

The Moral Division of Labor and the Jus ad Bellum/Jus in Bello Distinction

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The legislation developed after World War II treats the *in bello* and the *ad bellum* codes as two entirely independent systems. The former applies to soldiers, the latter to states and statesmen. One of the most striking differences (or apparent incongruities) between the two codes is that in the *ad bellum* code, a state that initiates an aggressive war is condemned by international law as having committed a crime; it is not, however, the crime of the soldiers who carry out the war. Rather, legally speaking, soldiers' acts of killing within armed conflicts are permissible insofar as they follow the *in bello* regulations, which are purposely designed to apply to soldiers independently of the cause for which they fight.ⁱ

Michael Walzer's interpretation of this tradition is surprising and controversial: soldiers, he claims, are *morally* equal, whether they carrying out aggression or defending against aggression, and the egalitarian *in bellum* code is a reflection of this moral fact.ⁱⁱ He explicitly rejects the claim that the equality of soldiers "is merely conventional" and that the truth about war rights is best expressed in terms of justice: "the more justice the more right."ⁱⁱⁱ

Some prominent critics (whom I call "purists") are quick to attack this interpretation: Walzer, they argue, fails to attend to the merely conventional nature of the distinction between *jus in bello* and *jus ad bellum*. This failure is significant for various reasons. In particular, Walzer commits himself to the view that the individual acts that constitute prosecution of the unjust war might satisfy the *in bello* proportionality constraint; that the good effects of such acts might outweigh their bad effects. And this, the critics argue, does not make sense. No individual act, which together with others constitutes an aggressive war, can have good effects that can appropriately be weighed in the proportionality calculation. Jeff McMahan concludes that "it is rather mysterious what traditional just war theorists have been assuming in their supposition that unjust combatants can satisfy the requirement of proportionality in the same way that just combatants can."^{iv} Though they subject themselves

to the *in bello* code, unjust combatants do not thereby change the simple fact that they kill innocent people -- that is, they kill soldiers who justifiably defend their homeland. These killings cannot be proportionate if they further an unjust goal.

This paper aims to draw a coherent moral distinction between the *in bello* and the *ad bellum* codes that would explain the above incongruity between them.

Part I presents in more detail the purist worry as to the coherence of the *in bello/ad bellum* distinction. In part II, I offer "a short answer" to the purist challenge. This answer elucidates what just war theorists have in mind when they claim or imply that unjust combatants might satisfy the requirement of proportionality. Part III exposes the real issue between purists and traditionalists: purists find the traditional distinction *morally* incoherent, rather than logically inconsistent. Part IV addresses this real, and deeper, worry.

I. The Purist Challenge

Let me introduce the purist challenge by discussing a distinct but closely related problem. Consider the *legal* distinction between the *in bello* and the *ad bellum* codes. As the Nuremberg tribunal asserts, wars of aggression are essentially evil.^v Yet until 1928 there was no mention of the wrongness of resort to aggressive war in the positive law. The 1928 "Kellogg-Briand Pact" which "condemns recourse to war for the solution of the international controversies"^{vi} outlawed wars of aggression, for the first time. Later, the UN Charter criminalized such wars and individualized the legal responsibility for them.^{vii}

As many argued, this change *should* have had a tremendous impact on the conventions that regulate conduct *within* wars. The *in bello* regulations were legislated much before 1928, when initiating a war was not yet officially recognized as wrong, and so no legal distinction was made between the states engaged in armed conflict.. Consequently, the *in bello* provisions had to apply without any distinction based on the nature or the origin of the armed conflict. Specifically, combatants on both sides enjoy equal immunity from criminal prosecution; if they surrender, they regain immunity from attack; and they are entitled to special treatment in case they have become prisoners of war. It seems, however, that the legal

recognition of the wrongness of aggressive war should undermine the principle of equal treatment of soldiers in the army of the aggressor state and soldiers in the army of the defending state. Indeed, the contemporary prohibition of wars of aggression would seem to entail radical legal inequality between just and unjust combatants: “[s]tripped of the mantle of such legality the act [of killing in wars of aggression] ... stands out starkly as an unjustifiable and inexcusable killing of a human being.”^{viii} That is to say that the *in bello* code should reflect the asymmetry between just and unjust combatants that is implied in the new *ad bellum* legislation.

The failure to recognize the deep consequences of the contemporary criminalization of wars of aggression is fatal: “the just war doctrine is committed to the seemingly paradoxical position that the war taken as a whole is a crime, yet that each of the individual acts which together constitute the aggressive war is entirely lawful.”^{ix} Moreover, according to a well-known principle (*ex injuria jus non oritur*), no legal powers beyond those available in peacetime may be gained as a result of a state's waging an unlawful war. In particular, unjust combatants cannot acquire rights they did not have before, simply by virtue of participating in such wars.^x This immediate implication is flatly denied by the weird conjunction of a discriminating *ad bellum* code with an indiscriminating *in bello* code.

The above legal problem can be easily dissolved. After all, legislators are free to restrict the scope of the principles they employ; in particular, they can restrict the scope of the principle on which the arguments against the legal equality of soldiers is based. Legislators have the power to equalize morally *unequal* soldiers – e.g., for pragmatic reasons. The pragmatic reasons for doing so are apparent. The legal rights allocated to *just* combatants by the international law that preceded the Kellogg-Briand Pact are still valuable. And these rights won't be respected unless the contemporary legislation secures the same benefits to unjust combatants; for typically each side in a war claims that it is the other side that is unjust. Were soldiers given a license to deny *in bello* benefits to their enemies, states would never pay heed to international humanitarian law. The distinction between the two codes is, thus,

extremely useful.

Interestingly, Walzer seems to reject this pragmatic interpretation for the discrepancy between the two codes. Walzer is well aware of the immorality of wars of aggression. He maintains that, even so, the legal equality of soldiers reflects their moral equality.

Let me quickly sketch Walzer's argument.^{xi} Suppose that a bank-robber shoots a guard reaching for his gun. The robber is guilty of murder, because he had no right to rob the bank. The fact that he was put under a lethal threat by the guard is irrelevant. Walzer believes that our view of soldiers participating in a conventional firefight is radically different. A soldier who shoots another soldier in battle is not considered a murderer even if he kills a soldier who defended his homeland. In particular, he is not considered to be a murderer by his enemies. Like the just combatant, the unjust combatant is said to act in self-defense. "The case is not different from what it would be if the second soldier [the just combatant] shot the first [the unjust combatant]. So far as they fight in accordance with the *in bello* rules, no condemnation is possible."^{xii} What is the difference between the robber and the unjust combatant? Walzer's answer is this: "the crucial point is that there are rules of war." As long as they fight according to these rules, their actions are morally permissible. Walzer concludes that the *in bello* and the *ad bellum* codes must be independent: in constructing the former, we should ask how the duties of belligerents, fighting in accordance with rules of just military practice, are to be determined, without reference to the justice of their cause.

The difficulties in Walzer's argument concern three related topics: the moral equality of soldiers; the independence of the *in bello* and the *ad bellum* codes; and the connection between these two doctrines. I shall start with the latter. Soldiers are said to be morally equal *if – and to the extent that –* they fight in accordance with *in bello* rules. Indeed, they are equal *by virtue* of the fact that they both follow these rules. On the other hand, Walzer also claims that the *in bello* rules that govern the fighting are designed to apply to both sides independently of their cause, *because of* the "equality of the battlefield." Put together, these two claims form a vicious circle: All combatants are morally equal *because* the *in bello* code

should be independent of the *ad bellum* code with its distinction between just and unjust sides in a war; and the codes should be independent in this way *because* all combatants are morally equal.

Consider, secondly, the moral equality of soldiers as Walzer presents it: soldiers of both sides are said to kill in self-defense. The difficulty here is obvious: in what sense do unjust combatants, who conduct an aggressive war, act in self-defense? Moreover, even soldiers who, as a result of being engaged in a war of aggression, find themselves under a deadly attack have no right to defensive killing. For, like the bank-robber, unjust combatants have no right to attack those who, in defending themselves, put them under lethal risk.^{xiii}

Thirdly, let us look at the attempt to legislate an *in bello* code that applies the same rules to both sides, irrespective of the cause for which they fight. It is partly successful: unjust combatants might avoid targeting civilians, respect the rights of prisoners of war, halt the killing when the other side surrenders, etc. Unfortunately, however, it is simply impossible for unjust combatants to act proportionately or to be restrained by morality. The very idea that the *in bello* requirement of proportionality can be equally satisfied by both sides is incoherent. The requirement that a proportionate military act satisfies seems simple and straightforward: the (relevant) goods it causes outweigh its bad effects. More specifically, the level of destruction of a proportionate act should not be excessive, given the military advantage gained by it. But, as McMahan rhetorically asks, “how... could a Nazi soldier weigh the harms he would cause to enemy combatants against the end of victory by the Nazis without assigning any value to the victory?”^{xiv} Or, to quote from Hurka’s recent discussion:

If “military advantage” justifies (foreseeably) killing civilians, it does so only because of the further goods such advantage will lead to ... This view has the radical implication that no act by soldiers on a side without a just cause can satisfy [*in bello*] proportionality: if their acts produce no expected goods, they can never be just. ... If we consider the morality of war rather than its legality, the independence of its two branches cannot be maintained.^{xv}

The conviction expressed by McMahan and Hurka is appealing: moral principles are not as flexible as legal principles; unlike the scope of the former principles, the scope of the latter principles is not a matter of decision, and cannot be restricted for pragmatic reasons. Hence, as a distinction within the sphere of *justice*, the *in bello/ad bellum* distinction is untenable. Wars of aggression are essentially evil; soldiers who contribute to these wars – even if they do so in accordance with the *in bello* code – do evil. In particular, they violate the natural rights of the (innocent) soldiers they kill on the battlefield and the civilians they put under the risk of collateral damage. They do so for no good reason; therefore, such acts cannot be proportionate.

II. The Short Answer

The complaints – as both McMahan and Hurka express them – convey two distinct sets of worries. The first regard the *logical* consistency of the traditional view. Let me put these worries in order:

(a.) The traditional view is viciously circular. Soldiers are morally equal on the assumption that they comply with the *in bello* code. Yet, the *in bello* code is built on the assumption that the soldiers are morally equal.

(b.) The traditional view appeals to the ethics of self-defense in establishing the moral equality of soldiers. But the ethics of self-defense is nonegalitarian: a guard who shoots a bank-robber in self-defense and a bank-robber who shoots a guard in self-defense are not morally equal. Hence the appeal to the ethics of self-defense is fallacious.

(c.) The *in bello* proportionality constraint – as it is formulated by the traditional view – cannot be satisfied by unjust combatants.

This section proposes a “short answer” to this set of worries. The short answer proves that the traditional notions of self-defense, equality, and proportionality employed in the traditional view form a perfectly consistent theory of just war. However, the short answer raises a further set of deeper worries that regard the *ethical* coherence of the traditional view. I shall present these worries in section III and address them in section IV.

The short answer is based on a simple observation. Natural moral rights – as they are

construed in the Western political tradition – are exchangeable. We have such rights by virtue of being autonomous subjects; that is, having rights typically involves the power to waive them, in order to gain other rights. In particular, soldiers are morally equal because they accept a legal convention that commands equal concern and respect for all soldiers, regardless of the moral status of the political decisions that they are carrying out.

Let us look at a micro-level case in which basic moral rights are exchanged. Members of domestic societies have a right not to be attacked by others. By entering the ring, a boxer waives this right and – in return – gains a right-privilege to attack his rival. Note, first, that *ex ante* (i.e., before the match) the convention that governs boxing is considered by both sides to be mutually beneficial. This is why we can safely presume that the boxers accepted it. Note, further, that the redistribution of rights within the boxing ring is not produced by *explicit* agreement. Rather, it is generated by the tacit acceptance of the rules, which is indicated by their entering the ring. The analogy should be clear: the *legal* rules that govern the combat in war free soldiers from making sure that they fight with just cause. By wearing uniforms, soldiers accept these rules; they give up their right not to be attacked by soldiers in other armies (in case these latter soldiers were ordered to do so by their political leadership). By accepting this convention, they give the enemy soldiers the right to attack, in obedience to their political and military leadership; in return, they gain the same right.

McMahan disagrees. He argues that soldiers who were “forced to become combatants by unjust aggression against their homeland” did not consent to be attacked by their enemy. It would be absurd “to imagine people consenting to being killed by the invaders,” he says.^{xvi} But the traditionalist's reply to this complaint is quite simple: soldiers attribute the crime of aggression to the leader who commanded it, rather than to the soldiers who carry it out; the soldiers “just follow orders.” Indeed, no one consented to waive the right not to have an unjust war declared against them.

Three features of the traditional convention are crucial to its "moral efficacy." First, the legal equality of soldiers is not an abusive or radically unfair norm. Secondly, decent

societies have a right of self-defense, and hence, it is morally permissible to be a soldier in such societies. Finally, the moral equality of soldiers is conventional in Lewis's Humean sense:^{xvii} The practice of treating soldiers as equal is (at least *ex ante*) a *mutually beneficial* regularity. Let me briefly argue for this final claim: Blind obedience is the essence of the profession of arms. The permission to follow legal orders entitles soldiers to undertake the duty of obedience. The obedience of soldiers enables armies to place themselves under the full control of the state. The full control states have over their armies enables them to launch a just preemptive attack or to form credible deterrent threats. The ability to launch a preemptive attack and to pose a deterrent threat is necessary for efficient self-defense.

I assume that the universal acceptance of a convention that has the above three features generates a redistribution of moral rights. The short answer dissolves the worry expressed by (a). It is true that in constructing the *in bello* code, the legislator seeks restrictions that apply to belligerents equally, irrespective of the justice of their cause. But contra Walzer, this legislative goal is *not* justified by – or based on – the moral equality of soldiers. Rather it is justified, independently, by the benefit to all that is provided by such egalitarianism; in virtue of this justification, it is nearly universally accepted by soldiers. And it is the tacit acceptance of this rule that generates the moral equality of soldiers. So, the contractual argument involves no vicious circularity. As for (b), the difference between the bank-robber and the unjust combatant is simple. The convention entitles soldiers to be obedient. That is, they are allowed to disregard *ad bellum* considerations; unjust combatants have a right *not* to know whether the cause of their war is just. There is no analogous story to tell about the robber.

The dissolution of the third worry, as it is formulated in (c), follows naturally from the short answer to (a) and (b). The probable effects of the victory in an unjust war, the stated goals of such a war, and the contribution of the individual act to the accomplishments of unjust goals are simply irrelevant to *in bello* proportionality, just as they are irrelevant to the *in bello* regulations in general. Rather, the requirement of *in bello* proportionality should be

understood in light of the moral equality of soldiers and the duty of obedience that the traditional convention legitimizes. Put briefly, *in bello* proportionality requires that the measures soldiers take in fulfilling this duty won't be unnecessarily harmful; the enemy soldiers should be treated as if they are innocent. Restrained soldiers manifest an *internalization* of the basic idea of the egalitarian war convention. They try to accomplish the mission assigned to them while causing minimum damage to the other side.

Proportionality has another aspect. Within war, armed forces ought to have one super-goal: victory. The victory of one side is defined by the law as the surrender of the other side, and surrender is an identifiable rule-governed legal event. Proportionality requires that the victory (i.e., the surrender of the enemy) or, in some rare cases, the postponing of defeat, would be the *only* ultimate objectives of *the armed forces* in war. It additionally requires that the measures taken for accomplishing victory would not be unnecessarily harmful.

To better understand this requirement, let us imagine a paradigmatic violation of *in bello* proportionality. Think of a general who is about to win a certain battle. Yet, one of his further objectives in fighting this battle is to kill as many enemy soldiers as possible. For reasons of self-interest, he'd rather avoid committing war crimes. So he plans the battle in a way that makes it harder for the enemy to surrender. He violates the *in bello* proportionality because he has no *strategic* reasons for the killings he commits. His actions display bloody hatred of the enemy. As Walzer reminds us, such bad generals are everywhere, “every military history is a tale of violence and destruction out of all relation to the requirement of the combat: massacres ... and, ill-planned and wasteful battles that are little better than massacres.”^{xviii} In contrast, a restrained general keeps his soldiers in check – and his strategy is aimed at winning as quickly and with as little damage as possible.

Note that the bad general might act out of *justified* hatred – there might be circumstances in which the individuals he excessively and unnecessarily injures *deserve* the harm inflicted on them. They support their corrupt leader and are wholeheartedly identified with the regime he leads. Even then, the unnecessary killings are disproportionate. For, the

war convention disregards considerations of culpability and deserts in the battlefield. Again, the analogy to sports matches is helpful: boxers might have many different ulterior motives. It is certainly possible, for instance, that what a boxer really wants is to humiliate his rival. But when the match between them is in progress, his behavior should be guided by the definitional objective of the match, namely: wining. Unnecessary humiliation is inappropriate, even if it does not involve a violation of the rules of the game.

In sum, a soldier might be restrained by morality, even if he is fighting for a state that is conducting an unjust war. First, he is entitled to follow (*in bello*) permissible orders by virtue of the mutual acceptance of the traditional convention. Secondly, he may do so in a proportionate way; that is, in a way that minimizes unnecessary harms.

The full restraining strength of the *in bello* proportionality requirement is revealed in Walzer's discussion of the nuclear bombings of Hiroshima and Nagasaki.^{xix} This discussion conveys the somewhat implicit message that the numbers of killed enemy soldiers should count in *selecting* the type of victory to which a state should aim. In particular, it is possible that an *ad bellum* desirable goal is ruled out by the *in bello* proportionality requirement. Let me explain.

Walzer grants (for the sake of the argument) that the casualties caused by the atomic bombs dropped on Hiroshima and Nagasaki are not nearly as many as there would have been had the American air force continued fighting until the Japanese would unconditionally surrender. He further assumes that the Americans would have fought in strict accordance with the *in bello* rules. Finally, he grants (again, merely for the sake of the argument) that forcing the Japanese to acknowledge their total defeat was morally desirable. He nevertheless argues that "even if ...the unconditional surrender was [indeed] morally desirable it might still be morally undesirable because of the actual human costs it entailed."^{xx} Under the *ad bellum* code, aiming at *unconditional* surrender is justified, and such surrender can be achieved in accordance with the other *in bello* rules. Yet, the equality of soldiers entails that the enemy

soldiers should be treated *as if* they are innocent. Hence, *in bello* proportionality implies that since the numbers are that big, the Americans should have been satisfied with *conditional* surrender.

III. Is the Short Answer Morally Coherent?

The short answer dissolves the “mystery” as to what traditionalists *could mean* by insisting that unjust combatants can satisfy the *in bello* proportionality requirement in the way just combatants do so. It clarifies in what sense they can be restrained by morality. Still, it would strike many as suspicious. The traditional view – as it emerges from the short answer – undermines the basic idea that the “basic constituency of all morality must be individuals.”^{xxi} And as such, it is a morally incoherent system. Or so purists would argue.

Let us focus on a combatant who clearly realizes that the war he is about to fight is unjust: his leader is corrupt, the leader's victory in the war would be a moral disaster, and on top of this, as an unjust combatant he is likely to kill innocent people who defend their country. The short answer points to three normative facts. First, in decent societies, it is permissible to be a soldier. Second, a soldier is entitled to undertake the duty of obedience, as a result of the nearly universal acceptance of the traditional war convention. Thirdly, the convention is (at least *ex ante*) mutually beneficial. Purism, as I reconstruct it here, accepts all this, yet denies that these facts have the weight attributed to them by the short answer. It is still impermissible for a soldier to further an unjust goal by killing innocent people.

Consider, first, the tacit consent attributed to just combatants. True, in some contexts, consent is of some importance. Killing a person against his will is murder, even if this person's life is not worth living; the moral status of this killing is radically different if the victim asks to be killed. But the short answer clearly overstates the significance of consent; it is wrong to kill a person in a duel, despite the mutual consent involved. And, surely, the killings committed in unjust wars are more like wrongful killings in duels. The killings by unjust combatants in war are worse, because they further an unjust goal. Purists may thus concede that, due to the acceptance of the war convention, killing an unjust combatant does

not necessarily involve a violation of his right to life; yet they insist that these killings are still impermissible.^{xxii}

Neither do purists deny that soldiers are under duty of obedience and that the undertaking of this duty is somewhat important. They concede that unjust combatants have a moral reason to follow orders. *Prima facie*, soldiers in decent societies ought not to subvert the military forces in which they serve. Purists argue, however, that this set of contractual duties may sometimes be overridden. *All things considered*, unjust combatants ought to refuse taking part in an aggressive war. For, their institutional commitment notwithstanding, soldiers have a moral reason *not* to kill innocent people in order to further the unjust goals of their political leaders. Such a reason is very rarely outranked:

There is a limit to what a person is required to do by his role within a just institution ... killing people who have done no wrong and depriving people of their political freedom lie beyond these limits. ... it is hard to accept that an executioner would be justified in executing a person he knows to be innocent....^{xxiii}

The fact that the *in bello* legislation is mutually beneficial cannot shake the powerful conviction McMahan expresses.^{xxiv}

The gist of the purist counterargument is perfectly general. Moral deliberation involves weighing *all* the moral reasons that can be offered for and against the action at stake. By its very nature, deliberation is unbounded and infinitely inclusive. Disregarding a relevant factor – like the cause of a war or the moral innocence of just combatants – is impermissible. Indeed, the very idea of a moral right to disregard a morally relevant consideration is incoherent

I wish now to offer an analogy. I shall argue that the philosophical conviction that underlies the purist rejection of the traditional war convention is further illustrated by G. A. Cohen's critique of the Rawlsian distinction between the personal and the political.^{xxv} I shall later use the analogy to support a "divisional" conception of moral reasoning.

Rawls argues that a society's basic structure should be designed so that social and economic inequalities would be to the greatest benefit of the least well off members of society.^{xxvi} Rawls infers from this principle that a just tax regime allows for (undeserved) inequalities. Equal distribution of a society's goods is ideal. But if a certain kind of unequal distribution – for example, according to one's contribution to the social product – would increase the social product and thereby benefit even the least well off members, then the society ought to allow such an unequal distribution. Generally, talented people would not work as hard and would not contribute as much to the social product if taxation would reduce their income to the income of the poor. Hence, a tax regime ought to allow inequality in net incomes as far as the resulting incentives tend to raise the lowest income.

Now, crucially, Rawls's inference is valid only if a deeply divisional conception of moral reasoning is presumed. Agents operating in the free market are allowed to maximize their income. Surely, however, this acquisitive behavior causes inequalities (that the tax regime reduces). That is, for Rawls, agents in the free market permissibly lack the knowledge about the effects of their acquisitive behavior on social justice. On the other hand, citizens in a just society put effort and time into designing a tax regime. While doing so, they take social justice to be their sole concern. Thus, for Rawls, what we owe to each other as fellow citizens through our common institutions is very different from what we owe to each other as private individuals. We live in two parallel spheres: in our "private" lives we pursue our own personal projects; our "individual" choices are not expected to be governed by principles of social justice. Yet, as citizens, we should struggle for the justice of the institutions to which we are subjects.

Cohen finds this incoherent: if justice requires the basic structure of the society to be designed optimally to promote the well-being of the least well off, justice requires *personal choices* of citizens to promote this goal as well. Or, as he puts it, "if we care about social justice, we have to look at four things: the coercive structure, other structures, the social ethos, and the choices of individuals."^{xxvii} Following Cohen, Murphy says: "If people have a

duty to promote just institutions, why do they lack a duty to promote whatever it is that just institutions are *for*?^{xxviii} Indeed, it makes no sense to require citizens to pursue egalitarian justice in one way – through efforts at basic structure design – but not to require them to pursue it in other ways as well.^{xxix} Hence, talented moral people would be motivated by their true commitment to the difference principle in forming their personal preferences. In operating in the free market, they would be much less acquisitive. The conviction underlying this critique is, again, perfectly general: in deliberating as citizens, we ought to take facts about social justice as overwhelming considerations. But moral deliberation is unboundedly inclusive: reasons of justice are relevant to any other choice situation. It follows that personal choices ought to be guided by reasons of justice, as well as by other considerations.

The analogy, in a nutshell, is this: on Rawls's conception of political justice, there are choice situations in which we are entitled to disregard relevant information about the inequalities our acquisitive behavior generates. Purists like Cohen object to this divisional conception of moral deliberation. On the traditional conception of just war, aggressive states are criminal; citizens of such states are required to put effort into preventing the outlawed violence these states would exercise. But oddly, soldiers are not required to do so. They are entitled to lack the relevant knowledge as to the cause of the war they fight. As soldiers, their moral deliberation might be restricted to *in bello* considerations. McMahan finds this divisional conception of moral reasoning untenable.

IV. The Moral Division of Labor and the In Bello/Ad Bellum Distinction

IV.1 The Counterintuitive Implications of Purism

Purism regarding the ethics of war yields very counterintuitive results. Here are a couple of them. We have so far focused on soldiers who are required by the state to participate in an unjust war. Let us look at a soldier (ranked highly in the chain of command) who finds himself in different circumstances. Our general realizes that his country lies under an imminent threat from a military rival. A prevalent misconception blinds the political leadership; the politicians are unaware of the imminent threat. The general reasonably

conjectures that waiting for the order to initiate a preemptive attack would cause the wasteful death of thousands of innocent people on both sides. He also recognizes how morally important allegiance to his institutional commitments is; he nevertheless reasonably believes that it is not as important as saving thousands of people from death. So he preemptively attacks, and a war starts (we'll call him 'the active general'). As he predicted, no political leader knew of the provocative nature of the general's action; all the politicians were under the impression that the other side was the first to use force. That is, his infinitely inclusive and open moral deliberation recommends an unauthorized attack. Yet, as far as commonsense morality is concerned, there is no real doubt that the general had the right *not* to consider an unauthorized attack.

Or, consider the executioner McMahan concisely discusses in an above-quoted passage. The executioner knows that the prisoner he is about to execute is totally innocent. Purists believe that "it is hard to accept that the executioner would be justified in executing [the prisoner]." Let us grant this for a moment. Still, suppose the executioner did not follow McMahan's advice. Would we like to describe his lawful killing as *morally equivalent* to excused murder? Or, suppose that the executioner did not know that the victim is totally innocent; would we want to describe his ignorance as a merely valid excuse for a wrongful killing?

As Pogge points out,^{xxx} Cohen's purist conception of justice faces similar worries. Suppose you are in a position to steal from the bank that recently hired you. Suppose further that justice requires heavier taxation on firms, and that in the near future these taxes are unlikely to be imposed. So you unlawfully transfer some of the bank's funds to the poor. One question is whether you did the right thing, or whether the embezzlement is justified. Another is: Aren't you entitled not to consider breaking the law? Whatever the answer to the first question, the commonsense answer to the second seems clear – in the circumstances we specified, the banker has the right to disregard some considerations of societal justice.^{xxxi}

These examples might suggest that egalitarian justice would not be better achieved if

it is more widely pursued.^{xxxii} Freeing people from the duty to promote distributive justice in their personal lives might well be a better way to promote justice. (The analogy to Adam Smith's invisible hand is obvious: freeing people from the duty to maximize general utility and allowing them to maximize their own well-being is the way to maximize general utility.) But such a response to the challenge does not really address the fundamentally attractive conviction that underlies purism. True, in examining the desirability of a *legal* norm, a Kantian question is in place: "what if every one would do that?" This question is irrelevant to the particular decision the banker, the active general, and the executioner have to make. If moral deliberation is as inclusive and unbounded as purists take it to be, these individuals have to tackle a particularistic question. "How likely is this violation of my institutional commitment to cause an injustice?" By stipulation, their violations of the institutional commitments are unlikely to cause any further harm or injustice. Even so, they seem to be exempted by morality from weighing a certain set of normative facts by virtue of their institutional commitment. Purists challenge this exemption; it seems to them incoherent.

I conclude, therefore, that a successful Rawlsian approach to the cases at hand must defuse the seemingly attractive conception of moral deliberation as infinitely inclusive. Something must have gone wrong with this conception. Contractual morality – a system built on the exchange of rights for mutual benefit – divides the moral labor in a way that allows divisional moral reasoning. Or so I shall argue in the next section.

IV.2 Conventionally Moderated Morality: On the Moral Division of Labor

Why is the executioner entitled to put to death a convicted innocent person, without checking himself whether his victim deserves capital punishment? I shall argue, in this section, that one crucial descriptive fact does the explanatory work. The executioner is required by the convention that governs the basic coercive structure of the society to disregard considerations of justice, partly *because* the convention obliges the *courts* to respond to considerations of this sort. This convention is nearly universally accepted because of being beneficial to all. And the universal acceptance of the convention has normative implications. In particular, it is

the basis of the executioner's *moral* right not to be guided by considerations of desert.

Let me describe a conception of morality that divides the moral labor in this way. It is based on two related claims. First, moral requirements are not “excessively high-minded”; the rule “ought implies can” is interpreted, within this system, as saying that morality does not require moral sainthood. More specifically, morality does not condemn our natural tendency to promote our own self-interest, to pursue our personal projects, or to give priority to the interests of the near and dear. Morality merely restricts our partiality. More importantly for my purposes here, moral requirements are *cognitively* moderated; i.e., they are sensitive to human cognitive limitations. That is, “ought implies can” implies that in many circumstances morality does not require knowing *all* the morally relevant facts.

To illustrate this idea, consider the egalitarian aspect of the Lockean morality of the state of nature. It comes down to this: the earth belongs to men in common. This principle might be institutionalized by two distinct egalitarian models. One is the common property model, according to which “resources are governed by rules whose point is to make them available for use by all or any members of the society.” The other is the collective property model, in which “the community as a whole determines how important resources are to be used. These determinations are made on the basis of the social interest through mechanisms of collective decision-making.”^{xxxiii}

Individual humans, however, have the moral right to be partial. Therefore, “the tragedy of the commons” is not only devastating but also morally interesting: “If everyone is entitled to use a given piece of land, then no one has an incentive to see that crops are planted or that the land is not over-used.”^{xxxiv} Note that were we moral saints, we would care about others' interests to the degree we care about ours. Common property would create an incentive in all of us to make sure that the crops are planted or that the land is not overused. And, were our cognitive limitations less severe, efficiently coordinating a shared treatment of the land would not be impossible. By allowing for private property, morality recognizes human partiality and human cognitive limitations. Rather than undermining self-interest,

morality controls it by limiting the scope of the right to private property. “The needy Brother [has] a *Right* to the Surplusage of [another’s] Goods; so that it cannot justly be denied him, when his pressing Wants call for it ... Charity gives every Man a *Title* to so much out of another’s Plenty, as will keep him from extream want where he has no means to subsist otherwise.”^{xxxv} The Lockean morality of the state of nature is a trade-off between two opposing forces; and it seems to reflect deep commonsense moral convictions.

The second idea central to the morality I describe here has to do with the *way* its requirements are moderated. Put roughly, morality is moderated by a social cooperative arrangement that divides the moral labor. Thus, individuals operating in the market are free to maximize their profit, despite the fact that their acquisitive behavior generates inequality. This is *because* society as a whole is under the duty to legislate and enforce social justice. Furthermore, they are free to lack the relevant information as to the effects of their acquisitive behavior. For, again, within the social structure, others are under the institutional duty to obtain this information. The same is true of the executioner and the active general. In deliberating whether to fulfill his duty, the executioner has a right to disregard any belief of his as to the justice of the execution; when the active general is on duty, he has the right to disregard any belief of his as to the justice of the unauthorized preemptive attack.

Purists might ask: How does the executioner’s institutional duty dissolve the victim’s right to life? After all, doesn’t the victim have a (“natural”) claim against the executioner that he won’t kill him? The answer to this question brings us back to the short answer. The tacit acceptance of the convention is an inherent part of the conventionally moderated morality I describe. To wit, subjects tacitly accept the assembly of rules that govern the commonwealth; this tacit acceptance generates a redistribution of rights and duties. In particular, the innocent victim’s claim against the executioner is lost *because* (within the conventionally sustained social structure that the victim accepted) the state – rather than the executioner – violates his right to life. In other words, our society is so structured that it involves a tacit convention that an innocent person has a right against the courts that they not order her execution, but she

does not have a right against an executioner that he carry out such an order. Similarly, for unjust combatants: in fulfilling their duty of obedience, they do not violate any claim just combatants have against them. The just combatants lost their particular claim by tacitly accepting the division of moral labor conventionalized by the distinction between the *in bello* and the *ad bellum*. In deliberating whether to fulfill their institutional duty, these individuals are exempted from attending to moral considerations, which others in the social structure are under institutional duty to respond to. This is how morality shows sensitivity to their cognitive limitations. Indeed, in this political structure, a requirement to be aware of *ad bellum* considerations would be excessively high-minded.

Compare this interpretation of the argument form of institutional commitment to McMahan's reading of it. As it is understood by McMahan, the argument says that it is a moral necessity to uphold the "efficient functioning of just institutions," even if on occasion that requires doing injustices. This reading *is* vulnerable to McMahan's purist critique: the reason one has to uphold the efficient functioning of just institutions is easily defeated, or outweighed, by the reason one has not to kill innocent people. As I suggest understanding it, however, the point of the argument is quite different. Divisional morality says that requiring inclusive moral deliberation from individuals is excessively high-minded. It also specifies how moral requirements are moderated. So if occupying a role that is generated by a social structure is morally permissible, subjects are free to follow their institutional commitment without being engaged in weighing considerations which others in the relevant social structure ought to weigh.

IV.3 Comments on Responsibility and Justification

I have used the language of rights in explaining how the moral labor is divided and in formulating the normative implications of this division. I have suggested that divisional morality entitles soldiers not to consider or be guided by *ad bellum* considerations. Let me now express this suggestion in terms of two other moral concepts: responsibility and justification.

In its strongest (implausible) version, moderated morality says that the executioner's right to lack the morally relevant information absolves him from moral responsibility, or even from moral agency. The agents responsible for the killing of the innocent victim are the state and those whose institutional commitment obliges them to implement justice in punishment. The executioner is merely the medium through whose agency the state acts. Basically, the same is true of the active general. Now, as citizens, both the executioner and the unjust combatants are responsible for the wrongs their states commit. But, in its strongest version, divisional morality entails that they are not responsible for the state's wrongful killings any more than are other citizens. Certainly, this strong version should be weakened in light of our conception of agency. There is a special relation between the actions of the state and those of the individual subjects who carry them out. Sensitive agents engaged in wrongful killing cannot avoid the moral emotion famously described by Williams as "agent-regret."^{xxxvi} Agent-regret is a symptom of the special relation between a person and the direct consequences of his actions. I cannot tell, however, *how* the strong version of the conventionally moderated morality should be modified.

Moderated morality entitles soldiers to disregard morally relevant considerations. Are soldiers *justified* in disregarding these considerations? The answer might well be: No. If I am correct, it is permissible to be only moderately moral; but permissions or exemptions do not necessarily constitute justifications; it might be morally wrong to be merely moderately moral. Thus, facts about exemptions can be put in terms of "weak moral permissibility": A is (weakly) permissible if and only if by A-ing, the agent violates no claim held against him. The weakness of this notion of permissibility is revealed by the fact that (as a matter of conceptual possibility) it is *not impermissible* to prevent the agent from A-ing. To illustrate, defeating your rival in chess is morally permissible. Clearly, it is also permissible for your rival to prevent you from defeating him. The crucial feature of weak permissibility is that it is a middle-ground category; though the fact that X's A-ing is weakly permissible does not imply that X's A-ing is justified it does imply that it is more than merely *excusable*. Thus,

moderated morality does not entail that the executioner is morally *justified* in killing an innocent convicted person, or that the general is justified in failing to wage the unauthorized attack. Letting the innocent victim escape, or launching the unauthorized attack might be heroic; and it would be wrong not to be heroic. Still, both agents are exempted from promoting the greater good.

Two arguments that we have already discussed miss the distinction between permission and justification. In responding to the argument from institutional commitment, McMahan says “it is open to doubt whether the efficient functioning of the military would be fatally compromised by weakening of the automaticity of obedience to orders to fight in a war.”^{xxxvii} Based on the plausible empirical conjecture that the functioning of the military would not be compromised by individual acts of refusals, he goes on to argue that an unjust combatant is *justified* in refusing to participate in an unjust war, and that it would be morally wrong not to do so. So if an unjust combatant fails to refuse because of his cognitive or moral limitations, his killings are merely *excused*. McMahan misses the basic idea that inspires conventionally moderated morality: a moral division of labor creates a realm of moral rights, which can be characterized neither by the notion of justification nor by the notion of excuse. Even if McMahan’s empirical conjecture is a truth that *justifies* refusal by the unjust combatant, this combatant’s participation in the war might still be permissible. In other words, a soldier might have a right to kill enemy soldiers in war, while being obliged to waive this right; he has a right to be partial even if morality requires impartiality.

Cohen overlooks this possibility as well. For him, undeserved inequalities are unjust. Agents operating in the free market whose acquisitive behavior causes undeserved inequalities are immoral. Cohen immediately raises the “huge” question of blame: are the acquisitive people blameworthy for the injustice they cause?^{xxxviii} He seems to answer negatively: in a capitalist society, where self-interest is a norm that governs the market, people are *excused* for the failure to be guided by considerations of social justice. Put in his words, “it is essential to apply principles of justice to dominant patterns in social behavior –

that, as it were, is where the action is – but it doesn't follow that we should have a persecuting attitude to the people who emit that behavior."^{xxxix} That is, Cohen believes that acquisitive behavior is excused. If so, he misses another possibility: agents operating in the free market have the right to act in their own self-interest; i.e., their acquisitive behavior is permissible. The division of labor does not *justify* their acquisitive behavior, but it does more than excusing it.

Another possible version of the purist argument against the war convention is built on the same confusion. Since this version of purism might look attractive, I shall close by developing it in some detail.

As already noted, in defending the Rawlsian dualism, Pogge points out that a regime that entitles men and women to pursue their own personal projects might sustain a social structure that better achieves justice than the one Cohen envisions. Purism with respect to the war convention might accept Pogge's conjecture and argue for a clear disanalogy between the Rawlsian divisional structure of morality and that of the traditional morality of war. In Rawls's theory, justice is an institutional virtue, and individuals are not always required to take this virtue into consideration in their deliberations; similarly, in the traditional just war theory, states, their leaders, and their citizens – but not their soldiers – are required to be guided by considerations of *jus ad bellum*.

Now, the *disanalogy* – purists might argue – is much more important: if Pogge's conjecture would turn out to be true, the divisional norms recommended by the Rawlsian theory sustain a just society. In contrast, the war convention permits (and thus legitimizes) killing innocent people for *no* good reason. After all, were soldiers accountable for the violence they exercise – were they required to justify the war in which they participate in a national or an international court – the number of unjust threats would have been minimized. Requiring accountability from soldiers is not excessively high-minded. So, the alternative norms purists envisage are superior to the traditional norms, even from the standpoint of moderated morality. Purists might further argue that individual soldiers who *deny* the validity

of the distinction between *jus in bello* and *jus ad bellum* by responding to *ad bellum* considerations are moral pioneers. Those people make “a path which [will] become easier and easier to follow as more and more people follow it, until social pressures are so altered that it becomes harder to stick to [the old] ways than to abandon them.”^{x1} That is, purism (as I read it now) views repeated acts of refusal to participate in unjust wars as elements of the continuous struggle against a morally flawed norm.

But are ordinary people required to struggle for such a radical social change? A plausible version of moderated morality will answer this question in the negative. If the change is desirable, the struggle for such a change would be certainly admirable; refusals to participate in unjust wars are further justified because they contribute to implementing a better social norm. Still, the current norm is not indecent or egregiously immoral. Moreover, the mutual acceptance of the current convention is mutually beneficial. Hence, *moderated* morality does not impose the duty for generating "big" social changes in societies; soldiers might well be exempted from considering the likelihood that their heroic refusals will bring about the desirable changes.

Summary

A social structure that divides the moral labor serves to moderate the requirements of morality. In particular, there are circumstances in which conventionally moderated morality entitles those who occupy a role within this structure to disregard considerations to which others, who occupy other roles, should respond by virtue of their institutional commitment. I have shown that the distinction between *jus in bello* and *jus ad bellum* is validated by such a conception of morality. I have also shown that the counterintuitive implications of the alternative, purist conception of morality and moral reasoning speak clearly in favor of this conception of morality.

ⁱ This and other statements about the international law are drawn from Yoram Dinstein, *War, Aggression, and Self-Defence* (Cambridge: Cambridge University Press, 1988).

- ii Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), pp. 34-44.
- iii Ibid., p. (229
- iv Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004), pp. 693-733, p. 717.
- v International Military Tribunal (*Nuremberg*), Judgment (1946), *International Military Tribunal* 1:171, 219-23, quoted in Dinstein, *War, Aggression, and Self-Defence*, at p. 119.
- vi General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact of Paris), 1928, *L.N.T.S.* 94:57; quoted in Dinstein, *War, Aggression, and Self-Defence*, at p 81.
- vii Charter of the United Nations, 1945, *Int.Leg.* 9: 327, 346, quoted in Dinstein, *War, Aggression, and Self-Defence*, at p. 155.
- viii Dinstein, *War, Aggression, and Self-Defence*, at pp. 156-57.
- ix David Rodin, *War and Self-Defense* (Oxford-New York: Clarendon Press-Oxford University Press, 2006), p. 167.
- x Dinstein, *War, Aggression, and Self-Defence*, at p. 157.
- xi Walzer, *Just and Unjust Wars*, pp. 34-44.
- xii Ibid., pp. 127.
- xiii For an elaboration of this line of objection, see McMahan, "The Ethics of Killing in War," section I.
- xiv McMahan, "The Ethics of Killing in War," p. 715.
- xv Thomas Hurka, "Proportionality in the Morality of War," *Philosophy and Public Affairs* 33 (2005), pp. 34-66, at p. 44.
- xvi Jeff McMahan, "On the Moral Equality of Combatants," *Journal of Political Philosophy* 14 (2006), pp. 377-93 .
- xvii David Lewis, *Convention* (Cambridge, Mass.: Harvard University Press, 1969).
- xviii Walzer, *Just and Unjust Wars*, at p. 130
- xix Ibid., pp. 263-68
- xx Ibid., p. 267.
- xxi Thomas Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs* 33 (2005), pp. 113-47, at p. 124.
- xxii See McMahan, "On the Moral Equality of Combatants," p. 381, where this argument is presented.
- xxiii McMahan, "On the Moral Equality of Combatants," p. 385.
- xxiv Ibid.
- xxv See, e.g., G. A. Cohen, "Where the Action Is: On the Site of Distributive Justice," *Philosophy and Public Affairs* 26 (1997), pp. 3-30.
- xxvi See John Rawls, *Political Liberalism* (New York, Columbia University Press, 1993), p. 6.
- xxvii Cohen, "Where the Action Is," p. 26.
- xxviii Liam Murphy, "Institutions and the Demands of Justice," *Philosophy and Public Affairs* 27 (1999), pp. 251-91, at p. 280.
- xxix This is an almost direct quotation from Thomas Pogge, "On the Site of Distributive Justice: Reflections on Cohen and Murphy," *Philosophy and Public Affairs* 29 (2000), pp. 137-69, at p. 159.
- xxx Pogge, "On the Site of Distributive Justice," at p. 162.
- xxxi A purist response to this challenge might introduce the notion of side- or deontological constraints: institutions should promote justice without violating the rights of individuals and firms; so Cohen might believe that the same is true of individuals. Applied to the cases at hand, however, the notion of side-constraint seems unhelpful; inviolable rights that function as side-constraints are usually attributed to individuals. And neither the good banker (who violates the rights of a bank) nor the good general (who violates his duty to the state) do that. Cf. Pogge, ad. loc.
- xxxii Pogge, "On the Site of Distributive Justice," at p. 160.
- xxxiii The quotes are from Jeremy Waldron, "Property," *Stanford Encyclopedia for Philosophy* (2004).
- xxxiv Ibid.
- xxxv John Locke, *Two Treatises of Government* (1960), vol. 1, p. 42, quoted from Laslett's edition (Cambridge 1960) by Jeremy Waldron, "Enough and as Good Left for Others," *The Philosophical Quarterly* 29 (1979), pp. 319-28, at p. 327.
- xxxvi See Bernard Williams, "Moral Luck," reprinted in his *Moral Luck* (Cambridge: Cambridge University Press, 1981), pp. 20-39.
- xxxvii McMahan, "On the Moral Equality of Combatants," p. 386; cf. idem, "The Ethics of Killing in War," section III.

xxxviii Cohen, "Where the Action Is," section IV.
xxxix Ibid., p. 26
xl Ibid.