Superior Law

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In the last decade a suggestive new way of approaching the ethics of war has been developed within analytical moral philosophy. This approach has abandoned or substantially downplayed the collectivist underpinnings apparent in much traditional just war theory. Instead of prioritising the moral status of communities and the states that purport to embody them, it has instead begun with the human rights of individual persons, and in particular the most fundamental of rights: the right to life. This approach to the ethics of war is oriented around the question of when and under what conditions a person can become liable to lethal attack. It addresses this question not primarily by reflecting on the historical and legal norms that have shaped the practice of war, but on the status and nature of rights, often drawing on theoretical devices, arguments and analogies from contexts outside war.

The approach is powerful because its starting point is so minimal: persons have rights, and to kill or maim a person who is not liable to such treatment is to commit an appalling moral crime. This basic idea has been used to generate significant revisions to traditional just war theory. One such revision has been to abandon the 'moral equality of soldiers'. This centre piece of modern just war theory, strongly defended by Michael Walzer, holds that combatants on both sides of any conflict have equal rights and duties (the symmetry thesis), and that the *in bello* rights and duties of combatants are independence of the *ad bellum* status of their conflict (the independence thesis).

In contrast the rights based approach suggests that unjust combatants (those fighting a military campaign that is *ad bellum* unjust) do not in general possess the permission to kill enemy combatants. I call this view restrictive asymmetry. Some theorists in the rights based approach also suggest that some non-combatants may be liable to be targeted in war if they are morally responsible for the unjust acts of war of others. I call this view permissive asymmetry. These two positions are independent and I have argued that the

restrictive asymmetry is correct at the level of basic moral liability, whereas the permissive asymmetry is not.[1]

Denying the moral equality of combatants is not the only revisionary conclusion that the rights based approach suggests. Traditional accounts of the ethics of war permit the unintended killing of non-liable persons, provided such killing is both necessary and proportionate to the achievement of a concrete military advantage. But this expansive permission, often justified by reference to the doctrine of double effect, does not cohere with the requirements of due-care normally thought to be entailed by human rights. In no context other than war would it be deemed permissible to blow up a building in which innocent bystanders were present in order to kill a person who was posing or contributing to an unjust threat – unless the threat posed was of truly catastrophic proportions. Reflecting on the demands of human rights suggests that traditional rules on collateral damage in war are grossly over permissive.

The focus on human rights also has significant implications for *jus ad bellum*. I have previously argued that it is not possible to account for the central *ad bellum* right to fight wars of national defence (as that right has been traditionally understood) on the basis of the defensive rights of individual persons. In an argument that is in some ways consonant Seth Lazar has suggested that the rights-based view leads to the absurd conclusion of pacifism.[2] This claim is too strong. Collective violent defence against genocidal aggression and humanitarian intervention to stop mass atrocity can clearly be justified on the basis of individual rights. But the rights based view does suggest that the traditional wide reaching permission within both just war theory and international law for states to engage in war to defend political sovereignty and territorial integrity cannot be so supported. This is not classical pacifism, but a new and potentially viable position intermediate between just war theory and pacifism - albeit one requiring considerable further development and defence.

[1]Rodin, David and Shue, Henry (Ed.s), *Just and Unjust Warriors: the Moral and Legal Status of Soldiers*, Oxford University Press, Oxford, 2008.
[2] Lazar, Seth, "The Responsibility Dilemma for Killing in War", *Philosophy and Public Affairs* (2010) Volume 38, Number 2, pp. 180-213.

But there is a puzzle inherent in this new body of work. Despite achieving a degree of acceptance within analytical philosophy that some have claimed give it the status of a 'new orthodoxy', the rights based approach has had no discernable impact on the application and development of international law and international legal scholarship. Perhaps it is not surprising that lawyers have not engaged with this philosophical literature – disciplinary silo-think is strong. What is more startling is that some of the most prominent philosophical proponents of the rights based approach have themselves vigorously resisted drawing legal conclusions from their moral arguments. There is thus a remarkable consensus between both proponents of moral asymmetry, the leading figure of whom is Jeff McMahan, and opponents that the laws of war should stay roughly as they are – a position we might call 'legal conservatism'.

But the consensus view is wrong. If the rights based view is correct, this will compel us to consider far reaching amendment to central aspects of the publically administrable rules of war; not only the Laws of Armed Conflict, but also related aspects of domestic law and the operating policies of militaries. I explore some of the potential implications for law in the final section. My primary purpose, however, is to refute a set of arguments that seek to establish the viability of the symmetrical combatant rights as a matter of law. First I will address the arguments of Jeff McMahan who believes that there is a significant separation between law and morality, such that legal conservatism about the equality of combatants is compatible with moral revisionism. Second, I address the arguments of Henry Shue and Michael Walzer who reject asymmetry both as a matter of law and of morality. For these theorists there is a schism, not between law and morality as McMahan believes, but rather between the moral code applicable to war and the ordinary morality of everyday life of which a robust individual right to life is such a prominent feature. I argue that both positions make a related mistake about the nature and source of the underlying moral norms, and the way in which they constrain the law.

In this paper I will address only the issue of restrictive asymmetry. I will be arguing that unjust combatants should not possess the legal privilege of killing enemy combatants, or be immune from liability for participating in unjust war.

Moral constraints on the content of law

Let us begin by reflecting on the relationship between law and morality. Law in general does not have the same content as morality, and nor should it. There are a number of ways in which the content of law and morality may justifiably diverge. First, there are aspects of morality for which there is no appropriate analogue in law. This is particularly true of the perfectionist and virtue-related aspects of morality. A legal regime that attempted to enforce perfectionist values or virtues would be intrusive, but, more importantly, it would be self-defeating: realising virtue has value primarily because it is achieved through one's own unconstrained moral agency. Legal coercion, would destroy what we think is most valuable about the achievement of moral values and virtues.

Second, some moral rights and goods are too trivial to be protected by a regime of law because the costs of enforcement would significantly outweigh the benefits. For example unprovoked verbal abuse is morally wrong, but its harm is not sufficient to justify the costs of full legal protection (exceptions are hate speech, incitement and significant cases of liable).

Third, some laws are pure conventions which have a morally important co-ordinating function but where the specific terms of co-ordination are morally arbitrary. The *locus classicus* is the legal obligation to drive on one particular side of the road (it doesn't matter morally which side of the road we drive on, as long as we all drive on the same side).

But neither of these considerations applies to the provisions of *jus in bello*, of which the moral equality of combatants is a component. Those provisions concern rights rather than perfectionist values, and the rights in question are both centrally important, and have a content that is non-arbitrary from a moral perspective.

However a fourth consideration is relevant. One function of a system of law is to promote the welfare of the community it serves. For this reason, the law must be developed and administered in a way that is mindful of consequences and externality costs (including unintended effects and perverse incentives) that are generated by law itself. Such effects may generate morally compelling reasons for the law to adopt a content that varies from

morality. This may be the case when a particular form of legal regulation would be destructive of the very rights and values it is intended to protect.

A number of authors have argued that precisely such reasons justify the law in maintaining the equal privilege for both just and unjust combatants to kill in war. Why might this be so? First rejecting the moral equality of combatants might reduce the likelihood that unjust combatants would comply with other important *in bello* prohibitions such as non-combatant immunity, necessity and proportionality. This may be because unjust combatants will lack an incentive to comply with currently accepted *in bello* prohibitions if they are not granted equal war privileges. If there is no moral distinction between attacking just combatants and attacking non-combatants, then there is little incentive for unjust combatants to abstain from the latter given that they are already committed to attacking the former. Second, holding soldiers responsible for participating in an unjust war may adversely affect the ability of states to organise and maintain effective military defence forces. Rejecting the moral equality of combatants may thus carry the risk of making just states vulnerable to aggression. Third, if combatants in an unjust war feared being held responsible for that war, it may encourage them to continue fighting, thus prolonging wars and increasing suffering.

Each of these arguments has problems and I believe there are good grounds for doubting their conclusions. But that is not the line of argument I wish to pursue here. Instead I want to enquire what would be the implications for law, if these arguments are sound and legally instituting restrictive asymmetry would indeed be significantly welfare destroying. In particular, I want to investigate what one would have to believe about the relationship between law and morality in order to view these considerations as adequate grounds for accepting the equality of soldiers as a matter of law while rejecting it as a matter of morality. McMahan articulates the assumptions well:

> "The morality of war is not a product of our devising. It is not manipulable; it is what it is. And the rights and immunities it assigns to unjust combatants are quite different from those it assigns to just combatants. But the laws of war are conventions that we design for the purposes of limiting and repairing the breakdown of morality that has led to war, and of mitigating the savagery of war,

> seeking to bring about outcomes that are more rather than less just or morally desirable. For the reasons given…the laws of war must be mostly or entirely neutral between just and unjust combatants."[3]

Now some forms of law clearly do have a status of this kind. Consider laws that establish what lawyers call *mala prohibita* offences.[4] These are laws, such as parking regulations, that introduce a prohibition into what was previously a realm of liberty. In the absence of regulation, there would be no requirement to park in one way rather than another. The prohibitions fulfil a socially useful function by co-ordinating behaviour, and the design and content of the prohibition is entirely subordinated to the contribution they make to social utility. There is no underlying 'morality of parking' to which one might expect or require the law to conform.

But other aspects of law are not like this. *Mala in se* offences, such as most aspects of criminal law, provide for the legal regulation of action that is already wrong, independently of the law. In such cases the law does not simply introduce a socially useful prohibition or co-ordinating function where previously there was a liberty. Rather the law articulates and make administrable an underlying moral norm. In Blackstone's evocative words, offences against rights and natural justice "are bound by superior laws, before those human laws were in being." [5] It follows that the law is not free to assume any configuration that may be maximally useful; it is substantially constrained by the content of the underlying norms.

To see the way that the content of such law is morally constrained by the content of underlying moral norms, consider the following example. Imagine a society in which an ethnic minority is despised and subject to persistent abuse and harassment. This abuse culminates in a macabre tradition on the national anniversary in which a single man from the minority community is captured and ritually hanged in the central square of the capital city. In the years in which the scapegoat ritual is prevented or fails, the general

[3] McMahan, Jeff, "The Morality of War and the Law of War", *Just and Unjust Warriors*, p.35,
[4] On the distinction between *malum prohibitum* and *malum in se* see Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the Whitehouse", *Columbia Law Review* 105/6 (2005): 1681-1750, 1691-2.

[5] Blackstone, *Comentaries of the Laws of England*, (Philadelphia: Childs and Peterson 1860) Vol. I, Introduction, Sect 2, p. 56.

violence and abuse against the minority increases dramatically resulting in several dozen additional deaths. Suppose now that a proposal is put forward to formalise a set of legal rules for the treatment of the minority in this society. The law makers are humanely motivated and they have good reason to believe that the optimal law for securing the rights of the ethnic minority as a whole would be one which permitted the hanging of the ritual scapegoat under strictly controlled conditions, while providing robust legal protection to members of the community outside this unique context.

Would such a law be morally permissible? It seems clear that it would not, and the reason is that such a law conflicts with underlying moral rights. It is important to be clear about what is the nature of this conflict. It is not that the proposed law is failing to *secure* or *protect* the rights of the minority, at least on one understanding of what it means to secure rights. We may accept, for the sake of argument, that the scapegoat law will yield the smallest possible number of rights violations across the society as a whole. The decisive moral objection consists rather in the way that the law instrumentalises the violation of the scapegoat victim's moral rights. The law has not mandated the death of the scapegoat victim, but it has created a legal right to violate the moral right to life of the scapegoat victim, and it has created this right *as a means* to securing some further good. As such the law itself is in violation of the underlying rights of potential victims.

The analogy with McMahan's proposal for the laws of war is obvious. On McMahan's view the laws of war establish a legal privilege for unjust combatants to kill morally innocent just combatants, as a means to securing overall compliance with the laws of war and hence minimising unjust harm. Moreover the killing of just combatants by unjust combatants is not simply a matter about which the law is silent. The legal privilege functions as a positive right to kill, much in the way that the liberty to kill in self-defence functions as a right within domestic criminal law.[6] It functions as a codified exception to an established prohibition that may itself be relied upon in normative and legal argumentation. As the UK *Manual of the Law of Armed Conflict* says in summary of the

[6] See on this Rodin, D., War and Self-Defense, Oxford University Press, Oxford, 2002, pp 30-31.

Law of Armed Conflict: "Combatants have *the right* to attack and to resist the enemy by all the methods not forbidden by the law of armed conflict."[7]

Seth Lazar has objected that there are two significant disanalogies between the scapegoat and soldiers in war. First, in the scapegoat case it is predictable who will be the victims and who the perpetrators, but in war we do not know *ex ante* who will be on the just and unjust side. Second, the scapegoat killing is an extraordinarily aggravated crime, in the way that killing even non-liable soldiers is not: the sacrifice victim is utterly vulnerable, defenceless, and he has in no way chosen to place himself in this predicament.[8]

But neither of these considerations are material to our judgement in this case. If the scapegoat were killed in a society dominated by a sacrifice cult in which violence within the community could be only averted by permitting a randomly chosen member of that same community to be ritually killed, this would hardly make the law more acceptable. Similarly many combatants in war approximate the scapegoat's utter vulnerability and defencelessness: think of a Soviet conscript cowering in his trench under the fearsome power of a German artillery barrage. Conversely if the law permitted the scapegoat victim to be forced into gladiatorial contest in which he were armed and had a 50% chance of survival, the law would be equally inconsistent with underlying rights. The force of the example comes not from the aggravating circumstances of the death, but from its structural features: the law is instrumentalising the violation of moral rights for policy purposes.

But perhaps the objectionable result arises only from the fact that the law creates a positive right for unjust soldiers to kill non-liable just soldiers. Lazar hypothesises that if the law was amended to simply pass over the killing of just combatants in silence - neither prohibiting nor explicitly permitting it – then it would be morally acceptable. But this ignores the fact that a central moral purpose of *mala in se* law is to articulate and make administrable underlying moral rights. The law is not an agent, but it is perhaps not

[7] UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, Oxford University Press, 2004, p. 38 (emphasis added).

[8] Seth Lazar, "the morality of war and the laws of war"

misleading to describe this purpose as a fundamental duty of the law; and it is a duty the law can fail through silence as much as through positive prescription or proscription.

Consider (as an imperfect analogy) a commander who could achieve some morally important goal if a number of civilians in his area of control were killed. He has a platoon itching to kill because of the death of a beloved comrade, and before sending them out into the area on patrol he neither instructs, nor permits them to kill civilians – he simply passes over the issue in silence. Such action would be seriously wrong: a commander is obligated to take active steps to prohibit his men from killing civilians. In a similar way a fundamental moral purpose of the law is to proscribe the violation of basic rights. Of course the law is not always in a position to do this effectively or satisfactorily. There may be many reasons for this: the law may lack sufficient resources, or it may be institutionally or juridicaly underdeveloped. Whatever the reason, a legal regime that fails to effectively proscribe the violation of fundamental moral rights is always thereby morally defective, and calls morally for revision or development.

There is a further very interesting objection which Lazar presses against my position. He claims that many combatants fighting without a just cause will not be liable to be killed because they lack sufficient responsibility for the offence that constitutes the just cause. If that is correct then even a restrictive asymmetry position, which attributes the right to kill only to just combatants, will instrumentalise a legal permission to kill those who are not liable. Although this is not the place fully address this objection, the error of this position, I believe, is its analysis of the conditions for moral liability. All combatants operate within a chain of command. When their collective action is directed towards an unjust objective, they are participating in what would be called a criminal conspiracy in a domestic context. The victim of a domestic conspiracy to kill has the right to kill any member of the conspiracy in self-defence. This is the case even if some members of the conspiracy are not directly threatening (the driver, the spotter and so forth), or are acting under duress, or possess a reasonable but false belief that they were acting justifiably. The degree of responsibility required to ground liability to defensive force is more minimal than that required to ground liability to punishment, therefore some conspirators may be liable to be killed in defence even if they are not culpable for the purposes of punishment. Recall also that *ad bellum* offences sufficient to merit defensive military

action are on my account much more restrictive than under current just war theory or international law. Though some combatants who operate within a chain of command in service of such unjust objectives may have an excuse which renders them immune to punishment, it is highly unlikely that these excusing conditions would render them non-liable to defensive force.

I conclude that if restrictive asymmetry is true at the level of moral liability, then the current configuration of the law of war is morally unsustainable for precisely the same reason that the scapegoat law is – it creates a legal privilege for certain persons to violate the moral rights of others, as a means to achieving broader desirable ends. Laws that have this form are themselves clearly rights violating.

Now to assert that such a law violates important moral rights, does not in itself entail that the law would be all things considered morally impermissible. It is conceivable that if the consequences of any alternative configuration of the law would be sufficiently bad, then that configuration of the law (though admittedly rights violating) could be justified as the lesser evil. However once we see that rights are at stake – it is not simply a matter of balancing overall good and evil consequences of rules as with *mala prohibita* offences – it becomes clear that the threshold for justification of such a law is very substantially higher. Are there any cases in which *mala in se* law justifiably permits what morality prohibits?

[McMahan considers as an example the penalty for rape in domestic criminal law. He argues that even if it were true that rapists deserve (morally speaking) to be punished with death, it would be wrong to institute death as the legal penalty for rape, because rapists would then have an incentive to kill their victims, thus minimising the chance of prosecution with no risk of additional punishment. The example clearly presupposes many assumptions that may be questioned.[9] But even if these are accepted, the case is

[9] One such assumption is that equivalent punishments for rape and murder will incentives murder (in many jurisdictions the maximum penalty for both rape and murder is life imprisonment). Moreover the example will only be relevant if one assumes that criminal penalties are a matter of desert, rather than liability. A punitive sanction is deserved if the infliction of the sanction is morally mandated or good in itself, independently of the good consequences it may bring about. But to say that a person is liable to punishment is to say only that they would not be wronged in applying the punishment as a means to (or in the course of) bringing about some further good. If,

not an analogy to the law of war. McMahan proposes that that the laws of war should, for consequentialist reasons, create a legal right (liberty) to do something which is morally prohibited (killing just combatants who are not liable to be killed). In the rape case there is no suggestion that rapists should be granted a legal right to rape. Any morally acceptable criminal justice system must criminalise and punish rape; it is simply that (accepting the example's assumptions) we ought not to punish the convicted rapists to the full extent of their desert. This is clearly a very different matter.]

A better example is the legal immunity from prosecution enjoyed by serving diplomats and their staff. The justification for this immunity is clearly of the lesser-evil form. Given the importance of maintaining open diplomatic relations between states, it would be too dangerous to allow states to prosecute diplomats under local jurisdiction, since there would be a temptation to engage in tit-for-tat legal harassment that could quickly lead to the wholesale break down of diplomatic relations.

Yet the exemption from prosecution contained within the norm of diplomatic immunity does not attribute a right to break domestic law. Indeed the Vienna Convention on Consular Relations, which establishes the modern norm, explicitly affirms that: "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State."[10] Furthermore, because we are discussing a potential lesser evil justification, the numbers really matter. Diplomatic staff globally number in the tens or hundreds of thousands, whereas members of the armed forces number in the tens of millions. Moreover, it is no part of the task of diplomats to use force or engage in activities that characteristically violate domestic law. I know of only one modern example of a murder committed by a person enjoying the privileges of diplomatic immunity (in 1984 policewoman Yvonne Fletcher was killed by a person shooting from inside the Libyan embassy in London). Soldiers on the other hand use lethal force as part of their stock and trade, and given the traditional precept that a war cannot be just on both sides, a significant proportion of the

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as I think plausible, punishment is a matter of liability rather than desert, then a law would be violating no underlying moral norm by failing to apply punishment to the full potential liability when doing so would be counter-productive.

[10] Vienna Convention on Consular Relations, 1963, Art 55.1.

military action undertaken by soldiers is within the context of wars that are unjust. If, as restrictive asymmetry maintains, the killing and destruction inflicted by unjust soldiers on just combatants is a grave moral crime, then the law is creating a liberty right to engage in rights violations on a massive scale, as a means (and a means of unproven effectiveness at that) to achieve other goods. It is hard to imagine how such a configuration of the law could be acceptable as a matter of basic morality.

Separating the Morality of War from the Morality of Ordinary Life

The previous section examined the moral case for recognising a divergence between law and morality, assuming that restrictive asymmetry is correct at the level of basic morality. A number of authors have run the argument in the other direction. They agree that the law and morality of war must be congruent, but view moral asymmetry to be so repugnant to provide a strong reason for rejecting it at the level of morality as well as law.

Henry Shue and Michael Walzer have both argued that moral asymmetry is false because war has distinctive features which mean it must be governed by a moral code quite distinct from that of ordinary life outside war.[11] Both Shue and Walzer argue that proponents of asymmetry beg the question by assuming a false analogy or continuity between the rules appropriate to war and the rules appropriate to other aspects of ordinary life. War is fundamentally different to ordinary life. So much so, that the practice of war is necessarily incompatible with many of the rules of ordinary morality.

Shue believes that the basic problem with the asymmetry argument is its insistence that the criterion for liability to attack in war is *individual* moral liability. Given the kind of activity war is, no combatant at war could determine whether the enemy combatant he is aiming at fulfils the conditions for moral liability. Therefore, if we are to have a morality of war at all, it must presuppose a criterion for liability that is very different to that appropriate in contexts outside of war.

[11] Shue, Henry, "Do we need a "morality of war"?", *Just and Unjust Warriors*; Michael Walzer, "What is Just War Theory About?", unpublished paper, presented Israel Institute for Advanced Study, 11 July 2011.

Walzer points to universal features of the soldier's experience: war is a radically coercive and collectivising experience that makes the application and enforcement of individual moral rights impossible.

Both argue that to criticise the morality (or laws) of war, on the basis that they diverge from the moral requirements of ordinary life is to beg the question. For one would first need to demonstrate that there is a meaningful continuity between the morality of ordinary life and war, and that the morality of war should conform to the morality of everyday life. In an earlier work (approvingly quoted by Shue) Michael Walzer scathingly dismisses McMahan's position:

"What Jeff McMahan means to provide . . . is a careful and precise account of individual responsibility in time of war. What he actually provides, I think, is a careful and precise account of what individual responsibility in war would be like if war were a peacetime activity." [12]

These arguments invite two fundamental questions. First is it true that asymmetric laws could not be applied in a morally acceptable? I address this question in the final section. Second, both authors assume that the morally appropriate response to a practice like war that necessarily violates fundamental provisions of ordinary morality, is what we might call "permissive regulation" – permitting the practice while submitting it to regulatory oversight – rather than outright prohibition.[13] Is this supposition correct?

To see what is at stake here, consider how we might think of an advocate of slavery in 1806 who made the following response to prohibitionist critics: "You tell me that slavery is morally impermissible because it is inconsistent with the dignity of persons and the fundamental precept that no human should be the chattel property of another. But this simply begs the question by applying the moral rules appropriate to ordinary life to the quite different activity of slave-holding. Nowhere have you demonstrated that there is a meaningful continuity between the moral rules appropriate to ordinary life and the moral

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[12] Walzer, Michael, 'Response to McMahan's Paper', *Philosophia*, 34 (2006), pp. 43–5, at p. 43.

[13] This is why Shue is careful throughout to couch his argument in conditional terms: a separate morality of war is viable only "if war can be tolerated" (*Just and Unjust War*, p. 95.), and later "unless we can eliminate war" (*Just and Unjust War*, p. 96)

rules appropriate to slave-holding. Indeed slave-holding is so different from ordinary life that the practice would be utterly impossible if one had to abide by ordinary moral rules such as the prohibition on owning another person – this is indeed one of the tragic things about slavery. If we are to regulate the practice of slavery to mitigate the suffering it causes, we must recognise that the content of those regulations must be very different to the content of ordinary morality and must allow the owning of other persons." Clearly we ought not to be very impressed with this line of thought.

The point, of course, is that from the fact that a particular practice or form of conduct requires its own divergent moral or legal rules, it follows neither that the rules, or the activity itself, are morally acceptable. Any practice that requires separate moral rules, divergent from the moral rules of everyday life must itself be assessed in moral terms.

How, then, ought we to assess the moral acceptability of practices that require divergent moral codes? Two points are critical. The first is that we start with a defeasible presumption against such deviation. The fact that a practice requires a moral code inconsistent with the morality of ordinary life is a consideration that stands against it, and in need of some substantive justification. The second point is that this justification can only be achieved by reference to the values and principles of ordinary morality itself.

Consider for example, the separate and divergent rules that allow prosecuting barristers to engage in aggressive questioning of witnesses, or allow psychiatrists to not disclose potentially incriminating information about their clients (within reason). In each of these cases, we ask whether permitting a localised deviation from ordinary moral rules by these special codes is justifiable in terms of the broader contribution they make to those same underlying ordinary moral values. In both cases the answer is yes, though it is equally apparent that the burden of proof is held by those who propose and maintain the separate moral code.

Shue complains that defenders of asymmetry are begging a question by assuming that moral norms from every-day life apply also to war. But it is only by reference to ordinary norms – the ordinary morality of everyday life – that we can establish whether a proposed practice and its divergent norms pass the minimum threshold of moral acceptability at all. Clearly, it would be entirely circular and question-begging to assess the morality of a

practice like war, slave-holding, or cross-examination by the lights of special moral codes that already assumed the special rights and liberties in question. Ordinary every-day morality is thus inescapable.

But, it may be argued, war is equally inescapable. We will never eliminate war, and precisely because it is a morally serious matter we must try to regulate it as best we can, moderating its evils to the extent that this is possible. This will necessarily require a permissive regulatory regime that recognises, at some level, the legitimacy of unjust combatants engaging in war. We have no other choice, since we do not have the luxury of eliminating war by fiat of moral will.

This reasoning is certainly tempting, but it cannot be right. For consider: two hundred years after the abolition of the UK slave trade it is estimated that there are more slaves in servitude today in absolute terms than before prohibition. Slave-holding, like war, is a practice with deep societal and behavioural roots. In all likelihood slavery, like war, will never be eradicated. Similarly with theft, rape, murder and most other criminal practices: though outlawed and morally prohibited such practices will never be eliminated. Yet nobody supposes that the ineradicable nature of these practices provides any reason to implement a permissive regulatory regime that implicitly recognises their legitimacy.

But perhaps the difference is this: Even though slave holding, rape, murder and the like cannot be eradicated, they can be effectively controlled through prohibitionary norms. Prohibition of these practices protects the rights of potential victims more effectively than a regime of permissive regulation. It is this fact that explains why we prohibit rather than legitimise and regulate such practices. Moreover, it is precisely this expectation that we do not have in the case of warfare. If an outright prohibition of war could be expected to yield better protection than its permissive regulation, then participation in war (or at least participation in unjust war) should be prohibited, but until such time we must endorse a special 'morality of war' with its uncomfortable deviations from ordinary morality.

But this response, which turns on the consequences of prohibition compared with permissive regulation, entirely misrepresents the moral objection to a regulatory regime for slavery or most criminal practices. Suppose there had been good evidence in 1806 that a regime of strict regulation of the slave trade would yield better protection for the

victims of slavery than its outright prohibition. (This is not entirely implausible: the practice of slavery was deeply engrained in the international system and highly profitable. There were reasons to doubt that prohibition could be effectively enforced, and even if it could, the trade might simply move to other states with even less concern for the welfare of the "cargo".) Would this be a good reason for implementing a 'humanitarian' regulatory regime for slavery and recognising a special 'morality of slave-holding' (sadly at odds with the 'morality of everyday life')? It would not. When rights of fundamental importance are at stake – rights like the right against rape, the right against torture, the right not to be killed unless liable – then the content of moral and legal norms cannot be simply determined by consequences. The content of the right sets basic constraints on what the content of the law can be, and whether it is morally intelligible to engage permissive regulation (rather than prohibition) of the practice at all.

As with the arguments seeking to separate law from morality considered in the previous section, it is the nature of the right to life that is the fundamental sticking point. Shue characterises the requirement never to intentionally kill those who are not morally liable as a requirement of "the morality of ordinary life", implying thereby that it is a moral rule for civilian life; life excluding war. But this is misleading. The requirement is not a feature of the morality of "ordinary life" understood as excluding the practice of warfare (anymore than the prohibition on ownership of another person is a requirement of the morality of "ordinary life" excluding the practice of slave-holding). It is rather a central feature of the ordinary morality of human life – a form of life that includes practices as diverse as slavery, murder, self-defence, aggression, warfare and so forth.

We may draw an suggestive analogy from the field of epistemology. In 1939 G. E. Moore famously held up his hands before an audience at the British Academy and purported thereby to prove the existence of the external world.[14] Despite its theatricality, the demonstration had a serious and persuasive point. Propositions about the existence of ordinary objects like Moore's hands can be known with greater certainty than the premises of all the fancy sceptical arguments arrayed against them. I believe that a similar status is possessed by certain kinds of moral fact. That one ought never or almost

[14] Moore, G.E., 'Proof of an External World' *Proceedings of the British Academy* 25 (1939) 273-300. Reprinted in *Philosophical Papers* and in **G. E. Moore: Selected Writings* 147-70

never kill a person who has done nothing to make themselves liable to be killed, has a kind of elementary status in our morality (a similar status is possessed by the proposition one ought never to rape or hold another person as chattel property). Like the existence of Moore's hands in epistemology, it seems true that *whatever* else we can know about morality, we can know *these things*. Moreover we can be more certain of these propositions than we could ever be of the largely consequentialist premises of arguments that seek to establish the viability of a divergent legal or moral systems. This highly elementary and basic nature of the right to life is the real sticking point. The supposition of a viable, separate and divergent morality of war or law of war may feel reassuring, but it is ultimately not sustainable.

Practical implications

The preceding sections have argued that if restrictive asymmetry is true, then we have no choice but to align the publically administered rules of war, including international law and LOAC, with this underlying moral reality. But how ought we to do this? In the final section I offer the beginnings of an answer to that question.

First and foremost we must recognise that there are substantial constraints on what may count as the just enforcement of the laws of war. In particular it cannot be justified for victors to punish defeated combatants for participating in an unjust war – the precedent of Nuremburg notwithstanding. This is not simply a matter of the disastrous consequences such a practice would likely have. Even in cases in which unjust combatants are objectively liable to punishment for participating in an unjust war, military victors do not possess the required authority to try or punish them. This is because parties to a conflict lack the most elementary aspect of a procedurally just authority: impartiality.

Legal conservatives often observe that the laws of war rely on self-administration for enforcement. Although this was historically the case, it is no longer wholly true. The *ad hoc* International Criminal Tribunals, and more recently the International Criminal Court (the first international criminal court of permanent standing), have assumed the role independent enforcement authorities. While still in their infancy, these institutions clearly do fulfil the requirements of basic procedural authority, including the crucial

quality of impartiality. Moreover, while not originally included in its remit, from 2017 the crime of aggression will be justiciable within the ICC.

One potential way to give legal voice to the rights and duties of individual combatants, therefore, would be to simply extend the ICC's obligation to prosecute the crime of aggression to all participants in an aggressive war – including ordinary combatants – rather than merely senior officials.

There are however significant problems with this proposal. First is a practical problem of resourcing. In the first nine years of its existence the ICC has managed to indict just 26 individuals for war crimes and has not yet concluded a single successful prosecution. The court, as currently configured, is simply not able to take on the task of enforcing the prohibition of aggression against the huge numbers of combatants that typically participate in an unjust war. Second, are issues with the fairness of prosecuting ordinary combatants when their epistemic condition is such that it may be very difficult to determine whether or not they are in compliance with *ad bellum* law.

But both issues could potentially be addressed within an intelligent regime of law. First, one would hope that that both the resourcing and procedural efficiency of the ICC will rise over time. More importantly, the law must prioritise the enforcement of cases of egregious non-compliance. We may draw an analogy with the requirement on combatants to disobey unlawful orders in *jus in bello*. Combatants are required by law to disobey only *manifestly* unlawful orders. In a similar way, ordinary combatants should be held responsible in law, not for participation in any unjust war, but only for participation in *manifestly* unjust wars. This will help to address both the resource issue (there are less manifestly unjust wars than unjust wars) and the epistemic issue (it is not unreasonable to require combatants not to participate in a military campaign that is manifestly unjust).

Which wars ought to be included in the category of 'manifestly unjust'? It is evident that the suggestion made above that restrictive asymmetry be given effect by extending legal responsibility for the crime of aggression to ordinary combatants is insufficient. The category of manifestly unjust war will certainly include instances manifest and egregious aggression (the Iraqi invasion of Kuwait would be an example; the German invasion of

Poland another). But the category must also include instances of unjust civil war, particularly war in support of genocide or mass atrocity, that is nonetheless not an instance of international aggression.

It might be objected that participating in genocide and mass atrocity is already an unlawful act justiciable within the ICC. What, then, would be gained by extending legal responsibility to ordinary combatants for participating in military action in support of these unjust practices? The point is that a combatant may contribute to a genocide or mass atrocity, not by participating in the killing, but by providing a conventional military defence of the state's criminal action. An example would be the soldiers and mercenaries who have fought for the Gaddafi regime while that regime was engaged in the massacre of its own citizens. Such soldiers are not engaged in an act of aggression, nor are they necessarily directly implicated in the killing of civilians. But to fight a war in support of a regime engaged in genocide, or crimes against humanity is surely a paradigm case of participation in an unjust war.

Yet, it might be responded, this hardly deals with the resource problem. Even if the mandate of the law was limited to participation in manifestly unjust war, the number of ordinary combatants implicated in such a war will still be in the tens or hundreds of thousands. Such numbers would overwhelm any judicial mechanism, leading either to paralysis or degraded standards of justice.

The answer to these concerns must surely be the same as in any domestic context: prosecutorial discretion. Where the resources of justice are limited we must do what we can. In particular, we must start with the worst cases – and most responsible agents – first. Inevitably this would mean focussing prosecutorial attention on senior members of government and the military who bear most responsibility for the unjust war.

But this seems to raise a different problem. Those are just the people who are liable to prosecution under the current system. What is the point of these far reaching modifications to the content of international law if it makes only a marginal difference to who actually gets prosecuted? What benefit can there be in allowing the content of international law be allowed to run so far ahead of its capacity to enforce?

The answer is that there is a profound difference between a legal privilege on the one hand, and a legal prohibition that cannot be fully or effectively enforced within current legal institutions on the other. The former creates a normative permission for a practice; the later simply acknowledges that a prohibited practice cannot (yet) be effectively enforced within existing systems. There are important reasons – both practical and theoretical – for why the law should clearly articulate that participation in an *ad bellum* unjust war is unlawful, even if the international community does not have the institutional capacity to prosecute all persons who violate this law.

Consider the practical reasons first. One such reason has to do again with prosecutorial discretion. If participation in unjust war is criminalised – albeit rarely in practice prosecuted – then the threat of prosecution can be used as a tool in international peace diplomacy. Combatants participating in an unjust war whose loyalty is wavering could be threatened with prosecution if they continue to fight. Conversely combatants in such a situation who offered to defect or assist in terminating the unjust war could be offered immunity from prosecution (though crucially not a legal justification). Comparable forms of prosecutorial discretion are commonly used for policy objectives in most domestic jurisdictions, but the current legal privilege to target enemy combatants entirely foregoes such tools at the international level.

Second, a legal prohibition can contribute to compliance even if formal enforcement is rare, by enabling and supporting administration of the norm in adjacent contexts. We should be careful not to ignore the subtle ways in which legal norms interact with each other and with broader moral and policy considerations. Extending the prohibition on *ad bellum* unjust war to participation by ordinary combatants may facilitate or draw support from associated changes in domestic law, government policy or wider moral perceptions. Let me indicate some ways that these effects could occur.

Criminalising participation in manifestly unjust war may lead to changes in domestic law. Almost certainly it would require states that ratified such an amended international law to formally acknowledge a right of selective conscientious objection for their serving soldiers (as is *de jure* recognised in Australia and *de facto* recognised in Israel). This may facilitate compliance with both restrictive asymmetry at the *in bello* level, and

broader *ad bellum* compliance by inhibiting the ability of states to raise military forces to prosecute manifestly unjust war.

Innovative lawmakers may also respond to changes in international law through amendments to domestic law and policy far removed from the military context. One such area could be immigration and asylum policy. One could envisage a policy in which US immigration officials were prohibited from granting a Green Card to persons who had participated in certain classes of manifestly unjust military operation. The compliance incentives of policies of this kind could be substantial, though they are distant indeed from the traditional model of criminal prosecution.

Military organisations themselves could make innovative use of such a prohibition. Legal conservatives often argue that a law that implemented restrictive asymmetry would endanger just states because it would make it impossible to maintain an effective fighting force if soldiers had a *de facto* right of selective conscientious objection. I doubt that this claim is true. Even if extending *ad bellum* liability to ordinary soldiers does degrade military effectiveness (itself a contestable claim), the effectiveness of potential unjust threats will presumably be degraded more than the effectiveness of just defenders. So the net effects on the security of just states should be positive. Be this as it may, it is certainly true that Western Military forces are facing a crisis in their ability recruit and retain competent service-men and women. There are many reasons for this, but anecdotal evidence suggests that one reason concerns the widespread perception that the recent wars of Western states – particularly those of the United Kingdom and the United States – have been unjust.

A potential response might be for military organisations to offer flexible or conditional commissions. For example a potential recruit could be offered the option to sign up on the condition that he would only be required to fight in certain kinds of operation, or operations that are authorised in specified ways. This could have the twin benefits of expanding the potential recruitment pool for the military, and creating powerful internal incentives for Western States not to engage in unjust war. While there is nothing to stop such developments even under the current regime, an international law that criminalised participation in unjust war could be a spur to this kind of innovative policy and law

making. I do not wish to suggest that all (or any) of these developments would come to pass if restrictive asymmetry were implemented in international law. The point is that there are numerous ways in which a norm that prohibits participation in unjust war can be given effect, even if formal prosecution is problematic and rare.

Now legal conservatives will doubtless be horrified at what they will view as a dangerously cavalier attitude to innovation in the laws of war. Jeremy Waldron has made this point forcefully: the laws of war are too important and too fragile to sustain much tinkering. Those laws do indeed have conventional elements that deviate from underlying moral norms, but in Waldron's phrase they are "deadly serious conventions".[15] They have developed over a long period through the iterated reflection of both jurists and practitioners. The accommodation between humanitarian constraint and military necessity embodied in the law may be a "Faustian pact", but there is reason to believe that it is the best that can be achieved.[16] In contrast, criticism and proposed amendment by well meaning idealists may degrade or destabilise the whole structure, with potentially disastrous consequences.

There is a serious point to this admonition, and one would be foolish to ignore it. The stakes here are indeed high. On the other hand we cannot simply ossify or fetishise the law. In particular, we must explain how our conception of the law can be consistent with the possibility of moral (and legal) progress. Why should we assume that the current status of the law represents its optimal configuration? And if the risks of innovation are so high, how did we get safely to this current state of development? These questions demand serious reflection.

But they are not easy to answer on the supposition that the laws of war are simply, or primarily, conventional in nature. The classic account of conventions by David Lewis (as summarised by Waldron) holds that a rule R functions as a convention for a community if a number of conditions, including the following, are met: "(1) almost everyone conforms

[15] Jeremy Waldron, "Civilians. Terrorism, and Deadly Serious Conventions", in *Torture, Terror, and Trade-Offs*" (Oxford: Oxford University Press 2010) 104.

[16] The term is Charles Garraway's.

to R; (2) almost everyone expects almost everyone else to conform to R."[17] But this hardly describes the current rules of war. These are not rules with which everyone or almost everyone already conforms, but rather tenuous norms struggling to generate legitimacy and compliance. To take but one well known example, through the course of the twentieth century (a period during which the prohibition on killing non-combatants was formalised in seminal legal texts) the ratio of non-combatant to combatant deaths in war increased from 1:10 to 10:1.[18] The development of the laws of war over the last century has indeed been a remarkable achievement. (I suspect that the individuals and institutions responsible for this development will be heroes to many readers, as they are to me). Yet the laws of war remain in many respects weak, ineffective, marginal and incomplete. Near universal conformity with the rules remains a distant objective of moral discourse, not an established starting point.

A better way of understanding the potential of progress in the law is to reflect on how the law obtains its normative force. Typically it has twin sources: people obey the law because it is in their own self-interest to do so, and because the law is morally legitimate (it coheres with Blackstone's 'superior law'). The prudential force of the law itself has two interlocking sources: it is better for everyone if most people obey just laws, and adequate enforcement sanctions make it unprofitable to free ride or defect.

But recent changes in the character of war, have substantially undermined the prudential aspects of the law's normativity. The principal adversaries of Western States are no longer other peer states, but rather terrorist groups who will not obey the laws of war, whatever their enemies do. The reciprocity that was long a source of stability and compliance for the laws of war has substantially broken down. At the same time the enforcement sanctions of the laws of war are still extremely weak and uncertain. Taken together these two facts mean that we can no longer rely on the prudential or self-interested sources of international law's normativity (if we ever could). If it is to have

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[17] Jeremy Waldron, "Civilians. Terrorism, and Deadly Serious Conventions", in *Torture, Terror, and Trade-Offs*" (Oxford: Oxford University Press 2010) 98.

[18] There have been drops in the absolute numbers of civilians killed in war in recent decades, but this has been driven by declines in the number and size of wars (an *ad bellum* effect) rather than increasing *in bello* compliance.

normative force, the moral legitimacy of the law is therefore critical: without it, the law is naked.[19]

If this is right, then the integrity and coherence of international law is of utmost importance. But the current law, defended by legal conservatives, is literally incoherent. It affirms both that recourse to war is unlawful (unless undertaken in self-defence against an armed attack, or authorised by the United Nations Security Council), yet it simultaneously grants to the vast majority of persons responsible for carrying out these unlawful acts of war the legal privilege to do so. It is as if domestic legislators had outlawed organised crime, and then (in light of the gravity of the problem) produced detailed regulations on the conduct of organised criminal activities – specifying who may killed in hits, and how, using which weapons and so forth. The final twist occurs when, realising the difficulty in getting gangs to comply with these regulations, the law grants a wide ranging legal privilege to engage in criminal activities (provided the regulations are complied with) to all but the most senior gang members. The craziness of this way of proceeding is only obscured because of a long standing perversion in our moral thinking about war that is beautifully captured by Waldron:

> "We have worked too long with a model that assumes that the default position is that you can kill anyone you like in wartime and that people have to be argued out of *that*... We have worked so long with that model, that we have forgotten how to think clearly–and carefully and with the appropriate moral severity–about the legitimate taking of human life in time of war."[20]

A coherent law must recognise that voluntary participation in a criminal endeavour (such as unjust war) is itself a crime. This is certainly consistent with recognising that certain participants may be excused. But it is not consistent with the granting of a general symmetrical privilege to kill enemy combatants.

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[19] Western militaries have an acute awareness of prudential reasons for following the law. Their domestic population will not tolerate the continuation of operations that substantially deviate from the law. But the fact that legal compliance forms part of their "license to operate" is entirely dependent on the perceived moral legitimacy of the law. It is because the public perceives the law to be legitimate that it places these constraints on the action of the military.

[20] Jeremy Waldron, "Civilians. Terrorism, and Deadly Serious Conventions", in *Torture, Terror, and Trade-Offs*" (Oxford: Oxford University Press 2010) 110.

None of this is to suggest that we can retreat into some moral fantasy, in which all relevant moral conclusions derive from *a priori* arguments and in which we can ignore the messy realities of implementing law in the real world. But we need to be realistic, first about our ability to predict the consequences of differing configurations of the law. Often we have can have no more than most speculative and vague idea of such effects. Second, we must be realistic about the way in which the effectiveness of the law can be bound up with its moral underpinnings – including what I have called the integrity and coherence of the law. Third, we must think more broadly and creatively about the way that legal and non-legal norms can collectively contribute towards strengthening compliance. Most importantly, we must not allow legitimate concerns over moral regress to overwhelm the urgent moral imperative for progress.