



De Ethica

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DE ETHICA

A JOURNAL OF PHILOSOPHICAL, THEOLOGICAL AND APPLIED ETHICS

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From the Editors

In this issue two articles are published. Both are concerned with central questions for contemporary analytical ethics. The first article by Emma Duncan deals with the Trolley Problem and the distinction between doing and allowing; the second, by Kevin W. Gray, examines the nature and scope of distributive justice. From the perspective of a journal that is dedicated to both philosophical ethics and theological ethics, the two articles are also interesting in a different and perhaps more subtle way. Both articles address issues of great importance for philosophy as well as for theology. One deals with the dilemma of justification of killing non-liable persons and the other with the question of how global ethics should be constructed. Those are issues where a dialogue between theology and philosophy is of vital significance.

In Emma Duncan's article, 'Trolleys and Transplants: Derailing the Distinction Between Doing and Allowing', the well-known Trolley Problem is in focus. The Trolley Problem was first outlined by Philippa Foot (1920-2010), in her seminal essay 'The Problem of Abortion and the Doctrine of Double Effect'.¹ In Foot's paper, the Trolley Problem was introduced as part of a discussion of the Doctrine of Double Effect – one of the characteristically Thomistic contributions to moral philosophy. A central part of much Catholic ethical thinking, it has also occupied a pivotal role in secular, non-religious ethical discussion.² Foot, however, was an atheist, and had little interest for theological inquiries. Nevertheless, her interest in virtue theory began when she read Thomas of Aquinas' *Summa Theologica* after it had been suggested to her by Elisabeth Anscombe.³

The Trolley Problem is also interesting in the sense that its problematic character builds on an often-shared moral intuition according to which the sole worker on the track is endowed with human dignity that protects him from being easily sacrificed to save more people. While there is plenty of empirical work building on the Trolley Problem and trying to make sense of our moral intuitions, one should not be too quick to dismiss the influx of religious traditions on our set of central moral intuitions and our apparent reluctance to weigh the life of one against the lives of many.

¹ Philippa Foot, 'The Problem of Abortion and the Doctrine of Double Effect', in Philippa Foot, *Virtues and Vices and Other Essays in Moral Philosophy* (Berkeley: University of California Press, 1978), pp. 19-32.

² For instance, in the context of Just War Theory, it was developed by Michael Walzer in his *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977).

³ 'The Grammar of Goodness: An Interview with Philippa Foot', *The Harvard Review of Philosophy*, 11 (2003), pp. 32-44.

In Kevin W. Gray's article – 'The Scope of the Global Institutional Order: Can Pogge Survive Cohen's Critique of Rawls?' – G. A. Cohen's argument for extending principles of distributive justice to the private sphere are discussed. Cohen's works – in particular his early *Karl Marx's Theory of History: A Defence*, which paved the way for analytical Marxism, and his later *Rescuing Justice and Equality* – have had an immense impact on the ethical and philosophical discussion.⁴ As a philosopher belonging to the political left, he is often seen as a typical non-religious thinker. To some extent such stereotyping is true: In his Gifford Lectures in 1966, Cohen described himself as having been raised to be 'antireligious' by his communist parents.⁵ Nevertheless, in the same lectures Cohen notes that his later agnostic position was as much a result of his upbringing as of rational persuasion.⁶ Perhaps more interestingly, when describing what led him to his critique of Rawls' theory he mentions the Gospels as a crucial source of inspiration. After watching Pasolini's movie *Il Vangelo secondo Matteo* (Eng. *The Gospel According to St. Matthew*), he started to read the Gospels and became 'deeply impressed' by their ethical content.⁷ Inspired by them, Cohen went on to construct a powerful critique of Rawls' theory of justice, arguing that justice must be a requirement for each individual, not only for social institutions.

While modern moral philosophy and theological ethics are sometimes seen as incompatible, having grown apart and building on different foundations and radically different traditions, there are reasons for doubting that this picture is accurate. And to the extent that it is, one might ask what will be lost if the separation is endorsed and maintained. *De Ethica* aims to explore the opposite path, where philosophical ethics and theological ethics can co-exist and fertilize each other. Rather than lamenting what will be lost, we want to see what can be won.

This issue also marks the end of an important and exciting period in the short history of this journal, as it is the last issue published with Professor Emerita Brenda Almond as *De Ethica's* Editor-in-Chief. Professor Almond accepted the position while the journal was very much just an idea, agreeing to help it in the start-up phase. Drawing from her experience as co-founder and editor of the well-known *Journal of Applied Philosophy*, we certainly improved the quality of the new journal and managed to avoid many mistakes. We are therefore very grateful for the leadership of Professor Almond over the last couple of years.

We are also happy to welcome Professor Elena Namli, Uppsala University, Sweden, as our new Editor-in-Chief. Under her leadership we hope to develop *De Ethica* further as a high-quality journal and a forum for scholarly discussions.⁸

⁴ G. A. Cohen, *Karl Marx's Theory of History: A Defence* (Oxford: Clarendon Press, 1978); G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, Mass.: Harvard University Press, 2009).

⁵ G. A. Cohen, *If You're an Egalitarian, How Come You're so Rich?* (Cambridge, Mass.: Harvard University Press, 2001).

⁶ *Ibid.*, p. 6.

⁷ *Ibid.*

⁸ Professor Namli will be presented in the next issue of *De Ethica*.

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From the Editors

In der vorliegenden Ausgabe finden sich zwei Artikel. Beide behandeln zentrale Fragestellungen der zeitgenössischen analytischen Ethik. Der erste Artikel von Emma Duncan befasst sich mit dem sogenannten Trolley-Problem und der Unterscheidung zwischen Handeln und Zu- bzw. Unterlassen. Der zweite Artikel, verfasst von Kevin W. Gray, untersucht das Wesen und den Geltungsbereich von Verteilungsgerechtigkeit. Aus der Perspektive einer Zeitschrift, die sich sowohl der philosophischen als auch der theologischen Ethik verschrieben hat, sind diese Beiträge auch auf eine andere und vielleicht subtilere Art interessant. Beide haben Themen, die sowohl für die Philosophie als auch für die Theologie von großer Wichtigkeit sind: einer dreht sich um das Dilemma, die Tötung schuldloser Personen zu rechtfertigen; der andere um die Frage, wie eine globale Ethik aufzubauen ist. Für beide Fragen ist der Dialog zwischen Philosophie und Theologie von höchster Bedeutung.

Emma Duncans Artikel ‚Trolleys and Transplants: Derailing the Distinction Between Doing and Allowing‘ stellt das wohlbekanntes Trolley-Problem in den Fokus. Dieses Gedankenexperiment wurde zuerst von Philippa Foot (1920-2010) in ihrem berühmten Artikel ‚The Problem of Abortion and the Doctrine of Double Effect‘ entworfen.¹ Foots Artikel präsentierte das Trolley-Problem als Diskussionsbeitrag zum Prinzip der Doppelwirkung, eines klassisch thomistischen Moralkonzeptes. Dieses zentrale Prinzip vieler katholischer Morallehren nimmt auch in zahlreichen säkularen und areligiösen ethischen Debatten eine tragende Rolle ein.² Foot war Atheistin und hatte wenig Interesse an theologischen Fragestellungen. Ihre philosophische Begeisterung für Tugendethik wurde jedoch durch die Lektüre von Aquinas’ *Summa Theologica* geweckt, ein Werk, das ihr von Elizabeth Anscombe empfohlen worden war.³

Das Trolley-Problem ist auch in dem Sinne interessant, dass sein dilemmatischer Charakter sich auf eine weitverbreitete moralische Intuition gründet, nach der der einsame Arbeiter auf den Schienen an einer Menschenwürde teilhat, die es verbietet ihn einfach zur Rettung anderer Leben zu opfern. Obgleich es inzwischen viel empirische

¹ Philippa Foot, ‚The Problem of Abortion and the Doctrine of Double Effect‘, in Philippa Foot, *Virtues and Vices and Other Essays in Moral Philosophy* (Berkeley: University of California Press, 1978), S. 19-32.

² Dieses Prinzip ist zum Beispiel von Michael Walzer im Rahmen seiner Theorie des gerechten Krieges weiter entwickelt worden, siehe *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977).

³ ‚The Grammar of Goodness: An Interview with Philippa Foot‘, *The Harvard Review of Philosophy*, 11 (2003), S. 32-44.

Forschung zum Trolley-Problem und den ihm anhängigen moralischen Intuitionen gibt, sollten wir den Einfluss religiöser Denktraditionen auf diese Intuitionen und unsere offenbare Zurückhaltung, ein Leben zur Rettung vieler zu opfern, nicht unterschätzen.

Kevin W. Grays Artikel ‚The Scope of the Global Institutional Order: Can Pogge Survive Cohen’s Critique of Rawls?’ diskutiert G. A. Cohens Argument für die Ausweitung von Prinzipien der Verteilungsgerechtigkeit auf die Privatsphäre. Cohens Werke – insbesondere *Karl Marx's Theory of History: A Defence*, das den Weg bereitete für den analytischen Marxismus und sein späteres Buch *Rescuing Justice and Equality* – hatten einen enormen Einfluss auf die zeitgenössische Ethik und politische Philosophie.⁴ Als Philosoph der politischen Linken wird Cohen oft als typischer areligiöser Denker angesehen. In gewisser Hinsicht trifft dies zu: In seinen Gifford Lectures von 1966 beschrieb Cohen sich selbst als jemand, der von seinen kommunistischen Eltern zu einer antireligiösen Haltung erzogen wurde.⁵ In derselben Vorlesungsserie merkte er jedoch auch an, dass sein Agnostizismus in gleichem Maße das Resultat seiner Erziehung und seiner rationale Überzeugungen sei.⁶ Noch interessanter ist, dass er die Evangelien als tragende Inspiration für seine Kritik an Rawls anführt. Nachdem er Pasolinis Film *Il Vangelo secondo Matteo* gesehen hatte, begann er, das Neue Testament zu lesen und war tief beeindruckt von dessen ethischem Gehalt.⁷ Hierdurch angeregt formulierte Cohen seine schlagende Kritik an Rawls’ *Theory of Justice*, in der er argumentiert, dass Gerechtigkeit einen moralischen Maßstab für jeden einzelnen Menschen darstellt, nicht bloß für soziale Institutionen.

Oft werden die moderne Moralphilosophie und die theologische Ethik als inkompatibel angesehen, so als hätten sie sich weit auseinanderentwickelt und würden sich auf radikal verschiedene intellektuelle Fundamente und Traditionen stützen. Diese Ansicht ist durchaus zu bezweifeln; und in dem Maße, wie eine klare Trennlinie zwischen Philosophie und Theologie zweifelhaft ist, lässt sich auch fragen, was durch ihre Beibehaltung möglicherweise verloren geht. *De Ethica* geht den entgegengesetzten Weg; hin zu einer Ethik, in der Philosophie und Theologie koexistieren und sich gegenseitig befruchten können. Anstatt über das Verlorene zu klagen, wollen wir sehen, was gewonnen werden kann.

Diese Ausgabe markiert außerdem das Ende einer wichtigen und spannenden Periode in der kurzen Geschichte dieser Zeitschrift: dies ist die letzte Ausgabe, die unter der Führung von Brenda Almond veröffentlicht wird. Professor Almond übernahm die Position als Chefredakteurin, als die Zeitschrift kaum mehr als eine Idee war, und war bereit, besonders in der Aufbauphase Hilfestellung zu leisten. Durch ihre Erfahrung als Mitgründerin und Herausgeberin des bekannten *Journal of Applied Philosophy* haben wir sicherlich die Qualität von *De Ethica* verbessern und viele Fehler vermeiden können. Wir sind daher sehr dankbar für Professor Almonds Führungsstärke über die letzten Jahre.

⁴ G. A. Cohen, *Karl Marx's Theory of History: A Defence* (Oxford: Clarendon Press, 1978); G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, Mass.: Harvard University Press, 2009).

⁵ G. A. Cohen, *If You're an Egalitarian, How Come You're so Rich?* (Cambridge, Mass.: Harvard University Press, 2001).

⁶ *Ibid.*, S. 6.

⁷ *Ibid.*

Wir sind sehr erfreut, Professor Elena Namli von der Universität Uppsala (Schweden) als neue Chefredakteurin begrüßen zu dürfen. Unter ihrer Leitung hoffen wir, *De Ethica* weiter zu entwickeln als ein hochwertiges Forum für wissenschaftliche Diskussion.

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Trolleys and Transplants: Derailing the Distinction Between Doing and Allowing

Emma Duncan

Two key elements in Judith Jarvis Thomson's most recent response to the famed Trolley Problem produce a tension that threatens to undermine her account. First, in a reversal of part of her 1985 position, Thomson now argues that a bystander is not permitted to divert a threat. Second, her use of the Doctrine of Doing and Allowing (DDA) to explain intuitions about the permissibility of threat diversion conflicts with her constraint of an agent's available options to the present tense, which is designed to prevent past bad acts from justifying bad acts in the present. I contend that the conflict between DDA and the tense constraint creates an inconsistency in Thomson's current position and supports the conclusion that no one, including the trolley driver, is permitted to turn the trolley. In order to resolve this conflict, Thomson must either abandon one of the core features of her explanation or reject a fundamental intuition driving the Trolley Problem, that the driver may divert the trolley to save lives.

Two key elements of Judith Jarvis Thomson's 1985 and 2008 responses to the famous Trolley Problem produce a tension that threatens to undermine her account.¹ In order to explain intuitions about the permissibility of threat diversion, Thomson appeals to the Doctrine of Doing and Allowing (DDA), according to which it is more objectionable to do harm than to allow it to be done. Thomson also endorses what I call the Present Choice Constraint (PCC), which is designed to place limits on the circumstances under which threat diversion is permissible, in order to prevent past bad acts from justifying bad acts in the present. I contend that a conflict between DDA and PCC renders Thomson's current position on the Trolley Problem untenable. In order to resolve this conflict, Thomson must either abandon one of the core features of her explanation or reject a fundamental intuition driving the Trolley Problem (an intuition Thomson shares) that the driver may divert the trolley to save lives.

To demonstrate the difficulty, I first explore Thomson's position on the Trolley Problem, contrasting her 1985 and 2008 accounts, both of which appeal to DDA understood in terms of positive and negative rights to explain why an agent may

¹ Judith Jarvis Thomson, 'The Trolley Problem', *The Yale Law Journal*, 94:6 (1985), pp. 1395-1415; 'Turning the Trolley', *Philosophy & Public Affairs*, 36:4 (2008), pp. 359-374.

sometimes kill in the process of diverting a threat in order to reduce harm. Next, I explain why the lack of clear criteria to distinguish killing from letting die creates a significant problem for Thomson's current position. The main claim here is that there appears to be no morally relevant feature that can be used to distinguish between killing and letting die across versions of the Trolley Problem. Not only is DDA not doing the important explanatory work in these cases, but, I contend, it conflicts with another of Thomson's principles, namely PCC. This in turn prevents her account from accommodating the very intuitions it was designed to explain. The conclusion is that Thomson must either sacrifice a key intuition motivating her account and claim that the driver of the trolley may not divert it in order to save lives, or let go of DDA and seek another means of support for her intuition.

The Trolley Problem(s)

First introduced by Philippa Foot, the Trolley Problem has been revised and extensively explored by Thomson in defense of DDA, a doctrine that holds that doing harm is more objectionable than allowing harm to be done.² There have been many variations on the Trolley case, but the simplest remains the most problematic. In her well-known article from 1985, 'The Trolley Problem', Thomson considered the original case and a variation thereon, which are summarized as follows:

Trolley Driver: As a trolley Driver rounds a bend, driving through a steep point in a valley, he sees five people on the track ahead, who cannot get off the tracks in time. As he applies the brakes to stop the trolley he realizes they have failed. He sees an inactive spur of track to the right onto which he could turn the trolley to avoid hitting the five, but alas, there is someone stuck on that track too. His choices are to allow the trolley to continue forward, hitting the five who will surely not survive, or turn the trolley onto the spur of track, hitting the one, who will also not survive. Is Driver permitted to turn the trolley?

Bystander: The situation above is unfolding before an otherwise uninvolved Bystander who happens to be in front of a track switch. Driver has fainted at the shock of the impending disaster, and Bystander is the only one with the ability to divert the trolley. Bystander has the option to do nothing and allow the trolley to hit the five, or pull the switch and divert the trolley toward the one. Is Bystander permitted to turn the trolley?

Thomson then agreed with Foot that if in each of the above two cases, there are only the two specified options, Driver is permitted to turn the trolley, according to the *Killing Five*

² Philippa Foot, 'The Problem of Abortion and the Doctrine of Double Effect', in Philippa Foot, *Virtues and Vices and Other Essays in Moral Philosophy* (Berkeley: University of California Press, 1978), pp. 19-32.

vs. Killing One Principle, which states: 'A must not kill five if he can instead kill one.'³ She also concluded that Bystander may pull the switch to divert the trolley, killing the one and sparing the five. Furthermore, Thomson argued that the distinction between doing harm and allowing it to be done can account for intuitions that, when faced with a similar dilemma, prohibit a surgeon from harvesting the organs of one person in order to save five. Consider this summary of Thomson's case:

Original Surgeon: A brilliant Surgeon, who is superbly adept at performing organ transplants, has five patients suffering from organ failure. Two patients each need a lung, two a kidney, and one needs a heart. If they do not receive the proper organs today, they will die. A young man with the correct blood type enters the clinic and, upon being informed of the situation, politely declines to donate his organs. Is Surgeon permitted to take the man's organs to save the five?

Intuitively, Surgeon is not permitted to take the organs of the one in order to save the five. However, the question then becomes: if Driver may turn the trolley, why may not Surgeon take the organs? What is the morally relevant difference between the two cases? Foot concluded that while Driver is *responsible for the threat* posed to the five and so is faced with killing them, Surgeon is not responsible and would merely allow them to die by failing to operate.⁴ In accordance with the *Letting Five Die vs. Killing One Principle*, which states that A must let five die if saving them requires killing B,⁵ Foot concluded that Surgeon must not perform the transplant. Thomson argued that although this is an attractive solution, there is one significant problem: Bystander seems to be in the same situation as Surgeon, facing a choice between killing five or killing one, yet only Bystander is permitted to divert the threat.

In 'Turning the Trolley', published in 2008, Thomson attempts to solve this problem by reversing her position that Bystander is permitted to turn the trolley, further claiming that there is no morally relevant difference between Surgeon and Bystander: they are both faced with a decision between killing one and letting five die, so neither may divert the threat.⁶ While her initial conclusion that Bystander is permitted to turn the trolley was more consistent with commonly held intuitions about the bystander's choices, Thomson now recognizes that this conclusion is inconsistent with the *Letting Five Die vs.*

³ Thomson, 'Turning the Trolley', p. 360. Though more clearly labeled in her 2008 article, the principles are the same as those Thomson mentions in 1985. For clarity, I herein refer to the principles as they appear in her 2008.

⁴ Foot, pp. 27-29. See also Judith Jarvis Thomson, 'Killing, Letting Die, and The Trolley Problem', *The Monist*, 59:2 (1976), pp. 204-217, at pp. 205-206.

⁵ Thomson, 'Turning The Trolley', p. 360.

⁶ A. W. Friedman's work appears to have been the impetus for Thomson's shift in 'Turning the Trolley'; see A. W. Friedman, *Minimizing Harm: Three Problems in Moral Theory* (Massachusetts Institute of Technology, PhD diss., 2002). Friedman very thoroughly examined the issues of threat initiation and threat type and dismissed each as insufficient to justify the distinction between the driver and the bystander. He specifically examined them as defenses of the intuition that it is okay for the bystander to turn the trolley but not to push the fat man onto the tracks, concluding that it is indeed impermissible to do either.

Killing One Principle,⁷ which she takes to be true. The rationale is that if Bystander (like Surgeon) allows the threat to continue on its original course, she merely allows the five to die, whereas if she acts to divert the threat, she kills the one. On the other hand, Driver, being in a relevantly different relationship, may divert the threat since any action he takes will result in killing. Thus, Thomson purports to account for the morally relevant differences between the trolley and surgeon cases, and intuitions that it is morally permissible in certain situations (e.g., the Driver case) to divert a threat in order to reduce harm. However, I contend that Thomson's most current solution to the problem is untenable—the differences between Driver and Bystander cannot support her application of DDA in these cases. If this is indeed so, then as long as Thomson wishes to maintain that Bystander is not permitted to turn the trolley, she must also accept that Driver is not permitted to turn the trolley either.

In both her 1985 and 2008 articles, Thomson takes for granted that Driver is responsible for killing innocent people regardless of what action he takes (or refrains from taking),⁸ but she admits that what makes this so is not at all clear. Thomson asserts that the justification for her conclusion lies in the *Killing Five vs. Killing One Principle*, but there is little indication as to why the driver should be considered to be killing no matter which option he chooses.

In her 2008 article, Thomson appeals to positive and negative rights to illuminate DDA. A negative right is one of non-interference, and a positive right is an entitlement to some provision, which generates a less stringent claim than a negative right. According to Thomson, Driver violates the negative rights of the all the victims regardless of which option he chooses, whereas Bystander only violates the positive rights of the five by allowing the trolley to continue on its track, but will violate the negative rights of the one if she turns the trolley. Since negative rights are violated by acts and positive rights by omissions, Thomson argues that Driver kills the five while Bystander merely allows them to die. But in virtue of what can Driver but not Bystander be said to violate the negative rights of, and therefore be responsible for killing, the five unfortunate victims?

There are four possibilities:

- i) *Threat initiation*: A kills B (rather than lets B die) if A initiated the threat that results in B's death.
- ii) *Control*: A kills B (rather than lets B die) if A is in control of the threat that results in B's death.
- iii) *Professional obligation*: A kills B (rather than lets B die) if A has a professional obligation to prevent the threat from harming (or resulting in the death of) B.
- iv) *Part of the threat*: A kills B (rather than lets B die) if A is a part of the threat that results in B's death. Unfortunately, Thomson has not

⁷ Thomson, 'Turning the Trolley', pp. 363-364. Thomson relies on Friedman's exploration of the various defenses of DDA, and agrees with his conclusion that the principle prohibits Bystander from turning the trolley.

⁸ Thomson, 'The Trolley Problem', p. 369.

convincingly explained what feature(s) ground the difference between killing and allowing to die in the trolley cases, or whether an agent can really find him or herself in such a situation where he or she is morally permitted or even obligated to kill one instead of five (or any such number).

There are a few reasons why these concerns bear further scrutiny. First, the lack of clear criteria for determining whether an action constitutes a killing or an allowing to die undermines the application of DDA in certain cases, making the implications of the distinction unclear. Second, Thomson's explanation of the differences between the cases seems to rule out features, such as control, that seem *prima facie* relevant to the distinction between killing and allowing to die. Finally, the features Thomson's explanation does not definitively rule out are insufficient to qualify an act as a killing rather than an allowing to die. Careful comparison of the conditions in each case reveals that the differences between the positions of Driver and Bystander cannot support the distinction between doing and allowing in a way that enables DDA to do the explanatory work in Thomson's answer to the Trolley Problem. However, before comparing the conditions, I will address Thomson's attempt to defend the difference between Driver and Bystander through an appeal to positive and negative rights.

Killing vs. Allowing To Die

In 'Turning the Trolley' Thomson mounts a defense of the difference between Driver and Bystander, citing DDA and the distinction between positive and negative rights. She argues that the difference between Driver and Bystander is that Driver violates the negative rights of the victims regardless of which option he chooses, whereas Bystander violates the positive rights of the five if she does nothing, but violates the negative rights of the one if she turns the trolley. Unfortunately, this justification is circular since determining whether Driver violates the positive or negative rights of the five depends on whether he is killing the five or simply failing to provide them with life-saving assistance.⁹ Given that the determination of which rights are violated depends upon the classification of an action as a killing or an allowing to die, and much of Thomson's justification for classifying Driver's actions as *killing* and Bystander's as *allowing to die* rests on the distinction between positive and negative rights, neither classification is sufficiently justified. But there are other possible explanations for the difference between Driver and Bystander.

First, it is important to understand the conditions under which Thomson thinks it is permissible to kill one in order to avoid killing a greater number. Thomson holds that the threat posed to the five must be numerically identical to that posed to the one in order for the agent to be justified in killing the one to save the five. An agent is not permitted to save the five by initiating a new threat to the one. Second, Thomson endorses what I call the Present Choice Constraint (PCC), which requires that an agent's options be restricted to those presently open to him or her, prohibiting an agent from acting, here and now, to

⁹ Thomson, 'Turning the Trolley', pp. 360, 372. Thomson believes that Foot and Friedman were right to appeal to positive and negative rights to explain the distinction.

better his or her own moral record or that of another.¹⁰ For example, if Thomson's Surgeon had poisoned five victims then had a change of heart and could only save the five by extracting and transplanting the organs of the one, he would not be permitted to infringe the rights of the one to better his own moral record.¹¹

According to Thomson, Surgeon's past action initiated a threatening sequence that is still in train, and despite his past action, *here and now* he faces the choice between killing one and letting the five die from the threat he initiated (after which it will come to be that Surgeon has killed the five). This constraint also holds interpersonally. If someone else had poisoned the five, Surgeon is still prohibited from killing one, and must let the five die.¹² If these two requirements are met—that the threat be the same and the choice not be an attempt to improve one's own or another's moral record—the case can plausibly be considered one in which it is permissible to divert the threat. By comparing the conditions in the various eligible cases, we can now attempt to identify the relevant factor whose presence makes it the case that the trolley driver will kill the five (rather than let the five die).

Threat Initiation

In *Trolley Driver*, Thomson explains that the death of the five qualifies as a killing on the part of Driver because he is 'driving' the threat to five. So, what about 'driving' is relevant to the distinction between killing and letting die? One possible explanation is that Driver initiated the threat that is now barreling toward the five, and threat initiation is the distinguishing factor. This means that any agent who initiates a threatening sequence is responsible for that sequence in such a way that makes any death resulting from that sequence a killing on the part of the agent. Thus, in such cases, the agent is permitted to divert the threat toward the lesser number. However, the mere fact that someone initiated a threat is insufficient to show that her failing to divert the threat would constitute a killing. In her 1985 article, Thomson argued that if a malicious surgeon were responsible for the threat posed to the five victims, having poisoned them, he would not be permitted to kill the one in order to save the five. The rationale is that even though the malicious surgeon initiated the threatening sequence, that sequence is still in train. So, despite the moral significance of his past actions, he is faced, here and now, with the choice of killing one and letting five die, after which it will come to be that he has killed the five.¹³ This seems to bar Driver from turning the trolley as well, if he is responsible for the threat's initiation. But this will be discussed more, later.

For now, let us discuss threat initiation independent of intent. Consider a variation on the Trolley Problem, the *Radio Switch case*:

¹⁰ In 'The Trolley Problem', this is Thomson's principle '(II)'; an expansion of Foot's initial *Killing Five vs. Killing One Principle*.

¹¹ Thomson, 'The Trolley Problem', p. 1414.

¹² *Ibid.*, p. 1413. Thomson says that if a villain started the trolley it is plausible that we may divert it. In fact, she says, we *may* be permitted to divert it *regardless of who started it*. This claim creates a fair bit of tension with her 2008 position that Bystander is not permitted to turn the trolley, and casts doubt over just how DDA and Thomson's appeal to positive and negative rights are to be understood.

¹³ Thomson, 'The Trolley Problem', p. 1413.

Radio Switch: Rupert is the 'driver' of an automated trolley that starts on its own and runs on a program. All that Rupert controls from the cab are the brakes, which he and the engineer inspected and approved the night before. The automated system is monitored from a control room at headquarters, which monitors track and train activity, and Controller is responsible for shifting the tracks, should the need arise. Although Rupert may radio in a request to shift the track, he has no direct control over the course of the trolley. The trolley proceeds along its programmed route, operating properly for several hours, when Rupert routinely applies the brakes and finds that they have failed. Upon radioing the control room to request a track shift in order to divert the trolley onto an inactive spur of track, Controller informs Rupert that a person is somehow stuck on the inactive track and no one can extricate him in time. What is worse, there are five other people stuck on the active track ahead, none of whom can be removed in time to avoid being hit by the trolley.

Examining this case through Thomson's framework, I see four possible options for the agents involved, each of which highlights different factors as morally relevant: (1) Only Rupert (like Thomson's Driver) is morally permitted to turn the trolley,¹⁴ (2) only Controller herself is permitted to turn the trolley; (3) neither Rupert nor Controller are permitted to turn the trolley; or (4) both Rupert and Controller are permitted to turn the trolley.

Option (1) removes threat initiation and control from the list of features potentially relevant to killing versus allowing to die. First, Rupert did not start the trolley, nor is he responsible for the brake failure, which is a crucial part of the threatening sequence. If threat initiation is the key feature distinguishing killing from letting die, then Rupert is not permitted to turn the trolley since doing so would constitute killing the one, while letting the trolley continue on its course would be allowing the five to die. So, by the *Killing One vs. Letting Five Die Principle*, Thomson must conclude that in this case either Rupert may not turn the trolley, or threat initiation is not the morally relevant feature at play.

Second, when there is a mismatch between the agent who initiated the threat and the agent who controls it, the situation is analogous to Thomson's Bystander case, wherein the only agent with the power to divert the trolley is (in her view) not permitted to do so. Given that Bystander did not initiate the threat he is not permitted to divert it, by the *Killing One vs. Letting Five Die Principle* and Thomson's PCC. Note, this also rules out option (4). Since Controller's position is directly analogous to that of Bystander (aside from the professional aspect, which will be discussed later), Thomson cannot endorse option (4) while maintaining that Bystander may not divert the trolley. Herein lies another difficulty for Thomson's current view.

¹⁴ Note that although Rupert is not *able* to turn the trolley, he may still be morally permitted to do so. I am morally permitted to kill someone who poses a direct threat to my life though I may lack the means to do it. If, however, Thomson means obligated rather than merely permitted, then (1) does not make much sense. If this is the case, (1) would still speak against threat initiation as the relevant difference between Driver and Bystander.

According to Thomson, what an agent may permissibly do depends on the choices available to her here and now. PCC further constrains the available options, holding that one is not permitted to do harm in order to better her own moral record or that of another. Thus, any agent who initiated a threatening sequence in the past is not permitted to do harm here and now to ameliorate the consequences of that action. So, if the feature relevant to the distinction between killing and letting die lies in the past, as does threat initiation in trolley cases, no agent—not even the initiator of the threat—is permitted to divert the impending threat if that involves killing another. This effectively turns all trolley drivers into bystanders, an odd consequence of PCC.

Thus, Thomson's argument cannot be that Driver is permitted to turn the trolley because otherwise his past behavior initiating the threat will kill the five. Given PCC, if initiating the threat in the past makes it so that Driver kills (rather than lets die) the five, he is not permitted to turn the trolley to make it so he will have killed just one instead of five. While this point does not itself prove that threat initiation cannot be the morally relevant difference between the trolley driver and the bystander, it does show that if Thomson wishes to maintain both PCC and her conviction that Driver is permitted to turn the trolley, the distinguishing factor between killing and letting die cannot be threat initiation. Nor, as I shall now argue, can it be control.

Control

Advocates of (1) may not appeal to control as the relevant difference since Rupert lacks control of the trolley, given the brake failure and the role of Controller. So, if control of the threat is indeed the relevant feature, then Thomson must opt for (2), which states that only Controller may turn the trolley. Advocates of (2) may appeal to the fact that Controller governs the behavior of the trolley now that the brakes have failed and is therefore the agent faced with the option of killing five or killing one, permitting her to divert the trolley.

This, however, cannot be right. Aside from her status as a railway employee, her situation is no different from that of Thomson's Bystander, who Thomson now claims is not permitted to divert the trolley because the decision she faces is between either killing one, or allowing five to die from an existing threat that she did not initiate.¹⁵ Moreover, endorsing (2) would be not only a significant rejection of the intuitions that motivate the Trolley Problem, but also a reversal of Thomson's most recent stance that Bystander is not permitted to turn the trolley. So, control cannot be the morally relevant difference tracked by DDA in Thomson's explanation. But what of the common thread between Rupert and Controller, that of professional obligation?

Professional Obligation

Thomson could respond that both Rupert and Controller have a professional obligation to prevent the threat from harming the unfortunate individuals on the tracks, an obligation that Bystander lacks. The idea is that given their status as railway employees,

¹⁵ Thomson, 'Turning the Trolley', pp. 369-372. This permission need not be employment-based. In her 2008 Thomson considers the case of Alfred, who experiences brake failure while driving his car. She argues that since he is in control of the threat, if he is faced with the option of killing one or killing five (not having the option of being altruistic and killing himself, which, if available, he must choose), he should swerve to kill one.

both Rupert and Controller assume responsibility for any possible mishaps related to the operation of the trolley and are obligated to do what they can (short of creating a new threat), to minimize the harm done by the threatening sequence in progress.¹⁶ Thus, if they divert the trolley they will kill one, but if they do nothing they will kill five, in virtue of their professional relationship to the threat and to the potential victims. Therefore, according to the *Killing Five vs. Killing One Principle*, both Rupert and Controller are permitted to turn the trolley, whereas Bystander is not. However, professional obligation does not seem to be what distinguishes between doing from allowing, nor does it appear robust enough to bestow on an act the status of killing.

First, it seems quite implausible that the difference between killing and allowing to die hinges on one's profession. It does not seem right that Rupert's inability to divert a threat he did not initiate transfers to any coworker (including Controller), in virtue of their shared employment with the trolley company, the moral status of killing regardless of whether they act or refrain from acting. It is also implausible that one's employment entails the acceptance of limitless responsibility for any and all mishaps that could occur in relation to their employment duties.¹⁷ Second, failure to fulfill an obligation of protection against a threat one is otherwise not morally responsible for does not thereby generate the responsibility necessary for killing rather than letting die. Consider self-defense. Thomson argues that permission to kill in order to defend against a threat is not transferrable to a third party.¹⁸ While any one of five people may shoot the driver of a car careening toward them, a bystander is not permitted to do so on their behalf. The single exception is an officer of the law, who may kill the driver to protect the five. However, though the officer's professional obligation may permit him to kill the one, the permissibility of his doing so is not due to the fact that he also faces the choice of killing the five.

Failure to fulfill an obligation to protect against harm does not translate into *killing*. If the officer does nothing he will have merely allowed the five to die. Moreover, it seems that such a professional obligation to prevent harm may run counter to Thomson's PCC, requiring persons in certain professions to intervene even when the result improves the moral record of another. The bottom line is that, while Thomson notes that what makes the driver's decision one between *killing and killing* rather than *killing and allowing to die* is not easy to identify, it looks suspiciously like this may be due to the fact that no such morally relevant difference exists in these cases. However, there is one more potential explanation for this difference: being part of the threat.

¹⁶ I am indebted to an anonymous reviewer for suggesting that the notion of professional obligation be expanded and the assumption of responsibility for trolley-related contingencies be directly addressed.

¹⁷ Imagine some freak natural occurrence causes the trolley to collide with a number of innocent victims. It seems improper that the driver of the trolley should be said to have killed the victims because, as a trolley company employee he has assumed responsibility for any and all trolley-related happenings. There are (and should be) limits to professional responsibility, an idea that was born in mind during the construction of the *Radio Switch* case.

¹⁸ Judith Jarvis Thomson, 'Self-Defense', *Philosophy and Public Affairs*, 20:4 (1991), pp. 283-310.

Part of the Threat

In 'Equating Innocent Threats and Bystanders', Helen Frowe explores the question of whether one is permitted to kill an innocent person who is part of a threat to her life.¹⁹ The important point for our purposes is the notion of a composite object, whereby an individual attached to a threatening object is considered part of the threat. Applied to the Trolley Problem, the argument is roughly that if the driver is part of the threat posed by the trolley, then he is somehow responsible for that threat in a way that makes his action or inaction a killing, thereby permitting him to turn the trolley. For Frowe, it does not matter whether the individual in the composite object is innocent; if he is *instrumental* to the threat then he is part of the threat in a way that makes him responsible for killing whoever dies from the threatening sequence. If being part of the threat is sufficient to account for the difference between killing and letting die, then Thomson may have a means to remedy the inconsistencies in her present response to the Trolley Problem.

Frowe argues that someone threatened by a trolley may destroy the trolley in defense of her life, even when that entails the death of an innocent person trapped inside the trolley. The innocent person inside the trolley is part of the threat and is therefore a proper target of self-defense. However, if we take this sense of being part of a threat as the relevant condition for killing rather than letting die, then it seems all and only those individuals on the trolley are permitted to divert it, and if no one diverts then all are responsible for killing the five. This does not seem quite right. In the trolley cases, what it means to be part of a threat (in a sense relevant to the difference between killing and allowing to die) lies in Frowe's notion of instrumentality—whether an agent is instrumental to the threat.

Recall Thomson's PCC, which restricts the scope of options open to the agent in the present, and forbids an agent from causing harm here and now to better his or her own moral record or that of another. This constraint also affects the way we characterize the causal chain and its relevance to the agent's available options. When determining whether an agent is instrumental to a threat, which, according to Frowe, means that killing the agent would halt the threat to the victim, we must look to the present circumstances. Given this requirement, being part of the threat cannot explain the difference between the driver of the trolley and a bystander, since none of these agents are instrumental to the threat in the manner described by Frowe.

In Thomson's original Trolley Driver, Driver is not instrumental since killing Driver would not affect the threat the trolley poses to the five. This is also the case with Bystander and the agents in Radio Switch. Interestingly, Frowe's condition would affect the potential threat to the one on the side-track. Whoever controls the trolley currently directed toward the five is instrumental to the threat to the one if he or she diverts the trolley. Thus, once the threat is in train the only significant factor in the killing/letting die distinction becomes control, and only with respect to diverting the threat toward the one. In terms of Frowe's argument, this means that the one has a claim against the agent in control and may kill the agent in self-defense to prevent the agent from diverting the threat toward her. But the five have no such claim, since the death of the agent in control would not halt the threat to the five. The absence of this claim suggests that no one stands

¹⁹ Helen Frowe, 'Equating Innocent Threats and Bystanders', *Journal of Applied Philosophy*, 25:4 (2008), pp. 277 - 290.

in the relation to the threat necessary to allow an agent to divert it. So, if being part of the threat is the morally relevant feature tracked by DDA in Thomson's explanation, she is forced to conclude that no one may divert the threat.

The argument is that if the killing of A saves B from the threat, and if the threat is allowed to proceed, A will kill B (rather than let B die). If A has the choice between killing and letting die, A must choose letting die. But, where A is Driver, Bystander, Rupert or Controller, killing A will not save B, where B is the five on the track ahead. Thus, what Driver, Bystander, Rupert or Controller does to the five is not killing but letting die. Therefore, since the present choice to divert the trolley would constitute killing the one (because eliminating the agent would halt the threat to the one), and the agents each face a choice between killing one and letting five die, none of the agents are permitted to divert the trolley.

The conclusion then must be that no one is permitted to turn the trolley, option (3). Indeed, Thomson must also conclude the same in the Driver and Bystander cases. DDA, as it has been deployed by Thomson to explain intuitions in trolley cases, does not appear to track any consistent feature common to the relevant agents across the cases. It looks as though intuitions, rather than carefully constructed principles and distinctions, bear the weight of her conclusions. If Thomson is to avoid the tension between PCC and DDA, and her intuition that Driver but not Bystander may divert the trolley, she must abandon one of these commitments. I will argue that there is reason for Thomson to give up her reliance on DDA rather than PCC. Though DDA is an intuitively meaningful distinction that effectively supports conclusions in other types of cases, it is out of place in Thomson's proposed solution to the Trolley Problem. To demonstrate the importance of PCC, let us now turn to transplants.

Transplants

PCC is an important requirement, as we do not want DDA to justify present bad acts in order to prevent past bad acts from coming to fruition. To illustrate the concern, consider a variation on the case of the *Malicious Surgeon*.

Malicious Surgeon: A surgeon administers a poisonous chemical to his five patients, who are slowly dying from the organ damage caused by the chemical. They will not survive unless the poison is thoroughly removed from their bodies. The surgeon has a change of heart and realizes that the only way to save the five is to hook them up to a young man with unusually strong and healthy kidneys that will be able to filter the poisons from the systems of the five, diverting the threat from the five to the one. Unfortunately, absorbing the poison from the five will overwhelm the young man's system and cause his death. Upon being informed of the situation, the young man politely declines to be hooked up to the five.

Tension may arise here given Thomson's position that the moral status of an act is determined by what options are available to an agent here and now.²⁰ Though Malicious Surgeon's past act of poisoning the five patients was indeed wrong, if Malicious Surgeon is permitted to act here and now to better his own past moral record, and the five are not yet dead, then he should be considered to be facing a choice between killing five and killing one, thereby making it morally permissible for him to kill the one in order to have not killed the five. This seemingly allows one bad act to justify another bad act in order to lessen the severity of a past wrong that has not yet reached its conclusion. This consequence is not likely to be embraced by many DDA defenders who wish to say that a surgeon in such circumstances should not be permitted to sacrifice the one.

The rationale behind denying that Malicious Surgeon may sacrifice the one seems to be that, although the five are not yet dead, the deed has been done and the surgeon is now faced with the choice of allowing the poison to continue coursing through the veins of the five, destroying their organs and eventually resulting in their deaths; or attach the one to the five to filter out the poison, thereby killing the one. Here and now Malicious Surgeon has the option of killing one or allowing five to die (though if he lets them die, it will then come to be that he has killed them).²¹

Now apply this to the trolley case. Let us assume Driver is responsible for the threat posed by the trolley, thereby making his position relevantly similar to that of Malicious Surgeon. If Thomson thinks Driver is responsible for the threat posed to the five by having started the trolley, then why is Driver not faced with the very same options as either of the surgeons?²² Why does Driver not face a choice between allowing five to die and killing one, as Malicious Surgeon is held to be?²³ Even if the case is amended such that the surgeon's poisoning the five was somehow non-culpable, Thomson would likely still wish to block the conclusion that he is therefore permitted to kill the one.

²⁰ Thomson, 'The Trolley Problem', p. 115.

²¹ For more on this point see Jason Hanna, 'Doing, Allowing, and the Moral Relevance of the Past', *Journal of Moral Philosophy*, (2014, online). Does the fact that he will have killed provide a potential way out of the present problem for DDA? I do not think so but am not discounting the possibility. Introducing the notion 'will have killed' may get the desired result in the driver's case but not likely in transplant cases.

²² One could appeal to the Doctrine of Double Effect (DDE) arguing that the surgeon uses the death of the one as a means to save the five while the driver does not. However, this does not appear to be the distinction Thomson is drawing. Moreover, although DDE may easily prohibit the surgeon from killing the one, it is DDE not DDA doing the work, and it does not get the desired results in the bystander trolley cases. Appeals might be made to intention and threat type in an effort to establish morally relevant differences between the surgeon and the driver. However, intention does not appear to clarify the distinction between doing and allowing and can easily be stripped away from the surgeon case in order to place him on par with the hapless trolley driver. One may also point out that while the surgeon has threatened the five with poison and is therefore not permitted to create the new threat of an operation toward the one, while the driver would be diverting a threat toward the one, rather than creating a new type of threat. However, this condition can easily be eliminated and we still end up with the inconsistent results already observed.

²³ Note that even if *Malicious Surgeon* and *Driver* must allow the five to die, once they die it will come to be that *Malicious Surgeon* and *Driver* have killed them.

Moreover, if an agent is not permitted to kill one in order to improve his or her, or another's, past moral record, then in situations in which a trolley driver is responsible for some non-accidental brake failure, out of neglect or sabotage, or some other agent is responsible for the failure, turning the trolley would presumably not be permissible for the driver. In this case, the driver would be killing the one in order to save the five he otherwise would have killed by his own fault, or the fault of another. This seems a clear-cut case Thomson would define as *killing vs killing*, which closely resembles Driver's circumstances. If being responsible for a threat in a way that leads to a killing also makes the agent responsible in a way that prohibits him or her from acting in the present to reduce the harm of a past wrong, then apparently, diverting a threat in a case of *killing vs. killing* is never permissible. Thus, the constraints of DDA and Thomson's PCC together leave a narrow (or worse, nonexistent) set of cases to which Thomson's solution could actually apply. Indeed, how can an agent be responsible for an act such that, though its consequences constitute killing, it is not the result of the agent's past wrong, thereby permitting the agent to divert the threat and diminish the harm? I contend that if any such cases do exist, DDA will not aid in illuminating them.

In fact, Thomson's requirement that the threat to the one be quantitatively identical to the threat to the five is able to prohibit the actions of Thomson's would-be organ-stealing Surgeon. In *Original Surgeon*, the transplant is prohibited by the fact that Surgeon would be creating a new threat rather than diverting one. Even if the condition were eased to require only qualitative similarity, so that Surgeon could extract the other healthy organs from a patient dying of, say, liver failure, Thomson's PCC is strong enough to block the transplant. Recall, a consequence of PCC is that *no one* may divert a threat, not even a surgeon in such a case.

Conclusion

Thomson must concede that a trolley driver should no more be permitted to turn the trolley than a bystander should, and no more permitted to kill the one than a surgeon should. There simply is no morally relevant difference that can distinguish between doing and allowing in a way that would clearly separate the acts of the various agents along the lines of killing versus allowing to die. Attempts to identify such a difference either raise more similarities between Driver and Bystander, and thereby result in an application of DDA that gets the wrong result in paradigm cases, or allow the commission of present bad acts designed to lessen the harm of past bad acts whose results have not fully come to fruition.

Unfortunately, this renders the explanatory power of DDA in Thomson's account virtually inert. As stated earlier, it may not be so bad for Thomson to dismiss our intuitions about the driver and accept that he is not permitted to turn the trolley. However, if she takes this route, the problem still arises that there are few (if any) cases in which anyone is ever permitted to divert a threat. Given that DDA leads to the conclusion that even the driver of a trolley is not permitted to divert a threat, it appears that *no one* can really ever be permitted to divert a threat, forcing Thomson to look elsewhere in order to account for strong intuitions to the contrary. If instead we opt to dismiss those intuitions and embrace the logical conclusions of Thomson's application of

DDA, then as A. W. Friedman rightly noted,²⁴ the trolley case becomes an interesting and provocative non-problem.²⁵

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²⁴ Thomson, 'Turning the Trolley', p. 364.

²⁵ I would like to thank Jason Hanna for his invaluable advice throughout the writing of this paper. I also would like to extend thanks to Adrian Seeley, Tatyana Kostochka, and Rebekah Hunt for patiently enduring many a trolley-related conversation and for graciously lending me their philosophical and editing skills. Thanks also to the students and faculty at Northern Illinois University, the University of Illinois at Urbana-Champaign, and the University of Utah for their helpful commentary on various iterations of this paper. Finally, I would like to thank the anonymous reviewers at *De Ethica* who's thorough and insightful comments helped strengthen my arguments.

The Scope of the Global Institutional Order: Can Pogge Survive Cohen's Critique of Rawls?

Kevin W. Gray

In this paper, I develop a critique of Thomas Pogge's attempt in Realizing Rawls to expand the scope of the Original Position. I argue that Pogge is guilty of assuming the same arbitrary boundary between public and private behaviours made by Rawls. To actualize this critique, I take G. A. Cohen's critique of John Rawls, found in its fullest form in Rescuing Justice and Equality, alongside Thomas Pogge's attempt, in Realizing Rawls, to expand the scope of the Original Position. Cohen argues that the boundary Rawls wishes to draw between the public and private cannot be coherently maintained in the application of the Difference Principle. I argue that if this claim is true, then Pogge's attempt to expand the scope of Rawls' Theory of Justice to the international arena is actually considerably more radical than Pogge intended. Not only do we need to worry about the justice of institutions in international law, but we now need to worry about the justice of individual actions inside a system of global justice. I conclude by considering some objections against Cohen's, and thus, my position.

Thomas Pogge has recently and powerfully argued for the existence of stringent, individual obligations owed to the global poor.¹ Yet, those who might otherwise be most sympathetic to Pogge's attempt to globalize Rawls have often been puzzled by his reluctance to challenge the distinction between public and private actions that figures so prominently in Rawls' work on domestic justice.² In this paper, I take a position largely inspired by the work of G. A. Cohen and suggest that if we take Cohen's argument seriously, it threatens Pogge's attempt to justify a limited regime of international assistance and entails instead much stronger international obligations. This paper is part

¹ I am indebted to value feedback I received on this paper from audiences at the ECPR in Reykjavik in 2011, at the IIS in New Delhi in 2012, the APA Eastern Division Meeting in December 2012, and from the Faculty Colloquium at Marist College in November 2011. In particular, I wish to thank Andrei Buckareff, Henry Pratt, and Jeffrey Epstein for their helpful comments on early versions of this paper. Naturally, any errors remain my own.

² For criticism of Pogge, and also Rawls, on this point, see G. A. Cohen, 'Where the Action Is: On the Site of Distributive Justice', *Philosophy & Public Affairs*, 26:1 (1997) ['Where the Action Is'], pp. 3-30, which I discuss below, and Liam Murphy, 'Institutions and the Demands of Justice', *Philosophy & Public Affairs*, 27:4 (1999), pp. 251-291.

of a larger attack on Pogge's theory of global justice as well as being a partial (and incomplete) challenge to the divide between public and private the figures so prominently in much contemporary political philosophy.

In his writings, Pogge advances two (not necessarily unrelated or incompatible) arguments in favour of augmented obligations of justice in the international arena: an earlier critique of Rawls' *A Theory of Justice*, and a later, more minimalist theory, which is inspired by an analysis of the negative duties of all actors in a global economy.³ As to the latter, not only do states have humanitarian obligations to help each other in emergencies, Pogge argues, but, because state actors are also responsible for much of the poverty in other countries, they owe, at a minimum, a negative duty to other states.⁴ However, it is the consequences of the former argument that interests me in this paper.

It is to Pogge's credit, from a cosmopolitan perspective, that in his earlier work he attempts to improve Rawls' theory. He recognizes, for instance, both in *Realizing Rawls* and in the subsequent 'An Egalitarian Law of Peoples', that Rawls had no answer, in *A Theory of Justice*, as to why we should conclude that the principles of justice stop at the border of the nation-state, or why historically arbitrary boundaries should be taken as final.⁵ Even if we were to believe that these historically contingent facts were important, or in some way made it difficult to extend the scope of justice beyond the nation state, those difficulties would not, *ex ante*, justify refusing to extend the Original Position (OP) beyond the border of the nation state.⁶

³ This second argument, which is at its heart a mercantilist approach to global justice, comes out clearest in Thomas Pogge, *World Poverty and Human Rights [World Poverty]* (Cambridge: Polity, 2002).

⁴ For criticism of this position, see Magnus Reitberger, 'Poverty, Negative Duties and the Global Institutional Order', *Politics, Philosophy & Economics*, 7:4 (2008), pp. 379-402; Mattias Risse, 'How Does the Global Order Harm the Poor?', *Philosophy & Public Affairs*, 33:4 (2005), pp. 349-376, and Uwe Steinhoff, 'Why "We" Are Not Harming the Global Poor: A Critique of Pogge's Leap from State to Individual Responsibility', *Public Reason*, 4:1-2 (2012), pp. 119-138. Risse argues that the global order does not in fact harm the poor (relative to any reasonable baseline); Reitberger argues that Pogge confuses the global institutional order and the actions of individual countries; Steinhoff argues that Pogge's conception of collective responsibility is untenable.

⁵ Rawls later provides an answer in *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999) [*LoP*], albeit in a form which is suggestive at best. In *LoP*, Rawls 'imagines an international "original position" in which all reasonable peoples are represented. He emphasizes that peoples, not persons, are the units of representation' (Charles Beitz, 'Rawls's Law of Peoples', *Ethics*, 110:4 (2000), pp. 669-696, at p. 673). In keeping with that view, he does not argue for a duty of distributive justice between peoples, but instead argues that peoples owe merely a duty of assistance to disadvantaged peoples (*LoP*, p. 37). Those disadvantaged peoples, comprising he calls burdened societies, should be assisted in developing just institutions (Beitz, p. 676; *LoP*, p. 34). This view has come under harsh criticism as enshrining what Pogge calls an academic 'rationalization of double standards of economic justice' (*World Poverty*, p. 108).

⁶ It may even be the case, as Pogge argues, that behind a veil of ignorance,

[d]elegates of liberal societies as Rawls conceives them would therefore not merely *prefer*, but would *choose*, my [Pogge's] more egalitarian law of peoples over his [Rawls'] inegalitarian alternative. In doing so, they would also envision a more democratic world order, a greater role for central organizations, and, in this sense, more world government than we have at present. ('An Egalitarian Law of Peoples', *Philosophy & Public Affairs*, 23:3 (1994), pp. 195-224, at p. 224)

In this paper, I will go one step further than Pogge, and claim that Rawls cannot merely be criticized for failing to extend the OP, but also for presupposing an arbitrary boundary between public and private. I will develop this critique in four steps. In the first two steps, I will summarize Cohen's critique of Rawls and then develop Pogge's extension of Rawls' theory to the global arena. In the next step, I will draw the two together in order to argue that Pogge's theory is ultimately vulnerable to Cohen's critique of Rawls. In the final step, I will address several potential criticisms against my arguments and suggest solutions. In particular, I will argue that Pogge's early work commits him to a view of global justice that is incompatible with his latter criticism of Cohen.

Cohen's Critique of Rawls

In several places in his writing, G. A. Cohen co-opted the feminist slogan 'The personal is the political' to argue that much of contemporary political philosophy took for granted what was ultimately an arbitrary line between the realm of personal freedoms and the sphere of political activity.⁷ Taking on Rawls, Cohen argued, both in his response to Joshua Cohen's 'Taking People as They Are' and in the better-known *Rescuing Justice and Equality (RJE)*, that Rawls assumes an artificial cleavage between institutions and persons.⁸ Cohen's central point in that work is that Rawls hangs too much on the justice of institutions without taking into account the ways in which people act as a result of religion, culture, ethics, or economics.

Cohen's argument is effectively that Rawls' Difference Principle (DP) is not merely a claim about the relations of justice that should exist in a just society, but also a factual claim about the prevailing ethos inside capitalist society.⁹ Only once we know the nature of the ethos that exists in a particular society are we able to actually apply the DP. Thus, Cohen claims that Rawls was blind to the relationship between the selfishness of individuals, and what this meant for the possibilities for equality and justice.¹⁰ In a series of debates with Joshua Cohen, Ronald Dworkin, Thomas Pogge, amongst others, Cohen argues against the typical understanding of the DP (viz. that the DP properly understood is a claim about the basic structure of society in a minimalist sense) and instead claims that the DP cannot be separated from debates surrounding what would constitute a just social ethos.¹¹ In so doing, Cohen is not attempting to overthrow the DP's focus on the so-called basic structure of society, but, as he puts it, to bring social facts back in.¹² Cohen

⁷ 'Where the Action Is', p. 3.

⁸ At some level, this should be no great surprise: Rawls famously argued in *A Theory of Justice* [ToJ] (Cambridge, MA: Harvard University Press, 1971) that justice is the first virtue of institutions, and not of other social arrangement amongst people.

⁹ G. A. Cohen, *Rescuing Justice and Equality [RJE]* (Cambridge, MA: Harvard University Press, 2008), p. 120.

¹⁰ *RJE*, p. 122.

¹¹ See also Thomas Pogge, *Realizing Rawls [Realizing]* (Ithaca: Cornell University Press, 1989) and Joshua Cohen's 'Taking People as They Are?', *Philosophy & Public Affairs*, 30:4 (2001), pp. 363-386. For a feminist critique of the problems of defining the scope of the DP, particular as it relates to the family, see Susan Moller Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989).

¹² *RJE*, pp. 375-377.

maintains that any attempt to construct a society must not be content to create a just basic structure, but also to create a just social ethos, which individuals in that particular society should uphold in aspects of their life.

The relationship between the DP and contingent facts about the social ethos in place are relevant, on Cohen's view, in order to explain the ways in which the DP might be applied. To illustrate with a plausible real world experience: a government might plausibly choose to raise taxes on the wealthiest individuals in society in order to be able to increase welfare benefits for the least well-off members of society. However, whether or not raising taxes will actually lead to increased benefits, and therefore to increased benefits, will depend on contingent facts about the morality prevailing in a specific country.¹³ If by raising taxes on the wealthiest members of society, fewer of them will continue to work hard – and net revenues will decline and thus welfare benefits will fall – then raising taxes on the well-off would not be permitted under the DP. It is not necessarily the case that people will react in this way, or that they will act similarly in all societies or at all times. How people will react under different institutional arrangements is a feature of the political community that cannot be blind to the prevailing social *ethos*.

In work published shortly before his untimely death, Cohen moved beyond emphasizing the blindness of Rawls' theory to social facts to arguing that democratic theory makes it too easy for the powerful to advance arguments in favour of their own positions by relying on an artificial divide between public and private, between behaviour which we judge acceptable and that which generates opprobrium. In *RJE*, Cohen considers the case of an individual or a class of actors who might be disinclined to act in a certain way if the government made a decision different from the one that the individual or collective actor recommends. In the example Cohen gives, the relevant assertion is the threat by the talented not to work hard unless they are granted preferential tax rates or some other privilege. They can make such a threat because the private actions of individuals are separated from those public acts that are properly regulated by a theory of justice.

To show the relevance of such cases, Cohen reconsiders Rawls' DP. As is standard in the literature, Cohen takes the DP to permit policy decisions if the following condition holds true: (1) there is no alternative distribution that will make the least advantaged better off. However, Cohen believes that this underdetermines just acts, as it depends, tacitly, on social facts. If Cohen is correct, (1) will not necessarily entail a just distribution (and will tolerate unjust behaviour on the part of the talented). Instead, Cohen wishes to add another condition, which he believes must underlie Rawls' application of the DP: (2) there is no alternative distribution that is unavailable simply because the more talented, the well-off, etc., act (or threaten to act) in such a way as to prevent such an alternative distribution.¹⁴

¹³ There is some anecdotal evidence to suggest that higher rates of taxation are more palatable to the wealthy in some European states, such as the Netherlands and Germany, than they are in the United Kingdom or the United States. I discuss the importance of this evidence below.

¹⁴ Kasper Lippert-Rasmussen, 'Inequality, Incentives and the Interpersonal Test', in *Justice, Equality, and Constructivism. Essays on G. A. Cohen's Rescuing Justice and Equality*, edited by Brian Feltham (London: Wiley-Blackwell, 2003), pp. 55-73, at p. 63.

Cohen's example for this argument comes from post-war British history.¹⁵ He speaks derisively of what he calls 'Nigel Lawson's Tax Cut', when, in March 1988, Her Majesty's Chancellor of the Exchequer lowered the top income tax rate from 60 % to 40 %, with the goal, partially at least, of encouraging capitalist accumulation, reinvestment and entrepreneurialism, and thus economic and job growth, all created by relying on the richest and presumably most-talented members of society's self-interest.¹⁶

Assuming that by cutting the tax rate dramatically, the government of Great Britain successfully stimulated the economy and improved the lot of the worst off in British society – an unlikely proposition, admittedly, given what we now know of the change in income distribution in 20th century Britain, which resulted in increased inequality, etc. – Lawson's actions seem perfectly permissible under the DP (in that it satisfies (1)).¹⁷ And yet, there is something deeply unsettling about it.

Cohen's objection to those who would agree that such a tax cut was a reasonable application of Rawls' theory is that they suffer from a tendency to frame the debate in largely abstract terms, concerning themselves only with institutional arrangements under a pre-existing *ethos*. Rawls and his defenders allow this argument to be made about the actions of individuals while abstracting them from their cultural milieu. Instead, Cohen wants to know how arguments for certain political arrangements are advanced in concrete situations, how such arguments depend on underlying ethical beliefs (held by individuals in that society), and what effect membership in political communities might have on our ability or willingness to make these arguments.

The problem, Cohen argues, is that Rawls' approach risks conflating two separate things: the values of the talented classes and the interests of the poor. To get at the problem, consider the following case. It is non-trivially true that the poor (appropriately defined) would be better off and inequality would be less if the talented (also appropriately defined) would simply, out of the kindness of their hearts, hand the poor some percentage of their income at the year's end, instead of keeping it for themselves, as a way of reducing inequality. Now imagine that, instead of being an act of charity, the government were going to enforce such an act by instituting a system of taxation designed to accomplish the same thing.

Of course, knowing that they were going to do without this income, the rich and talented might simply decide not to work as hard, to take more vacations, spend long weekends with the family, etc., and in that case, the poor, being deprived of the effects of the talented, might be substantially worse off. Thus, the rich might act in a self-interested

¹⁵ However, one could easily imagine similar examples from the United States (e.g. the lowering of income and inheritance taxes rates under George W. Bush)

¹⁶ *RJE*, p. 27. These members of society have come to be called 'job creators' in contemporary American political discourse. The term is misleading. As Paul Krugman argued recently in the *New York Times* the marginal tax rate on the ultra-rich could be something like 70% without diminishing government revenues (Paul Krugman, 'Taxing Job Creators', (2011), online at <http://krugman.blogs.nytimes.com/2011/11/22/taxing-job-creators> (accessed 2013-03-03)); see also Peter Diamond and Emmanuel Saez, 'The Case for a Progressive Tax: From Basic Research to Policy Recommendations', *Journal of Economic Perspectives*, 25:4 (2011), pp. 165-190.

¹⁷ This ignores the sketchy economic justification. For discussion of how the argument appears to have failed on empirical grounds, see, for example, Francis Jones, Daniel Annan, and Saef Shah, 'The Distribution of Household Income 1977 to 2006/07', *Economic & Labour Market Review*, 2:12 (2008), pp. 18-31.

way that would deprive the poor of any benefit. (In effect, this is Nigel Lawson's argument in reverse, which said: cut the taxes of the rich, they will work harder and the poor will benefit; here, if we do not cut the taxes of the talented, the talented work less, and the poor lose out.)

However, the rich need not act in this way; they could pitch in and work harder for the sake of their fellow citizens. At first glance, Nigel Lawson's argument for inequality seems in concordance with Rawls' DP (and should satisfy social liberals, who might otherwise be sceptical of arguments for inequality). However, it hides a deeper problem with Rawls' philosophy: Rawls had proposed a division of labour in moral theory between the political considerations of what would constitute a just government and the actions of individuals within the supposedly just state. The former was properly the subject of a theory of justice; the latter not.

This division of labour, Cohen objects, gives the rich and talented too much leeway. It allows those individuals who might benefit from some arrangement in the real world to act in such a way, or to threaten to act in such a way, inside a society as to make that arrangement, beneficial to the upper-class, the only practical solution to a problem and thereby influence the creation of laws. The rich, the most talented, etc. might simply claim that it is a fact about human nature that higher rates of income tax produce less energetic members of society, and that in the long run, the poor will lose out. It is simply an (unfortunate) fact, they might say, that we cannot tax the rich heavily because if we do, we will worsen the lot of the worst off in society.

However, to accept such an argument from the rich would be to permit them to justify their actions using the sort of selfish reasons that we would reject if they were made in a different context by a friend, a family member, or a member of our community. Understood in terms of the example I gave earlier about the need for lower taxes, individual members of the upper-class are effectively black-mailing the poor when demanding lower taxes to work harder and create more jobs. Thus, Cohen suggests as a corollary to the DP, his so-called Interpersonal Test (IPT), which asks:

[h]ow robust a policy argument is, by subjecting it to variation with respect to who is speaking and/or who is listening when the argument is presented. The test asks whether the argument could serve as a justification of a mooted policy when uttered by any member of society to any other member.¹⁸

Put simply, Cohen argues that we would only accept arguments under the DP if they were not coming from members of our community. However, if they were, such arguments would be condemned immediately as selfish and immoral, and unacceptable in a just community, where no one would be allowed to make such self-serving arguments in any public forum without immediate challenge.¹⁹

¹⁸ *RJE*, p. 42.

¹⁹ Elsewhere, Cohen gives as an example a group of friends who decide to go camping together. In principle, there are at least two different ways that a group of people could act together on a camping trip (or in some other similar activity). Every individual could assume a different job – one person could fish, another person could cook, etc. – and all could share the fruits of their labour. Or, each person could work entirely for herself – the person who brought the fishing equipment could claim the spoils of her labour, the person who peeled and cooked the vegetables could keep them for herself, etc. (G. A. Cohen, *Why Not Socialism?* (Princeton: Princeton University Press, 2009),

Pogge's Attempt to Globalize Rawls

In his critique of Rawls, Cohen considers only the domestic case of the IPT: for instance, the claim that by lowering taxes we will encourage the richest to invest more in economic production or the most talented to work harder and thereby to better the lot of the poor, which turns on the (supposed) proclivity of these members of society to work harder only if taxes are sufficiently low. This claim, however, depends not merely on the justice of institutions, but on contingent facts about culture, etc. In what follows, I shall ask if there are special facts about the international community such that we should apply only the DP beyond national borders, as Pogge suggests in his earlier work, or if we instead should also apply IPT beyond those boundaries.

As Pogge has remarked, most of us do not bother to consider the question of the justice of borders or of the global order on a day-to-day basis:

My impression is that most people in the rich countries think of our global economic order as basically just – although this order does not meet [the] important minimal requirements we place on any national economic order.²⁰

And yet, *pace* the intuitions of many people, there are many reasons to doubt the justice of the global order. As has been well-rehearsed elsewhere in Pogge's writings, the global order suffers from two principle flaws. First, the global order cannot be changed by the majority of the population (i.e., it is beyond their reasonable political control), and second, it does not fail to prevent enormous poverty. To the latter, the extent of world poverty is well-known – for instance, in 1998, one quarter of the world's population lived below the poverty line.²¹ Furthermore at the beginning of this century, 14 % of people worldwide were undernourished, 16 % lacked access to clean drinking water, 40 % lacked basic sanitation and close to 1 billion people were illiterate.²²

As to the former, there are serious problems with four aspects of the global order: (1) governments are allowed to exercise in power in the global arena regardless of how they came to power, (2) they are allowed to profit from the international borrowing privilege (i.e. the right of sovereign borrowing, from global institutions such as the IMF, the World Bank, etc.), (3) they are granted the right to use land and resources as they see fit, and (4) they may make decisions binding on future generations.²³

If we accept that international boundaries suffer from a great deal of arbitrariness, how should we apply Rawls' theory, Pogge asks in his early work? There are two ways that we might apply the OP at a global level. One possibility is that we might apply the OP first at the national level and then at the international level, keeping at all times the focus of the DP on individuals (R1). The second possibility is that we

pp. 4-5). It is not unreasonable to think that we would hate the latter situation, and condemn as selfish any person who insisted on keeping all the products they produced for themselves, or who bargained for special privileges as a result of their superior talents (e.g. at fishing) or superior starting situation (e.g. ownership of a fishing rod).

²⁰ *World Poverty*, p. 95.

²¹ *Ibid.*, p. 97.

²² *Ibid.*

²³ *Ibid.*, pp. 112-114.

apply the OP at the national level and then apply it between countries at the international level (R2) taking countries (rather than individuals) as the primary agents.²⁴

Now, it would seem that this second possibility (R2) is incompatible with Rawls' original intuition: countries cannot be actors behind the veil of ignorance.²⁵ Rawls specifically states that only people 'count' in the appropriate way in his theory.²⁶ Adopting a two-tiered approach and applying the veil of ignorance twice – once at the domestic and then once at the international law with states as actors behind the veil – would be incompatible with Rawls' original intuition. However, the first possibility (R1) is equally problematic. After all, voters behind the veil of ignorance are supposed to be blind to incidental considerations (e.g., race, religion, etc.). Presumably they must also be blind to citizenship and country of origin.

Instead, it is Pogge's suggestion that just institutions are required when people are forced to interact with one another.²⁷ This Kantian-inspired intuition, which one would expect Rawls to accept, forms the basis of Pogge's project. He argues, as those familiar with his later work know, that the global institutional order is deeply unjust because people adversely affected by the actions of distant actors have no say in the global institutional order. Not only can unjust rulers bind their populations for generations to come, and not only can corporations wield great influence over governments, but the one supposedly democratic institution available – interstate bargaining – can be, and often is, deeply coercive.²⁸

If it is true that the demands of justice attach as soon as people interact, then proceeding from the domestic arena to the international arena, as Rawls does, gets justice backwards.²⁹ It is certainly true that for a state to function properly, it needs treaties and other international agreements. It is also true that, in general, international agreements can only be established *after* the national institutional order has been secured. However, in the same way that to have a system of property rights, or of capitalist production, one requires a pre-existing state with built in laws and legal protections, in order to establish a state one must first have a just international order.³⁰

As the establishment of a just domestic order depends on the existence of a just international order, the conditions under which that order comes to exist are themselves part of a theory of justice. In the modern world, it is largely the rich and powerful countries (and those citizens who buy goods, etc.) which are responsible for the creation

²⁴ *Realizing*, p. 242. This second possibility is very close to Rawls' approach in *LoP*. Here, Rawls assumes 'an international 'original position' in which all reasonable peoples are represented (Beitz, p. 673).

²⁵ It is precisely for this reason that Rawls does not include these features of the OP in his application of something like the OP in *LoP*. Instead, his claim appears to be that in the international original position, we will have knowledge of the nature of peoples (e.g. whether they be liberal or not).

²⁶ *Realizing*, p. 113.

²⁷ *Ibid.*, p. 241.

²⁸ *Ibid.*, pp. 243-248.

²⁹ *Ibid.*, p. 254.

³⁰ *Ibid.*, 257. This is presumably captured by Rawls, though in a different sense, when he talks about the obligation of states to help burdened peoples establish an internal institutional order (*LoP*, p. 107).

of global institutions.³¹ A global institutional scheme is imposed on all states which are new to the international order and who had no say in its creation (e.g. the recently independent or de-colonized states).³² In other words, in order for all states to be able to properly function, the demands of national justice and the Kantian principle that just institutions should cover all regimes of interaction require something like a global application of the veil of ignorance and the DP.

This is quite a radical conclusion, for Pogge is trying to show that for a just domestic state of affairs to exist, we require a just international state of affairs regulated along Rawlsian lines. Nonetheless, I will argue in the third section, following Cohen, that in spite of the power of this conclusion Pogge still leaves too much leeway to the rich and powerful.

An International Cohen

If we bring Cohen's argument back in at this point, we can see that, at least on a *prima facie* telling, Pogge's argument actually entails far more than Pogge initially thought.³³ What the talented cannot say under Pogge's scheme, or the leaders of those countries where the talented live, if Cohen is correct, is that they will work less hard, or perhaps even not at all, if they are forced to redistribute their wealth on a global level. Were they to say so, they would run afoul of Cohen's IPT, by making an argument that could not possibly be justified. In other words, nothing like the DP is defensible globally if the DP entails, as Rawls would have us believe, a sharp division between public and private.

In a way, what I am proposing is the simple result of transposing Cohen to the international level. However, there are five objections that a defender of Pogge might level against this expansion of the IPT?³⁴ I will address each objection in turn: First, one might argue that my description of our obligations to the global poor places an impossibly high burden on the well-off. Second, my critic might argue that I am confusing Pogge's discussion of the OP with Cohen's criticism of the DP. Third, my critic might argue that I am ignoring the role external actors might play in our considerations; a case specifically considered by Cohen in *RJE*. Fourth, my critic might argue that as Cohen's argument is premised on the existence of a community at the national level, as no such community obtains on the international level, Cohen's IPT cannot be used against Rawls at the international law.³⁵ In this section, I will argue that the first four hold no traction against Cohen. In the final section, I will address the one final objection from

³¹ The most prominent example is the unequal bargaining power exercised by the United States and the European Union, when they threatened to withdraw from the GATT if developing states did not agree to the new WTO agreement. See, for example, Ilan Kappor, 'Deliberative Democracy and the WTO', *Review of International Political Economy*, 11: 3 (2004), pp. 522-541.

³² *Realizing*, p. 276.

³³ There is some evidence to suggest that Pogge no longer thinks his initial position is correct. At a minimum, he has de-emphasized the original argument on the expansion of the OP in favour of a discussion of the negative duties we owe the global poor.

³⁴ Of course, Pogge could just accept my argument as a friendly rejoinder, but he has not done so in his work, as I will discuss in the fifth objection.

³⁵ I wish to thank the anonymous reviewer who pressed this possible objection against my paper and encouraged me to formulate a response to it.

Pogge himself, drawn from his discussion of Cohen's and Murphy's work which, while more difficult to rebut, ultimately also collapses.³⁶

First, the easiest objection to make is to say that Cohen is imposing an impossibly high burden on members of wealthy societies, if they are responsible not only institutionally, but with their individual live choices, for helping the distant poor.³⁷ Quite simply, my critic might say, that it is a psychological fact that people cannot be asked to work so hard, or to sacrifice so much, in order to help people with whom they have little contact.³⁸ The response to this is fairly simple though.

Even if it is the case that high levels of taxation pose a burden on the talented, that burden is felt differently in different countries and is likely to provoke different reactions (such as altruism on the one hand, or tax evasion, and selective withdrawal from the economy on the other) depending on the citizenship and culture of individuals. Thus, while it is surely a psychological fact that high taxation stirs up different emotions in the Netherlands and in Germany than it does in the United Kingdom and in the United States, how people react to taxation is a contingent fact of national political culture and not a constant feature of human nature.³⁹ Rawls assumes a hard and fast line between the public and the private without realizing that the location of that line, and how people react to it, is (partially) dependent on culture. Government action (including programs designed to portray taxation and redistribution in a different light), changes in schooling, and the marshalling of the resources of civil society are all likely to change the types of arguments individuals make and how changes in taxation are received. In order to rebut the critic and to show that my call for enhanced individual responsibility does not place an impossibly high burden on the wealthy and talented, I need only show that the response to increased taxation and redistribution is not constant and that the increased taxation and redistribution is not at the maximum level attainable. The former follows from my considerations above. The latter is an empirical proposition which, while unproven, seems likely to be true.

Second, my critic might object that I am playing sleight of hand. Cohen's criticism of Rawls is not a criticism of the application of the OP but instead of the application of the DP. Pogge, conversely, is concerned not with the DP, but with whether or not we should apply the OP on the global level. The critic is likely to ask whether or not I am confusing two separate ideas. However, I do not believe that it is possible to remain loyal to Pogge's original critique of Rawls and advance such an argument.

³⁶ See Thomas Pogge, 'On the Site of Distributive Justice: Reflections on Cohen and Murphy' ['Site of Justice'], *Philosophy & Public Affairs*, 29:2 (2000), pp. 137-169.

³⁷ Joseph Heath suggests that, even if we conceived of this as an obligation for governments transfer funds from one country to another, this might require the transfer of amounts in the order of a third of GDP from rich countries to poor countries if even a minimal standard of health and education is to be guaranteed (Joseph Heath, 'Rawls on Global Distributive Justice: A Defence', *Canadian Journal of Philosophy, Supplementary Volume*, 31 (2005), pp. 193-226, at p. 196).

³⁸ Strictly speaking, this is an argument against Cohen's IPT and not against my argument, but my argument, so the story goes, is more vulnerable to this objection because we are speaking of helping not our fellow citizens, but the distant poor. I address this in my fourth response to my critic.

³⁹ The current anti-taxation crusades in the United States - a thoroughly recent creation - would appear to speak to this point.

Pogge's argument about the inequality of bargaining in the international arena is meant to demonstrate that if we expand the OP to a global level, we must be conscious of how any international institutional order will allow bargaining to take place amongst states and individuals. That is Pogge's point about the relationship between the state and the international order and about the need for a just system of treaties. No discussion of the OP can be blind to how the DP might be applied by the most powerful, after an international order has been set up. Thus, it is a matter of concern under the OP that the rich and powerful might effectively blackmail the poor. No such international order could be just under Pogge's theory. If an institutional order were to allow such an application of the DP, it would be vulnerable to Cohen's objection.

Third, it might be objected that even Cohen himself considers, in his writings, the case where (unpalatable, anti-egalitarian) policies must be adopted because of the attitudes or potential actions of external agents. For instance, the actions of some foreign individuals (who are not members of our political community and hence not vulnerable to Cohen's critique of Rawls) might negatively affect a country. In the United Kingdom, Harold Wilson oft-spoke, while serving as shadow chancellor, of the so-called 'Gnomes of Zurich' (that is, of international bankers). Wilson argued that the government's hands were tied, so to speak, by these bankers who would react negatively to certain policy decisions. Wilson argued that the government might, in order to placate those bankers, who were foreign citizens and not members of the British political community, have to make anti-egalitarian decisions.⁴⁰ However, Pogge cannot fall back on Cohen's defense (on pragmatic grounds) of less than ideal taxation. There can be, *ex hypothesi*, no group of people who fall outside the scope of the OP or the DP. Pogge's extension of Rawls to the global arena expressly precludes it. Any person taking such an action, or threatening to take an action that will harm others, must be able to justify any such selfish behavior in the global arena.

However, my argument might appear that this excludes the possibility that individuals are free to choose their own careers or their hours of work.⁴¹ By characterizing the actions of individuals who threaten to work less hard (or to chose different careers) as blackmail, it would appear that my proposal risks imposing professions, or working hours, on individuals in the name of maintaining equality. However, this objection is premised, yet again, on the idea that individuals' responses to different economic incentives are fixed. And yet, our best social science shows that the response of individuals, including tendencies towards compliance or evasion, to different rates of taxation is dependent on the effects of culture.⁴²

⁴⁰ *RJE*, p. 45; Nigel Lawson, when in government, argued that the gnomes of Zurich were putting pressure on the British pound; the only solution, he argued, would be to force British labourers to drop their demands for higher wages.

⁴¹ It was suggested, by an anonymous reviewer, that preventing the rich from exercising this rhetorical option would be to take their choice to choose a career or their working hours away from them. After all, if I prefer gardening to doctoring (at equal pay), then requiring me to work to benefit all people takes away any choice I might have as to career. It is this which produces what Cohen calls the Pareto trilemma (*RJE*, p. 183), whereunder it appears that we must either sacrifice freedom of occupation choice or equality.

⁴² For instance, to see the effects of culture on tax evasion and tax compliance, see: Charles W. Bame-Aldred *et al.*, 'National Culture and Firm-level Tax Evasion', *Journal of Business Research*, 66:3 (2013), pp. 390-396, and Ronald C. Cummings *et al.*, 'Effects of Culture on Tax Compliance: A Cross

Fourth, it might be objected that as Cohen's argument is premised on the existence of a community at the national level, and as no such community obtains on the international level, Cohen's IPT cannot be used against Rawls there.⁴³ Rawls' theory, it may be argued, is premised on the belief that liberal peoples have three basic features – they have just constitutional governments, the appropriate common sympathies to members of their societies, and a moral nature.⁴⁴ These latter two features explain, in part, why redistribution is possible at the national level but not at the international level. As Rawls suggests, it is 'a psychological principle that social learning of moral attitudes supporting political institutions works most effectively through society wide shared institutions and practices.'⁴⁵

Rawls is clearly using the notion of community here to discuss a different problem than Cohen, with respect to his use of community with the IPT. Rawls is attempting to show that institutional structures for redistribution can only exist where there exist an appropriate sense of community, whereas Cohen is attempting to show that where a community exists, certain types of arguments become untenable. However, Rawls has not shown that such attitudes obtain uniquely at the national level. The existence of such attitudes has been shown amongst transnational groups (in religious, ethnic and cultural communities), suggesting that institutional arrangements for redistribution will not only obtain traction at the domestic level. Moreover, even if moral attitudes track institutional arrangements, there is no reason to think that those institutions must always precede the existence of the appropriate moral attitudes.

The Objection against Supergoal Monism

Fifth and finally, Pogge does respond to a similar argument elsewhere which might save the limitations he imposes on the DP.⁴⁶ In that work, Pogge challenges Cohen's criticism of Rawls, claiming that it is premised on the belief that individuals in a just society must be motivated by one unique overarching *ethos*.⁴⁷

Check of Experimental and Survey Evidence', Center for Research in Economics, Management and the Arts (CREMA), Working Paper No. 2004-13 (Berkeley, 2004), online at: <https://ideas.repec.org/p/cra/wpaper/2004-13.html> (accessed 2015-08-16).

⁴³ This was suggested by an anonymous reviewer.

⁴⁴ *LoP*, pp. 23-24; Rawls subscribes to the view that peoples (nations) are more willing to cooperate with each other than with other people and generally share a desire that they be governed by themselves and not by others (Beitz, pp. 678-679).

⁴⁵ *LoP*, p. 112, n. 44.

⁴⁶ 'Site of Justice'.

⁴⁷ Pogge calls this belief *supergoal monism*, which

'postulates that there is one goal (or system of goals), which ought to be all-pervasive: exalted and prescribed in conventions and institutional rules, permeating the ethos, inspiring individuals. Persons, in particular, ought consciously to pursue (aim at, strive for) this goal' ('Site of Justice', p. 156).

Pogge treats that *ethos* as a form of act utilitarianism for the purposes of his critique. If Pogge is correct, he would have actually proven something much stronger, which is that act utilitarianism cannot ever provide a theory of justice.

As is well-known, Rawls requires citizens to act so as to uphold the basic structure of society. However, they are required to act to uphold the basic structure only inside those realms governed by the basic structure. But why should citizens only be required to pursue justice with respect to the basic structure while not simultaneously pursuing justice in other realms, Cohen asks?⁴⁸ Good Rawlsians should, Cohen suggests, if they are interested in pursuing justice, insist on an 'equality-inspired ethos even if there is an alternative feasible'.⁴⁹

Naturally, it is generally not true that if we aim for justice in one realm, we must aim for it in all of our actions. For instance, if we aim for political justice, we are not required to aim for justice when participating in market-driven (economic) activities, or in the courtroom (where defense attorneys need not aim to see the guilty punished in every case), or in the political system (where we do not expect politicians to aim for content neutrality or to always accurately represent the views of their opponents).⁵⁰ The requirement to act to always maximize some goal is likely to lead to undesirable requirements. First, the direct pursuit of a goal may require the well-off, in order to aid the worst off in all spheres of activity (not solely in the political arena), not merely to provide money, but also respect and friendship (the social bases of self-respect) to the worst-off. Second, individuals may be required to violate other important goals, if their goals conflict with the prevailing *ethos* of justice (e.g. it seems likely that we may not be able to advance agent-relative goals, such as the desire to take care of our children, if we could better use our talents to help the distant poor). Third, individuals may even be required to violate the law (e.g. if they may save many lives by harming the innocent, or may improve the lots of the worst off by embezzling) if so doing would aid the worst off. Under some circumstances, individuals may be required to violate the (perfectly) just rules in place.

[A] basic structure designed optimally to promote D will include a property regime shaped to support the incentive toward productive work through laws against theft and embezzlement. But citizens who can do more for D in some particular case by violating these laws are nonetheless morally required to do so. This requirement is hard to swallow: It entails that citizens are morally required to violate even just laws produced by a just political system and that the worst-off, in particular, are never morally permitted (let alone required) to pass up maximizing opportunities to embezzle money for themselves.⁵¹

In other words, to eliminate the sort of behavior that Cohen objects to, individuals may be required to engage often in extraordinarily burdensome (and potentially illegal) activities. Can this problem be solved? Pogge suggests, wrongly I believe, that it cannot. It is not clear, first of all, that Cohen would view it as a problem that we are required to break the law to help the worst off. But clearly we cannot be good Rawlsians and be required to constantly undermine the basic structure.

To rule out this possibility, we must build into the OP constraints sufficient to prevent individuals from being required to undermine the OP. One of those constraints,

⁴⁸ Cohen calls this restriction arbitrary ('Where the Action Is', pp. 22-23). Problematically, it allows unjust practices to continue in institutions not regulated by the basic structure (viz. the family).

⁴⁹ Site of Justice, p. 159. In the example above, therefore, they should not blackmail the poor.

⁵⁰ The examples are Pogge's ('Site of Justice', p. 159).

⁵¹ 'Site of Justice', p. 162.

however, cannot be, Pogge suggests, a rule that stipulates that we must follow the law (as under the super-goal monist position, law can have no independent value). However, it might nonetheless be possible, Pogge concedes, to construct a monism based on a model of human flourishing, wherein a basket of rights (perhaps even mutually incommensurable rights) are posited. Such a monism need not

[...] make crushing demands on culture and lifestyle and, under favorable conditions, [might leave] plenty of room for the pursuit of agent-centered goals. Understood as supergoal monism, it would also keep infrequent the occasions on which persons are morally required to violate just social institutions.⁵²

However, Pogge believes that Cohen could not accept such a monism, because if he did, it would allow for an *ethos* to exist that did not maximize equality. This would return us to Rawls' original problem: either individuals must be forced to possess such an *ethos*, or social institutions would be designed in such a way that individuals might be required to embezzle. This dilemma, Pogge suggests, is why Rawls builds a division of labor into his theory.⁵³ The theory can set an ambitious goal for the basic structure – minimizing inequality as much as possible, while at the same time avoiding 'the totalitarian implications this goal would have if it also governed *ethos*, conventions, and personal conduct.'⁵⁴

However, Pogge has missed an important counter-argument: he misrepresents Cohen's view when he claims that Cohen cannot say that it is a basic value that we should generally be required to follow the law. Such a claim on Cohen's part would be generally compatible with Cohen's (at least rhetorical) commitment to Rawlsianism. The DP is not free-standing in Rawls' theory – it comes into play only after we have set up a just society wherein: 'Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.'⁵⁵

Cohen does not deny the importance of basic liberties at any point in his writing – he merely denies that they should be granted lexical priority over the DP.⁵⁶ Whether or not, therefore, we have a duty to obey the law is not reducible to whether or not failing to do so would maximize equality. After all, there are several other reasons why one might wish to obey the law, all compatible with Cohen's view.

It is unclear why Pogge believes that Cohen cannot simply state that, broadly, there is a good reason to follow the law most of the time. Law, after all, is not only designed to ensure economic equality (for Rawls, for Pogge or for Cohen). It is also designed to preserve a system guaranteeing basic social primary goods, basic rights, to allow for human flourishing, to provide security of the person, etc. However, there may very well be a tension between the various rights and privileges we might wish to guarantee under the OP and the maximization of equality. To the extent that requiring

⁵² *Ibid.*, p. 163.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, p. 164. Cohen and Murphy also argue that the exact site of the divide between morals and ethics (or in Rawlsian terms, politics and ethics) is arbitrary in Rawls theory. That criticism however – which I generally find convincing – plays no role in my response here.

⁵⁵ *ToJ*, p. 220.

⁵⁶ This is at least one of the ways to interpret the argument in *RJE* designed to show that individuals possess freedom to choose their careers as they see fit.

the *en masse* abandonment of the legal order would result in massive rights violations, it would be unjust under the Rawlsian framework.

Thus, we may very well have a duty to obey the law most of the time, but we also have a duty to break it in certain extreme cases, as breaking it occasionally would result in greater justice (for our Cohen-inspired Rawlsian) while breaking it more often would undermine the possibility of a system of laws existing in the first place. While we do not necessarily know *a priori* where this line is, all we need to do is identify one such situation where breaking the law would increase justice – and surely this is not a difficult task – in order to see that a partial duty to obey the law is better than a complete duty (and conversely, no duty at all). Put simply, there is no reason to specify the exact point at which breaking the law or setting aside some goals to help the poor is necessary. We merely need to show that drawing the line somewhere between the abandonment of law in all situations or scrupulous respect for the law is all that Cohen's supergoal monism requires in order to show that Pogge's criticism fails. Pogge may be unhappy with the idea that we should break the law even occasionally, in a well-ordered society. However, there is no reason to think that this would bother Cohen.

Concluding Remarks

To briefly conclude then, I have argued that Pogge's argument entails a much stronger conclusion than he himself intended. Individuals must act to maximize equality in all spheres of activity, not merely in those regulated by the basic structure. This would of course not necessarily require individuals to give all their monies to the distant poor, or to volunteer their talents in far off communities. However it would prevent individuals from arguing that higher taxation or higher redistribution across national borders would cause them to change their careers or to not work as hard. It would also require governments to put in place the appropriate social institutions to encourage global civil society, a sense of community with distant others, and other mechanisms to support a more egalitarian global community.

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