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THE WAR CONVENTION AND THE MORAL DIVISION OF LABOUR

BY YITZHAK BENBAJI

My claim is that despite powerful arguments to the contrary, a coherent moral distinction between the jus in bello code and the jus ad bellum code can be sustained. In particular, I defend the traditional just war doctrine according to which the independence between the in bello and ad bellum codes reflects the moral equality between just and unjust combatants and between just and unjust non-combatants. In order to establish this, I construe an in bello proportionality condition which can be satisfied by just and unjust combatants alike.

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 according to the *ad bellum* code, a state which initiates an aggressive war is condemned by international law as having committed a crime; but this condemnation finds no echo in the *in bello* code with respect to the soldiers who carry out the war. Rather, legally speaking, soldiers' acts of killing within armed conflicts are permissible so far as they follow the *in bello* regulations; and these regulations are designed to apply to soldiers independently of the cause for which they fight.¹

Michael Walzer's interpretation of this tradition is surprising and controversial: soldiers, he claims, are morally equal, whether they are carrying out aggression or defending against aggression, and the egalitarian *in bello* code is a reflection of this moral fact.² Walzer explicitly rejects the claim that the equality of soldiers 'is merely conventional', whereas soldiers' true moral rights in war depend on the justice of the cause for which they fight. He rejects (p. 229) the 'the more justice the more right' morality of war.

Some prominent critics (whom I shall call 'purists') are quick to attack this interpretation: Walzer, they argue, fails to attend to the merely conventional

¹ This and other statements about the international law are all drawn from Y. Dinstein, *War, Aggression, and Self-Defence* (Cambridge UP, 1988).

² M. Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), pp. 34-44.

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 killings committed by unjust combatants are morally permissible. Further, he seems to believe that acts that constitute prosecution of the unjust war might satisfy the *in bello* proportionality constraint, i.e., that the good effects of such acts might outweigh their bad effects. 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. Unjust combatants kill morally innocent people, i.e., soldiers who are exercising their right of self- and other-defence. Such acts cannot be proportionate, nor, therefore, morally permissible. In sum, Walzer simply overlooks the deep moral asymmetry between just and unjust combatants.

In this article I aim to draw a coherent moral distinction between the *in bello* and the *ad bellum* codes which would explain the above incongruity between them. §I presents in more detail the purist worry as to the coherence of the *in bello/ad bellum* distinction. In §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 have a right to kill just combatants in self-defence, and that these killings might satisfy the requirement of proportionality. §III exposes the real issue between purists and traditionalists: purists find the traditional distinction morally incoherent, rather than logically inconsistent. §IV addresses this real and deeper worry.

I. THE PURIST CHALLENGE

I shall introduce the purist challenge by discussing a distinct but closely related problem. There is a *legal* distinction between the *in bello* and the *ad bellum* codes. As the Nuremberg tribunal asserts, wars of aggression are essentially evil.³ 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’, outlawed wars of aggression for the first time.⁴ Later the UN Charter criminalized such wars and placed the legal responsibility for them on individual political leaders.⁵

³ International Military Tribunal (*Nuremberg*), Judgement (1946), quoted in Dinstein, *War, Aggression, and Self-Defence*, p. 119.

⁴ General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg–Briand Pact of Paris), 1928, quoted in Dinstein, p. 81.

⁵ Charter of the United Nations, 1945, quoted in Dinstein, p. 155.

Many have argued that this change should have had a tremendous impact on the conventions which regulate conduct *within* wars. The *in bello* regulations were legislated well before 1928, when initiating a war was not yet officially recognized as wrong, and so no legal distinction was made between the two sides of an armed conflict. Consequently the *in bello* provisions had to apply without any distinction based on which side had initiated 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 if they have become prisoners of war. It seems, however, that legal recognition of the wrongness of aggressive war should undermine the principle of equal treatment of soldiers. Indeed, the contemporary prohibition of wars of aggression seems to entail radical legal inequality between just and unjust combatants: ‘Stripped 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’ (Dinstein, pp. 156–7).

Failure to recognize the deep consequences of the contemporary criminalization of wars of aggression is problematic: ‘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’.⁶ 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 simply by virtue of participating in such wars acquire rights they did not previously have (Dinstein, p. 157). This immediate implication is flatly denied by the weird conjunction of a discriminating *ad bellum* code with an indiscriminating *in bello* code; for unjust combatants acquire, by their aggression, the right to kill enemy soldiers, a right they did not have in peacetime.

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 which preceded the Kellogg–Briand Pact are still valuable. These rights will not 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 which is unjust. Were soldiers given a

⁶ D. Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), p. 167.

licence 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 of the discrepancy between the two codes. He is well aware of the immorality of wars of aggression. He maintains that even so, the legal equality of soldiers reflects their moral equality.

Walzer's argument (*Just and Unjust Wars*, pp. 34–44) can be sketched thus. One might suppose that the following case is analogous to a war of aggression: 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. But Walzer believes that our view of soldiers participating in a conventional battle is radically different. A soldier who kills another soldier in battle is not considered a murderer even if the soldier he killed was simply defending 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-defence. 'The case is not different from what it would be if [the just combatant] shot [the unjust combatant]. So far as they fight in accordance with the *in bello* rules, no condemnation is possible' (Walzer, p. 127).

What is the difference between the robber and the unjust combatant? Walzer's answer (*ibid.*) 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 have addressed the purist critique of the doctrine of the moral equality of soldiers elsewhere,⁷ so here I shall focus on the other two (intimately related) topics. Walzer seems to make the following claims. First, 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. Secondly, the codes should be independent in this way *because* all combatants are morally equal. These two claims, taken together, seem to constitute a case of viciously circular reasoning.

⁷ See Y. Benbaji, 'The Responsibility of Soldiers and the Ethics of Killing in War', *The Philosophical Quarterly*, 57 (2007), pp. 558–73, and 'A Defense of the Traditional War Convention', *Ethics* (forthcoming).

Furthermore, the *in bello/ad bellum* distinction itself is suspicious. An *in bello* code which applies the same rules to both sides, irrespective of the cause for which they fight, has its advantages: unjust combatants might be more inclined to avoid targeting civilians, to respect the rights of prisoners of war, to halt the killing when the other side surrenders, etc. However, it is simply impossible for unjust combatants to act proportionately. The very idea that the *in bello* requirement of proportionality can be equally satisfied by both sides is incoherent. I shall spell out this purist line of thought in more detail.

In bello proportionality has two aspects. First, it regulates soldiers' attitudes to their enemies. Soldiers ought not to inflict suffering upon their opponents beyond necessity, and in return, they expect not to have suffering beyond necessity inflicted upon themselves.⁸ This is, however, the less important aspect of the proportionality requirement (and it is sometimes understood as a distinct requirement of necessity and minimal force). The primary aspect of *in bello* proportionality concerns collateral harm to non-combatants; it is of crucial importance, since states fighting just wars might have no choice but to use air power in defending their just claims: 'with aerial warfare civilians became extremely vulnerable and were inevitably collateral targets, potentially on a much larger scale than previously'.⁹ The permission implied by *in bello* proportionality is this: notwithstanding the presumed innocence of civilians, soldiers have the right to harm them *collaterally* if the harm inflicted is not excessive, given the military advantage gained by it.

An act is usually taken to be proportionate if its (relevant) good effects outweigh its (relevant) bad effects. But, as McMahan rhetorically asks, 'how ... could a Nazi soldier weigh the harms he would cause to enemy combatants [or to enemy non-combatants] against the end of victory by the Nazis without assigning any value to the victory?'¹⁰ More generally, no individual act which, together with others, constitutes an aggressive war can have good effects which can appropriately be weighed in the proportionality calculation. McMahan concludes (p. 717) 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'. 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

⁸ Thanks here to Paul Gilbert.

⁹ J.G. Gardam, 'Proportionality and Force in International Law', *American Journal of International Law*, 87 (1993), pp. 391–413, at p. 399.

¹⁰ J. McMahan, 'The Ethics of Killing in War', *Ethics*, 114 (2004), pp. 693–733, at p. 715.

the morality of war rather than its legality, the independence of its two branches cannot be maintained.¹¹

The conviction expressed by McMahan and Hurka is appealing: moral principles are not as flexible as legal principles; the scope of moral 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. Though they subject themselves to the *in bello* code, unjust combatants do not thereby change the simple fact that they kill innocent people. 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. Unjust combatants inflict harm for no good reason, since any military advantage they achieve thereby has only negative (instrumental) value; therefore the harm they inflict cannot be proportionate.

II. THE SHORT ANSWER

The purist's complaints, as both McMahan and Hurka express them, can be seen as involving two distinct sets of worries. One set of worries is about the *logical* consistency of the traditional view, and includes the following:

- (a) The traditional view is viciously circular. Soldiers are morally equal on the assumption that they equally 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 separation of the spheres of *jus in bello* and *jus ad bellum* is conceptually impossible. For the *in bello* proportionality constraint, as formulated by the traditional view, cannot be satisfied by unjust combatants, given the *ad bellum* criminality of aggression.

This section proposes a 'short answer' to this set of worries. The short answer proves that the traditional notions of equality and proportionality employed in the traditional view form a perfectly consistent theory of *jus in bello*. However, the short answer raises a further set of deeper worries regarding the *ethical* coherence of the traditional view. I shall present these worries in §III and address them in §IV.

The short answer is based on a simple observation. Natural moral rights, as construed in the Western political tradition, are exchangeable. Individuals 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

¹¹ T. Hurka, 'Proportionality in the Morality of War', *Philosophy and Public Affairs*, 33 (2005), pp. 34–66, at p. 44.

(more beneficial) rights. Here is 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. *Ex ante* (i.e., before the match) the convention which governs boxing is considered by both sides to be fair and mutually beneficial. This is why we can safely presume that the boxers accept it. The redistribution of rights within the boxing ring is not produced by *explicit* agreement. Rather, it is generated by tacit acceptance of the rules, which is indicated by the combatants' entering the ring.

The short answer assumes that decent states strongly prefer rule-governed wars to 'total' wars. In the absence of rules which govern combat, states might be 'forced to fight to the point of destruction rather than strategic surrender'.¹² Once a war has broken out, an agreement which would effectively limit war's violence is almost unachievable: it would be extremely difficult for states to fight and bargain simultaneously. Hence decent states would seek an agreed system of rules to govern their future wars, prior to any armed conflict between them. I assume, and this is a crucial assumption, that the objective of the contracting parties is minimizing the harm inflicted on morally innocent people within wars, without limiting the right states have to use force in protecting their just claims. I shall call the agreement whose goal I have described 'the *in bello* agreement' (or 'the *in bello* contract').

Three clusters of highly plausible assumptions constitute the complex background against which this contract is entered into. I shall call the first of these sets of assumptions *anarchy*: states assume that international justice can be enforced only by self-help, and that in some circumstances they are entitled to protect their just claims by using force.

In modern international society, as in Locke's state of nature, there is no central authority able to interpret and enforce the law, and thus individual members of the society must themselves judge and enforce it ... each member [in this society] is a judge in his own cause.¹³

In particular, states have a right to wage defensive wars, which includes a right to eliminate an imminent aggressive threat pre-emptively.

A second set of assumptions will be referred to as *obedience*. Briefly, the obedience of soldiers is crucial for the efficiency of the national defence which armies provide, and therefore it is an essential aspect of the profession of arms. Obedient soldiers enable armies to place themselves under the full control of the state. The control which societies have over the military prevents private wars and sustains military efficiency. The obedience of soldiers

¹² C. Kutz, 'Fearful Symmetry', in D. Rodin and H. Shue (eds), *Just and Unjust Warriors: the Moral and Legal Status of Soldiers* (Oxford UP, 2008), pp. 69–86, at p. 75.

¹³ H. Bull, *The Anarchical Society* (Columbia UP, 1977), p. 48.

is of utmost importance for a further reason: states can obtain information to which private individuals have no access. Hence full control over obedient armies enables states to initiate a just pre-emptive attack or to form a credible deterrent threat, even if these actions look unjust to private (and therefore less well informed) individuals. We can assume, in short, that requiring soldiers to attend to *ad bellum* considerations would undermine military effectiveness. (I shall say more about this controversial assumption later.)

A third set of assumptions can be referred to as *enforceability*. Rules of war would be part of the *in bello* agreement only if it could be known by the warring parties during the war whether these rules were being intentionally violated. Intentional violation of the agreement by one side gives the other a right to proportionate retaliation, and states will be able to calibrate the appropriate sanction in a mutually acceptable way on the basis of the severity of the violation. In short, rules of which the warring parties are able to know that they were violated are enforceable by the warring parties during the war. On the other hand, in wars governed by rules which fail the *enforceability* test, each side will regard itself as entitled to retaliate for (what it takes to be) the enemy's violation of the *in bello* agreement. Such retaliations would aggravate the apparent injustice in the eyes of the other. As a result, 'war's violence quickly spirals even higher'. Indeed, a war governed by unenforceable rules 'is prone to illegitimate escalation of targets', and consequently 'increases the risks to both parties, without any compensating advantage' (Kutz, p. 78).

To repeat, then, *anarchy*, *obedience* and *enforceability* form the background against which the *in bello* contract is entered into. The most fundamental aspect of the traditional *in bello* code is the legal equality of soldiers. States equalize the legal status of soldiers by immunizing enemy soldiers from *post bellum* legal prosecution. That is, states entitle soldiers to follow orders which are permissible according to the *in bello* code, without attending to *ad bellum* considerations. This aspect of the traditional convention is easily elucidated as a term of the *in bello* agreement I have described. States guarantee *post bellum* immunity to enemy soldiers in order to secure *post bellum* immunity for their own soldiers. This agreement straightforwardly supports the obedience of their soldiers, and therefore enhances their power to protect their *just* claims. In a clear sense, then, the legal equality of soldiers is an element of a fair contract.

Moreover, the *post bellum* immunity of soldiers, and the legal equality that follows from it, is a mutually beneficial regularity. It is, in other words, a convention in Lewis' Humean sense.¹⁴ For it is in the interest of individuals

¹⁴ D.K. Lewis, *Convention* (Harvard UP, 1969).

who live in a world of sovereign and mutually suspicious states to be protected by a decent state which controls an obedient army. That is, soldiers (and their families, friends and fellow citizens) benefit from the *in bello* agreement because it makes national defence more efficient.

Conjoined with the boxing analogy, the above analysis avoids the charge of vicious circularity expressed in (a). In constructing the *in bello* code, states seek for restrictions which apply to all belligerents equally, irrespective of the justice of their cause. *Contra* Walzer, this legislative goal is not justified by or based on a pre-conventional moral equality of soldiers. Rather, the egalitarian legislation is justified independently by the fairness of the contract and by the mutual advantage which its acceptance secures. The moral equality of soldiers follows from a further fact: combatants alienate their right not to be attacked by the unjust combatants as part and parcel of a set of norms governing combat which are mutually beneficial to just and unjust combatants alike. It is, then, tacit acceptance of the fair and mutually beneficial egalitarian law of war that generates the moral equality of soldiers: no combatant wrongs another, provided they all accept the convention. This interpretation somewhat weakens Walzer's version of the doctrine of the moral equality of soldiers. Unjust combatants are still morally different from just combatants in that their action serves an unjust cause.

McMahan rejects the boxing analogy. 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. At least in such cases, it would be absurd 'to imagine people consenting to being killed by the invaders', he says.¹⁵

But the traditionalist's reply to this complaint is quite simple. Soldiers have indeed not consented to waive the right not to have an unjust war declared against them. Yet they attribute the crime of aggression to the leaders who commanded it, rather than to the soldiers who carry it out; soldiers merely follow orders. Besides, soldiers' implicit consent is insufficient for generating moral equality among them; other features of the egalitarian convention contribute to its 'moral efficacy'. As I have just noted, the convention is fair: decent societies have a right of self-defence, and so being a soldier in such societies is permissible. (I say 'decent societies' in order to exclude societies founded on radically immoral principles, such as Nazi Germany; soldiers who carried out the Nazi aggression had no contractual right to do so, because the Third Reich had no right of national defence to begin with.) Universal acceptance of a convention is, in addition, mutually

¹⁵ McMahan, 'On the Moral Equality of Combatants', *Journal of Political Philosophy*, 14 (2006), pp. 377–93, at p. 381.

beneficial. It is nearly universal acceptance of the *fair and mutually beneficial* convention which generates an egalitarian redistribution of moral rights.

The problem of *in bello* proportionality for aggressors was expressed in (b) above. It might be thought that with respect to this difficulty, the contractarian argument I have so far developed is unhelpful. For purists would argue that states that seek an *in bello* agreement would agree on an *asymmetrical* proportionality requirement. Such a requirement exemplifies what David Rodin calls 'restrictive asymmetry': the agreement would affirm the restrictions imposed on just combatants by the traditional *in bello* proportionality requirement, but deny the privileges which the traditional convention assigns to unjust combatants.¹⁶

This is because, morally speaking, just combatants ought not to inflict disproportionate collateral harm on enemy civilians, even if this promotes their just aim. Moreover, an *ex ante* agreement by which they commit themselves to avoiding disproportionate harm to civilians would be mutually beneficial if, in return, they can expect a more restrained (aerial) warfare on the part of the enemy. But according to Rodin, the *in bello* agreement should totally prohibit collateral harming of just non-combatants by an aggressive state. After all, the collateral harm that aggressors inflict on civilians is unnecessary for protecting the aggressors' *just* claims. To repeat, the goal of the *in bello* contract is minimizing harm to innocent people without limiting the right of states to wage *just* (defensive) wars.

Why, then, insist on an egalitarian *in bello* proportionality requirement?

The answer is simple: the *in bello* contract which states reach must be symmetrical if *obedience* and *enforceability* are two elements of the factual background against which the contract is entered into. For suppose only just combatants are entitled to inflict collateral harms on civilians. A pilot fighting a just war has been ordered to bomb a munitions factory located within a city of the enemy country, knowing that if he bombs the factory the explosion will kill a group of innocent civilians. The bombing is necessary and proportionate, hence morally permissible. The pilot suspects, however, that the war he fights is unjust; so under an asymmetric contract he would refuse to kill any civilians unless and until he is convinced that his suspicion is baseless. *In bello* proportionality, as restrictive asymmetry develops it, would thus undermine the obedience of soldiers, and thereby unduly limit states' right to use defensive force.

Purists tend to reject *obedience*.¹⁷ Rodin remarks that most soldiers, especially those who actually fight a just war, are likely to believe that they serve a

¹⁶ Rodin, 'The Moral Inequality of Soldiers: Why *Jus in Bello* Asymmetry is Half Right', in Rodin and Shue (eds), *Just and Unjust Warriors*, pp. 44–68, at p. 55.

¹⁷ See McMahan, 'On the Moral Equality of Combatants', p. 386.

just cause. Hence an asymmetric regime will not limit a state's right to use force in protecting its *just claims*. There is no 'empirical evidence linking the attribution of individual responsibility to reduced military effectiveness'.¹⁸ Rodin does concede that restrictive asymmetry would erode the obedience of soldiers who participate in *unjust* wars.¹⁹ This, however, should not bother states negotiating an *in bello* agreement, especially given that in developing the *jus ad bellum* code, they agreed on criminalizing wars of aggression. After all, the disobedience of unjust combatants would minimize the suffering inflicted on innocent people within wars, without limiting states' power to protect their just claims. This consequence is obviously desirable from the standpoint of the *in bello* contract.

A full defence of *obedience* is beyond the scope of this paper. Notwithstanding, it is worth noting that the empirical question – how important the obedience of soldiers is to military effectiveness – is more complicated than Rodin's analysis suggests. After all, only states whose armies are obedient can pose a deterrent threat to wage a *preventive* war, whose aim is eliminating immature or distant threats. 'Preservation of the balance of power ... requires the use of force or threat of force in response to the encroaching power of another state, whether or not that state has violated legal rules.'²⁰ As opposed to pre-emptive wars, most preventive wars are illegal and immoral. Thus, under an asymmetric contract, soldiers are likely to refuse participating in such wars. Consequently states governed by this contract will not be able to form a credible threat to wage a preventive war. However, the immorality of preventive wars does not entail that a credible threat to initiate such wars is immoral. For the existence of such threats might contribute to the preservation of a peaceful stable balance of power. In other words, the obedience of armies might be crucial for efficient national defence, despite purists' arguments to the contrary.

As Kutz points out ('Fearful Symmetry', pp. 73–81), restrictive asymmetry fails for a further reason: the rules of war it entails do not pass the *enforceability* test. Combatants tend to believe that they are fighting for a just cause and (accordingly) that the war of their enemy is unjust. Hence under an asymmetric agreement any aerial bombardment (say) carried out by one side is likely to be considered by the other as a violation of *in bello* proportionality, and will invite retaliation in kind. So an asymmetric *in bello* agreement would tend to increase war's violence rather than diminish it. I

¹⁸ Rodin, 'The Moral Inequality of Soldiers', p. 60.

¹⁹ 'I have had numerous conversations with British and American officers who believed that the invasion of Iraq in 2003 was morally unjustified, but who fought there none the less, out of a sense of professionalism and a belief that the separation of *jus in bello* from *jus ad bellum* entitled them morally to do so' (Rodin, p. 62).

²⁰ Bull, *The Anarchical Society*, p. 109.

conclude that if *anarchy*, *obedience* and *enforceability* are true, *in bello* proportionality must be symmetrical. Indeed, states would agree that the contribution of the individual acts which constitute an unjust war to the accomplishment of the unjust aims of this war is irrelevant to the *in bello* proportionality calculation.

This, however, does not address the conceptual problem: how could collateral harm inflicted on civilians by combatants fighting an aggressive war be proportionate? How could the good effects of an act which has no good effects outweigh its bad effects?

My answer draws on what I take to be a fundamental feature of the *in bello* agreement: it entitles soldiers to treat their own victory as if it is good in and of itself. Victory is defined in neutral terms: it is the surrender of the enemy. Surrender is construed as a rule-governed legal event. In sustaining the obedience of their armies, I suggest, states agree on separating the final military end of the warring armies (i.e., victory) from the final political ends aimed at by the warring states. States go to war in order to enforce their just/unjust claims; so for them, victory is a means to a further end: it has merely instrumental value. In contrast, soldiers are entitled by the agreement to treat their victory as a final end. Consequently they are entitled to measure the value of a specific military action as if this value is exhaustively determined by the extent to which it furthers victory. Thus the ‘*in bello* good effects’ of a battle are unrelated to the value of the final end of the war.

In addition, the *in bello* agreement conventionally defines the relevant *bad* effects of a military act on the basis of two fundamental obligations it imposes. The agreement obliges just combatants to treat their enemies as if they are not even minimally culpable for the injustice of the war they fight. Unjust combatants are treated as mere instruments of the state for which they fight. Additionally, the agreement obliges soldiers to treat civilians as if they are innocent bystanders, whatever their political commitments and contribution to the military effort may be. In other words, the direct harms inflicted on enemy combatants and the collateral harms inflicted on enemy non-combatants are defined as the unavoidable *bad* effects of military acts. Again, by this definition, the disvalue of a specific battle is unrelated to the value of the final end of the war.

In the light of the above conventional stipulations, egalitarian proportionality for *jus in bello* is easily conceivable. The *in bello* value of an aerial bombardment (carried out by *S*’s forces) is the anticipated military advantage gained by it, which is determined by the extent to which the bombardment contributes to *S*’s victory. The aerial bombardment is ‘better’ the more important it is for *S*’s victory. On the other hand, the bombardment is worse the more harmful it is for enemy soldiers and civilians. The military

act is proportionate if the extent to which it contributes to *S*'s victory is sufficiently great, compared with the direct and indirect harm it inflicts on enemy soldiers and civilians. The arguments for *in bello* proportionality are therefore highly specific: what is the value of this tank factory to the enemy's war effort, and how many civilians, considered as innocent bystanders, can we put at risk to deny the enemy that precise value? Or how many civilian deaths are proportionate to the value, for our war effort, of destroying this rocket launcher and its operators?

How this interpretation works is shown by a paradigm violation of *in bello* proportionality. Suppose a general is about to win a just war. One of his further objectives in fighting the war is killing as many enemy combatants and as many enemy non-combatants as possible. He is not a sadist, however. He justifiably believes that his killings are preventive: eliminating its military forces and demoralizing its citizens would undermine the ability of the aggressive state to commit another crime against peace in the future. In addition, he justifiably believes that the individuals he preventively kills *deserve* the harm inflicted on them, for they support their corrupt leader and are wholeheartedly identified with the aggressive regime he leads. The general would rather avoid fundamental war crimes, so he does not directly kill civilians or prisoners of war, and will halt the violence once the enemy surrenders. Thus the disproportionate killings take place *before* the enemy has the chance to surrender. Indeed, the general plans the war in a way which makes it very hard for the enemy to surrender. Additionally, instead of using ground troops, he uses disproportionate aerial bombardments, which cause excessive collateral damage to civilians.

I return to the profoundest difficulty purists find in the traditional just war theory: how can it be that morally innocent people, *viz* soldiers who fight a just war, or just non-combatants whose collateral killing satisfies the *in bello* requirements of necessity and proportionality, lose their moral right to life? In resolving (a), the short answer compared soldiers to boxers: in joining the army, soldiers waive their right not to be attacked, just as boxers waive their right against attack by entering the ring. This reasoning is inapplicable to civilians: there is no datable act of will by which civilians manifest acceptance of *in bello* proportionality. Moreover, the fact that the two fighters agree to waive their rights not to be harmed does not mean that they are permitted to inflict significant incidental harm on innocent third parties through their combat. I think, however, that the above objection overstates the difference between soldiers and civilians. I have argued that the convention which allows proportionate collateral killing of civilians is fair because it affirms the right of nations to protect their just claims; and it is mutually beneficial because it minimizes the unjust harm inflicted on

people within wars. Therefore intelligent and informed moral civilians would accept it. True, no civilians have ever actually done so. Still, I suggest, since states and not private individuals are the agents operating within the international realm, a state is authorized by its citizens to act in their interests in such matters. As part of this general tacit authorization, states have the moral authority to reach an *in bello* contract, which redistributes civilians' rights and duties. Therefore a pilot fighting an unjust war who carries out an *in bello* proportionate attack violates no claim which just non-combatants hold against him. Indeed, civilians authorize their state to exchange the claim they have against such an attack for other (more beneficial) rights.

III. IS THE SHORT ANSWER MORALLY COHERENT?

The short answer dissolves the 'mystery' as to what traditionalists could mean by insisting that unjust combatants might satisfy the *in bello* proportionality requirement in the way just combatants do. It clarifies in what sense they can be restrained by morality. Still, it may strike many as suspicious. The traditional view, as it emerges from the short answer, undermines the idea that the 'basic constituency of all morality must be individuals'.²¹ This makes it a morally incoherent system, so purists would argue.

I shall 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 he, as an unjust combatant, is likely to kill innocent people who are defending their country. According to the short answer, the convention which allows him to undertake the duty of obedience is, *ex ante*, fair and beneficial to the relevant parties. Purism, as I reconstruct it here, accepts this, yet denies that these features of the convention 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.

Tacit consent is attributed to just combatants. True, in some contexts, consent is of some importance. Killing a person against his will is murder, even if his life is not worth living; the moral status of the killing is radically different if the victim asks to be killed. Nevertheless, the short answer clearly overstates the significance of consent: for example, it is wrong to kill a person in a duel, despite the mutual consent involved. Surely the killings committed in unjust wars are more like wrongful killings in duels than like killing someone because he has asked to be killed. The killings by unjust

²¹ T. Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs*, 33 (2005), pp. 113-47, at p. 124.

combatants in war are worse, because they further an unjust goal. Purists may thus concede that given acceptance of the war convention, killing a just combatant does not necessarily involve a violation of his right to life; yet they insist that such killing is still impermissible.²²

Moreover purists need not deny that soldiers are under a duty of obedience, nor that undertaking this duty is of some importance. *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, soldiers ought to refuse to take part in an unjust aggressive war. For, their institutional commitment notwithstanding, soldiers have an overriding 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. As McMahan puts it ('On the Moral Equality of Combatants', p. 385),

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.

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

The gist of the purist counter-argument 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 deeply unstable.

Here is what I take to be an analogy. I shall argue that the philosophical conviction which underlies the purist rejection of the traditional war convention also underlies G.A. Cohen's criticism of the Rawlsian distinction between the personal and the political.²³ I shall later use the analogy to support a Rawlsian (i.e., '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.²⁴ Rawls infers from this principle that a just tax regime allows for (undeserved) inequalities. Equal distribution of a society's

²² See McMahan, 'On the Moral Equality of Combatants', p. 381, where this argument is presented.

²³ 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.

²⁴ See J. Rawls, *Political Liberalism* (Columbia UP, 1993), p. 6.

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 net income to that of the poor. Hence a tax regime ought to allow inequality in net income to the extent that the resulting incentives would tend to raise the lowest income.

Crucially, Rawls' inference is valid only if a deeply divisional conception of moral reasoning is presumed. For him, agents operating in the free market are allowed to maximize their income. Surely, however, this acquisitive behaviour is morally permissible despite the fact that it causes unjust inequalities. That is, for Rawls, agents in the free market permissibly lack knowledge about the effects of their acquisitive behaviour 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 one another as fellow citizens through our common institutions is very different from what we owe to one another as private individuals. Our 'individual' choices are not expected to be governed by principles of social justice, while citizens, as such, should be concerned for the justice of their institutions.

Cohen (p. 26) finds this incoherent: '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'. 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.²⁵ Hence talented but also moral people who operate in the free market ought to be much less acquisitive.

The analogy, in a nutshell, is this: on Rawls' conception of political justice, there are choice situations in which we are entitled to disregard relevant information about the inequalities our acquisitive behaviour generates. Purists like Cohen object to this divisional conception of moral deliberation. Analogously, on the traditional conception of just war, citizens are required to put effort into preventing the unjust violence their states might perpetrate in waging wars of aggression. But, oddly, soldiers are entitled to lack relevant knowledge of the cause of the war they fight: their moral deliberation may be restricted to *in bello* considerations. McMahan finds this divisional conception of moral reasoning untenable.

²⁵ This is an almost direct quotation from T. Pogge, 'On the Site of Distributive Justice: Reflections on Cohen and Murphy', *Philosophy and Public Affairs*, 29 (2000), pp. 137–69, at p. 159.

IV. THE MORAL DIVISION OF LABOUR AND THE *IN BELLO/AD BELLUM* DISTINCTION

IV.1. *The counter-intuitive implications of purism*

Purism regarding the ethics of war yields counter-intuitive results. Here are a couple of them. I have so far focused on soldiers who are required by the state to participate in an unjust war. But now I take a general who finds himself in different circumstances. He 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 danger. The general reasonably believes that waiting for the order to initiate a pre-emptive attack would cause the wasteful death of thousands of innocent people on both sides. Of course, he also recognizes the moral importance of his institutional commitments (including the commitment not to attack unless ordered to do so by the political leadership); he nevertheless reasonably believes that these are not as important as saving thousands of people from death. So he pre-emptively attacks, and starts a war (I shall call him 'the active general'). He manages to arrange things so that no political leader knows of the provocative nature of his action: the politicians are under the impression that the other side was the first to use force. In short, his infinitely inclusive and open moral deliberation justifiably recommends an unauthorized attack.

In general, if ordinary soldiers are morally required not to fight an unjust war even if this means disobeying orders delivered by the political leadership that represents them, then the converse must also be true.²⁶ That is, they ought to wage a just war, even if they are not ordered to do so. But as Dan Zupan points out, the main function of the *jus ad bellum* condition of proper authority is to prohibit private military action.²⁷ The purists' conception of moral deliberation as all-inclusive cannot fully embrace this *ad bellum* restriction. Purists would have to concede that the active general was right to reason as he did and act accordingly.

As far as common sense morality is concerned, however, there is no real doubt that the active general at least had the right *not* to consider an unauthorized attack.

The executioner whom McMahan concisely discusses in a passage quoted above knows that the prisoner he is about to execute is innocent. Purists

²⁶ Here I follow Cheyney Ryan, 'Moral Equality, Victimhood and the Sovereignty Symmetry Problem', in Rodin and Shue (eds), *Just and Unjust Warriors*, pp. 131–52, at pp. 151–2.

²⁷ D. Zupan, 'A Presumption of the Moral Equality of Combatants: a Citizen-Soldier's Perspective', in Rodin and Shue (eds), *Just and Unjust Warriors*, pp. 214–25, at pp. 215–17.

believe that ‘it is hard to accept that the executioner would be justified in executing [the prisoner]’ (McMahan, p. 385). I shall grant this for a moment. Still, if the executioner did not follow McMahan’s advice, would anyone describe his killing the prisoner as *morally equivalent* to condoned murder? Or, if he did not know that the victim was innocent, would anyone say that he committed a wrongful killing out of (excused) ignorance?

A seemingly attractive rejoinder to the above challenge would run as follows. There is a distinction between two questions: one is whether the execution is permissible if the executioner *knows* that the convicted person is innocent, i.e., whether the ‘informed executioner’ has the right to kill the victim. Another question is whether the *uninformed* executioner ought to obtain the relevant information before the execution. Purists might answer the second question in the negative. Because of lack of space, I have to reject this answer without a detailed argument. I shall just say that I see no reason not to accept the following conditional: if an informed executioner has no moral right to carry out the court order to execute an innocent person, then an uninformed executioner has no moral right to execute anyone without first conducting his own investigation and making sure that the prisoner deserves the punishment. The burden of proof is on the purist if he does not want to accept this conditional. A purist might appeal to the doing (killing)/allowing (letting die) distinction in order to solve the puzzle of the active general. Alas, this strategy cannot help with the puzzling executioner case.

As Pogge (p. 162) points out, Cohen’s purist conception of justice faces similar worries. Suppose you are in a position to steal from the bank which has recently hired you, and that you justifiably believe that justice requires heavier taxation on firms. 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 the embezzlement is justified. Another is whether you are entitled not to consider breaking the law. Whatever the answer to the first question, the common sense answer to the second seems clear – in the circumstances specified, the banker has the right to disregard some considerations of social justice (there are purist responses to this challenge which Pogge convincingly refutes). These examples might suggest that egalitarian justice would not be better achieved if it is more widely pursued (see Pogge, p. 160). Freeing people from the duty to promote distributive justice in their personal lives might well be a better way to promote justice. Raz’s conception of the law seems to capture this suggestion. On Raz’s view, legal regulations pre-empt the need for further moral reflection.²⁸ In so far as the law gives the executioner/the general/the banker a reason to do what it tells

²⁸ J. Raz, *Practical Reason and Norms*, 2nd edn (Princeton UP, 1990), pp. 35–48, 178–99.

him to do, it also gives him an exclusionary reason, which is a reason not to act on contrary reasons, even if these contrary reasons are moral.

But this response does not really address the fundamentally attractive conviction which underlies purism. True, in examining the desirability of a *legal* norm, a Kantian question is in place: 'What if every one did 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 different question, 'How likely to cause an injustice is this violation of my institutional commitments?'. By stipulation, their violations of the institutional commitments are unlikely to cause any further harm or injustice. Even so, they seem to be morally exempted by virtue of their institutional commitments from weighing a certain set of normative facts. Purists challenge this exemption; it seems to them incoherent. Even if the law does provide exclusionary reasons, these are easily outweighed in such cases.

I conclude 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 moderated morality, a system built on the exchange of rights for mutual benefit, divides the moral labour in a way which allows divisional moral reasoning. This is what I shall argue for in the next section.

IV.2. *Conventionally moderated morality: on the moral division of labour*

Why is the executioner entitled to put a convicted innocent person to death without checking for 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 which 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 it is fair and (*ex ante*) beneficial to all. 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 the prisoner's desert.

I shall describe a conception of morality which divides the moral labour 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 (or even trying to find out) all the relevant facts.

An illustration of this idea is provided by 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’.

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’.²⁹

If we were moral saints, we would care about others’ interests as much as we care about ours. Common property would create an incentive in all of us to make sure that the crops are planted and that the land is not overused. If our cognitive limitations were less, efficiently co-ordinating 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.’³⁰ The Lockean morality of the state of nature is a trade-off between two opposing forces; and it seems to reflect deep common sense moral convictions.

The second idea central to the morality I describe here has to do with the *way* in which its requirements are moderated. Roughly, morality is moderated by a social co-operative arrangement that divides the moral labour. Thus individuals operating in the market are free to maximize their profit,

²⁹ The quotations are from J. Waldron, ‘Property’, *Stanford Encyclopedia of Philosophy* (2004), <http://plato.stanford.edu/entries/property>.

³⁰ Locke, *Two Treatises of Government*, quoted by Waldron, ‘Enough and as Good Left for Others’, *The Philosophical Quarterly*, 29 (1979), pp. 319–28, at p. 327.

despite the fact that their acquisitive behaviour generates inequality. This is because society as a whole is under the duty to legislate and enforce social justice. Furthermore, individuals are free to lack relevant information about the effects of their acquisitive behaviour. 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 fulfil 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 pre-emptive attack.

Purists might ask how the executioner's institutional duty negates, or overrides, the victim's right to life. After all, has not the victim a ('natural') claim against the executioner, not to be killed by him? This question brings me back to the short answer. Tacit acceptance of the convention is an inherent part of the conventionally moderated morality I describe. That is, citizens tacitly accept the set of rules which govern the commonwealth; this tacit acceptance generates a redistribution of rights and duties. In particular, the innocent victim has no claim against the executioner because (within the conventionally sustained social structure that the victim accepts) his claim is against the state; it is the state, rather than the executioner, which violates his right to life. In other words, our society is so structured that it involves a tacit convention that innocent persons have a right against the court that it must not order their execution, but do not have a right against an executioner that he must not carry out the order.

Similarly for unjust combatants: in fulfilling their duty of obedience and fighting an unjust war, they do not violate any claim which just combatants have against them. The just combatants lose this particular claim by tacitly accepting the division of moral labour conventionalized by the distinction between the *in bello* and the *ad bellum* codes. In deliberating whether to fulfil their institutional duty, individual soldiers are exempted from attending to certain moral considerations, to which others in the social structure are under an institutional duty to attend. This is how morality shows sensitivity to our cognitive limitations. Indeed, in this political structure, a requirement to be aware of *ad bellum* considerations would be excessively high-minded.

This interpretation of the argument from institutional commitment may be compared with the reading of it which McMahan gives and criticizes. As understood by McMahan, the argument is that it is a moral necessity to uphold the 'efficient functioning of just institutions', even if on occasion this requires doing injustice. 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 ever present reason 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 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 are supposed to weigh.

IV.3. *Comments on responsibility and justification*

I have used the language of rights in explaining how the moral labour is distributed 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. Now I shall 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. 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 the 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'.³¹ 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. Thus facts about exemptions can be put in terms of 'weak moral permissibility': act ϕ is (weakly) permissible if and only if by performing ϕ the agent A violates no claim held against him. The weakness of this notion of permissibility is revealed by the fact that (as a matter of

³¹ B. Williams, 'Moral Luck', reprinted in his *Moral Luck* (Cambridge UP, 1981), pp. 20–39.

conceptual possibility) it is *not impermissible* to prevent *A* from doing ϕ . 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: the fact that *A*'s ϕ ing is weakly permissible does not imply that *A*'s ϕ 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 launch an unauthorized attack. Letting the innocent victim escape, or launching the unauthorized attack, might be heroic. Still, both agents are exempted from the duty to promote the greater good. Thus an act may be morally permissible, though morally unjustified.

McMahan's purism misses 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'.³² Relying on the plausible empirical conjecture that the functioning of the military would not be compromised by individual acts of refusal, 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 refuse. So if an unjust combatant fails to refuse because of his cognitive or moral limitations, his killings are merely *excused*. The basic idea which inspires conventionally moderated morality is, however, that a moral division of labour 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 which 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; one has a right to be partial even if morality requires impartiality.

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 which achieves justice better than the one Cohen envisages. A purist 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

³² McMahan, 'On the Moral Equality of Combatants', p. 386; cf. 'The Ethics of Killing in War', §III.

of war. In Rawls' 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*.

The disanalogy, purists might argue, is much more important: if Pogge's conjecture turned out to be true, the divisional norms recommended by the Rawlsian theory sustain a just society. In contrast, the war convention promotes injustice, since it 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 wars would be reduced. Requiring accountability from soldiers is not excessively high-minded. So the alternative norms which 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'.³³ 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 the change would certainly be admirable; refusals to participate in unjust wars would be justified not only in themselves, but also because they contributed to establishing a better social norm. Still, the current norm is not indecent or egregiously immoral. In cases like this, *moderated* morality does not impose the duty for generating 'big' social changes in societies; soldiers might well be exempted from even considering the likelihood that their heroic refusals will bring about the desirable changes.

V. SUMMARY

A social structure that divides the moral labour serves to moderate the requirements of morality. In particular, there are circumstances in which conventionally moderated morality entitles those who occupy a role within

³³ Cohen, 'Where the Action Is', p. 26.

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 divisional conception of morality. Soldiers have a right not to be guided by *ad bellum* considerations because statesmen are under a duty to do so. I have also shown that the counter-intuitive implications of the alternative purist conception of morality speak clearly in favour of the divisional conception of morality which I have sketched and defended.³⁴

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