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Paternalism, Consent, and the Use of Experimental Drugs in the Military

JESSICA WOLFENDALE
Centre for Applied Philosophy and Public Ethics, University of Melbourne, Victoria, Australia

STEVE CLARKE
James Martin 21st Century School, Oxford University, and the Centre for Applied Philosophy and Public Ethics, Charles Sturt University, New South Wales, Australia

Modern military organizations are paternalistic organizations. They typically recognize a duty of care toward military personnel and are willing to ignore or violate the consent of military personnel in order to uphold that duty of care. In this paper, we consider the case for paternalism in the military and distinguish it from the case for paternalism in medicine. We argue that one can consistently reject paternalism in medicine but uphold paternalism in the military. We consider two well-known arguments for the conclusion that military organizations should not be entitled to use experimental drugs on troops without first obtaining the informed consent of those troops. We argue that both of these are unsuccessful, in the absence of an argument for the rejection of paternalism in the military altogether. The case for military paternalism is widely accepted. However, we consider three ways in which it could be challenged.

Keywords: *duty of care, experimental drugs, informed consent, military personnel, paternalism*

I. INTRODUCTION

Civilians are able to exercise a considerable amount of autonomy in their lives. This is in large part because many, if not most, of the relations between civilians

Address correspondence to: Jessica Wolfendale, Centre for Applied Philosophy and Public Ethics, University of Melbourne, VIC, 3010, Australia E-mail: jwo@unimelb.edu.au

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are structured around the mutual consent of all who are involved in those relations (Kleinig, 1982, 91). Goods are not bought or sold without the parties involved in the trade consenting to the transaction, couples are not married without each person's consent to the marriage being expressed, and patients do not undergo medical procedures without first providing their consent to those procedures. Of course there may be occasions where someone attempts to sell products, get married, or operate on another person without first obtaining the relevant consent, but fortunately in most contemporary societies there are legal institutions in place designed to remedy any such violations of consent.

By contrast, consent plays a very small role in military life. According to military ethicist J. Pearn,

> In normal military service, whether during training or on operations, the theme of free or informed consent is almost never relevant. Duty is duty and command is command, and the Clausewitzian principles of "the definition and maintenance of the aim", irrespective of discomfort or risk, take precedence over any individual discretion in the military doctrines of all sophisticated forces (Pearn, 2000, 352).

In volunteer military forces, members of the military consent to enter military service, but once they join the military their ability to exercise their autonomy is severely curtailed.[1] As a member of a modern military force, I will not be asked to consent to have a regulation military haircut, I will not be asked to consent to participate in training exercises, and I will typically not be asked to consent to participate in a war against another country. Instead, I will be ordered to do all these things. So long as my orders are not blatantly illegal or immoral, I will be required to obey them.[2] If I refuse to obey these orders, I can be summarily dismissed or even court-martialed.

It might be supposed that the general failure of the military to seek the consent of its members to participate in military activities could be explained by the fact that military organizations are hierarchical authoritarian organizations that have little concern for the welfare of individual military personnel. However, it is not the case that military organizations lack concern for the welfare of individual military personnel. Military organizations are paternalistic organizations. Paternalists, including typical military officers, take it upon themselves to act in the best interests of those that they enter into paternalistic relations with, to whom they hold an explicit duty of care.[3] Upholding this duty of care involves a wide array of activities, such as ensuring that military personnel are properly trained, that they are given adequate clothing, weapons, and armor, and that they are physically prepared for the exigencies of combat. It may also involve ignoring or violating the consent of military personnel.

What exactly is paternalism? A widely accepted definition of paternalism is offered by Gerald Dworkin, who defines paternalism as "the interference of a state or an individual with another person, against their will, and justified by a claim that the person interfered with will be better off or protected from harm" (Dworkin, 2005). Paternalistic organizations are organizations in

which the value of paternalism is generally accepted by members of the organization and in which a paternalistic ethos can be expected to develop. Paternalistic policies are policies that limit the recipient's choices and that are adopted because an authority considers that the benefit to the recipient of the policy is a reason in favor of that policy. For many people, the term paternalism has negative connotations and to refer to a policy or action as paternalistic is to criticize it, *en passant* (Schwartz, 1977; Fried, 1981; Shiffrin, 2000). However, paternalism need not be a term of approbation, and paternalistic policies and actions can sometimes be justified.

The most obvious instance of justified paternalism is found in the relations between adults and young children. Young children are often unable to make sensible decisions about their own interests, and so it is clearly better that their parents and other adults who have their interests at heart make decisions on their behalf. The alternative, allowing young children to attempt to identify their best interests and identify the best ways in which these can be met, would lead to very suboptimal outcomes. It is much harder to justify paternalistic policies and actions toward adult humans. However, there are several policies that count as paternalistic in the sense defined above that are widely accepted as justified, such as policies enforcing the mandatory wearing of seat belts and motorcycle helmets. Paternalism has been widely accepted in a variety of areas of human life, particularly in medicine, and it remains dominant in the military today.

This paper is concerned with the justification of paternalistic policies in the military. In particular, we consider recent challenges to the scope of the military's paternalistic authority. These challenges focus on the question of whether the military should obtain the informed consent of troops prior to the administration of experimental or nonstandard vaccines or drugs. First, we consider the case for paternalism in the military and distinguish this from the failed case for paternalism in medicine. We argue that one can consistently reject paternalism in medicine but uphold paternalism in the military. Second, we consider the arguments of bioethicist George Annas and lawyer C. A. Milner who argue that military organizations should not be entitled to use experimental drugs on troops without first obtaining the informed consent of those troops. We argue that both Annas and Milner are unsuccessful in arguing for this conclusion, in the absence of an argument for the overthrow of paternalism in the military altogether. Third, though, we sketch three ways in which an opponent of military paternalism could attempt to reject the widely accepted case for military paternalism altogether.

II. PATERNALISM IN THE MILITARY AND IN MEDICINE

When defenders of the status quo in the military are asked to explain why military organizations are typically paternalistic rather than consensual

organizations, they usually point to the need for discipline to be maintained during military operations. Effective military operations involve the coordination of the activities of many individuals in order to be able to achieve rapid group actions in what might be unstable and dangerous conditions. Operations in which individual military personnel were asked for their consent to participate would be unwieldy and ineffective. We need efficient military forces, so we cannot allow for consent in the battlefield or so we are told (Fitzpatrick & Zwanziger, 2003, 3; Huntington, 1957, 47). As military ethicist Samuel Huntington explains: "For the profession to perform its function, each level within it must be able to command the instantaneous and loyal obedience of subordinate levels. Without these relationships, military professionalism is impossible" (Huntington, 1957, 73, in Hartle, 2004, 34). For similar reasons, there is little room for consent in other aspects of military operations. The importance of discipline to effective functioning is such that it encompasses not only all aspects of military training (Pearn, 2000, 352) but also seemingly trivial aspects of military life such as standards in personal appearance and dress. No consent is sought for these activities because conformity in these matters is crucial to developing a culture in which the ability of the group to operate efficiently is prioritized.

Until the last decades of the 20th century, medicine was also governed by a culture of paternalism. It was widely believed that patients typically lacked both the specialized knowledge and relevant medical experience that medical decision making requires, and so were in no position to make significant medical decisions. Not only did medical professionals take it upon themselves to make decisions based on a knowledge of medical facts on behalf of patients but also often took it upon themselves to make decisions about values in medicine on behalf of patients. Atul Gawande, the prominent writer on medicine for the *New Yorker*, recounts that his father, also a doctor, made decisions for patients who came to him seeking vasectomies. His judgment was informed by moral as well as technical considerations. If a prospective patient was unmarried, married without children, or "too young," he would refuse to perform the requested operation (2002, 210). His attitude was typical of many generations of paternalistic doctors.

A change in medical culture was marked by the publication of Jay Katz's *The Silent World of Doctor and Patient* (1984). Katz argued that many decisions about a suggested operation or course of treatment were personal decisions. He argued forcefully for the conclusion that doctors had no business making these decisions on their patients' behalf; patients were in fact capable of making decisions regarding matters of medical fact if they were properly advised by a medical professional. Katz developed a model of the patient as an autonomous decision maker informed by a doctor,[4] a rival to the traditional paternalistic model in which the patient was the infantilized subject of a doctor's benevolent treatment. It is due to the influence of Katz and others that a hitherto paternalistic culture has been changed irrevocably so that the

doctrine of informed consent is now considered to be absolutely central in medical care, at least in contemporary Western societies.

The demise of paternalism in medicine can be traced to the increased recognition of the value of patient autonomy. Would a similar concern for troop autonomy spell the end of paternalism in the military? Concern for the autonomy of military personnel would not be sufficient to overturn the case for military paternalism, in the absence of further reasons for rejecting military paternalism altogether. The medical sphere and the military sphere are disanalogous in two important and related ways.

First, what drove Katz's argument against medical paternalism was an appeal to individual values. However, such an appeal is not readily applicable to the military sphere. In military organizations, individual preferences are suppressed in order that the group may function more effectively. To be able to do this, military organizations require that military personnel "… subordinate personal preferences to the good of the military unit and the good of the country" (Wakin, 1995, 3). Second, the unquestioning obedience required from military personnel has no corollary in the medical case. A patient who wishes to act in accordance with her individual preferences—even when these may involve a risk to her health—may be risking her life but typically would not be risking the lives of others. However, a soldier who wishes to act in accordance with her individual preferences rather than in the best interests of the group may not only be risking her own life but also the lives of other soldiers and the success of military endeavors.

The argument for military paternalism therefore depends crucially on considerations of group effectiveness. However, this emphasis on group effectiveness rather than individual welfare seems to raise doubts about whether military organizations are paternalistic organizations at all. The attitude of military organizations toward their individual members is certainly very different from a doctor's attitude toward her patients. A doctor is motivated solely by concern for her patient's welfare, but military organizations protect the health of individual military personnel because that is the best way to promote good military functioning. Does this mean that the term "paternalism" is inappropriate in the military context?

This is the view taken by Fitzpatrick and Zwanziger (2003) in their discussion of the entitlement of troops to informed consent for the use of experimental drugs. Since the reduced autonomy of troops is justified by concerns of collective efficacy, rather than just by concerns for the individual soldiers' welfare, they claim that it is not justified by an appeal to paternalism. Although Fitzpatrick and Zwanziger acknowledge that the health of the individual combatant is one of the aims of using protective measures such as vaccines, they claim that "… in a military context this aim [protecting the individual's welfare] is pursued for *multiple* reasons, rather than *only* for the sake of the individual" (Fitzpatrick & Zwanziger, 2003, 5). This belief is shared by other bioethicists. Michael Gross, for instance, claims that "One

treats soldiers, with either standard or investigational drugs to maintain the integrity of a collective fighting force, not to care for particular patients" (Gross, 2004, 27).

It is true that a paternalistic action must, by most standard definitions, be motivated by concern for the recipient's interests.[5] However, this does not imply that the action may not also be motivated by other-regarding considerations. It seems to us that a policy that is justified by concern for the welfare and effectiveness of a group can be properly described as a paternalistic policy provided that the concern for the welfare of the group is not considered to override concerns about the welfare of the individuals within that group. A paternalistic military has a duty of care toward its individual members and will coordinate the activities of the group while having due regard for the welfare of individual members of the group. An organization that justifies its activities by appeal to considerations of collective efficacy but does not also maintain due regard for the welfare of its individual members is not a paternalistic organization.

Fitzpatrick and Zwanziger (2003) appear to believe that because the military justifies its activities by appeal to considerations of collective efficacy as well as by appeal to considerations of individual welfare, it is not properly speaking a paternalistic organization. They argue that the existence of what they term an "other-regarding justification" for the administration of experimental vaccines means that the justification is therefore not paternalist (Fitzpatrick & Zwanziger, 2003, 8). But this seems wrongheaded. Many actions that are widely considered to be paternalistic are motivated by regard for the interests and well-being of others as well as individuals. As Shiffrin (2000) argues, although paternalistic actions are defined by the agent's motive, that motive may be broader than just concern for the welfare of the recipient of the action. For example, we would all agree that a park ranger who refused to allow me to climb a steep and dangerous mountain out of concern for my safety was acting paternalistically. Shiffrin points out that we would still describe his action as paternalistic if it were also motivated out of concern for my husband, who would be bereft if anything happened to me (Shiffrin, 2000, 217). That the motivation for the ranger's action is "other-regarding" does not mean that it is not paternalistic. There are further examples of actions that are widely accepted as paternalistic, which are also motivated by other-regarding considerations. For example, governments may require the mandatory vaccination of a population when an epidemic threatens in order to protect the individual citizens and also to protect the community as a whole. A parent may decide to treat a child's head lice against her wishes because it is in her interests and also because it will stop the lice spreading to other children. Fitzpatrick and Zwanziger appear to be stipulating a new meaning for the term paternalism that is not generally recognized and that is not consistent with many every day uses of the term.

The need for paternalistic policies in most areas of military activity is largely unquestioned; however, the scope of military paternalism has recently been challenged in relation to the use of experimental vaccines and drugs for prophylactic purposes. We will now consider whether this challenge succeeds.

III. EXPERIMENTAL DRUGS IN THE MILITARY

The debate about the nonvoluntary administration of experimental vaccines and drugs for prophylactic purposes began in response to the use of experimental drugs in the First Gulf War. Prior to sending troops to Iraq, the American Department of Defense (DoD), concerned about the possible use of chemical and biological weapons by Iraqi forces, petitioned the Food and Drug Administration (FDA) to allow the administration of pyridostigmine bromide and antibotulism vaccine (botulumin toxinoid) to US troops, without first obtaining their informed consent. A waiver of informed consent requirements was obtained on the grounds that obtaining the informed consent of Gulf War soldiers was "not feasible" (Milner, 1997, 225).[6] Both pyridostigmine bromide and antibotulism vaccine were experimental drugs that at that stage had only been subjected to partial testing. Consequently, pyridostigmine bromide was issued to 696,562 American troops, two thirds of whom took the drug in question. The decision as to whether particular troops took the drug was made by their major unit commander (Milner, 1997, 225). Although antibotulism vaccine was offered to troops on a voluntary basis, 88% of the US troops who took the vaccine reported that they had not been told that taking this drug was optional (Milner, 1997, 225).

Milner and Annas are both very critical of the above policy. Milner argues that the use of investigational vaccines without seeking the informed consent of troops was a form of medical experimentation that "effectively turned US military personnel into guinea pigs" (Milner, 1997, 207). Therefore, she argues, the DoD decision to seek a waiver of informed consent amounted to a violation of the Nuremberg Code and violated the statutory prohibition on the use of DoD funds for medical experimentation on human subjects (Milner, 1997, 228). Annas also argues that the use of investigational compounds for prophylactic or therapeutic purposes is a violation of the Nuremberg Code, but on somewhat different grounds. He argues that, although the drugs were administered with therapeutic intent, this intention does not alter the compounds' investigational status (Annas, 1998, 257). Both argue that the US military should modify its policy to respect the informed consent of troops, at least in cases of experimental drug use.

Before moving on, it will be helpful to flag a distinction that we will make which Milner fails to recognize and Annas recognizes but appears to misunderstand. Although the DoD sought and received FDA approval for the use of experimental drugs during the First Gulf War without the usual informed

consent process, they did not do so for the purposes of conducting an experiment. Providing investigational or nonstandard vaccines to combatants is intended to protect the health and combat fitness of the individual combatant and to enable them to fulfill military objectives. So *contra* Milner, the use of experimental drugs for nonexperimental therapeutic or prophylactic purposes is not a violation of the Nuremberg code, properly speaking, because the Nuremberg code is a code concerning *medical experimentation*.

Annas recognizes the distinction between administering an investigational drug as treatment and administering an investigational drug for experimental purposes, but he argues that it is the drug's investigational status, not the intent governing its use, which dictates that informed consent must be obtained and which makes its nonconsensual usage a violation of the Nuremberg Code even if the US military did not administer such drugs for experimental purposes (Annas & Grodin, 1991, 25; Annas, 1998, 258). However, the intention of the person administering an investigational compound is central to ascertaining whether the use of the compound is therapeutic or experimental, as the Belmont Report makes clear: "The fact that a procedure is 'experimental,' in the sense of new, untested, or different, does not automatically place it in the category of research" (Howe and Martin, 1991, 21–2).[7] Neither Milner nor Annas are correct in their claim that the decision to use experimental drugs was a violation of the Nuremberg Code.

In a request to the FDA for a waiver of informed consent requirements for the use of such drugs, the DoD argued that the compulsory use of these drugs was in the best interests of individual US military personnel and in the best interests of the US forces as a whole. According to the DoD: "special military exigencies sometimes must supersede normal rights and procedures that apply in the civilian community. Consistent with this … military members may be required to submit to medical care deemed necessary to preserve life, alleviate suffering, or protect the health of others."[8] The DoD was concerned that if the drugs were given on a voluntary basis, individual military personnel who refused them would be risking their lives, and the combat capabilities of US forces would be undermined. These do seem to be plausible concerns. At the time of the First Gulf War, Saddam Hussein's regime was known to have possessed both biological and chemical weapons and to have used such weapons on enemy troops during the earlier Iran-Iraq war. An army division in which some troops had taken drugs designed to protect against chemical and biological agents such as botulism and in which some troops had not would have an extremely diminished combat capacity in the event of a chemical or biological attack. Either unvaccinated troops would have to be sent home, resulting in a reduced force number and delays in finding replacements, or those soldiers who were protected against the effects of chemical and biological weapons would be occupied with the medical care of those who were not protected. In such a situation an entire division could potentially be rendered ineffective as a combat unit.

Military personnel are routinely given drugs and vaccines without their consent, in order to enhance their combat effectiveness. In Australia, military personnel are required to take a routine series of vaccinations as part of their general fitness for military service (Australian Senate Official Committee Hansard, 2004, 61). The military aims to ensure the safety and effectiveness of any drugs and vaccines given to military personnel and informs them of the nature of what they are given, but though in most cases these are drugs and vaccines that have been properly clinically trialed, these can still involve an element of risk to the recipient—many common vaccines have side effects. However, the risk posed by both standard and experimental vaccines must be weighed against the risk posed by exposure to diseases and chemical and biological weapons—risk not only to the health of individual combatants but also to the health of other military personnel and the success of the mission as a whole (Fitzpatrick & Zwanziger, 2003, 4). If military personnel are wounded or ill, they may not refuse any medical treatment that returns them to active duty (Annas, 1998, 250; Gross, 2004, 24). When military personnel are given a course of medical treatment, it is with the explicit aim of preparing them to be effective in combat, rather than with the aim of enabling their autonomous choice about medical treatment to be realized.

Given that obtaining the informed consent of military personnel is not required for any of the activities described earlier, it seems extremely inconsistent to suggest that consent be required for the use of experimental drugs in combat. Indeed, even when nonexperimental drugs and vaccines have been made voluntary (as occurred with the anthrax vaccine), military personnel find the inconsistency disturbing. A study of the attitudes of British military personnel toward the voluntary Anthrax Vaccination Program—a program that did not involve the administration of an experimental drug since the Anthrax vaccination is an approved drug—found that many were troubled by the sudden emphasis on informed consent precisely because it was not consistent with military practice in other areas of medical and military care: "Whilst the purpose of the voluntary policy with written consent was designed to decrease worries, armed forces personnel reported the opposite, suggesting that it increased anxiety over the vaccine" (Murphya et al., 2006, 3112).

The demand that informed consent be obtained from military personnel before the administration of experimental drugs is strikingly inconsistent with the paternalistic nature of military life, and the attempts of Milner and Annas to justify this demand without also challenging the overall paternalistic culture of the military do not succeed.

In the next section, we consider two ways in which an opponent of our position might seek to justify the demand for informed consent for the use of experimental drugs for therapeutic purposes in the military, without questioning the justification for military paternalism in general. We show that these are both unsuccessful.

IV. OBJECTIONS TO THE CONSISTENCY ARGUMENT

Military personnel give implicit consent to many aspects of military life but do not give implicit consent to take experimental drugs

With the exception of conscripts, military personnel exercise free choice in becoming members of a military organization. They may subsequently participate in life-endangering combat in theaters of war without being able to exercise choice over whether or not to participate, and they may engage in high-risk training exercises and use weapons that can cause fatal accidents. However, it might be argued that there is a relevant sense in which military personnel do consent to these activities. When volunteers decide whether or not to join the military, they are, of course, aware that their decision will involve placing their future selves in circumstances where they would be required to participate in mandatory life-endangering activities, such as participation in war, when they are given a legal order to do so. Before joining the military, new recruits will also be aware that there are various other ways in which they will be required to give up individual control of aspects of their lives in order to participate in an effective military organization: "Recruits generally understand that they are forfeiting some autonomy when they enlist, and that they may be ordered into dangerous and even life-threatening situations" (Fitzpatrick & Zwanziger, 2003, 9).

We are not familiar with any military organizations in which recruits are explicitly given the opportunity to consent to waive their rights to exercise future choices about participation in life-endangering training exercises, theaters of war, and so on. However, because it is well known that military life involves such activities, it seems plausible to think that new recruits provide implicit consent or what Fitzpatrick and Zwanziger call "anticipatory consent" (2003, 9) to these activities, in advance. It is not widely known, however, that military life can involve taking experimental drugs and vaccines, and so it is not true that recruits provide implicit consent to the taking of such drugs, or so our opponent would argue.

We accept that the appeal to implicit consent is a legitimate form of argument; however, we dispute the above characterization of implicit consent in the military context. We argue that once implicit consent in the military context is properly understood, it can be seen to include implicit consent to take experimental drugs for therapeutic or prophylactic purposes. Let us start by noting a couple of shortcomings of our opponent's characterization of implicit consent in the military context before going on to provide what we take to be a superior characterization of implicit consent in the military context.

The first weakness of our opponent's argument is that it is entirely contingent on what recruits may or may not know, and this may vary over time. If it became widely known that military service could involve the compulsory use of experimental drugs and vaccines, then, under the above characterization

of implicit consent, military personnel would be seen to have provided implicit consent to take experimental drugs and vaccines. Furthermore, it seems plausible to think that this might in fact become widely known given that such issues are a matter of concern to the media, and common knowledge is informed by the media. Perversely, if our opponent's argument were to become widely known, it could undermine itself because knowledge of this argument would involve knowledge of the fact that troops can be expected to take experimental drugs and vaccines without consent.

The second weakness of our opponent's position is that it appears to achieve too much. There are many aspects of military life that involve compulsory activities that are not common knowledge and that a new recruit could not reasonably be expected to be informed about. For example, it is not widely known that pilots undergo special training to inure them to high G environments (Pearn, 2000, 353), and it is not widely known that troops deployed to high-stress regions have to undergo special battle-inoculation training to inure them to the particular stresses they are likely to encounter (Wilson, Braithwaite, & Murphy, 2003, 29). Nor is it widely known that periodic medical examinations and vaccinations are mandatory for all military personnel (McManus et al., 2005, 1124). So under our opponent's characterization of implicit consent, these activities are not implicitly consented to. Nevertheless, they are activities that the military requires particular personnel to undergo without seeking their consent. So our opponent's characterization of implicit consent would require that the military seek explicit consent to a variety of activities that they do not currently seek explicit consent for in addition to the use of experimental drugs in combat.

In our view, a volunteer who joins a paternalistic military organization provides implicit consent to various subsequent activities; however, this is best understood in terms of the general relations that recruits implicitly consent to enter into when they join a preexisting hierarchical organization. The volunteer implicitly consents to allow him or herself to be used in a variety of ways that are necessary to the military's legitimate ends, on the understanding that the military will take reasonable measures to minimize risks to him or her while pursuing those ends. This involves being prepared for combat in a variety of ways that need not all be specified in advance. These will include physical training, inoculation against disease, and psychological preparation for the rigors of battle.

Part of the reason why the ways in which a volunteer implicitly consents to be prepared for war are not specified in advance is that these cannot all be specified in advance. The introduction of new weapons, new training techniques, and new medical procedures is an endemic feature of military life. Because a military organization is primarily developed to oppose other military organizations, it must be able to adapt itself to changing circumstances by changing the ways in which it operates. Individual military personnel are expected to be similarly adaptable. So the implicit consent that

they provide must be broad in scope. This is not to deny that there are limits to that consent. Military personnel do not give implicit consent to be used in ways that are outside the scope of the military's brief. It would be impermissible, for example, for an officer to use her subordinates as household servants or as manual laborers on her private farm. However, success in the theater of war is well within the military's brief and if the use of experimental drugs enables a military organization to achieve those ends whilst minimizing risks to troops then it seems that troops do in fact provide implicit consent to take such experimental drugs.

Military personnel should not give up the rights that they are fighting to protect

A second argument against our position focuses on the rights and values that combatants are fighting to protect. In liberal democracies, the military is committed to the protection of the civilian society and the rights that are characteristic of that society. These rights include rights to freedom of speech, freedom of association, privacy, and the right to informed consent about medical procedures. Since military forces are protecting these rights, then, the argument runs, they should not be required to give up the very rights they are protecting.

A literal version of this argument is clearly implausible. Military personnel do give up many rights when they join the military. It is uncontroversial that military personnel forego rights to free speech, rights to privacy, and the right to political association. According to military ethicist Malham Wakin:

> Military professionals, however, in order to perfect the instrument of defending these values [of society], of necessity curb their own exercise of some of these freedoms. They accept restrictions on the liberty to speak, they refrain from partisan politics, they are denied political office while on active duty, they accept restrictions on their freedom of movement, and in general subordinate personal preferences to the good of the military unit and the good of the country (Wakin, 1995, 3).

Such sacrifice is considered essential to the group cohesion, discipline, and self-sacrifice that is necessary to good military functioning. Military personnel recognize that in order to defend the rights of society, they must forego some of those same rights.

Perhaps, however, a more sophisticated version of this objection to our position could be developed that conceded that military personnel must give up *some* rights in order to enable the functioning of effective military organizations. For example, allowing recruits to exercise their rights to free speech and political association could endanger military functioning by threatening military security and military political neutrality. It therefore seems reasonable to require recruits to give up these rights. But military personnel retain other rights, such as the right to religious practice and reproductive liberty, because the exercise of these rights does not impinge on military functioning

and, our opponent could argue, they should also retain the right to informed consent to the taking of experimental drugs and vaccines in combat. To assess this objection, we must clarify if the effective functioning of a military organization requires that military personnel forego the right to informed consent to the taking of experimental drugs.

Military personnel accept restrictions on their freedom regarding matters of central concern to their physical well-being, such as physical training and diet. They also accept significant restrictions on their freedom with regard to medical matters, undergoing compulsory medical tests and waiving the right to informed consent in regard to nonexperimental drugs and vaccines, which are taken for the purposes of preparation for and participation in combat and training. Given the acceptance of these limitations on the freedom of military personnel in the medical context, including limitations on the right to informed consent to the use of nonexperimental drugs and vaccines, it is hard to understand why we should not also accept limitations on the right to informed consent in the case of experimental drugs. If our opponent accepts that the rights of military personnel may be limited in the name of military efficacy, then it looks like the argument is lost because it seems that there will be circumstances in which the use of experimental drugs and vaccines will significantly aid military efficacy, and arguably the use of an antibotulism vaccine in the First Gulf War was one such circumstance. But if our opponent does not concede that the rights of military personnel may be limited in the name of military efficacy, then it seems that she is arguing for a radical overhaul of military practice and her objection is not an objection that is particularly targeted at our position.

V. THE LIMITS OF PATERNALISM

We have argued that considerations of consistency tell in favor of a paternalistic military being entitled to compel its troops to take experimental drugs and vaccines when it is reasonable to hold that it is in the troop's interests to do so. The order to take a vaccine or drug would be a legal order requiring obedience. However, we do not hold that a paternalistic military is entitled to compel its troops to take part in medical experiments, and it might be thought that we ourselves are guilty of arguing inconsistently on this point. Our answer to this charge of inconsistency is that paternalism does not typically warrant the use of troops in medical experiments. A paternalistic organization has a duty of care toward its individual members and it is generally inconsistent with that duty of care to use those members for the purposes of medical experimentation, even if this is in the best interests of the organization all things considered.[9]

Now it might be pointed out that military organizations have sometimes used their members to conduct medical experiments that have not been in

the interests of individual participants. Notoriously, in the 1950s the US military used some of its soldiers as experimental subjects without their knowledge, giving these soldiers lysergic acid diethylamide (LSD) in order to study the effects of LSD on humans (McManus et al., 2005, 1121). Other experiments involved exposing military personnel to radiation and mustard gas (McManus et al., 2005, 1121). We acknowledge that such events have taken place but argue that these do not receive a paternalistic justification. They are instances of a failure of the military to uphold its duty of care toward its members.

That such failures have occurred points to a weakness of paternalism, which is that it is difficult to ensure that paternalists uphold their own stated values. One possible response to this problem is for governments to put in place administrative mechanisms to monitor paternalistic organizations' compliance with their duty of care. However, this is only a partial solution. Organizations can successfully evade the scrutiny of government watchdogs and other oversight bodies. The underlying problem is that paternalistic organizations such as modern militaries are sometimes willing to compromise their core values when they judge that it is in their interests to do so. In societies in which consent is of overriding importance, the justification for paternalism is one of expediency. Paternalism is viewed as a means to an end and so the sincerity of organizations' commitment to paternalistic values is sometimes open to doubt. Advocates of paternalism will usually concede that they would prefer not to have to coerce members of paternalistic organizations to act obediently. However, they will argue that seeking consent is impractical given the need to ensure the well-functioning coordinated activities of members of paternalistic organizations such as military organizations. The standard justification for military paternalism is that a paternalistic ethos along with an authoritarian command structure is necessary for effective military functioning. In the final section, we sketch ways in which this standard justification could be challenged.

VI. ALTERNATIVES TO A PATERNALISTIC MILITARY

The vast majority of modern military organizations are paternalistic and authoritarian. The standard justification for military organizations having these characteristics is that these are prerequisites of military efficiency. We have argued that our opponents are not entitled to reject paternalism in regard to one aspect of military operations without also rejecting paternalism in the military in general. In this last section of the paper, we briefly consider possible arguments for rejecting military paternalism in general. In order to do this, we need to provide reasons to dispute the standard justification for paternalism in the military. We will outline three reasons to dispute the standard justification, all of which could be further developed. First, one might

dispute the claim that paternalistic and authoritarian military organizations are the only efficient military organizations. Second, one might dispute the claim that paternalistic and authoritarian military organizations are in fact efficient organizations. Third, one might dispute the need for an efficient military. It is beyond the scope of this paper to develop any one of these arguments fully. They are offered as suggestions for further development for those who accept the force of our argument but who are unwilling to simply accept a consistently paternalistic military.

Our first suggestion is that it is possible to argue that a nonpaternalistic and nonauthoritarian military could nevertheless be efficient. The anarchist militias, which fought on the Republican side in the Spanish Civil War, are clear examples of nonauthoritarian and nonpaternalistic organizations. The militias were formed on strict egalitarian principles, quite unlike the structure of ordinary military forces. Yet despite the radical (and initially chaotic) appearance of these militias, the emphasis on comradeship, equality, and the benefit of members understanding the reasons behind different military procedures created a dedicated military force with high morale and good discipline. George Orwell famously fought with the anarchist militias. He writes:

> Cynical people with no experience of handling men will say instantly that this [doing away with authoritarian structures] would never "work," but as a matter of fact it does "work" in the long run …. I was acting-lieutenant in command of about thirty men ….We had all been under fire for months, and I never had the slightest difficulty in getting an order obeyed or in getting men to volunteer for a dangerous job … it is a tribute to the strength of "revolutionary" discipline that the militias stayed in the field at all. For until about June 1937 there was nothing to keep them there, except class loyalty … the militias held the line, though God knows they won very few victories, and even individual desertions were not common (Orwell, 1938, 26).[10]

Other examples of effective consensual military organizations can be found in private military companies such as Blackwater, Sandline International, MPRI, and others.[11] These companies hire personnel on a contract basis, offering high salaries. Personnel agree to undertake missions in a completely voluntary manner. That these private military companies are efficient is suggested by the strong demand for their services worldwide.[12]

Although it is plausible to think that militias and private military companies can operate effectively without being authoritarian in structure and paternalistic in ethos, it is less clear that large-scale conventional military forces can operate successfully without a traditional chain of command. Defenders of an authoritarian and paternalistic military will want to insist that they cannot. However, although there are no clear examples of large-scale conventional military forces operating successfully without a traditional chain of command, it is at least possible that an effective large-scale military without a traditional chain of command will yet emerge. We can imagine an effective military that is less paternalistic than most current military organizations.

Perhaps in such a military there would be a greater scope for consent and for autonomous operation at different levels of activity.[13] For example, consent could be sought prior to a particular deployment or prior to a particularly high-risk mission. Military personnel would be apprised of the reasons for the deployment and the expected risks and would be given the option to refuse. Exactly how such consent would be institutionalized is an interesting question that is beyond the scope of this paper, but such consent is at least theoretically possible.[14]

Our second suggestion is that it is possible to dispute the widely accepted assumption that paternalistic and authoritarian military organizations are efficient. When the case for a paternalistic ethos and an authoritarian command structure is spelt out in more detail, it is usually claimed that these promote instant obedience and discipline, which are both necessary for good military functioning. However, the long-standing assumption that instant obedience and discipline promote successful military functioning has often been questioned. For example, in *On the Psychology of Military Incompetence*, Norman Dixon found that rigid adherence to the chain of command and a refusal to question or disobey orders was a contributing factor in major instances of military incompetence in British history, such as the Siege of Kut in World War I and the fall of Singapore in World War II. The moral, intellectual, strategic, and personal failings of the military leaders of these tragedies were compounded by the ingrained tendency of those beneath them not to question orders, even when those orders were patently suicidal.

In relation to World War I, Dixon notes that the high level of incompetence demonstrated in that war was linked to (among other things) "a terrible crippling obedience" (Dixon, 1976, 82). That such unthinking obedience is still a problem is suggested by the results of a 2002 study on dysfunctional military decision making in the US military, which found that a military culture that encouraged rigid thinking and adherence to a "groupthink" mentality led to erroneous decision making and to moral exclusion—the failure to consider ethical and moral principles that were directly relevant to the situation in question (Bordin, 2002, 3). This study also noted that: "… formalized and complex organizational structures restrict the ability of the organization to learn. Historians have documented this tendency as being particularly prevalent in military organizations" (Bordin, 2002, 5).

Cleary there are disadvantages to having a paternalistic and authoritarian military, as well as advantages. To develop a convincing case for the conclusion that a paternalistic and authoritarian military does not in fact lead to overall efficiency, one would have to demonstrate that the disadvantages outweigh the advantages and show that some other form of military organization is in fact more efficient in general than a paternalistic and authoritarian military.

The third way to undermine the standard case for authoritarianism and paternalism in the military would be to accept that the only highly efficient

large-scale military organizations are authoritarian and paternalistic, but to argue that it is worth accepting a sacrifice in efficiency in order to avoid having to tolerate authoritarianism and paternalism in the military. This line of argument is unlikely to win over many adherents in our time, given that many countries perceive themselves to be facing threats to their national security and wish to maintain a military that is sufficiently powerful to defeat those threats, should hostilities break out. Fulfilling this wish might not be incompatible with having a less-than-fully effective military in some wealthy countries who perceive themselves to be facing few threats, but we are unaware of any countries who currently accept that they should maintain a less-than-fully effective military. However, we can well imagine possible future societies where military threats were perceived to be of a very low magnitude, and where significant wealth has been accumulated. In such societies, the argument for maintaining an effective military at the cost of tolerating an authoritarian structure and a paternalistic ethos in that military might not seem very compelling.

NOTES

1. Even consent to enter military service is denied to conscripts.

2. In the military law of most Western countries, military personnel are legally required to obey an order given by a superior except in cases where the order is obviously illegal or immoral—when there is no possibility that a combatant could have mistakenly believed that his orders were legal (Osiel, 2002, 46).

3. For example, the list of core values published by the US Navy states that "we will … care for the safety, professional, personal and spiritual well-being of our people" (Hartle, 2004, 69).

4. A model that is further developed by Faden and Beauchamp (1986) and others.

5. However, Seana Shiffrin argues that an action need not be motivated by concern for the recipient's interests in order for it to be paternalistic. Under her broader conception of paternalism, "Behaviour may be paternalist if the motive behind it is simply that the (putative) paternalist knows better than the agent, or may better implement, what the agent has authority for doing herself" (Shiffrin, 2000, 216).

6. The decision of the FDA to grant a waiver of informed consent requirements was challenged in court by a serviceman stationed in Saudi Arabia during the First Gulf War (*Doe v. Sullivan*). However, the challenge was summarily dismissed (Milner, 1997, 228–30).

7. Similarly, Fitzpatrick and Zwanziger argue, against Annas, that "It is a mistake … to infer form the fact that a medical intervention is innovative—i.e. involves the use of compound that is classified for *legal* purposes as "investigational"—that it must therefore constitute research in an *ethically* relevant sense, and that waiving consent thus amounts to coercive use of troops as human research subjects" (Fitzpatrick & Zwanziger, 2003, 4).

8. See Informed Consent for Human Drugs and Biologics, Determination that Informed Consent is Not Feasible, 55 Fed. Reg. 52,814, 52,815 (1990) (codified at 21 C.F.R. § 50.23(d)). Cited in Milner (1997), 224.

9. Participation in a medical experiment can sometimes be consistent with upholding a duty of care. For example, the Defense Advanced Research Projects Agency in the United States is funding research into a Restorative Injury Repair program (DARPA, 2007). It is plausible to think that participation in this research could benefit injured military personnel. At a minimum to be consistent with a duty of care participation in an experiment must be likely to benefit the participant, all things considered. But to be considered ethically acceptable, informed consent must also be obtained from the participant prior to the experiment.

10. The fact that the militias were on the losing side in the Spanish Civil War has sometimes been attributed to their egalitarian structure. However, Orwell argues that their lack of success is more

appropriately attributed to a lack of decent weapons and basic military supplies such as maps and charts (Orwell, 1938, 28).

11. The Web site Private Military.org provides information and research on the activities of private military companies worldwide. See http://www.privatemilitary.org/pmcs.html.

12. Demand for private military forces is not only strong but also appears to be increasing. A 2006 industry survey found that since 2001 there have been significant increases in revenue and operations in the private security sector (International Peace Operations Association, 2006).

13. Special Forces units currently exhibit some of these characteristics. Special Forces personnel generally have more opportunities to exercise autonomy than ordinary military personnel. This is at least partly explained by the fact that Special Forces operations are usually high risk, small scale, and unpredictable. It is therefore difficult to generalize from the case of these forces to military organizations in general. Furthermore, it has been argued that, in light of the nature of modern military operations, military personnel at lower ranks as well as higher should be given greater autonomy and decision-making responsibility (Liddy, 2004, 140).

14. Perhaps military personnel would be required to sign consent forms prior to deployment, stating that they understand the risks involved as far as these are available and have consented to participate knowingly and voluntarily. Such forms would, for efficiency's sake, only be available prior to deployment. Seeking explicit consent for each and every military action would be unfeasible.

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