had Official Approval*, TIMES (London), May 20, 1998, LEXIS, News Library, Ttimes File [hereinafter *Sandline Chief*]; *Lines in the Sand*, TIMES (London), May 19, 1998, LEXIS, News Library, Ttimes File; Jon Ungeod-Thomas, *Cook to Lift Ban on Mercenaries*, TIMES (London), Oct. 3, 1999, LEXIS, News Library, Ttimes file; Nicholas Watt, *Minister Accused of Misleading the Lords*, TIMES (London), June 10, 1998, LEXIS, News Library, Ttimes File; Nicholas Wood, *Cook Plans Curbs on Mercenaries*, TIMES (London), May 30, 1998, LEXIS, News Library, Ttimes File; Nicholas Wood, *Mercenary Whose Work is Danger*, TIMES (London), May 4, 1998, LEXIS, News Library, Ttimes File.

⁶ For a more detailed description and analysis of the public policy debates mentioned in this paragraph, see discussion *infra* Part IV.

Taken together, Parts I and II portray an apparent tension between the theory and practice of liberalism. On the one hand, we have the idea that force must be monopolized; on the other hand, we have the fact that force has been privatized. How might this tension be resolved? Should we monopolize or privatize force? Is the answer the same for punishment, policing, and military force? Or is the tension between theory and practice only apparent? Are our choices between public and private more complex? When we consider the privatization of punishment, policing, and military force, what principles should guide our thought?

The rest of the Article speaks to these issues. Part III introduces the customary four-box matrix, which conveys a distinction between two important concepts: the “demand” for force and the “supply” of force. In the rest of the Article, the supply/demand matrix serves as our polestar, guiding us toward fundamental critiques .

First, in Part IV, the matrix helps us navigate the maze of our public policy debates. These debates raise many different principles and concerns: the values of (1) economic efficiency, (2) egalitarian distributions, (3) public goods, (4) public accountability, and (5) human rights, and the dangers of (6) industrial influence, (7) market failure, and (8) cultural commodification. When we apply the supply/demand matrix to each of these arguments, we slice through the polemical morass. We perceive quickly that our public policy arguments have generated powerful critiques of the private demand for force but weak critiques of the private supply of force. We see that our current approach is too generic, and as a result, it is too superficial. We have yet to identify any fundamental principles that constrain the privatization of punishment, policing, and military force.

In Part V, I restart my analysis from scratch. I return to the state of nature, the intellectual foundation of liberal thought, in search of such principles. I retrace our first steps from anarchy to monopoly to state at a more deliberate pace. Step by step, I construct a new version of the state-of-nature story and a more fleshed-out picture of the monopoly thesis. I dub my vision the “liberal theory of force.”

My argument proceeds in four stages. The first three are supply-side stages. First, I introduce an “ultraminimal state” in which the demand for force is completely public and the supply of force is completely private. Next, I introduce a “military state” in which the demand for force is still public but the supply of military force is now public too. (The supply of policing and punishment remain private in the military state.) I argue that the military state is more stable than the ultraminimal state because it is less vulnerable to the “problem of loyalty”—the danger of military revolt.

In stage three, I generalize the argument. I develop the concept of the “intensity of force,” and argue that the intensity of force justifies the state’s monopoly of the supply of force, in equal proportions, to equal degrees. It turns out to be a surprisingly blunt line of thought that remained over-

looked. I argue that punishment is the least intense form of force, policing is the median form of force, and military force is the most intense form of force. In less opaque terms, armies are more powerful than prisons. For this simple reason, I argue that the liberal state must monopolize the supply of military force but need not monopolize the supply of punishment. In an ideal liberal state, armies must be public, but prisons may be private. Police, I conclude, are a more mixed and complex case: They fall between the two extremes of armies and prisons. In the fourth stage of my argument, I include a few brief remarks on the private demand for punishment, policing, and military force.

This Article has several aims, some more ambitious than others. If I am fortunate, I will convince you that my blend of liberal theory is both distinctive and worthwhile. If not, I hope at least to persuade you that the privatization of prisons, police, and armies tells us something important about ourselves: that we do not yet understand the liberal state's *raison d'être*, that we have left stones unturned amid the foundations of liberal thought. On a more practical level, I aim to give you a helpful framework for thinking about whether our punishment, policing, and military institutions should be public, private, or both.

I. ANARCHY, MONOPOLY, AND STATE

*State-of-nature explanations of the political realm are fundamental . . . even if incorrect. We learn much by seeing how the state could have arisen, even if it didn't arise that way. If it didn't arise that way, we also would learn much by determining why it didn't; by trying to explain why the particular bit of the real world that diverges from the state-of-nature model is as it is.*⁷

A. *The Story of the State of Nature*

We start with a story: Once upon a time, there were individuals who lived in a state of nature, a community without government.⁸ These individuals thought that they had things called “rights”—or at least, they thought that they should. But they had a problem: On the whole, they were a rational, self-interested lot, and resources were scarce. Human nature and mother nature worked against one another, making life rather unpleasant. The individuals frequently fought over resources and violated each other's

⁷ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 8-9 (1974).

⁸ For a similar analogy between state-of-nature theory and fictional narratives, see Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990).

rights.⁹ In other words, they got away with whatever they could, and in the absence of government, they could get away with a lot.

This tale is very old and often told, so you might remember its happy ending: The individuals eventually become so fed up with fighting against each other that they start working together. One way or another, they end up creating an organization that determines and enforces rights, or prevents and settles disputes. In some accounts, this organization begins as a kind of a "market" or "corporation" that is structured around a voluntary system of prices.¹⁰ (You pay only for the protection you want; you get only the protection for which you pay). In the end, though, it always ends as a "state" or "government" that is organized around a mandatory system of taxes. (Everyone pays for protection; everyone is protected.) Out of private competition emerges public coercion. Without further ado, then allow me to introduce the "liberal state."

This state-of-nature story is the bible of liberalism.¹¹ It lays down the deepest dogmas of liberal thought and spins them into a forceful account of our social, economic, and political origins. For at least four centuries, this tale of genesis has been passed down and retold by a long line of liberal philosophers, politicians, and lawyers, among others.

Of course, it has been told in many different ways—as many ways as there have been liberal theorists, or at least, liberal theories. In each rendition, some basic concept like "nature," "reason," "freedom," "justice," "democracy," or even "efficiency" plays the lead role, motivating and organizing the individuals in the story and justifying the state they create.¹²

⁹ Different versions of the state-of-nature story vary sharply on the questions of how often and how severely individuals violate each other's rights in the absence of government. Thomas Hobbes suggested that the life of anarchy is "nasty, brutish, and short," like a state of "war." THOMAS HOBBS, *LEVIATHAN* 189 (Ernest Rhys ed., Everyman's Library 1947) (1651); see also BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 3 (1980). John Locke suggested that in a state of nature, human beings tend to respect each other's rights. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 210 (Neil H. Atford et al. eds., Legal Classics Library 1994) (1690); see also NOZICK, *supra* note 7, at 10, 336 n.10; Richard Ashcraft, *Locke's State of Nature: Historical Fact or Moral Fiction?*, 62 AM. POL. SCI. REV. 898 (1968). But even Lockean theorists admit that the "inconveniences of the state of nature" eventually pile up, so that individuals ultimately form a state. See LOCKE, *supra*, at 231, 347; NOZICK, *supra* note 7, at 10-11, 118; cf. James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?*, 71 CHI.-KENT L. REV. 41, 41-42 (1995) (describing a similar dispute between "social contract" and "self-help" schools of the state-of-nature tradition).

¹⁰ See, e.g., I F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 38-39, 46-48 (1973) (describing one stage in the formation of government as "spontaneous order"); NOZICK, *supra* note 7, at 12-28 (describing stages in the formation of government as a "dominant protective agency" and an "ultra-minimal state").

¹¹ For a definition of the terms "liberalism" and "liberal," see discussion *infra* Part I.B.1.

¹² See, e.g., ACKERMAN, *supra* note 9, at 10-12 (discussing neutrality); HAYEK, *supra* note 10, at 35-54 (discussing spontaneous order); HOBBS, *supra* note 9, at 85 (discussing self-preservation); IMMANUEL KANT, *On the Common Saying, 'This May Be True in Theory, But It Does Not Apply in Practice'*, in KANT'S POLITICAL WRITINGS 61, 73-81 (Jans Reiss ed., H. B. Nisbet trans., 1970)

In the most expansive accounts, the liberal state does a good deal more than just prevent and settle disputes. It also pursues many other public projects—from transportation to education, from health care to welfare.¹³ But even in the most minimal accounts, the liberal state encodes rights into laws and uses threats and acts of physical coercion to enforce them.¹⁴ It polices and punishes; it protects and defends. Thus, no matter who tells the tale, or how it is told, the state-of-nature story always ends with the same basic punchline: The state has, must have, or should have a monopoly of force.¹⁵

(discussing law of nature); LOCKE, *supra* note 9, at 173-74 (discussing the law of nature); NOZICK, *supra* note 7, at 12-25 (discussing market pressures); JOHN RAWLS, A THEORY OF JUSTICE 3-6 (1974) (discussing justice); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 18-25 (Carlton House 1939) (1762) (discussing the general will); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (R. H. Campbell et al. eds., 1981) (1776) (discussing the invisible hand).

¹³ See, e.g., ACKERMAN, *supra* note 9, at 139; RAWLS, *supra* note 12, at 101, 107, 258-61.

¹⁴ See, e.g., NOZICK, *supra* note 7, at 108-09 (defining the state as a “dominant protective agency” that operates as the “ultimate enforcer and the ultimate judge with regard to its own clients”); SMITH, *supra* note 12, at 69, 708 (arguing that the two fundamental “public” duties of the state are the duty of “protecting the society from the violence and invasion of other independent societies” and the duty of “protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it”). John Stuart Mill rejected the liberal ideas of the “state of nature” and the “social contract,” but he embraced the assumption that every society and government has an inherent right to use “physical force in the form of legal penalties” to achieve the “prevention and punishment” of “crimes.” JOHN STUART MILL, ON LIBERTY 91-92 (Curran V. Shields ed., Macmillan 1956) (1859).

¹⁵ For a definition of the term “force,” see discussion *infra* Part I.B.2. Although Max Weber coined the famous phrase “monopoly of force” many years ago, it remains a standard definition of the “modern state” among contemporary political, legal, social, and economic theorists. Weber’s definitions of the “modern state” and “political community” appear often throughout his vast body of work. 1 MAX WEBER, ECONOMY AND SOCIETY 56 (Guenther Roth & Claus Wittich eds., 1968) [hereinafter WEBER, ECONOMY AND SOCIETY]; 2 WEBER, ECONOMY AND SOCIETY, *supra*, at 901-04; MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ARTICLES IN SOCIOLOGY 77, 78 (H. H. Gerth & C. Wright Mills eds., 1946) [hereinafter WEBER, *Politics as a Vocation*]; MAX WEBER, MAX WEBER: THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 156 (A. M. Henderson & Talcott Parsons eds., 1947) [hereinafter WEBER, SOCIAL AND ECONOMIC ORGANIZATION]. In the secondary literature on Weber, this definition is most frequently quoted in the following terms: “The claim of the modern state to monopolize the use of force” is one of the “essential,” “primary,” and “formal” “characteristics of the modern state.” Cf. 1 WEBER, ECONOMY AND SOCIETY, *supra*, at 56; WEBER, SOCIAL AND ECONOMIC ORGANIZATION, *supra*, at 156.

I plan to consider the details of Weber’s definition in my future work. Here I will just point out that the general idea that “the state” has, must have, or should have a “monopoly of force” is much broader than Weber’s particular idiom and was widely endorsed by theorists of politics, law, and society long before Weber wrote his famous words. The idea is at least as old as the state-of-nature story itself, and probably much older than that. See Guenther Roth, *Introduction* to WEBER, ECONOMY AND SOCIETY, *supra*, at lxxxii (“Weber follows juridical usage when he makes the existence of a legal order dependent on a staff ready to resort to physical or psychic coercion, and when he defines the *modern* political community—the state—in terms of its monopoly on the legal use of force.”); cf. STEPHEN P. TURNER & REGIS A. FACTOR, MAX WEBER: THE LAWYER AS SOCIAL THINKER 103-04 (1994) (linking Weber’s “monopoly of force” to Rudolph von Jhering’s “monopoly of coercion”); Jim Whitman, *Aux Origines du “Monopole de la Violence,”* Address Before the Ecole Normale Supérieure, Fontenay-St. Cloud (Jan. 21, 1995) (on file with author) (linking Weber’s “monopoly of force” specifically to Rudolph von Jhering’s “monopoly of coercion,” and generally to the “social wrong” or “self-help” strains

Let us call this conclusion the “monopoly thesis.” It is hard to exaggerate the pedigree and influence of this idea. For four centuries, it has been widely accepted and articulated, in one form or another, by philosophers, political scientists, sociologists, historians, and economists—both liberal and non-liberal alike.¹⁶ Today it is typically treated as a truism, a self-evident definition or principle of government, a natural and necessary fact of life.¹⁷ And not just by scholars: Judges, lawyers, politicians, and pundits also routinely remind us that the powers of “law enforcement” and “homeland defense” are among the most traditional, essential, and exclusive projects of government.¹⁸

of the state-of-nature tradition).

¹⁶ Karl Marx was perhaps the most famous “non-liberal” to articulate something like the monopoly thesis. He wrote that the concept of “security,” or “the police,” was “the supreme concept of civil society” in liberal states and the “only” reason for which “[t]he whole society exists.” Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26, 43 (Robert C. Tucker ed., 2d ed. 1978). Of course, Marx was sharply critical of this liberal principle of security, which he regarded as nothing more than “the assurance of [civil society’s] egoism.” *Id.* But he did not doubt that liberal states had actually pursued and achieved it. The German philosopher Carl Schmitt, another notable “non-liberal” theorist, also believed that “[t]he most significant of all the monopolies, the monopoly of the armaments, is in [the State’s] hands, and belongs primarily to it.” CARL SCHMITT, *Machtpositionen des modernen Staates* (1933), in VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEN JAHREN 1924-1954, at 367-69 (Duncker & Humblot 1958) (1933).

¹⁷ To test this statement quickly, I performed a search for the phrases “monopoly of force” and “monopoly of violence” in law reviews. I checked how often the phrases appeared and how rarely they became the subject of argument. My search yielded roughly 200 references yet just three passages that could be classified as “arguments” for or against the monopoly thesis. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 650 (1989) (arguing that the monopolization of violence was developed by German statists and rejected by American individualists); Whitman, *supra* note 9, at 71, 76 (discussing claims that a monopolization of violence was an aim of early states); David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387, 472-75 (1999) (discussing the monopolization of violence as an alternative to decentralized, private violence).

¹⁸ See, e.g., *Foley v. Connelie*, 435 U.S. 291, 297 (1978) (describing “[t]he police function” as “a most fundamental obligation of government”); *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting) (“The most basic function of any government is to provide for the security of the individual and of his property.”); *Giron v. Corr. Corp. Am.*, 14 F. Supp. 2d 1245, 1249 (D.N.M. 1998) (“The function of incarcerating people, whether done publicly or privately, is the exclusive prerogative of the state. This is a truly unique function and has been traditionally and exclusively reserved to the state.”); cf. *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947) (“Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces.”). *But see* *Richardson v. McKnight*, 521 U.S. 399, 405 (1997) (noting that “correctional functions have never been exclusively public”).

During the recent Congressional debate over the “federalization” of airport security, the monopoly thesis was advanced by politicians and lobbyists on both sides:

This is police work. . . . We must put security in the hands of law enforcement officers. The American people, the brave, decent, wonderful people of this country deserve law enforcement in the airports. Federal law enforcement patrols the shores of the United States. They guard our borders. They track terrorists down. They are standing right now outside this Chamber protecting us and the people in this building . . . I ask all of you, do you want to contract out the Capitol Police? Do you want to contract out the U.S. Marines? Do you want to contract out the FBI and the Customs Service? I do not think so.

B. *The Monopoly Thesis*

So liberal states “monopolize” force. They did. They do. They must. They should. Huh. As story endings go, this sounds like a good one, but what does it mean, and why is it so? These are the central questions of this Article, and the answers turn out to be surprisingly complex. But we should not get ahead of ourselves. We should start by noting a few things that the monopoly thesis does not say by clarifying a few basic terms.

1. *Liberal*

First, “liberal.” In this Article, when I say that something is “liberal”—e.g., a philosopher, a state, or an idea—I do not mean to say that it is left-wing or socialist rather than conservative, right-wing, or capitalist. Everything on that list is “liberal” for my purposes. Instead, when I say that something is liberal, I mean to say that it follows the philosophical, political, and legal tradition of “liberalism,” which has strongly influenced and reflected the development of modern, industrialized states in the West. What is liberalism? In this Article, liberalism includes any set of ideas based upon the state-of-nature story itself.¹⁹ So the first thing to remember is that the monopoly thesis is a liberal thesis. It claims that *liberal* states must monopolize force.²⁰

147 CONG. REC. H7631 (daily ed. Nov. 1, 2001) (statement of Congressman Gephardt); Jennifer Waters, *Out Come the Guns for Airline Safety Bill*, CBS Marketwatch, Oct. 31, 2001, LEXIS, News Library, Mktwtc File (quoting David Stempler, president of the Air Travelers Association, who argued to Congress, “Law enforcement is a basic function of government that should never be ‘contracted out’ to private security firms that provide ‘rent-a-cops.’”).

¹⁹ To be more precise, something is “liberal” to the extent that it implicitly or explicitly endorses the following five assumptions: (1) Freedom and justice are fundamentally matters of individual rights (which may be defined in terms of liberty, consent, fairness, or equality); (2) human behavior is normally rational and self-interested; (3) resources are naturally scarce; (4) in the absence of a state, people tend to fight over resources and violate each other’s rights; (5) therefore, people would or should establish a limited state to monopolize force and enforce each other’s rights. In more scholarly terms, my conception of “liberalism” includes a rejection of anarchist and utopian thought and commitments to individualism, rational choice theory, and the ideal of a sovereign limited by both the rule of law and the boundary between public and private domains.

Of course, when I define “liberalism” so broadly, I leave room for much disagreement among “liberals.” See, e.g., *supra* notes 9-10, 12-14 and accompanying text (describing several disagreements among liberals); discussion *infra* Part IV (describing the public policy debates over the privatization of force). In particular, one should not assume that my conception of “individualism” excludes conceptions of politics driven by democratic principles, such as majoritarian rule or interest group conflict. See generally Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. L. & RELIG. 65 (1989) (discussing the open-ended meaning of liberal individualism). I address the relationship between democracy and the privatization of force in Part IV. See discussion *infra* Part.IV.D.

²⁰ The monopoly thesis may well be part of a body of thought that is much broader than liberalism, which might be called “modern” or “modernist” political, social, and economic thought. In this Article, I am concerned only with the status of the monopoly thesis in liberal thought.

2. Force

Second, “force.” Force is any legitimized threat or act of physical coercion. Note four things: First, force is only physical coercion, or violence; it is not social, economic, or any other kind of coercion. Second, force is only legitimized violence; it is not crime, terrorism, or other kinds of violence that are not legitimized by liberal states.²¹ Third, force includes

²¹ As I explain later, liberal states “legitimize” violence by “allocating” violence pursuant to liberal political and legal procedures. See discussion *infra* Part III.C. This positivist definition purposefully brackets some very big questions: What is “legitimacy”? Which kinds of violence are “legitimate”? These are obviously very important questions. They have preoccupied modern philosophers for centuries, especially liberal philosophers. But they are not the subjects of this Article. In this Article, I try to move past the question of the legitimacy of force and focus more intently upon the distinction between “public” and “private” uses of force.

In addition, my definition brackets two other big questions: Are so-called liberal states actually “liberal”? Do they sometimes “legitimize” illiberal acts of violence, such as crime, terrorism, or genocide? In this Article, I tend to assume that liberal states are more or less liberal and that they tend to exercise punishment, policing, and military force in legitimate ways.

Of course, I am aware that in the real world, these are not very useful assumptions. It is often impossible to tell whether a particular state is actually liberal, let alone whether a particular example of violence is actually legitimate. Throughout modern history, moreover, so-called liberal states have authorized and committed illegitimate threats and acts of violence, including crime, terrorism, and in some cases, perhaps genocide. But this Article is not about crime, terrorism, or genocide, and it is not about the legitimacy of punishment, policing, and military force *per se*. It is about the legitimacy of privatizing punishment, policing, and military force. To examine this last question in detail, I have pushed other questions aside. Fortunately, my assumptions do not shoulder any of my argument’s burden. I have adopted them only as fictions for the purpose of arguing about other things. In doing so, I do not mean to suggest that they always or often hold true.

Other scholars—in other contexts, with other purposes in mind—have often abandoned and attacked the liberal distinctions between “force” and “violence.” This approach has primarily been developed in a series of critical analyses of “law’s violence.” See, e.g., Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601, 1607 (1986); Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 11 CARDOZO L. REV. 919, 927 (Mary Quaintance trans., 1990); Austin Sarat, *Situating Law Between the Realities of Violence and the Claims of Justice*, in LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 3, 3-4 (Austin Sarat ed., 2001); Austin Sarat & Thomas R. Kearns, *Introduction to LAW’S VIOLENCE* 1, 1 (Austin Sarat & Thomas R. Kearns eds., 1992); Robert Paul Wolff, *Violence and the Law*, in THE RULE OF LAW 54, 59 (Robert Paul Wolff ed., 1971). To a lesser extent, it can also be traced through economic histories of state-formation and materialist histories of punishment. See generally DARIO MELOSSI & MASSIMO PAVARINI, THE PRISON AND THE FACTORY (1981) (punishment); GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (1968) (punishment); Richard Bean, *War and the Birth of the Nation State*, 33 J. ECON. HIST. 203 (1973) (state formation); Douglas Hay, *Property, Authority, and the Criminal Law*, in ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17-18 (Douglas Hay et al. eds., 1975) (punishment); Frederic C. Lane, *The Economic Consequences of Organized Violence*, 18 J. ECON. HIST. 401 (1958) (state formation); Charles Tilly, *War Making and State Making as Organized Crime*, in BRINGING THE STATE BACK IN 169 (Peter B. Evans et al. eds., 1980) (state formation).

I find these works insightful and inspiring, and they have indelibly marked the thoughts expressed in this Article. But the techniques which they develop would not serve me well here. I mean to take liberalism seriously for the moment, and develop the “monopoly of force” thesis into a complete, concrete response to the recent privatization of punishment, policing, and military force. For such purposes, it would be pointless to consider whether, and to what extent, the state must monopolize crime. I believe that a study of the monopoly of force, independent from the legitimacy of force, is long overdue.

threats as well as acts. Fourth, for our purposes, force usually refers to only specialized, organized kinds of legitimized violence—that is, the force exercised by modern punishment, policing, and military institutions.²² (There is a brief moment when it also includes individualized threats and acts of force, like self-defense and self-help, but when it does, I make that clear.) Taken together, these points suggest the second thing to remember about the monopoly thesis: Liberal states must monopolize *punishment, policing, and military force*.

3. *Public*

Third, I will address “public” and the related term “monopolization.” These terms are a bit more complex so a basic framework is helpful. In the modern liberal world, we often use three basic metaphors to describe the kinds of organizations through which we recognize and respond to social problems: “community,” “market,” and “state.”²³ I cannot spend much space on these metaphors here, so I will just say a few things.

Communities shape behavior through duties: “I *ought* to do this for you because it is the *right* thing to do.” They operate through overlapping cultural systems of beliefs, symbols, and rituals, such as morality, religion, family, friendship, work, voluntarism, and neighborhood.

Markets shape behavior through profits: “I *want* to do this for you because I will *receive* something of value for doing it.” Markets operate through economic systems of reciprocal, self-interested exchange in which prices signal how much supply and demand there are for particular goods and services.

States shape behavior through force: “I *must* do this for you or else I will *lose* something of value for failing to do it.” States operate through systems of political and legal authority in which principles and policies are developed, interpreted, and applied by legislative, adjudicative, and administrative institutions. In addition, states operate through systems of political and legal power in which principles and policies are enforced by punishment, policing, and military institutions.²⁴

Of course, there have never been any pure communities, markets, or states in real life. These words signify tendencies, principles, and struc-

²² In this Article, I use the terms, “punishment,” “policing,” and “military force” many times. I do not define them completely, but I come close to defining them at one point. See discussion *infra* Part V.D.3 (defining the intensity of force).

²³ See JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 14-17 (1989) (discussing “voluntarism,” “the price system,” and “government”); see also WEBER, *ECONOMY AND SOCIETY*, *supra* note 15, at 50-53 (distinguishing between “consensual” and “imposed” order in organizations and between “voluntary” and “compulsory” association).

²⁴ When I say that states “operate through” punishment, policing, and military institutions, I mean to leave open the question of whether these institutions are public or private.

tures rather than actual institutions. Every organization must draw to some degree upon more than one of these ideas, if not upon all three at once. The modern administrative state, for example, is a massive, sprawling network of institutions. In innumerable ways, it mixes cultural, economic, and political principles to pursue its objectives. Thus, when we say that a “community,” “market,” or “state” is *doing* something—or, for that matter, when a “corporation” or “government” does something²⁵—we do not really mean it. We are using a metaphor. We actually mean that people are doing something, and that on balance, they tend to use particular means and act with particular motives.

Now we can make a first pass at the monopoly thesis and the difference between “public” and “private” punishment, policing, and military institutions. The monopoly thesis says that liberal states must “monopolize” force. This is obviously a vague statement which could mean several different things, some of which are more plausible than others. We will consider each possibility in due course.

But for now, let us start with the most obvious one: On its face, the monopoly thesis seems to suggest that punishment, policing, and military institutions must be “public”—that punishment, policing, and military tasks must be performed primarily by states rather than markets or communities.²⁶ More broadly, it suggests that the people who exercise force must be motivated and organized primarily by political and legal authorities rather than economic exchanges or cultural duties. As I have already mentioned, this is a widely held thesis. It should sound intuitive and sensible—perhaps even inevitable—to our modern, liberal, American ears.

4. *Private*

Yet I also suggested that these days it has become a less plausible thought. Over the last thirty years, there has been a remarkable privatization of punishment, policing, and military force in liberal states. “Privatization” of force? Now what does that mean? It does not mean that our

²⁵ Two further definitions are required: First, “corporations” means “for-profit corporations”; it does not include non-profit corporations, which are communities, or voluntary associations. See discussion *infra* Part I.B.4 (defining “private” and “privatization”). Second, I often contrast the terms “market” and “state.” My idea is that “markets” are networks of corporations and “states” are networks of governments. To be sure, my “state/government” distinction is somewhat artificial, but it helps to distinguish between references to particular institutions (e.g., prisons) and references to whole networks of such institutions (e.g., prison systems).

²⁶ I recognize that this statement is, in many ways, a bastardization of Weber’s definition of the modern state. See *supra* note 15 (discussing Weber’s definition of the modern state). Like most liberal theorists, Weber focused more upon how states express or control the demand for force, and less upon how states create the supply of force. See discussion *infra* Part III (explaining the distinction between the supply of force and the demand for force). I explore this demand-side approach later, through a thought experiment that I call “the ultraminimal state.” See discussion *infra* Part V.B.

punishment, policing, and military institutions are becoming less like states and more like communities. That may be true: The recent revivals of shame sanctions, community policing, and private militias could be examples of such trends.²⁷ But such developments are beyond the scope of this Article. For our purposes, the terms “private” and “privatization” mean that our punishment, policing, and military institutions are becoming less like states and more like markets—more motivated by profit, more shaped by economic exchange.

II. OUT OF ANARCHY? A BRIEF HISTORY OF FORCE

*Today the relation between the state and violence is an especially intimate one [A] state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.*²⁸

*[O]nly in theory at best has the modern state achieved a monopoly over violence [A]s a general matter the modern state takes on only a qualified form of monopoly . . . and the modern state is deeply ambivalent about how to divide up the market shares.*²⁹

Mind the gap: On the one hand, we have an old set of theories that (apparently) require the monopolization of force. On the other hand, we have a new set of practices that (apparently) constitute the privatization of force. Questions leap out: How and why did this rift emerge? Is the monopoly thesis fantasy or fact? In our history, have so-called liberal states ever actually established, or even sought to establish, public monopolies of punishment, policing, or military force? If so, do liberal states still maintain such monopolies now?

In this Part, I take up these questions. If they seem like obvious questions to ask, it might surprise you to learn how rarely liberal philosophers have bothered to ask them.³⁰ For the past four hundred years, political and

²⁷ For a discussion of shame sanctions, compare Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996), with James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998). For a discussion of community policing, see Carl B. Klockars, *The Rhetoric of Community Policing*, in COMMUNITY POLICING: RHETORIC OR REALITY 239, 240 (Jack R. Greene & Stephen D. Mastrofski eds., 1988). For a discussion of private militias, see JOYCE L. MALCOLM, *TO KEEP AND BEAR ARMS* 4 (1994).

²⁸ WEBER, *Politics as a Vocation*, *supra* note 15, at 78 (emphasis in original).

²⁹ Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example*, in LAW'S VIOLENCE, *supra* note 21, at 175, 182, 202.

³⁰ When I say that political and legal philosophers and theorists have scarcely tested the monopoly thesis, I do not mean to say the same thing about political and legal historians, sociologists, or anthropologists—especially Weber, whose work I draw upon heavily in this Article. *But cf.* Whitman, *supra* note 9, at 41–43 (describing the “imposing” and “nearly unanimous[]” authorities on ancient law

legal theorists have hotly contested the “plot” of the state-of-nature story, but they have scarcely tested the story’s famous conclusion at all. Under the influence of the social contract tradition, they have carefully interrogated the legitimacy of force, but they have barely investigated the monopoly of force.³¹ They have preferred to fight over what the state may decide rather than what the state must actually do. In other words, they have presumed that liberal states monopolize force, but they have rarely troubled themselves to examine, explain, or prove the point.³²

who endorse the “self-help” version of the state-of-nature story).

³¹ See, e.g., ACKERMAN, *supra* note 9, at 21-23, 83, 174-77 (introducing assumptions regarding the “perfect technology of justice,” such as a “ray gun,” an “ideal police force,” an “ideal punishment strategy,” and a “transmitter-shield”); LOCKE, *supra* note 9, at 167-76 (conceptualizing political power as a “right” and the state as a “common authority”); RAWLS, *supra* note 12, at 4-5 (introducing the assumption of the “well-ordered society” in order to push aside “problems . . . of coordination, efficiency, and stability”); ROUSSEAU, *supra* note 12, at 1, 18, 43-44, 84, 116 (telling the state-of-nature story, but ignoring the role of punishment and policing institutions). The tendency to privilege legitimacy over violence also appears in the work of Frederick von Hayek. See generally HAYEK, *supra* note 10 (telling the state-of-nature story but ignoring the role of punishment and policing institutions).

³² To be more precise, I should add the caveat, “present company excluded.” My critique of the liberal tradition does not accurately describe the handful of liberal and quasi-liberal thinkers whose works I drawn upon in this Article: Niccolò Machiavelli, Thomas Hobbes, Max Weber, Samuel Huntington, Robert Cover, and Robert Nozick. These authors have thought through the liberal state’s monopoly of force more carefully than most. As I have already suggested, the worst offenders have come from the social contract tradition: John Locke, Jean-Jacques Rousseau, Immanuel Kant, John Rawls, and Bruce Ackerman. See discussion *supra* note 31 and accompanying text. But others, like Hayek, have neglected the monopoly thesis as well. See generally HAYEK, *supra* note 10.

A small handful of other political and legal theorists have stopped to ask whether the monopoly thesis is actually true. On the whole, the results have been rather disappointing. Typically, they have treated the monopoly thesis as a straw argument, and cited things like “organized crime,” “vigilantism,” “self-defense,” and “self-help” as purportedly “strong” counterexamples. See, e.g., NOZICK, *supra* note 7, at 23 (“[A] state may exist without *actually* monopolizing the use of force it has not authorized others to use; within the boundaries of a state there may exist groups such as the Mafia, the KKK . . . striking unionists, and Weathermen that also use force.”); Levinson, *supra* note 17, at 637 (arguing that “the Weberian definition of the state—i.e., the repository of a monopoly of the legitimate means of violence”—is “profoundly statist,” and inconsistent with the “American political tradition” that aims to maintain “ultimate power, including the power of arms, in the populace”); Weisberg, *supra* note 29, at 182 (“[O]nly in theory at best has the modern state achieved a monopoly over violence as law enforcement. Much violence is committed by people thoroughly persuaded that they are enforcing legitimate legal or moral norms.”).

To be sure, some of these could be counterexamples, especially self-defense and self-help. But they are not strong ones, because they do not attack the core of the monopoly thesis. At most, they call for a few modifications. See, e.g., TILLY, *supra* note 21, at 169-70 (defining national states as “relatively centralized, differentiated organizations the officials of which *more or less successfully* claim control over the *chief concentrated means of violence* within a population inhabiting a large, contiguous territory”) (emphasis added); Charles Tilly, *Western State-Making and Theories of Political Transformation*, in *THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE* 601, 638 (Charles Tilly ed., 1975) [hereinafter Tilly, *Western State-Making*] (offering “the definition of a state as an organization, controlling the *principal means of coercion* within a given territory”) (emphasis added).

In any event, these counterexamples pale next to the systematic privatization of punishment, policing, and military force that has taken place in liberal states during the past thirty years. For the most part, the recent privatization of force has not inspired much sustained reconsideration of the monopoly thesis. But there have been some promising starts. See, e.g., MICK RYAN & TONY WARD, *PRIVATIZA-*

A. *The Monopolization of Force*

If we take a very broad view of human history, it is easy to see why these questions have been so widely ignored. In contrast to ancient and medieval civilizations, today's world is clearly distinguished by a greater separation of public and private domains.³³ This is probably true throughout the West and certainly true in those Western states that call themselves "liberal."

There is no question that in the Europe of 1000 A.D., for example, there were no distinctly "public" punishment, policing, and military institutions at all.³⁴ In fact, there were not even centralized, national states, nor were there many institutions that specialized in the exercise of "punishment," "policing," or "military" force.³⁵ Today, Western states have all of these institutions, and they are numerous and powerful indeed. Thus, it seems safe to say that in the long run, the monopoly thesis rings more or less true: In relative terms, today's "liberal" states more or less "monopolize" force. Presumably, this explains why so many people assume that they did, they do, they should, and they must.

But one thousand years is a rather long run. When we take such a broad view of history, we obscure a great deal. We fool ourselves into thinking of the emergence of public punishment, policing, and military institutions as a necessary, deliberate, one-way shift from "private" to "public," which coincided roughly with the onset of things like "modernity," "industrialization," "centralization," "bureaucratization," "liberalization," and "democratization." It was not and did not. The trend cannot be

TION AND THE PENAL SYSTEM: THE AMERICAN EXPERIENCE AND THE DEBATE IN BRITAIN 3, 69 (1989); JANICE E. THOMSON, *MERCENARIES, PIRATES, & SOVEREIGNS: STATE-BUILDING AND EXTRA-TERRITORIAL VIOLENCE IN EARLY MODERN EUROPE* 7-14 (1994).

³³ As one author explains, "Pre-modern societies, especially ancient ones, are rather uniformly characterized by the confusion of public and private realms and, where law itself had attained articulate form, a confusion of public and private legal norms." Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 122 (2001).

³⁴ As Charles Tilly explains:

A thousand years ago, Europe did not exist. . . .

. . . .

None of these half-familiar places names . . . should disguise the enormous fragmentation of sovereignty then prevailing throughout the territory that would become Europe. The emperors, kings, princes, dukes, caliphs, sultans, and other potentates of AD 990 prevailed as conquerors, tribute-takers, and rentiers, not as heads of state that durably and densely regulated life within their realms. Inside their jurisdictions, furthermore, rivals and ostensible subordinates commonly used armed force on behalf of their own interests while paying little attention to the interests of their nominal sovereigns. Private armies proliferated through much of the continent. Nothing like a centralized national state existed anywhere in Europe.

CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1992*, at 38-40 (1992).

³⁵ See *id.* at 29, 53, 122 (discussing the specialization of policing and military forces between the mid-nineteenth and late twentieth centuries).

categorized in such simple, developmental terms.³⁶ At times, the establishment of public punishment, policing, and military institutions was surprisingly contingent, reluctant, irregular, and late.

In fact, throughout the millennium, states periodically resisted the monopoly logic by making punishment, policing, and military force more private in many respects. As any historian or sociologist knows, examples abound: European privateers,³⁷ mercenaries,³⁸ and mercantile companies,³⁹

³⁶ In some ways, the development of policing institutions provides the best example of this claim. As David Bayley writes:

It would be convenient to be able to say that contemporary police systems reflect a shift from private to public agency, from decentralized to centralized organization, or from feudal to state authority. Beyond noting that the transition to contemporary systems did mark a decline in decentralization, none of these generalizations aptly describe what happened in each country [I]t is difficult to categorize the operation of police authority in informative developmental terminology.

David H. Bayley, *The Police and Political Development in Europe, in THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE*, *supra* note 32, at 328, 349.

³⁷ See generally JAMES G. LYDON, *PIRATES, PRIVATEERS AND PROFITS* (1970) (demonstrating the rise of privateers as national heroes); THOMSON, *supra* note 32 (examining the organization of violence and the rise of privateering). In the thirteenth century, European states adopted the practice of "privateering," in which states authorized privately owned ships to attack foreign vessels, and retain some of the spoils as profits. *Id.* at 22-26. Privateering was no fleeting fad. For at least six centuries, privateers played a decisive role in naval conflicts between Western states. *Id.* They ensured England's naval superiority; they were the French navy; they helped win America's War of Independence and the War of 1812. *Id.* However, they caused problems too: by spawning an international industry of pirates, who were often hard for states to distinguish from privateers, and thus, hard for states to combat. *Id.* at 43-54, 67-68. The practice of privateering peaked during the eighteenth century, and was formally abolished by most states in 1856, when the Declaration of Paris was signed. *Id.* at 69-76.

³⁸ See NICCOLO MACHIAVELLI, *THE PRINCE* 42-47 (Quentin Skinner ed., Russel Price trans., 1988) (1532); ANTHONY MOCKLER, *THE MERCENARIES* 21 (1969) ("A history of mercenaries would be very little less than a history of warfare throughout the ages"); RICHARD A. PRESTON & SYDNEY F. WISE, *MEN IN ARMS: A HISTORY OF WARFARE AND ITS INTERRELATIONSHIPS WITH WESTERN SOCIETY* 139 (2d. ed. 1970); THOMSON, *supra* note 32, at 26-32, 54-59, 77-97; Quentin Skinner, *Introduction to MACHIAVELLI, supra*, at ix, xiii (describing Machiavelli's preference for national armies as a "cardinal belief," which "underlies practically everything he says about the best means of gaining and holding power"). In the fourteenth century, the feudal military system of knight service gave way to an international mercenary market. THOMSON, *supra* note 32, at 27. Private, for-profit armies known as "free companies" played the decisive role in the Hundred Years' War. *Id.* In the fifteenth, sixteenth, and seventeenth centuries, European rulers regularly took large loans from capitalists and hired military contractors to wage wars. *Id.* In the eighteenth century, most European states began to develop large, specialized, nationalized standing armies. TILLY, *supra* note 34, at 103. Until the end of the century, however, mercenary troops still constituted roughly twenty to thirty percent of European forces, and these armies were often led by officers who "purchased" promotions in rank. See THOMSON, *supra* note 32, at 95.

Like privateers, mercenaries frustrated sovereigns at times: In some cases, they refused to fight or deserted; in others, they fought too much, for too long, or for the wrong side. *Id.* at 54-59. But historians seem to agree that the biggest problems with mercenaries were not tactical, but political: The existence of mercenaries undermined the war-making authority of states over citizens, and threatened to draw "neutral" states into conflicts. *Id.* at 59. Mercenarism was prohibited by the United States in the Neutrality Act of 1794 and banned by most European states by the end of the nineteenth century. *Id.* at 78-84.

³⁹ See generally GEORGE CAWSTON & A.H. KEANE, *THE EARLY CHARTERED COMPANIES, A.D.*

English thief-takers;⁴⁰ American Pinkertons;⁴¹ and convict leasing systems in Europe and the United States.⁴² Each of these examples provides important reminders that in the grand scheme of history, today's private punishment, policing, and military markets are not wholly new.

But in the early twentieth century, they seemed to be things of the past. By then most liberal states had more or less achieved monopolies of pun-

1296-1858 (1896); THOMSON, *supra* note 32. In the sixteenth century, colonialism produced the mercantile company, which was a new breed of private military force. *Id.* at 32-33. These organizations took many forms, but the most important examples were also the most private: the Dutch and English East India Companies, and the Hudson's Bay Company. *Id.* at 32. As one scholar explains, these companies were, "as a rule, granted full sovereign powers [T]hey could raise an army or a navy, build forts, make treaties, make war, govern their fellow nationals, and coin their own money." *Id.* at 35. With the consent of various sovereigns, these for-profit firms governed much of the world's territory as private property for the better part of three centuries. *Id.* at 103. Like privateers and mercenaries, they disobeyed sovereigns at times: They often fought each other, and each other's states, when treaties and charters forbade it. *Id.* at 59-67. In some cases, they started wars, waged wars, or refused to let wars end. *Id.* at 61-67. By the late nineteenth century, mercantile companies had disappeared through an ad hoc series of bankruptcies, mergers, treaties, transformations, and abrogations. *Id.* at 97-105.

⁴⁰ See generally T.A. CRITCHLEY, A HISTORY OF POLICE IN ENGLAND AND WALES 900-1966 (1967); David Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1199 (1999). Throughout the seventeenth century, England distributed substantial rewards to private citizens for the capture and prosecution of criminals. *Id.* at 1199. Before long, this investment bred an infamous industry of "thief-takers," which was the primary means of law enforcement in eighteenth-century England. *Id.* In exchange for payment, thief-takers performed a full panoply of law enforcement tasks, from investigation and apprehension to prosecution and restitution. *Id.* at 1199-1200. Historians often remark that in this unregulated world of private law enforcement, anything could be bought for a price, so that corruption, extortion, and crime prevailed. Nonetheless, England relied heavily on this system of private policing until the early nineteenth century. *Id.*

⁴¹ See generally FRANK MORN, "THE EYE THAT NEVER SLEEPS": A HISTORY OF THE PINKERTON NATIONAL DETECTIVE AGENCY (1982); Sklansky, *supra* note 40, at 1212-17.

⁴² During the nineteenth century local governments in the United States, and to a lesser extent throughout Europe, leased inmate labor to private corporations. See MELOSSI & PAVARINI, *supra* note 21, at 62; DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996) (United States); RYAN & WARD, *supra* note 32, at 63 (England); DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 31-33 (1995) (United States, Canada, France, and the Netherlands); GORDON WRIGHT, BETWEEN THE GUILLOTINE AND LIBERTY: TWO CENTURIES OF THE CRIME PROBLEM IN FRANCE 162-63 (1983) (France). American contractors normally organized and supervised prison work directly, both inside and outside prison grounds. In this role, they fed, guarded, moved, detained, and disciplined prisoners, and, in some cases, ran entire prisons themselves. SHICHOR, *supra*, at 34-35; Alexis M. Durham III, *The Future of Correctional Privatization: Lessons from the Past*, in PRIVATIZING CORRECTIONAL INSTITUTIONS, 33, 37-42 (Gary Bowman et al. eds., 1993).

This system of convict leasing was most widely used in the Southern States after the Civil War, where it basically functioned as an extension of slavery by other means. See OSHINSKY, *supra*, at 57; SHICHOR, *supra*, at 36. It was abandoned after governments lost several contract disputes over the contractors' failure to perform, and organized labor launched a decisive lobbying campaign that deplored convict leasing as unfair wage competition. Durham, *supra*, at 39, 44-45. By the early twentieth century, inmate labor was largely managed by public officials and restricted to "state use"—the provision of goods and services that did not substantially compete against private industries. OSHINSKY, *supra*, at 70; SHICHOR, *supra*, at 42.

ishment, policing, and military force.⁴³ Here began a kind of golden age of public punishment, policing, and military institutions. For the next several decades, the song remained the same. Liberal states moved slowly but surely to perfect their coercive monopolies. The West fought two world wars and developed a massive network of military, policing, and punishment institutions, which were characterized by unprecedented levels of specialization,⁴⁴ professionalism,⁴⁵ bureaucratization, and strength. Mercenaries and private police did not entirely disappear during this period, but they went into wholesale retreat.⁴⁶

B. *The Privatization of Force*

About thirty years ago, however, something strange began to happen. After almost a half century of exile, the prodigal market returned.

1. *Policing*⁴⁷

When today's private policing sector emerged, it took most observers by surprise. In the post-War era, public policing had significantly supplanted private policing as the main means of law enforcement and public protection in the United States. Public police forces had captured the public eye by reinventing themselves with car patrols, radios, and sophisticated investigative techniques and technologies.⁴⁸ The private policing industry, meanwhile, had been largely forgotten and had limited itself to a low-key business in preventative patrols.⁴⁹

⁴³ This obviously depends upon what we mean by "monopolies," which this Article has yet to work out in any detail. See discussion *infra* Part V. For now, we can say that by the early twentieth century, liberals had come much closer to "monopolizing" force than they ever had before—no matter how the concept of "monopolization" is defined. In light of this fact, it is no coincidence that Weber coined the phrase "monopoly of force" as a description of modern liberal states in the early 1900s. Although, as I suggested earlier, the conceptual connection between government and force was already centuries old. See discussion *supra* note 15.

⁴⁴ TILLY, *supra* note 34, at 29, 53, 122.

⁴⁵ For a discussion of the development of professional military institutions in the West, see SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 19-58 (Belknap Press 1967) (1957).

⁴⁶ THOMSON, *supra* note 32, at 84-90 (highlighting the decline of mercenaries); Sklansky, *supra* note 40, at 1203-11 (examining the development of British and American public police forces and the corresponding decline in private police).

⁴⁷ See generally TREVOR JONES & TIM NEWBURN, *PRIVATE SECURITY AND PUBLIC POLICING* (1998); GEORGE O'TOOLE, *THE PRIVATE SECTOR: PRIVATE SPIES, RENT-A-COPS, AND THE POLICE-INDUSTRIAL COMPLEX* (1978); CLIFFORD SHEARING & PHILLIP STENNING, *PRIVATE POLICING* (1987); NIGEL SOUTH, *POLICING FOR PROFIT: THE PRIVATE SECURITY SECTOR* (1988); David H. Bayley & Clifford D. Shearing, *The Future of Policing*, 30 *LAW & SOC'Y REV.* 585 (1996); William C. Cunningham et al., *Private Security: Patterns and Trends*, *NAT'L INST. J.* (August 1991); Sklansky, *supra* note 40; *Policing for Profit: Welcome to the New World of Private Security*, *ECONOMIST*, Apr. 19, 1997 at 21.

⁴⁸ See Sklansky, *supra* note 40, at 1220.

⁴⁹ Policing scholars of the post-War era did not write on private policing at all. The best example

By 1971, the number of public police officers had surpassed the number of private security employees for the first time in the United States.⁵⁰ At the time, a research study predicted that in a few years, public police would employ twice as many Americans as the private sector.⁵¹ The implication was that in a manner of decades, the private policing industry would be nearly extinct.

Today this prediction is laughable. Since the early 1970s, the private security sector has boomed, leaving our public policing institutions far behind.⁵² Private security guards currently outnumber public police officers by a ratio of 3:1 in the United States.⁵³ Americans now spend more than twice as much money on private security guards (\$90 billion) as we spend on public police (\$40 billion) every year.⁵⁴ Observers have identified several political, social, and economic developments driving this trend: (1) the public's rising fears of violent crime; (2) the conservative backlash against "big" government; (3) the rise of mass private property; (4) and (somewhat circularly) the increasing commodification of security services.⁵⁵ Because observers expect these trends to continue for the foreseeable future, they expect continued expansion in the private security sector.⁵⁶

After the Aviation Security Act of 2001,⁵⁷ private police no longer protect America's airports—at least, not by themselves.⁵⁸ But few people realize that private police protect almost every other kind of space in our country: malls, supermarkets, stadiums, theatres, theme parks, casinos, hotels,

of this is probably T.A. Critchley's classic history of the English police, written in 1966, just as private police were starting a comeback in England. It is the definitive work on the English police, yet it does not make a single mention of the private police. See generally CRITCHLEY, *supra* note 40.

⁵⁰ See JAMES S. KAKLIK & SORREL WILDHORN, *THE PRIVATE POLICE INDUSTRY: ITS NATURE AND EXTENT* (Rand 1971); Sklansky, *supra* note 40, at 1220.

⁵¹ KAKLIK & WILDHORN, *supra* note 50, at 17; Sklansky, *supra* note 40, at 1220.

⁵² See JONES & NEWBURN, *supra* note 47, at 95-97 (describing the substantial growth of private security); O'TOOLE, *supra* note 47, at 4-5 ("Overall, the rent-a-cop business has been steadily growing at an annual rate of 11 or 12 percent."); SOUTH, *supra* note 47, at 23-25 (suggesting that despite the difficulty of finding reliable statistics it is clear private security has enjoyed staggering growth); Bayley & Shearing, *supra* note 47, at 585-87 ("In the United States, for example, there are three times more private security agents than public police officers."); Cunningham, *supra* note 47, at 146; Sklansky, *supra* note 40, at 1172-77 ("At this point, security guards in the United States actually outnumber law enforcement personnel . . ."); *Policing for Profit: Welcome to the New World of Private Security*, *supra* note 47, at 21 (highlighting the growth in private police since 1970).

⁵³ *Policing for Profit: Welcome to the New World of Private Security*, *supra* note 47, at 21. Sklansky claims that the ratio is closer to 3:2. See Sklansky, *supra* note 40, at 1174 & n.27.

⁵⁴ *Policing for Profit: Welcome to the New World of Private Security*, *supra* note 47, at 21.

⁵⁵ See Bayley & Shearing, *supra* note 47, at 598-602.

⁵⁶ See *id.* at 604-05.

⁵⁷ Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (codified as amended in scattered sections of 5, 26, 31, and 49 U.S.C.).

⁵⁸ For a discussion of the Act, see *infra* Part IV.C.

colleges, schools, hospitals, train and bus stations, parks, parking lots, offices, factories, plants, and all kinds of residences, including public housing projects, homeowners associations, and private estates.⁵⁹ Almost as much as public police, private police protect public properties: In 1995, forty percent of the security work performed for federal, state, and local governments was contracted out to private firms.⁶⁰ In some cases, they have even been hired by residents, merchants, and municipalities to police public streets.⁶¹ In countless locations across the United States, private police conduct patrols, investigations, interrogations, searches, and make arrests.⁶²

While it is easiest to describe the trend in terms of size, space, and function, it is actually about much more. In the last thirty years, the institutional divisions between public and private policing have become blurry again, and they promise to become blurrier.⁶³ Private police are often “deputized,” or given general public police authority, by federal, state, and local governments.⁶⁴ Public and private police often work together on projects, patrolling large public gatherings and events, and operating undercover stings within corporations.⁶⁵ Public police have increasingly charged for services, demanding fees for false alarms, or offering supplemental, for-profit protection to guard local merchants, residents, and public events. Public police moonlight more than they used to, often in uniform, sometimes through the coordination of police department bureaucracies.⁶⁶ At all institutional levels, public police are retiring to become private police, and they are retiring earlier to do so.⁶⁷ Experience in the private security sector is regarded as a valuable asset in public police hiring and vice-versa. In a final turn, public police forces have recently begun drawing upon private

⁵⁹ DAVID H. BAYLEY, *POLICE FOR THE FUTURE* 11 (1984).

⁶⁰ Sklansky, *supra* note 40, at 1177.

⁶¹ *Id.* at 1177-78 & n.56.

⁶² This is especially true of private police who work in retail stores, policing shoplifting. *Id.* at 1178 & n.56.

⁶³ See generally Gary Marx, *The Interweaving of Public and Private Police Undercover Work*, in PRIVATE POLICING, *supra* note 47, available at <http://web.mit.edu/gtmarx/www/private.html> (last visited Feb. 21, 2004) (on file with the Connecticut Law Review).

⁶⁴ See, e.g., GA. CODE ANN. § 35-2-71 (1998); S.C. CODE ANN. § 40-17-130 (2001); William F. Walsh & Edwin J. Donovan, *Private Security and Community Policing: Evaluation and Comment*, 17 J. CRIM. JUST. 187, 189-90 (1989).

⁶⁵ See Marx, *supra* note 63. Public police departments also hire private firms to staff less central police work. *Policing for Profit: Welcome to the New World of Private Security*, *supra* note 47, at 22-23; Sklansky, *supra* note 40, at 1177; James K. Stewart, *Foreword* to MARCIA CHAIKEN & JAN CHAIKEN, NAT'L INST. OF JUSTICE, PUBLIC POLICING—PRIVATELY PROVIDED, at iii (1987).

⁶⁶ WILLIAM CUNNINGHAM ET AL., PRIVATE SECURITY TRENDS: 1970 TO 2000, at 290 (1990); Sklansky, *supra* note 40, at 1176.

⁶⁷ See, e.g., David Firestone, *Bratton Quits Police Post; New York Gains over Crime Fed a Rivalry with Guiliani*, N.Y. TIMES, Mar. 27, 1996, at A1; Kevin Flynn, *Safir Is To Resign as Head of Police, City Officials Say*, N.Y. TIMES, Aug. 8, 2000, at A1; cf. *Mexico Hires Former New York Mayor as Consultant*, AGENCE FRANCE PRESSE, Oct. 16, 2002, LEXIS, News Library, Afp File.

contributions,⁶⁸ and reinventing themselves on the model of private security firms.⁶⁹

Admittedly, there are still some important differences between what public and private police actually do. Speaking very broadly, public police are still more likely to use force, make arrests, detain suspects, and conduct searches than private police. But surprisingly few of these distinctions are formally proscribed by statutes,⁷⁰ and as scholars of policing often note, it is more often cultural norms, rather than legal rules, that limit the authority of the public and private police and mark the boundaries between them.⁷¹

The recent revival of the private policing industry is not unique to the United States. In fact, it is a decidedly global trend. It has been mirrored in England, Canada, and Australia, where the ratio of private to public police is also 3:1; it has been magnified in South Africa and the former Soviet Union, where the ratio is roughly 10:1.⁷² This expansion has also brought about a worldwide deterioration of the boundaries between public and private police.⁷³ Today, there are more private police, in more places, doing more things, than ever before.

⁶⁸ See Michael Weissenstein, *Police Departments Turn to Private Money*, Associated Press Online, July 21, 2003, 2003 WL 59744593.

⁶⁹ The newest innovations in public policing include increasing preventative patrol techniques, decentralizing structures of command, "treating the public as customers," and "measuring performance by surveys of public satisfaction rather than exclusively by the number of crimes and arrests." See BAYLEY, *supra* note 59, at 146; DAVID GARLAND, *CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 186-90* (2001) (describing policing's new "accounting practices"); Bayley & Shearing, *supra* note 47, at 589-90.

⁷⁰ As Sklansky explains:

[T]he arrest powers of ordinary citizens in most states are not strikingly different, in some significant respects, from those of police officers. Officers can execute arrest warrants; private persons generally cannot. But the vast majority of arrests are made without a warrant, and the arrest powers of officers and civilians in that circumstance are relatively narrow.

Sklansky, *supra* note 40, at 1184 & n.84 (listing twenty-five states' statutes). Moreover, "[m]ost states also license and impose administrative regulations on segments of the private security industry, but the regulations are generally quite minimal." *Id.*

⁷¹ JONES & NEWBURN, *supra* note 47, at 203. In any event, it is clear that this boundary is fading and that private police are taking on more coercive tasks. But it is hard to say how much or how fast because the private policing industry is diverse, secretive, sprawling, and changing quite quickly. CUNNINGHAM, *supra* note 66, at 1, 3-4 (describing the lack of hard data on the nature and size of private security); SOUTH, *supra* note 47, at 12, 23 (explaining how the size of the private security industry has been increasing rapidly); Thomas M. Scott & Marlys McPherson, *The Development of the Private Sector of the Criminal Justice System*, 6 LAW & SOC'Y REV. 267, 275 (1971) (discussing the dynamic relationship between public and private security forces); Sklansky, *supra* note 40, at 1179 (discussing the diverse and secretive nature of the private security industry).

⁷² See Herbert Howe, *The Privatization of International Affairs: Global Order and the Privatization of Security*, FLETCHER F. WORLD AFF., Summer/Fall 1998, at 1, 3.

⁷³ See JONES & NEWBURN, *supra* note 47, at 199-214, 227-28, 244-46.

2. Punishment⁷⁴

The origins of today's private prisons can be found in the politics of yesterday's punishments. In Europe and the United States, the 1960s and 1970s were decades of riot and reform within prisons.⁷⁵ In response to allegations of system-wide inmate abuse, European and American governments undertook significant overhauls of their prison systems.⁷⁶ During this period, the prisoners' rights movement was born and the idea of rehabilitation was resurrected.

These changes were short-lived. In the American presidential campaign of 1968, Richard Nixon launched a "law and order" backlash against the prevailing tide of "liberal" law enforcement and punishment policies. In the early 1970s, this conservative campaign against crime spoke directly

⁷⁴ See generally RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY (1997) [hereinafter HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY] (evaluating how private prisons have worked thus far in practice and how to enhance their performance, and providing evidence to show that private prisons can act as a means for improvement across the entire prison system if they are regulated and held accountable for their actions); CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS (1990) (examining objections to private prisons that have been or could have been raised and assessing the validity of these objections); PRIVATE PRISONS AND THE PUBLIC INTEREST (Douglas C. McDonald ed., 1990) (exploring the emergence of private prisons, the pros and cons of private prisons, and concluding private prisons should not be banned if they can provide better services at equal or lower cost to the public than public prisons); PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 42 (exploring the benefits and detriments of privatizing prisons and advocating for a substantial change in prisons and for the continuation of the privatization of prison and jail services to achieve this goal); *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1868, 1879-87 (2002) [hereinafter *The Law of Prisons*]; Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265 (2001) (concluding private prisons will continue to exist and grow in the United States not replacing public prisons, but competing with them and stimulating improvement of the total prison system); Eric Schlosser, *The Prison-Industrial Complex*, ATL. MONTHLY, Dec. 1998, at 63 (arguing America's "prison industrial complex" is quickly corrupting the criminal justice system).

⁷⁵ In the first sixty years of the twentieth century, the only major progressive prison reform was the formal abolition of corporal punishment as a mechanism of disciplining inmates. See, e.g., JOHN BRIGGS ET AL., CRIME AND PUNISHMENT IN ENGLAND: AN INTRODUCTORY HISTORY 237-44 (1996) (describing efforts to reform English prisons, which began with the passage of the Prison Act of 1898); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 30-50 (1998) (giving an overview of judicial prison reform); SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 240 (1980) (exploring the reformation of the prison system); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 193-94 (2003) (describing prison reform in the United States, France, and Germany); Edgardo Rothman, *The Failure of Reform: United States, 1865-1965*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 169, 170, 183-85, 194-96 (Norval Morris & David J. Rothman eds., 1995) (discussing the significant transformations in prison infrastructures). But massive problems persisted throughout the period, often in horrific forms, especially on the "penal farms" and "chain gangs" of the American South. See OSHINSKY, *supra* note 42, at 33-34, 37-43, 45-53, 57-63, 67-71, 75-76.

⁷⁶ See FEELEY & RUBIN, *supra* note 75, at 34-47; WHITMAN, *supra* note 75, at 193-94 (describing the United States, France, and Germany). Of course, some efforts were more successful than others. See *id.*

to the growing fear of violent crime in the United States,⁷⁷ and it dominated the American political stage until the end of the century. Over the next three decades, the project of prison reform was forced into retreat, and the ethic of rehabilitation was largely supplanted by principles of retribution and incapacitation.⁷⁸

In the meantime, federal and state legislatures introduced a large array of anti-crime measures that dramatically increased the frequency and length of American prison sentences for both violent and non-violent offenders.⁷⁹ The American prison population skyrocketed.⁸⁰ The business of

⁷⁷ See WALKER, *supra* note 75, at 236 (recounting Richard Nixon's campaign assertions that the Attorney General and Supreme Court had been soft on crime). There is much debate about whether this fear was rational or not. Compare GARLAND, *supra* note 69, at 8, 96-100, 122, 145-46, 152-53 (arguing that it was "a very inexact match for the actual patterns of victimization and risk," but nonetheless noting that there were "steep increases in reported crime (especially violent offending) that occurred in the decades after 1960"), with Thomas Arvanides, *Increasing Imprisonment: A Function of Crime or Socioeconomic Factors?*, 17 AM. J. CRIM. JUST. 19 (1992) (claiming that crime rates either remained constant or fell during the 1960s, 1970s, and 1980s).

⁷⁸ See FEELEY & RUBIN, *supra* note 75, at 46-50; GARLAND, *supra* note 69, at 199-200; DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 4-8 (1990); WALKER, *supra* note 75, at 243.

⁷⁹ It is important to note that most of the growth of the American prison population has been among non-violent criminals. WHITMAN, *supra* note 75, at 56. The most well-known examples of such sentencing measures are New York's Rockefeller laws, the federal sentencing guidelines, and the new wave of "three-strikes-and-you're-out" laws. Schlossler, *supra* note 74, at 56; see also WALKER, *supra* note 75, at 221-22, 248-49 (discussing the Rockefeller laws); John Clark et al., "Three Strikes and You're Out": A Review of State Legislation, 1997 NAT'L INSTIT. OF JUST. 1; Anthony N. Doob, *The United States Sentencing Commission Guidelines: If You Don't Know Where You Are Going, You Might Not Get There*, in *THE POLITICS OF SENTENCING REFORM* 199, 201-05 (Chris Clarkson & Rod Morgan eds., 1995).

As James Whitman observes, in the same time period, state and local governments also began to reintroduce several "old/new" modes of punishment, which were styled on pre-modern shaming sanctions. WHITMAN, *supra* note 75, at 58; see also Rick Bragg, *Chain Gangs to Return to Roads of Alabama*, N.Y. TIMES, Mar. 26, 1995, at A16 (describing the revival of chain gangs in several states); Blaine Harden, *Parading of Suspects is Evolving Tradition*, N.Y. TIMES, Feb. 27, 1999, at B1 (discussing the parading of suspects, as well as punishment of offenders that involve signs, shirts, or bumper stickers describing offenses).

⁸⁰ Today, in terms of punishment, the United States has left the rest of the West far behind. We are the only Western state that still executes criminals, and our rates and lengths of incarceration dwarf those of other Western states. As James Whitman reports, "American convicts . . . serve sentences roughly five and ten times as long as similarly situated French ones; and almost certainly even longer by comparison with German convicts." WHITMAN, *supra* note 75, at 57. Our incarcerated population reached 1 million in 1990 and 2 million in 2000. *Id.* (citing *U.S. Prison Population Hits the 2 Million Mark*, INTERNATIONAL HERALD TRIBUNE, Feb. 16, 2000, at 9, LEXIS, News Library, Arcnws File). Our rate of incarceration stands "between 450 and 700 per 100,000 of the general population—on a rough par with Russia," while "[t]he typical European incarceration rate, by contrast, stands somewhere between 65 and 100 per 100,000." *Id.* at 58 (citing U.S. Department of Justice, Bureau of Statistics, *Jail Statistics*, at <http://www.ojp.usdoj.gov/bjs/jails.htm> (last visited Oct. 16, 2003) (on file with the Connecticut Law Review)); International Centre for Prison Studies, *Prison Brief for United States of America*, at <http://www.kcl.ac.uk/depsta/rel/icps/home.html> (last visited Oct. 16, 2003) (on file with the Connecticut Law Review); The Sentencing Project, *U.S. Surpasses Russia as World Leader in Rate of Incarceration*, at <http://www.sentencingproject.org> (last visited Oct. 16, 2003) (on file with the Con-

imprisonment was reborn. In the 1980s and 1990s, roughly 1,000 jails and prisons were built in the United States.⁸¹ Today, Americans spend roughly \$35 billion per year on imprisonment,⁸² and the overcrowding of our prisons grows steadily worse.⁸³

From the very beginning, the American private sector was well-positioned to take advantage of this penal revival. In the early 1970s, the federal government had already begun to support research and technical assistance that would foster public-private partnerships in prison industries, and state governments had already begun to try out such ventures.⁸⁴ By the early 1980s, the Reagan and Bush Administrations, Congress, and Chief Justice Warren Burger were aggressively recruiting private corporations to provide discrete prison services, finance and construct prisons, and manage low- and mid-security facilities by signing employment, leasing, and ownership agreements.⁸⁵

By the end of the 1980s, the private prison industry had emerged and had begun to take on the task of providing punishment in the United States. Complete private ownership and management became common in low-security facilities housing the mentally ill, illegal aliens, juveniles, and minor offenders in most states.⁸⁶ In the 1990s, at the behest of the Clinton Administration, private corporations expanded into the business of managing minimum, medium, and maximum security adult prisons. By 1998,

necticut Law Review).

⁸¹ See Schlosser, *supra* note 74, at 52.

⁸² See *id.* at 54.

⁸³ In 1989, there were forty-three states under court order to eliminate overcrowding in prisons. Lisa Belkin, *Rise of Private Prisons: How Much of a Bargain?*, N.Y. TIMES, Mar. 27, 1989, at A14. In 1998, there were thirty states that had relocated prisoners to jails and other facilities to diminish overcrowding. See ALLEN J. BECK & CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1998, at 7 (Aug. 1999) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p99.pdf> (last visited Mar. 16, 2004) (on file with the Connecticut Law Review). See generally WHITMAN, *supra* note 75, at 61.

⁸⁴ Barbara Auerbach, *Federal Government Involvement in Private Sector Partnerships with Prison Industries*, in PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 42, at 91-92. The federal government conducted eighteen studies on this subject between 1971 and 1993. *Id.* at 101 n.2.

⁸⁵ The level of recruitment was remarkable: The Justice System Improvement Act of 1979 contained an amendment, sponsored by Senator Charles Percy of Illinois, which authorized the Law Enforcement Assistance Administration to establish seven Prison Industry Enhancement Pilot Projects, and authorized the goods produced by these projects to be placed in interstate commerce, and sold to the federal government. *Id.* at 101 n.6. In 1980, Chief Justice Warren Burger launched an unusual, highly publicized "factories within fences" campaign to encourage private corporations to become invested and involved in the ongoing renovation and expansion of the American prison system. Warren E. Burger, *More Warehouses, or Factories with Fences?*, 8 NEW ENG. J. OF PRISON L. 111, 111-20 (1982). For a summary of the federal government's involvement in the birth and growth of the private prison industry, see Auerbach, *supra* note 84, at 91-92.

⁸⁶ See MELISSA SICKMOND ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 38-39 (1997); Douglas C. McDonald, *Public Imprisonment by Private Means: The Reemergence of Private Prisons and Jails in the United States, the United Kingdom, and Australia*, 34 BRIT. J. CRIMINOLOGY 29, 29-32 (1994).

twenty-six states had private prisons operating or under construction, eight more states had passed statutes authorizing delegation to private prison firms, and there were over 154 private prisons.⁸⁷ By 2000, these prisons housed roughly 120,000, or six percent, of the nation's 2 million prisoners.⁸⁸ Today, the private prison population is growing four times faster than the overall prison population,⁸⁹ and industry experts and investment analysis predict more expansion to come.⁹⁰

The private prison industry is changing and evolving quickly, but some clear patterns of doing business have emerged. There are two American firms in the industry—Corrections Corporation of America (“CCA”) and Wackenhut Corrections Corporation (“Wackenhut”)—that collectively generate about \$350 million in revenues, and control about seventy-five percent of private prisons, both in the United States and worldwide.⁹¹ In the United States, there are roughly five other companies with the remaining twenty-five percent market share.⁹²

Although CCA and Wackenhut began by operating juvenile and INS facilities, the bulk of their business is now minimum- and medium-security adult prisons and jails.⁹³ CCA dominates the U.S. market, but Wackenhut operates prisons in the United Kingdom, Canada, Australia, New Zealand, and South Africa and is currently negotiating with governments in countries such as Germany, France, the Netherlands, the Czech Republic, and Venezuela.⁹⁴

⁸⁷ Peter Finn, *With Lawrenceville Facility, Va. Enters World of Privately Run Prisons*, WASH. POST, Jan. 18, 1998, at B10, LEXIS, News Library, Wpost File (“In 26 states and the District, 154 privately run prisons with a capacity of 107,500 prisoners are in operation or under construction, according to the Private Corrections Project at the University of Florida’s Center for Studies in Criminology and Law.”); Sharon Dolovich, *The Ethics of Private Prisons* 30 (Nov. 1999) (unpublished manuscript, on file with the Connecticut Law Review) (“Today, at least 34 states plus Puerto Rico have passed enabling statutes legalizing the delegation of prison operations to private firms.”).

⁸⁸ White, *supra* note 33, at 112.

⁸⁹ *Id.*

⁹⁰ See Gail DeGeorge & Julia Flynn, *Go Directly to Jail*, BUS. WK., Dec 15, 1997, at 139 (“Charles W. Thomas, director of the Private Corrections Project at the Center for Studies in Criminology at the University of Florida, estimates average annual growth in private prisons of 25% over the next five years. That has hardly gone unnoticed on Wall Street.”); Steven Donziger, *The Prison-Industrial Complex: What’s Really Driving the Rush to Lock ‘Em Up*, WASH. POST, Mar. 17, 1996, at C3, LEXIS, News Library, Allnws File; Nzong Xiong, *Private Prisons: A Question of Savings*, N.Y. TIMES, July 13, 1997, at C5 (quoting Jennifer Childe of Wasserstein Perella Securities).

⁹¹ Peter P. Donker, *CiviGenics Booms as Inmates Increase*, TELEGRAM & GAZETTE (Mass.), Aug. 5, 1997, at E1, LEXIS, News Library, Allnws File.

⁹² See Dolovich, *supra* note 87, at 33-34.

⁹³ *Id.* at 33.

⁹⁴ See Fox Butterfield, *For Privately Run Prisons, New Evidence of Success*, N.Y. TIMES, Aug. 19, 1995, at A7 (stating that Australia, Britain, and New Zealand have private prisons; Canada, France, the Netherlands, and the Czech Republic are negotiating with American corporations to build them); Nick Cohen, *Much Profit in a Prison; As Law and Order Goes Private, Security Firms Are Scrambling To Corner the Incarceration Market*, INDEPENDENT (London), Sept. 5, 1993, at 15, LEXIS, News

In the United States, federal and state governments often enter into arrangements with private prison companies, under which the corporations raise capital, design and construct facilities, manage day-to-day operations, and sign long-term lease-purchase agreements.⁹⁵ Recently, private companies have begun to build prisons prospectively, without prior state approval.⁹⁶ Management contracts are usually awarded to the lowest bidder, and pay schedules are based on per inmate, per day fees. Private prison statutes typically (1) authorize public officials to enter prison management contracts with corporations; (2) describe bidding procedures, which often include mandatory savings objectives; (3) demand that the contractor carry insurance and obey all applicable laws and regulations; (4) provide for state monitoring; and (5) reserve the state's authority to decide when prisoners are released.⁹⁷

3. *Military Force*⁹⁸

Library, Indpnt File (Germany, France, the Netherlands); John Collins, *Counties Need the Private Corrections Choice*, WIS. ST. J., Oct. 1, 1995, at 2B, LEXIS, News Library, Wistjl File (Australia, Britain, New Zealand, Canada, France, the Netherlands, and the Czech Republic); Frauke Kaberka, *Germany's First Privately-Owned Prison Goes Up Near Rostock*, DEUTSCHE PRESSE-AGENTUR, Nov. 11, 1994, at International News, LEXIS News Library, Dpa File (Germany); Raisa Pages, *Degrading Humanity*, MORNING STAR (London), May 16, 2002, at 10, LEXIS, News Library, Morstr File (private prison expansion targeted in Latin America and Europe); *Top Stories From Major Swiss Morning Newspapers* (Zurich): *Company Pushes Private Prisons*, BLOOMBERG NEWS, Aug. 25, 1994, LEXIS, News Library, Allbnn File (Germany); *Venezuela: Foreign Countries May Operate Prisons*, SUN-SENTINEL (Fort Lauderdale, Fla.), Apr. 29, 2001, at 18A, LEXIS, News Library, Susen File (Venezuela); Eric Walgren, *Investing in Crime and Punishment*, BUS. WK. ONLINE, Oct. 23, 2003 ("Wackenhut Corrections is the only outfit with significant operations outside the U.S. . . . The Boca Raton (Fla.) concern has 48 facilities in the U.S., Australia, South Africa, New Zealand, and Canada.").

⁹⁵ See RYAN & WARD, *supra* note 32, at 9-12; Dolovich, *supra* note 87, at 27.

⁹⁶ See Herman B. Leonard, *Private Time: The Political Economy of Private Prison Finance*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 74, at 66, 72-75.

⁹⁷ For a comprehensive review of these statutes, see Dolovich, *supra* note 87, at 30-32 & n.135 (collecting and summarizing statutes).

⁹⁸ See generally DAVID ISENBERG, CENTER FOR DEFENSE INFORMATION, SOLDIERS OF FORTUNE LTD.: A PROFILE OF TODAY'S PRIVATE SECTOR CORPORATE MERCENARY FIRMS (1997), available at <http://www.cdi.org/issues/mercenaries/merc1.html> (last visited Feb. 25, 2004) (on file with the Connecticut Law Review) [hereinafter ISENBERG, CORPORATE MERCENARY]; ROBERT MANDEL, ARMIES WITHOUT STATES: THE PRIVATIZATION OF SECURITY (2002) (discussing the transformation of force from the exclusive domain of national governments to an increasing involvement of "mercenaries, private armies, militia, vigilante squads, transnational criminal organizations, self-defense forces, and survivalist enclaves" and how this has been an unexpected and unwelcome development in many sectors); Howe, *supra* note 72, at 1 (noting observations that a large growth in private security forces in contrast to state controlled forces may well threaten global order as such a military force is less accountable and controllable than militaries controlled by states); Montgomery Sapone, *Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT'L L.J. 1 (1999) (suggesting "a connection between partial commodification of private military labor and the global economy of violence."); Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J INT'L L. 75 (1998) (detailing how "sophisticated military professionals have created the modern, private, international security company" and their international influence); David Isenberg, *Combat for Sale: The New*,

In comparison to the development of private policing and private prisons, the emergence of private military corporations is a more recent, less well-known phenomenon. To understand the revival of the private military market, one must first understand the business of war.

For the first half of the twentieth century, the size and strength of the United States Armed Forces reflected America's engagement in warfare: They increased during times of crisis and decreased during times of peace. In World War I, the United States Army was expanded to a force of roughly 3.7 million soldiers; after the war, it was reduced to roughly 175,000. In World War II, the Army peaked at 8.5 million soldiers; after the war, it shrunk to 554,000.⁹⁹ During each war, the American manufacturing industry rapidly and extensively mobilized to produce equipment and supplies for the war effort; after each war, it turned back to other tasks.¹⁰⁰

Once the Cold War settled in, however, it quickly became clear that something had changed.¹⁰¹ The United States took on the role of a global superpower, and together with the other members of NATO, built up unprecedented levels of peacetime readiness. It established military outposts around the globe, providing weapons, technology, intelligence, strategy, training, and soldiers to dozens of less developed nations and resistance groups.¹⁰² The U.S. entered an arms race against the Soviet Union, designing and producing progressively sophisticated and powerful technologies of force.¹⁰³

In the Cold War, American military spending soared.¹⁰⁴ The demand

Post-Cold War Mercenaries, USA TODAY MAG., Mar. 2000, at 12 [hereinafter Isenberg, *Post-Cold War*]; Nelson D. Schwartz, *The Pentagon's Private Army*, FORTUNE, Mar. 17, 2003, at 100 (describing "the large—and growing—role that private companies play in war"); Leslie Wayne, *America's For-Profit Secret Army*, N.Y. TIMES, Oct. 13, 2002, at C1 (discussing the successful transformation of the image of mercenaries into "private military contractors" with some even being subsidiaries of Fortune 500 corporations).

⁹⁹ Col. John F. Shortal, *20th Century Demobilization Lessons*, MIL. REV., Sept. 1, 1998, at 66, 1998 WL 24798960.

¹⁰⁰ See HUNTINGTON, *supra* note 45, at 364 ("The rapid demobilization in 1945 and 1946 first seemed to indicate a repetition of the post-World War I pattern.").

¹⁰¹ See *id.* (suggesting that the change was especially obvious after the outbreak of the Korean War).

¹⁰² See CENTER OF MILITARY HISTORY, *AMERICAN MILITARY HISTORY* 543 (Maurice Matloff ed., 1989), available at <http://www.army.mil/cmh-pg/books/amh/AMH-24.htm> (last visited Oct. 30, 2003) (on file with the Connecticut Law Review) ("[T]he United States was by 1949 providing military equipment and training assistance to Greece, Turkey, Iran, China, Korea, the Philippines, and the Latin American republics.").

¹⁰³ David Remnick, *Soviet Article Attacks U.S. on Cold War, Arms Race*, WASH. POST, Aug. 30, 1988, at A17, LEXIS, News Library, Wpost File ("A major article published today in the Communist Party newspaper Pravda accused the United States of single handedly starting the Cold War between the two superpowers and accelerating the arms race that began after World War II.").

¹⁰⁴ From 1950 to 1990, overall defense spending in the United States grew from \$106 billion to \$300 billion (in 1990 dollars). WILLIAM W. KAUFMANN, *GLASNOST, PERESTROIKA, AND U.S. DE-*

for military equipment and supplies swelled and begat a large, permanent, private defense industry.¹⁰⁵ From its very beginnings, this industry was closely allied to the Department of Defense, one of the most powerful interest groups in the United States.¹⁰⁶

Please do not misread me: I am not about to say that these early defense contractors were private military institutions. In terms of this Article, they were not military institutions at all. They did not fight wars; they produced military equipment and supplies. Military force was still “public,” still monopolized by the United States government. In fact, we might say that during this era, the United States and NATO established a monopoly of military force throughout much of the world. Although some liberal citizens continued to fight as mercenaries, they fought only in small, informal groups, often in violation of domestic laws, and always without any explicit, public acknowledgement, permission, or encouragement from liberal states.¹⁰⁷

But in 1990, things changed again. The Cold War ended. The Soviet Union broke apart, the Berlin Wall came down, and the global threat of communism disappeared. For our purposes, these events brought about two important and interconnected changes in the military policy of modern liberal states: First, NATO began to demobilize its armed forces, putting large numbers of soldiers and weapons out of work; second, NATO became more reluctant to commit large numbers of troops abroad for prolonged stays, especially in contested territories.¹⁰⁸

Of course, the end of the Cold War was not the dawn of world peace. Since 1990, there have been many large, prolonged military battles in Africa, Eastern Europe, and Asia in which NATO refused to intervene. But

FENSE SPENDING 2 (1990).

¹⁰⁵ See George C. Wilson, *Departing Pentagon Official Urges 'Moving Room'*, WASH. POST, Aug. 27, 1985, at A13, LEXIS, News Library, Wpost File (“[W]e’re the only country in the world that really relies on the private sector to build us our weapons . . .”).

¹⁰⁶ See HUNTINGTON, *supra* note 45, at 364-65. In 1961, in a farewell address to the nation, President Eisenhower left Americans with the following oft-quoted warning: “In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex.” Schlosser, *supra* note 74, at 52-54.

¹⁰⁷ Of course, it can be argued that there was tacit consent. See THOMSON, *supra* note 32, at 96-97 (arguing that the Cold War brought about a decline in the enforcement of anti-mercenary laws). Most of the mercenary activity during the Cold War took place in Africa. Between 1960 and 1980, mercenaries from the United States, Britain, France, Germany, Italy, Spain, Portugal, Australia, Belgium, and the Netherlands fought in Congo, Nigeria, Angola, and Rhodesia. *Id.* at 93-94. Depending on how one defines “mercenary,” there was one possible example of state-sanctioned mercenaryism during this period: The United States Government paid per diem fees in exchange for the use of South Korean, Thai, and Philippine troops during the Vietnam War. *Id.* at 94. Internationally, Pakistan is one of the chief suppliers of mercenary forces. Most Pakistani mercenaries serve in the armies of Middle Eastern states. See *id.* at 90-92.

¹⁰⁸ Between 1989 and 1999, the active duty force size of the United States Armed Forces was reduced from 2,174,200 to 1,385,700. Maj. Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV 111, 111 (2001).

the United Nations, NATO, and less developed states and resistance groups have continued to demand weapons, technology, intelligence, strategy, training, and soldiers. Before long, “private military companies” (“PMCs” or “private armies”)¹⁰⁹ emerged to meet the military demands of less developed states and resistance groups, filling the supply gap left by the demobilization of NATO forces.¹¹⁰

Today’s PMCs typically offer clients a variety of military services: the training of ground, air, and sea troops, logistical support and specialization, high-technology intelligence systems, materiel procurement, static-site defense, and peacekeeping.¹¹¹ Military Professional Resources, Inc. (“MPRI”) is one of the more successful PMCs in the United States. Based in Alexandria, Virginia, MPRI trains and equips soldiers, and provides military expertise, planning, organization, and logistical support.¹¹² Even more than most defense contractors, MPRI is intimately associated with the United States Department of Defense: The CEO of MPRI is a former Army Chief of Staff, and the Board of Directors consists mainly of retired United States generals and admirals.¹¹³ MPRI has hundreds of former United States special forces personnel training and equipping foreign soldiers throughout the world.¹¹⁴ The United States government has supplied over \$100 million in surplus equipment to assist MPRI, continues to refer governments and organizations seeking military training and equipment to MPRI, and reviews every MPRI contract before it is signed.¹¹⁵ The Pentagon has contracted with MPRI to teach Army ROTC at 215 universities in the United States¹¹⁶ and to train, coordinate, and support dozens of mis-

¹⁰⁹ In this Article, I use the terms “private military corporations” and “private armies” interchangeably. When I refer to those corporations that do not engage in active combat, I use more conventional terms, like the “defense industry” or “defense contractors.”

¹¹⁰ ISENBERG, CORPORATE MERCENARY, *supra* note 98; MANDEL, *supra* note 98, at 55-57; Howe, *supra* note 72, at 1, 7; Zarate, *supra* note 98, at 76; Isenberg, *Post-Cold War*, *supra* note 98, at 12; *see also* Sapone, *supra* note 98, at 1 (explaining that counterinsurgencies and covert actions during the Cold War were fought by “shadowy commandos with suspicious connections to the Pentagon,” while current conflicts are fought by “mercenaries with impeccable resumes who negotiate contracts openly and give interviews to the press”).

¹¹¹ *See* Jonathan Weisman & Anitha Reddy, *Spending on Iraq Sets Off Gold Rush*, WASH. POST, Oct. 9, 2003, at A1, LEXIS, News Library, Wpost File (discussing the variety of services provided by private military companies in Iraq).

¹¹² *See generally* Military Professional Resources, Inc., *About MPRI*, at <http://www.mpri.com/site/about.html> (last visited Oct. 30, 2003) (on file with the Connecticut Law Review) (summarizing MPRI’s services and philosophy).

¹¹³ P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 120 (2003).

¹¹⁴ *See id.* at 120, 122.

¹¹⁵ ISENBERG, CORPORATE MERCENARY, *supra* note 98; SINGER, *supra* note 113, at 121-29.

¹¹⁶ P.W. Singer, *Have Guns, Will Travel*, N.Y. TIMES, July 21, 2003, at A15; Memorandum from Stewart W. Wallace, Major General, United States Army, to Retiring/Separating Officers & Senior NCOs (Mar. 31, 2000), available at <http://www.penfed.org/usawoa/Sr-Jr-ROTC-opportunities.htm> (last

sions in American interests.¹¹⁷ The company offers opportunities for United States trained soldiers to fight in such international hotspots as Macedonia, Bosnia, Serbia, Croatia, and Africa.¹¹⁸ MPRI has long-term contracts to supervise all aspects of several multinational United Nations-sponsored peacekeeping teams, such as the African Crisis Response Initiative.¹¹⁹

As you have probably noticed, I did not say that MPRI fights battles or wages wars. Like most PMCs, MPRI claims that it does not.¹²⁰ Generally, PMCs do everything but fight: They train foreign troops before wars, provide back line support during wars, and perform peacekeeping duties after wars.¹²¹ They tend to be rather taciturn and mysterious when asked how often they exercise force.¹²² They are especially reluctant to say that they initiate combat for clients.¹²³ There is no question that they often find themselves in combat zones, and on front lines, but they claim to restrict themselves to logistical and defensive tasks.¹²⁴ They studiously avoid la-

visited Oct. 30, 2003) (on file with the Connecticut Law Review).

¹¹⁷ See generally Military Professional Resources, Inc., *International Overview*, at http://www.mpri.com/channels/int_overview.html (last visited Oct. 30, 2003) (on file with the Connecticut Law Review) (summarizing international services provided by MPRI on behalf of the United States government).

¹¹⁸ See Military Professional Resources, Inc., *International Europe*, at http://www.mpri.com/subchannels/int_europe.html (last visited Oct. 30, 2003) (on file with the Connecticut Law Review) (detailing the countries MPRI works in and the services it has provided in Europe); Military Professional Resources, Inc., *International Africa*, at http://www.mpri.com/subchannels/int_africa.html (last visited Oct. 30, 2003) (on file with the Connecticut Law Review) (detailing the countries MPRI works in and the services it has provided in Africa).

¹¹⁹ Special Report, *Box 4: Outsourcing: Private Military Companies (PMCs)*, FOREIGN POLICY IN FOCUS (May 2002), available at http://www.fpi.org/papers/miltrain/box4_body.html (last visited Oct. 30, 2003) (on file with the Connecticut Law Review).

¹²⁰ SINGER, *supra* note 113, at 119.

¹²¹ See Wayne, *supra* note 98.

¹²² See KEN SILVERSTEIN, PRIVATE WARRIORS 144 (2000) ("The firms themselves are not eager to discuss their activities. Nor is the State Department's Office of Defense Trade Controls . . ."); Jim Krane, *Private Firms Do U.S. Military's Work*, Associated Press, Oct. 29, 2003, available at <http://www.globalpolicy.org/security/peacekpg/training/1029private.htm> (last visited Feb. 19, 2004) (on file with the Connecticut Law Review) ("The world of military contracts is a murky one. In Iraq and Afghanistan, important buildings in the capitals bristle with gun-toting Americans in sunglasses Ask who they work for and one often hears 'no comment' or 'I can't tell you that.'").

¹²³ DAVID SHEARER, PRIVATE ARMIES AND MILITARY INTERVENTION 39 (1998) ("Executive Outcomes has been directly involved in combat; MPRI claims to work only in a training capacity. A senior MPRI employee compared the two companies thus in July 1997: 'when a fire is raging a government may call in EO. But when the fire has been put out, we . . . install the necessary precautions to ensure it won't start again.'"); SILVERSTEIN, *supra* note 122, at 186 ("Officially, DynCorp employees in Colombia have no role in combat operations against guerilla groups . . . [b]ut several reports suggest DynCorp personnel are actively involved in counterinsurgency in the south, where guerillas are especially strong."); SINGER, *supra* note 113, at 119 ("MPRI . . . makes pointed comparisons with other firms in the field, seeking to make clear its location within the military consulting service.").

¹²⁴ For example, Sandline International, a PMC that has engaged in active warfare in Sierra

bels like “mercenaries” or “soldiers-for-hire,” preferring to market themselves as “private security firms,” staffed by officers who are “professionals,” “leaders,” and “strategists” and soldiers who are “advisors,” “specialists,” and “peacekeepers.”¹²⁵ Both the industry and the clientele are committed to guarding the secrets of particular missions.¹²⁶ Thus, it is hard to know when, how, and how much PMCs exercise force. But it has become increasingly obvious that some do.

Three examples are especially clear. Recently, two companies—Executive Outcomes and Sandline International—have openly engaged in direct military conflict for clients in exchange for fees.¹²⁷ Both companies have won battles decisively in Africa.¹²⁸ In March 1995, the government of Sierra Leone hired Executive Outcomes—a PMC based in South Africa—to win back the rebel-beleaguered Kono diamond mines in exchange for the right to operate the Koidu diamond field, once the government was rein-

Leone, markets itself as a company that “specializes in problem resolution and the provision of associated consulting services,” and seeks “to offer governments and other legitimate organizations specialist military expertise.” See Sandline Int’l, *Overview of the Company*, at <http://www.sandline.com/site> (last visited Feb. 9, 2004) (on file with the Connecticut Law Review). Similarly, although MPRI is currently conducting quasi-military operations in Colombia, Afghanistan, and Iraq, it describes itself as a “professional services company” that aims “to provide the highest quality education, training, organizational expertise, and leader development around the world.” See Military Professional Resources, Inc., *About MPRI—Taking Expertise Around the World*, at <http://www.mpri.com/site/about.html> (last visited Feb. 9, 2004) (on file with the Connecticut Law Review).

¹²⁵ See, e.g., JAMES R. DAVIS, *FORTUNE’S WARRIORS: PRIVATE ARMIES AND THE NEW WORLD ORDER* 33 (2000) (“Within the PMC industry . . . few companies will submit willingly to the label of ‘mercenaries.’ The moral connotation that accompanies that word simply carries too much baggage. Executive Outcomes, despite years of fielding some of Africa’s best combat troops and winning two wars for its clients, refused to accept the mercenary title.”); SHEARER, *supra* note 123, at 39 (“[Executive Outcomes] has tried to burnish its corporate image in a bid to avoid mercenary stereotypes”); SILVERSTEIN, *supra* note 122, at 166 (“American officials draw a sharp line between [Executive Outcomes and Sandline] and US companies like MPRI and Vinnell. The crucial difference, they say, is that the government prohibits American firms from directly participating in combat MPRI is . . . desperate to avoid being called mercs”) (internal quotation marks omitted); SINGER, *supra* note 113, at 104 (“[Executive Outcomes] promoted itself as providing five key services to clients: strategic and tactical military advisory services; an array of sophisticated military training packages in land, sea, and air warfare; peacekeeping or ‘persuasion’ services; advice to armed forces on weapons selection and acquisition; and paramilitary services.”); *id.* at 217 (“Members of PMCs bristle at almost any negative characterizations of their business, in particular allegations that they are the equivalent of mercenaries.”).

¹²⁶ See *supra* note 122 and accompanying text.

¹²⁷ James Rupert, *Diamond Hunters Fuel Africa’s Brutal Wars*, WASH. POST, Oct. 16, 1999, at A1, LEXIS, News Library, Wpost File.

¹²⁸ See Sam Kiley, *Send in the Mercenaries, Mr. Cook*, TIMES (London), Jan. 22, 1999, LEXIS, News Library, Times File (“Sandline may have co-operated with British diplomats to help restore the lawfully elected President Kabbah to his rightful position as Sierra Leone’s head of state.”); Jonah Schulhofer-Wohl, *Should We Privatize the Peacekeeping?*, WASH. POST, May 12, 2000, at A1, LEXIS, News Library, Wpost File (“EO was able to drive back Revolutionary United Front (“RUF”) troops from around the capital, Freetown, retake key mines from the RUF and destroy the RUF’s headquarters.”).

stated.¹²⁹ Executive Outcomes took just eleven days to accomplish what the government's armies could not: They drove the rebels away from the capital and, with the support of the company's combat helicopters and MIG-23 fighters, chased the rebels out of the diamond fields.¹³⁰ By the end of 1996, Executive Outcomes had beaten back the rebels for eighteen months, but the Sierra Leone Army had grown upset at the government's continued and increasing reliance on outside armies.¹³¹ The government signed a peace treaty with the rebels, and Executive Outcomes was asked to leave the country in January 1997.¹³²

Just four months later, the officers of the Sierra Leone Army seized control of the country and began murdering political opponents.¹³³ The United Nations expressed concern but offered only an arms embargo and diplomatic efforts.¹³⁴ In March 1998, the British High Commissioner in Sierra Leone, acting under the apparent authority of the British Home Office, asked a British corporation, Sandline International, to help train and equip a local force, which would be capable of removing the generals.¹³⁵ Sandline employees trained and directed the West African multinational peacekeeping force (staffed mostly by Nigerians) and equipped them with thirty tons of small arms (imported by Sandline).¹³⁶ Under Sandline's direction, the West African force restored the elected president of Sierra Leone to power.¹³⁷ When the news broke in Britain, a national political scandal erupted.¹³⁸ The Prime Minister was nearly rebuked by Parliament, and Parliament developed a bill to regulate—not prohibit, but regulate—future dealings between PMCs and British officials.¹³⁹

¹²⁹ See Sam Kiley, *Sierra Leone Faces Aid Cut Over Apartheid Soldiers*, *TIMES* (London), July 19, 1995, LEXIS, News Library, Ttimes File ("This month a company of men who were trained by the South Africans retook the Kono diamond mining area in the east of the country, around the towns of Koidu and Yengema, thus denying the rebels access to a source of funding.").

¹³⁰ See Kiley, *supra* note 128 ("President Kabbah had almost routed the rebels with the help of Executive Outcomes, a South African mercenary company. With 146 soldiers of fortune and one M124 helicopter gunship he had all but finished them off.").

¹³¹ See Isenberg, *Post-Cold War*, *supra* note 98, at 14.

¹³² See Jeffrey Lee, *Give a Dog of War a Bad Name*, *TIMES* (London), May 4, 1998, LEXIS, News Library, Ttimes File ("In January 1997 . . . President Kabbah ended Executive Outcomes' contract.").

¹³³ This is a good counterexample to the liberal theory of force. See discussion *infra* Part V.C.

¹³⁴ See . . . *And African Democracy*, *WASH. POST*, Nov. 4, 1997, at A16, LEXIS, News Library, Wpost File (celebrating the United Nation's decision to impose an oil and arms embargo on Sierra Leone).

¹³⁵ See Evans, *Sandline Chief*, *supra* note 5; *Lines in the Sand*, *supra* note 5; Watt, *supra* note 5.

¹³⁶ See Nicholas Rufford, *Diamond Dogs of War*, *TIMES* (London), May 10, 1998, LEXIS, News Library, Ttimes File (detailing the arms shipped to Sandline and how its training of Nigerian forces blew up in the face of the Labour party).

¹³⁷ Lee, *supra* note 132.

¹³⁸ See *supra* note 5 and accompanying text.

¹³⁹ See *id.* In 1998, the South African Parliament passed the Military and Foreign Assistance Act,

But Colombia is the most dramatic and recent example on record. Numerous PMCs are working under contracts with the Colombian government, the United States Department of Defense, and the United States Department of State at an estimated cost of between \$770 million and \$1.3 billion.¹⁴⁰ They make up roughly twenty percent of the American military personnel working in Columbia, flying BlackHawk attack helicopters to assist Colombian security forces in the ongoing military campaign against drug cartels and Marxist guerilla rebels.¹⁴¹

We should be careful not to make too much or too little of these examples. On the one hand, they are not epic wars. They are relatively small conflicts that involve modest commitments of equipment and troops. At most, they suggest a limited trend toward a public/private substitution: In some conflicts, when modern liberal states refuse to intervene, PMCs fill the gaps. On the other hand, these examples suggest that liberal states might be responsible for these arrangements to some degree. The British government has permitted and encouraged PMCs to fight in Sierra Leone, and the United States government remains deeply involved in the day-to-day business of MPRI.¹⁴²

But what about the big wars, in which modern liberal states directly intervene? Surprisingly, PMCs have become increasingly involved in these conflicts too. Since the Cold War, an increasing number of civilian defense contractors have been joining government military personnel on the front lines.¹⁴³ Private defense employees made up roughly one percent of personnel deployed in the first Gulf War; they were approximately ten per-

under which the South African parliament passed legislation that effectively banned mercenaries by making it unlawful for any South African citizen to participate in armed conflict on foreign soil, and implementing stiff forfeiture penalties for violations. Dustin Chick, *Mercenary Groups Discussed*, BUS. DAY (South Africa), Dec. 11, 1998, at 2, LEXIS, News Library, Tmlbd File; see also *Executive Outcomes Set To Close Down*, AGENCE FRANCE PRESSE, Dec. 9, 1998, LEXIS, News Library, Afp File (stating that Executive Outcomes announced its decision to close eight months after the legislation was passed).

¹⁴⁰ SINGER, *supra* note 113, at 207.

¹⁴¹ Guillory, *supra* note 108, at 111-12 (citing Juan O. Tamayo, *Privatizing War: U.S. Civilians Taking Risks in Colombia Drug Mission*, WILMINGTON MORNING STAR, Feb. 26, 2001, at A1). The American firm DynCorp was hired by the Department of State to maintain and pilot Blackhawk helicopters and conduct search-and-rescue missions. *Id.* at 127. In February 2001, the FARC guerillas downed a Colombian helicopter and a DynCorp Blackhawk was sent to rescue the crew. *Id.* DynCorp employees became directly engaged in a firefight against FARC guerillas. *Id.*; Ignacio Gomez, *U.S. Mercenaries in Colombia*, COLOMBIA REPORT, Jul. 16, 2000, available at <http://colombiajournal.org/colombia19.htm> (last visited Oct. 10, 2003) (on file with the Connecticut Law Review).

¹⁴² See SINGER, *supra* note 113, at 115, 121-22.

¹⁴³ See Schwartz, *supra* note 98, at 102 (“[T]he Army has changed dramatically in the past decade, shedding almost one third of its soldiers even as it has taken on missions from Kosovo to Kabul. At the same time, a government-wide push to privatize, as well as the increasing complexity of military hardware, makes the military more dependent on contractors.”).

cent of personnel deployed in Bosnia and the second Gulf War.¹⁴⁴

There have been abuses and scandals. In Bosnia, for example, seven DynCorp employees were fired for operating a sex ring, in which underage Bosnian women were held as slaves.¹⁴⁵ But in the private military industry, the future looks bright. DynCorp already protects State Department Employees around the world and recently won contracts to protect the new President of Afghanistan, Hamid Karzi, and to “re-establish police, justice, and prison functions in post-conflict Iraq.”¹⁴⁶ MPRI already conducts troop training throughout Africa and recently won a contract to help build a coast guard in the oil-rich waters of Equatorial New Guinea.¹⁴⁷ And, while the news from Iraq is still new, one observer predicted that PMCs would play a bigger role in Iraq than they have played in any previous war.¹⁴⁸ By all accounts, the revival of PMCs has barely begun.

4. *Two Observations*

To say the least, the privatization of force is a complex, widespread trend.¹⁴⁹ Like the monopolization of force, it resists simple descriptions and classifications. Nonetheless, we can make two obvious points.

First, we have not come full circle. Liberal states are not back where they started one hundred years ago, let alone one thousand years ago. Today’s private punishment, policing, and military corporations are hardly comparable to the practices of convict leasing, thief-taking, strike-busting, colonization, mercenarism, or privateering that prevailed in centuries

¹⁴⁴ SINGER, *supra* note 113 (Iraq); Wayne, *supra* note 98 (Bosnia).

¹⁴⁵ Schwartz, *supra* note 98, at 108.

¹⁴⁶ *Id.* at 103.

¹⁴⁷ Wayne, *supra* note 98.

¹⁴⁸ See Schwartz, *supra* note 98, at 104.

¹⁴⁹ I have provided only a broad outline of this trend. I have not mentioned, for example, our historical reliance upon professional bailbondsmen and rewards. See Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 744-77 (1996) (discussing the legal rights of bounty hunters in English common law, early America, and the modern United States); Holly J. Joiner, Note, *Private Police: Defending the Power of Professional Bail Bondsmen*, 32 IND. L. REV. 1413, 1414-16 (1999) (discussing the history of the professional bail bonds system). The United States Government offered several large rewards for information leading to the capture of high-profile fugitives: \$25 million for Osama bin Laden and Saddam Hussein; \$30 million for Uday and Qusay Hussein; \$2 million for Ramzi Ahmed Yousef and Timothy McVeigh; and \$1 million for Eric Rudolph and Theodore Kaczynski. See *Program Placing Bounties on Terrorists Started in '84*, BALT. SUN, July 4, 2003, at 9A (bin Laden); *U.S. Offers \$25-Million Reward for Information Leading to Saddam's Capture*, CAN. PRESS, July 3, 2003, 2003 WL 58533698 (Saddam Hussein); *U.S. to Pay \$30M for Saddam's Sons Tip*, TIMES (LONDON), Aug 1, 2003, at 19 (Uday and Qusay Hussein); J. Scott Orr, *Lavish U.S. Bounties Yield Prey Only Rarely*, SEATTLE TIMES, Aug 11, 2003, at A13 (Ramzi Ahmed Yousef, Timothy McVeigh, Eric Rudolph, and Theodore Kaczynski). In addition, the Montgomery County Police Department collected \$500,000 in private funds for information leading to the capture of the “snipers” who killed ten people in the fall of 2002. See *\$500,000 Up for Grabs in Sniper Case: Reward Money Still To Be Decided*, Can. Press, Oct. 25, 2002, 2002 WL 102274585.

past.¹⁵⁰ To be sure, private punishment, policing, and military corporations have emerged and expanded quickly over the last thirty years, but they still live largely in the shadows of exceptionally powerful governments. In many cases, they exist largely at the request or behest of such governments.

For this reason, we should be suspicious of analogies between past and present examples of the privatization of force. Such analogies tend to obscure one of the greatest political, economic, and social transformations of recent history: the rise of modern, liberal administrative states. In today's world, liberal states have many more political, economic, and cultural resources available to hold modern punishment, policing, and military markets in check.¹⁵¹ How liberal states should use these resources is a less obvious question, which we are about to confront.

The second point is the flipside of the first: Although the privatization of force has just recently begun, it constitutes a striking, decisive departure from our recent past. Before this trend began, most liberal states had been monopolizing punishment, policing, and military force for at least fifty years, and in some respects, for nearly three centuries. Thirty years ago, private armies and private police were nearly forgotten, and private prisons did not exist. Today, these corporations are doing a thriving business around the world, and increasingly being noticed by legislatures, courtrooms, and newspapers. I have highlighted the most extreme examples because they drive my point home: Over the last thirty years, liberal states have started to turn away from—or at least reconsider—the old adage that the state must monopolize force.

¹⁵⁰ As obvious as this point seems, some critics of prison privatization have sought to resist it. See, e.g., SILVERSTEIN, *supra* note 122, at 145-46 (suggesting a historical link between early “mercenaries” and modern private “mercenary firms” and arguing that “[t]he only difference between what these firms do and what mercenaries do is that the companies have gained the imprimatur of government”); Durham, *supra* note 42, at 40-43 (arguing that “the historical record” of convict leasing suggests that the modern privatization of prisons will increase “abuses of inmates”); *id.* at 49 (“[I]t seems likely that at least some of the errors committed in the nineteenth century experiment with correctional privatization will recur in modern efforts.”); Chris Weaver & Will Purcell, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 HOW. L.J. 349, 353 (1998) (“analogiz[ing] the prison industrial complex with the convict leasing system of the Reconstruction Era”); White, *supra* note 33, at 133 (“I think it clear that convict leasing does anticipate in a very substantial way the problematic characteristics of the contemporary private prison.”); see also W.J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829, 847-49 (1987) (arguing that a “survey of past practice in Tennessee teaches a number of lessons” regarding the “risks” associated with modern private prisons).

¹⁵¹ Cf. Sean McConville, *Aid from Industry? Private Corrections and Prison Crowding*, in AMERICA'S CORRECTIONAL CRISIS: PRISON POPULATIONS AND PUBLIC POLICY 221, 225 (Stephen D. Gottfredson & Sean McConville eds., 1987) (“The scope and powers of public regulatory bodies have grown enormously in the last century and a half.”). Of course, this presumes that liberal states want to regulate private markets. If they do not, then they are not very “liberal” states.

III. THE MATRIX: SUPPLY AND DEMAND

*[N]o one . . . is suggesting that the state . . . should give up its monopoly over the allocation of punishment All that is being argued is that the delivery of some of these punishments might be entrusted to private agencies in one form or another.*¹⁵²

So a gap has apparently emerged between the theory and practice of liberalism. I am hardly the first person to notice it. Beneath the radar of most liberal philosophers,¹⁵³ vibrant public policy debates have been raging for years over the privatization of punishment, policing, and military force. In the next Part, we will explore those debates. But we are not yet prepared.

Before we delve into our public policy debates, we must first introduce a fundamental distinction: the distinction between the *supply of* and the *demand for* force. It is a complex and broad distinction that must be deliberately defined. In the next Part, our efforts will pay off. The distinction will deepen our understanding of many relevant topics: our recent privatization of punishment, policing, and military force; our public policy debates over these trends; and our abiding attachment to the old idea that liberal states must monopolize force.

In this brief Part, I spell out the distinction between supply and demand from two different perspectives: at first through an economic lens, and then through a political/legal lens. In economic terms, the supply/demand distinction represents distinction between the “provision” of force and the “payment” for force. In political/legal terms, it represents the distinction between the “exercise” and “allocation” of force. But these are opaque terms that must be explained.

There are actually two distinctions here: between “public” and “pri-

¹⁵² RYAN & WARD, *supra* note 32, at 3.

¹⁵³ But not all, if you count Michael Walzer as a “liberal” philosopher. See Michael Walzer, *At McPrison and Burglar King, It's . . . Hold the Justice*, NEW REPUBLIC, Apr. 8, 1985, at 10 [hereinafter Walzer, *McPrison and Burglar King*] (recognizing and discussing the debate about privatization of prisons). I find it a little hard to do that, though, because Walzer seems to eschew every kind of foundational analysis in his work. See MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS*, at xi (1977) [hereinafter WALZER, *JUST AND UNJUST WARS*] (“I did not begin by thinking about war in general, but about particular wars.”); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY*, at xiv (1983) [hereinafter WALZER, *SPHERES OF JUSTICE*] (“My argument is radically particularist. I don’t claim to have achieved any great distance from the social world in which I live. One way to begin the philosophical enterprise—perhaps the original way—is to walk out of the cave, leave the city, climb the mountain, fashion for oneself . . . an objective and universal standpoint But I mean to stand in the cave, in the city, on the ground. Another way of doing philosophy is to interpret to one’s fellow citizens the world of meanings that we share.”).

vate” and between “supply” and “demand.” In public finance theory, the distinction¹⁵⁴ between “public” and “private” modes of organization can be broken down into two component distinctions: First, there are public and private ways to create supply; second, there are public and private ways to

¹⁵⁴ Please note that I purposefully avoided using the word “choice” here. In this Article, I generally eschew the social contract metaphor. Still, I should clarify the degree to which the privatization of force is actually a product of collective, intentional “choices”—in particular, the intentional choices of liberal states. As the rest of this section suggests, it is not always accurate to talk in those terms.

Think of private policing, for example. Over the last thirty years, we have seen the privatization of both the supply of and the demand for policing. See discussion *supra* Part II.B.1. Corporations provide more policing than they once did; individuals and corporations buy more policing than they once did. See *id.* While it is clear that policing has been “privatized” in the passive sense, it is not so clear that liberal states have been “privatizing” policing in the active sense. True, liberal states have hired private police firms. See discussion *supra* note 60 and accompanying text. But that is only half of the picture, and the picture is large. To some degree, the privatization of policing has been driven by markets in addition to governments.

Many liberal philosophers—especially libertarians—tend to believe that markets are not the products of collective, intentional choices. Instead, they argue that markets emerge “naturally” or “organically” as the result of the uncoordinated, self-interested choices of individuals. In fact, this is often cited by political theorists as the definition of a “market.” See, e.g., HAYEK, *supra* note 10, at 38 (discussing the “spontaneous order” and the “market order”); SMITH, *supra* note 12, at 456 (discussing the market as the product of “an invisible hand”). A few such theorists have even used this idea to explain and justify the development of the liberal state. See, e.g., NOZICK, *supra* note 7, at 52 (“We argue that the first transition, from a system of private protective agencies to an ultraminimal state, will occur by an invisible-hand process”); SMITH, *supra* note 12, at 46–48 (discussing how society emerges from spontaneous order and government emerges to “keep” the order).

This question of “choice” is not a significant issue for my argument. It can be largely resolved by defining the term “privatization” carefully and clarifying my position on the responsibility of governments. For present purposes, let us say that “privatization” is a process, rather than an activity. The process of “privatization” is a series of intentional and unintentional acts and omissions of governments, corporations, and individuals, through which governments end up providing and paying for less punishment, policing, and military force, while corporations and individuals end up providing and paying for more. (The terms “provision” and “payment” are defined in this Part, as are the rough synonyms “exercise” and “allocation.”).

At first glance, the claim that markets develop “naturally” or “organically” seems to raise a deep philosophical question: If liberal states do not always cause the privatization of force, should we hold liberal states responsible for the privatization of force? Indeed, if liberal states do not cause the process of privatization, then why bother to ask what liberal states should “do” about the privatization of punishment, policing, and military force?

These questions may sound deep, but they actually ring hollow. The fact that states do not always create markets does not mean that states are powerless to promote or resist the emergence of markets, or that states should not be held responsible for the existence of markets. In this Article, I tend to assume that states can and should be held responsible for all forms of privatization, whether or not it was the result of acts or omissions, intentional or unintentional, collective or individual, public or private. Even if liberal states did not always cause the privatization of force, in most cases, they could have done something about it. They could have resisted it, if not eliminated it. The Aviation and Transportation Security Act is a case in point. In the era of the modern administrative state, there is nothing “natural,” “organic,” or “necessary” about the emergence of markets. See discussion *supra* Part II.B.4 (discussing the power of modern liberal states). (One exception might be the global emergence of the private military market, which is somewhat beyond the control of any given state, and can only be limited by the application of international laws.)

express and control¹⁵⁵ demand.¹⁵⁶ This suggests the following two-by-two matrix, which I will leave empty for now:

¹⁵⁵ I apologize for the awkward phrase “express and control demand,” but it is necessary because I am painting a picture that includes markets and governments in the same broad stroke. We can use these two terms interchangeably, depending on how we think of demand. In a purely free market, we think of demand as a given: It is the sum of every consumer’s desires for a particular product. In this model, no one “controls” demand; each consumer “expresses” demand by bidding on different products at different prices. But our system of punishment, for example, is not a purely free market. How we talk about the demand for punishment depends on who we imagine demanding punishments. For example, if we think of the government as the customer, then we would talk of the government’s “demand” for punishment. We would say that legislators, judges, and administrators “express” demand by regulating and paying for the process of punishment. But if we think of the people as the customer, then we would speak of the people’s “demand” for punishment. In this case, we would describe a more complicated dynamic, in which governments both “express” and “control” the demand for punishment. Thus, it becomes necessary to include both terms in the text.

¹⁵⁶ To my knowledge, this formulation of the distinction between the “supply” of and “demand” for force does not appear in the literature on the privatization of punishment, policing, and military force, or anywhere else. It is, however, inspired by a handful of comparable distinctions. See, e.g., DONAHUE, *supra* note 23, at 7-11 (distinguishing between the “performance” and “financing,” or “delivery” and “payment” of services); RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 41-72 (5th ed. 1989) (distinguishing between the “production” and “provision” of social goods); RYAN & WARD, *supra* note 32, at 69 (distinguishing between the “delivery” and “allocation” of imprisonment); THOMSON, *supra* note 32, at 8-9 (distinguishing between state and non-state “ownership,” state and non-state “decision-making authority,” and authoritative and market “allocation” of state violence). By using the general labels “supply” and “demand,” I mean to phrase my argument simultaneously in economic, political, and legal terms, to cast the widest possible net for my readers.

My distinction between “supply” and “demand” is perhaps most akin to Donahue’s distinction between “delivery” and “payment.” See DONAHUE, *supra* note 23, at 7-11. Thus, it might be worth identifying one important difference between our two frameworks. When Donahue refers to the “privatization decision,” he means only the choice between public and private supply, as distinguished from the choice between public and private demand. See *id.* at 7 (“[I]n the United States, privatization had a quite different meaning . . . [I]t meant (and continues to mean) enlisting privatized energies to improve the performance of tasks that would remain in some sense public.”); *id.* at 10 (“This book aims to develop and illustrate a set of principles to guide the allocation of publicly financed tasks between governmental and nongovernmental organizations.”); *id.* at 12 (“This and the following chapter provide a framework for thinking about *privatization*, mapping the terrain on the . . . *domain of social spending*.”) (emphasis added); *id.* at 79 (describing “the privatization decision” as the choice between the public or private “*performance of public functions*”). When I speak of “privatization,” I refer to the demand for force, as well as the supply of force. This suggests that in my view, policing has been “privatized,” whereas in Donahue’s view, it has not.

Figure 1

		Demand	
		Public	Private
Supply	Public		
	Private		

When you look at this matrix, consider a few general caveats. First: Please remember that “public” and “private” are always metaphors and matters of degree. In real life, institutions inhabit countless complex spaces along a continuum between these two ideal forms. Second: In the United States, roughly one *half* of the tax revenues collected by federal, state, and local governments is spent in the lower left box of the matrix, to pay for privately supplied goods and services.¹⁵⁷ That fact has very little to do with the privatization of punishment, policing, and military force, but it provides a sense of how widespread the “public demand, private supply” arrangement has become in today’s liberal states. Lastly, and most importantly, please take a moment to put your mind into the matrix. It is exceptionally abstract, and rather opaque, but worth a bit of intellectual struggle. For this reason, I will flesh out the matrix not just once, but twice, from both economic and political/legal perspectives.

A. *Provision and Payment: The Economics of Supply and Demand*

First, think economically. What do I mean by “public” and “private” ways to “create supply” and “express or control demand”? In economic terms, I mean public and private modes of *provision* and *payment*.¹⁵⁸ What

¹⁵⁷ See DONAHUE, *supra* note 23, at 8 (stating that “[t]he American public sector—federal, state, and local levels combined—spent \$965 billion in 1988 Of this sum, \$462 billion went to buy goods and services from outside organizations.”).

¹⁵⁸ Public finance theorists beware. In public finance theory, the terms “production” and “provision” are traditionally used to denote “supply” and “demand,” in that order. See, e.g., MUSGRAVE & MUSGRAVE, *supra* note 156, at 41-72 (laying out an economic theory of the public production and provision of social goods). Thus, for public finance theorists, it will seem strange that I have chosen the terms “provision” and “payment” to denote “supply” and “demand.”

While I was reluctant to introduce new terms into an old debate, I had no choice but to adopt new terms here. Unfortunately, I found that the traditional “production/provision” formulation suffered from two major problems: First, in common usage, “production” and “provision” are normally understood to be synonyms, and both are understood to describe ways in which someone *supplies* something

is “provision”? Provision represents the following question: Who provides punishment, policing, and military force—governments or corporations? If you are not an economist, that question might sound awkward. In everyday life, we do not normally talk about “supplying” or “providing” punishment, policing, and military force. But that is precisely the point: The economic perspective encourages us to think of punishment, policing, and military force as “services” that governments and corporations “provide.”

What is “payment”? Payment represents the following question: Who pays for punishment, policing, and military force—governments or “customers”? (By “customers” I mean private individuals, associations, and corporations.) Instead of payment, we might also say “spending.” When customers pay for something, we often call that “purchasing” or “consumption”; when governments pay for something, we often call that “financing.”¹⁵⁹ These synonyms clarify one important point: For the purposes of this Article, “payments” are not only payoffs, or monetary exchanges. They are payoffs attached to economic decisions. They are private and public arrangements to purchase and finance the provision of force.

Like every other choice on the matrix, the choices between public and private provision and payment are not black and white. Specifically, “provision” can be broken down into three distinctions between public and private forms: ownership, management, and employment. In contrast, it is not very helpful to break down “payment” into separate parts. But it is helpful to think about the difference between public and private payment as the difference between taxes and prices: Public payments are relatively collective and mandatory, like most taxes; private payments are relatively individual and voluntary, like most prices.¹⁶⁰ With this more economic per-

to someone else. (It is possible that “provision” is slightly broader than that, but they clearly overlap.) Second, when we speak of punishment, policing, and military force—or more broadly, when we speak of services, rather than goods—it is very awkward to use the term “production” to describe the creation of supply and very confusing to use the term “provision” to describe the expression of demand. Take policing, for example: When we want to say that the state “supplies” policing services, we don’t normally say that the state “produces” policing services. In fact, we are more likely to say that the state “provides” policing services. When we talk about supply, we typically say that goods are produced and services are provided. In fact, when I presented an earlier version of this Article at a workshop, several readers consistently made this exact mistake, although many of them have written extensively in the field of law-and-economics. I therefore decided to go with the flow and find some new terms.

¹⁵⁹ Two additional points: First, when we say “financing,” we must be careful. This is a question of demand. It is a question of who pays revenues, not who invests capital. Capital is a question of supply, not demand. It is the same as the question of ownership: Whoever invests capital owns the organization.

Second, in common parlance, we say that the government “finances” widely-used services, whereas private organization and individuals “pay for” or “purchase” them. For this reason, when I discuss the possibility of “public payment,” I often use the verb “to finance” in lieu of “to pay for.” Although it does introduce a small degree of uncertainty, it enables me to write in much more common, less awkward terms.

¹⁶⁰ This distinction is helpful, but it must not be taken too literally, like the matrix itself. Not everything called “taxes” and “prices” fits this profile. Some taxes are relatively optional; some prices are

spective in mind, let us revisit the matrix:

Figure 2¹⁶¹

		Payment	
		Public	Private
Provision	Public	U.S. Armed Forces	U.S. Postal Service
	Private	Private Prisons	Private Police

Hopefully, this makes things a bit clearer. Rather than running through each box, I will compare two examples: private prisons and private police. In terms of provision, the two examples are similar: Corporations provide

relatively mandatory. We often use labels like “taxes” and “prices” to attack and defend economic policies. *See* DONAHUE, *supra* note 23, at 9 (noting that the first Bush administration traded on the distinction between taxes and prices).

This point was offered by Donahue, who seemed to understand in practice, if not also in theory, that both “distribution” and “voluntariness” were factors in distinguishing between public and private payment. *Compare id.* at 9 (discussing the difference between prices and taxes and using both distribution and voluntariness as factors), *with id.* at 7, fig. 1.1 (presenting only “delivery” as the “central” issue in distinguishing between “collective” or “individual” systems of “payment”).

As this suggests, there is an important difference between what makes “payment” and “provision” public. The distinction between public and private payment can be discerned, or defined, in terms of two variables: the “voluntariness” and the “distribution” of payment. In contrast, voluntariness is not such a good guide when it comes to the distinction between public and private provision.

Of course, there is some sense in which the form of capital is linked to the form of payment—the state can not own something without collecting taxes—but the same is not really true for public labor. We would not want to say, for example, that public management and employment actually requires us to draft state managers and employees. Presumably, our state’s annual work force is considerably larger than the stream of jurors who we conscript into service every year and the occasional influx of drafted soldiers. We do not normally talk about public labor this way, and later in this Article, I argue that there are some good reasons for that.

This, in turn, raises the question of what we actually mean when we say that labor is “public.” Often, we simply mean that capital is public. But sometimes we also mean that, as a result of the public nature of capital, public labor is less influenced by the market: less motivated by profit; less concerned with ends (as opposed to means); less governed by output-based contracts (as opposed to input-based contracts); less vulnerable to competitive pressures, such as the threat of termination. In a word, we mean that public labor is more “loyal” to some public cause. *See id.* at 40–48 (distinguishing between “profit-seeking” and “civil service”). In this Article, I argue that the public provision of military force is the single most extreme example of this phenomenon. *See* discussion *infra* Part V.D.3.

¹⁶¹ To simplify matters, this figure includes only private police who are hired by private customers, such as individuals, associations, or corporations. When private police are hired by governments, they appear in the lower left box, like private prisons.

both private prisons and private policing. But in terms of payment, the two examples are different: Customers pay for private policing, but they do not pay for private prisons.¹⁶² Only governments pay for private prisons.

The difference between private punishment and private policing is even more complicated. In my example, I included only private police hired by private customers, such as individuals, associations, and corporations. In other words, I excluded private police hired by governments. But in the real world, governments often enter the private policing market as “customers” (or “consumers”) and pay for private police. In the United States, federal, state, and local governments spend almost as much on private police as they spend on public police.¹⁶³ In those cases, private police are roughly like private prisons: provision is private, payment is public. Thus, in the real world, “private policing” appears in both the lower left and lower right boxes.

As this point suggests, it is possible to think about these examples and boxes in much broader terms. For instance, imagine that “public police” and “public prisons” were included in the matrix as well. They would both appear in the upper left box, alongside the United States Armed Forces. Including these two examples reveals that we can speak of the overall provision of and payment for “policing” or “punishment.” What would we say? From this broad perspective, we would say that the provision of policing is both public and private, or “mixed,” and the provision of punishment is also mixed. The payment for policing is also mixed.¹⁶⁴ But the payment for punishment is different: It is purely public. Only governments finance punishment. This is a special quality of punishment: You cannot “shop” for imprisonment services. At times, it will become useful to think in these broader terms.

Before we move on, let me clarify two further points: First, you might have noticed that PMCs do not appear on the matrix. In the private military market, there are some confusing details.¹⁶⁵ But on the whole, for the

¹⁶² This might appear to be a simplification given that shareholders invest capital in private prisons. But we should not read the word “payment” literally so that it includes all forms of payment. “Payment” is about revenues, not capital; it is about income, not investment. In the matrix, capital investments appear on the supply side because they determine the ownership of punishment, policing, and military institutions.

¹⁶³ See *supra* note 60 and accompanying text.

¹⁶⁴ As we have seen, the payment for policing is deeply mixed: Individuals and corporations pay for private police, and governments pay for both private and public police. “Policing” is thus the most diversely organized of the three forms of force; it appears in three of the four boxes in the matrix.

¹⁶⁵ The biggest detail is whether we consider foreign states as “public” or “private” customers, and whether you distinguish between “liberal” and “non-liberal” states. For the purposes of this Article, foreign liberal states are public customers, and foreign non-liberal states are beside the point. (Thus, I only included the examples of Sierra Leone, and perhaps Colombia, because they highlighted the complicity of liberal states, such as Great Britain and the United States, in hiring PMCs.)

purposes of the matrix, we can say that private armies that are owned, managed, and staffed within the territories and jurisdictions of liberal states are roughly like private police who perform different tasks, and work almost exclusively for government clients.¹⁶⁶ By definition, they are privately provided, but in most cases, they are publicly financed.

The second point is that, no, I am not a conspiracy theorist. I do not believe that the U.S. Postal Service has anything to do with the supply of or demand for force. I include the U.S. Postal Service just to round out the matrix: The federal government provides postal services, but customers pay for them, by paying for stamps.¹⁶⁷ There are more relevant examples that fall into this box, but they are much more obscure. The clearest one is public police departments “moonlighting” for private clients in exchange for private funds.¹⁶⁸

B. *Exercise and Allocation: The Politics and Law of Supply and Demand*

Enough economics. Now let us shift into political/legal gears. What do I mean by “public and private ways” to “create supply” and “express or control demand”? In political and legal terms, I mean public and private modes of *exercise* and *allocation*. “Exercise” is a fairly simple concept: It is the execution, performance, or implementation of punishment, policing, and military tasks. It asks us: Who exercises punishment, policing, and military force—corporations or governments? There is, however, one important wrinkle. From now on, we must distinguish between the “use” and “exercise” of force. The “use” of force includes only *threats* and *acts* of legitimate physical coercion. The “exercise” of force includes these threats and acts, but it also includes many *supply-side* decisions regarding who may use force, as well as when, where, how, how much, and against whom force may be used. Instead of exercise, we might also say “enforcement.”¹⁶⁹

The concept of “allocation” is much more complex.¹⁷⁰ First and fore-

¹⁶⁶ See discussion *supra* note 110 and accompanying text.

¹⁶⁷ The United States Postal Service turns a profit. It is operated entirely on the proceeds of postal charges. Postal Reorganization Act of 1970 § 101(d), 39 U.S.C. § 101(d) (2000); see also DONAHUE, *supra* note 23, at 8.

¹⁶⁸ ALBERT J. REISS, JR., PRIVATE EMPLOYMENT OF PUBLIC POLICE 5-8 (1988).

¹⁶⁹ The term “enforcement” has two down-sides: First, it is incredibly awkward to say, “the enforcement of force.” Second, we do not normally use the terms “military” and “enforcement” together.

¹⁷⁰ Janice Thomson breaks the public/private distinction into three different categories: “decision-making authority,” “allocation,” and “ownership.” THOMSON, *supra* note 32, at 8. Roughly speaking, her concept of “decision-making authority” is equivalent to my concept of “allocation.” Her use of the term “allocation” is a bit puzzling. She appears to be guessing whether governments, corporations, and other organizations make decisions based on economic or political motives. This seems like an unnecessary guessing game, and moreover, it leads her to a questionable result: She says that whenever one state “leases” troops to another state, this a “market” allocation, comparable to the motives of a “soldier of fortune.” *Id.* at 8-9.

most, “allocation” includes all of the *demand-side* decisions that governments and customers make regarding who may use force, as well as when, where, how, how much, and against whom force may be used.¹⁷¹ But it also includes demand-side activities: discussions, negotiations, and inspections. It asks us: Who allocates punishment, policing, and military force—governments or customers? Instead of allocation, we might also say, “authorization,” or “legitimation.”¹⁷²

Like the concept of payment, the concept of allocation cannot be usefully broken down into component parts. But it is helpful to think about the difference between public and private allocation as the difference between regulations and contracts: From the perspective of citizens, public allocations are relatively collective and mandatory, like most regulations; from the perspective of customers, private allocations are relatively individual and voluntary, like most contracts. We classify regulations by the public institutions that issue them: “legislative,” “judicial,” and “administrative.” Punishment offers good examples of regulations: Legislators define crimes and establish penalties; judges fix sentences; politicians and administrators review requests for clemency and parole.

Like the taxes/prices distinction, the regulation/contract distinction

I do not consider exchanges of troops and funds between states as especially advanced examples of “privatization.” In contrast to other examples, there are governments on both sides of these exchanges. As a result, there is less reason to suspect that these exchanges are motivated by “profit,” in the narrow, economic sense of that term. And once we start to include the “self-interested” motivations of states as “profits,” the modern, Weberian framework starts to fall apart. Second, on a more mundane level, I do not think that this distinction adds much to Thompson’s analysis, or that it would add much to mine. And it comes at a big cost: A matrix with four boxes is hard enough to understand. A matrix with eight boxes—essentially a flattened out cube—is really a bit of a nightmare. See, e.g., *id.* at 8 (outlining an “eight-box” matrix).

¹⁷¹ There is a tricky issue here: It seems that every “allocation” of force is also an “exercise” of force, in the sense that every allocation of force is a “threat” of force. In *Violence and the Word*, Robert Cover famously argued that “[n]either legal interpretation nor the violence it occasions may be properly understood apart from one another.” Cover, *supra* note 21, at 1601. I agree. But I am not arguing that allocations and exercises can be understood apart from one another in everyday life. I am only arguing that they can be distinguished in conceptual terms, as Cover did in his work. There is clearly a distinction between authorizing and making threats. In Cover’s terms, it is described as the difference between “word” and “deed,” “thought” and “act,” “deliberation” and “domination.” See *id. passim*.

¹⁷² The term “authorization” has two disadvantages: First, in the verb form, it is one-sided. When we “authorize” force, we permit people to exercise it. You cannot use the term “authorize” negatively, to signal a denial of authorization. (By contrast, the term “allocate” always has both a positive or negative sense.) Second, and similarly, the term “authorize” often has broadly permissive connotations. Once someone is “authorized” to do something, they are typically left with substantial discretion. Of course, the term “allocation” may have the opposite fault: It connotes a situation of ongoing control, which may not necessarily be present when we allocate punishment, policing, and military force. You cannot have everything.

The term “legitimation” is more problematic than “authorization” because it is too normative for our purposes. It obscures the fact that politics and law are not only ways of justifying the exercise of force, but also ways of organizing the exercise of force. See generally *id.* at 1616-17 (discussing the problem arising when the realizable organization of force is at odds with the ideal legal model).

should not be taken too literally. It obscures a very important exception: Sometimes governments act like customers. They sign contracts with private prisons, police, and armies. Although these allocations are, indeed, "contracts," they are nonetheless public allocations of force. From the perspective of suppliers, they are individual and voluntary; from the perspective of citizens, they are collective and mandatory.

One of the key elements in the exercise/allocation distinction is the distinction between supply-side and demand-side decisions regarding the use of force. I do not intend to offer any airtight, non-circular definition of these terms. I will say only that supply-side decisions are the kinds of decisions made by managers and employees of public punishment, policing, and military institutions; and owners, managers, and employees of private punishment, policing, and military institutions. (There are no "owners" of public institutions; voters do not make decisions on the supply-side of the matrix.) Demand-side decisions are regulations and contracts. They are made by legislators, judges, administrators,¹⁷³ and customers.

"Allocation" is easily the broadest and least intuitive concept in this section. In everyday life, we do not often lump together public and private allocations of force. But it is possible to think of them both as members of a particular species of high-level decision regarding the who, when, where, how, and how much of force. In this sense, public and private contracts function much like sentences, warrants, and declarations of war, as well as statutes that authorize and govern exercises of punishment, policing, and military force.¹⁷⁴ All of these things allocate force.

With this political/legal perspective in mind, let us return one last time to the matrix:

¹⁷³ Of course, when I say "administrators," I do not mean to include administrators who are themselves managers and employees of public punishment, policing, and military institutions. In other words, I do not include public wardens, guards, police officers, military officers, and soldiers. Normally, I would use the term "bureaucrats," but later that term takes on special significance in my argument and is applied to public military employees. See discussion *infra* Part V.C.

¹⁷⁴ As these examples suggest, there are many different ways to categorize allocations: "narrow" versus "broad" and "ex ante" versus "ex post," to name just two.

Figure 3¹⁷⁵

		Allocation	
		Public	Private
Exercise	Public	U.S. Armed Forces	U.S. Postal Service
	Private	Private Prisons	Private Police

Because this version of the matrix includes the term “allocation,” it highlights the point that I made earlier—that the distinction between public and private is not black and white. Look at prisons: The matrix suggests that the allocation of imprisonment is “public”—that only governments allocate imprisonment. But there are counterexamples: In countless cases, private persons make demand-side decisions that help determine who is imprisoned, for how long they are imprisoned, and for what they are imprisoned. Individuals decide whether and how to gather evidence, press charges, testify, speak at parole hearings, and so on. But on the whole, the matrix is correct: It is most often and most importantly governments that allocate imprisonment.

To see the same point from the other side, consider the example of the private police. The matrix suggests that the allocation of private policing is “private”—that only customers allocate private policing force. Again, there are counterexamples: Even when private police are privately hired, governments still allocate private policing to some degree. After all, in some cases, governments regulate private policing; they enforce contracts, civil codes, and criminal statutes against private policing firms and employees. But again, on balance, the matrix is correct here too: It is most often and most importantly customers who allocate private policing.

C. *Into the Matrix*

Hopefully, you sense where this is headed. I want to encourage you to think of the last two distinctions—provision/payment and exercise/allocation—as two different versions of the first and most basic distinction between supply and demand. For our purposes, the distinctions between public/private “provision” and public/private “exercise” are actu-

¹⁷⁵ Like Figure 2, this figure includes only private police who are hired by private customers. See discussion *supra* note 161.

ally the same distinctions, as are the distinctions between public/private “payment” and public/private “allocation.” It is awkward to convey in words, but easier to convey in analogies:

Supply Analogies

1. Public Supply = Public Provision = Public Exercise
2. Private Supply = Private Provision = Private Exercise

Demand Analogies

1. Public Demand = Public Payment = Public Allocation
2. Private Demand = Private Payment = Private Allocation

Initially, you may balk at the analogies between payment and allocation. Please do not bother. I am not suggesting that “payments” and “allocations” are the same things, or that every decision to pay for something is also a decision to allocate something. Sometimes they are; sometimes they are not. For instance, if I hire a bodyguard, my payment for force would be very closely linked to (perhaps indistinguishable from) my allocation of force. But when judges send criminals to prison, they probably do not consider the economic costs of imprisonment,¹⁷⁶ and they certainly do not make public payoffs to prisons. Nor should they.¹⁷⁷ Sentences are public allocations, not public payments.

But the matrix is not about individual cases, nor even categories of allocations and payments. It is about the distinction between public and private organizational modes. Thus, when I draw analogies between payments and allocations, I suggest only that private allocations require private payments and that public allocations require public payments. Conversely, I suggest that private allocations do not require public payments and that public allocations do not require private payments. In modern organizations, the two pairs almost always appear together; they almost never cross-

¹⁷⁶ But see Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1230 (1985) (“Although judges and legislators do not often speak the language of economics, this Article suggests that they often do reason implicitly in economic terms, and that economic analysis is therefore helpful in explaining the basic structure of law, including the criminal law.”).

¹⁷⁷ The idea that judges cannot and should not command the power of the “purse” or the “sword” is a old canard in the jurisprudence of judging. It is also a classic expression of the doctrine of separation of powers. See *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Courts authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”); THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter, ed. 1961)(stating that the judiciary is the least dangerous branch of government because it has no control of the sword or purse); Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 59 (2002) (arguing that since judges have control over neither the sword nor the purse, all they have is the public confidence).

pollenate, as follows:

Public Organizational Modes

1. Public Demand = Public Payment + Public Allocation
2. Public Supply = Public Provision + Public Exercise

Private Organizational Modes

1. Private Demand = Private Payment + Private Allocation
2. Private Supply = Private Provision + Private Exercise

In concrete terms, what does this say? Imprisonment provides a simple example. When (public) judges send criminals to prisons, (public) legislators and (public) administrators consider the economic costs of imprisonment, and make public payoffs to prisons. Individual victims of crimes, for example, do not foot the bill.¹⁷⁸ More broadly, when governments allocate punishment, policing, and military force, governments consider the economic costs of these allocations, and governments make payoffs to fund them. Public allocations require public payments.¹⁷⁹ It is not a controversial thought.

Once that much is clear, we can leave the matrix behind. We can venture into our public policy debates over the privatization of punishment, policing, and military force, with the distinction between supply and demand firmly in mind.

¹⁷⁸ In this respect, it is important to distinguish supply from demand, provision from payment, and exercise from allocation. As I suggested earlier, the law-and-order crackdown of the last thirty years led to prison "privatization." See discussion *supra* Part II.B.2. But that was the privatization of supply, not demand. Thus, in my terms, it would be wrong to say that shareholders and corporations *pay for* imprisonment. They invest in punishment, but that is a matter of ownership, and thus, a matter of provision, or supply. They do not supply the revenues or income of private prisons. Payments for private prisons come from taxpayer funds. They are public.

¹⁷⁹ I might add three points: First, there could be some minor exceptions, but they prove the rule. There is one kind of exception that seems most likely: Imagine that a wealthy liberal state offers military aid to an impoverished, pro-democracy rebel group, which then hires a PMC to fight in a civil war. See discussion *supra* Part II.B.3. If we loosened the definitions a bit, we might say that this was an example of a "public payment" and a "private allocation." In substance, though, the distinction seems a bit artificial. At the very least, the liberal state has decided against whom force should be exercised. This is typically considered the most important allocation of all.

Second, the causal chain runs in the other direction as well. Public payments beget public allocations. The clearest examples are negative: Budget freezes and cuts cause government shutdowns. But budget increases enable, and often inspire, increases in allocations (both regulatory and contractual).

Third, when I draw this analogy between payment and allocation, my underlying principle is rational self-interest: Payment and allocation are linked because in the long run, in the big picture, and at the highest levels, governments, corporations, and individuals do not often pay money for nothing and, thus, do not often receive money for nothing. On the whole, organizations get just what they pay for, and pay for just what they get.

IV. THE PUBLIC POLICY DEBATES

*Opponents of privatization . . . never seem able to say with any precision why the private administration of prisons would threaten the 'essence' of the state. It is important to remind ourselves here that we are not discussing the legislative and judicial allocation of punishment, but only its delivery.*¹⁸⁰

Over the past thirty years, many politicians, lawyers, professors, and pundits have argued for and against the privatization of punishment, policing, and military force.¹⁸¹ But until now, few commentators have explored the normative, theoretical links between these debates. Instead, the bulk of the commentary has remained bifurcated between intensive studies of individual institutions or industries and sweeping analyses of privatization itself.¹⁸² There has been little dialogue between the two modes and, thus, little discussion of the "privatization of force" as such. As a result, the normative insights that we have already gained on these topics have remained scattered and hidden. Reading any particular argument, it is difficult to see the landscape of controversy—the continuities and discrepancies between arguments for and against the privatization of punishment, policing, and military force.

In this Part, I glean the most common themes, tropes, and claims from our public policy debates. I aim to discern our normative horizons, so that we may transcend them. But I should warn you of a few things: First, I call these "arguments," but they are ideal types, not actual arguments. In the vast body of literature on the privatization of punishment, policing, and

¹⁸⁰ RYAN & WARD, *supra* note 32, at 69.

¹⁸¹ In researching and writing this Part, I performed a comprehensive search of the vast literature on the privatization of punishment, policing, and military force. If I were to cite each proposition to this body of literature, there would be no room for text. Instead, I cite to a handful of the clearest examples of each type of argument.

¹⁸² Of course, there are some qualified exceptions to this statement. To my mind, the best example of a book that does both things well is John Donahue's *The Privatization Decision: Public Ends, Private Means*. In the end, though, Donahue's concern is both broader and narrower than mine. On the one hand, he offers a theory of "privatization" itself rather than just the privatization of punishment, policing, and military force; on the other hand, he offers a theory that explains when supply should be private but says next to nothing on the topic of private demand. See DONAHUE, *supra* note 23, at 10 ("This book aims to develop and illustrate a set of principles to guide the allocation of publicly financed tasks between governmental and nongovernmental organizations.").

There are some other works that consider the privatization of prisons and policing together, as part of the privatization of "law enforcement." See, e.g., GARLAND, *supra* note 69. There are still others that consider the privatization of prisons and policing as part of a more general trend toward the privatization of "criminal justice." See, e.g., PRIVATIZING CRIMINAL JUSTICE (Roger Matthews ed., 1989). Finally, although one author speaks of the "privatization of security," he largely excludes the privatization of policing, defining the concept of "security" in military terms. See MANDEL, *supra* note 98.

military force, each of the ideas below appears in almost every imaginable form: simple, complex, sublime, and ridiculous. They pop up in studies, polemics, diatribes, and rants. Even the simplest arguments draw upon more than one of these themes; the best ones usually draw upon several at once.

In this Article, I cannot provide a complete catalog of our actual policy arguments, let alone a blow-by-blow account. Instead, I offer a whirlwind tour—an index of straw arguments, a review of essential themes. In other words, the arguments below beg countless important, interesting questions about the privatization of punishment, policing, and military force. I take up only the most original and relevant ones.

For each argument, my analysis follows regular techniques. First, I lay out the argument itself. I apply each argument to the most common and relevant examples: punishment, policing, or military corporations, or some combination thereof. I do not quote passages, nor do I pause to score polemical points. I elaborate the basic principles of the argument in the most abstract possible terms. I reveal less what the argument says and more how the argument works.

Then I respond. In each response, I probe the strengths and weakness of the argument in an overtly analytical, philosophical mode. I do not seek cheap victories here. I test the boundaries of each argument. I explore what the argument might and might not achieve, in its most persuasive forms; more importantly, I explore what it may never do in any event.

In the end, I conclude that our public policy debates do precisely what public policy debates often do—no more and no less. They identify significant practical pitfalls of privatizing prisons, police, and armies, but they do not articulate any fundamental objections to the privatization of force *per se*. They teach us how to regulate and reform the privatization of force, but they do not justify prohibitions against private prisons, police, and armies themselves.

I attribute these limitations to a common blindness in our public policy critiques: They provide strong objections against the private demand for force but weak objections against the private supply of force. In other words, they ultimately fail to confront the most pervasive and plausible model of privatized force: The model in which the supply of force is private but the demand for force is public. In the next Part, I pick up where our public policy debates have left off. Going back to the state of nature, I explore whether, why, and how the model of private supply and public demand would fail.

A. *Economic Efficiency*

1. *Argument*¹⁸³

Like all proponents of privatization, advocates for the privatization of punishment, policing, and military force make arguments motivated by *economic efficiency*.¹⁸⁴ These arguments are simple and elegant. They look like this: Private companies are more efficient than governments. Private companies provide higher quality services at lower prices. They meet demands faster, more flexibly, more accurately, more completely, at lower prices. Everybody wins: Streets, prisons, and nations are safer; taxes are lower, and shareholders are richer.¹⁸⁵

More specifically, advocates say these kinds of things: Private prisons are financed, constructed, and operational quicker than public prisons. The inmates' living conditions are better; inmates are safer; escapes are less frequent. Most importantly, argue advocates, they are less expensive to run than public prisons. Private police make preventative patrols that public police cannot afford to make. They deter crime before it is committed. They offer added protection at a moment's notice. They spend less time doing paperwork and eating donuts. They internalize the costs of policing by charging clients directly. Again, they cost less money than public police. Private armies deliver expertise, training, weapons, transportation, intelligence, and soldiers quicker than governments. Private armies mobilize, fight, and win faster than public armies—and above all, they work for less.¹⁸⁶

2. *Response*

Or so the logic of efficiency suggests. It is deeply controversial. In public policy circles, it is easily the most hotly debated and researched issue of all. The efficiency argument has been most intense in the context of punishment, where scholars have conducted many detailed, empirical

¹⁸³ For a discussion of the efficiency of private prisons, see generally DONAHUE, *supra* note 23, at 150-78; LOGAN, *supra* note 74; PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 42, at 1-3; *The Law of Prisons*, *supra* note 74, at 1868, 1873-79; Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531 (1989). On the efficiency of private police, see Bayley & Shearing, *supra* note 47, at 585; Sklansky, *supra* note 40, at 1189. For a discussion of the efficiency of private military companies, see generally MANDEL, *supra* note 98; and Howe, *supra* note 72, at 5 ("Economy is a major selling point for private security. Private security has a 'shadow' capability that can be quickly assembled when needed and contracted. . . . Paying for specialists only when needed saves considerable sums in salary, housing and pensions, while the leasing of private equipment, especially airplanes and helicopters, saves storage, insurance and maintenance costs."); Zarate, *supra* note 98, at 150, 152.

¹⁸⁴ See discussion *supra* note 142 and accompanying text.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

studies comparing the quality and cost of public and private prisons.¹⁸⁷ Unsurprisingly, the results of these studies have been mixed, and the studies have been controversial.¹⁸⁸ These arguments often boil down to one underlying question: When we debate the relative efficiency of public and private punishment, policing, and military institutions, which camp bears the burden of proof?

This quandary cannot be resolved by further empirical studies. It suggests deeper, more philosophical issues.¹⁸⁹ In the interest of advancing the privatization conversation, rather than rehashing it, I concede the economic efficiency argument. For the purposes of argument, let us assume that corporations provide punishment, policing, and military services more efficiently than governments.¹⁹⁰ So what? Efficiency is obviously important, but there must be more to life.¹⁹¹

What more? By asking this question, we begin a liberal investigation of the privatization of force. Fortunately, we have a healthy head-start. Recent critics of privatization have taken several liberal turns, pressing the public policy debates beyond the economic principles of quality and cost.¹⁹² They have sounded their critiques in seven classic liberal themes: the values of (1) egalitarian distribution; (2) public goods; (3) human rights; and (4) public accountability; and the dangers of (5) industrial influence; (6) market failure; and (7) cultural commodification.

B. *Egalitarian Distribution*

1. *Argument*¹⁹³

¹⁸⁷ See generally DONAHUE, *supra* note 23, at 150-78 (summarizing empirical studies); *The Law of Prisons*, *supra* note 74, at 1868, 1873-79 (same).

¹⁸⁸ See DONAHUE, *supra* note 23, at 157-59.

¹⁸⁹ See generally Kahan, *supra* note 27 (arguing that empirical debates over public policy questions often mask more divisive, normative controversies).

¹⁹⁰ Please note that I did not concede that punishment, policing, and military markets are perfect. As we will see, these markets might be subject to several different kinds of economic failures that raise non-economic concerns. See my discussions of lack of competition, agency costs, public goods in this Part, and of natural monopolies in the next Part.

¹⁹¹ But see Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 85, 100-01 (1985) (defending the principle of wealth maximization as a comprehensive system of moral thought).

¹⁹² See discussion *infra* Parts IV.B-IV.I.

¹⁹³ For a discussion of the distribution of private policing, see, for example, JONES & NEWBURN, *supra* note 47; THE PRIVATE SECURITY INDUSTRY: ISSUES AND TRENDS (Ira A. Lipman ed., 1988); SOUTH, *supra* note 47; MALCOLM K. SPARROW ET AL., BEYOND 911: A NEW ERA FOR POLICING 49 (1990); Bayley & Shearing, *supra* note 47, at 593 ("[P]luralizing [policing] under market auspices at present does not improve security equally across society. It favors institutions and individuals that are well-to-do. Commercial policing . . . leads to the inequitable distribution of security across class lines."); Cunningham, *supra* note 47, at 146; Sklansky, *supra* note 40, at 1190-91, 1223-24, 1284; Andrew Stark, *Arresting Developments: When Police Power Goes Private*, AM. PROSPECT, Jan.-Feb.

First, critics object that private markets provide the greatest security to the highest bidders rather than protecting all citizens equally.¹⁹⁴ This distributive argument appears most frequently in criticisms of private policing and military markets. It comes in two forms: static and dynamic. Both versions proceed from the presumption that policing and military security are the kinds of things that every individual and organization wants and deserves.¹⁹⁵

In the static version, critics note that private policing and military corporations sell security, whereas public policing and military institutions ration it. Thus, private security ends up in the hands of the wealthiest customers, while public security is more evenly shared.¹⁹⁶ There is an obvious rejoinder to this argument: Private security markets most often function as supplements, rather than substitutes, for public security networks. Customers only purchase the services of private policing and military corporations when governments cannot or will not provide them. This response works especially well in the private military markets, in which poor states typically hire PMCs because rich states refuse to help them.¹⁹⁷ This suggests that in the real world, the only alternative to PMCs is not public armies, but no armies.

This response provokes the subtler, dynamic version of the distributive

1999, at 41, 46-48. For a discussion of the distribution of military force, see, for example, MANDEL, *supra* note 98, at 77-78 ("Critics argue that the more individuals and private groups seek to provide their own protection, the more societal disparities in security may grow within and across countries as security may become more a function of disposable income"); *id.* at 88 ("The worst-case scenario for the long-term consequences of security privatization includes . . . the widening of the gap between the rich and the poor"); Howe, *supra* note 72, at 5 ("Private security can enter situations where Western governments presently fear to tread, especially after the world's intervention into Somalia Not coincidentally, the rise of these companies is coinciding with the pullback of western nations and the United Nations from peacekeeping and peace enforcing."); Zarate, *supra* note 98, at 150 ("[PMCs] fulfill an important role in international peace and security—a role which has been abdicated by states in many cases. . . . [PMCs] allow small, struggling states to obtain quick and effective military expertise when other states are unwilling to devote their national forces or resources to aid besieged governments in their internal conflicts. Rather than being a threat to small states as mercenaries were in the past, [PMCs] give small states a degree of independence from large state support or reliance on regional or international intervention.").

¹⁹⁴ This sounds a lot like the "accountability mechanisms" argument, which I set forth below in Part IV.D.1, but it is different. This is an argument about the distribution of security rather than the distribution of economic or political power.

¹⁹⁵ "If public safety is considered a general responsibility of government, perhaps even a human right, then increased reliance on commercial private policing represents a growing injustice." Bayley & Shearing, *supra* note 47, at 593.

¹⁹⁶ See, e.g., *id.* ("The problem is that pluralizing under market auspices . . . favors institutions and individuals that are well-to-do."); MANDEL, *supra* note 98, at 77 ("[T]he privatization of security may lead to inequality and injustice because security is available to those in power or those who can pay for it." (quoting International Alert, *The Privatization of Security: Framing a Conflict Prevention and Peacebuilding Policy Agenda* 13 (April 2001))).

¹⁹⁷ See, e.g., Howe, *supra* note 72, at 5, 7; Zarate, *supra* note 98, at 150.

argument: Critics claim that our increasing reliance on private policing and military markets encourages wealthy individuals, corporations, and governments to “exit” from public security networks,¹⁹⁸ leaving poor communities and states undefended. This argument appears chiefly in criticisms of private policing markets.¹⁹⁹ As we have already seen, wealthy individuals, associations, and corporations have purchased more private policing over the last thirty years.²⁰⁰ Yet these same customers pay some of our highest tax bills. Critics worry that eventually, wealthy customers will become fed up with “paying twice for security—once to the government, and once to hired private firms.”²⁰¹ They will relocate to privately-owned, low-crime, low-tax, enclaves in which public policing levels are low. They will lobby for cutbacks in public policing institutions and demand tax vouchers for private security expenses.²⁰² They will withdraw their resources from public police forces and reinvest them in private policing markets. As this trend evolves, governments will find themselves increasingly unable to sustain or improve public police protection in impoverished precincts.²⁰³

2. Response

This is a fine argument, as far as it can progress. But it does not go very far for at least two reasons. First, note what this argument does not do: It does not offer any critique of the model of private supply and public demand. The clearest example, which I will return to often in this section, is private prisons. In the private prison market, the demand for punishment is purely public. Only governments finance and allocate imprisonment.

¹⁹⁸ For the famous explanation of the “exit, voice, loyalty” framework in economics generally, see ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

¹⁹⁹ See, e.g., Bayley & Shearing, *supra* note 47, at 593-94 (“The effects of pluralization under commercial auspices would be even more harmful if the prosperous sectors of the community who pay most of the taxes were to withdraw resources from the public sector.”). Some critics have made similar suggestions about private military markets. See, e.g., MANDEL, *supra* note 98, at 77 (“Critics argue that the more individuals and private groups seek to provide their own protection, the more societal disparities in security may grow within and across countries as security may become more a function of disposable income”); Howe, *supra* note 72, at 5 (“Not coincidentally, the rise of [PMCs] is coinciding with the pullback of western nations and the United Nations from peacekeeping and peace enforcing.”).

²⁰⁰ See discussion *supra* Part II.B.1.

²⁰¹ Bayley & Shearing, *supra* note 47, at 593-94.

²⁰² See NOZICK, *supra* note 7, at 26-27 (discussing private protection vouchers); cf. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 89 (1962) (discussing private school vouchers).

²⁰³ According to some analysts, this trend has already developed in certain communities. See, e.g., Sklansky, *supra* note 40, at 1223-24 & n.342, 1284 (describing failed efforts to increase police funding in Southern California); Sam Walker, *The Urban Police in American History: A Review of the Literature*, *J. POLICE SCI. & ADMIN.* 252, 254 (1970) (accounting for underpolicing in low and middle income neighborhoods).

Governments are the only customers of private prisons, so they can distribute imprisonment however they like. If governments distribute imprisonment along class lines, that is a problem created by governments, which is primarily for governments to solve. It is not a problem for private prisons.

This is a critical point, which can be applied to military and policing markets too. Governments may not be the only customers in private military markets, but they are by far the most significant customers.²⁰⁴ Governments are also major customers in private policing markets: In the United States, they spend almost as much on private police as they spend on public police.²⁰⁵ Thinking back to the matrix, let us call these the cases of “public demand.”

In these public demand cases, the static argument sounds hollow, and the dynamic argument makes no sense at all. The static argument supposes that when supply and demand are public—when governments provide, finance, exercise, and allocate punishment, policing, and military force—force is evenly distributed. But distribution is primarily a matter of payment and allocation, not provision and exercise. What, then, is the problem with the private supply of force? If the static argument is correct, then when governments make payments and allocations, they produce egalitarian distributions. Punishment, policing, and military force are doled out according to principles of justice rather than wealth.

For similar reasons, the dynamic argument does not apply to public demand. Admittedly, when governments hire private policing corporations, they spend tax dollars that would have otherwise been spent on public policing institutions. But if they distribute private security evenly, and in sufficient amounts, then who cares? Clearly, governments cannot tell themselves that they are paying “twice” for security, and they cannot withdraw resources from themselves. In both the static and dynamic senses, the public purchasing of private policing runs no risk of distributive injustice.

This leaves private demand cases, such as the private purchasing of private policing. Distributive arguments suggest that the choice between public and private demand is black and white. When governments purchase policing, it is justly distributed; when individuals and corporations purchase policing, it is sold. So what shall we do? The black and white logic of these arguments suggests one obvious solution: We could prohibit individuals, associations, and corporations from hiring private policing corporations. If we did, then they could not exit public policing institutions. They would have no other source of protection against crimes.

Of course, that is a drastic and implausible idea. It raises a whole host of special concerns about self-defense, self-help, and property rights, which

²⁰⁴ See generally discussion *supra* Part II.B.3.

²⁰⁵ See discussion *supra* note 60 and accompanying text.

I want to defer.²⁰⁶ (I do not revisit the topic of “private demand” until the end of Part V, in the final stage of my liberal theory of force.) For now, let us focus on a more commonplace, reasonable proposal: tax and transfer. We could tax private purchases of private policing and transfer these funds to impoverished communities. Since we are concerned with the distribution of security, we could earmark these funds. For example, states could offer private security grants to public and private organizations in crime-ridden, impoverished areas or send private security vouchers or coupons to indigent citizens.²⁰⁷ With these modest reforms of private demand, some of the benefits of our burgeoning private policing markets would redound to all.

This, then, is the second conceptual limit of the distributive critiques. When they critique private demand, they are not fundamental. They are just cautionary tales, which can be answered by *redistribution*, one of our most standard liberal reforms.

C. *Public Goods*

1. *Argument*²⁰⁸

Whereas the first argument is about the distribution of security, the second argument is about the quantity and quality of security that is distributed. In this argument, critics assert that under certain special conditions, private markets do not produce enough security, leaving customers and citizens exposed to crimes and attacks.²⁰⁹ The debate over the federalization (or monopolization) of airport security provides the most prominent and current example. In the United States, on September 11, 2001, nineteen Al Qaeda terrorists slipped through airport security checkpoints, hijacked four planes, and killed thousands of innocent people. After the attacks, many politicians and pundits argued that the privatization of airport security had pulled the industry into a “race to the bottom” in which air-

²⁰⁶ See discussion *infra* Part V.D.

²⁰⁷ See, e.g., NOZICK, *supra* note 7, at 27 (“Under this plan all people, or some (for example, those in need), are given tax-funded vouchers that can be used only for their purchase of a protection policy from the ultraminimal state.”).

²⁰⁸ For a discussion of public goods and private policing, see DAVID N. HYMAN, MODERN MICROECONOMICS 665-66 (2d ed. 1989); Sklansky, *supra* note 40, at 1192-93 (discussing free-rider problems, displacement, and distributive problems associated with private policing); Max More, Libertarian Alliance for Life, Liberty, and Property, *Private Police and the Free Rider Problem*, POLITICAL NOTES NO. 17, available at <http://www.libertarian.co.uk/lapubs/polin/polin017.pdf> (discussing the efficiency of privatizing police forces and refuting arguments against such privatization) (last visited Oct. 5, 2003) (on file with the Connecticut Law Review). For a discussion of public goods and private military corporations, see SINGER, *supra* note 113, at 226-27. For a discussion of public goods and private or private demand, see DONAHUE, *supra* note 23, at 18-20. For a discussion of the theory of public goods, see MUSGRAVE & MUSGRAVE, *supra* note 156, at 55-58.

²⁰⁹ See Paul Krugman, *Reckonings: The Public Interest*, N.Y. TIMES, Oct. 10, 2001, at A19 (discussing the need for federalization of airport security).

lines competed by keeping the quantity and quality of airport security services abysmally low.²¹⁰

Under the circumstances, it is easy to see why most of these arguments were rather heavy on rhetoric and light on analysis. But we can think through the airport security problem more carefully now. The “quantity” and “quality” arguments seem to blend together four economic concepts: market failures, public goods, tying arrangements, and negative externalities.

In economics, “market failure” is a term of art. It refers to situations in which actual markets fail to produce perfect equilibria between supply and demand.²¹¹ Economists have a fairly standard list of common market failures, and everyone’s list includes the category of *public goods*. For our purposes, we can define goods as “public” when they are relatively “non-exclusive”: Once they are sold to one customer, it is too costly for the seller to stop other customers from enjoying them too. In common parlance, we call this the problem of “freeriding”: One person buys something, then everyone else mooches rather than buying more for themselves. In the airport security market, the logic of public goods clearly applies: Within airports—and especially within airplanes—security is not very exclusive. Once you truly protect one customer, you have already protected a whole plane of customers, if not a whole airport as well.²¹²

Under these special circumstances, in unregulated markets, supply never satisfies demand. Rather than producing goods that no one would buy, firms refuse to produce anything at all. To cure this failure, states intervene. They compel consumption. They impose taxes upon citizens and establish optimal levels of quality and quantity in markets.

Interestingly, there is a sense in which commercial airlines had already attempted to self-regulate—to achieve a similar result by themselves, even before the terrorist attacks of September 11, 2001. Before the Aviation Security Act of 2001, in the commercial airline industry, you could not buy air travel without buying airport security. Whenever you purchased a ticket, you paid for security and travel together.²¹³ Thus, within the indus-

²¹⁰ See, e.g., Editorial, *Politics v. Security*, S.F. CHRON., Oct. 15, 2001, at A14, LEXIS, News Library, Sfchm File; see also E.J. Dionne Jr., Editorial, ‘*Back to Usual*’, WASH. POST, Oct. 26, 2001, at A35, LEXIS, News Library, Wpost File (asserting that the practice of awarding airport security contracts to the lowest bidder results in inadequate security).

²¹¹ See JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 74-75 (2d ed. 1988) (describing how this phenomenon applies to public goods).

²¹² In public goods theory, military defense is the classic example of a public good. MANDEL, *supra* note 98, at 33 (“In theory, of course, economists have long looked at defense as a public good, with nonexclusivity of benefits to the protected population the key justification.”); STIGLITZ, *supra* note 211, at 123. Other common examples are the protection of the environment and the construction of highways.

²¹³ See David Carrig, *Infiniti Sets Prices*, USA TODAY, Sept. 9, 1996, at 1B, LEXIS, News Library, Usatdy File (describing increases in airfares to compensate for increased security costs); Adam

try, the price of airport security functioned less like a “price” and more like a “tax.” If you wanted to fly, you could not avoid paying it.²¹⁴ In economic terms, this is a “tying arrangement” because the two services are bundled together.²¹⁵

In retrospect, this private solution was only a band-aid. It produced a tragic example of what economists would call a “negative externality”—a cost imposed upon third parties, rather than buyers or sellers.²¹⁶ Price competition kept ticket prices down, and airlines kept airport security levels below par.²¹⁷ On September 11, 2001, the public paid a terrible price.²¹⁸ After the attacks, Congress passed the Aviation and Transportation Security Act of 2001, which federalized airport security—imposing mandatory increases in levels of screening, training, staffing, and compensation.²¹⁹

2. Response

Before we take a closer look, this sounds like an obvious reform. Like the distributive argument, the public-goods argument is less a theory of public supply and more a theory of public demand. It is, as economists say, a theory of public “spending” or “finance.”²²⁰ In this case, the theory suggests that when airlines purchase and allocate security, they do not purchase and allocate enough. The obvious solution, then, was not to federalize the *supply* of airport security. It was to federalize the *demand* for airport security—to put the financing and allocation of airport security under federal control. Once demand became federal, politicians could hire as much security as they desired. The problems of “exclusivity” would dis-

Levy, *Airfares to Rise, American CEO Says*, TIMES-PICAYUNE (New Orleans, La.), Aug. 15, 1996, at C6, LEXIS, News Library, Notpic File.

²¹⁴ See discussion *supra* Part III.A.1 (discussing the distinction between prices and taxes).

²¹⁵ 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 90 (1996).

²¹⁶ See SINGER, *supra* note 113, at 211, 228 (discussing the “negative externalities” of the private military market); see also STIGLITZ, *supra* note 211, at 75-76 (defining “negative externalities”).

²¹⁷ See, e.g., David Firestone, *The Leader in Airport Security, and In Lapses*, N.Y. TIMES, Nov. 9, 2001, at A1 (noting that, “as the airlines sought to cut costs and award security contracts to the lowest bidder, screening companies began what many in the industry call a race to the bottom, hiring employees at the lowest possible wages and cutting corners to keep checkpoints manned . . .”); *Security Firm To Give Up Contracts At Airport*, N.Y. TIMES, Dec. 1, 2001, at B6 (describing one security company’s responsibility for mistakes made at Logan Airport after September 11th).

²¹⁸ This is a sensitive topic, so let me clarify two points: First, this argument is not an effort to lay moral blame upon private security corporations, airlines, or air travelers for the terrorist attacks of September 11, 2001. It is an attempt to identify one of the reasons that our airport security system was vulnerable. Second, this argument is retrospective: Obviously, one of the biggest reasons for our vulnerability was the element of surprise. Before September 11, 2001, most people did not want the same levels of airport security that they want after the terrorist attacks. Nonetheless, as many commentators observed, they probably wanted a lot more airport security than they actually had.

²¹⁹ Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597 (codified as amended in scattered sections of 5, 26, 31, and 49 U.S.C.).

²²⁰ See discussion *infra* Part III.A.

appear.

What would this reform have looked like? Just like the actual Aviation Transportation and Security Act of 2001, a hypothetical "Public Goods Act of 2001" would have imposed a host of quality and quantity requirements. Throughout the nation's airports, it would have increased the requisite levels of screening, training, staffing, and compensation of airport security personnel. These requirements could have been included in regulations, as the Administration proposed, but they also could have been included in "specs," or procurement policies, required by contracts between the federal government and private security firms. They could have been enforced through negotiations and inspections in addition to, or in lieu of, traditional enforcement mechanisms.²²¹

In some respects, this would not have been too different from the Aviation and Transportation Security Act that was actually passed. Under the authority of the Act, the FAA paid a human resources corporation, NCS Pearson, over \$100 million to "recruit, test, and hire" our new federal passenger and baggage screeners.²²² The contract required physical and psychological assessments of applicants and specified other quality and quantity goals.²²³ It is a bit strange: We federalized the supply of airport security; we even regulated the demand for airport security; yet we signed a contract with a corporation in order to carry out our own regulatory reforms.

In the end, then, the hypothetical Public Goods Act might have looked much like the real Aviation and Transportation Security Act, with one necessary distinction: the passenger and baggage screeners at airports would work for Airport Security Inc., rather than the United States Department of Justice. Is this a distinction with a difference? That remains to be seen.²²⁴ But this much is already clear: If there *is* a difference between these two solutions, it does not hinge on the nonexclusivity of airport security or the concept of public goods.

D. Public Accountability

²²¹ Before the Bush Administration approved the Aviation and Transportation Security Act, it advanced a similar proposal—to impose tougher federal administrative regulations and oversight upon airlines and airport security firms, in order to increase the quantity and quality of airport security services. Deirdre Shesgreen, *Bush Offers Compromise on Aviation Security Bill: It Stalls on Provision to Make All Screeners Federal Employees*, ST. LOUIS POST-DISPATCH, Oct. 4, 2001, at A7, LEXIS, News Library, Slpd File. It is the same principle that is described in the text: private supply and public demand, which might also be called "regulation without socialization."

²²² *Government Steps Up Plan To Hire Airport Screeners*, USA TODAY, Mar. 4, 2002, available at <http://www.usatoday.com/news/nation/2002/03/04/airport-screeners.htm> (last visited Oct. 5, 2003) (on file with the Connecticut Law Review).

²²³ Brian Friel, *Security Sweep*, GOV'T EXECUTIVE, Mar. 2003, at 49, LEXIS, News Library, Govexc File.

²²⁴ I briefly revisit the airport security question later. See discussion *infra* Part IV.H.2.

1. Arguments²²⁵

²²⁵ For a discussion of accountability and private prisons, see, e.g., HARDING, *PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY*, *supra* note 74, *passim* (discussing accountability and regulation in private prisons and the subsequent improvement of the entire prison system); *Id.* at 340-41 (stating that “The regulatory systems and accountability mechanisms that govern their operations must ensure that private prisons meet acceptable state and community standards There is evidence that, as long as they are properly regulated and publicly accountable, private prisons can stimulate improvement of the total prison system.”); LOGAN, *supra* note 74, at 181-220 (exploring the arguments for and against the privatization of prisons and concluding that such privatization will not destroy accountability, reduce liability, or increase the potential for corruption); Nicole B. Casarez, *Furthering The Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 249-51, 293-303 (1995) (arguing that private federal prisons must be just as accountable as public prisons and proposing a congressional mandate that subjects private operators to uniform standards of accountability); Michael Keating, Jr., *Public Over Private: Monitoring the Performance of Privately Operated Prisons and Jails*, in *PRIVATE PRISONS AND THE PUBLIC INTEREST*, *supra* note 74, at 130, 130, 133, 152-53 (analyzing the issue of accountability in regard to the privatization of prisons and arguing that all the processes and mechanisms that are applied to public prisons must be applied with equal force to private prisons); *The Law of Prisons*, *supra* note 74, at 1879-87 (comparing public and private mechanisms of accountability in private prisons).

For a discussion of accountability and private police, see, for example, JONES & NEWBURN, *supra* note 47, *passim* (questioning the claimed distinction between private security and public policing on the basis of accountability, and discussing ways in which accountability of the marketplace may be more effective than political mechanisms of accountability); O'TOOLE, *supra* note 47, *passim* (exploring the private sector and policing, and ways in which “rent-a-cop” abuses may be reduced by better standards in recruiting and managing private security); SOUTH, *supra* note 47, at 155-63 (advocating democratic accountability and “very serious vigilance” of the private security sector); Bayley & Shearing, *supra* note 47, at 596-97 (discussing the lessened accountability of commercial private policing and volunteer private security as compared to public policing which provides accountability through the democratic process); Sklansky, *supra* note 40, at 1189, 1191 (“[P]rivate policing has been celebrated as more *accountable* than its public counterpart [T]he supposed accountability of private policing has a troubling side as well. Private companies are thought more accountable than government because they answer to their particular customers instead of to the general public.”); James J. Vardalis, *Privatization of Public Police: Houston, Texas*, 3 SECURITY J. 210, 211 (1992) (arguing that public police are less accountable than private police).

For a discussion of accountability and private military corporations, see, for example, ISENBERG, *CORPORATE MERCENARY*, *supra* note 98 (discussing the global trend toward privatization leading to the re-emergence of private mercenary firms, and ways to ensure these firms retain accountability both domestically and internationally); MANDEL, *supra* note 98, 146-48 (recognizing the need for accountability in private security and discussing the necessary prerequisites for moving toward new forms of accountability that will support, not supplant, already existing national and international laws and law enforcement mechanisms); SINGER, *supra* note 113, at 215 (“[t]his particular form of privatization removes military expertise from the realm of public accountability.”); *id.* at 220 (“Public military forces have all manner of traditional controls over their activities, ranging from internal checks and balances, domestic laws regulating the activities of the military force and its personnel, parliamentary scrutiny, public opinion, and numerous aspects of international law. PMFs however, are only subject to the laws of the market Other than its shareholders, there are no real checks and balances on a PMF.”); Howe, *supra* note 72, at 1, 3-4 (“[S]ome observers believe that a dramatic growth in private security could challenge this control and eventually may threaten global order with military force that is less accountable and controllable than state militaries Critics assume that money drives mercenaries’ actions and that greed will quickly shred any accountability As Western governments increasingly work with private firms, some critics worry that such cooperation may circumvent public oversight and enforcement.”); Zarate, *supra* note 98, at 77 & n.14, 146-49 (discussing the involvement of PMCs in violent conflicts in Africa).

Third, critics argue that privatization diminishes the *public accountability* of punishment, policing, and military force. Broadly speaking, these arguments draw upon two central themes: First, the distinction between public and private *institutional purposes* (politics vs. profits); second, the distinction between public and private *accountability mechanisms* (elections vs. exits).²²⁶

a. Institutional purposes: politics vs. profits

The simplest, most common concern is that public and private institutions pursue different purposes: politics and profits. On the one hand, governments pursue political²²⁷ and legal goals more than economic gains; on the other hand, corporations pursue economic gains more than political and legal goals.²²⁸ Almost every policy argument against the privatization of punishment, policing, and military force begins by carving out this basic boundary between states and markets. To sharpen the contrast, critics often call public punishment, policing, and military workers “civil servants,” “bureaucrats,” and “professionals,” and private workers, “employees,” “contractors” and “mercenaries.”²²⁹ In some cases, they spin out rather involved motivational profiles of these ideal types.²³⁰ Implicitly and explicitly, they draw upon a long line of liberal thinkers—political, legal, economic, and social theorists—who have articulated similar distinctions between public and private institutions and spheres.²³¹

²²⁶ If economic efficiency is the most controversial issue in our policy debates, then “public accountability” is easily the most complex. Critics voice so-called “public accountability” concerns on many different levels, depending on how much they stuff into the concepts of “public” and “accountability” and how deeply they delve into political and economic theory. For the sake of brevity and clarity, I have boiled down these themes and split them into several discrete arguments. I have included the two most common and simple accountability arguments here under the heading “public accountability.” Together, they amount to a majoritarian critique of privatization. I have included two more complex accountability arguments later under the headings “industrial influence” and “market failure.” For this reason, some significant privatization critiques are not addressed under the “public accountability” section. They are addressed shortly, below.

²²⁷ By calling these goals “political,” I do not mean to say that they are not professional or bureaucratic. I mean to use the word political in the broadest, most idealistic sense. In lieu of “political goals,” one might also say “public goals” or “public policies.”

²²⁸ See ROBERT LEKACHMAN, *VISIONS AND NIGHTMARES* 104-06 (1987) (arguing that private organizations are motivated primarily by profit maximization); Walzer, *McPrison and Burglar King*, *supra* note 153, at 11 (distinguishing the concerns of courts in sentencing criminals from the decidedly economic considerations of privately run prisons responsible for the welfare of the criminals).

²²⁹ The psychological descriptions of public punishment, policing, and military personnel are typically more involved. See, e.g., DONAHUE, *supra* note 23, at 46-48 (describing the differences between “the profit seeker” and “the civil servant”); HUNTINGTON, *supra* note 45, at 20-21, 59-79 (describing the differences between “the military mind” of “the mercenary” and “professional” soldiers and officers).

²³⁰ See discussion *supra* Part I.B.3.

²³¹ The most famous is undoubtedly Max Weber. The two most important sources are his essays: *Bureaucracy*, and *Politics as a Vocation*. I return to the subject of bureaucracy later. See discussion

In the simplest accountability arguments—and only in the simplest ones—there is little else than these two points. From such modest beginnings, critics leap to a verdict: Since the goals of punishment, policing, and military force are political and legal, the goals of punishment, policing, and military organizations must be political and legal too. Politics and profits must not be mixed. When they are, we run serious risks: Corporations trade public aspirations for private rewards.²³²

b. Accountability mechanisms: elections vs. exits

The second concern is a more sophisticated cousin of the first: States and markets rely primarily upon different accountability mechanisms. Generally speaking, governments react to the threat of “elections” and corporations react to the threat of “exits.” (For these purposes, “exits” occur when customers stop purchasing punishment, policing, and military services, or shareholders sell punishment, policing, and military shares.²³³) Critics remind us that electoral accountability is public, but market accountability is not. In an election, each citizen can vote, and each vote counts only once; in a market, only customers and shareholders can exit, and each exit is counted in dollars and cents. In short, public accountability is shared, whereas market accountability is sold.²³⁴

2. Responses

a. Accountability tradeoff

When public accountability objections are stated in such simple terms, responses are easy to find. For our purposes, let us focus on one that is already familiar by now: Notice how these two arguments stumble when they are applied to situations in which the supply of force is private and the demand for force is public.

The first argument sets forth a distinction between the purposes of governments and corporations. But as privatization advocates often ex-

infra Part V.C.6.

There is a second step in these arguments, although it is more often assumed than articulated. Purposive arguments presume that the goals of punishment, policing, and military force are political and legal. (Note the distinction: This is a claim about the inherent purposes of *force*, not the actual purposes of punishment, policing, and military *organizations*.)

²³² Surprisingly, Michael Walzer’s critique of private prisons and private police is based largely on these naïve assumptions. See Walzer, *McPrison and Burglar King*, *supra* note 153. However, if we read Walzer’s article generously, and in the context of his other work, we can generate a much more nuanced objection, which I call the “cultural commodification” argument. See discussion *infra* Part IV.H.1.

²³³ For the famous explanation of the “exit, voice, loyalty” framework in economics generally, see HIRSCHMAN, *supra* note 198 at 15-19.

²³⁴ This argument is structurally similar to the distribution argument. But this argument is about the distribution of influence rather than the distribution of security. See discussion *supra* Part IV.B.

plain, this distinction glides over an obvious fact: Corporations do not pursue profits willy-nilly; they pursue profits by creating the kind of supply that satisfies demand.²³⁵ Just as governments pursue votes by pleasing potential voters, corporations pursue profits by pleasing potential customers and shareholders. They deliver goods and services of desirable quantities and qualities, at desirable prices, and in doing so, they create desirable investment opportunities. Thus, it is sophomoric to say that corporations pursue “profits” and nothing else. If we want to compare apples to apples, we should say that governments pursue the goals of voters, whereas corporations pursue the goals of customers and shareholders. But this is where the second, more sophisticated argument kicks in: Accountability bought by customers and shareholders is not the same as accountability shared by voters. The former is economic, or “private;” the latter is political, legal, or “public.”

This “mechanisms” argument—like every other argument in our policy debates—is an important argument that operates within important limits. For present purposes, I want to emphasize two: First, the mechanisms argument obscures an important tradeoff between accountability and publicness. When we compare elections and exits, we should weigh the pros and cons on both sides. It is true, as the mechanisms arguments suggest, that elections are more public than exits. But it is also true that elections are less accountable than exits.²³⁶

By itself, this point probably seems trivial. The thrust of the public accountability argument is publicness, not accountability. This point, how-

²³⁵ Of course, corporations also try to pursue profits by creating demand. I address that issue in my discussion of “industrial influence.” See discussion *infra* Part IV.F.1.

²³⁶ Why? There are two reasons. First, generally speaking, the threat of elections is much less constant than the threat of exits. Customers and shareholders may exit corporations at any time; citizens may vote only once a year, or even less often than that. The second reason for the tradeoff is that—in the context of punishment, policing, and military institutions—the threat of elections is much more remote than the threat of exits. Our public punishment, policing, and military institutions are significantly isolated from our mechanisms of representative democracy. This is obviously true in the direct sense: There is a relatively short list of directly-elected public punishment, policing, and military personnel. In our military institutions, this list includes only the Commander-in-Chief; in our policing institutions, it includes only some commissioners, chiefs, and sheriffs; and in our punishment institutions, it includes no one at all. The point also holds true in the broader sense: For the most part, our public punishment, policing, and military institutions are heavily-unionized “bureaucracies,” which hire, promote, and fire independently of election results. See HUNTINGTON, *supra* note 45, at 16-17 (discussing the establishment of “professional” military bureaucracies in liberal states). The contrast with private corporations is sharp: Most private prison guards, security guards, and private soldiers are subject to the threat of exits. These private industries are not heavily unionized. DONAHUE, *supra* note 23, at 163 (private prisons); Sklansky, *supra* note 40, at 1189 (discussing private police). Losing customers and shareholders often means losing jobs. This might sound like a controversial claim, but I can assure you that it is not. I am not suggesting that there is a high level of economic competition in punishment, policing, and military markets. I consider that issue below. See discussion *infra* Part IV.G.2. Here, I am only suggesting that there is more economic competition in these markets than there is political competition in our public punishment, policing, and military institutions.

ever, does not exist by itself. It stands next to another, more important point, to which I turn now. Just like the last argument, this one applies weakly to cases of public demand.

b. Public demand

The two public accountability arguments—the purposes and mechanisms objections—suggest that the choice between public and private is a choice between politics and profits, elections and exits, voters and customers. But these distinctions start to founder before an already familiar foe—the public demand for force. Recall that governments are the primary customers—in many cases, the only customers—of private punishment, policing, and military corporations.²³⁷ When governments are customers, the choices between customers and voters, elections and exits, and politics and profits are no longer so stark. In these contexts, the purposes and mechanisms arguments become rather weak.

As before, the clearest example is private prisons. In this industry, voters vote, taxpayers pay, and governments shop for imprisonment. Voters elect politicians, who hire administrators, who hire private prison corporations. Administrators finance and allocate imprisonment. They act like customers: They write contracts, cut checks, and conduct inspections. If voters do not like the performance of public officials, they can hold the corporation accountable at the next election by voting for someone else. In the meantime, if public officials do not like the performance of private prisons, they can hold them accountable at the next negotiation, payment, or inspection by firing them and hiring someone else. Rather than swapping politics for profits, or elections for exits, the model of private supply and public demand marries the two. It pursues political and legal goals through economical means.

This is the customary response from privatization advocates.²³⁸ This give-and-take, however, is hardly the end of the matter. In some respects, the public demand response is equally naïve. It assumes the model of the perfect market, ignoring the possibility that private punishment, policing, and military markets might “fail.”

Consider these three points: First, the public demand model presumes

²³⁷ See discussion *supra* note 162 and accompanying text (punishment); *supra* notes 60 & 163 and accompanying text (policing); and *supra* note 110 and accompanying text (military).

²³⁸ See generally DONAHUE, *supra* note 23 (discussing how privatization can improve public undertakings by making them more efficient and accountable).

that governments are virtuous and diligent customers, who are willing and able to protect the human rights of inmates, suspects, and combatants. Second, the public demand model glosses over the distinction between governments and shareholders. It presumes a perfect barrier between the government's control of demand and the shareholder's control of supply, so that the latter is not influenced, manipulated, or corrupted by the former. Third, it presumes that the marriage of private supply and public demand does not spawn other market failures, such as inadequate competition and agency costs. Whether these constitute fundamental objections to the privatization of force remains to be seen. Clearly, though, simple distinctions between "politics" and "profits" or "elections" and "exits" are inadequate.

E. *Human Rights*

1. *Argument*²³⁹

The fourth argument against the privatization of force concerns the dangers of excessive and arbitrary uses of force. The central claim is that private punishment, policing, and military corporations violate *human rights* more often than public punishment, policing, and military institutions.²⁴⁰ This is clearly a grave concern, and it surfaces often in public policy debates. Almost every criticism of private prisons, police, and armies flies under the banner of human rights at some point. Most of these criticisms rely primarily upon the logic of other arguments—especially the public accountability arguments mentioned above²⁴¹ and the industrial in-

²³⁹ For examples of arguments addressing the implications of private prisons on human rights, see RYAN & WARD, *supra* note 32, at 34-39; Harold J. Sullivan, *Privatization of Corrections: A Threat to Prisoners' Rights*, in PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 42, at 139, 139-55; Weaver & Purcell, *supra* note 150, at 377-80 (articulating human rights arguments against private prisons). For arguments addressing the implications of private military corporations on human rights, see *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. ESCOR, 50th Sess. at 15, U.N. Doc. E/CN.4/1994/23 (1994); ISENBERG, CORPORATE MERCENARY, *supra* note 98; MANDEL, *supra* note 98, at 3-4 ("Critics see all privatized security personnel as disruptive, involving rabid mercenary 'dogs of war' who exploit violence for personal gain, serve as agents for unsavory powers, or thoughtlessly promote repression, turmoil, and human-rights violations."); *id.* at 82 (claiming "[s]everal analysts feel that the presence of privatized security increases the frequency and severity of human-rights violations or other crimes against humanity."); *id.* at 88 (noting that "[t]he worst-case scenario for the long term consequences of security privatization includes . . . the proliferation of violence and crimes against humanity . . ."); Sapone, *supra* note 98, at 4-5; Zarate, *supra* note 98, at 146. For examples of arguments addressing the implications of private police forces on human rights, see Bayley & Shearing, *supra* note 47, at 595 ("Private commercial policing . . . [is] apt to be more intrusive, premonitory, and presumptive than public policing.").

²⁴⁰ See sources cited *supra* note 239.

²⁴¹ These are the simplest human rights arguments. They might be called "individual accountability" arguments. In analytical terms, these arguments make no significant improvements upon the "institutional purposes" arguments, which we considered above. See discussion *supra* Part IV.D.1. They argue that: (1) corporations pursue economic gains (more than political goals); (2) the protection

fluence and market failure arguments mentioned below. But there is one strain of human rights talk that is independent: anti-majoritarian arguments.

In anti-majoritarian arguments, critics attack the public demand model more directly. This critique is most often applied to the private prison market, in which governments are the only consumers of force.²⁴² Anti-majoritarian critics claim that when governments hire private prisons, they are not interested in safeguarding the rights of inmates or combatants. Instead, they are interested in promoting popular agendas and cutting costs.²⁴³ For these critics, "privatization" is the enemy of human rights; it signifies the state's subordination of inmates' rights to achieve temporary political and economic victories. This suggestion appears throughout the literature concerned with private prisons in both implicit and explicit shades.²⁴⁴

Anti-majoritarian arguments typically begin with historical narratives. In the punishment context, critics sometimes draw suggestive analogies between nineteenth-century convict leasing and twentieth-century private prisons.²⁴⁵ More often, they provide left-wing histories of the development of the private prison industry over the last thirty years. When they list the penal reforms of the 1970s and 1980s, they often note that these reforms enjoyed widespread popular support.²⁴⁶ Nonetheless, they strongly imply that these reforms were unjustified. When critics recite the periodic expansions of prison populations, they suggest that these expansions were unnecessary and motivated by ideology, if not racism and greed.²⁴⁷ They

of human rights is a political goal (which does not yield economic gains); (3) and therefore, on the whole, corporations are likely to sacrifice human rights for economic gains. There is no point in rehashing these arguments in any detail. They follow the same formula that we have already seen and are refuted by the same response: When governments finance and allocate force, the simple distinction between the purposes of governments and corporations largely dissolves. The question is why corporations would not do what they were hired to do, or why governments would not hire them to protect human rights. These issues are explored below. See discussion *infra* Parts V.E.-V.G.

²⁴² It may also be applied to the private military market in which governments are the primary consumers. But the argument is more complex, tentative, and unpersuasive in this context. For similarly unpersuasive applications to the private policing market, see Bayley & Shearing, *supra* note 47, at 585-88; Joiner, *supra* note 149, at 1418 ("By far the most criticism comes from those who oppose the ability of professional bail bondsmen to exercise powers of custody.").

²⁴³ See Linda G. Cooper, *Minimizing Liability With Private Management of Correctional Facilities*, in *PRIVATIZING CORRECTIONAL INSTITUTIONS* *supra* note 42, at 131.

²⁴⁴ See, e.g., Neve Gordon, *Strategic Violations: The Outsourcing of Human Rights Abuses*, *HUMANIST*, Sept. 1, 2003, at 10 (arguing that "outsourcing has often been put to use [by governments] to abdicate social and moral responsibility," in order to achieve "legal, political, and economic" benefits).

²⁴⁵ See *supra* note 150.

²⁴⁶ See, e.g., Dolovich, *supra* note 87, at 23 & n.98 ("As early as the mid-1960s, skepticism was already emerging on both the left and the right regarding the value of seeking out root causes of deviant behavior and the possibility of successful state intervention to change such behavior Since the 1968 election, nearly every presidential candidate has recognized the value of 'out-toughing' his opponent by affirming his own toughness on crime and by making his opponent appear relatively lenient.") (citations and internal quotation marks omitted).

²⁴⁷ See, e.g., Weaver & Purcell, *supra* note 150, at 359-60 ("Along with this rise in the prison

often observe that the popular fear of violent crime was much greater than the actual incidence of violent crime, and that in any event, prisons were filled with non-violent criminals.²⁴⁸ This kind of talk challenges the premise of prison privatization—that governments need to construct, manage, and operate more prisons quicker and thus, need to turn to the private sector.²⁴⁹

In such arguments, these historical narratives serve an important purpose. They highlight the way governments allow popular politics to trump human rights. They draw a line between the interests and influence of voters and victims. They testify to the bad faith, or the weak will, of public officials. They suggest that the principles of privatization are democracy and downsizing rather than the protection of inmate rights. In subtle and not so subtle ways, these arguments call into question an important assumption of the public demand model of privatization—the notion that public officials are virtuous, diligent consumers of force.

In most cases, of course, human rights arguments do not stop there. They paint this picture in vivid detail. They provide stories of human rights abuses committed by corporations. They emphasize two types of dangers: First, companies may intentionally mistreat inmates, suspects, and combatants in order to cut costs, and second, companies may cut back on labor expenses, leaving inmates, suspects, and combatants at the mercy of unscreened, untrained, understaffed, and underpaid employees.²⁵⁰ In some

population, there has also been a return to such Southern tactics as chain gangs and prisons for profit. Furthermore, there has been a reoccurrence of laws that are not overtly race-based but which have a similar disproportionate impact on blacks as laws of the Reconstruction Era Both buyers and sellers of prison goods are making huge profits while the prison population continues to grow out of control. This is largely due to the lobbying efforts of the major corporations that have an economic interest in the prison industry.”); Dolovich, *supra* note 87, at 24 (“These numbers represent the fruits of more than a decade of increasingly punitive legislative attitudes toward crime, driven by the frenzy of the war on drugs and the decline of the rehabilitative ideal in favor of an emphasis on retribution and incapacitation.”).

²⁴⁸ See, e.g., White, *supra* note 33, at 145 (“[T]he public prison is transparently problematic and irrational, and . . . it requires the state to face directly the political, legal, and fiscal costs of pursuing a criminal justice policy that has brought about almost exponential increases in the rate and the aggregate number of people incarcerated.”); see also Christian Parenti, *The “New” Criminal Justice System: State Repression from 1968-2001*, MONTHLY REV., July 1, 2001 (noting that in the United States, “over 60 percent of all prisoners are in for non-violent drug crimes, 6.5 million people are in prison, on parole or probation,” and discussing “a common explanation that . . . portrays the prison boom as driven by direct and specific economic interests”).

²⁴⁹ Similarly, many PMC critics have suggested that the privatization of military force was brought about by the end of the Cold War and the West’s consequent withdrawal from international conflicts. See, e.g., MANDEL, *supra* note 98, at 1; SHEARER, *supra* note 123, at 27, 32-34; SINGER, *supra* note 113, at 49-60; Howe, *supra* note 72, at 1-2; Zarate, *supra* note 98, at 75-76; Isenberg, *Post-Cold War*, *supra* note 98, at 12.

²⁵⁰ See, e.g., Robert Avery, “I went to bed hungry” in Ontario Superjail, TORONTO STAR, Mar. 1, 2003, at A12, LEXIS News Library, Tstar File (reporting accusations that a private prison company was “cutting corners to make money at the inmate’s expense,” resulting in inadequate food, medical care, and protection among inmates); Singer, *supra* note 116, at A15 (noting that “a former DynCorp

cases, the parade of pitfalls is horrific—suspects searched, arrested, and detained without probable cause;²⁵¹ inmates crowded into cells, denied basic needs, disciplined harshly, or even tortured.²⁵²

2. Response

There are three major stumbling blocks for the anti-majoritarian strain of human rights arguments—evidence, style, and reform. The first two are straightforward, and not worth pursuing here in great detail: First, anti-majoritarian arguments suggest that private punishment, policing, and military corporations violate human rights more often than public punishment, policing, and military institutions. But this claim has been vigorously and carefully contested, and there is very little empirical evidence to support it.²⁵³ Second, there is a stylistic tension in anti-majoritarian arguments: They criticize governments harshly while urging for more public controls. They criticize the human rights policies of public legislative, judicial and administrative institutions; nevertheless, they defend the human rights practices of public punishment, policing, and military institutions. Of course, this is just a tension, not a contradiction. There could be good reasons to trust public prisons, police, and armies more than legislators, judges, and administrators. The problem is that anti-majoritarian arguments rarely offer such reasons, so the tension is rarely resolved. As a result, they often slide from arguments against private punishment, policing, and military corporations, into arguments against the exercise of punishment, policing, or military force itself.²⁵⁴

employee has accused the company of cutting costs by hiring waiters and security guards to work as mechanics on Army helicopters”); cf. DONAHUE, *supra* note 23, at 163 (“Both proponents and critics cite lower labor costs as a key feature of private prisons. [Labor] accounts for roughly 60 percent of the overall costs of corrections.”)

²⁵¹ Paula Barr, *Force, Authority of Bounty Hunters Come Into Question*, TIMES-PICAYUNE (New Orleans, La.), Jan. 4, 1995, at A2, LEXIS, News Library, Notpic File (reporting that two children were maced during an arrest by a bounty hunter); Peter Hermann, *Bondsman shoots man in chase*, BALTIMORE SUN, July 8, 1995, at 2B, (reporting that bondsman shot a fleeing man); Wayne, *supra* note 98 (reporting that “[i]n Bosnia, employees of DynCorp were found to be operating a sex-slave ring of young women who were held for prostitution after their passports were confiscated”).

²⁵² See, e.g., Judith Greene, *Bailing Out Private Jails*, AM. PROSPECT, Sept. 10, 2001, at 23, (reporting that prisons operated by CCA and Wackenhut had “a record of continuing abuses” and “repeatedly erupted in violence and disturbances”).

²⁵³ See, e.g., MANDEL, *supra* note 98, at 148:

One of the underlying problems here is that the desire to impose new accountability standards on private security providers may be based not so much on evidence of violation[s] of national and international laws by the current crop of companies but rather more heavily on a combination of lawless activities by mercenaries in earlier eras and apprehensions about what might happen in the future. This kind of motivation, focusing on hypothetical or historical violations, faces inherent limitations and ambiguities.

See also SHEARER, *supra* note 123, at 69 (“The most frequently cited criticism of the private military sector concerns lack of accountability.”).

²⁵⁴ In these cases, the argument peters out into a futile, tragic finale. One critic concludes: “[T]he

This leads to the third obstacle, which merits more attention here: If today's privatization effort is motivated by the wrong objectives, why must we prohibit privatization instead of reforming it? Let us assume that in empirical terms, the anti-majoritarian critique is correct: When today's governments privatize force, they sacrifice human rights to democracy and downsizing. Now we come to a fork in the road to human rights. On the left, we could assume that this majoritarian dynamic is a natural, necessary fact about governments and therefore prohibits governments from hiring private prisons, police, and armies at all. On the right, we could try to protect victims from voters. We could *reform* the privatization of force by reforming the demand-supply relationship between governments and corporations. We could look for concrete ways to motivate public officials and private employees to respect and protect the rights of inmates, suspects, and combatants.

This road has not been traveled by human rights critics, but it has been positively trammled by legal scholars. In law reviews, scholars have often observed that our most significant human rights safeguards have been designed to protect against abuses committed by governments rather than corporations.²⁵⁵ As a result, they have argued, the activities of private punishment, policing, and military corporations often fall through legislative, judicial, and administrative cracks.²⁵⁶

private prison . . . is at root a sub-species of an institution that is, in the final analysis, fundamentally irrational . . . the private prison emerges as something worthy of great concern precisely because of the inherent irrationality of prison as such." White, *supra* note 33, at 146. He continues: "Put another way, we might think of the private prison and convict leasing as together demonstrating the inability of the legal structure of the liberal state to retain its coherence in the context of fundamentally illiberal practices in punishment." *Id.* In a similar vein, another finishes: "It can be argued . . . that [the activities of mercenary organizations] cannot be any worse than what states already do In fact one can validly argue that it is the modern state-centered form of military service which is the most destructive." ISENBERG, CORPORATE MERCENARY, *supra* note 98.

In public policy circles, this is deeply impractical talk. Are we to rid ourselves of prisons, police, and armies altogether? There are two issues here: the legitimacy of force and the legitimacy of the privatization of force. It is certainly conceivable that the former has failed us, and thus, that the latter has too. But if that is the case, then we have much bigger fish to fry than private prisons, police, and armies. If we want to protect human rights, we should probably concentrate on them.

²⁵⁵ For a general discussion of corporate liability for violations of international laws protecting human rights, see Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443 (2001).

²⁵⁶ See, e.g., DAVIS, *supra* note 125, at 33 ("Executive Outcomes, despite years of fielding some of Africa's best combat troops and winning two wars for its clients, refused to accept the mercenary title. One reason that EO could get away with such a claim is the lack of a definition of what exactly constitutes a mercenary under international law."); Guillory, *supra* note 108, at 113-30 (describing various challenges in classifying civilians, government employees, and contractors accompanying military forces under international law of war); *id.* at 115 (noting that some commentators view civilians accompanying military forces as neither "combatants" nor "noncombatants," but "quasicombatants" under international law); Sklansky, *supra* note 40, at 1244-45 (noting that in most cases, "private security guards [are] treated as private rather than public actors" because "private police personnel occupy an awkward middle ground between public law enforcement and private citizens"); *cf.* Isenberg,

Let us call these “loophole” arguments. In such arguments, legal scholars rarely suggest that loopholes are reasons to ban the privatization of punishment, policing, and military force. Far more often, they argue that we should *regulate* private prisons, police, and armies by closing the gaps.²⁵⁷ They propose reforms designed to constrain the behavior of private punishment, policing, and military corporations and employees.²⁵⁸ They argue, for example, that (1) private prisons should not enjoy immunity from federal lawsuits,²⁵⁹ (2) private police searches should be governed by the Fourth Amendment and thus justified by probable cause,²⁶⁰

Post-Cold War, *supra* note 98, at 15 (arguing that “[t]he ambiguity regarding the use of mercenaries also works to their disadvantage” because “they don’t get the protection of international humanitarian law,” even though “they are required to follow the rules and customs of war”).

²⁵⁷ See sources cited *infra* notes 259, 260, and 262.

²⁵⁸ *Id.*

²⁵⁹ The Supreme Court denied private prisons one form of sovereign immunity in *Richardson v. McKnight*, 521 U.S. 399, 401, 412 (1997) (holding that private prison guards cannot claim qualified immunity in § 1983 suits), but granted them another form of sovereign immunity in *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 63 (2001) (holding that companies operating private correctional facilities, like agencies operating analogous public facilities, are not subject to civil rights suits under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971)). For “loophole” arguments about these two holdings, see, e.g., *The Law of Prisons*, *supra* note 74, at 1879-83 (arguing that “the additional judicial check” imposed by *Richardson* “should increase private prison quality” by making “private prisons . . . more accountable for their constitutional violations than . . . public prisons”); Lori DaCrosse, Note, *Richardson v. McKnight: Barring Qualified Immunity from 42 U.S.C. § 1983 for Private Jailers*, 26 PEPP. L. REV. 149, 168 (1998) (arguing that “*Richardson* guarantees that prisoners’ civil rights will not slip through the cracks of the profit motive foundation”); Demetria L. McCain, Note, *Malesko v. Correctional Services Corp. in the Second Circuit: Pursuing Damages for Constitutional Violations by the Private Prison Industry*, 44 HOW. L. J. 399, 400 (2001) (“[F]ederal prison privatization . . . [does] not warrant the protection of federal sovereign immunity. . . . [T]hese companies and their stockholders should be held financially responsible where the constitutional rights of an individual have been abridged through acts done in the course of business.”); cf. Robert Trant, Comment, *Richardson v. McKnight: Are Private Prison Operators Engaged in State Action for the Purposes of 42 U.S.C. § 1983?*, 25 N.E. J. CRIM. & CIV. CON. 577, 605-06 (1999) (arguing that private prisons are engaged in “state action” for the purposes of the Fourteenth Amendment and act “under color of state law” for the purposes of 42 U.S.C. § 1983).

²⁶⁰ See, e.g., Marco Caffuzzi, *Private Police and Personal Privacy: Who’s Guarding the Guards?*, 40 N.Y.L. SCH. L. REV. 225, 225-27 (1995); Steven Euler, *Private Security and the Exclusionary Rule*, 15 HARV. C.R.-C.L. L. REV. 649, 649-53 (1980); Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039, 1041 (1971); Michael A. Braun & David J. Lee, Comment, *Private Police Forces: Legal Powers and Limitations*, 38 U. CHI. L. REV. 555, 565-73 (1971); Gloria G. Dralla et al., Comment, *Who’s Watching the Watchman? The Regulation, or Non-Regulation, of America’s Largest Law Enforcement Institution, the Private Police*, 5 GOLDEN GATE U. L. REV. 433, 433-36 (1975); Peter Fine, Note, *Private Assumption of the Police Function Under the Fourth Amendment*, 51 B.U. L. REV. 464, 464, 468-82 (1971); Lynn M. Gagel, Comment, *Stealthy Encroachments upon the Fourth Amendment: Constitutional Constraints and Their Applicability to the Long Arm of Ohio’s Private Security Forces*, 63 U. CIN. L. REV. 1807, 1809-11 (1995); Robert A. Hillman, Note, *Admissibility of Evidence Seized by Private University Officials in Violation of Fourth Amendment Standards*, 56 CORNELL L. REV. 507, 507-08 (1971); Terrance L. O’Connor, Comment, *Search and Seizure by Private Parties: An Exception to the Exclusionary Rule*, 5 LAND & WATER L. REV. 653, 653-59 (1970); Susan E. Pfeifer, Comment, *Unreasonable Private Searches and Seizures and the Exclusionary Rule*, 16 AM. U. L. REV. 403, 403-08 (1967); Note, *Regulation of Private Police*, 40 S.

and (3) mobilized defense contractors and PMC soldiers should be classified as lawful “combatants” under the Geneva Convention and bound by international laws of war.²⁶¹

Many of these proposals reflect an old assumption in legal thought—that judges, lawyers, and litigators must carry the mantle of human rights and shoulder the anti-majoritarian burden alone.²⁶² But it is easy to imagine less conventional, more modern solutions that draw upon the powers of legislators and administrators as well. Contracts could be drafted to include more rights-conscious performance incentives, reporting and monitoring requirements, and insurance, damages, and termination options.²⁶³ Statutes and regulations could be drafted to require public agencies to monitor our private prisons, police, and armies more closely.²⁶⁴ Or they could empower human rights groups—such as Amnesty International and Human Rights Watch—to do so instead.²⁶⁵

Would any of these reforms work? In the long run, which road would be better? Would regulated corporations exercise punishment, policing, and military force more or less callously than governments? These choices between public and private supply present hackneyed dilemmas in public policy circles. In the end, this is the greatest weakness of anti-majoritarian arguments: Although these questions are familiar and inevitable, anti-majoritarian arguments provide no useful tools to resolve them. When it comes to private supply, these arguments make a strong case for reform, but a weak case for prohibition. They offer no proof that the model of private supply and public demand is broken beyond repair.

Yet they do suggest that reforms would be hard won, if not unwinnable. As one critic warns, “I do not deny that aggressive courts, compe-

CAL. L. REV. 540, 540 (1967); Harvey L. Ziff, Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608, 608 (1967).

²⁶¹ Guillery, *supra* note 108, at 134-36 (proposing a new paradigm under which “civilians may support and participate in military activities,” but are treated as “combatants” once “they are . . . integrated into combat operations,” by “becoming an uninterrupted, indispensable part of an activity . . . intended to disrupt enemy operations or destroy enemy forces or installations”).

²⁶² See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 260-68 (1962) (discussing the role of the court in carrying out the human rights guaranteed by the Constitution).

²⁶³ The *Harvard Law Review* recently dubbed “Information, Contracts, Monitoring” as “the new frontier” in the prison privatization. For a more detailed discussion of these possibilities, see *The Law of Prisons*, *supra* note 74, at 1886-91.

²⁶⁴ Isenberg, *Post-Cold War*, *supra* note 98, at 16 (arguing that “regulation, not prohibition, is needed,” in the form of “a general set of rules, governed by an international body such as the U.N. or the International Court in The Hague, covering the conditions under which PMCs can operate”).

²⁶⁵ See MANDEL, *supra* note 98, at 148 (“[W]hatever accountability system emerges needs to support rather than supplant existing national and international laws and law enforcement mechanisms. Moreover, such a system should take fully into account the already functioning safeguards provided by the intense scrutiny from nongovernmental organizations, such as Human Rights Watch and Amnesty International, that are highly vocal and vigilant and well connected to the U.S. Congress and its counterparts in other nations.”).

tent legislatures, and zealous reformers *theoretically could* resolve all the diverse problems that plague private prisons But the possibility of reform must not be confused with its probability.”²⁶⁶ Anti-majoritarian critics remind us that in the real world, the privatization of punishment, policing, and military force is not likely to be accompanied by human rights reforms.²⁶⁷ In political terms, the privatization of force is about democracy and downsizing, not human rights. We should not expect governments to reform private punishment, policing, and military markets by themselves. On the contrary, we should expect them to resist such reforms. This is the greatest strength of anti-majoritarian arguments: They offer the historical, practical reminder that voters rarely protect victims, so that democratic governments are inconstant guardians of human rights.

This is a useful admonition. But it criticizes the privatization of force qua popular politics rather than privatization qua privatization. It fails to articulate any structural, systematic link between the privatization of force and the regulatory failures of governments.

F. *Industrial Influence*

1. *Argument*²⁶⁸

a. *Influence*

This link is the subject of the “industrial influence” argument, the fifth argument against the privatization of force. Like the last one, this criticism is focused primarily on the private prison and defense contracting industries, which rely exclusively on the model of private supply and public demand. In principle, however, it is easily adaptable to the public demand sector of the private policing and private military industries, so I will in-

²⁶⁶ White, *supra* note 33, at 146.

²⁶⁷ *Id.*

²⁶⁸ See DONAHUE, *supra* note 23, at 52-56 (on industrial influence and privatization generally); *id.* at 174-78 (on industrial influence and private prisons); MANDEL, *supra* note 98, at 88 (“The worst-case scenario for the long-term consequences of security privatization includes . . . the corruption of coercive authority . . . and the irresponsible, uncontrolled, and potentially neocolonialist use of foreign-policy influence.”); O’TOOLE, *supra* note 47, at xi-xii (“Out of curiosity about this ‘police-industrial complex,’ I did some research into the private police industry I had thought of private security as the civilian fringe of public law enforcement, but I found that the two are more like mirror images of each other.”); Michael Janus, *Bars on the Iron Triangle: Public Policy Issues in the Privatization of Corrections*, in *PRIVATIZING CORRECTIONAL INSTITUTIONS*, *supra* note 42, at 81-83 (“Proponents of privatization point out that this process of influencing decision makers would provide corrections with a long overdue source of political power Opponents point to the potential abuse of this power.”); Zarate, *supra* note 98, at 147 (discussing industrial influence and private military corporations); Steven Donzinger, *The Prison-Industrial Complex: What’s Really Driving the Rush to Lock ‘Em Up*, WASH. POST, Mar. 17, 1996, at C3, LEXIS, News Library, Wpost File (“[A]n ‘iron triangle’ of government bureaucrats, private industry leaders and politicians . . . exercises a powerful influence on crime policy.”).

clude references to those markets as well.²⁶⁹ The industrial influence argument focuses on the powerful interest groups formed by private punishment, policing, and military industries. Critics argue that these interest groups spend money to influence, capture, and corrupt our legislative, judicial, and administrative institutions.²⁷⁰ Corporations invest in lobbying, donations, and bribes to court political and legal favors. They persuade public officials to purchase services from private punishment, policing, and military corporations,²⁷¹ and to deregulate private punishment, policing, and military markets. They sponsor pro-industry studies, seminars, and conferences, exchange public and private personnel, and finance campaigns. They cultivate contacts, friendships, and professional debts. In other words, they barter *influence*.

To economists, this is yet another example of market failure, which they call “rent-seeking” behavior.²⁷² Corporations waste public and private funds, spending shareholder money to squeeze excessive benefits from public projects. But for most critics, industrial influence is not just a problem of waste. It is a problem of deliberation, and thus, a problem of democracy.²⁷³ Most critics are concerned that privatization leads politicians to think and talk about politics in selfish and irrational ways.²⁷⁴ First, after

²⁶⁹ In this Article, for the purposes of exposition, I posit a theoretical distinction between private military corporations, which provide military force, and defense contractors, which do not. Of course, we have already seen that this distinction itself is falling apart. See *supra* Part II.B.3 and accompanying notes.

²⁷⁰ HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 74, at 42-47, 159 (describing “the process of capture and private prisons”; “[A] weakness shared by all states is that the monitoring system has often been less rigorous than it should. This is mainly because of the principle of capture”); SHICHOR, *supra* note 42, at 241 (“[T]he privatization trend opens up ample possibilities for the emergence of conflict of interest problems and increases the possibilities for corruption”); Greene, *supra* note 252, at at 23, 27 (describing links between the federal government and private prison companies).

²⁷¹ This need not be as sinister as it sounds. Recall that the “exercise” of force includes threats, in addition to acts. Thus, we could spend a great deal of money on preventative, defensive, or deterrent measures, which—if they worked—would mean that we would end up making more threats but using less force. Samuel Huntington argues that this “conservative” ethic is the essence of the “professional military mind.” See HUNTINGTON, *supra* note 45, at 93.

²⁷² See DONAHUE, *supra* note 23, at 52-53.

²⁷³ This raises an interesting question: Why is this not just another version of the public accountability argument? In many people’s minds, it is. But there is an important distinction here, between accountability to actual voters and accountability to some idea of a rational, public sphere. See *infra* note 274. Notice how “accountability” runs through these arguments like an uber-theme: public accountability (majoritarianism), individual accountability (human rights), and deliberative accountability (industrial influence).

²⁷⁴ Such criticisms are grounded in a normative conception of the “public sphere,” which has been articulated by many twentieth century political thinkers. See, e.g., AMY GUTTMAN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996) (“The principles of deliberative democracy that we develop here are variations on familiar themes in political theory and practice We try to clarify the themes and bring them together into a coherent whole, which we call the constitution of deliberative democracy.”); JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE

enough donations and bribes, officials might think more of themselves and less of the public at large. They might support punishment, policing, and military policies that advance their own careers or line their own pockets. Second, after enough lobbying, officials might be more easily persuaded by sham evidence and shoddy arguments and may start to perceive criminal and military threats where they do not actually exist.

The most harrowing and persuasive industrial influence arguments look to the past and the future. They harken back to an ominous moment in 1961, when President Eisenhower, in his farewell address to the nation, left Americans with the following warning: "In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex."²⁷⁵ These days, we hear echoes in our public policy debates when private prison critics describe the recent rise of the "prison-industrial complex,"²⁷⁶ and private military critics note that the once docile defense contracting industry now stands alongside the United States Armed Forces on our front lines.²⁷⁷

Looking ahead, the industrial influence argument predicts the worst. As these industries continue to expand and mature, critics predict that they will buy more and more political influence and become a primary shaper of the popular demand for punishment, policing, and military force.²⁷⁸ They

("The bourgeois public sphere may be conceived above all as the sphere of private people come together as a public . . ."); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 10-11 (1948); Seyla BenHabib, *Deliberative Rationality and Models of Democratic Legitimacy*, 1 *CONSTELLATIONS* 26, 30-31 (1994), explaining:

According to the deliberative model, legitimacy and rationality can be attained with regard to collective decision making processes in a polity if and only if the institutions of this polity and their interlocking relationship are so arranged that what is considered in the common interest of all (in Rousseau's terms, "the general will") results from processes of collective deliberation conducted rationally and fairly among free and equal individuals.

Id.; Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY* 143-55 (Robert E. Goodin & Philip Pettit eds., 1997) ("In this essay I explore the ideal of a 'deliberative democracy' I propose an account of the value of such an association that treats democracy itself as a fundamental political ideal and not simply as a derivative ideal that can be explained in terms of the values of fairness or equality of respect.").

²⁷⁵ President Dwight D. Eisenhower, *Farewell Address* (1961), available at <http://www.ourdocuments.gov> (last visited Nov. 17, 2003) (on file with the Connecticut Law Review).

²⁷⁶ See Schlossler, *supra* note 74, at 54.

²⁷⁷ See Guillory, *supra* note 108, at 111 ("In times past, civilians served in support positions primarily behind the lines, safely away from the fighting. Today, many civilian technicians are working alongside the troops at the frontline.").

²⁷⁸ See, e.g., MANDEL, *supra* note 98, at 86 ("[T]here are those who fear a more devious—perhaps even conspiratorial—intentional use of privatized security by national governments for negative foreign-policy ends [I]t is conceivable to some that the most unscrupulous private military companies could have an interest in seeing violence and turmoil perpetuated to drum up business for their services."); *id.* at 88 ("The worst-case scenario for the long-term consequences of security privatization includes . . . the corruption of coercive authority . . . and the irresponsible, uncontrolled, and potentially neocolonialist use of foreign-policy influence."); Schlosser, *supra* note 74, at 54 ("Three decades after the war on crime began, the United States has developed a prison-industrial complex—a

will fund politicians and administrators who are tough on crime and tougher on terrorism. To feed market growth and produce investment returns, corporations will fund research and reform efforts that target newer, larger “demographics” of inmates, suspects, and foes. Payments and allocations will be motivated by self-interest and fear.

b. Comparison

Like every argument against privatization, this one is comparative; the problem of influence is not unique to markets. Understandably, wardens, police chiefs, and generals believe that they provide vital services to the public. To exercise punishment, policing, and military force effectively, they lobby politicians and administrators for bigger budgets and broader mandates.

It is easy to imagine the myriad ways in which such partnerships between public supply and public demand go astray in everyday government. The construction and renovation of an entire nation’s punishment, policing, and military infrastructure provides many opportunities for corruption, manipulation, and back-door influence between public officials. Taken together, such public projects represent a massive pie, and everyone wants a slice. When we contemplate worst-case scenarios, we must admit that some wardens, police commissioners, and generals are likely to trade political favors with legislatures and regulators in pursuit of professional and personal goals.

The challenge is to explain why the problem of influence would be worse in “private-public” partnerships than in “public-public” partnerships—why private prisons, police, and armies would extract more rents from legislatures than public prisons, police, and armies. More often than not, industrial influence arguments do not bother to prove this critical point. But the logic of such arguments suggests a plausible answer: Whereas public institutions are bound to obey public budgets, corporations may reinvest profits into the political process itself. In particular, corporations have the capacity to exchange revenues with legislatures by trading political contributions for government contracts. When corporations and governments join forces, a distinctive type of tender—political contributions—greases the skids for influence peddlers.

In partnerships between public institutions, the buying and selling of influence is a strictly black market affair. Wardens, police chiefs, and generals cannot put public funds into the pockets of politicians and regulators without breaking laws. They must spend institutional funds on prisons, police, and armies, rather than diverting them toward political campaigns

set of bureaucratic, political, and economic interests that encourage increased spending on imprisonment, regardless of the actual need.”).

or partisan causes.²⁷⁹ As public officials, they can pull strings but they cannot cut checks. As a result, they must barter for political influence instead of buying it.

In partnerships between corporations and governments, by contrast, there is a relatively open market for political power. In the United States, for example, corporations may establish, administer, and solicit contributions to “political action committees,” which may donate money directly to politicians, campaigns, and causes.²⁸⁰ For private punishment, policing, and military corporations, such political action committees are rational and legal investment vehicles. By advancing or impeding political careers, political action committees can influence the development of our punishment, policing, and military policies in ways that promote and protect shareholder interests.

Of course, such committees can be defended as organized efforts to express political interests and invigorate political debates.²⁸¹ But when we compare public and private institutions, we must prepare for the worst of both worlds. It seems clear that when we consider the problem of industrial influence, the prospect of political action committees makes matters worse. Once we throw government contracts into this mix, the purpose of political action committees turns increasingly suspect. We may no longer imagine private contributions to ideological allies; we must contemplate winks and nods between politicians and entrepreneurs. Politicians, administrators, and contractors may exchange tit-for-tat, payment-for-payment, contribution-for-contract. In return for “reasonable” donations, corporations may tap into taxpayers’ pockets.

2. *Response*

When compared to the first four arguments, this one seems fabulous. It achieves what the others could not: It explains one of the structural, systematic ways in which the privatization of punishment, policing, and military force engenders regulatory failures. More than the earlier arguments, it confronts the public demand model head on. It suggests that governments make better managers of markets than they make customers in markets. More specifically, it belies the second feature of the public demand

²⁷⁹ See, e.g., U.S. CONST. art. II, § 8 (“Congress shall have power to . . . provide for the common defense and general welfare of the United States”); *Kendall v. United States*, 37 U.S. 524 (1838) (holding that executive officials must spend federal funds as directed by Congress). In the United States, federal and state laws also prohibit many public employees from playing “an active part in political management or in political campaigns.” See Rafael Gely & Timothy D. Chandler, *Restructuring Public Employees’ Political Activities: Good Government or Partisan Politics?*, 37 HOUS. L. REV. 775, 782 (2000) (quoting the Hatch Act and describing similar state laws).

²⁸⁰ *Fed. Election Comm’n v. Beaumont*, 123 S. Ct. 2200, 2203 (2003) (citing 2 U.S.C. § 441b (2000)).

²⁸¹ *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976) (holding that expenditures of political action committees are protected by the First Amendment).

model—the perfect barrier between the shareholder’s control of supply and the government’s control of demand. It demonstrates that supply does not simply “satisfy” demand. Shareholders, managers, and employees pursue their own interests, instead of passively satisfying consumers. When markets expand, corporations develop the ability to influence, manipulate, and corrupt public demand. The more that we grant them control of provision and exercise, the more that they purchase control of payment and allocation. Slowly, private supply warps public demand.

This is serious business in the context of punishment, policing, and military markets. We are not dealing with widgets or stamps. When private supply warps public demand, politicians start selling off our ability to make demand-side decisions, which are some of the most elemental decisions of equality, freedom, and justice. They are the highest-level decisions about who may use punishment, policing, and military force, as well as when, where, how, how much, and against whom punishment, policing, and military force may be used.

Many industrial influence critics claim that these problems are already upon us. They claim that our rising prison populations are driven, in part, by the private prison industry and that our rising security costs are driven, in part, by private security firms.²⁸² There is already some shocking evidence: Forty states have recently passed “truth in sentencing” legislation to reduce the availability of parole for prisoners.²⁸³ The model bill was drafted by a private, for-profit lobbying firm known as the American Legislation Education Corporation.²⁸⁴ Among the draftees were employees of CCA, the country’s largest private prison corporation.²⁸⁵

But the strongest case for the industrial influence argument lies far in the future, in a world in which the privatization of force is much more advanced. If we had enormous, powerful punishment, policing, and military industries, then we would really have something to worry about.

In light of these looming dangers, the obvious practical, political and legal response seems to be the prohibition of privatization. But does the industrial influence argument really require it? In theoretical terms it does not. Like the human rights argument, it is not an argument against the privatization of punishment, policing, and military force by itself. It is an argument against the combination of corporate campaign contributions and the privatization of force. If we curb the problem of corporate campaign finance, then we curb the problem of industrial influence. In other words, we face yet another practical fork in the road. Which policy could be changed easier, quicker, and more completely? Current events offer only a

²⁸² See Karen Olsson, *Ghostwriting the Law*, MOTHER JONES, Sept.-Oct. 2002, at 17, 18.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

crumb of evidence on both sides: In the past three years, Congress has passed the McCain-Feingold Act²⁸⁶ and the Aviation and Transportation Security Act.²⁸⁷ The former victory was hard won; the latter was easily won, yet motivated by the exceptional events of September 11, 2001. This is not the place to wonder which was the greater exception and which was the more plausible rule, let alone which one is more likely to “work.” To tackle these major controversies would lead us far afield. The question remains: Is there anything fundamentally wrong with the privatization of punishment, policing, and military force per se?

G. Market Failure

1. Arguments

Critics take up this question more directly in a sixth set of arguments. They argue that the public demand model produces two final forms of market failure—inadequate competition and agency costs.

a. Inadequate competition²⁸⁸

The inadequate competition argument is closely related to the industrial influence argument. They often appear in the same sources and depend on each other in complex ways. They are most often applied to the same industries—private prisons and defense contractors—which are the purest examples of public demand. Critics argue that in these two industries, only a few large corporations dominate the field. In economics, this is called “oligopoly”—a market in which a small group of suppliers excludes entrants and raises prices.

In these arguments, it is often hard to disentangle causes from effects. Generally speaking, though, critics argue that the root cause of oligopoly is the concept of a “natural monopoly”: a market in which high “fixed” costs and “sunk” costs diminish incentives to enter or exit.²⁸⁹ For our purposes,

²⁸⁶ Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 18 and 47 U.S.C.).

²⁸⁷ Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597 (codified as amended in scattered sections of 5, 26, 31, and 49 U.S.C.); discussion *supra* Part IV.C (evaluating the public policy arguments for and against the Aviation and Transportation Security Act).

²⁸⁸ For a discussion of competition and privatization generally, see DONAHUE, *supra* note 23, at 78. For a discussion of competition among private prisons, see *The Law of Prisons*, *supra* note 74, at 1883 in which the private prison industry is described as a “somewhat concentrated oligopoly”; Dolovich, *supra* note 87, at 33 (stating that CCA and Wackenhunt control approximately 75% of the private prisons in America).

²⁸⁹ One also hears that public officials are spending “other people’s money,” so they care much less how they spend it. See *Richardson v. McKnight*, 521 U.S. 399, 414, 418-19 (1997) (Scalia, J., dissenting) (“[I]t is fanciful to speak of the consequences of ‘market’ pressures in a regime where public officials are the only purchaser, and other people’s money the medium of payment. Ultimately, one prison-management firm will be selected to replace another prison-management firm only if a decision is made by some *political* official not to renew the contract.”) (internal citation omitted). The

fixed and sunk costs involve supply-side investments in highly specialized construction, materiel, and perhaps expertise.²⁹⁰ Costs are “fixed” when they do not decline as provision expands; costs are “sunk” when they cannot be recovered upon exit.²⁹¹

Such costs give rise to inadequate competition in several ways. Most of all, they diminish the incentives for new firms to enter, old firms to exit, and customers to switch mid-stream. Only a few firms have the necessary resources and expertise to compete for large contracts. Contracts are long-term. Cancellations are rare, costly, and contested. Prices stabilize or steadily increase. Strong ties exist between public officials and private contractors, who depend on one another to survive and thrive. Rent-seeking is rampant.

b. Agency costs²⁹²

The agency argument is more complex. It comes from the economic theory of agency relationships, in which principals hire agents to do things for them. Agency costs arise when agents do not do what principals desire. In agency arguments, the principals are citizens and/or governments, and the agents are public and private punishment, policing, and military corporations. As one commentator explains, there are several common causes of agency costs: “[T]he agent’s interests do not entirely coincide with those of the principal; the principal does not have complete control over the agent; the agent has only partial information about the principal’s interests; and the principal has only partial information about the agent’s behavior.”²⁹³

Agency theory describes several different kinds of agency relationships which are each suited to minimize different kinds of agency costs. In this context, the two relevant kinds are outsourcing and employment relationships.²⁹⁴ In “outsourcing” relationships, principals hire agents to deliver results. In “employment” relationships, principals hire agents to obey or-

problem with this argument is that, in the private prison industry, most states have statutes that require savings and most contracts are awarded to the lowest bidder. See Dolovich, *supra* note 87, at 30-31.

²⁹⁰ Expertise relates to the agency argument: When principals have a great deal of expertise, they are less interested in outsourcing work. If they do, then agents develop a great deal of expertise, and become irreplaceable and unmanageable.

²⁹¹ In addition, some critics note less tangible, demand-side “switching costs,” such as the professional prestige that politicians and administrators invest in particular projects, and the administrative morass involved in making large-scale institutional changes. See, e.g., DONAHUE, *supra* note 23, at 165 (“Even if there are a number of firms bidding to take over when a city, state, or county first decides to privatize, jurisdictions will probably find it difficult to switch contractors if their incarceration company disappoints them.”).

²⁹² For a discussion of agency costs and privatization generally, see DONAHUE, *supra* note 23, at 38-39, 41-45, 56. For a discussion of agency costs and PMCs, see SINGER, *supra* note 113, at 151-52.

²⁹³ See, e.g., DONAHUE, *supra* note 23, at 38.

²⁹⁴ There are two other common phrases for these words—“contracting” a project “out” and “keeping” a project “in-house.”

ders. Outsourcing works well when principals have simple, predictable, certain goals, and do not care too much how agents achieve them. Agents know *ex ante* what principals want them to do, and principals know *ex post* what agents have done. In contrast, employment works well when principals have complex, unpredictable, uncertain goals, and care a lot about how agents achieve them. In such arrangements, principals can monitor and manage an agent's methods as well as an agent's results.

Agency critics observe that the goals of punishment, policing, and military organizations are exceedingly complex, unpredictable, and uncertain.²⁹⁵ Moreover, we care immensely how these goals are achieved. As a result, governments encounter problems when they attempt to outsource punishment, policing, and military force. Contracts are difficult to write, terms are hard to negotiate, and compliance is hard to monitor.²⁹⁶ By introducing the profit motive, we increase agency costs. We grant agents more room to run amok; we must work harder to stop them.

2. Responses

a. Economics

Finally we have two astute objections to the public demand model itself. Like the industrial influence argument, these arguments show how private supply can shake free from public demand. They suggest two different ways in which punishment, policing, and military corporations could frustrate, escape, or ignore the public demand for force. But these two arguments are better than the last one. They are not about defects that inhere in our political and legal processes. They are about defects that inhere in private punishment, policing, and military markets themselves.²⁹⁷ The inadequate competition argument attributes market failure to the nature of punishment, policing, and military tasks; the agency costs argument attributes market failure to the nature of punishment, policing, and military goals. The competition argument focuses on the costly nature of private supply; the agency argument focuses on the complex, unpredictable, and uncertain nature of public demand.

But if we mean to conduct a *liberal* analysis of the privatization of force, these criticisms provide funny hooks upon which to hang our hats. When we started this analysis, we conceded the economic efficiency argument. Then we moved beyond economic questions to explore a series of traditional liberal values—equality, security, democracy, and liberty. Among these values we found few fundamental concerns. Now, we finally

²⁹⁵ See, e.g., DONAHUE, *supra* note 23, at 166-67; SINGER, *supra* note 113, at 152-53.

²⁹⁶ See, e.g., DONAHUE, *supra* note 23, at 166-67; SINGER, *supra* note 113, at 152-53.

²⁹⁷ In this regard, they are like the public goods argument—except that the public goods argument applies only to the model of private supply and private demand. See discussion *supra* Part IV.B.2.

find two inherent objections to the privatization of force, but we have apparently come full circle. These are economic arguments, unadorned by political and legal values. They argue that punishment, policing, and military markets minimize competition and maximize agency costs. Market failure arguments pull out the two pillars of the free market model: competition and information.

In doing so, they land us back where we started: in the heated empirical debate over whether corporations “really” provide punishment, policing, and military force more efficiently than governments. For critics of privatization, this is enemy terrain. Entrepreneurs, administrators, and legislators believe fervently in the economic efficiency of markets and are suspicious of market failure arguments. They insist that punishment, policing, and military markets *are* competitive, that tasks and results *are* definable. For many conservatives, these are articles of ideological faith. Fixed and sunk costs are low; contracts are complete; results are verifiable; savings are real.

I grant that these two market failure arguments have serious political and legal implications. When we are talking about punishment, policing, and military force, every economic argument does. Both arguments suggest structural ways in which private punishment, policing, and military corporations could betray our public demands and develop immunities to the possibilities of public negotiations, inspections, and sanctions. They remind us that when markets fail, the accountability of corporations fails too.²⁹⁸ If these arguments are correct, then private punishment, policing, and military corporations would not do the things that we want them to do. In this sense, these two market failures pose the widest political and legal threats. They threaten equality, security, democracy, and human rights, all at once.

In the end, however, these market failure arguments remain tethered to economic roots. In different ways, each argument is limited by the horizon of the economic perspective. The competition argument is too narrow-

²⁹⁸ Note that here, “accountability” is much broader than it was earlier. This is accountability to governments. It could be accountability to any particular goal that government pursues, or all of them. Earlier, “public accountability” meant accountability to voters. That was majoritarian accountability. See discussion *supra* Part IV.D.1.

As I previously mentioned, I have conceded the economic efficiency hypothesis; see discussion *supra* Part IV.A.2; so I will not discuss whether these same market failures also make punishment, policing, and military corporations less economically efficient. By contrast, some commentators argue that “accountability” is actually a subset of “efficiency,” or that “efficiency” is actually a subset of “accountability,” so that these two market failure arguments are fundamentally the same. See, e.g., DONAHUE, *supra* note 23, at 10 (“But efficiency, at base, is merely one aspect of a more fundamental quality—accountability.”). But I remain skeptical of these terminological tyrannies. I do not understand how one can declare what words “actually” mean, especially words like “accountability” and “efficiency,” apart from looking at how they are commonly used. In my experience, when people use the term “efficiency,” they are referring to economics, and when people use the term “accountability,” they are referring to politics. So I consider the two issues distinct.

mind; it assumes that the demand for force is not malleable and, thus, it overlooks a simple path to reform. The agency argument is much better, but it is still too broad. It fails to explain the singular significance of punishment, policing, and military force. But these are cryptic claims that must be explained:

b. Competition

To consider the limits of the competition argument, let us focus on the problem of private prisons. Critics claim that fixed and sunk costs are unusually high in this industry which discourages new firms from entering, old firms from exiting, and public officials from switching firms.²⁹⁹ The major fixed and sunk costs in the industry are the construction, design, and lease purchase of prisons.³⁰⁰

Here is the typical story:³⁰¹ A public prison system becomes overcrowded. Politicians, administrators, or judges call for the construction of more prisons. Questions of funding arise. Generally speaking, securing public funding for prison construction is a lengthy and uncertain process. Voters often support long prison sentences, but they do not often support large prison bonds.³⁰² Even when they do, public financing involves budget hearings and design competitions, which private financing avoids. So governments enter a "lease purchase" agreement with private prisons. The private prison corporation raises the capital, designs the physical structure, and finances the construction project. The state leases the prison from the corporation until the contract expires.³⁰³

Is any of this necessary? Only if you assume that demand is fixed. It is easy to imagine a world in which lease purchase agreements are illegal. In this world, public officials would be forced to secure public funding for prison construction.³⁰⁴ There are two reasons to prefer this world: First, some might argue that this system would be more just. Voters would be

²⁹⁹ See DONAHUE, *supra* note 23, at 165.

³⁰⁰ Ohio Department of Rehabilitation and Correction, *Testimony to the National Conference of State Legislators Corrections Association President Outlines Cost-Control Strategies*, at <http://www.drc.state.oh.us/web/Articles/article153.htm> (last visited Feb. 20, 2004) (on file with the Connecticut Law Review) (summarizing Director Reginald A. Wilkinson's distinction between "fixed costs" such as "the capital expenditures associated with planning, developing and building prisons" and "variable costs" such as "those expenses associated with management and maintenance of correctional institutions").

³⁰¹ This story is taken from Dolovich, *supra* note 87, at 26-27.

³⁰² This is an interesting example of how allocations and payments sometimes diverge. See, e.g., Leonard, *supra* note 96, at 84.

³⁰³ What happens at the end of the lease varies. In some cases, ownership "reverts" to the state; in other cases, the state purchases the facility at below-market price. In any event, these are not normal instances of "ownership." They are much more like leases. Dolovich, *supra* note 87, at 27.

³⁰⁴ An analogy: The Department of State donated \$103 million of surplus military equipment to MPRI, which MPRI provided to the Bosnian Army. Public payment; private provision. See ISENBERG, *CORPORATE MERCENARY*, *supra* note 98.

forced to reconcile allocations and payments. If they refused to pay for long sentences, they would be forced to abandon them.

But let us put that point aside, and turn to the second reason, which takes the competition argument on its own terms. There are good reasons to think that a publicly financed, privately supplied prison industry would be more competitive than the one we have now. Firms would not bear the burdens of financing construction, design, and ownership. Both corporations and governments could enter and exit contracts more easily. Would private prisons still be cheaper? Two things suggest that they would: First, lease-purchase agreements often cost *more* than public bonds because corporations are less effective risk spreaders than governments.³⁰⁵ Second, construction, design, and ownership are not the *only* costs of imprisonment, nor even the most significant ones. Labor represents roughly sixty percent of the overall cost of imprisonment,³⁰⁶ and labor is neither a “fixed” nor a “sunk” cost.

Cutting labor costs raises other problems, of course, which we have already seen. If labor costs drop too low, people are placed at risk: inmates, guards, and, if escapes increase, everyone else. But, as we have already seen, that argument does not prove much. This problem can also be resolved through public demand reforms. It proves that governments should pay for (and allocate) high quality labor, but it does not prove that governments should provide labor at all. Taken together, the two arguments prove only that any form of imprisonment—public, private, or mixed—imposes significant costs.

Again, though, we must remember that in the real world, conscientious reform is not likely to accompany the privatization of prisons. Public officials are not likely to abandon lease purchasing agreements, and if they do, they are not likely to demand high quality labor from private prisons. But my point is theoretical: We do not need to assume that the demand for imprisonment is fixed. Public demand is determined by public officials. In a democracy, it could be otherwise. Fixed and sunk costs could diminish, if not disappear.

c. Agency

Since the agency argument is more complex, the economic limitations of this argument are harder to describe. It is a remarkably ambitious argument. It purports to identify those criteria upon which *any* kind of organization should choose between employment and outsourcing. For our purposes, it offers a complete theory of our public choices between public and private supply. What is this magic formula? It incorporates the complex-

³⁰⁵ SHICHOR, *supra* note 42, at 143; Leonard, *supra* note 96, at 73; Dolovich, *supra* note 87, at 27.

³⁰⁶ See DONAHUE, *supra* note 23, at 163.

ity, predictability, and certainty of ends, and the relative importance of ends versus means.³⁰⁷

It is the most thoughtful argument yet. It applies strongly and inherently to our topic. No reform proposals could hope to mitigate the inherent complexity, unpredictability, and uncertainty of our punishment, policing, and military policies. No one could convince us that in these three endeavors, methods are not important. Moreover, the argument's reasoning makes intuitive sense. Complexity, unpredictability, and uncertainty are solid reasons not to outsource punishment, policing, and military force. So is the relative importance of means. In a careful way, these criteria articulate our proverbial wisdom: "If you want something done well, you should do it yourself."

But I do not think that this argument conveys everything that we want to say about the supply of punishment, policing, and military force. Indeed, I do not think that it comes close. It is too generic; it sweeps too far. Consider the first three criteria: complexity, predictability, and certainty. Imagine that public officials decide to fund a few projects—any projects at all. They conclude that the goals of these projects are indeed complex, unpredictable, and uncertain. The argument recommends that they establish a public agency of "civil servants," "bureaucrats," or "professionals" to pursue these goals.

So which are our most complex, unpredictable, and uncertain public endeavors? High on anyone's list would have to be publicly funded programs in scientific research, humanities research, and the fine arts. The argument suggests that the supply of these programs should be public. Is it? Well, that is not an easy question to answer. Some supply is public, some is private, and some is non-profit, quasi-profit, and various other middling shades. Note the tension: The goals of research and arts programs are *at least* as complex, unpredictable, and uncertain as the goals of punishment, policing, and military institutions. These criteria suggest that the case for the public monopolization of ownership, management, and employment should be at least as strong in the fields of research, art, and force.

I think not. I think that there is some wisdom to the idea that the state has, must have, or should have a "monopoly of force." I do not think that there is much wisdom in the idea that the state has, must have, or should have a monopoly of research or art.

But the thrust of my objection does not depend on the plausibility of these counterexamples. They are merely illustrative. My point is conceptual: I do not think that the state must monopolize the pursuit of all complex, unpredictable, or uncertain goals in similar ways, to similar degrees. But I do think that the state must monopolize the supply of force. The

³⁰⁷ See, e.g., *id.* at 45.

question remains: Why force?

The final criterion of the agency argument hits the mark: the relative importance of ends versus means. This last criterion suggests an obvious and powerful distinction between force, on the one hand, and things like research and art, on the other hand. Only the most illiberal sensibilities could suggest that scholarly and artistic *methods* are more important than—or even equally important to—punishment, policing, and military methods. Liberals might believe that the goals of research, art, and force are all equally important, but they could hardly suggest that the specific means are as well.

We monopolize punishment, policing, and military force because, in these projects, methods and results are both profoundly important to us. We care not only that force is exercised, but also when, where, how, how much, and against whom. When we privatize punishment, policing, and military force, we surrender control of punishment, policing, and military methods. We surrender control of the supply-side decisions about who may use force as well as some of the decisions about when, where, how, how much, and against whom forced may be used. Although these are less critical than demand-side decisions, they are nonetheless decisions of great consequence and importance.

In the great tradition of utilitarian economics, this last argument is both structurally brilliant and morally vacant. It is structurally brilliant because it is true: We monopolize the exercise of force because it matters how force is exercised. It is morally vacant because it fails to ask why. Why is the exercise of force—instead of research, art, or anything else—so important? More specifically, why is the exercise of force—in addition to the allocation of force—so important? We are on the right track, but we have not yet cracked our chestnut: “The state must monopolize force.” What we lack is a liberal account of the special significance of force.

H. *Cultural Commodification*

1. *Argument*³⁰⁸

Enter the seventh and final policy argument against the privatization of force. Like the others, this argument begins with the premise that governments and corporations pursue different purposes. Unlike the others, how-

³⁰⁸ For a discussion of commodification and private prisons, see LEKACHMAN, *supra* note 228; Jan Elvin, *A Civil Liberties View of Private Prisons*, 65 PRISON J. 47 (1985); John J. Dilulio, *What's Wrong with Private Prisons*, 92 PUBLIC INTEREST 66 (1988); Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 826 (1987) (discussing the hidden issue of symbolism); White, *supra* note 33, at 120, 139; Walzer, *McPrison and Burglar King*, *supra* note 153, at 10-11. For a discussion of commodification and private police, see Walzer, *McPrison and Burglar King*, *supra* note 153, at 10-11. For a discussion of commodification and private military corporations, see Sapone, *supra* note 98.

ever, it does not make any predictions about how these different purposes cause different actions or create different results. The logic of this argument is more cultural than instrumental. Critics claim that when we privatize the exercise of punishment, policing, and military force, we privatize the social meaning of punishment, policing, and military force.³⁰⁹ On this view, the privatization of force engenders the *commodification* of force.³¹⁰

Much ink has been spilled defining concepts like “social meaning” and “commodification,” but those controversies need not detain us long here. To simplify: The term “social meaning” describes an interpretation shared by a society;³¹¹ the term “commodification” describes the way that a society comes to interpret something as a commodity—as an object of economic exchange³¹²—and to imagine or recognize the existence of a market. Both terms may be applied to anything, such as a speech, a text, an artifact, an idea, a practice, an institution. Most critically for our purposes, they may both be applied to exercises of punishment, policing, and military force.

The commodification argument hinges on two presumptions. The first is old hat: the idea that governments pursue public purposes; corporations pursue private purposes. The second is new hat: the idea that institutions and meanings are necessarily linked, such that when we change the purposes of institutions, we change the social meaning of institutional prac-

³⁰⁹ See, e.g., Walzer, *McPrison and Burglar King*, *supra* note 153, at 11.

³¹⁰ Many of these commodification arguments describe themselves as “ethical,” but they actually boil down to cultural claims. See LEKACHMAN, *supra* note 228, at 106 (arguing that private prisons are driven by profit-maximization rather than sensitivity to the needs or rights of prisoners); DiIulio, *supra* note 308, at 70-71 (discussing the morality of private prisons); Elvin, *supra* note 308, at 47; Walzer, *McPrison and Burglar King*, *supra* note 153, at 10-11; Dolovich, *supra* note 87, at 9-10. For a more straightforwardly cultural approach, see Janus, *supra* note 268, at 75.

³¹¹ In commodification arguments, there is a lot of confusion over *whose* interpretations of punishment, policing, and military force are “changed” by privatization, and whose interpretations “matter” most. There are three relevant groups: (1) inmates, suspects, and combatants; (2) prison guards, police, and armies; and (3) some version of the public at large, such as taxpayers, voters, or citizens. The commodification argument presumes that privatization changes the meaning of force for prison guards, police, and armies, so the argument cannot be about that. Often, as I explain later, the argument focuses on inmates, suspects, and combatants. But I do not take this argument very seriously. Clearly, we can aspire to communicate certain public messages to inmates, suspects, and combatants, but we cannot seriously concern ourselves over whether these messages actually get across to these victims. Our actions will always speak louder than our words, and our violent actions will always speak loudest of all. As Robert Cover once explained, in the eyes of inmates, suspects, and combatants, state violence casts a shadow over our symbolic gestures. Cover, *supra* note 21, at 1629 (“Between the idea and the reality of common meaning falls the shadow of the violence of law, itself.”).

This leaves only one audience: the public at large. Clearly, the social meaning of what happens to victims is relevant to the public at large. I address only this issue in the text.

³¹² “Commodities” are objects of economic exchange, fungible goods bought, sold, and traded in markets for profits. In some sense, money is the purest commodity; it is often said that things such as “life” and “love” are not or should not be commodities. Recently, it has also been said that “health care” and “professional sports” are increasingly being “commodified,” and that these are bad developments.

tices too. With these two presumptions in place, the argument proceeds smoothly: When public officials exercise force, they convey public messages, such as “just say no,” “respect the rule of law,” and “don’t tread on us.” When private employees exercise force, they convey private messages, such as “the customer is always right” or “Force, Inc.” When private employees catch and punish criminals, defend borders, and wage wars, they “commodify” force. Society reads these actions as “about” the bottom line rather than “about” some political or legal ideal. Thus, the privatization of force “degrades” or “cheapens” exercises of force. It strips them of public significance.

Like human rights arguments, commodification arguments often focus on the victims of punishment, policing, and military force: inmates, suspects, and the casualties of war. First, critics claim that privatization sends the message that these victims are not human beings but commodities.³¹³ Second, critics claim that privatization places cultural “distance” between the victims of force and the citizens of the liberal state.³¹⁴ It signals our indifference to these victims, our refusal to take responsibility for the fates of inmates, suspects, and the casualties of war. By adding an extra institutional layer between ourselves and our exercises of punishment, policing, and military force, we imply that these are no longer our arrests, our punishments, our wars, and thus no longer our suspects, our prisoners, our casualties.³¹⁵ In cultural terms, we wash our hands of our most violent deeds.

2. Responses

a. Conclusions

Many policy experts have responded, “So what?” Oddly, critics rarely bother to explain the normative importance of commodification.³¹⁶ This is

³¹³ This criticism is often applied to private prisons, which place per-day price tags on inmates, and may transfer them off to distant locales. See, e.g., Dolovich, *supra* note 87, at 29, 102-05.

³¹⁴ Walzer, *McPrison and Burglar King*, *supra* note 153, at 11-12 (“So long as we send men and women to prison, we have to pay attention to what happens to them once they are there.”).

³¹⁵ See, e.g., *id.* at 12. To punctuate these points, commodification critics often ironically invoke economic symbols, catch-words, and catch-phrases to describe privatization. In these arguments, privatization is often “out-sourcing” or “contracting out.” Michael Walzer nicely sums up the result in the title of his article on private prisons and police: *At McPrison and Burglar King, It’s Hold the Justice*. *Id.* at 10.

³¹⁶ Commodification critics rarely trouble themselves to spell out normative conclusions and principles—to explain why the social meaning of punishment, policing, and military force is, or should be, important. See, e.g., *id.* at 11. In a debate as lively as this one, this is a serious flaw. Social meaning does not stand alone; it stands alongside countless other serious compelling concerns.

In lieu of such arguments, cultural critics normally proffer canned assumptions and assertions that exercises of punishment, policing, and military force “must” send public messages. *Id.* They pronounce that the privatization of punishment, policing, and military force is an “unseemly” and “inappropriate” delegation of “inherently” public functions, functions that are “the quintessence of a state’s

a shame. "So what?" is a powerful question to ask, and yet, as one critic notes, there are several powerful ways to respond.³¹⁷ The best answer suggests that exercises of force are intended to convey important public messages, and that privatization scrambles the reception of these messages. Social meanings are not merely side effects of exercises of force; they are also one of the reasons that we exercise force. They represent one aspect of our punishment, policing, and military policies, purposes, or goals. We exercise force not only to stop crimes and fight wars, but also to send public messages, create public symbols, and express public norms.

In liberal states, of course, force is exercised to send liberal messages and maintain liberal values. Liberal societies police and punish criminals to proclaim that crime is wrong and the social contract is right. They fight wars to affirm the ideals of the rule of law, democracy, and human rights. These social meanings are vital social resources; they are a large part of what binds us together and makes us behave. When we exercise punishment, policing, and military force, we strengthen the cultural foundations of our political, legal, economic, and social systems.

Not always, to be sure. Just as we do not always catch suspects and win battles, we do not always get our messages across. But if the commodification argument is correct, then privatization will cause our punishment, policing, and military messages to misfire more often. Even when we achieve our instrumental goals, people will attribute the "wrong" purposes to exercises of force, and our cultural goals will not be achieved. The cultural fabric of our societies will weaken.

This is a definite improvement over the agency argument. It explains why the means of force, as opposed to the means of other collective endeavors, are especially important to us. Exercises of punishment, policing, and military force are potent cultural signs, conveying vital messages. Talk might be cheap, but exercises of force are obviously not. When institutions exercise force, they both protect and destroy our most valued social goods: property, liberty, and life. They jeopardize and sacrifice in the name of ideals. These are intensely meaningful practices. We listen carefully to the messages that they send.

This argument makes terrific sense. It suggests the most probable and plausible justification for our recent "federalization" of the airport security supply—to pronounce, to ourselves and to others, our national commitment to "homeland defense."³¹⁸ It helps us understand why we "read" exercises of punishment, policing, and military force—because they are designed to

sovereign function." *Id.* These are not principles; they are mumbo jumbo. In mushy ways, they restate an enigmatic, age old ideal: "The state" has, must have, or should have a "monopoly of force." They make no effort to explain or justify this conclusion at all.

³¹⁷ See Dolovich, *supra* note 87, at 99-115 (illustrating expressivist arguments).

³¹⁸ See discussion *supra* Part IV.C.1.

be read. Most importantly, the argument provides a purely non-economic, political objection to the model of private supply and public demand.

b. Cultural change

But the argument has a few fundamental flaws. We will start with the most straightforward point: When we talk about the social meaning of an exercise of “force,” we must consider two sources of that social meaning: supply and demand. When we interpret an exercise of force, to determine whether it is “public” or “private,” we ask two kinds of questions. On the supply-side, we ask who provided and exercised it—who carried it out at the search, arrest, incarceration, or attack. On the demand-side, we ask who paid for and allocated it—who signed the contract, passed the sentence, issued the warrant, or declared the war.

The commodification argument suggests that when we change who exercises force, we change the purposes of force and, thus, the social meaning of force. Already, we see that the argument had softened some: In truth, publicly-allocated, privately-exercised force is not *completely* commodified. It is a muddle of public and private purposes and, thus, a mixture of public and private meanings. It is a mixed message.

But the argument still seems to stand: Mixed messages do not often blend into strong cultural cement. We read exercises of force. We expect to find public meanings in them. We read them, in part, by asking who exercises force. We expect to find out that public officials exercise force. Thus, we expect to read public meanings from public exercises of force. When private employees exercise force, our expectations are frustrated. We read public/private meanings from private exercises. Vital messages are not conveyed. Private signs fail to signify public values. The cultural pillars of the liberal state start to shake.

Or do they? For some reason, the commodification argument assumes that when institutions change, only the content of our interpretations change. Why should that be? Why would the methods or sources of our interpretations not change, too? It is easy to imagine. Suppose that for fifty years, public officials ignore the critics of private prisons, police, and armies. Our governments continue to hire private punishment, policing, and military corporations. Let us focus on the private prison example, the most familiar and imaginable of the three. After fifty years, our entire prison population is housed in private prisons. In this world, what is the social meaning of imprisonment?

The commodification argument only sees one possibility, but I see two. In the first scenario, we can assume that the argument is correct. Imprisonment is relatively commodified. In this world, when we interpret imprisonment, we ask ourselves both, “Who exercises imprisonment?” and “Who allocates imprisonment?” Things are just as they are today. The answers to these questions are mixed, so the social meaning of imprison-

ment is mixed too.

But in the second scenario, we can imagine that the argument is incorrect. Imprisonment is privatized but not commodified. In this world, we have created new practices of cultural interpretation to suit our new practices of punishment. (Think of it as a cultural “reform,” although it would probably be neither intentional nor self-conscious.) When we interpret imprisonment in this world, we do not think at all about who exercises imprisonment. We just ask ourselves, “Who allocates imprisonment?” If the answer is “legislators, prosecutors, judges, and juries,” then we read imprisonment as “public.” We read public values from public *allocations* of imprisonment. In statutes, plea bargains, and sentences, we see the same old symbols: “Crime is wrong and the social contract is right.” We read nothing from private *exercises* of imprisonment.³¹⁹ We recognize that private prisons have private purposes, but we do not consider this to be a salient cultural fact.

Could that happen? If it happened completely, it would represent a tectonic cultural shift. But when it comes to the task of cultural self-justification, I think that we are a remarkably adaptable species. We often perform backflips and cartwheels to “read” ourselves right. Indeed, I suspect that in some circles, this cultural shift is already well underway. I venture that there are already some legislators, judges, administrators, and entrepreneurs who actually and honestly do not believe that “private” imprisonment is significantly different from “public” imprisonment in cultural terms. When they consider the social meaning of imprisonment, they think about the public character of legislators, prosecutors, judges, and juries rather than the private character of wardens and guards.

But my argument does not hinge on these empirical claims. For my response, it is enough to say that this could happen. In the future, we could revise our sources and methods of cultural interpretation; we could keep the content of cultural interpretation constant. We could look at private prisons, police, and armies and think public thoughts. Under the tide of privatization, we could learn to see the social meaning of force as determined by the identity of those who allocate force rather than the identity of those who exercise it.

Now we can ask the big question: Would this culture be “liberal”? Commodification critics want to say “no.” They purport to identify necessary yet mysterious links between public purposes, public meanings, and public responsibilities: Since private prison guards have private purposes, these purposes must have social significance. It must matter who exercises force. If it does not, then this must be a callous society in which no one cares about the exercise of imprisonment. In this society, private prisons

³¹⁹ Or, to put this point in other words, we read public messages from private exercises of imprisonment. We look at “private” prisons, yet we read “public” punishments.

deprive inmates, but the public remains indifferent. We tell ourselves that they are not our prisons and, thus, not our prisoners.³²⁰ But who says so? Where are such imperatives written? The Liberal Book of Culture?

Liberal societies do not always and everywhere interpret “privatization” as culturally significant. Sometimes, private purposes exist within a larger institutional framework of public purposes and public responsibility. Consider today’s “public” prison guards, police, or soldiers. Our guards, police, and soldiers are not drafted, and they do not work for free. They are a volunteer corps that applies to work and gets paid for it. Presumably, these payments introduce some private purposes into our public prisons, police departments, and armies. As a society, however, we dismiss these purposes as culturally irrelevant. Why? Because we believe that “public” guards, police, and soldiers work within a larger institutional framework of public ownership, oversight, bureaucracy, and professionalism. In cultural terms, could we not say something similar of private prisons, police, and armies themselves? Could we not say that they are contained within a larger system of public executive, legislative, and judicial institutions, which have public purposes, and impose public responsibilities? Could we not deem our payments to private prisons, police, and armies to be culturally insignificant?

There are good reasons to say no, to say that public demand cannot control private supply, but we have already seen them. They are economic and political reasons, not cultural ones. When we reject this possibility on cultural terms, we must offer cultural evidence or cultural arguments.³²¹ If we do not, we practice cultural imperialism. We presume that public ownership, management, and employment “really” mean one thing and private ownership, management, and employment “really” mean something else. We presume that the institutions of today are the natural and necessary foundations for the liberal culture of tomorrow.

In commodification arguments, there is a fair amount of this conclusory talk. Critics declare that the privatization of force is an “unseemly,” “inappropriate” delegation of an “inherently public function,” a function that is “the quintessence of the state’s sovereign power.”³²² However, these statements appear as rabbits from hats. How do we know what functions

³²⁰ See, e.g., Walzer, *McPrison and Burglar King*, *supra* note 153, at 12.

³²¹ In my research, I have not found any commodification arguments that draw upon sociological or anthropological support.

³²² See, e.g., SINGER, *supra* note 113, at 226 (noting the traditional belief that security is “a fundamental public service”); White, *supra* note 33, at 120, 139 (claiming that “the prison is in many respects the quintessence of a state’s sovereign function” and arguing that the private prison “attenuates and ultimately insulates the state from accountability of a more symbolic, political kind”); Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 669 (1987); Walzer, *McPrison and Burglar King*, *supra* note 153, at 10 (articulating a symbolic objection to private prisons and police).

are “inherently public”? What delegations are “unseemly” and “inappropriate”? What privatization “means”? Does privatization mean the same thing to every liberal society? The same thing today as tomorrow? The same thing unregulated as reformed? In the end, these claims provide circular justifications for cultural critiques.³²³

I. *Limits and Flaws*

I should confess that these questions are tough love. Like many people, I share the vague intuition that private punishment, policing, and military corporations are unseemly, perhaps even illiberal. After all, we have spent the last four hundred years telling ourselves that the state has, must have, or should have a monopoly of force. Today, the monopoly thesis is firmly rooted in our political culture, widely regarded as a building block of our public values. Yet in our public policy debates, it has rarely been much more than a premise, a conjecture, or a conclusory remark.

In this age of private punishment, policing, and military markets, we should no longer be satisfied with pat restatements of ancient ideas. We should not simply say that private prisons, police, and armies are “unseemly” or “irresponsible.” If we mean to advance our public policy debates over the privatization of force, we must re-examine and re-justify the old idea that the state must monopolize force. More specifically, we must distinguish between monopolies of supply and demand.

By now, it should be clear that this is precisely what our policy debates have failed to do. There is a long list of arguments, so let me briefly remind you: economic efficiency, egalitarian distribution, public goods, public accountability, human rights, industrial influence, market failure, and cultural commodification. As we have already seen, each of these critiques voices valuable and important concerns. Each one provides strong and clear reasons to be skeptical of the private demand for punishment, policing, and military force.

Yet each one applies more weakly and unclearly to the private supply of force.³²⁴ Once we assume that government will more or less finance and

³²³ To be fair, I should add that most cultural theorists do not believe that such foundations “exist.” See, e.g., WALZER, SPHERES OF JUSTICE, *supra* note 153, at xi-xvi (articulating an anthropological, sociological, immanent, inductive approach to moral philosophy). However, I do not know what that means. By “foundations,” I do not mean actual building blocks, of course. I mean nothing more than explanations and justifications. If we are going to say that private prisons, police, and armies are “unseemly,” “inappropriate” delegations of an “inherently public function,” which are “the quintessence of the state’s sovereign power,” then I do not think we can make our case upon the idea of social meaning alone. We must argue for “this” social meaning over “that” one, the good one over the bad one, the accurate one over the sloppy one, and so on. We cannot simply say “privatization means commodification” and end the debate. We must provide foundations, explanations, or justifications for our interpretations. In other words, we must make arguments.

³²⁴ After developing this insight, I stumbled upon a brilliant statement of the same point in the private prison context. Mick Ryan and Tony Ward write:

allocate force, it becomes much less clear whether, how, and how well these arguments apply. Perhaps governments should actually provide and exercise force too. Perhaps corporations should provide and exercise force instead, under the careful watch of public institutions, bolstered by a commonplace package of legal, economic, and redistributive reforms. This is the model of private supply and public demand. In our public policy debates, when demand is public and supply is private, the devil slips into the empirical details.

We should ask ourselves how we got into this analytical mess, so that we might get ourselves out. I have identified three basic flaws in our public policy debates, which limit the depth of our current analyses: Our arguments are (1) too boilerplate, (2) too indiscriminate, and (3) too “stuck” in our present situation, too mired in the modern administrative state.

1. *Boilerplate Arguments*

First, our arguments are boilerplate. They look surprisingly like the public/private debates over *non-coercive* endeavors, such as education, health care, housing, or even water. It is as if we have taken our old template for “public/private” debates and imposed it upon ourselves yet again. We have turned what might have been a distinctive controversy into a classic clash between utilitarians and liberal-democrats. Everything falls into line—the right favors privatization; the left favors monopolization. In customary places, our clichés come to roost—efficiency on the right, democracy, rights, accountability, and culture on the left.

2. *Indiscriminate Arguments*

Perhaps as a result, our arguments are indiscriminate. Each one gestures or aspires toward a theory of everything, or almost everything. Several offer nearly “complete” theories of how to decide between public and private organizations. They threaten to boil each other down until every argument looks like the subspecies of another. While privatization advocates assure us, “it is all about efficiency,” critics argue that it is “really” all

It is important to stress at this point that no one . . . is suggesting that the state . . . should give up its monopoly over the *allocation* of punishment . . . few would challenge the idea that only the state should be able to impose punishments which require the organized use of force on any substantial scale, such as imprisonment, the death penalty or punishments like probation which are backed by the threat of imprisonment for non-compliance. All that is being argued is that the *delivery* of some of these punishments might be entrusted to private agencies in one form or another.

RYAN & WARD, *supra* note 32, at 3. They continue:

Opponents of privatization . . . never seem able to say with any precision *why* the private administration of prisons would threaten the “essence” of the state. It is important to remind ourselves here that we are not discussing the legislative and judicial *allocation* of punishment, but only its *delivery*. As we have seen, there is nothing very new (or very archaic) about entrusting the delivery of punishment to private agencies

Id. at 69.

about “democracy,” “rights,” “accountability,” or “culture.” They are all doubly wrong: In the practical sense, it is about all of these things. In the philosophical sense, it is not about any of these things.

How can we tell? None of these principles offer any clear or compelling ways to differentiate the private supply of punishment, policing, and military force from one another. In our policy debates, “force” often functions as no more than an extreme example of a very general idea of what government is supposed to do. In this way, the debate has lost touch with the instinctual, visceral energy that we sense in that vague liberal verdict: “The state must monopolize *force*.” To borrow from Einstein, our public policy debates have generated a *general* theory of the public/private distinction but not a *special* theory of the relationship between government and force.³²⁵

3. *Modern Administrative Arguments*

On the one hand, I am not inclined to chant that conclusion before politicians, judges, administrators, and policy experts, in the hope that it might prevent the privatization of punishment, policing, and military force. As I said, in today’s climate, when our truisms are no longer true, they are much less compelling. On the other hand, I am also not inclined to “get real” and dismiss a four hundred year old ideal. It is too easy to mock the state-of-nature story and the monopoly thesis as idle fictions. They are fictions, to be sure—perhaps more than other philosophies are—but that is precisely the point.³²⁶ Some fictions—even apparently naïve or nonsensical ones—reveal great truths.³²⁷ To paraphrase Aristotle, facts tell us only who we

³²⁵ See ALBERT EINSTEIN, RELATIVITY: THE SPECIAL AND THE GENERAL THEORY 61 (Robert W. Lawson trans., 1961) (1905).

³²⁶ Locke seems to have believed that the state of nature actually existed, LOCKE, *supra* note 9, at 319-22. However, this view has been abandoned by most other state-of-nature theorists. Robert Nozick makes the point nicely:

State-of-nature explanations of the political realm *are* fundamental potential explanations . . . and pack explanatory punch and illumination, even if incorrect. We learn much by seeing how the state could have arisen, even if it didn’t arise that way. If it didn’t arise that way, we also would learn much by determining why it didn’t; by trying to explain why the particular bit of real world that diverges from the state-of-nature model is as it is.

NOZICK, *supra* note 7, at 8-9. Similar points have been made by others. See, e.g., IMMANUEL KANT, CRITIQUE OF PURE REASON 534-35 (Paul Guyer & Allen W. Wood eds. & trans., 1998) (1781) (discussing the hypothetical use of reason); IMMANUEL KANT, THE METAPHYSICS OF MORALS, §§ 47, 52 (Mary Gregar ed. & trans., 1996) (1797) (discussing the hypothetical use of the social contract); IMMANUEL KANT, THE PHILOSOPHY OF KANT: IMMANUEL KANT’S MORAL AND POLITICAL WRITINGS 422 (Carl J. Friedrich ed., 1949) (same); RAWLS, *supra* note 12, at 17-21 (explaining that the “original position” is neither “an actual historical state of affairs,” nor “a primitive condition of culture,” but a “purely hypothetical situation,” “expository device,” and “intuitive notion” that has been “characterized so as to lead to a certain conception of justice”).

³²⁷ I tend to think of the statement, “The state must monopolize force” as what Zen Buddhists might call a “koan.” A koan is a statement that initially sounds like nonsense, but as you meditate on it, it pushes you to a greater state of awareness. Koans are usually phrased as questions. In the West, the

were and who we are, but fictions tell us who we might have been and who we might yet become.³²⁸

Fictions are especially useful in this context. They help us reveal the third flaw of our public policy debates: They are too deeply attached to present realities. In the grand scheme of things, our present realities are somewhat mundane. Private prisons house less than ten percent of our adult prison population.³²⁹ Private police are everywhere, but they are not running our local police departments, let alone the FBI or the CIA. Private armies are fighting small conflicts, but in the biggest battles, they fight alongside public armies or they do not fight at all. The change has been striking, but as we have seen, it has hardly begun.

In this atmosphere, critics are forced to fight at the margins. They must make arguments that apply to the somewhat modest private punishment, policing, and military markets of today. They must object to the kinds of private prisons, police, and armies that exist today and the kinds that may emerge tomorrow. They make these arguments in the shadow of an imperious institution—the modern, administrative, liberal state. At every turn, they must confront the possibility of public, liberal reforms: redistributions, contracts, inspections, and regulations. They are forced to make empirical claims about which institutions are most likely to fail and which reforms are most likely to succeed.

V. THE LIBERAL THEORY OF FORCE

The state of nature story helps us escape these earthly realities. It shakes us free from our worldly assumptions, pushing us beyond our normative horizons. It shoves us back to our imagined past and forward to our imagined future. When we imagine a condition of anarchy, we push the privatization principle all the way, to its logical end. We force ourselves to confront the very thing that is so troubling, so surreal, about this trend—the idea of a stark state, in which the demand for punishment, policing, and military force is completely public, but the supply of punishment, policing, and military force is completely private. This is our first thought experiment—the “ultraminimal state.”³³⁰

most popular example of koan is, “What is the sound of one hand clapping?”

³²⁸ Compare:

The distinction between historian and poet is not in the one writing prose and the other verse—you might put the work of Herodotus into verse, and it would still be a species of history; it consists really in this, that the one describes the thing that has been, and the other a kind of thing that might be. Hence poetry is something more philosophic and of graver import than history, since its statements are of the nature rather of universals, whereas those of history are singulars.

2 ARISTOTLE, *Poetics*, in THE COMPLETE WORKS OF ARISTOTLE 2316, 2323 (Jonathan Barnes ed., 1984).

³²⁹ White, *supra* note 33, at 112.

³³⁰ Like everything else in this Article, the idea of the ultraminimal state is not wholly my own.

As we have already seen, the specter of the ultraminimal state has haunted our public policy debates for years. In this Part, we disinter the foundations of liberal thought, in order to exorcise this philosophical fiend. We return to our story of origins, to retrace our first steps: anarchy, monopoly, state. Through the lens of liberal thought, we consider carefully why and how liberal states must “monopolize” force.

The argument proceeds in four stages: First, we develop the thought experiment of the ultraminimal state more completely and concretely. Second, we trace the first step of the liberal state’s evolution from the “ultraminimal state” to the “military state,” a close cousin in almost every respect. Third, we generalize our first argument into a few basic principles, which we then use to pinpoint how far the liberal state lies beyond the military state. This wraps up the problem of private supply. Lastly, we rethink the problem of private demand.

A. *A Caveat*

An apology is necessary before we commence. This is obviously an ambitious project. It runs roughshod over sacred philosophical turf. I should clarify that I undertake this project with my tongue firmly planted in my cheek. I do not take the state-of-nature story too seriously, let alone my particular rendition of it.

Like most answers to important questions, my answers here are not entirely new. Indeed, taken separately, they might not be remotely new. Over the last four centuries, the monopoly thesis has been articulated and endorsed, in one form or another, by a long list of intellectual giants. My liberal theory of force draws inspiration from scattered positivist and realist strains of political philosophy that I have found in the works of Niccolò Machiavelli, Thomas Hobbes, Max Weber, Samuel Huntington, Robert Nozick, and Robert Cover.³³¹ In developing the liberal theory of force, I

Robert Nozick uses the term “ultraminimal state.” NOZICK, *supra* note 7, at 26-27. However, when he uses the term, Nozick means a state that is nothing more than a dominant protection association (or a private protection corporation), which charges each individual for protection, and protects only those individual who pay. As inspiration for this kind of picture, Nozick cites to several works on “anarcho-capitalism.” *Id.* at 335-36 & n.4.

Norman Macrae sketches a picture closer to my “ultraminimal state” in a paper on privatization. See Norman Macrae, *A Future History of Privatisation, 1992-2022*, ECONOMIST, Jan. 3, 1992, at 15, LEXIS, News Library, Econ File (“By 2015 there will be only two main public goods left . . . (things best provided by government rather than by markets) . . . redistribution and military protection. These will then become competitivised.”). In his article on private prisons and private police, Michael Walzer invokes the image of a state without punishment or policing institutions. Walzer, *McPrison and Burglar King*, *supra* note 153, at 10 (“One somehow imagined that even a minimal state, stripped of all its welfare functions, would still have a police force and a prison system of its own.”). Finally, in a recent episode of *The Simpsons*, Homer Simpson establishes a private security firm, Springfield, Inc., and signs an exclusive contract with Mayor Quimby to police the Town of Springfield. See *The Simpsons: Poppa’s Got a Brand New Badge* (Fox television broadcast, May 22, 2002).

³³¹ See HOBBS, *supra* note 9, at 183-92, 228, 269-81 (discussing the powers of the common-

have studied the works of these thinkers, and the works of other liberal theorists, with due care. In some ways, my argument differs sharply from these famous sources. But in the end, it owes almost everything to what they have said.

Is my theory a distinctive blend of these strains? In some respects, on some issues, I think so. Indeed, I think that in some ways, the sum produces more insight than its older, more famous parts. In future works, I may endeavor to prove those immodest propositions by way of more cautious, complete analyses of these well-known texts. But in this Article, I do not. In such a small space, it would be foolish to assay a march through four centuries of our philosophical traditions in an effort to earn my disciplinary stripes. However, it would be equally foolish to remain silent, with a theory on the tip of my tongue.³³²

I adopt a compromise here: I lay out my claims clearly in the text, without the clutter of dense readings and textual allusions. I highlight my greatest debts and differences in the footnotes. This approach is likely to displease my most philosophically-trained readers, but I suspect that it is likely to please almost everyone else. I do admit, however, that in this important respect—and in many other significant ways, which I confess in due course—my argument is not yet complete.

B. *The Ultraminimal State*

*By 2015 there will be only two main "public goods" left . . . (things best provided by government rather than markets) . . . redistribution and military protection. These will then become competitivised.*³³³

Enough preliminaries. It is time to set the stage for the liberal theory of force by developing the thought experiment of the ultraminimal state. This marriage of public ends and private means has been a skeleton in the

wealth); HUNTINGTON, *supra* note 45, at 7, 19, 58-61, 80, 143-47, 161-62 (discussing the interaction of the military mind and military profession and western society); MACHIAVELLI, *supra* note 38, 42-43, 45-6; NOZICK, *supra* note 7, at 3-146 (discussing the state of nature theory); 2 WEBER, *ECONOMY AND SOCIETY*, *supra* note 15, at 904-08 (discussing the "stages in the formation of political association"); WEBER, *Politics as a Vocation*, *supra* note 15, at 77-78; WEBER, *SOCIAL AND ECONOMIC ORGANIZATION*, *supra* note 15, at 155-56 (discussing political corporate groups); Cover, *supra* note 21, at 1601 (discussing the violence that legal interpretation imposes on its victims); Skinner, *supra* note 38, at vii.

³³² In *Anarchy, State, and Utopia*, Nozick expresses similar thoughts:

Much of what I say rests upon or uses general features that I believe such theories would have were they worked out. I would like to write on these topics in the future. If I do, no doubt the resulting theory will differ from what I now expect it to be, and this would require some modifications in the superstructure erected here. It would be foolish to expect that I shall complete these fundamental tasks satisfactorily; as it would be to remain silent until they are done. Perhaps this essay will stimulate others to help.

NOZICK, *supra* note 7, at xiv.

³³³ Macrae, *supra* note 330, at 15.

closet of our public policy debates for years. It is a twisted sister of economics and politics, an outlandish cross between the state of nature and the traditional minimal state. But gossip is not polite. Let us summon up this conceptual ghost.

1. *The Big Question: The Ultraminimal State*

Imagine that after decades of downsizing and privatizing government, Americans have eliminated everything but our most essential administrative agencies, courts, legislatures, and executive offices. We still rely on government for the same array of social services, but we outsource them all. We pay private firms to do public works in exchange for taxpayer funds.

As a result, our massive, modern administrative state has been transformed into a lean, well oiled machine. It is no longer just the post office that turns a profit. In all public projects, we get more bang for our collective bucks. Thanks to a healthy dose of liberal reforms—redistributions, contracts, inspections, and regulations—we receive these services where, when, and how we want them.

But this is an *ultra*-minimal state, so it lacks something else—something more than these traditional examples of “big” government. It is also without three hallmarks of the modern state: public punishment, policing, and military institutions. Private military corporations defend boundaries, protect allies, and fight wars. Private police firms find and catch suspects. Private prison companies detain and execute criminals. In other words, the supply of force is completely private.

It is a startling image. It almost gives you the feeling that you just watched the state of nature movie, then hit “rewind.” But take note: When we return to the first frame, things look somewhat different now. This is not quite anarchy. In some important sense, it seems like a state. The state *demand*s force; the market *supply*s it. The state uses political, legal, and economic mechanisms to keep private punishment, policing, and military corporations in line.

2. *The Short Answer*

You might already sense something deeply circular about this idea of the ultraminimal state. This, I think, is the great benefit of the state-of-nature story: It abruptly unmaskes the circularity underlying the privatization of punishment, policing, and military force. In today’s world, “privatization” is implicitly premised upon the separation between the supply of force and the demand for force, which is plausible at the margins, in the context of the modern administrative state. But when we push this distinction all the way back to anarchy, it falls apart.

In the state of nature, individuals would not be able to establish institutional boundaries between the demand for force and the supply of force so

that the former could become “public” and the latter could become “private.” In the condition of anarchy, the only organization that could finance and allocate force would also be—must also be—an organization that could provide and exercise force. It would be an organization that could not only make decisions, but also enforce them. It would be an organization that could not only spend taxes, but also collect and protect them. In other words, it would be a *minimal* state.

3. *The Long Answer: The Liberal Theory of Force*

So far, so good. This hasty critique of the ultraminimal state implies that there must be some fundamental limit upon the privatization of punishment, policing, and military force. It suggests that somewhere between our modern realities and our ultraminimal fantasies, there is some threshold that must not be crossed. What this threshold looks like, and why it exists, are the central questions for the liberal theory of force.

In the rest of this Part, we explore those two questions more rigorously and articulate the liberal theory of force. Hopefully our object and method are already clear: We search for inherent liberal constraints upon the privatization of force. To find such constraints, we push the concepts of private supply and public demand to the hilt. First, we augment public demand: We strip away all of the public policy problems with the privatization of force and replace them with our most favored, most effective liberal reforms: redistributions, contracts, inspections, and regulations. Then, we augment private supply: We privatize *all* of our punishment, policing, and military institutions. In our mind’s eye, we envision an ultraminimal state.³³⁴

Then we think through this thought experiment carefully. We ask several questions: Would the ultraminimal state be a “liberal” state? What distinctive problems would beset it? How might those problems be addressed? Might they be addressed by a public monopoly of the supply of force? Must they be addressed by a monopoly of all three forms of force—punishment, policing, and military supply—for similar reasons, in similar ways, and to similar degrees? Once we have answered these questions, we modify the ultraminimal state one last time, in order to reconsider the problem of private demand.

³³⁴ The ultraminimal state is clearly not the purest form of the privatization of force. We could always imagine “State, Inc.,” in which the demand for force would be private too. In this world, there would be no governance of punishment, policing, and military force at all. In effect, there would be “markets” for executive, legislative, judicial, and administrative services, in addition to markets for punishment, policing, and military services. I do not find the proposal remotely liberal or plausible, but Nozick discusses similar ideas in some detail. NOZICK, *supra* note 7, at 10-28, 54-56, 88-90, 96-119.

C. *The Military State*

*[U]nlike other goods that are comparatively evaluated, maximal competing protective services cannot coexist; the nature of the service brings different agencies not only into competition for customers' patronage, but also into violent conflict with each other.*³³⁵

As our story begins, it is déjà vu all over again: "Once upon a time, there were individuals, who lived in a state of nature . . ." You remember the rest: They had rights; resources were scarce; they had fights; they cooperated. One way or another, they created a state. Let us put aside how they created a state—by social contract, by market exchange, by armed revolution—and concentrate on what kind of state they created.

1. *The Problem of Loyalty: Take One*

a. *The ultraminimal state*³³⁶

Initially, let us imagine that they created an ultraminimal state: a state of administrative, judicial, legislative, and executive organizations. This state, as its first order of business, implements a perfect package of liberal

³³⁵ *Id.* at 17.

³³⁶ My story of the ultraminimal state is loosely based upon passages from Machiavelli and Nozick. In *The Prince*, Machiavelli emphasizes the disloyalty and cowardice of mercenary forces: The mercenary and auxiliary are useless and dangerous; and if one holds his state on the basis of mercenary arms, he will never be firm or secure; because they are disunited, ambitious, without discipline, unfaithful; gallant among friends, vile among enemies; no fear of God, no faith with men; and one defers ruin insofar as one defers the attack; and in peace you are despoiled by them, in war by the enemy. The cause of this is that they have no other love nor other cause to keep them in camp but a little pay, which is not sufficient to make them want to die for you.

MACHIAVELLI, *supra* note 38, at 43.

In *Anarchy, State, and Utopia*, Nozick argues that in the state of nature, unregulated market forces would lead individuals to establish a "dominant protective agency," which would look much like a minimal state. NOZICK, *supra* note 7, at 15-17. He writes, "[o]ut of anarchy, pressed by spontaneous groupings, mutual-protection associations, division of labor, market pressures, economies of scale, and rational self-interest, there arises something very much resembling a minimal state or a group of geographically distinct minimal states." *Id.* at 16-17. In my argument, I focus extensively upon one obvious observation that Nozick makes: The idea that "the nature of [protective] service[s] brings different agencies not only into competition for customers' patronage, but also into violent conflict with each other." *Id.* at 17. I regard this apparently trite point as one of the lynchpins of Nozick's argument, and one of the most helpful insights he makes.

It is possible to read Subsections C.1 and 2 of this Part as extended analyses of the following two theses: (1) that mercenaries are not loyal and (2) that the prospect of violent conflict between punishment, policing, and military institutions creates special possibilities and problems in liberal states. In the first section, I deepen and defend Machiavelli's thesis; in the next section, I apply my own version of Nozick's thesis differentially to military, policing, and punishment institutions. In *Anarchy, State, and Utopia*, Nozick completely ignores the minimal state's monopoly of military force, although it provides the strongest, most persuasive example of his "de facto" monopoly of force. See discussion *infra* Conclusion.

reforms and hires corporations to provide all manner of public services. Most importantly, for our purposes, it hires private punishment, policing, and military corporations.

What happens next? On one level, the answer is rather obvious; on another level, it is rather involved. We start with the first level. Be warned: This first answer is simplified and simplistic. It engages in, and hinges upon, a definitional trick.

Initially the plot unfolds as planned. Boundaries are defended; allies are protected; wars are fought. Suspects are found and caught. Criminals are imprisoned, and if you prefer to imagine it, the worst criminals are executed. The system runs smoothly: The state pays and the market provides.

One day, however, something snaps. Somewhere in the upper echelons of the private military industry, in a moment of moral weakness, someone perceives an illicit opportunity and hatches a criminal scheme. It could be almost any scheme at all, so long as it is both illegal and profitable. It must subvert the contracts, inspections, regulations, and redistributions of the ultraminimal state, and it must generate income or the prospect of income to come. It could be a simple theft or a small conspiracy. It could be a diversion of taxpayer funds. More ambitiously, it could be a treaty with the state's enemies, or an attack upon the state's allies, or a military intervention in a disputed election at home or abroad. Most ambitiously, it could involve rebellion, civil war, conquest, or colonization. It could involve an endless list of potential partners: criminals, terrorists, rebels, enemy states, and other corporations.

Let us call this the *problem of loyalty*.³³⁷ If the crisis remains small, the ultraminimal state could suppress it. It could pay private police to investigate, apprehend, and deliver the conspirators. Or it could pay loyal private armies to quash the rebellion and defend the state. Suppose, however, that the crisis spreads, like a virus, through the private military industry. Either by collusion, acquisition, merger, competition, or violent conflict,³³⁸ several of the most powerful, profitable private military corporations come together. Secretly or overtly, gradually or suddenly, intentionally or accidentally, peacefully or violently, they form a private monopoly of the supply of military force within the territory of the ultraminimal state. In other

³³⁷ There are several other things we might call it, such as a crisis of "accountability," "agency," or "legitimacy." I reject those labels below. See discussion *infra* Conclusion.

³³⁸ As we saw earlier, it has been said that the supply of punishment, policing, and military force are "natural" monopolies. See NOZICK, *supra* note 7, at 16-17; see also discussion *infra* Part IV. This thesis is premised on the existence of increasing "returns to scale" or "economies of scale" in these endeavors. Typically, these returns are attributed to high fixed or sunk costs. I accept this idea, especially in the instance of military force, but that is not all that I am contemplating here. Like Nozick, I believe that the supply of military force also enjoys "coercive" returns to scale. See NOZICK, *supra* note 7, at 16-17. As a firm or state produces more intense forms of force, it increases its ability to defeat—not compete, in the economic sense, but defeat, in the violent sense—less powerful firms and states. *Id.* I spell out the implications of this thesis later. See discussion *infra* Part V.D.4.

words, they form a dominant military organization, which we will call an "MO." Within the state's borders, the MO is *dominant*: It is the organization most capable of using acts and threats of physical coercion to subordinate individuals and institutions.³³⁹

Now the sky is the limit. The MO can pick almost any perfidious path. For simplicity's sake, let us focus on one: The MO plots nothing less than the violent overthrow of the ultraminimal state and the establishment of "State, Inc."³⁴⁰ Of course, the ultraminimal state would be crushed instantly by the MO. If politicians, judges, and bureaucrats refused to pay the MO for services, tried to "fire" the MO, or imposed financial or criminal sanctions upon the MO, they would be forced off stage. The state's impressive array of political, legal, and economic reforms would be worth little more than the pages on which they were written. In short order, the MO would install a new regime. Thus ends the story of the ultraminimal state.

b. The military state

Once again, let us push "rewind," and roll back to the state of nature. Now, we imagine that individuals created a "military state" rather than an ultraminimal state. In the military state, the supply of military force is public: Military force is publicly provided and exercised as well as publicly financed and allocated. In every other way, the military state is just like the ultraminimal state: Although the military state owns, manages, and staffs military institutions, it still contracts out policing and punishment to the market.³⁴¹

We must be clear on one point: Our "military state" is not a traditional "military state," in the sense that either Myanmar or Iraq might be called a "military state" at the moment. Our military state is neither totalitarian nor authoritarian, neither ruled by a military junta nor governed by martial law. It is a state founded by rational, self-interested individuals. It is constructed in an effort to cure the problems of anarchy and pursue the liberal ideals of democracy, liberty, and justice. It is precisely like the ultraminimal state, with one important exception: It monopolizes the supply of military force.

If we perform our calculations too quickly, it appears that this distinction makes all the difference: The military state seems to solve the problem

³³⁹ It is important to add that I mean "dominant" in the preponderant (or "majority") sense, not the pluralist (or "plurality") sense: The MO has the ability to quash any combination of forces within the state's borders. In other words, it owns fifty-one percent of the military forces. (This is a highly metaphorical number, which represents strength rather than the number of soldiers or weapons.)

³⁴⁰ The details of State, Inc. are not important. The relevant point is that private military corporations could replace the ultraminimal state with whatever set of political, legal, and economic structures they prefer—anything from anarchy, to a liberal or totalitarian state.

³⁴¹ As far as I know, my conception of the military state is an original one.

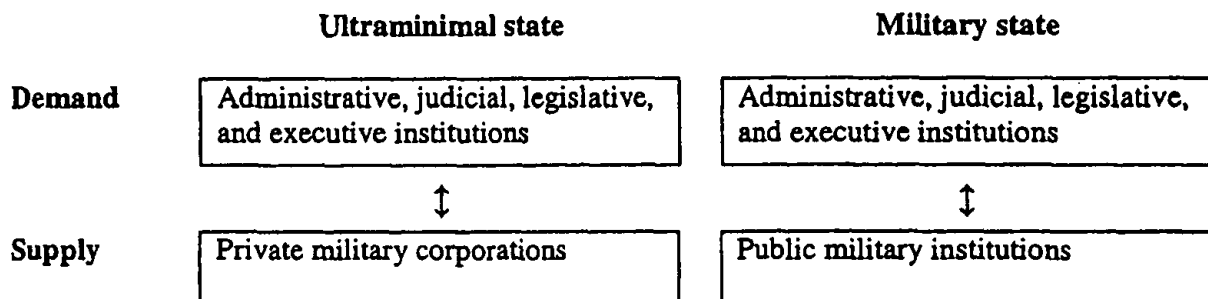
of loyalty. If any other entity, such as an angry mob, a private policing corporation, or another state, were to try anything funny . . . well, I am sure that you get the idea. The military state could crush any treasonous schemes. It could rely on its monopoly of military force to stifle any threats of revolution, civil war, or conquest. Unlike the ultraminimal state, it could establish and maintain *order*.

2. *The Problem of Loyalty: Take Two*

Perhaps you already sense the truism: The obvious answer treats “the state” and “the market” as real institutions, rather than metaphors, against my earlier advice.³⁴² Without argument, it presumes that public military institutions are loyal—or at least, more loyal than private military corporations. To defend this presumption, in lieu of logic, it employs misdirection. It implies that in a rational self-interested world, “the market” could not be as loyal to “the state” as “the state” would be to itself. After all, “the state” is “the state,” and it is neither rational nor self-interested to betray oneself. In the “military state,” “the military” becomes part of “the state.” There is no one left—no individuals, associations, or corporations—with the ability to overthrow “the state.” In this answer, the concept of the “military state” literally dissolves the problem of loyalty.

In such extreme doses, this kind of wordplay is conclusory. If we slice our philosophical fruits more carefully, we can compare apples to apples. We can reconsider the ultraminimal state and the military state in terms of two different relationships between supply and demand organizations:

Figure 4³⁴³



³⁴² See discussion *supra* Part I.B.3.

³⁴³ Note that each of these states is *more* “minimal” than the traditional “minimal,” “night-watchman,” or “liberal state.” Most liberal philosophers simply assume that the minimal state includes public punishment and policing, and they presume military institutions to be public. See, e.g., Walzer, *McPrison and Burglar King*, *supra* note 153, at 10 (“One somehow imagined that even a minimal state, stripped of all its welfare functions, would still have a police force and a prison system of its own.”).

This more involved formulation of the problem of loyalty has several significant advantages. First, it reconceptualizes “the state” and “the market” as institutional relationships, rather than actual institutions. From this more accurate perspective, it is easy to see through the sophistry of the obvious answer. We can no longer say, for example, that the “military state” possesses a “monopoly of military force,” or that the “ultraminimal state” lacks a “monopoly of military force.” We must speak more specifically of organizations, monopolies, and the relationships between them.

Second, this formulation reveals that the relevant players are roughly the same in the two states. In each case, there is a network of administrative, judicial, legislative, and executive institutions, which monopolizes the demand for military force. In other words, there is a deliberative government organization, or a “GO.”³⁴⁴ In each case, there is a network of military institutions—armies, navies, air forces, strategists, technologies, and material—which monopolizes the supply of military force. So there is an MO in both states. In the ultraminimal state, the MO is private; in the military state, the MO is public. We are no longer looking for loyalists and traitors. We are looking for more or less durable relationships between the MO’s monopoly of supply and the GO’s monopoly of demand.

Third, this formulation suggests that the problem of loyalty is no paper tiger, which can be swept aside by the definition, or even the realization, of the military state. It is more general, fundamental, and incurable than our obvious answer implies. It is at least as broad as the problem of civil-military relations.³⁴⁵ It exists in *all* states—ultraminimal, military, or oth-

³⁴⁴ The “GO” label remains useful so long as we keep in mind that the GO is not necessarily the only public institution in the state. As I explain in the text, in the military state, the MO is public as well.

³⁴⁵ In different terms, Samuel Huntington describes the same dilemma:

Any profession experiences a tension between its inherent professional aspirations and the extraneous politics in which it may become involved. The military profession, because of its crucial significance to society as well as the vast power which it must wield when the state is threatened, manifests this tension to a higher degree than most other professional bodies. An element of tragic necessity exists in this relationship The tension between the two, consequently, can never be removed; it can only be ordered so as to make it more or less endurable.

HUNTINGTON, *supra* note 45 at 95. While Huntington had a sophisticated grasp of the nature of civil-military relations, he, like Machiavelli, limited himself to rather simplistic, historical criticisms of mercenary forces:

The mercenary officer was the dominant type from the breakdown of feudalism to the latter part of the seventeenth century Under the mercenary system the officer was essentially an entrepreneur, raising a company of men whose services he offered for sale. The mercenary officer might possess a higher or lower level of vocational competence. Success, however, was judged not by professional standards but by pecuniary ones. An army was composed of separate units each the property of a different commander. The mercenaries were individualists, to some degree in competition with each other; they possessed neither common standards nor corporate spirit. Discipline and responsibility were absent. War was a predatory business and the ethics of predatory business prevailed.

Id. at 20-21. (Note: Huntington substantially misdates the decline of mercenaries. As we have seen, it

erwise. In the ultraminimal state, the problem is posed by private corporations; in the military state, the problem is posed by public institutions. Thus, in our move from the ultraminimal to the military state, the problem of loyalty changes form—from external to internal, from private to public—but it does not disappear. Rather than a stark choice between treason and loyalty, we confront a relative comparison of risks.

Lastly, this formulation relates the link between demand and supply to one of the most fundamental dilemmas of liberal thought—the problem of how, in a world of rationality, self-interest, and scarcity, deliberation tames domination,³⁴⁶ authority tames power,³⁴⁷ or legitimacy tames violence.³⁴⁸ In our story, we pose the quandary this way: By definition, the MO wields a monopoly of the supply of military force. It is dominant. If the members of the MO are rational and self-interested, like everyone else, then why would they be loyal to the GO? If power tends to corrupt, and absolute

was much more recent than 1700. See discussion *supra* Part II.A.) My criticism of mercenary forces differs from Huntington's criticism in at least two ways: It applies to modern private military corporations, as well as traditional mercenary forces, and it applies to soldiers, as well as officers. Both distinctions are based upon a more basic methodological difference: Huntington's analysis is more historical; mine is more philosophical. He is more interested in what mercenaries were; I am more interested in what mercenaries could be.

The most substantial difference between Huntington and me, however, comes in the next section, in which I explore the differences between punishment, policing, and military force, and develop the relationship between the monopolization of force and the intensity of force. See discussion *infra* Part V.D.II. Also, I embrace liberal theory, while Huntington did not. See HUNTINGTON, *supra* note 45, at 147-48:

It is no coincidence that the two statesmen who displayed the most penetrating insight into military policy and the deepest appreciation of the military function were the two great spokesmen of the conservative groups: Alexander Hamilton and John C. Calhoun In more than a hundred and fifty years American liberalism never produced a governmental leader with comparable ability and interest in military matters.

Id.

³⁴⁶ See Cover, *supra* note 21, at 1608 (“The experience of the prisoner is, from the outset, an experience of being violently dominated, and it is colored from the beginning by the fear of being violently treated.”).

³⁴⁷ HOBBS, *supra* note 9, at 75-76 (“[I]n a condition of Warre, wherein every man to every man, for want of a common Power to keep them all in awe, is an Enemy, there is no man can hope by his own strength, or wit, to defend himself from destruction, without the help of Confederates”); IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 53 (John Ladd trans., Bobbs-Merrill Educational Publishing 1965) (1780) (“It confers on us an authorization that we cannot derive from mere concepts of justice in general, namely, the authorization to impose an obligation on all others—an obligation that they otherwise would not have had—to refrain from using certain objects of our will because we were the first to take possession of them.”); ANTHONY T. KRONMAN, *MAX WEBER* 38-40 (Stanford University Press 1983) (“But that is just to say that authority is one species of power”); ROUSSEAU, *supra* note 12, at 35 (“There is for nations, as for men, a period of youth, or, shall we say, maturity, before which they should not be made subject to laws; but the maturity of a people is not always easily recognisable, and, if it is anticipated, the work is spoilt.”).

³⁴⁸ WEBER, *Politics as a Vocation*, *supra* note 15, at 78 (“[W]e have to say that a state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory.”); see also Cover, *supra* note 21, at 1608 (“And punishment, if it is ‘just,’ supposedly legitimates the coercion or violence applied.”).

power tends to corrupt absolutely, then why would the MO prostrate itself to a bunch of politicians, judges, and administrators? In answering these conundrums, what difference is produced by the distinction between a “private” or “public” MO? In other words, why would the MO of the military state be any more loyal than the MO of the ultraminimal state?

3. *The Solution: A Culture of Loyalty*³⁴⁹

This is the central question of this Article, the main challenge to the dictum that “the state must monopolize force.” In response, I tease out the truth from our earlier truism. I expose the hidden sense in which our obvious answer to the problem of loyalty was essentially correct. I argue that in the most deep and direct sense, the “public” aspect of the MO—the idea that the MO is part of “the state”—is no more than a set of beliefs, symbols, and rituals that produce a kind of institutional wordplay themselves. When we say that our military institutions are “public,” we describe a culture of loyalty within those institutions.

There are two ways to make this point: We can reason from the culture of loyalty to the military state and from the military state to the culture of loyalty. Both ways highlight different aspects of the argument. Since the point is pivotal, I court redundancy and make it both ways.

a. Take one: From the culture of loyalty to the military state

Recall that in modern, liberal societies, we use three basic metaphors to describe organizations: “state,” “market,” and “community.” Each one depends upon a different principle to organize and motivate collective activities: “force,” “profit,” and “duty.” Let us apply each of these principles to the problem of loyalty and see which one fits best.

i. *Force*

It should be instantly clear that the political and legal principle of *force* cannot ensure the loyalty of the MO. Political and legal reforms do not

³⁴⁹ My solution to the problem of loyalty is primarily based upon the works of Max Weber and Robert Cover. A full comparison of the relevant sources is the subject of another article, which I have drafted. Roughly speaking, what Weber calls “legitimacy,” I call “loyalty.” However, there is a crucial distinction between the two concepts: Weber’s legitimacy is popular. It is a “belief[] held by the[] members” of political associations. 2 WEBER, *ECONOMY AND SOCIETY*, *supra* note 15, at 903. My loyalty is institutional: It is a set of beliefs held by generals, sergeants, and soldiers. See discussion *infra* Conclusion.

This distinction is motivated by the work of Cover, who highlighted the ways in which “law” suffers from a problem of “social organization” because judges depend on an institutional hierarchy that links deliberation to domination—or, in my lexicon, the demand for force to the supply of force. But my work differs from Cover’s in that I emphasize the primary importance of military loyalty. Cover was focused less upon state violence and more upon law’s violence—i.e., policing and punishment. See Cover, *supra* note 21, at 1601 (“Legal interpretive acts signal and occasion the imposition of violence upon others Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.”).

leap off pages to punish military betrayals. They must be enforced. But in physical terms, the GO is impotent and the MO is dominant. If the GO entreats or hires helpers, the MO would defeat those helpers. The GO cannot force the MO to do anything.

ii. *Profit*

The economic principle of *profit* is only slightly more interesting: Perhaps the loyalty of the MO could be ensured by the prospect of self-interested, reciprocal exchange with the GO. Perhaps if the GO collects enough taxes, it could purchase the loyalty of the MO. Perhaps if the MO betrays the GO, the GO could withhold payment, or boycott the MO. The GO could ensure loyalty through economic reforms: contracts, inspections, and redistributions.

These economic hopes sound familiar, but they do not sound plausible in this hypothetical context. They are premised on the GO's ability to collect and protect taxpayer funds and enforce economic reforms. Let us take these three premises in reverse order: economic enforcement, tax protection, and tax collection. *Enforcement* still does not work. Like political and legal reforms, contracts, inspections, and redistributions do not enforce themselves. In the market, the GO is still impotent and the MO is still dominant. *Protection* is only mildly more plausible. If the MO wants tax dollars, it need not earn them by obeying orders. It can just take them—from politicians, judges, and administrators, or from the people themselves.³⁵⁰ Even *collection* fails. Taxes are coercively raised. How could the GO collect taxes? Politicians, judges, and administrators cannot raise taxes by themselves. If private policing firms enforced the state's tax codes, then who would police them? More importantly, who would protect them? They would be robbed and extorted by the MO.

iii. *Duty*

This leaves the principle of *duty*, which turns out to be the ace up our sleeve. What is "duty"? As I explained earlier,³⁵¹ the principle of duty is neither corporal nor capital, but cultural. Duty represents all of our voluntary, non-material modes of organization and motivation. Duty is our collective conscience—our senses of sanctity, morality, legitimacy, and justice. Our duties are created and sustained by our systems of beliefs, symbols, and rituals.

Why does duty work best in the military state? Force and profit assault the MO's self-interest on the surface, in the bodies and wallets of generals,

³⁵⁰ Of course, it would be least efficient to take taxes directly from citizens. However, if liberalism's assumptions are valid, see *supra* note 19 and accompanying text, then after a few harsh examples, most people would probably ante up to the military state without much of a fight.

³⁵¹ See discussion *supra* Part I.B.

sergeants, and soldiers. But duty assaults self-interest at the core, in the “minds,” “hearts,” or “souls” of generals, sergeants, and soldiers. It does not work against the MO’s self-interest, like force. It does not work with the MO’s self-interest, like profit. It works through the MO’s self-interest. It transforms and transcends the MO’s self-interest altogether. It fuses individual and institutional interests.

Of the three principles, duty is the only one which neither presumes nor requires any threats or acts of force.³⁵² It requires only an act of union: In one way or another, the MO comes to consider itself bound to the GO and, thus, obliged to the GO. Together they form a single “community,” like a family, a neighborhood, a religion . . . or a state. Generals, sergeants, and soldiers come to adopt a system of beliefs, symbols, and rituals that ties them to the mast of the state. They come to believe that loving the state is right and that they do not want to be wrong. They come to respect, obey, and enforce the decisions of the state, not for the sake of particular decisions, but for the sake of the state itself. Without reservations, they endorse the authority and legitimacy of the state. In short, they develop a military *culture of loyalty*.

The absence of force in this process is the key point. In the encounter between the GO and the MO, the GO stands naked before the MO. There is no third party to enforce regulations, contracts, inspections, or redistributions. If the MO betrays the GO, the GO is instantly lost. In this encounter, the state is created, and thus, it cannot be presumed. There is no state in the background. There is no “there” there, no state to intervene, to save

³⁵² The principle of force obviously requires the use of force. But the principle of profit also subtly presumes the use of force. It presumes the existence of a market in which buyers and sellers are “free” to buy, sell, not buy, and not sell as they choose. Of course, in transactions between the GO and the MO, the GO is not “free” to buy, sell, not buy, or not sell. To secure these freedoms, the GO would need to call upon a superior force. But the MO is dominant. No superior force exists.

There is one good argument that the principle of profit is fundamental—the concept of the division of labor. This is a Nozickean notion, a modern-day fusion of Locke and economics. Imagine that the GO is wise and the MO is strong. The argument predicts that the MO would agree to “partner” with the GO to produce mutual benefits. The GO would make decisions, and the MO would enforce them. This is the vision of the ultraminimal state.

I think that this argument fails the plausibility test. First, it assumes that the MO are too stupid to govern themselves, yet smart enough to recognize this fact, and selfless enough to accept it. Second, it assumes that the members of the GO are not only exceptionally wise but also exceptionally brave. Suppose, for example that the MO says to the GO, “You make decisions, and we will review them.” How will the members of the GO respond? If they refuse this offer, they could be killed. But if they accept it, they save the state at the price of liberal ideals.

In any event, the argument eventually falls victim to Occam’s razor. Imagine for a moment that the deal between the MO and the GO is struck, and the labor of government is divided between deliberators and dominators. For one hundred years, the GO commands and the MO obeys. After a century has passed, would we still say that this reflects the MO’s rational self-interest? Would we say that the same stupid people continue to work for the MO, and the same smart people keep working for the GO, for generations? Would it not be more direct and plausible to say that the MO has developed a sense of duty to the GO?

the state, to protect the state's purse, to compel the MO to obey orders. In terms of physical coercion, this is a unique situation. It only occurs in the institutional relationship between the GO, which monopolizes the demand for military force, and the MO, which monopolizes the supply of military force. Here the problem of loyalty peaks, threatening the stability of the state.

Like the analogous concepts of "deliberation," "authority," and "legitimacy," the culture of loyalty achieves a remarkable feat. It reduces one of the most fundamental tensions of liberal thought. It stands at the bottom of liberalism's rational, self-interested world, holding it up. Ultimately, the liberal state's destiny turns on this military culture of loyalty.

iv. *Duty, loyalty, and monopoly*

But terms like "force," "profit," and "duty" are relentlessly abstract. Like "state," "market," and "community," they are ideal types. In the real world, institutional relationships depend upon complex collisions of force, profit, and duty in everyday settings. Thus, in the real world, the problem of loyalty never disappears. In some institutional relationships, it is relatively large; in others, it is relatively small. But it always exists.

For this reason, I am not suggesting that everything is perfect and pure in the fantasy worlds of the "state of nature," the "ultraminimal state," and the "military state." In fact, I am not suggesting that anything is perfect or pure. In both the ultraminimal and military states, the relationship between the GO and the MO would depend upon force, profit, and duty. In both states, the MO would be bound to the GO by political, legal, and economic reforms, and cultural norms. After all, shareholders, managers, and employees are not unadulterated individuals made up purely of egos and ids. They are voters; they are jurors; they are citizens. They have some sense of public duty, some sense of loyalty to the state.

But there is a difference: They are not generals, sergeants, or soldiers. For them, loyalty is more like a hobby or a job, and less like a vocation or a profession.³⁵³ They sign contracts, but they do not swear oaths. They do not eat state foods, wear state clothes, and sleep in state beds. In everyday life, they do not constantly hold beliefs, share symbols, and practice rituals that bond them to the state. In other words, private military corporations are not "public."

In some ways, then, my central claim is quite modest. In the ultraminimal state, the MO is private; in the military state, the MO is public. In all other ways, the two states are the same. My claim is that if there is any distinction between these two relationships, it must be some relative distinction between profit and duty, between capital and cultural connections. A private MO would tend to place profit above duty; a public MO would

³⁵³ See WEBER, *Politics as a Vocation*, *supra* note 15, at 83.

tend to place duty above profit.³⁵⁴ A private MO would tend to think of itself first and the state second. It would be more likely to betray the state. A public MO would tend to think of itself second and the state first. It would be more likely to obey the state.

In different scenarios, the difference created by the military state could range from the subtle to the severe.³⁵⁵ But the difference would always remain. Since it would always be a relative difference, the military state would always enjoy a relative advantage. But all other things being equal, it would be an advantage of utmost importance. It could alter the fate of the state.

b. Take two: From the military state to the culture of loyalty

The military state is an early turning point in the liberal theory of force. There is much more to say, but in an important sense it is largely downhill from here. So, let us pause for a moment and ponder this point.

First, let us flip the argument around to reconsider it from behind. Whereas before we reasoned from loyalty to publicness, now we will reason from publicness to loyalty. A moment ago, we asked ourselves: Which would be more loyal to the state, a public or private MO? Now we will ask ourselves: In the military state, in what sense is the MO “public”? Which “public” qualities of the MO matter most? For the sake of variety and vividness, we will explore these questions in the real world. After all, in the United States, we actually have an MO, and we say that our MO is “public.” But on the deepest level, in the most direct sense, what makes the United States Armed Forces “public” for us?

Surely, at different levels, the United States Armed Forces are public in many ways. First, the United States Armed Forces have political and legal links to the United States government. For example, they are bound by the Constitution and the laws of the United States. They must obey the orders of the Commander-in-Chief and the Military Code of Justice.³⁵⁶ If generals, sergeants, and soldiers disobey these orders and laws, they can expect to be reprimanded, dismissed, or punished. Second, the United States Armed Forces have economic links to the United States government. They are owned, managed, and staffed by the United States government rather

³⁵⁴ This probably sounds familiar. It is an argument from “institutional purposes.” As I said earlier, almost every argument against the privatization of force is, fundamentally, an argument from institutional purposes. See discussion *supra* Part IV.D. The point here is to highlight how much more plausible the argument becomes in the context of the ultraminimal state, in which the supply of military force is completely private.

³⁵⁵ Of course, there are many other ways to promote or undermine civil-military relations that are unrelated to the monopolization or privatization of armies. See, e.g., Bruce A. Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 645-46 & nn.19-21 (2000) (discussing how the choice between presidentialist and parliamentary democracy influences the stability of liberal states).

³⁵⁶ U.S. CONST. art. II, § 2, cl. 1; 10 U.S.C. § 802 (2000).

than by any particular politicians, judges, administrators, or citizens.³⁵⁷ They draw upon taxpayer funds to purchase equipment and pay salaries. Third, the United States Armed Forces have cultural links to the United States government. They consider themselves “parts” of the United States government, just as legislatures, courts, and agencies do. They consider themselves one step removed from the market, like a special breed of civil servants or public professionals. They hold beliefs, share symbols, and practice rituals that place them aboard the ship of state.

At different levels, then, the metaphors of “public politics,” “public law,” and “public economics” can be fruitfully applied to the relationship between the United States government and the United States Armed Forces. This is especially true of the relationship between the United States government and individual generals, sergeants, and especially soldiers. But when we consider the United States Armed Forces—not as groups of individuals, but as organizations, or a network of organizations—it becomes rather implausible to speak in political, legal, and economic terms. Ask yourself this: Why do the United States Armed Forces obey the Commander-in-Chief or the Military Code of Justice? Why do the United States Armed Forces ask Congress for budget increases?

In any other public encounter, the answer is clear: “Public politics,” “public law,” and “public economics” are metaphors backed up by threats and acts of military *force*.³⁵⁸ Upon every other public relationship, the state’s monopoly of the supply of military force casts a shadow.³⁵⁹ To some degree, corporations, associations, and individuals obey the state’s political, legal, and economic decisions because if they did not, at some point, they would become targets of force. This implicit or explicit threat of physical coercion is, in all other cases, the distinctive characteristic of those political, legal, and economic relations that we call “public.” In politics, law, and economics, public relations are mandatory (and collective), or they are not “public” relations at all.

But in the public encounter between the GO and the MO, there is no threat of force in the background. In this public relationship, the state’s monopoly of the supply of military force is established. In the final analy-

³⁵⁷ See generally 10 U.S.C. § 101 (2000) (detailing the definitions of United States military forces).

³⁵⁸ Arguably, one might say the same thing of “public culture,” also known as “public values” or “public speech.” In liberal theory, we often tend to think of the cultural sphere as an unregulated “marketplace of ideas.” But over the last century, scholars have increasingly recognized the need for state intervention on behalf of public values. The most prominent example is probably public funding for education and the fine arts. See generally ACKERMAN, *supra* note 9 (discussing liberal education); OWEN FISS, *THE IRONY OF FREE SPEECH* (1996) (discussing public funding of public debate). I have not included “public culture” on this list because it would make my argument more contentious and less clear.

³⁵⁹ Cf. Cover, *supra* note 21, at 1629 (“Between the idea and the reality of common meaning falls the shadow of the violence of law, itself.”).

sis, politicians, judges, and administrators do not bully or buy the obedience of the United States Armed Forces. How could they? Here the concepts of public politics, public law, and public economics lose traction. But the concept of "public culture" holds fast. Why are the United States Armed Forces "public"? They are public because they think they are public. In the end, it is as simple as that.

4. *Monopolization as Socialization: Ownership, Management, and Employment*

By analyzing the state's monopoly of military force as a culture of loyalty, we propose a link between the *monopolization* and *socialization* of military institutions in liberal states. (The pun on "socialization" is intentional.³⁶⁰) Now we may study this link more closely. Rather than thinking in terms of the relationship between "the military" and "the state," we may think in terms of *three* relationships between the two entities: the relationships of public "ownership," "management," and "employment." We move from "why" questions to "how" questions: How is monopolization related to socialization? When armies are monopolized, how are generals, sergeants, and soldiers socialized to obey the state? How do public ownership, management, and employment structures instill a sense of duty, or a culture of loyalty, in military institutions and personnel?³⁶¹

Complete answers to these questions will remain beyond our ken and our scope. They call for a complete trip from "why" to "how"—a full

³⁶⁰ In some ways, by using economic terms like "supply," "monopoly," "ownership," "management," and "employment," I have stacked the deck against myself. They make my argument for the military state unduly difficult. They imply that "public-ness" is an economic concept and impose the burden of proving the relationship between economics and culture.

To lighten my burden a bit, I could invoke the term "socialization" instead of "monopolization." It has an appropriately ambiguous meaning in this context. Rather than saying that the state must "monopolize" the production of military force, I could say that the state must "socialize" it. Note the double-entendre: In the economic sense, "socialize" means making the ownership, management, and employment of the armed forces "public." In the cultural sense, "socialize" means instilling an ethic of loyalty into the beliefs, symbols, and practices of the armed forces. It is the indoctrination of generals, sergeants, and soldiers. Of course, while this pun is suggestive, it cannot be much more than a pun. We need arguments, not word games. We need to explore the cultural significance of public ownership, management, and employment.

³⁶¹ There is also a wrong-headed but instructive objection: "Wait a minute. Why such rigid distinctions between politics, law, economics, and culture? Do not politics, law, and economics influence culture? If so, then why can we not use politics, law, and economics to create a culture of loyalty?" We can and we must. One of the premises of my argument is that culture does not just exist "in our minds," whatever that means. It exists in our conversations and representations, and, perhaps most of all, in our everyday practices and institutions. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973) ("Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning."). This is why public and private ownership, management, and employment structures play major roles in the development of military cultures. The better question is in the text.

foray into anthropological and sociological studies of the relationships between public politics, law, and economics, on the one hand, and public culture on the other hand. But the liberal theory of force is not anthropological or sociological. It is a decidedly philosophical, speculative endeavor. On these “how” questions, our speculations are drawn from two familiar sources: first, basic principles of public ownership, management, and employment, laid out in numerous works of modern political, economic, and social theory;³⁶² second, common knowledge of modern military institutions and cultures. For now, more rigorous proofs—or disproofs—must be left to other authors, or at least, other articles.

As we have already seen, the supply of force breaks down into three political, legal, and economic concepts: ownership, management, and employment. In order to link monopolization to socialization, we can relate these to three cultural concepts: identification, professionalism, and bureaucracy. The links are not neat; there are overlaps on all sides. But for our present purposes, they suffice.

a. Public ownership

Public ownership has two distinctive qualities: It is collective and mandatory. In public armies, every citizen owns a “stake” in the armed forces, and every stake is the same “size.” Citizens can leave the state and, thus, “lose” stakes in the armed forces, but they cannot buy or sell stakes.³⁶³ These two qualities produce two well-known effects: On the one hand, public ownership embeds inefficiency and rent-seeking within our armed forces; on the other hand, public ownership embeds public purposes within our armed forces. By dispersing stakes and minimizing competition, public ownership insulates our armed forces from market pressures.

³⁶² Some of the more famous texts have been ANTHONY DOWNS, *INSIDE BUREAUCRACY* (Little Brown & Co. 1967) (1966) (discussing bureaucratic decisionmaking); HIRSCHMAN, *supra* note 198 (discussing economic theory); JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* (William Ashley ed., Augustus M. Kelley Publishers 2d ed. 1987) (1848) (discussing the influence of money on government); BERNARD S. SILBERMAN, *CAGES OF REASON* (1993) (studying the institutionalization of rational state bureaucracy); HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* (3d ed. 1976) (analyzing administrative behavior by examining the process of “choice which leads to action”); WEBER, *ECONOMY AND SOCIETY*, *supra* note 15 (empirically comparing “social structure and normative order in world-historical depth”); Max Weber, *Bureaucracy*, in *FROM MAX WEBER: ARTICLES IN SOCIOLOGY*, *supra* note 15, at 196 (discussing the elements and characteristics of modern bureaucracy) [hereinafter WEBER, *Bureaucracy*]; WEBER, *Politics as a Vocation*, *supra* note 15 (discussing “what politics as vocation means and what it can mean.”). For a rare philosophical treatment, see Joseph Raz, *Authority and Justification*, 14 *PHIL. & PUB. AFF.* 3 (1985).

³⁶³ War bonds—like all public bonds—are ultimately paid off by taxpayers. They are essentially present withdrawals on future tax streams. See Frank Pellegrini, *The Return of War Bonds?*, *TIME*, Sept. 15, 2001, available at <http://www.time.com/time/nation/article/0,8599,175060,00.html?o=0> (last visited Nov. 7, 2003) (on file with the Connecticut Law Review) (“Republican senators Mitch McConnell and Conrad Burns introduced legislation Friday to direct the Department of the Treasury to issue War Bonds for the first time since WWII. Paul O’Neill would set the terms—U.S. citizens would make the loan.”).

This difference between public and private armed forces would surely be a matter of grades.³⁶⁴ In many markets, individuals are more or less insulated from market pressures by employment contracts: Corporations hire them to deliver results and follow instructions and judge them in terms of both profits and duties.³⁶⁵ But in states, whole institutions are insulated from market pressures. Public ownership imposes institutional walls. Within these walls, public modes of management and employment flourish.

But public ownership does not simply create public spaces. It also creates public places, which are infused with public values. Public ownership signals an identification between military institutions and the project of government. Because generals, sergeants, and soldiers are sustained by public property, surrounded by public symbols, and engaged in public rituals, they come to consider themselves public professionals and public bureaucrats.

b. Public management and employment

These days, the terms “professional” and “bureaucrat” are deeply contested, and thus, poorly defined. It often seems that everyone wants to be a “professional” and no one wants to be a “bureaucrat.” Still worse, military work is so strange, and so special, that mundane terms like “professional” and “bureaucrat” are rarely applied to generals, sergeants, and soldiers. In the liberal theory of force, however, these terms must be applied to military work. They each link the “insulation” of military work to three traditional military values: service, hierarchy, and loyalty.

Military officers are the managers of public armies, and in many ways, they are professionals.³⁶⁶ They believe that military management is a public service. They understand their work as a public calling, career, commitment, service, or duty. They believe that the value of their work is not

³⁶⁴ See DONAHUE, *supra* note 23, at 47 (“[S]cholars . . . have stressed *insulation from the market* as a key characteristic of bureaucracies Employment contracts insulate *individuals* from market pressures—partially or entirely, for reasons sound or unsound. In a public bureaucracy, the *organization* is walled off from the price system.”).

³⁶⁵ See discussion *supra* Part IV.G.1.

³⁶⁶ See HUNTINGTON, *supra* note 45, at 7-58 (“The vocation of officership meets the principal criteria of professionalism [A] distinct sphere of military competence does exist which is common to all, or almost all officers and which distinguishes them from all, or almost all, civilians[:] . . . the management of violence. . . . The direction, operation, and control of a human organization whose primary function is the application of violence is the peculiar skill of the officer.”). Huntington defines the military profession in terms of “expertise” (i.e., “specialization”) as well as “responsibility” (i.e., “service”). Although I agree that military officers are experts, I do not believe that this distinguishes them from most other professionals, as Huntington himself suggests. In this Article, I discuss only the unique aspects of military professionalism: the extreme commitments to service, hierarchy, and loyalty, which distinguish military officers from all other professionals. I argue that by making and keeping these particular professional commitments, military officers establish a stable foundation for the military state.

estimable in dollars and cents, and that their only “clients” are “the state” and “the people.” They believe that their work is extremely important and connected to broad social objectives: homeland defense, national security, international stability, etc. They swear an oath to uphold and defend the state. They typically work full-time, are often “on call,” and often live where they work, on and around military bases. They consider themselves a distinct group of workers: distinct from civilians; distinct from soldiers.

Soldiers are the employees of public armies, and in many ways, they are bureaucrats.³⁶⁷ Like officers, they are insulated from market pressures and the public at large. They are hired, promoted, demoted, and fired on the basis of highly formalized policies and rules rather than revenues and costs. They swear oaths, work full-time, and imagine their work as a public commitment, service, or duty (although not as a permanent “calling” or “career,” as officers do). During training and active duty, soldiers are separated from society, family, and officers. More than most other public workers, they pledge themselves to a term of service, which they may not abandon or shirk without severe consequences. As employees, soldiers are rigorously and meticulously disciplined and trained. To unique degrees, they are socialized to sacrifice self-interest in the name of military service, hierarchy, and loyalty. They are trained to exalt hierarchy and procedure, to prioritize obedience over ingenuity, and routine over results.³⁶⁸ They are inundated with symbols and rituals of military service, hierarchy, and loyalty: flags, emblems, uniforms, medals, slogans, and salutes.

5. *Military Conscription: Professionals vs. Bureaucrats*

When liberal states draft soldiers, the culture of military loyalty becomes especially strong and clear. In fact, the military draft is the most “public” aspect of public military employment. In other public institutions, ownership is always collective and mandatory, but in the military draft, public employment becomes collective and mandatory as well. In liberal states, other instances of collective, mandatory employment are exceptionally rare. Military conscription transforms military work into an actual act of public service, like jury duty or paying taxes. It demands a profound sacrifice of self-interest, from all citizens, in the name of public values such as security, democracy, and freedom.

For our purposes, the military draft highlights three important points. First, it demonstrates the different roles of officers and soldiers in the production and maintenance of a loyal armed forces. Second, it marks the

³⁶⁷ See generally MORRIS JANOWITZ, *SOCIOLOGY AND THE MILITARY ESTABLISHMENT* 17-25 (rev. ed. 1965) (comparing the military establishment to a nonmilitary bureaucracy and analyzing the military social system).

³⁶⁸ Cf. DONAHUE, *supra* note 23, at 44-48, 79 (noting that bureaucrats obey orders); SIMON, *supra* note 362, at 125 (same); WEBER, *Politics as a Vocation*, *supra* note 15, at 95; see also discussion *supra* Part IV.G.1 (examining agency costs).

limits of the “public” by showing us what we do not mean when we say that armies are “public” suppliers of force. Third, it points to another example of the tension between deliberation and domination: an example that occurs within military organizations themselves.

One simple observation helps to demonstrate these three points: In most liberal states, soldiers are drafted at times, but officers are not drafted at all. The two principles of the draft—collectivity and compulsion—are applied easily and often to soldiers. But when we try to apply them to officers, they make little sense.

Soldiering is the quintessential “bureaucratic” task, easily amenable to collective and mandatory execution. Soldiers tend to act in groups, as subordinates. They follow others; they follow orders. In the soldier’s work, collectivity and compulsion are facts of everyday life. Officers, by contrast, tend to act alone, as leaders. Leadership may neither be democratized nor compelled. Officers cannot be forced into the military profession; they must be “called” into officer work, just as doctors, lawyers, and teachers are “called” into careers.

The distinction between officers and soldiers is flexible yet fundamental. We can imagine many exceptions: In some armies, officers are trained with soldiers; in others, there might be significant movement between officer and soldier ranks.³⁶⁹ Some individuals might be drafted as soldiers and later transformed into officers. Others might even be drafted as officers, in some limited sense, for some limited period of time. But in most armies, most of the time, the “real” officers—i.e., the members of the permanent, elite officer corps—are not members of the masses, and not forced to serve. In professional settings, principles of collectivity and compulsion may not be applied. As I just mentioned, this distinction has three implications.

First, it reveals the critical role that officers play in the relationship between states and armies. Officers bear the fundamental responsibility for the socialization of armed forces. The example of the draft makes the point plain: Soldiers cannot socialize themselves. There must be some military personnel who are not drafted, who are not transient, to create and sustain a loyal culture. There must be a permanent officer corps so that there can be permanent armies with permanent loyalties. This is the distinctive role of the officer corps. Officers socialize armies, instilling the culture of loyalty into soldiers. Officers stand “between” soldiers, on the one hand, and poli-

³⁶⁹ For example, Israel trains officers and soldiers together, but the United States does not. Compare Isr. Defense Forces, *The Army of the People*, at <http://www.idf.il/english/history/future5.stm> (last visited Jan. 30, 2004) (on file with the Connecticut Law Review) (“The IDF does not produce officers through academies, rather commanders rise through the ranks by their leadership and command abilities.”), with U.S. Military Academy at West Point, *About the Academy*, at <http://www.usma.edu/about.asp> (last visited Jan. 30, 2004) (on file with the Connecticut Law Review) (“Ever mindful of its rich heritage, West Point continues to prepare its graduates to serve as commissioned leaders of character in America’s 21st Century Army.”).

ticians, judges, and administrators, on the other. They bind them together. They establish and sustain a “state within a state”:³⁷⁰ an insulated domain in which loyal soldiers evolve. When citizens are drafted, they are inundated with flags, emblems, uniforms, medals, slogans, and salutes, until they are transformed into soldiers. It is officers, more than anyone else, who perform that critical cultural task.

The draft also suggests a second point: that our concept of “public” supply only goes so far. In most circumstances, “public” supply requires only that ownership be collective and mandatory. In “public” schools, hospitals, police departments, and prisons, employees volunteer. But these institutions are still “public” because they are publicly owned. In armies, by contrast, we sometimes draft soldiers. In these moments, public employment becomes collective and mandatory too. But we never extend the principles of “collectivity” and “compulsion” to public management, and it is hard to imagine that we could.

Finally, the draft reveals, in the most fundamental way, how deeply the tension between deliberation and domination actually runs. Earlier, we teased out the tension between the GO and the MO. Now we can see that the same tension exists within the MO as well. To simplify the point: Generally speaking, soldiers use force more often than officers. In the most literal sense, it is more often soldiers than officers who “dominate” individuals and institutions, by carrying guns, driving tanks, flying planes, and above all, by aiming and firing weapons.

This raises a familiar question: Why do soldiers obey officers? Why not take over armies and states themselves? There are ultimately no answers to these questions. They highlight the fundamental tension between deliberation and domination, the profound nature of the problem of loyalty. They show us that in the deepest sense, the liberal state’s monopoly of force always already presumes cultural links. Not just cultural links between the supply of force and the demand for force, which we have already seen, but links within the supply of force itself. In the absence of loyalty, there cannot be military institutions, let alone military states.

6. *Market Socialization: Private Professions and Private Bureaucracies*

With these observations in mind, we can return to the main line of the argument, which can be stated in more general terms: Service, hierarchy, and loyalty are the hallmarks of military life. For our purposes, it is most important to see the causal connection between insulation and socialization. Economic insulation is a necessary—although not remotely sufficient—condition for the creation and sustenance of extremely strong cul-

³⁷⁰ See HUNTINGTON, *supra* note 45, at 1-97, 143-62; discussion *infra* Parts V.D.4-V.D.5 (examining governability).

tures of public service, hierarchy, and loyalty within institutions.

Two questions clarify this point. Why do other, non-military, public institutions lack such strong cultures of service, hierarchy, and loyalty? In other settings, the problem of loyalty is less vital and less severe. Treason costs less for states and earns less for traitors. Why do private corporations lack such strong cultures of service, hierarchy, and loyalty? In markets, these cultures cannot develop to the same degree. With less shelter from market pressures, and with less identification with public projects, private managers and employees remain more motivated by the principle of profit, more tethered to self-interest.

This last sentence raises some prominent eyebrows.³⁷¹ There are many examples of private professions and private bureaucracies. One wonders, then, whether the ultraminimal state could hire a highly professional, highly bureaucratic military corporation.³⁷² If such a company existed, then it could surely be hired. But this thought puts the cart before the horse. In general terms, it is fine to have faith in markets—to believe that, when all things are equal, supply satisfies demand. But in the ultraminimal state, in the market for military force, all things are not equal. Suppliers have the ability to dominate consumers.

In the ultraminimal state, why would highly professional, highly bureaucratic military corporations exist? Tradition? Custom? Luck? Simply because politicians, judges, and administrators desired them? Because the state drafts contracts calling for “professionalism” and “bureaucracy” in the performance of contractual duties? Because the state solicits bids from only “professional” and “bureaucratic” suppliers? Even if such model corporations evolved, who would defend them against other, less scrupulous military corporations? Even if they could defend themselves, who would compel them to remain highly professional, highly bureaucratic corporations?

It is easy to imagine the ultraminimal state taking some significant

³⁷¹ See, e.g., WEBER, *Bureaucracy*, *supra* note 362, at 197, 222 (“It does not matter for the character of bureaucracy whether its authority is called ‘private’ or ‘public.’ . . . The bureaucratization of organized warfare may be carried through in the form of private capitalist enterprise, just like any other business.”). A full response to Weber’s position is beyond the scope of this Article. For now, I will be brief: First, it is not clear, in these passages, whether Weber is speaking of the distinctive formation of *modern* states. Second, if he is speaking of modern states, I think that he is wrong, at least insofar as his argument applies to military institutions. In some collective endeavors, it might be correct to compare the “bureaucratization” of public and private institutions. It is not, however, correct to compare them in the case of military force. Public armies are far more bureaucratic than private ones. Third, this is a structural fact, not just an empirical one. While Weber’s work on bureaucracy is still highly regarded, few scholars today accept the idea that there are no significant distinctions between public and private bureaucracies. See, e.g., DOWNS, *supra* note 362, at 24-25 (defining bureaucracy in terms of an organization’s insulation from market forces).

³⁷² DAVIS, *supra* note 125, at 22-25 (arguing that after the Cold War, some privately-employed soldiers qualify as “professionals”); cf. SILVERSTEIN, *supra* note 122, at 145 (“[m]ercenaries are one of the world’s oldest professions”).

steps. In most markets, there are ways to socialize corporations, by promoting the development of professional and bureaucratic practices and norms. Most markets can be regulated. Legislatures can set industry-wide “standards,” and when they are violated, courts can punish individual cases of “malpractice.” These steps may work well in the professions of medicine and law, but in the military profession, they would be petty and out of place. The concentrated powers of military institutions create a concentrated danger of treason that calls for a concentrated form of socialization. In the relationship between the liberal state and its military institutions, the problem of loyalty peaks. In response, the liberal state must socialize generals, sergeants, and soldiers strictly. It must *monopolize* the supply of military force.

D. *Beyond the Military State?*

*Power tends to corrupt and absolute power corrupts absolutely.*³⁷³

*One somehow imagined that even a minimal state, stripped of all its welfare functions, would still have a police force and a prison system of its own.*³⁷⁴

In some ways, the story of the military state is much like the traditional story of the liberal state: there are individuals; there are fights; there are institutions. From conflict comes togetherness. In our story, we say that the principle of duty tames the principle of force, or more precisely, that the demand for force tames the supply of force. In the annals of liberal thought, these are familiar motifs: right tames might; deliberation tames domination; authority tames power; legitimacy tames violence.

There are many nuances among these narratives, but there is one glaring distinction between our story and others: The military state is much leaner than the traditional liberal state. Unlike the “monopoly state,” the military state relies completely upon private policing and punishment corporations. Why? From the traditional liberal perspective, this limitation makes little sense. After all, the military state is constructed to resolve the problem of loyalty. In the broadest sense, the problem of loyalty is boundless. It is like the problems of legitimacy, authority, and agency; it arises whenever one institution—indeed one individual—wields power over or depends upon another.

But ours is not a traditional liberal perspective. This is a liberal theory of force, not a liberal theory of morality or politics. The military state is

³⁷³ Lord Acton, *Letter to Bishop Mandell Creighton*, (April 3, 1887), in *THE OXFORD DICTIONARY OF QUOTATIONS* 1 (Elizabeth Knowles ed., 1999).

³⁷⁴ Walzer, *McPrison and Burglar King*, *supra* note 153, at 10.

not constructed to resolve every incidence of the problem of loyalty. It is constructed to cure only the most unusual, severe case: *the problem of order*.

What is the problem of order? In the ultraminimal state, the problem of loyalty reaches a climax. The prospects of disloyalty grow exceptionally high, and the consequences of disloyalty grow exceptionally grim. On the one hand, the ultraminimal state has too little ability to socialize private military corporations, and on the other hand, private military corporations have too much ability to overthrow the ultraminimal state. As a result, disloyalty is linked to disorder. The ultraminimal state is unstable. It is subject to threats and acts of rebellion, civil war, conquest, and colonization. It is likely to be replaced, again and again, by new corporations or states, domestic or foreign. It cannot defend boundaries, protect allies, and fight wars. It cannot establish and maintain *order*.

As we have already seen, the problem of order justifies the formation of the military state. It proves that the liberal state must monopolize the supply of force so that it can establish and maintain order. This is the first thesis of the liberal theory of force, which we will call the "principle of order." In the last section, we identified and justified the principle itself. In this section, we identify and justify the limits of the principle. We ask and answer the following questions: How far does the principle of order go? How much of the supply of force must the liberal state monopolize? The principle itself suggests an answer: The liberal state must monopolize enough of the supply of force to establish and maintain "order."

But how much is that? Does the principle of order justify anything beyond the military state? Does it justify a monopoly of policing? A monopoly of punishment? If not, are there other, more extensive principles that might? In particular, given that there is a principle of order, is there also a principle of law?

1. *The Principle of Order . . .*

In order to identify the limits of the principle of order, we need a much deeper understanding of the principle itself, and the problem that the principle cures. In other words, we need to hone in on the link between disloyalty and disorder. As we have already observed, disorder is a much more finite problem than disloyalty.³⁷⁵ Almost any institution can betray the state, but very few institutions can *topple* it. In the military state, we cannot say, for example, that the private prison industry has the ability to subjugate the state. Prisons can commit crimes and violate the state's laws,

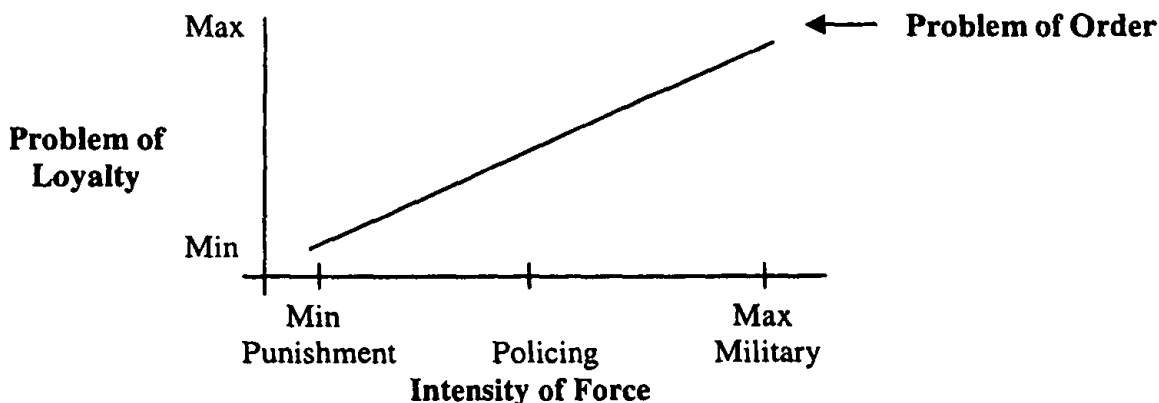
³⁷⁵ Although it is more finite in relative terms, both problems are "infinite," in the sense that they never disappear. In this sense, the problem of order is infinite yet bounded; the problem of loyalty is infinite and unbounded. Cf. EINSTEIN, *supra* note 325, at 137-39 (articulating the theory of a "bounded" yet "infinite" universe).

but they cannot wage wars and upset the state's order. Armies, by contrast, can do all of the above.

Why? Why, in relative terms, are armies so dangerous and prisons so docile? Why is military force such a singular form of force? Why is military disloyalty so strongly linked to disorder? The answer is intuitively clear: *Military force is the most intense form of force.* The most intense form of force produces the most intense form of the problem of loyalty, which is the problem of order.³⁷⁶ It is a simple idea.

Now, for our limited purposes, the problems of order and loyalty start to take shape. They are both linked to the intensity of force. Imagine a more or less direct correlation: Where the intensity of force is greatest, the problem of loyalty is greatest, and the problem of order exists. Where the intensity of force is least, the problem of loyalty is least, and the problem of order does not exist. Perhaps pictures are clearer than words:

Figure 5



When you look at this graph, many questions and objections probably come to mind. First: Is this for real? Well, not exactly. Like the demand/supply matrix, the loyalty/intensity graph is a metaphor. Please do

³⁷⁶ Huntington and Weber make analogous points. See HUNTINGTON, *supra* note 45, at 95 (stating that the political-professional tension in the work of military officers is produced by the "vast power" wielded by military institutions); 2 WEBER, *ECONOMY AND SOCIETY*, *supra* note 15, at 903-04. Weber writes:

The modern position of political associations rests on the prestige bestowed upon them by the belief, held by their members, in a specific consecration: the "legitimacy" of that social action which is ordered and regulated by them. This prestige is particularly powerful where, and in so far as, social action comprises physical coercion, including the power to dispose over life and death. It is on this prestige that the consensus on the specific legitimacy of action is founded.

Id. If we swap "legitimacy" for "loyalty," my point is similar to Weber's. But in this exchange, something is lost: "Loyalty" is a belief held by generals, sergeants, and soldiers; "legitimacy" is a belief held by the "members" of "political associations." See discussion *supra* Part V.C; discussion *supra* note 278 and accompanying text; discussion *infra* Conclusion.

not take it too literally. In particular, please do not infer anything from the shape or the slope of the curve, or the evenly-spaced arrangement of “punishment,” “policing,” and “military force” along the X-axis. I am flexible in terms of suggestions, so to speak.³⁷⁷

But one feature of the graph is fixed: The problem of loyalty cannot reach “zero” in the case of punishment. In punishment institutions, the problem of loyalty diminishes, but it does not disappear. The curve depicts relative comparisons among the three forms of force, rather than absolute descriptions of each one. In relative terms, the problem of loyalty is greatest in the case of military force, and least in the case of punishment force. We will return to this matter shortly when we search for the principle of law.

2. . . . and the Intensity of Force

Second: What is “intensity”? Why is policing more “intense” than punishment? These are more serious questions, which demand more involved responses. “Intensity” breaks down into three elements: “severity,” “breadth,” and “speed.” Severity is a measurement of the physical harm that any exercise of force does, or could do, especially to individuals, but to physical property as well. Breadth is a measurement of how widely that harm is distributed (again, especially upon how many people, but upon how much property as well). Speed is a measurement of how quickly that harm occurs.³⁷⁸ Intensity is the quasi-mathematical “product” of all three elements.³⁷⁹

Where did these three elements come from? As far as I know, I invented them,³⁸⁰ although I did not pull them out of a hat. Each element bespeaks a liberal danger that inheres in any exercise of force: the danger that someone, or something, could be illegitimately harmed. The severity, breadth, and speed of force increases the chances that illegitimate targets could be harmed or illegitimate levels of harm could be inflicted.

It is important to point out that we are not talking about mistakes or accidents here. It may also be true that where the intensity of force is great-

³⁷⁷ I am especially open to one particular suggestion. See discussion *infra* Part V.D.2.d.

³⁷⁸ “Haste” is a plausible substitute for “speed.”

³⁷⁹ Strictly speaking, the physics term “momentum” might be more apt. In physics, momentum equals mass multiplied by velocity. Thus, the phrase “momentum of force” would convey the notion of severity, breadth, and speed, in a way that no other term really does. Unfortunately, the phrase “momentum of force” would be nearly incomprehensible to most readers—even to physicists, who think about “force” in much more general terms than liberal philosophers.

³⁸⁰ Most of all, the concept of intensity is a product of my common sense. But similar concepts could be teased out of oblique references in the relevant texts. See, e.g., HUNTINGTON, *supra* note 45, at 95 (referring to “vast power”); 2 WEBER, *ECONOMY AND SOCIETY*, *supra* note 15, at 904 (“referring to the power to dispose over life and death”); cf. Tilly, *supra* note 21, at 170 (“chief concentrated means of violence”) (emphasis added); Tilly, *Western State-Making*, *supra* note 32, at 601, 638 (“principal means of coercion”) (emphasis added).

est, the danger of unintentional, illegitimate harms is greatest. But mistakes and accidents are not our concerns in this context. We are talking about the danger of disloyalty, which involves the danger of intentional illegitimate harms.

This is not the place to venture involved, substantive definitions of “legitimacy” and “harm.”³⁸¹ These questions have been central controversies in modern philosophy for centuries. To dehorn these dilemmas, we may propose rough, procedural, semi-circular definitions. We can explain “legitimacy” in terms of allocations of force and “harm” in terms of exercises of force. Targets and levels of force are “legitimate” when they are “legitimized” by the liberal state’s allocative bodies, through liberal political and legal procedures.³⁸² “Harms” are the physical effects caused by exercises of punishment, policing, and military force. Because the term “exercise” includes threats,³⁸³ the term “harm” includes threat-based deprivations, such as physical confinement and the confiscation of property.

So much for the definition of intensity.³⁸⁴ The next step is the quasiharm: We can apply the three elements of intensity (i.e., severity, breadth, and speed) to the three forms of force (i.e., punishment, policing, and military force), so that we may determine the relative “intensity” of each form of force.

This, too, raises murky definitional questions: Whose exercises of punishment, policing, and military force will we judge? Which exercises of punishment, policing, and military force will we judge? To what specific practices do these three terms refer? They are certainly limited to the practices of liberal states, but beyond that, these questions are not easy to answer. Most definitions of “punishment,” “policing,” and “military force” are notoriously circular, cultural, and shifting.³⁸⁵ To make matters worse,

³⁸¹ Earlier, I defended my decision to avoid substantive definitions of legitimacy. See discussion *supra* note 21.

³⁸² See discussion *supra* Part I.B.2 (defining “force”). It is worth remembering that allocations can be narrow or broad, and they can occur before or after exercises of force. See discussion *supra* Part III.C (defining “allocation”).

³⁸³ See discussion *supra* Part I.B.2 (defining “force”) and Part III.C (defining “exercise”).

³⁸⁴ There is one more aspect of intensity to note: Intensity is based upon the physical harm that any exercise of force “does” or “could do.” In other words, it is equivocal; it is based upon both real and potential harms. This probably sounds like nonsense. If so, it is liberal nonsense. It is a necessary outgrowth of the liberal method: the method of reasoning about practical realities in imaginary terms. To judge the intensity of punishment, policing, and military force, we must ask ourselves two questions at once: “What happens in the real world?” and “What would happen in imaginary states, like the state of nature, the ultraminimal state, the military state, or the minimal state?” In liberal thought, the tensions between “is,” “must,” “could,” “would,” and “should” are pervasive and poorly understood. I revisit these tensions later, but I do not (and cannot) resolve them.

³⁸⁵ The definition of policing is particularly amorphous and unstable. See BAYLEY, *supra* note 59, at 328, 349 (“Specification of the nature of police is not as easy as it might seem. Organizations called police perform different functions in different countries The point should be underscored that today’s police systems, diverse in character, replaced systems of marked longevity that were

the modern lines between “punishment,” “policing,” and “military force” have recently blurred.³⁸⁶

Nonetheless, in liberal circles, the concepts of “punishment,” “policing,” and “military force” continue to carry some weight.³⁸⁷ In liberal states, we often say to one another that we have things called “punishment,” “policing,” and “military” institutions, and we often say that these institutions “punish,” “police,” and exercise “military force.” Generally speaking, when we say such things, we know what we mean. So rather than proffering slippery, inadequate definitions, I will work from our vague, cultural presumptions.

In any event, a little patience quickly pays off. As we apply the elements severity, breadth, and speed to the three forms of force, the meanings of “punishment,” “policing,” and “military force” become increasingly clear. In each instance, we ask strange and abstract questions: Which forms of force are the “minimum,” “median,” and “maximum,” in terms of severity, breadth, and speed?³⁸⁸

a. Severity

Surprisingly, “severity” turns out to be the most puzzling element. On one level, it seems clear that punishment is the minimum (i.e., less severe than policing and military force); on another level, it seems clear that mili-

equally diverse.”); Sklansky, *supra* note 40, at 1194-95 (“Policing as a concept has been remarkably malleable. . . . The special powers of law enforcement officers have never been well defined, but they have always been assumed to exist; the police have been defined more by culture than by law.”).

When definitions of punishment, policing, and military force are not completely circular, they are often partially circular, in the sense that they are explained in terms of “crime” and “war.” See, e.g., WEBSTER’S NEW WORLD DICTIONARY 1090-91, 1044-45, 860, and 527 (3d college ed. 1988). In less circular terms, the distinction between “policing” and “military force” is often described as a distinction between physical coercion that is “internal” and “external” to the state. See, e.g., BAYLEY, *supra* note 59, at 328-29 (“An army is publicly constituted to use force, just as police are, but its jurisdiction is external to the collectivity”); THOMSON, *supra* note 32, at 3 (defining military force as “extraterritorial violence”). But there are limits to this definition, as cases of riots, terrorist attacks, and civil wars demonstrate. See TILLY, *supra* note 34, at 75 (“At the level of the state, the organizational division between armed forces oriented to attacks on external enemies (armies) and those oriented to control of the national population (police) developed only slowly, and never became complete.”). In lieu of this rigid distinction, I have chosen the more flexible category of “breadth.”

³⁸⁶ This has occurred primarily under the influence of two trends: the privatization of force, which we have already explored, and the globalization of force, which I intend to address in my future work.

³⁸⁷ South Africa might be one prominent exception to this rule. The country relies so heavily upon private “security” forces; see Howe, *supra* note 72, at 3; that the distinction between “policing” and “military force” in South Africa becomes fuzzy indeed.

³⁸⁸ As you will see, this inquiry has a decidedly subjective, speculative, and stereotypical spirit. To some extent, in paving new paths, I must reason by the seat of my philosophical pants. If you find yourself resisting my categories and answers, I encourage you to come up with your own and explore those instead. On the whole, I am convinced that the intensity of force is the key to understanding the principle of order, and thus, to understanding the liberal state’s monopoly of force.

tary force is the maximum (i.e., more severe than policing and punishment). But there is no single level of analysis in which we can consistently distinguish the severity of all three forms of force.³⁸⁹

The first level is the abstract/possible mode of analysis. It compares the severity of punishment, policing, and military force in the abstract. For example: In the United States, our public armies, police, and prisons all kill, hurt, and detain people, and destroy, damage, and confiscate property. From this perspective, severity is constant in the United States; American practices of punishment, policing, and military force are equally severe. But in this respect, the United States is not a representative sample of liberal states around the world. In most other liberal states, prisoners are not executed; capital punishment is no longer permitted. So in most liberal states, punishment is less severe than policing and military force. In other words, punishment is the “minimum,” and policing and military force share the “maximum” together.

The second level is the actual mode of analysis, which is much more intuitively satisfying but much more intellectually complex. To see the actual level, we must compare the “average” severity of punishment, policing, and military force. In our minds, we must somehow “add up” the severity of all of the exercises of punishment, policing, and military force in liberal states, and then somehow “divide” by the total number of exercises themselves. In less obscure terms, the actual analysis compares the most common means of physical coercion in liberal punishment, policing, and military institutions.

This is a more insightful level of analysis, which is more consistent with the spirit of this inquiry. It begins with the actual effects of punishment, policing, and military practices and institutions. In these actual terms, military force is clearly the “maximum”; it is obviously more severe than policing and punishment. Threats and acts of death and destruction are the ordinary *modi operandi* of military institutions. By contrast, policing and punishment institutions tend to confine people more often than they kill them, and confiscate property more often than they destroy it.

The puzzle pops up when we try to compare the “actual” severity of policing and punishment. What should we compare? In coercive terms, what are the standard operating techniques of policing and punishment? Is policing best represented by search, arrest, or detainment? Is punishment best represented by parole or imprisonment? In relative terms, how severe are these techniques?

³⁸⁹ The two “levels” of analysis are themselves slightly abstract and difficult. If you do not find them helpful, you should simply ignore them. In philosophical terms, they add rigor to the analysis of severity, breadth, and speed. But in intuitive terms, they are probably excess baggage. For most people, the proposition that exercises of punishment, policing, and military force can be roughly distinguished in terms of severity, breadth, and speed is an obvious fact, which does not merit argument or proof.

Frankly, I mean to punt on this point. I do not think that these questions have any sensible answers. In developing my argument, I have tried out several ways to compare the “actual” severity of policing and punishment, but I always end up with apples and oranges. I have included my best attempts in the notes,³⁹⁰ but the bottom line is that none of them remotely succeed. These repeated failures have led me to conclude that in liberal states, there is no meaningful or cognizable distinction between the severity of policing and punishment. In individual cases, the severity of policing varies, and the severity of punishment varies, and they do not always vary together, depending upon the particular characteristics of individuals, crimes, arrests, and prisons. But on the whole, they are more or less equally severe. (If you are not inclined to agree, please adopt your own view and proceed. This turns out to be less consequential than the distinctions that follow.³⁹¹)

So for our purposes, let us conclude that military force is more severe than policing and punishment, and that policing and punishment are equally severe. In other words, in terms of severity, military force is the “maximum,” and policing and punishment share the “minimum.” As I argue below, the distinction between policing and punishment is more

³⁹⁰ I suppose it is conceivable that we could try to establish “average” policing and punishment practices, but I am not about to suggest any such mental jujitsu. To remain useful, I believe that philosophical arithmetic must remain modest.

In any event, if we could resolve this puzzle, others would take its place. Suppose, for the moment, that we should compare arrest and detainment, on the one hand, to imprisonment, on the other. We are still dealing in apples and oranges here. We could say that terms of imprisonment are relatively long, whereas arrest and detainment are relatively short-term affairs. But, of course, this relationship varies dramatically depending on the category of crime, among other things. Alternatively, we could say that the loss of liberty is more extreme and more permanent in prisons. But this relationship also varies dramatically depending on the circumstances of arrest, detainment, and imprisonment.

We only have one chance to resolve these comparative dilemmas—to compare “policing” and “punishment” responses to equivalent crimes, in an effort to compare apples to apples. The thought is that by focusing on concrete examples, we might be able to compare the severity of policing and punishment more effectively. Unfortunately, it does not seem to work.

For illustrative purposes, pick any felony that you like. Imagine uses of force in three moments: (1) during the crime; (2) during the arrest and; (3) during the punishment. (The first two are policing; the last one is punishment.) Which uses of force would be least and most severe? Without imposing arbitrary baselines, it seems impossible to be sure. Our intuitions crisscross and conflict. We might say any or all of the following things: (1) In the midst of crimes, police may use more force to prevent and stop crimes than prison guards may use to punish crimes; (2) Both police and prison guards may use whatever force is necessary, and no more, in order to overcome the resistance of suspects and inmates; (3) After suspects are proven guilty, they may become the target of more severe forms of force, like imprisonment. Because each of these principles seems to be based upon some kind of liberal logic, I see no way to resolve the tensions among them.

³⁹¹ If you think that policing is more severe, you should end up giving a stronger endorsement to my final position; if you think that punishment is more severe, you should end up giving a weaker endorsement to my final position. But, if my quasi-math is correct, then you should end up endorsing my final position either way. Once we incorporate our relative judgments of breadth and speed, the question of the relative severity of policing and punishment does not greatly change the final outcome. See discussion *infra* note 397.

aptly conceived in terms of breadth and speed.

b. Breadth

After dealing with severity, the element of breadth is a breath of fresh air. It is relatively easy to apply and adds much definition to the three forms of force: Military force is the most broad; punishment is the most narrow; policing falls between those two extremes. In each case the pattern is clear. It holds true on any level of analysis—abstract or actual.

We can conceptualize the element of “breadth” in two ways—by considering particular exercises of force and by considering the “aggregate” of all exercises of force. On the particular level: Liberal states almost always exercise punishment on an individual basis.³⁹² Liberal states typically exercise policing much more broadly to suit the exigency of policing work. When circumstances warrant, police arrest multiple individuals, search multiple locations, and seize multiple things.³⁹³ Lastly, liberal states often exercise military force on much broader scales: from rescues, raids, and peacekeeping missions, to naval blockades, air sorties, land invasions, and wars.

In some sense, however, it is rather semantic and arbitrary to speak of particular “exercises” of force. To meet this objection, we can speak in aggregate terms: The total harm of punishment is roughly the number of people who are currently in prison, and, perhaps, on parole. In the United States, this harm is unusually broad, with roughly two million people in

³⁹² In all liberal states, the concept of “collective punishment” or “guilt by association” is one of the strongest liberal taboos. See, e.g., Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Dec. 12, 1977, Protocol II, art. 4(2)(B), 16 I.L.M. 1442, 1444 (prohibiting collective punishments of persons not taking part in hostilities); Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Dec. 12, 1977, Protocol I, art. 75(2)(d), 16 I.L.M. 1391, 1423 (prohibiting collective punishment of persons under the control of a party to a conflict); Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, art. III, 6 U.S.T. 3517, 3538-39, 75 U.N.T.S. 287, 308-10 (prohibiting punishment of a person “for an offense he or she has not personally committed”); *United States v. Lane*, 474 U.S. 438, 475 (1986) (contrasting our acceptance of the “independent value of individual responsibility” against “our deep abhorrence of the notion of ‘guilt by association’”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982) (describing “guilt by association” as “a philosophy alien to the traditions of a free society”). But like every other taboo, it has not always been respected. Recently, the Supreme Court of Israel unanimously affirmed the deportation of several individuals to the Gaza Strip, in part because the individuals were blood-related to suicide bombers. Joel Greenberg, *Reprisals Rekindle a Debate in Israel*, N.Y. TIMES, Mar. 27, 1996, at A3. The opinion has been criticized as a violation of the Geneva Convention’s proscriptions against “collective punishment.” *Id.*

³⁹³ In the United States, these principles are most famously found in the Fourth Amendment, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

prisons or jails and another five million people on probation or parole.³⁹⁴ In other liberal states, these figures typically represent much lower percentages of the population.

Now there are many different ways to calculate the population of policing, but I do not want to get too caught up in them here. Whether we say that all citizens are policed, or that only suspects are policed, the policing population is always going to be greater than the punishment population. Every person in prison was probably a target of policing at some point, and many people who are not in prison are obviously targets of policing as well.

Compared to punishment and policing, the scope of military force is much broader still. Once we remind ourselves to include threats of military force, we instantly see that the targets of military force cover the globe. They overlap substantially with the targets of policing and punishment, but they also include billions of others inhabiting rival states. This is generally true of most military methods, but the example of nuclear threats drives the point home.

To sum up: In terms of breadth, punishment is the “minimum,” policing is the “median,” and military force is the “maximum.”

c. Speed

Lastly, there is the element of speed (which might also be called “haste”). Speed distinguishes punishment very clearly from policing and military force, but it does not significantly distinguish policing from military force.³⁹⁵ In relative terms, exercises of punishment are slow, while exercises of policing and military force are quick.

In some ways, this is the simplest distinction yet. It is produced by liberal political and legal procedures. More specifically, it is produced by the liberal criminal justice system, in which prosecutors, judges, and juries select the targets and levels of punishment on a case-by-case basis—before punishments are actually inflicted.

To be sure, this is an abstract and fictional distinction, and in actual terms, there are a few major wrinkles. In the United States, for example, more than ninety percent of all convictions are the result of plea bargains,³⁹⁶ which seem like quick and dirty business when contrasted with jury trials. Moreover, our system often deducts pre-trial “jail” time from

³⁹⁴ These are the figures provided by the U.S. Department of Justice for the end of 2001. See Bureau of Justice Statistics, *U.S. Correctional Population Reaches 6.6 Million*, Aug. 25, 2002, available at <http://www.ojp.usdoj.gov/bjs/pub/press/ppus01pr.htm> (last visited Nov. 3, 2003) (on file with the Connecticut Law Review).

³⁹⁵ In some sense, our judgments of speed turn out to be the “flip side” of our judgments of severity: Severity distinguishes military force from policing and punishment very clearly, but it does not distinguish policing from punishment much at all.

³⁹⁶ Paul Craig Roberts, *How the Law Was Lost*, 20 *CARDOZO L. REV.* 853, 856 (1999).

post-trial “prison” time, creating a kind of “instant punishment” that starts right after arrest, before a guilty plea or a trial.³⁹⁷ Conversely, the allocation of policing and military force can often be slow. We sometimes have prolonged political and legal debates over particular policing and military policies, or even particular exercises of policing and military force.

But these are quibbles. In relative terms, the temporal distinction is clear: In liberal states, policing and military force are exercised quicker or more hastily than punishment; punishment is exercised slower or more deliberately than policing and military force.

On average, the procedural constraints placed upon exercises of policing and military force are more likely to be *ex post* than *ex ante*, weaker than stronger, and more general than specific. Police and military personnel often choose particular targets and levels of force by themselves—in the field, so to speak—because they must make graver decisions quicker, more flexibly, and more frequently than prison personnel. Policing and military force are typically exercised in response to more urgent and changing concerns: planned crimes; crimes-in-progress; committed crimes; and in the case of military force, all manner of national security interests and threats. By contrast, the goals of punishment—retribution, deterrence, and rehabilitation—are typically regarded as less pressing concerns.³⁹⁸ If our punishment wheels grind slow and fine, then our policing and military wheels spin fast and rough.

So in terms of speed or haste, punishment is clearly the “minimum.” Is there a temporal distinction between policing and military force? There might be, but once again, I find myself unable to articulate one in any coherent, consistent terms. (This much seems clear: If such a distinction exists, it is likely to be much subtler and more variable than the distinction between punishment on the one hand, and policing and military force on the other hand.) In any event, the exercise would be pointless. We already have enough distinctions to produce our results. So let us say that in terms of speed, punishment is the “minimum” and policing and military force share the “maximum.”

d. Summary

To complete our quasi-multiplication tables:

³⁹⁷ More broadly, this fact blurs the distinction between the tasks of policing and punishment. Both involve detention, and the two forms of detention are frequently “exchanged.”

³⁹⁸ Again, one exception is “specific deterrence,” otherwise known as “incapacitation.” Insofar as the goal of punishment is to keep someone off the streets, the distinction between policing and punishment is very unclear. But this, once again, is an exception that proves the rule. Taken alone, the goal of incapacitation is a rather suspicious one in liberal thought. It smacks of preventative punishment. Presumably, once our collective right of retribution is exhausted it would not be legitimate to incapacitate an inmate to punish uncommitted or unproven crimes.

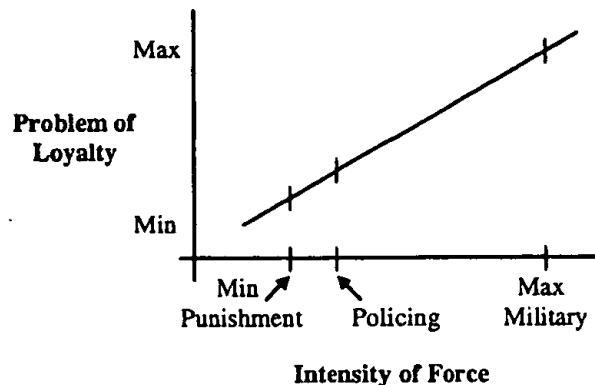
Figure 6³⁹⁹

	Severity	x	Breadth	x	Speed	=	Intensity
Military	Maximum		Maximum		Maximum		Maximum
Policing	Minimum		Median		Maximum		Median
Punishment	Minimum		Minimum		Minimum		Minimum

This should convey what I mean by the “intensity” of force, and why I think that punishment, policing, and military force are, respectively, the least, median, and most intense forms of force.

Before we move on, one last observation on the topic of intensity might be useful: In liberal states, every exercise of punishment, policing, and military force must be (1) necessary to achieve a legitimate goal; (2) limited to legitimate targets; and (3) to some degree, proportional to the threats and acts of criminals, terrorists, combatants, and enemy states.⁴⁰⁰ The concept of intensity could also be worked out and applied in terms of

³⁹⁹ With respect to severity, please refer back to my earlier point: If you were to conclude that punishment is more severe than policing—that it was the “median” in terms of severity—you would still end up ranking punishment, policing, and military force in the same order of intensity. *See supra* discussion note 389. (One might say that “speed” and “severity” would cancel one another out, and “breadth” would determine the difference between policing and punishment.) There would, however, be one important distinction: The punishment-policing difference would be relatively smaller, and the policing-military difference would be relatively larger. In our graph, the shape and slope of the curve would not change, but the distribution of punishment, policing, and military force along the X-axis would be different. Again, please do not take this too literally, but the new distribution would look roughly like this:



⁴⁰⁰ Among liberal states, these principles are embodied in the international laws of war, such as the law of the Hague and the law of Geneva. *See* Eric A. Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297, 298-99 (2003) (describing the principles of “necessity,” “discrimination,” and “proportionality”). In the United States, the principles of necessity and proportionality are embodied in our constitutional prohibitions against cruel and unusual punishment and the excessive use of force as well as our common law doctrines of self-help and self-defense.

these harms. Rather than speaking of the intensity of legitimate force, we could speak of the intensity of illegitimate violence: unpunished crimes, unpoliced crimes, and military threats.⁴⁰¹ Broadly speaking, our conclusions should be the same: Liberal states should act more severely, broadly, and quickly in response to more severe, broad, and urgent threats and harms.

3. *Intensity, Supply, and Demand*

With our “intensity” detour in mind, we can now return to the main path of our argument. In our search for the limits of the principle of order, we are juggling two concepts: the intensity of force and the problem of loyalty. More specifically, we are developing a direct relationship between the intensity of force and the danger of disloyalty: Where the intensity of force is greatest, the danger of disloyalty is greatest; where the intensity of force is least, the danger of disloyalty is least. Although our thesis remains vague, it may already be conceived—conceptually, metaphorically, and tentatively—as a relationship of cause and effect. We can say that the intensity of force “causes” the danger of disloyalty.⁴⁰²

The statement is provocative and suggestive but not very satisfying. It does not tell us much about why and how intensity could “cause” disloyalty. As a result, it leaves us unable to pinpoint where on the X-axis the problem of loyalty is substantially diminished, such that the problem of order does not exist. In order to identify the limits of the principle of order, we must fully understand the sense in which intensity “causes” disloyalty and disorder.

In other words, we must translate the terms of “intensity” and “disloyalty” into a more familiar, transparent, and concrete idioms. Returning to the familiar discourse of supply and demand is a helpful start. We can readily define “intensity” in terms of the supply of force: Intensity tells us how severely, broadly, and quickly harms are inflicted, or in other words, how severely, broadly, and quickly force is exercised. Then we can define “loyalty” in terms of the relationship between demand and supply: When loyalty exists, the payment for force induces the faithful provision of force; the allocation of force induces the faithful exercise of force. When disloyalty exists, then supply does not satisfy demand. Simply put, armies, po-

⁴⁰¹ This highlights my earlier point: There is no distinction between the “severity” of policing and punishment. In the liberal state, we often think of policing and punishment as two different responses to the same social harm—crime. If the proportionality principle is correct, policing and punishment should end up being about equally severe. It is only through breadth and speed that we can distinguish the intensity of “unpunished crimes” and “unpoliced crimes.”

⁴⁰² But we should be careful with such metaphors. We must remember that “intensity,” “loyalty,” and “order” are conceptual qualities, not concrete objects or actors. Thus, when we say that intensity “causes” disloyalty, we do not mean to suggest that intensity actually “increases” at some times and places. We make comparisons between the different ways that liberal states must interact with armies, police, and prisons.

lice, and prisons do not do what states ask them to do.

This suggests that when we say that intensity “causes” disloyalty, we mean that where the intensity of force is greatest, the link between demand and supply is weakest. More specifically, we mean that where the intensity of force is greatest, those institutions that finance and allocate force have less control over those institutions that provide and exercise force. When intensity is greatest, the power of supply is most concentrated; it threatens to subsume the power of demand.

In some ways, this is already a familiar thought. When we first introduced the ultraminimal state, we expressed a preliminary version of the same concern: We said that in the state of nature, the only organization that could finance and allocate force would also be—must also be—an organization that could provide and exercise force.⁴⁰³ Next, when we compared the ultraminimal state to the military state, we expressed a secondary version of the same concern: We noticed that the MO was uniquely positioned to betray the GO. This third version is the last. Now we can link the intensity of force to the inherent tension between supply and demand. We can describe this link systematically and explicitly in causal terms.

To make our discussion more concrete, we can return briefly to our familiar example—the formation of armies. There are several ways to imagine the formation of armies: through monopoly, contract, or some kind of “organic” development. Each one involves the organization and concentration of the most intense form of force. It involves the development of a matchless ability to inflict harm upon individuals and institutions. When we form an organization that wields this singular ability to inflict harm severely, broadly, and quickly, we form an organization that enjoys a singular opportunity—and thus, experiences a singular temptation—to subjugate the state.

Fortunately, as we have already seen, public and private armies are not equally tempted to capitalize upon this unique stroke of luck. But tragically, all other things being equal, public and private armies are equally equipped to betray the state. Thus, when we monopolize the supply of military force, we minimize the danger of disloyalty, but we do not altogether avoid it. The concentration of power inherently and inevitably produces the opportunity of abuse, and to some degree, it inevitably produces the temptation of abuse as well.

Thus, on our earlier graph, the intensity/disloyalty correlation was not accidental. In comparative terms, the intensity of force “causes” the danger of disloyalty in two different senses: (1) Intensity is the reason that the stakes of military disloyalty are higher (the liberal state could fall, and the greatest amount of life, liberty, and property could be lost); and therefore (2) it is also the reason that the risk of military disloyalty is higher, all other

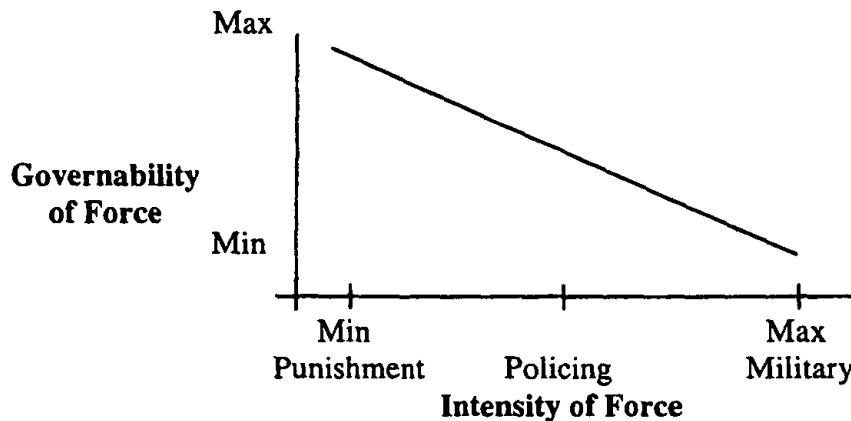
⁴⁰³ See discussion *supra* Part V.B.2.

things being equal.⁴⁰⁴ Of course, intensity is not the only cause of disloyalty, but it is a contributing factor, and in the context of military institutions, it is an exceptionally powerful one. When treason is easier to commit and likelier to succeed, traitors are easier to find and more likely to act. We should therefore expect that the danger of disloyalty will be greater when, where, and because force is more intense. The greater the intensity of force, the more that the supply of force threatens to swallow the demand for force whole.

4. *The Governability of Force*

This is all very strange and abstract. To clarify our thesis, it is helpful to slap a more familiar label on this variable dynamic between supply and demand. Let us call it the “governability” of force. We may say that where the intensity of force is greatest, the governability of force is least; and where the intensity of force is least, the governability of force is greatest. In other words, we may picture an inverse relationship between the governability and intensity of force:

Figure 7



More questions arise: What is the “governability” of force? Is “governability” the same as “loyalty?” The two concepts are related, but governability is not simply loyalty under a new name. It is the ability of states to promote loyalty through political, legal, economic, and cultural reforms. It is the ability of demand institutions to control supply institutions.

As we have already suggested, and as the graph depicts, liberal states

⁴⁰⁴ In the real world, of course, all other things are rarely equal for the very reasons that I just described. In most states, the most intense forms of force are also the most socialized and monopolized forms of force. In the modern era, armies are often more public than other institutions. I develop this thought shortly.

are least capable of governing exercises of military force. Because armies wield the greatest ability to inflict legitimate harm, they necessarily enjoy the greatest opportunity to inflict illegitimate harm. Thus, they necessarily experience the greatest temptation to inflict illegitimate harm—all other things being equal, in relative terms. The supply of military force always threatens to deviate from the demand for military force. If it is true, it is truly tragic. It vindicates the view that power tends to corrupt, and more specifically, that the most intense forms of power tend to corrupt most intensely.⁴⁰⁵ Let us briefly consider the idea from political/legal and economic perspectives.

a. Allocation and exercise

In the political/legal idiom, the governability graph says: Where the intensity of force is highest, institutions that allocate force have less ability to control institutions that exercise force. Politicians, judges, and administrators cannot control exercises of military force through political, legal, and economic reforms alone because they cannot enforce redistributions, contracts, inspections, and regulations against military institutions. In these relationships, where such reforms stand alone, they falter and fail. To support such reforms, politicians, judges, and administrators must also resort to “cultural” controls. They must combat the danger of disloyalty with the only tool that they have left—the monopolization, or socialization, of military force. They must instill a culture of loyalty in military institutions because military institutions exercise the most intense forms of force. This much we have already seen.⁴⁰⁶

Yet the graph suggests another point, which turns out to be a strange silver lining for minimalists. For the moment, let us presume that a military state emerges, so that the state *does* monopolize the most intense forms of force. Now the balance of power shifts as much as it ever does. The danger of disorder recedes. Now officials can rely on public armies to enforce redistributions, contracts, inspections, and regulations against other institutions. The need for further monopolization apparently fades.

b. Payment and provision

In economic translation, the governability graph says: Where the intensity of force is highest, institutions that finance force have less ability to control institutions that provide force. This is not mere repetition. As I said earlier, public allocations of force beget public payments for force.⁴⁰⁷ In the liberal state, this implies that public finance is not merely a matter of collecting taxes to buy up assets, develop technologies, and pay managers

⁴⁰⁵ Cf. Lord Acton, *Letter to Bishop Mandell Creighton*, *supra* note 373.

⁴⁰⁶ See discussion *supra* Part V.C.

⁴⁰⁷ See discussion *supra* Part III.D.

and employees. The sum of our public debt, equity, and income is also a manifestation of our public will. For our purposes, public spending is a rough reflection of our collective choices regarding when, how, how much, and against whom force should be used. When Americans say that they want to topple the Taliban, close down our borders, and throw terrorists in jail, these demands are eventually reflected in our public fisc.

In economic terms, the governability graph proposes two different ideas, which are both related to this basic link between public payment and public choice. First, it suggests that the purchasing power of public funds—the proverbial bang for our buck—is inversely related to the intensity of force. Where the intensity of force is greater, officials must spend more tax dollars to successfully control exercises of force; in other words, they receive less control for each tax dollar that they spend. As a result, budgets swell. Second, and similarly, the graph proposes that where the intensity of force is greater, tax dollars are more effectively spent upon “monopolization” rather than other reforms, such as redistributions, contracts, inspections, and regulations.

But there is a bright side in economic terms too: Once the state monopolizes military force, the economic tide turns. *Vis-à-vis* other institutions, the purchasing power of public funds becomes greater. It is now more effective to invest in political, legal, and economic reforms rather than investing in cultural ones.

5. *Governability vs. Efficiency*

Note the re-emergence of economic notions in terms like “purchasing power” and “effective spending.” These are not only metaphors now. After a long hiatus, the efficiency argument has returned.⁴⁰⁸ It is an instructive moment.

Earlier, in our public policy debates, the efficiency argument was our permanent pest. Several times we introduced political principles—accountability, rights, and distributions—in order to move beyond economic concerns into the political sphere. But it was a tough move to make. Our public policy debates remained stuck in the shadow of the modern administrative state, and thus, they remained tethered to market imperatives.⁴⁰⁹ When states are relatively powerful and liberal, markets are relatively free. Thus, political principles are always subject to complex and indeterminate economic tradeoffs. Possible gains in “accountability,” “rights,” or “distributions” must be traded against one another and weighed against possible losses in “security,” “protection,” “safety,” and, most of all, “efficiency.” It was difficult to say, with any degree of certainty, that the efficiency argument could be safely ignored.

⁴⁰⁸ See discussion *supra* Part IV.A.

⁴⁰⁹ See discussion *supra* Part IV.I.

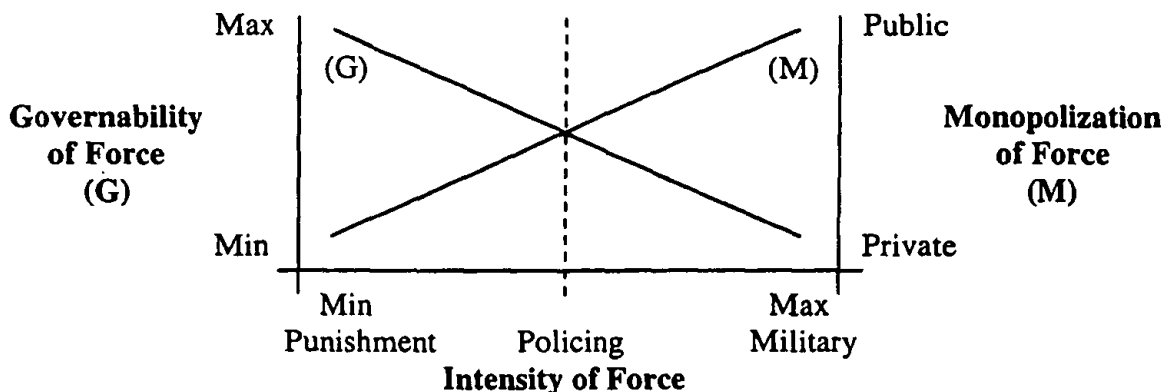
In the ultraminimal state things became clearer. Resources were still scarce so the efficiency principle still generally applied. But where the intensity of force was greatest—in private military corporations—the principle proved nothing. In the ultraminimal state, the efficiency argument fell apart. Politicians, judges, and administrators had no reliable way to sustain a link between the demand for military force and the supply of military force. When push came to shove, they had no way to govern military force at all.

In this atmosphere, it was naïve to argue that private armies would be more “efficient” than public ones. More efficient at what? More efficient for whom? The risk was too great and too clear that private armies would be more efficient at rebellion, civil war, conquest, and colonization than at protecting the state. In the pursuit of profit, they would reject the state’s contracts and choose self-employment or enter the business of government for themselves. Under such circumstances, tax dollars were more likely to pay extortion fees and fund revolutionary plans than to buy more efficient battle plans and victories. In the ultraminimal state, the efficiency argument was clearly unsound.

But now, as we take the first step away from the ultraminimal state, the efficiency argument regains some ground. Once the state monopolizes armies, the link between demand and supply becomes more stable, and the problem of loyalty becomes more subdued. When this change occurs in our military institutions, its consequences spill over into other institutions and industries. The military state may back redistributions, contracts, inspections, and regulations with threats and acts of force. Means of governance proliferate. It suddenly becomes plausible for politicians, judges, and administrators to think, talk, and act more broadly in efficiency terms.

6. *The Principle of Law?*

Where the intensity of force is least, the governability of force is greatest. This relationship generates a surprising result: In the liberal theory of force, the principle of law is weak and contingent. In contrast to the problem of order, the “problem of law” presents less severe, broad, and urgent harms. As a result, law enforcement institutions are more amenable to political, legal, and economic reforms. They require weaker cultural controls. In lieu of monopolies, the liberal state may use redistributions, contracts, inspections, and regulations to promote loyal law enforcement. Somewhere in the middle of the intensity curve—somewhere between armies and prisons, between “order” and “law”—the governability and monopolization of force intersect:

Figure 8⁴¹⁰

The M-axis represents a continuum from “publicness” to “privateness.” The center is the pivot point. The liberal state must monopolize the maintenance of order, but it need not monopolize the enforcement of law. But this entails some deeply controversial conclusions, which must be justified and explained.

a. The principle of punishment

We can start with the contrast between armies and prisons, which provides the clearest contrast between order and law. Here my conclusion is straightforward: Once the state monopolizes armies, it no longer needs to monopolize prisons. In the military state, politicians, judges, and administrators have other ways to promote loyalty in prisons. In lieu of monopolization, they can impose political, legal, and economic reforms upon private prisons. They can rely exclusively upon redistributions, contracts, inspections, and regulations.

In the military state, would private prisons be disloyal? Would there be corruption, extortion, and abuse? Would some inmates be punished too much and others not punished enough? Of course. All institutions falter and some institutions fail. But in the military state, when private prisons are disloyal, all hope is not lost. Politicians, judges, and administrators can call upon public armies to impose loyalty upon private prisons. When they identify errant firms and employees, they can withhold payments and terminate contracts. They can throw one private prison’s guards in another private prison’s cells. Backed up by threats and (if necessary) acts of military force, the state can enforce redistributions, contracts, inspections, and regulations against private prisons.

⁴¹⁰ In this graph, the phrase “monopolization of force” means only the monopolization of the supply of force.

Even if things happen to go completely awry, all is not yet lost: The military state can use public armies to “take over” private prisons temporarily until more loyal suppliers can be recruited and hired. Of course, this strategy has limits, as all strategies of governance do. If the military state had to exercise force against private prisons constantly or take over prisons permanently, then they would not be “private” prisons. The military state would become a “military-policing” state or a “military-policing-punishment” state.

But these are unlikely scenarios. Indeed, in our liberal framework they hardly make sense. We have already assumed that: (1) the military state is actively and liberally engaged in the political, legal, and economic control of private prisons and (2) private prisons are self-interested, profit-seeking organizations. Given these assumptions, the risk of prison disloyalty is minimal in the military state. The military state would design and regulate the market for punishment. It would reward loyalty and punish betrayal through political, legal, and economic reforms. Private prisons would have strong incentives to fulfill orders. They would have weak incentives, and fairly few chances, to do anything else. On the whole, schemes of corruption, extortion, and abuse would yield few profits and involve substantial risks and costs.

If this picture is too rosy for you, it can be easily darkened. If you prefer, you may suppose that the market for punishment malfunctions. Suppose that private prisons do not deliver the services that liberal values demand. Corruption, extortion, and abuse become rampant in private prisons. Who would be to blame? The state or the market? The customers or the providers?

If we mean to produce a fundamental criticism of private prisons, we must answer these questions definitively and persuasively, in the fairest possible terms. But in the liberal framework, we cannot. The moment that we lay blame upon private prisons, we entertain some possibility of market failure. In other words, we put ourselves back into the third-best world, into the heart of our public policy debates. We say, for example, that private prisons would create “agency” costs, or peddle “influence” with politicians and administrators.

More conceptually, when we make these critiques, we enter a world in which tradeoffs between loyalty and efficiency are inevitable and theoretical certainties are scarce. In the third-best world, it is no longer enough to prove that private prisons would be disloyal. We must also prove: (1) that private prisons would be more disloyal than public prisons; (2) that the disloyalty of private prisons would be “worse,” in liberal terms, than the inefficiency of public prisons; and (3) that the disloyalty of private prisons could not be diminished by political, legal, and economic reforms. It makes little sense to entertain private doubts, unless we play fair by entertaining public doubts too.

Of course, these three propositions are neither intuitive nor obvious; they are deeply empirical and contextual. At the very least, they permit the military state to experiment with private prisons. In this way, these propositions are easily distinguishable from the argument against private armies. Private armies have an obvious and inherent ability to destroy political, legal, and economic structures; private prisons do not. In most respects, private prisons must take the market for punishment as they find it. In this regard, they are less like private armies and more like other institutions: hospitals, schools, and the like.⁴¹¹

b. The principles of policing

What about policing disloyalty? In the military state, could the private police use more local, subtle forms of force—corruption, sabotage, or guerillaism—to destabilize the state itself? The answer turns largely on what we mean by the distinction between “policing” and “military” institutions or, from another perspective, “law” and “order.”

The term “policing” encompasses many things indeed.⁴¹² In most liberal states, the distinction between policing and military institutions is typically described as a distinction between “internal” and “external” exercises of force.⁴¹³ We often say that policing is exercised against citizens who live inside the liberal state’s boundaries, whereas military force is exercised against foreigners who live in enemy states.⁴¹⁴ In peaceful times such geographic distinctions are more or less sound. But in moments of disorder—hostage crises, mob riots, terrorist attacks, and civil wars—they tend

⁴¹¹ While this may sound shocking, it seems to be corroborated by one interesting fact: Until now, our public policy debates have been most heated and highly developed in the field of private prisons. And, as we have already seen, the private prison debate sounds much like other “public” versus “private” debates, over education, health care, and so on. See discussion *supra* Part IV.I.

⁴¹² See BAYLEY, *supra* note 59, at 349 (“Specification of the nature of police is not as easy as it might seem. Organizations called police perform different functions in different countries The point should be underscored that today’s police systems, diverse in character, replaced systems of marked longevity that were equally diverse.”); Sklansky, *supra* note 40, at 1194-95 (“Policing as a concept has been remarkably malleable The special powers of law enforcement officers have never been well defined, but they have always been assumed to exist; the police have been defined more by culture than by law.”).

⁴¹³ See, e.g., BAYLEY, *supra* note 59, at 328-29 (“An army is publicly constituted to use force, just as police are, but its jurisdiction is external to the collectivity.”); THOMSON, *supra* note 32, at 3 (defining military force as “extraterritorial violence”).

⁴¹⁴ In the United States, we have encoded this distinction into the Posse Comitatus Act of 1878, 18 U.S.C. § 1385 (2000). See generally JEFFREY D. BLAKE, CONGRESSIONAL RESEARCH SERVICE, TERRORISM AND THE MILITARY’S ROLE IN DOMESTIC CRISIS MANAGEMENT: BACKGROUND AND ISSUES FOR CONGRESS (2001) (discussing the history of the Posse Comitatus Act); Matthew Carlton Hammond, Note, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953 (1997) (same). The Act was passed after the Tilden-Hayes election of 1876, in order to end military supervision of elections in former Confederate states. 18 U.S.C. § 1385(2). It criminalizes military aid to domestic law enforcement, except as authorized by the Constitution or an act of Congress. *Id.* § 1385(1).

to erode.⁴¹⁵ In these circumstances, police behave much more like armies and armies intervene domestically themselves. Thus, the distinction between “internal” and “external” is variable and contingent. In some liberal states, like the United States, they are fairly firm; in others, like Italy, they are fairly flexible, when they exist at all.⁴¹⁶ For our fundamental analysis, it is much better to stick to the intensity of force—more specifically, to the severity and breadth of policing and military force. As we have already seen, exercises of policing are typically less severe and broad than exercises of military force.

Flip back to the last graph for a moment. The dotted line suggests a way to cut this Gordian knot. In broad strokes, we can say that one “half” of policing involves the enforcement of laws and the other “half” involves the maintenance of order. Of course, “half” is a metaphor too: I do not mean that police departments actually spend half of most days doing each kind of task. I simply mean that, in conceptual terms, we can divide policing into two parts. On the “law” side, there might be patrols, investigations, and arrests; on the “order” side, there might be home invasions, hostage crises, and riot control.

I am less interested in the details than the idea: The most severe and broad forms of policing must be public; the least severe and broad forms of policing may be private. Why? Think back to the military state. Public armies can do some things well, but they cannot do all things well in all places. Military force, after all, is the classic blunt instrument. By definition, it is the most severe and broad form of force. As the United States learned in Vietnam, and the Soviet Union learned in Afganistan, severity and breadth have both pros and cons. In the military state, if strong private police forces formed local guerilla bands, they could wreak significant havoc. By abusing authority and power, they could stoke the flames of revolt, then stand back while they burned.

By contrast, weak private police forces—patrollers, investigators, and arrestors—wield more limited powers vis-à-vis the military state. They can betray the state and engage in terrible abuses of individual rights. But they cannot subdue the state itself in any straightforward sense. Just like private punishment, private law enforcement is amenable to political, legal, and economic reforms.

In fact, this division of policing is nothing new. When we discussed

⁴¹⁵ In the wake of the terrorist attacks of September 11, 2001, the Bush Administration ordered lawyers in the Defense and Justice Departments to review the “use of the military in [domestic] law enforcement.” David Johnston, *Administration Begins to Rewrite Decades-Old Spying Restrictions*, N.Y. TIMES, Nov. 30, 2002, at A1; see also TILLY, *supra* note 34, at 75 (“At the level of the state, the organizational division between armed forces oriented to attacks on external enemies (armies) and those oriented to control of the national population (police) developed only slowly, and never became complete.”).

⁴¹⁶ See BAYLEY, *supra* note 59, at 366, 377.

the distinction between armies and prisons, it was already implicit in our solutions. We said that the military state could use public armies to impose loyalty upon private prisons by enforcing redistributions, contracts, inspections, and regulations against private prisons. This was true. But when public armies do such things, they would be capturing or confiscating more often than they would be killing or destroying. In other words, they would be acting as public police forces, not public armies. They would be “policing” private prisons. Strictly speaking, then, it was already clear that a pure “military” state would not be liberal. To some degree, the military state must go beyond itself. To some extent, it must monopolize policing to become and remain a liberal state.

c. Strong and weak theories of force

There are actually two theories implicit in this argument, one strong and one weak. The strong theory of force, which I do not endorse, states that there is no liberal principle of law. Under the strong theory, the liberal state may only monopolize order and may not monopolize law at all. Public law enforcement is forbidden. It is not necessary; so it is not permitted.

Presumably, this theory is motivated by a radical suspicion of public powers, which falls just short of anarchism. In its strongest forms, it is not a suspicion that I share. As we saw earlier, private powers are very problematic, even in the modern administrative state. There are many grounds upon which we might justify a principle of law: accountability, democracy, and rights. These are relatively contingent, empirical, and contextual grounds, but they are worthy grounds nonetheless. After all, we live in a contingent, empirical, and contextual world.

The weak theory of force, which I do endorse, makes room for those practical realities. It is just like the strong theory of force, without any special suspicions of public powers. The weak theory states that there is a liberal principle of law, but it is not a fundamental principle of liberal government. Under the weak theory, the liberal state must monopolize order, but it may also monopolize law. The distinction remains, but it is weaker. The door remains open for more expansive states. Liberal states may experiment with private prisons and private police to promote values like accountability, democracy, and rights.

The weak theory of force has one distinctive advantage: It enables us to conceptualize “monopolization” in degrees rather than absolutes. As we saw earlier, the distinction between “public” and “private” is less like an “on/off” switch and more like a “dimmer” switch. It is a continuum between two kinds of ownership, management, and employment styles. On the “order” side, we are more likely to find personnel who have been drafted and deeply socialized by the state. On the “law” side, we are more likely to find personnel who have been paid and weakly socialized by the state. The weak theory simply states that the former should be soldiers

and, perhaps, SWAT teams, while the latter may be prison guards and, perhaps, traffic cops.

In a nutshell, that is the liberal theory of force: Liberal states *must* monopolize order, and they *may* monopolize law.

E. *The Private Demand for Force*

Actually, that last formulation is not precisely correct. It constitutes only the “supply-side” of the liberal theory of force. Until now, a dubious presumption has lurked behind all of our previous graphs, principles, and hypothetical “states”—the idea that liberal states must completely monopolize the demand for punishment, policing, and military force, in equal ways, to equal degrees. In both theoretical and practical terms, it is simply not true. There are broad exceptions that swallow the putative rule. Think of our individual rights to self-defense and self-help. More broadly, think of our right to purchase private policing, with whatever wealth we might possess.

Recall that in most liberal states, you can actually “shop” for policing. If you happen to think that certain people should be imprisoned, you cannot hire a private prison to imprison them. If you happen to think that certain states should be invaded, you cannot hire private armies to invade them. (Unless, of course, you happen to be the head of a state.) But if you happen to think that certain people should be policed, you can hire private police to police them. Liberal states finance policing, but they are not the only entities that do. Individuals, associations, and corporations purchase policing. In fact, if you have enough money, you can do it yourself. Why policing? What special qualities of policing entitle individuals, associations, and corporations to provide and purchase it? In liberal states, why may there be a private demand for policing but not a private demand for punishment or military force? We can start with a few obvious points: In the state of nature, individuals would surrender some authority to the liberal state, but they would keep most authority for themselves. In liberal states, there are many decisions that politicians, judges, and administrators could not and should not make. These decisions are made by individuals, associations, and corporations instead.

For our purposes, there is only one relevant group of decisions—the who, when, where, how, and how much of punishment, policing, and military force. Individuals would reserve the right to make some allocations of force but not others. The relevant questions are: “Which ones?” and “Why those?”

As I hinted before, our working hypothesis is that individuals would reserve only policing allocations, and only a subset of those. More specifically, let us say that they would reserve only the “law” aspects of policing allocations—those aspects that deal with prevention, investigation, and apprehension. They would not reserve the “order” aspects of policing,

which involve home invasions, hostage situations, terrorist attacks, and riot control.

Most precisely, let us say that individuals would reserve limited rights to self-defense and self-help, as well as the limited right to hire private police, in order to aid the self-defense and self-help and others. They would keep no rights to hire private prisons or private armies, but they would keep a limited right to hire private police. These are completely conventional claims. But they beg the big question: Why those rights and not others?

There are many ways to justify these distinctions. We have already touched upon more than a few: property, privacy, accountability, equality, democracy, and rights. Yet the elements of the intensity of force are surprisingly helpful here too.

By hypothesis, let us say that individuals would reserve the right to inflict legitimate harms that are maximally quick yet minimally severe. If we look back to our quasi-multiplication tables, we will see that these are the same harms to which policing responds.

Is the hypothesis correct? I think so. It integrates many of the classic justifications for self-defense, self-help, and private policing.

1. *Speed: Punishment vs. Policing*

In the state of nature, individuals would surrender the right to allocate punishment, but they would keep a limited right to allocate policing. Why? *Speed* clearly has something to do with it. Every liberal definition of self-defense rights refers, in one way or another, to “imminent” harms. When harms are imminent, we may defend ourselves against them. When they are not we must forebear or call the public police. It is not just a question of supply. We may decide, within boundaries, how to use force, how much force to use, and against whom force is used. Our most drastic decisions are often reviewed by public authorities. But in the first instance, we allocate policing force ourselves.

By contrast, there is little rush to make punishment decisions. Punishment is allocated after policing is exercised. Suspects are already identified and subdued. There is plenty of time to ask politicians, judges, and administrators to intervene. They debate public values and impose public sanctions. In self-defense allocations, allocations of punishment are painstakingly slow.⁴¹⁷

⁴¹⁷ Strictly speaking, this is not always true, but the rare exceptions prove the rule. In liberal states, it is still often legal for parents to use corporal punishment against children and owners to use corporal punishment against pets. These are fascinating exceptions to the liberal paradigm of punishment. Both seem to depend on the idea that the minds of children and pets are not yet fully developed so that they cannot sustain long, complex links between crimes and punishments. In such circumstances, the logic is apparently that punishments must be inflicted quickly so that the “criminal” will connect the crime to the punishment, experience the feeling of guilt, and be deterred from future

2. *Severity: Policing vs. Military Force*

In the state of nature, individuals would surrender the right to allocate military force, but they would keep a limited right to allocate policing. Why? *Severity* clearly has something to do with it. Every liberal definition of self-defense rights refers, in one way or another, to “proportional” responses. When threats are minimally severe, we must defend ourselves in limited ways.

Of course, our responses need not be exactly proportional. We can use enough force to parry illegitimate threats. But the point is that in strong liberal states—states that monopolize armies—illegitimate threats to individuals are rarely severe. Individuals may elect to use bats, knives, or guns, but not bombs, tanks, or planes. In liberal states, the former are not necessary; so they are not permitted. The response must remain proportional to the threat.

3. *The Space of the Self: Public and Private Domains*

As we have already seen, *breadth* was the most useful way to distinguish between the supply of punishment, policing, and military force. After making several tries, I have decided that *breadth* is not a useful way to describe the distinctions between the demand for punishment, policing, and military force. But there are good analogies—the concepts of public and private “spaces,” “places,” or “domains.”

We are all familiar with the liberal notion that politicians, judges, and administrators should not rule certain private domains. The classic examples are the “mind,” the “body,” the “home,” and—perhaps less clearly these days—the “community” and the “market.” It is a fundamentally moral distinction: These domains circumscribe individual rights.

These moral distinctions have strong implications for the private demand for force. Punishment and military decisions need not often be made in our minds, bodies, homes, communities, or markets. They can be safely made in public spaces, by public actors. In some sense, it is a purely technological fact: These decisions are amenable to removal. They can be organized, centralized, and sequestered in public domains.

Self-defense and self-help decisions—i.e., “self-policing” decisions—cannot be contained and removed in these ways. No matter how hard liberal states try, crime continues to force itself into private domains. Criminals enter businesses, communities, and homes, and individuals must fend for themselves. They may call the police for assistance, but they need not ask for permission. If they are willing and able, they may act.

It is important to notice the way that technology and morality come together here. On the one hand, it seems that liberal states simply lack the

crimes. Of course, the results can be rather barbaric. But in temporal terms, this logic makes sense: Whenever punishment can be delayed, it should be delayed so that it can be governed by public norms.

capacity to be all things to all individuals, in all places, at all times. The public police cannot follow us wherever we go, deterring and fending off attacks. Thus, we keep our rights to self-defense and self-help, and, if these are not enough for our tastes, we keep our right to hire private police.

But it is not simply a matter of technological capabilities. Even if liberal states could police everyone, they would not. In moral terms, there are simply some places that liberal states may not be sovereign. They may not install a public police officer in my living room, for example, without cause or consent. In liberal states, there are individuals, and thus there are “selves.” And wherever there are selves, there are rights to self-defense, self-help, and private police.

4. *Conclusions on Private Demand*

Of course, there are public spaces in liberal states too. This highlights the inevitable tension between public and private policing in liberal states. On the one hand, individuals, associations, and corporations provide and purchase policing. On the other hand, the state provides and finances policing. But as individuals associate, as private property expands, as the demand for policing expands, private policing corporations proliferate. They threaten to supplant public police departments, to enforce private “laws” upon hapless citizens. As we have already seen, when private policing markets grow and spread, our reliance upon private police can produce strange distributions and externalities. In liberal states, they must be allowed to exist, but like all private projects, they must be constrained and contained. They must be limited by the division between public and private domains—by the concept of the liberal “self,” however inconstant, vague, and problematic that concept may be. Our considerations of speed, severity, and space—technical and moral considerations, one and all—distinguish public and private domains.

This, then, is a vague sketch of the liberal theory of private demand. Of course, speed, severity, and space are not the only grounds upon which we could construct a liberal theory of the demand for punishment, policing, and military force. As I hinted earlier, the choice between “public” and “private” demand is a very old and very analyzed topic.⁴¹⁸ As always, our public policy arguments also play a significant role. But here, as before, they work within limits. They do a decent job justifying a public demand for force, in general terms, but they do not effectively distinguish between punishment, policing, and military force. Everyone wants prisons, police, and armies that are “accountable,” “democratic,” “egalitarian,” and “liber-

⁴¹⁸ See discussion *supra* notes 30-32 and accompanying text (arguing that liberal theorists have extensively analyzed what states may decide while ignoring what states may do); see discussion *infra* notes 419-21 and accompanying text (arguing that liberal theorists have fetishized the problem of law while neglecting the problem of order).

tarian,” if we paint those values with broad enough strokes. But why, then, is there a private demand for policing but not punishment and military force? We clearly need a different set of arguments here. Speed, severity, and space are my preliminary thoughts.

CONCLUSION

So there you have it—the liberal theory of force. Out of the state of nature emerges a complex liberal state. It is neither an ultraminimal state nor a monopoly state. It has a public demand for punishment, policing, and military force, and a private demand for policing, in the service of self. It has a public supply of military force and a private supply of punishment. It has a supply of policing that is both public and private.

We can state the liberal theory of force in two theses. On the supply-side, there is the “intensity” thesis: In the name of loyalty, liberal states must monopolize order, and they may monopolize law. On the demand-side, there is the “self-policing” thesis: Liberal states must monopolize the demand for prisons and armies—and, to some degree, police forces—but they must also recognize the private demand for policing within private domains.

These two theses clearly raise more questions than they resolve. There is a long list of “big” questions—on subjects such as “law,” “legitimacy,” “responsibility,” “globalization,” and “postmodernity”—that I must postpone. For now, I will highlight a few of the distinctive aspects of the liberal theory of force.

A. *The Problem of Order vs. The Problem of Law*

In philosophical circles, the most distinctive aspect of the liberal theory of force is the focus on “order” before, over, and above “law.” In most state-of-nature stories, the threat of crime takes center stage, and little attention is left for the threats of rebellion, civil war, conquest, and colonization.⁴¹⁹ Such stories make short shrift of the problem of order and move directly to the problem of law. Thoughtful pauses between total anarchy and total monopoly are decidedly scarce. The typical tale starts with the state of nature and jumps directly to the so-called “minimal” or “night-watchman” state, in which punishment, policing, and military force are all

⁴¹⁹ For example, Hobbes and Locke mention military force rarely and briefly, and always in the same breath in which they mention policing and punishment. See HOBBS, *supra* note 9, at 86; LOCKE, *supra* note 9, at 303-05. In addition, they both draw analogies between the warring “sovereigns” of the world and the individuals in the state of nature. See HOBBS, *supra* note 9, at 187-88; LOCKE, *supra* note 9, at 303-19. In a similar vein, Nozick briefly suggests that “a conflict between clients of different agencies” could lead two agencies to “reach different decisions as to the merits of the case,” and thus “bring[] different agencies . . . into violent conflict with each other.” NOZICK, *supra* note 7, at 15-17. These are remarkably individualistic, legalistic conceptions of rebellion, civil war, conquest, and colonization.

monopolized, in similar ways, to similar degrees.⁴²⁰ In some stories, the state's monopoly of military force surfaces briefly, but only in facile analogies to the state's monopolies of policing and punishment.⁴²¹ More often, the state's monopoly of military force is apparently presumed, but it is not explicitly mentioned at all.⁴²²

⁴²⁰ Ironically, the only major exception to this rule is Nozick, who nonetheless completely ignores the role of military force in the rise of the liberal state. In *Anarchy, State, and Utopia*, Nozick carefully tracks the liberal state's development from anarchy, to a private protection market, to a dominant protective agency, to a minimal state, which "monopolizes" the use of force. Yet Nozick always conceptualizes this "monopoly" in terms of legislative, judicial, policing, and punishment institutions. He never once mentions the minimal state's monopoly of military force. See generally NOZICK, *supra* note 7. This is a shame, because military force would have provided the best example for his "monopoly" argument. See discussion *infra* Part V.C.

⁴²¹ Cf. HUNTINGTON, *supra* note 45, at 149-50 (describing the tendency of American liberalism to apply "domestic policies to international affairs").

⁴²² See *id.* at 149. In the social contract tradition, these "legalistic" tendencies are especially extreme. Social contractarians tend to ignore the exercise of punishment, policing, and military force entirely. They not only focus on law, but also they privilege the tasks of legislation and adjudication over the tasks of policing and punishment. See, e.g., ACKERMAN, *supra* note 9, at 21-23, 83, 174-77 (introducing assumptions regarding the "perfect technology of justice," such as a "ray gun," an "ideal police force," an "ideal punishment strategy," and a "transmitter-shield," in order to push aside "third-best" problems of "implementation"); KANT, *supra* note 12, at 75-77, 86-87 (telling the state-of-nature story as well, but also ignoring the role of punishment and policing institutions); LOCKE, *supra* note 9, at 303-19 (conceptualizing political power as a "right," and the state as a "common authority"); RAWLS, *supra* note 12, at 4-5 (introducing the assumption of the "well-ordered society," in order to push aside "problems . . . of coordination, efficiency, and stability"); ROUSSEAU, *supra* note 12, at 2, 4-5, 14 (telling the state-of-nature story, but ignoring the role of punishment and policing institutions). The tendency to privilege legitimacy over violence also appears in the work of Frederick von Hayek. See, e.g., HAYEK, *supra* note 10, at 17-21, 72-73 (telling the state-of-nature story, but ignoring the role of punishment and policing institutions).

Of course, these tendencies are not unique to liberal philosophers. Many critics have noticed the tendency to privilege what I have called the "demand" for force over the "supply" of force, in many other corners of modern thought. As Anthony Giddens writes:

Who controls the means of violence, how complete such control is and to what ends it is deployed are plainly matters of significance in all societies with 'armed forces'. Surveillance and control of the means of violence are, however, phenomena that largely escape the purview of the most influential schools of social theory, including Marxism, both in the nineteenth century and today.

2 ANTHONY GIDDENS, *A CONTEMPORARY CRITIQUE OF HISTORICAL MATERIALISM: THE NATION-STATE AND VIOLENCE* 2 (1985). Similarly, Austin Sarat and Thomas Kearns write:

Contemporary scholars treat the violence of law as too obvious to merit sustained attention and choose instead to emphasize the ideological, interpretative, meaning-affirming qualities of law. While no one pretends that law does not coerce and punish, many push such facts to the margin or claim that the violence in and around law is vestigial and incidental to our understanding of what law is

. . . .

. . . [I]t was a consequence of a purposive effort to free thought about law from its fixation on law-as-force, to kill once and for all the distracting ghost of Leviathan. Meaning and normativity, not physics and force, were . . . fast becoming the centerpieces of law talk. Violence, where it was noted at all, was treated as marginal or vestigial.

Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal*

Why have I bothered to be different? Like many “positivists,”⁴²³ I find the dearth of military analyses in liberal texts preposterous. In historical terms, the move from “order” to “law” represents a colossal leap in institutional development. Most of today’s modern, liberal states began to monopolize military force long before they began to monopolize policing and punishment.⁴²⁴ It is easy to guess why: It is not crime, but war that most often makes and breaks states. For many centuries, rebellions, civil wars, and conquests have contributed frequently, directly, and sizably to the rise and fall of states—especially “liberal” and “modern” states.⁴²⁵ In the last millenium, hundreds (and perhaps thousands) of states have been destroyed and created through threats and acts of rebellion, civil war, conquest, and colonization.⁴²⁶ To historians, this much is obvious; to laypersons, this much is intuitive. But in the state-of-nature tradition, this much is routinely and blithely ignored.⁴²⁷

Theory, in *LAW'S VIOLENCE*, *supra* note 21, at 211, 215-16 n.26 & 216. Robert Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW* 413 (David Kairys ed., 2d ed., 1990).

⁴²³ There is no denying that my theory is positivist and realist, but I would like to point out one interesting quality of it: At the heart of my positivist and realist picture, there lies the concept of “loyalty,” which is a deeply natural-law, idealist idea. And, unlike most positivists, I do not “hide” it. On the contrary, I mean to turn positivism inside out—to demonstrate that even our most positivist concepts, like the liberal state’s “monopoly of force,” depend on deeply natural-law, idealist sentiments. No matter how self-interested we imagine our world to be, we must always be prepared to recognize cultural connections among individuals. Without loyalty, there can be no communities, markets, or states.

⁴²⁴ As Weber writes:

If the coercive apparatus is strong enough, it will suppress private violence in any form Initially it is directed only against those forms of private violence which would injure directly the military interests of the political community itself Subsequently, it engenders, more generally, a form of permanent public peace, with the compulsory submission of all disputes to the arbitration of the judge, who transforms blood vengeance into rationally ordered punishment, and feuds and expiatory actions into rationally ordered . . . legal procedures Thus the political community monopolizes the legitimate application of violence for its coercive apparatus and is gradually transformed into an institution for the protection of rights.

2 WEBER, *ECONOMY AND SOCIETY*, *supra* note 15, at 908; *see also* TILLY, *supra* note 34, at 14-15 (discussing war as the means for creating the central organizational structures of European states).

⁴²⁵ *See, e.g.*, GIDDENS, *supra* note 422, at 1-5; TILLY, *supra* note 34, at 14-15, 224, 227; Tilly, *supra* note 21, at 170; Tilly, *Western State-Making*, *supra* note 32, at 636-37.

⁴²⁶ *See* TILLY, *supra* note 34, at 1-5.

⁴²⁷ *Cf.* Cover, *supra* note 21, at 1601 (“Legal interpretation takes place in a field of pain and death This much is obvious, though the growing literature that argues for the centrality of interpretative practices in law blithely ignores it.”). In different ways, Machiavelli, Huntington, Weber, and perhaps Cover have recognized the primacy of military force in the creation of states. (I cite the relevant works of the first three authors throughout this section. In addition, Cover briefly discusses rebellion in his famous article on law’s violence. *See* Cover, *supra* note 21, at 1605.) But each of these “exceptions” proves the rule: Each author stands, in one way or another, apart from the liberal tradition. Machiavelli embraced the concept of rational self-interest, but he was, of course, no liberal at all. Huntington held some deeply liberal beliefs, but declared himself a “conservative” in the tradition of Burke, and set himself resolutely against the “anti-military” tendencies of liberal thought. *See* HUNTINGTON, *supra* note 45, at 93-94, 143-57.

So philosophers are not historians. Fair enough. But even in philosophical terms, our military myopia is rather mysterious. In most state-of-nature stories, individuals find themselves under more or less mutual siege, yet institutions develop in utero, in a peaceful international void.⁴²⁸ If individuals fight with one another, then why not institutions and states? If we need legislatures, courts, prisons, and police forces, then why not commanders, armies, navies, and air forces as well? Aside from the idiosyncrasies of liberal thought and liberal thinkers, there is no apparent method to this philosophical madness.⁴²⁹ In the state-of-nature tradition, the problem of law has been practically fetishized, but the problem of order has been badly neglected.

Of course, it is easy to offer excuses. Order is clearly not the ultimate goal of the liberal state. We might say that we have often skipped over the problem of order in our haste, in order to consider the more "liberal" projects of government like the creation, interpretation, and enforcement of laws, and, arguably, elections, schools, housing, health care, and welfare. But whether we like it or not, order is the first step on the liberal path. In a world of scarcity and self-interest, it will always remain the most vital goal

Weber and Cover are more complicated cases. On Weber's ambivalence toward liberalism, see KRONMAN, *supra* note 347, at 182-88 (articulating "Weber's ambivalent critique of modernity," which Kronman describes as "almost . . . an intellectual (or moral) schizophrenia, an oscillation between irreconcilable perspectives"); David M. Trubek, Book Review, *Reconstructing Max Weber's Sociology of Law*, 37 STAN. L. REV. 919, 934-36 (1985) (reviewing ANTHONY KRONMAN, MAX WEBER (1983) (endorsing Kronman's reading of Weber; arguing that Weber "restated and distanced himself" from "liberal and Marxist views of law," but ultimately "fail[ed] to replace or transcend them"; concluding that "Kronman gives us the key, but it reveals that there are no principles after all.")). On Cover's ambivalent relationship to liberalism, see Sarat & Kearns, *supra* note 422, at 214-15 ("In Cover, we find both a critic of and an apologist for law's violence; we find an insistence that law be different from, and more than, violence; . . . combined with a reluctant embrace of legal force How could this self-proclaimed 'anarchist' and visionary legal thinker nonetheless embrace and defend the violence of law?"). There is one more exception: the "just war" tradition. See, e.g., WALZER, JUST AND UNJUST WARS, *supra* note 153, at xi-xvii. But this tradition raises special questions that are beyond the scope of this Article.

⁴²⁸ As Samuel Huntington writes:

Liberalism tends to assume the existence of that very national security which the military man considers to be continually threatened Liberalism never questioned the existence of the state. Instead it presupposed the state's self-sufficiency and external security [It does] not give the liberal state a security function. It was presumed to exist in vacuo The assumption of a state in a vacuum was particularly relevant to American liberalism because for almost a century American reality approximated the liberal image.

HUNTINGTON, *supra* note 45, at 90, 149 (emphasis omitted).

⁴²⁹ Samuel Huntington speculates that it was the isolated nature of England, and then later America, which allowed liberal philosophers to ignore the role of military force in the development of liberal states. See *id.* at 148-49. This thesis makes considerable sense of the literature. Hobbes, for example, seems relatively more conscious of the prospect of civil war than other narrators, and he wrote during a period of civil war in England. Similarly, Weber coined the phrase "monopoly of force" during the First World War. See discussion *supra* note 15. A more complete analysis of the relationship between historical wars and liberal theory might prove fruitful, but it would be well beyond the scope of this Article.

of the liberal state. A state must survive before it can thrive; it must be a state before it can be liberal. Individual rights cannot flourish in conditions of rebellion, civil war, conquest, and colonization. When the liberal state produces order, it lays the foundation for law. Law, in turn, lays the foundation for all manner of liberal projects.

In our story, then, first things come first. We do not skip off toward the liberal horizon, looking for problems to solve. We start with the most fundamental problem of government—the problem of order. We move to the most fundamental solution—the military state. Step by step, we build a liberal theory of force. What we find, in the end, is a liberal surprise—a state that is neither “minimalist” nor “monopolist,” but rather “positivist” or “realist.” It is both a public and private state, which solves the problem of order by taking the middle path and rejecting traditional extremes.

B. *Political Theory vs. Public Policy*

If the liberal theory of force sounds somewhat strange to most liberal philosophers, it will sound even stranger to public policy wonks. Until now, our public policy debates have not spoken of private prisons, police, and armies in the most fundamental terms. In lieu of first principles, they have offered the standard laundry list of utilitarian and liberal concerns: economic efficiency, egalitarian distribution, public goods, public accountability, human rights, industrial influence, market failure, and cultural commodification.

But as we have already seen, these standard paradigms are too broad to do the job well. In this context, breadth is not an advantage because it masks the depth of the problem of order. Ask yourself: What is the most profound problem with privatizing the supply of military force? What, in the end, happens to the ultraminimal state? Does it perish at the hands of inefficient means? Maldistributions? Free riders? Accountability lapses? Human rights violations? Donations and bribes? Excessive fixed or sunk costs? A cultural faux pas?

As I argued in Part IV, each of these suggests very good reasons that the liberal state should finance and allocate force. In addition, some identify reasons for the liberal state to provide and exercise force, as well—at least in some contexts, to some degrees. In the end, though, they all fall away under the cut of Occam’s razor. They highlight the general dangers of privatized institutions but not the special dangers of privatized force.

We need not rehash the deficiencies of each approach here, but it is useful to revisit two public policy arguments to play out the contrast. First, the problem of order may sound like a problem of “agency costs,” but it is not—at least not in any conventional sense. It is true that the ultraminimal state wishes to make itself into a “principal” and the MO into an “agent.” But it cannot. Agency relationships are premised on the freedom of a market, which exists in the shadow of a dominant capitalist state. In the ultra-

minimal state, when the MO enters the market, its dominance destroys the market's freedoms. The ultraminimal state is not free vis-à-vis the MO because there is no state standing behind it, threatening to protect it. This is not just a failure of the market; it is also a failure of the state itself in some sense. (and, if force is the distinctive character of law,⁴³⁰ then it is also a failure of law). Ultimately, the ultraminimal state reverts to a state of nature. This does not happen because the ultraminimal state lacks physical or economic power over the MO, although those things are both true. The ultraminimal state fails because it lacks a critical, cultural bond between the means of deliberation and domination.

In this respect, the liberal theory of force sounds distinctively cultural—much like the “cultural commodification” critiques. There are similarities. The problem of order is a problem about the social meaning of force. But it is not a problem of the popular meaning of force, which is commonly called the problem of “legitimacy.”⁴³¹ It is a problem of the institutional meaning of force, which is why I have called it the problem of “loyalty.”⁴³²

This distinction is critical, and it highlights the second difference between this theory and others: Here institutions matter more than individuals. While the liberal theory of force operates within the context of liberal states, and recognizes the values of democracy and rights, it does not fetishize these values. It reminds us that in many liberal states, the people are displeased with public institutions, but they do not revolt. It reminds us that beneath our political and legal structures, there is a monopoly of force—a cultural bond between the MO and the GO, which is much stronger than any generalized, popular conception of legitimacy, democracy, or rights. Individuals may love the liberal state, but generals, sergeants, and soldiers must love it. This military culture of loyalty is a matter of the state's political, legal, and economic survival.

C. *The Problem of Order in Everyday Life*

Since today's liberal states are not ultraminimal states, it is tempting for today's liberal citizens to dismiss the problem of order out of hand. It is especially tempting for Americans. Since the turning point of World War II, the United States has managed to maintain an extremely powerful, highly socialized network of military and policing organizations. But we should not take this fact for granted. It is neither a necessary nor a natural

⁴³⁰ See HANS KELSEN, *A PURE THEORY OF LAW* 44 (Max Knight trans., 1967) (defining law as a behavioral norm backed up by threats and acts of physical coercion, or, as he writes, a “normative coercive order”); Cover, *supra* note 21, at 1601 (“Legal interpretation takes place in a field of pain and death.”).

⁴³¹ See 2 WEBER, *ECONOMY AND SOCIETY*, *supra* note 15, at 903 (characterizing legitimacy as a “belief[] held by the[] members” of political associations).

⁴³² See *supra* note 376.

fact. It should be a source of awe, and perhaps fear, but it should not be an article of faith.

A brief tour of recent military coups and attempts should make us shift in our seats: Venezuela (2002); the Philippines (2001); Fiji (2000); Pakistan (1999); Sierra Leone (1996); the Soviet Union (1991); Thailand (1991); Nigeria (1990); Turkey (1980); Argentina (1976); India (1975); Peru (1975); Portugal (1974); Greece (1973); Chile (1973); and Brazil (1964).⁴³³

"It can't happen to us."⁴³⁴ Perhaps. One certainly hopes not. It might be worth pointing out, however, that some commentators have begun to fret over the instability of civil-military relations in the United States,⁴³⁵ and, on a more ominous note, that the FBI currently suspects that the anthrax-postal attacks originated in American military labs.⁴³⁶ Of course, all

⁴³³ See H.D.S. Greenway, *Rumor and Gridlock Seize Venezuela*, BOSTON GLOBE, Sept. 27, 2002, at A23, LEXIS, News Library, Bglobe File (Venezuela); *Congo, Philippines Convulse; Coast Dims; Jackson, Clinton Confess; Tripp's End World Point-Blank Range*, BOSTON GLOBE, Jan. 21, 2001, at E4, LEXIS, News Library, Bglobe File (Philippines); Charles A. Radin, *In Pacific, Another Ethnic Conflict with Roots in Imperial Age*, BOSTON GLOBE, May 31, 2000, at A2, LEXIS, News Library, Bglobe File (Fiji); Victoria Burnett, *Embattled Pakistani Leader Expects Warm Welcome in U.S.*, BOSTON GLOBE, June 20, 2003, at A13, LEXIS, News Library, Bglobe File (Pakistan); *Eager for Information*, BOSTON GLOBE, Feb. 24, 1996, at 4, LEXIS, News Library, Bglobe File (Sierra Leone); Andrew S. Weiss, *Like Father, Like Son on Russian Policy*, BOSTON GLOBE, Aug. 28, 2001, at A19, LEXIS, News Library, Bglobe File (Soviet Union); Colin Nickerson, *Thais Urge Punishment for Ousted Premier*, BOSTON GLOBE, May 25, 1992, at 1, LEXIS, News Library, Bglobe File (Thailand); Wil Haygood, *Nigeria on Trial; Writer's Hanging Latest Disaster to Shake Nation*, BOSTON GLOBE, Apr. 7, 1996, at 1, LEXIS, News Library, Bglobe File (Nigeria); *Coalition Approved Including Rightists*, BOSTON GLOBE, May 29, 1999, at A12, LEXIS, News Library, Bglobe File (Turkey); Philip Bennett, *Argentina's Peronist Front-Runner: Stirs Passions but Raises Doubts*, BOSTON GLOBE, May 14, 1989, at 2, LEXIS, News Library, Bglobe File (Argentina); H.D.S. Greenway, *A Fragile Kingdom*, BOSTON GLOBE, Dec. 7, 1996, at A14, LEXIS, News Library, Bglobe File (India); Scott Wilson, *Morale Crisis in Peru's Army Could Let Guerrillas Regroup*, WASH. POST, June 13, 2002, at A34, LEXIS, News Library, Wpost File (Peru); *Francisco da Costa Gomes Dies; Post-Junta Leader of Portugal*, WASH. POST, Aug. 1, 2001, at B7, LEXIS, News Library, Wpost File (Portugal); *George Papadopoulos, at 80: Former Leader of Greek Junta*, BOSTON GLOBE, June 28, 1999, at B5, LEXIS, News Library, Bglobe File (Greece); Fernando Gonzalez, *Latin America's Scheherazade*, BOSTON GLOBE, Apr. 25, 1993, at 14, LEXIS, News Library, Bglobe File (Chile); Kenneth Rapoza, *Brazilians Tell of Human Toll of Long Dictatorship*, BOSTON GLOBE, Jan. 5, 2003, at A21, LEXIS, News Library, Bglobe File (Brazil). See generally ERIC CARLTON, STATE AGAINST THE STATE: THE THEORY AND PRACTICE OF THE COUP D'ÉTAT I (1997) ("As a political expedient, the coup must be distinguished from other forms of political violence. A coup aims at substituting one ruling group by another; specifically, it is the seizure of power from within the system."); EDWARD LUTTWAK, COUP D'ÉTAT: A PRACTICAL HANDBOOK 27 (1979) ("A coup consists of the infiltration of a small but critical segment of the state apparatus, which is then used to displace the government from its control of the remainder.").

⁴³⁴ But see Charles J. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, 22 PARAMETERS 2 (1992).

⁴³⁵ See, e.g., SINGER, *supra* note 113, at 204-05; Dunlap, *supra* note 434; Thomas E. Ricks, *The Widening Gap Between the Military and Society*, ATL. MONTHLY, July 1997, at 66-78; Jean Edward Smith, *Firefight at the Pentagon*, N.Y. TIMES, Apr. 6, 2003, at 13.

⁴³⁶ See MARILYN W. THOMPSON, THE KILLER STRAIN: ANTHRAX AND A GOVERNMENT EXPOSED (2003); Eric Schmitt, *Scientist Denies Being Involved in Anthrax Plot*, N.Y. TIMES, Aug. 12, 2002, at

of these examples are only suggestive, and none of them supports my argument in the least. But they remind us that although the ultraminimal state and the military state are fictions, the problem of order is utterly real. It is the most vital problem of government. It is the only problem that the state cannot, under any circumstances, resort to force to resolve.

Once we take the problem of order seriously, it becomes worthwhile to consider the practical implications of the liberal theory of force. First, there is the obvious question: How do today's "liberal" states stack up against it? It turns out that they are doing fairly well. In fundamental terms, most liberal states remain stable and strong. Although private police are becoming more aggressive and expansive, they have not seriously displaced the most aggressive and expansive functions of public police forces yet. Although private armies are fighting wars, they are not leading us into major wars yet. The liberal theory of force imposes limits, but for the most part, they are limits that we have not tested yet. Perhaps we never will.

As we have seen, however, there are already a few troubling signs. Because the liberal theory of force reads monopolization as socialization, it encourages us to focus on cultural connections between states and markets—for example, the fact that public police forces have started to model themselves on private policing corporations or that private military corporations have started training domestic and foreign troops.⁴³⁷ Are these examples of the private supply of force? Not exactly. But they undermine the cultural bonds between politicians, judges, and administrators on the one hand and officers and soldiers on the other. They undermine the "public" aspects of our public policing and military institutions.

D. *The Ungovernability of Force*

In closing, I must acknowledge some distinctly unpleasant—to some readers they might seem "illiberal"—aspects of the liberal theory of force. First, it is a positivist theory: It tends to presume the legitimacy of force rather than attempting to justify or explain it. Second, it is an institutional theory: It almost entirely ignores the role of individuals and focuses on relations between organizations. Third, it is a realist theory: It hinges upon the thesis that force is not ultimately governable—or, at least, that the most intense forms of force are the least governable.

In liberal terms, these might sound like surprising traits. At first glance, they seem to ignore or reject some of the most fundamental values of liberal thought. But the conflicts are largely apparent. The liberal theory of force neither ignores nor rejects these values. It recognizes them but highlights the profound constraints under which these values persist. What are these constraints? First: The concept of "legitimacy" is often deeply

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⁴³⁷ See discussion *supra* Parts II.B.1, II.B.3.

contested, so that “liberal” states must often govern in the absence of consensus. Second, institutional relations often overwhelm individual relations and limit our ability to vindicate individual rights. Third, and most importantly for our purposes: The most intense exercises of force often escape our best efforts at governance.

These constraints bring us back to that special, inherent tension between the concepts of liberalism and statehood that I explored in Part V. This tension is a decidedly familiar tension in liberal thought, which appears under many guises, in the oppositions between public and private, nationalism and liberalism, state and individual, autonomy and order, and freedom and force. In all such theories, it is there from the beginning, already embedded within the idea of the “liberal state.”

In the liberal theory of force, this tension emerges out of the collision between two old thoughts: First is an assumption about human nature—that individuals are rational and self-interested. Second is an assumption about the nature of force—that force corrupts. If these assumptions are not always correct, then we are fortunate folks. This, indeed, is the great aspiration of liberal government—the hope that, under the right conditions, power might not tend to corrupt us, or at least, that it might not succeed. Perhaps our “public” can master our power. It is a hope that puzzles me, but it is a hope that I share.