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The Moral Power of Soldiers to Undertake the Duty of Obedience*

Yitzhak Benbaji

This essay develops a contractarian response to Jeff McMahan's critique of the traditional war convention. Contractarianism asserts, first, that an outcome in which the current war convention is accepted is better for all relevant parties than any other feasible outcome; second, that the war convention is fair; third, that soldiers accept the existing convention; fourth, that soldiers' acceptance of the convention equalizes their moral status within wars vis-à-vis each other. The essay addresses McMahan's powerful objections to each of the above statements.

I. INTRODUCTION: NUANCED CONTRACTARIANISM

The basic rules of engagement in war—the rules that constitute the “*jus in bello* code”—are well known: combatants may be intentionally

* This essay was first presented at the 2009 ELAC annual workshop at Oxford University, which was dedicated to Jeff McMahan's *Killing in War*. Later versions were prepared at Yale Law School, where I was a Robina Foundation Senior Fellow at the Schell Center for International Human Rights, and at the Institute for Advanced Studies in the Hebrew University, Jerusalem (IAS). I am thankful to these institutions and to Paul Kahn, Owen Fiss, James Silk, and Eliezer Rabinovici for their support and for the lively intellectual environment. I presented the paper at Georgetown University, NYU Law School, Tel Aviv University Law School, and at the IAS; I thank the organizers of these seminars and the participants for very helpful discussions. In particular, I am indebted to Oren Bar-Gill, Daphne Barak-Erez, Eyal Benvenisti, Leora Bilsky, Gabriella Blum, Alisa Carse, Tony Coady, Nili Cohen, Hanoch Dagan, Tsilly Dagan, Avihay Dorfman, Cécile Fabre, Helen Frowe, John Gardner, Chaim Gans, Judith Lichtenberg, David Luban, Larry May, David Rodin, Nancy Sherman, Henry Shue, Guy Sela, Balakrishnan Rajagopal, Jennifer Welsh, and Joseph Weiler. For helpful conversations and written comments, thanks to Danny Statman, Cheyney Ryan, and Michael Walzer. I reserve special thanks for Seth Lazar, the organizer of the ELAC symposium, and Jeff McMahan, who patiently read many versions of this essay and offered crucial substantive and editorial comments; significant improvements in the essay are due to their efforts, though I suspect that they both remained unconvinced by its argument.

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attacked if necessary, noncombatants may not be intentionally attacked, and unintended harms must be minimal and proportionate. These simple rules, which Walzer calls the “war convention,” embody an “independence principle,” which states that “the justifiability of a nation’s engaging in war is independent of the permissions and restrictions binding its troops.”¹ This, in turn, generates the symmetry principle, according to which “the normative permissions and restrictions binding co-combatants in a single conflict are identical.”² If just combatants (those whose war is just) have a right to kill their enemies in combat, then unjust combatants (those whose war lacks a just cause) have a corresponding right to kill just combatants. It further asserts that if just combatants have a right to inflict collateral damage on enemy noncombatants, unjust combatants have the right to do so as well.

These are legal principles, and many philosophers have argued that this is all they are: though they may be pragmatically justified, they are not moral principles and may even conflict with the moral principles that govern the practice of war. These philosophers argue that unjust combatants cannot have the same moral permissions as combatants who fight for a just cause. After all, “if death and destruction matter morally, as they do, and if reasons matter morally . . . then differences in combatants’ reasons for bringing about death and destruction must also matter morally.”³ Put in the language of rights, only soldiers who fight with a just cause could have a moral right to kill and maim. Unjust aggressors can have no moral right to act in this way. Therefore, the symmetry principle is untenable.

And yet, despite this philosophical resistance, commonsense morality does confirm the symmetrical regulations of combat. Michael Walzer seems to be right in arguing that soldiers are conceived by themselves and by others as morally equal, whatever their cause might be.⁴ Unjust combatants are not regarded as murderers who, for some pragmatic reasons, enjoy impunity. (Admittedly, commonsense morality won’t go as far as to confirm symmetry in exceptionally clear cases like Nazism.)⁵

1. Christopher Kutz, “Fearful Symmetry,” in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 69.

2. *Ibid.*

3. *Ibid.*

4. See, e.g., Michael Walzer, *Just and Unjust Wars* (New York: Basic, 1977), 33ff.

5. See Walzer’s treatment of the obedience of Nazi soldiers in *Just and Unjust Wars*, 37–40. Reasons for treating Nazism differently, and to distinguish World War II from other unjust wars, such as the Vietnam war, were offered in Michael Walzer, “World War II: Why Was This War Different?” *Philosophy and Public Affairs* 1 (1971): 3–21; and Avishai Margalit

Can the legal equality of soldiers reflect a deeper moral equality? This essay defends a positive answer to this question, by elaborating a contractarian response to the fundamental difficulty that the Walzerian moral interpretation faces. According to the contractarian approach to war (hereafter, “contractarianism”), just and unjust combatants are morally equal because, as Walzer argues, “military conduct is governed by rules [that] rest on mutuality and consent.”⁶ Or, as Thomas Hurka put it more recently, “by voluntarily entering military service, soldiers on both sides freely took on the status of soldiers and thereby freely accepted that they may permissibly be killed in the course of war.”⁷ In other words, contractarianism claims that soldiers are morally equal (at the level of rights) because of the contractual relations between them. It takes seriously the fact that, as a social role, soldiery is partly shaped by treaty-based positive and customary international law, as well as by informal rules and widely shared attitudes. It observes that symmetry is an element of the norms that define soldiery and asserts that by enlisting in the military, soldiers accept these norms.

The view I develop in this essay makes a further crucial point: soldiers’ tacit acceptance of their status is necessary but insufficient for establishing moral symmetry between them.⁸ Their acceptance of their status is “morally effective”—that is, soldiers lose their moral right against being attacked in war by accepting their role—if and only if the symmetrical rules that define soldiery codify a fair and mutually beneficial contract among states of the kind that Rawls refers to as “decent.”⁹ Like the Walzer/Hurka version, nuanced contractarianism starts off from the observation that legal symmetry is widely promulgated as a basic part of the internationally recognized role of soldiery. It additionally argues that consent to this symmetrical code

and Gabriel Motzkin, “The Uniqueness of the Holocaust,” *Philosophy and Public Affairs* 25 (1996): 65–83.

6. Walzer, in fact, offers two models: “The moral reality of war can be summed up in this way: when combatants fight freely, choosing one another as enemies and designing their own battles, their war is not a crime; when they fight without freedom, their war is not their crime. In both cases, military conduct is governed by rules; but in the first the rules rest on mutuality and consent, in the second on a shared servitude” (*Just and Unjust Wars*, 37). Contractarianism, as developed here, intentionally blurs Walzer’s distinction (cf. Sec. IV).

7. Thomas Hurka, “Liability and Just Cause,” *Ethics and International Affairs* 20 (2007): 199–218, 210.

8. Versions of the contractarianism that I explore here are offered in Yitzhak Benbaji, “A Defense of the Traditional War Convention,” *Ethics* 118 (2008): 464–95, and “The War Convention and the Moral Division of Labour,” *Philosophical Quarterly* 59 (2009): 593–618.

9. John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

on its own is not sufficient; it has to be consent to a regime that is mutually beneficial and fair.

MUTUAL BENEFIT. The outcome of following a symmetrical code will be better to each relevant party (i.e., individuals and decent states)—in terms of expected benefits and expected protection of rights—than the outcome of following an asymmetrical code.¹⁰

FAIRNESS. The symmetrical *jus in bello* code is not dictated by, nor does it create or maintain, unfair power or welfare inequalities among states or individuals.

CONSENT. Soldiers take on the role of soldiers and thereby accept the *jus in bello* code according to which (to quote Hurka again) “they may permissibly be killed in the course of war.”

The fourth, purely philosophical, proposition, Waiver, is about the nature of rights. If Mutual Benefit, Fairness, and Consent are all true, in accepting their status as soldiers, soldiers lose their moral claim against being unjustly attacked by other soldiers in the course of war.

WAIVER. If the *jus in bello* code permits all soldiers to kill each other in the course of war, and if this symmetrical code is an essential element in a fair and mutually beneficial legal set of rules that governs warfare, then, by accepting their status as soldiers, soldiers waive their moral right against being attacked by their adversaries.

Waiver asserts, in other words, that Mutual Benefit, Fairness, and Consent are a sufficient basis of soldiers’ morally effective waiver of their right against unjust attack in war.

Critics of the war convention are right to this extent: in “deep morality,” we have a right-claim against each and every individual (and against each and every other entity, such as states, organizations, etc.) not to be unjustly attacked by her (or it). Absent contractual relations among them, combatants are under a duty to make sure that any violent action that they exercise is just. In these conditions, they lack the moral power to undertake a duty of obedience to their state, whereby they offer themselves as instruments for whatever wars the

10. This claim is highly contingent for its truth on contemporary conditions. One question is whether states have reason to try to change those conditions. I offer a negative answer in my “Cosmopolitanism and the Laws of War,” in *Reading Walzer: Sovereignty, Justice and Culture*, ed. Yitzhak Benbaji and Naomi Sussmann (New York: Routledge, forthcoming).

state chooses. However, if soldiers can reasonably believe that their adversaries have freed them from the duty not to take part in unjust wars, then this empowers them to undertake the duty of obedience. Under such a contractual scheme, they know that if they are sent to fight an unjust war, they will not be violating their adversaries' rights, because their adversaries have waived their rights against lethal attack.

This overview of nuanced contractarianism leaves a series of moral questions open. What would it take for the laws of war to be mutually beneficial? What would it take for the laws of war to be fair? What would count as the relevant type of consent? What conditions must a legal system meet for its acceptance by the subjects it governs to be a true waiver of their moral rights? It leaves a series of empirical questions open as well: Does the contractarian account about the laws of war actually apply in real life? That is, do real soldiers satisfy Consent? Do the laws of war satisfy Fairness? Do the laws of war satisfy Mutual Benefit?

I address only some of these questions here; I defend those aspects of contractarianism that Jeff McMahan criticizes in *Killing in War*. McMahan's important book is the culmination of a critique of the traditional theory of the just war (best articulated by Walzer) and an attempt to replace that traditional view with a revisionist view that is individualist rather than statist in character. Hereafter, I refer to McMahan's view as "purism."

McMahan's most powerful and convincing arguments are leveled against the symmetry principle. He shows that the moral equality of soldiers cannot be grounded in any familiar account of the ethics of killing. In particular, the appeal of contemporary just war theory to the ethics of self-defense is inconsistent with symmetry: combatants who carry out a war of aggression are aggressors; they intentionally kill and maim just combatants, who, like noncombatants, retain their rights against being lethally attacked. Just as wrongful aggressors have no right to defend themselves outside the context of war, unjust combatants have no rights of self-defense in war. Conditions of war do not, according to purism, alter the basic asymmetrical morality of self-defense.

Influenced by McMahan's critique, contractarianism defends moral symmetry without appealing to the ethics of self-defense. But, McMahan argues, contractarianism fails. His critique begins by attacking two empirical propositions to which contractarianism is committed. McMahan denies that symmetry is mutually beneficial: a regime under which soldiers have no legal right to participate in a war of aggression is better for decent states, in terms of expected welfare and rights fulfillment, than a regime which allows obedience. McMahan denies a further proposition implicit in contractarianism: in

fact, he argues, there is no empirical evidence that just combatants have consented to rules that allow their unjust killing in war. The rules of war are, he suggests, open to a different interpretation. Moreover, even if this set of rules is symmetrical—that is, it allows unjust combatants to kill just combatants in war—there is no empirical evidence that soldiers actually accept it or take it to be essential to their role.

Finally, McMahan develops powerful objections to the conditional that underlies contractarianism, Waiver. Even if symmetry were an essential aspect of the rules that define soldiery, and these rules were mutually beneficial and fair, killing just combatants in war would remain impermissible. He concludes that the contractarian interpretation of the war convention leaves the “deep morality” of war untouched. Soldiers who carry out a crime of aggression intentionally kill individuals who have done nothing to lose their rights to life, and their doing so has the effect of advancing unjust aims. The legal rights and duties that the morally optimal law confers on unjust combatants cannot change these moral facts.

This essay aims to show that contractarianism, properly understood, avoids McMahan’s objections to Mutual Benefit, Consent, and Waiver. McMahan criticizes the presuppositions of a cruder form of contractarianism but does not address the empirical propositions that underlie the nuanced contractualist case for moral symmetry. The presuppositions of the more nuanced version I defend will emerge in my responses to McMahan’s objections.

Four preliminary comments are in order. First, as the overview I have just provided suggests, and as it will become clearer as I proceed, nuanced contractarianism appeals to a version of the fair play argument.¹¹ According to this argument, the nearly universal acceptance of a legal system that allows people to be engaged in presumptively wrong actions like deceiving, threatening, or hurting other people generates a moral permission to do so if the laws that permit such actions are necessary to attain the goal of the system and the system is a mutually advantageous and just venture. Like Arthur Applbaum, I take this to be the most promising argument for adversaries’ moral permissions (i.e., right-privileges) to treat people in a presumptively wrong way.¹²

11. Arthur Isak Applbaum, *Ethics for Adversaries* (Princeton, NJ: Princeton University Press, 1999), 120.

12. The main difference between the argument I offer in the text and Applbaum’s version of the fair play argument has to do with Consent, which his argument does not require. To use John Simmons’s helpful formulation: “One might have an obligation of fairness to do one’s part within a cooperative scheme from which one has willingly benefited, where ‘doing one’s part’ consists precisely in performing the tasks attached to an institutionally defined role.” This can be true even where “we have not strictly ‘accepted’

Second, in order to complete a contractarian case for symmetry, I should explain another crucial normative permission that is given to unjust combatants—the permission to cause necessary and proportionate harm to noncombatants on the just side as a nonintentional side effect of military actions. One might believe—as I do not—that civilians are not part of the contractarian scheme. And, as Applbaum notes, “much may turn on whether and when . . . [civilians] are to be considered [insiders] or outsiders, because what counts as unjust treatment of someone who cannot be understood to have voluntarily sought the benefits of a [cooperative arrangement] may be far more demanding than what counts as an injustice to [an insider].”¹³ Due to lack of space, I will not deal with this aspect of symmetry. The argument that follows shows merely that what soldiers are permitted to do to each other is the same for both sides.

Third, McMahan’s critique of contractarianism focuses solely on Mutual Benefit, Consent, and Waiver. He does not address Fairness. Although the claim that the laws of war do not create or maintain unfair power or welfare inequalities between relevant parties is no doubt controversial, I do not defend it here.

Fourth and finally, although I think McMahan’s objections to contractarianism are ultimately unsuccessful, his probing critique has necessitated some fundamental revisions in its structure, yielding a more nuanced and more compelling view as a result. Moreover, at its heart, the contractarian approach shares with McMahan’s revisionist purism a fundamental moral assumption: both assume that whatever the institutional duties to which a person is subject by virtue of the role she occupies, her moral right (or duty) to carry out these institutional duties should be explained in moral terms. With respect to unjust combatants, the purist view denies that there can be such an explanation, whereas contractarianism shows how legal rights, conferred on soldiers by a fair and mutually beneficial institutional scheme, become moral rights of those who are governed by this scheme.

II. MUTUAL BENEFIT

McMahan’s conviction is that, although international and domestic law should not criminalize combatants’ participation in aggressive war, it should make clear that soldiers have a legal duty, and a fortiori a legal right, to avoid taking part in aggressive wars. He believes that

those roles at all, but have only freely accepted the benefits provided by the schemes within which those roles are defined” (A. John Simmons, “External Justifications and Institutional Roles,” *Journal of Philosophy* 93 [1996]: 28–36, 29). Another difference is that my argument is less individualistic. See below at Sec. IV.A.

13. Applbaum, *Ethics for Adversaries*, 134.

such an asymmetrical legal regime is better for all relevant parties (in terms of expected welfare and rights protection) than a regime that permits and indeed requires the obedience of soldiers. This section demonstrates that McMahan's empirical argument against Mutual Benefit is neither complete nor decisive.

Section II.A lays out the normative and factual assumptions in light of which Mutual Benefit is taken by contractarians to be true. This presentation will enable us to identify the factual assumption which McMahan attacks. Section II.B shows that McMahan's empirical argument does not address, let alone rebut, the counterfactuals that could refute or verify Mutual Benefit. Section II.C sketches and partly addresses a further fundamental challenge to Mutual Benefit.

A. Mutual Benefit: Factual and Normative Assumptions

Seven assumptions underlie contractarianism's claim that legal symmetry is mutually beneficial in protecting both welfare and rights. I do not argue for these assumptions here, despite the fact that at least some of them are controversial.

First, decent states seek to protect their rights to sovereignty, political independence, and territorial integrity in order to protect their citizens' rights to life, security, and political autonomy. Hence, a contract among decent states would be characterized as "mutually beneficial" if it betters the capacity of each of these states to protect these rights.

Second, as a matter of principle, states are under a moral duty toward their citizens to maintain national security. Accordingly, they possess a liberty-right to take the necessary measures to do so (unless what is necessary is disproportionate). For, in the absence of a legitimate transnational sovereign capable of interpreting and enforcing states' and individuals' just claims, the institutional scheme that governs the society of states ought to be based on self-help.

Third, states' rights to sovereignty, political independence, and territorial integrity can best be protected by adopting a prohibitive *jus ad bellum*, which condemns wars of aggression as the major crime under international law.

Fourth, the prohibitive *jus ad bellum* must be enforced to be effective. In a society of decent states, the ideal way to do this would be through collective disarmament.¹⁴ In such a society, if all states gave up their armed forces, then the relevant rights of states and their citizens could be preserved.

Fifth, problems of commitment and of collective action render

14. In a society of decent states humanitarian intervention is not needed. In a less perfect world, states' armies might be needed in order to prevent crimes against humanity.

the ideal solution—mutual disarmament—unattainable in practice. Although all decent states prefer a situation in which all are unarmed to a situation in which all keep their military forces, since each decent state is interested, first and foremost, in protecting the legitimate interests of its own citizens, each most prefers for all others to disarm, while it alone retains its military capacity. This would enable it to enforce what it takes to be its rights. So, in the absence of a universally recognized authority to ensure that all parties disarm, the collective disarmament option is unworkable.

Sixth, the second-best alternative is a self-help-based regime, where states individually and collectively enforce the prohibitive *jus ad bellum* by fighting and defeating aggressor states.

The seventh, final, assumption is crucial. Self-help will be most efficient (and, hence, mutually beneficial to the contracting parties) if the parties are allowed to maintain obedient armies. This is because, in the circumstances described by the first six assumptions, a society of decent states will optimally enforce the prohibitive *jus ad bellum* code only if they have obedient soldiers at their disposal. So they design a scheme within which soldiers possess a legal right to participate in a war whatever its cause is. Under this regime, soldiers are only responsible for compliance with the *in bello* rules, not for the war itself, or its consequences.

Contractarianism is not committed to the false claim that actual states are decent. Nor does it assert that the symmetrical *jus in bello* regime applies to decent states only. Rather, it asserts that a regime is “contractually justified” and, in particular, that it satisfies Mutual Benefit only if it promotes the interest of all decent states; only if, that is, decent states would agree on it. Contractarians justify symmetry by showing that symmetry would have been a term in a contract among decent states that take the seven factual and moral assumptions stated above as given.

Most fundamentally, a contractually justified regime will secure states’ capacity to fight just wars (i.e., eliminate aggression) and will determine rules whose aim is minimizing rights violations within these wars. Under such a regime, the most fundamental legal duty to which combatants are subject is the *in bello* prohibition of the intentional killing of civilians and the duty to minimize foreseeable but unintended damage to them. Mutual Benefit asserts that any asymmetrical restrictions, like a duty to kill or maim aggressors only, would undermine the major objective of the contract: enabling states to eliminate aggression in the most efficient way. Such restrictions would compromise the obedience of soldiers and, thus, the ability of states to act in self-defense. Mutual Benefit asserts, in other words, that most states are not able to efficiently enforce the prohibitive *jus ad bellum* regime

except with obedient armed forces. Yet, states are not entitled to expect obedience from their soldiers, unless those soldiers enjoy the moral power to undertake the duty of obedience. Soldiers enjoy that moral power only if, by consenting to a symmetrical legal regime that is mutually beneficial and fair, their adversaries have waived their rights not to be unjustly attacked.

I suggest, in other words, that the parties to the agreement are states which successfully represent individuals in virtue of their decency. It might be thought, however, that a contractarian argument would run very differently with individuals as parties, since at least in some important contexts, decent states and individuals have conflicting interests. I am here abstracting from such details, although I hope that, when it comes to the regulations on using force in a decentralized society of states, there is no such conflict of interest. Individuals would reach the same arrangement on which decent states would agree. Arguing that this is so would require a long, complicated discussion.

B. Are Obedient Armies Efficient?

How might one try to refute the argument that the war convention is mutually beneficial? Although each of the assumptions in Section II.A might be disputed, the obvious option is to question the last assumption, according to which a self-help regime is unworkable if states are not entitled to expect their armed forces to obey their commands to go to war. Indeed, this is the line McMahan takes. He challenges Mutual Benefit on the basis of the following claim: if states were decent, they would prefer an asymmetrical regime that prohibits soldiers' participation in manifestly unjust wars. This asymmetrical regime would better protect the right of states to sovereignty and territorial integrity and the rights of individuals to life and safety. Most obviously, the rule that allows undertaking the duty of obedience does not serve the interests of the soldiers whose obedience is permitted by the current symmetrical regime: "Potential combatants would have more reason to accept a principle that would require them to attempt to determine whether their cause would be just and to fight only if they could reasonably believe that it would be. If they were to accept that principle, there would be fewer unjust wars and fewer deaths among potential combatants. Each potential combatant would be less likely to be used as an instrument of injustice and less likely to die in the service of unjust ends."¹⁵ After sketching a story about a German soldier who covertly aided the partisans in the Warsaw ghetto, Mc-

15. Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), 60. Note that McMahan rejects the contractarian approach to morality; his point here is merely that an asymmetrical regime would better fulfill the desiderata of contractarianism.

Mahan asks us to imagine “how utterly different everything would be . . . if only more such stories could have been told”; how different things would be had more Nazi soldiers avoided treating themselves as “functionaries who have been given a job to do.”¹⁶

Yet, even if conditions would have been better had there been more refusals in World War II, this does not speak against Mutual Benefit. For McMahan’s thought experiment deals with soldiers who are governed by the current symmetrical regime. No doubt, their courageous refusals might prevent great evils. However, what we need to know in order to determine whether Mutual Benefit is true is how different things would be were states and soldiers governed by the asymmetrical regime that McMahan envisions, that is, a regime that commands soldiers to avoid fighting without a just cause.

The answer to this question is complicated. I won’t try to show that nothing would be different, or that things would be worse. Whether the war convention is, in fact, more beneficial to the relevant parties than an asymmetrical scheme depends on a vast array of considerations. Neither I nor McMahan is qualified to assess the risks that these different regimes involve. What I can do, though, is show how shaky McMahan’s empirical claims are and bolster my own with plausible empirical speculations.

In order to defeat Mutual Benefit, an initially plausible speculation must be refuted—namely, that in the absence of an impartial institution that is able to provide a reliable and authoritative judgment as to whether a war is just, aggressive states will produce disinformation regarding the military campaign they are determined to carry out, which would fool most citizens and soldiers into thinking that it is just.¹⁷ Therefore, a rule instructing soldiers not to participate in aggressive wars might reduce their participation in such wars only in the margins. Thus, one reason to think that an asymmetrical regime would not be better is that aggressive states that want to fight unjust wars would simply work harder to deceive their soldiers.

It is common among purist critics of the traditional war convention to insist that the ignorance that is usually attributed to soldiers is exaggerated. The information that enables them to judge whether a war is just is, they claim, often accessible. After all, they note, we did not need a scrupulous investigation by a transnational institution to determine that the Nazi invasion of Poland was unjust. Yet, most

16. *Ibid.*, 101, quoting Hannah Arendt and Stanley Milgram, respectively.

17. Note that the third assumption that underlies Mutual Benefit is consistent with this behavior of states. For a state might consider aggression a crime and still erroneously believe that it has just cause for war and that it has the right and the duty to convince its soldiers that the war it wages is just.

cases are unlike the Nazi case and even the latter is not, as purists suppose it to be, a clear instance of a war that should have been obviously unjust to those who fought in it.¹⁸ Furthermore, while it may be true that Western soldiers could reach well-informed judgments about the morality of certain recent military campaigns, these judgments were formed under a regime which allows states to require obedience. States need less indoctrination in order to secure it. If the speculation offered above is true, soldiers who are entitled to be obedient by international law (and required to be so by the state they serve) might be in a better epistemic position to determine whether or not the cause of their war is just than they would be if their governments had to devote more resources to convincing them that they ought to fight.¹⁹

But consider a more modest argument against Mutual Benefit. According to contractarianism, in designing the regulations governing the use of force, decent states would aim to make unjust wars as costly as possible. If so, they should prohibit soldiers' participation in manifestly aggressive wars. For, "if there were legal provisions for soldiers to refuse to fight in a war that they could plausibly argue was unjust, this could . . . impair the ability of their government to fight an unjust war."²⁰ In fact, this is suggested by the speculation we have just discussed. Under an asymmetrical regime, states' crimes against peace would require more resources because aggressors would have to convince their soldiers that the cause of their war is just.

But this line of argument invites other speculations which, if true, reveal disadvantages in the asymmetrical regime that might cancel out this advantage. First, soldiers would have to be persuaded to fight not only in unjust wars but also in just wars. Consider, for example, a pilot who is ordered to initiate a permissible preemptive war by launching a surprise attack against the army of an aggressive state. Suppose that the pilot groundlessly suspects that the war he is ordered to initiate has no just cause. Or suppose he thinks that the war does not satisfy

18. See, e.g., Cheney Ryan, "Democratic Duty and the Moral Dilemmas of Soldiers," in this symposium.

19. McMahan observes that "the contemporary military organization that has the most conspicuous record both of instances of conscientious refusal to serve in certain campaigns . . . and of toleration of this sort of conscientious action is Israel's IDF." He thinks that this supports the epistemic asymmetry between just and unjust wars: "No one doubts that everyone in the IDF would fight with the utmost cohesion . . . in a just war of national defense" (*Killing in War*, 99). But, clearly, in Israel, tolerance of conscientious refusal comes with a huge investment in convincing youngsters that Israel's various wars are just, that being part of the IDF is honorable, and that avoiding military service is unfair and shameful.

20. *Ibid.*, 98.

the last-resort requirement. So, he suspects that the surprise attack he is ordered to carry out constitutes a crime of aggression. Under the asymmetrical regime, he is entitled to refuse to participate in the attack unless he is convinced that his suspicion is baseless. And convincing him might require resources that, under the current symmetrical regime, states fighting just wars do not have to deploy.

Those who would argue against Mutual Benefit must refute another empirical speculation that supports the symmetrical regime. The threat to fight a disproportionate and therefore unjust war might deter an unjust attack and so might be conducive to the optimal realization of rights and welfare. Yet, if one's combatants are at liberty to refuse to fight an unjust war, the credibility of such a deterrent threat will be diminished.

To take an example that McMahan himself suggested, suppose that an adversary wants to invade without having to engage in significant combat, so its soldiers are ordered to strap ten innocent civilians to every tank. Suppose that targeting the tanks is *in bello* permissible because the killing of the civilians who are strapped in the tanks would be necessary for victory and unintentional. Suppose, additionally, that the immediate military value achieved by the elimination of each tank is sufficiently high. Suppose, finally, that by strapping the civilians in this way, the enemy makes the effective military response to its invasion automatically *jus ad bellum* disproportionate.²¹ If we want to deter them from invading in this way, we have to be able to convince them that our combatants will attack their tanks even if they arrange the situation so that those attacks would be disproportionate. I speculate that such a threat would have been far more difficult to impose under a regime in which soldiers were forbidden to fight a disproportionate (and thus, unjust) war.²²

Whether it is actually permissible to threaten or to intend conditionally to do what it would be wrong to do is, of course, a vexed question, one that has been debated in the literature on the morality of nuclear deterrence. It is, however, reasonable to suppose that threats of wrongful action are permissible if they are bluffs. The speculation that it is precisely such benign threats that would be under-

21. Jeff McMahan, personal communication.

22. McMahan believes that if an attack is *in bello* proportionate it cannot make the war *ad bellum* disproportionate, at least on any sensible view of proportionality. More generally, he denies that *in bello* proportionality and *ad bellum* proportionality can diverge or be independent. Elsewhere I have argued that according to contractarianism, *in bello* proportionality measures the value of a specific military action as if this value is exhaustively determined by the extent to which the military action furthers victory. In contrast, the value relevant to *ad bellum* proportionality is measured relative to the importance of the just cause (Benbaji, "The War Convention and the Moral Division of Labour," 603).

mined if soldiers were known to have rights of conscientious refusal seems, at least on the face of it, very plausible.

To summarize, in addressing McMahan's critique of Mutual Benefit, I have offered four points. First, while he argues for his view by appealing to historical cases when more conscientious refusal would have led to less wrongdoing, these were exceptions to a symmetrical regime. So, they tell us nothing about how an asymmetrical regime would look. Second, under the asymmetrical regime, unjust states will simply invest more in propaganda to convince their soldiers that they are fighting justifiably. Third, if states have to convince their combatants of the justice of their wars, fighting just wars will become costlier. Fourth, under the asymmetrical regime, just states might lose the option of threatening to fight unjustly.

Again, I do not deny that both the symmetrical and asymmetrical regimes carry risks. The asymmetrical regime, under which soldiers have no right to fight unjustly, has more difficulties in deterring certain kinds of aggression, and it is more likely to produce disinformation and indoctrination; the symmetrical regime, which allows soldiers to obey even wrongful orders, risks armies acting in seriously wrongful ways. Which is preferable? As I have emphasized, the answer to this sort of question depends on complex questions of social psychology, international relations, availability of information, strength of transnational institutions, and so on. A plausible claim about the net effect of competing rules on state and individual rights would have to be more comprehensive, systematic, and rigorous than I have attempted. But the conjectures I have discussed reveal a problem in McMahan's critique of the empirical dimensions of contractarianism—namely, that it contains no serious empirical analysis of the comparative effectiveness of symmetrical and asymmetrical regimes in deterring unjust states and in making the morally relevant information accessible to just and unjust combatants.

C. Contractarianism and the Ex Ante Perspective

Consider what might be the most fundamental objection to Mutual Benefit. By allowing obedient armies, states expose certain individuals (soldiers, citizens who live close to the borders, etc.) to the grave risks of war. On the face of it, the interests of these individuals are not protected by the self-help-based regime that the society of states institutes. If so, an institutional scheme that allows for obedient armies is not mutually beneficial and thus lacks a contractarian justification.

This objection reveals a further normative assumption to which contractarianism is committed. To illustrate it, consider the rule that allows driving seventy miles per hour on highways. Suppose that if the speed limit on highways were forty miles per hour, driving would be

a much safer activity. In particular, a harmful accident occurs that would not have occurred under a forty miles per hour rule. The disadvantage of the low-speed-limit regime is obvious: if it is widely respected, transportation would be less pleasant and more time consuming. We can safely assume, however, that the victims of the accident were not, in fact, benefited from the seventy miles per hour rule.

In general, if we think of risky conventions as mutually beneficial, we assess them from an *ex ante*, rule-making standpoint. We explore the following question: what risks would individuals take, if they were to determine the rules of the road (say)? And, from this standpoint, the outcome in which everyone conforms to a high-speed-limit rule might well have greater expected benefits for all concerned than any other alternative. Contracts are necessarily arrangements made in advance in the face of uncertainty, when the relevant parties are forced to be guided by facts about expected benefits. The *ex ante* perspective is, therefore, the one that contractarianism takes to be action-guiding; ignorance is built into the contractarian methodology. The victims of the accident might be *ex ante* expected beneficiaries of the high-speed-limit regime, despite the fact that a low-speed-limit regime would be in their actual interest.

Contractarianism treats the war convention in the same way. The rule-making states are denied certain information—specifically, they do not know how the symmetrical *in bello* regime will affect them—and asked to assess whether it will, on balance, have greater expected net benefits for their soldiers and citizens. Does the symmetrical legal regime actually offer the greatest expected benefits for all relevant parties? Does a scheme which outlaws aggressive wars and confers on decent states a right to control obedient armies enforce the prohibition on aggression in the most efficient way? Admittedly, if some states know that they can better protect their legitimate interests under a (feasible) asymmetrical legal regime, contractarianism of the sort defended here does not generate a case for symmetry.

III. CONSENT AS A SOCIOLOGICAL THESIS

Consent says that by adopting their role as soldiers, soldiers accept the symmetrical *in bello* code, according to which they can be permissibly killed in the course of war. They accept, in McMahan's words, "a neutral conception of their role, according to which they are permitted to kill their adversaries, irrespective of whether the latter are just or unjust combatants."²³ This is, I claim, a publicly recognized part of the profession of arms.

23. McMahan, *Killing in War*, 53.

McMahan concedes that in joining the army, soldiers undertake the duty to protect their country and by implication that they take the risk of being unjustly but legally attacked: "The uniform enables enemy combatants to discriminate between combatants and noncombatants, taking only the former as their targets."²⁴ Taking risks, however, does not amount to waiving rights: "A person who voluntarily walks through a dangerous neighborhood late at night assumes or accepts a risk of being mugged; but he does not consent to be mugged in the sense of waiving his right not to be mugged, or giving people permission to mug him."²⁵ Moreover, an available interpretation of the acceptance of the *in bello* code makes no reference to rights at all. We can imagine a soldier arguing as follows: "There is a convention that combatants should attack only other combatants. . . . It is crucial to uphold this convention because it limits the killing that occurs on both sides in war. . . . In doing this I am not consenting to be attacked or giving the [unjust enemies] permission to attack me; rather, I am attempting to draw their fire toward myself and away from others."²⁶ Thus, there is no empirical evidence to the effect that soldiers free their adversaries from the duty not to unjustly attack them. Quite the contrary: many soldiers might reasonably believe that by becoming soldiers, they mark themselves only as those whose role is to carry out just wars in defense of their country.

This objection is based on a misunderstanding of Consent. Consider the law that regulates marital relationships in liberal societies and that permits unilateral exit from these relationships. Suppose a religious couple gets married in this social context. Both individuals believe that their marriage creates an indissoluble relationship. They believe that they are under a moral obligation not to dissolve the marriage. In their view, the possibility of unilateral or even bilateral exit from a marital relationship is incompatible with its moral and religious significance. This couple's beliefs are irrelevant to the status of their marriage (though not to the status of their relationship). To determine what moral liberties, claims, and duties are created by entering marital relations, we should not look into the heads of the participants engaged in this practice; the meaning of the rules defining this relationship is not to be found there. Ultimately, marriage is a social institution, and the rules that constitute it are essentially social.

True, the laws governing marriage by themselves ground only legal norms. They say nothing about morality in general or about moral

24. *Ibid.*, 55.

25. *Ibid.*

26. *Ibid.*

right-claims and duties in particular. Yet, once individuals consent to be married, they consent to the legal norms that govern and define this institution. And, by this act of consent, they allow for the redistribution of the moral claims that they hold against each other—assuming that the norms in question are fair and mutually beneficial.

Similarly, the role of a soldier is defined by positive and customary international law and by cultural understanding; once an individual chooses to become a soldier, she consents to the terms of the role so defined. Joining military forces is, in other words, an act “such as participation, compliance, or acceptance of benefit that *constitutes* tacit consent to the rules of an adversary institution.”²⁷ The institutional norms that define this role emerge from the social structure within which this role is created and maintained. In accepting their role, soldiers accept the norms and allow other soldiers to comply with them. As Michael Hardimon observes, “What one signs on for in signing on for a contractual social role is a package of [norms], fixed by the institution of which the role is a part.”²⁸

This argument does not deny a leeway in a society’s freedom to construct the role of a soldier. In particular, states are entitled to subject their soldiers to the duty of obedience, but they are free not to exercise this power; they might allow their soldiers to refuse to participate in a war that they find unjust. But, contractarianism does deny from a state the right to treat enemy soldiers as criminals. It asserts soldiers’ moral right to undertake the duty of obedience as a direct implication of the right of states to have obedient armies.

It might still be asked, why can’t soldiers join the army without waiving the right not to be attacked by unjust combatants? After all, individuals have a natural right to defend themselves and others from aggression, and, in exercising this right, they do not have to waive their right against unjust attack. The answer seems simple: contractarianism does not deny that individuals have a natural (or pre-conventional) right to defend themselves: individuals are at liberty to fight as partisans. Soldiers, on the other hand, choose to join the military forces; they intentionally subject themselves to a set of rules that defines their role; these rules allow other soldiers to undertake the duty of obedience, that is, to unjustly attack them. The justification for defining soldiery in this way, rather than some other, is that for the system to be morally optimal states must be able to expect their soldiers to obey their commands.

Soldiers might believe that the scheme that allows their adver-

27. Applbaum, *Ethics for the Adversaries*, 118.

28. Michael O. Hardimon, “Role Obligations,” *Journal of Philosophy* 91 (1994): 333–63, 354.

saries to undertake the duty of obedience is morally objectionable. As many understand their membership in the military, they are there to defend their family, home, and homeland. Still, rather than rejecting symmetry, they merely resent the symmetrical code to which they subject themselves by signing up. Their concrete reasons for joining the army—fighting a just war—cannot change the status of soldiers in general nor can they change their own status as soldiers.

Perhaps one might object that soldiers' consent to the institution of soldiery is morally effective only if they are properly informed about the implications of this consent. And yet, most soldiers know little international law and do not understand the distinctive moral contours of their role. Their decision to join the army cannot therefore ground the waiver of any important rights. But the marriage example casts doubt on this objection. It suggests that formal acceptance of a social role is an authentic instance of consent to the norms that define it, even if one lacks detailed acquaintance with the specific boundaries of the relevant institution as they are set down in the positive and customary law. The fact that the individuals in the marriage example did not know that the law allows unilateral exit seems irrelevant; their legal right of exit is created by their consent to become married—that is, to enter this specific institutional relationship, whose features are independent of their beliefs. Later, in discussing Waiver, I will further analyze the moral effectiveness of such uninformed consent.

Finally, it might be thought that any consent-based argument for the moral standing of the *in bello* rules applies only to professional armies composed of soldiers who freely took up their status as soldiers. This is also untrue. First, although conscripts are required by the law to join the army, this does not imply that they do so unwillingly. Indeed, some people who are willing to serve in the army would not join it unless the law obligates them to do so. They might believe, for example, that a law of conscription is necessary for preventing unfair free riding.

But consider individuals whose consent was genuinely unfree: a soldier who joined the army only because of her fear of the legal sanction for noncompliance, or a groom in a shotgun wedding. It would be an implausible stretch to say that the groom consents to love and honor the bride when he is forced to wed at gunpoint. The same is true of the reluctant conscript. As opposed to the eager volunteer and the enthusiastic conscript, she did not consent to the terms that define the soldier's role. This conviction (namely, that the reluctant conscript's "consent" does not deserve its name) is based on "the voluntariness argument." Consents are by definition voluntary—they cannot come about against the will of the consenter.

Coercion does not allow consent to be voluntary. Therefore, a coerced consent is not consent at all: even if consent to a role need not be informed, it must still be voluntary.²⁹

However, as Margaret Gilbert convincingly argued, the voluntariness argument is fallacious. True, in one sense, the reluctant conscript signed up against her will. Yet, in the important “decision-for” sense, her enlistment was not involuntary: the enlistee decided to join the army in order to avoid punishment.³⁰ Similarly, as opposed to the victim of a pickpocket, a person who hands over his wallet to a mugger offering a choice between his money or his life coercively consented to the transfer. Following Gilbert I assume that, despite the legal duress, the reluctant conscript accepts the rules that define the role she occupies because she decided to join the army.

It might be alternatively argued, of course, that acts of coerced consent lack moral significance; the mugger (say) can hardly raise it to oppose a demand that she return the wallet. But this worry challenges Waiver rather than Consent: by accepting the rules that define soldiery, the reluctant enlistee did not waive his right against being killed even if these rules are fair and mutually beneficial. I shall address this distinct worry while defending Waiver.

Let me sum up. Contrary to McMahan’s assumption, Consent is not a psychological thesis; contractarianism is not committed to the obviously false claim that in joining an army, each soldier engages in a tacit mental act whose content is, “I hereby waive my moral right against being unjustly attacked in war.” The claim I called Consent is a sociological thesis about the social meaning of taking on the status of a soldier and the norms that define the profession of arms. (Thus, Consent does not need a normative defense of the symmetrical rules that define soldiery. As far as the sociological thesis goes, the profession of arms could be defined asymmetrically. If there is a reason for keeping symmetry, it has to do with Fairness and Mutual Benefit. To repeat, legal symmetry is an element of a fair and mutually beneficial institutional scheme intended to prevent aggression by creating the optimal conditions for enforcing the prohibition on aggression.)

McMahan suggests a different empirical objection, according to which the profession of arms is not socially constituted by the symmetry principle. After all, our social understanding of the role of a soldier is not precisely defined and codified, and soldiers therefore do not consent to any explicit doctrine of symmetry. In fact, the understanding of their role that most soldiers actually accept could be

29. This is an almost direct quote from Margaret Gilbert, “Agreements, Coercion, and Obligation,” *Ethics* 103 (1993): 679–706, 684.

30. *Ibid.*, 685.

that they must wear uniforms and bear their arms openly in order to draw fire to themselves and away from civilians, “in much the same way a parent might attempt to draw the attention of a predatory animal toward herself and away from her child.”³¹

I disagree. True, “role concepts are . . . ‘interpretative’, [and] . . . people can reasonably argue about the proper interpretation or understanding of role terms and concepts.”³² But even if soldiers themselves have divergent views about what is essentially involved in their role, the law that defines the role they occupy and accept is unequivocal in its assertion of symmetry. Positive and customary law treats *jus in bello* and *jus ad bellum* as two independent subsystems. And the independence of each code from the other is realized through legal symmetry; the legal permissions and prohibitions of soldiers are the same whether or not their cause is just. This suggests that symmetry is part of what defines the role of the soldier in law, whether or not soldiers are fully aware of it.

Furthermore, states have the moral power to require obedience only if it is reasonable to believe that, by signing up, soldiers waive their right against being unjustly attacked. But the authority of states to require obedience has never been seriously challenged in the international community. Therefore, it must be widely acknowledged that the law denies soldiers a legal right not to be unjustly attacked, which in turn supports the claim that soldiers themselves share this understanding of their role.

IV. WAIVER AND TRANSFERRED RESPONSIBILITY

A. *Restrained versus Unrestrained Contractarianism*

Conjoined to Mutual Benefit, Fairness, and Consent, Waiver entails that by accepting the rules that define their profession, soldiers successfully waive their moral claim against unjust attack by enemy soldiers. Consent asserts that an individual’s becoming a soldier constitutes an acceptance of a code that allows targeting her in the course of war. Waiver asserts that individuals have the Hohfeldian power to release specific other individuals—soldiers of opposing armies—from a duty not to kill them in fighting an unjust war. It asserts further that consent to the fair and mutually beneficial symmetrical code is an effective exercise of this moral power.

The deepest objection to contractarianism denies this last claim on deontological grounds. A person’s claim against being unjustly

31. McMahan, *Killing in War*, 55.

32. Hardimon, “Role Obligations,” 336.

killed is not alienable just by her consent to morally optimal rules.³³ Thus, even if the rules of the war convention are mutually beneficial and fair, and soldiers freely accept these rules, unjust combatants have no moral right to kill soldiers who defend themselves, their family, and their country. Cases of voluntary euthanasia aside, in most circumstances of the intentional killing of innocents, the right against unjust attack that the victim possesses was violated, even if she explicitly consented to be killed.

In order to support the conviction that underlies this objection, consider an imaginary society that is governed by a self-help-based regime, in which duels are an effective mechanism for maintaining social order. This arrangement is unavoidable and therefore optimal, for the central authority lacks the resources for securing stability by other means. Suppose that in this society a villain “makes various public accusations . . . and . . . challenges [a good] man to a duel. . . . Suppose [further] that a refusal to fight would be interpreted as an admission of guilt . . . so the wronged man consents to fight the duel . . . [but] refuses to fire his own weapon. [The villain then] kills the man.”³⁴ Despite the man’s consent, the villain had no right to kill him.

This is a principled objection: the contractarian approach cannot be appropriate for war because the *in bello* code is not merely about regulating the pursuit of self-interest but about regulating killing. True, currently the best way for a soldier to prevent himself and other innocent people from being killed by unjust combatants is to play a role in a confrontation that an aggressive state has set up, according to the rules of which, if she participates, she makes herself a permissible target. It is, however, impermissible for unjust combatants to take advantage of this contractarian setting, especially if participating in this war might lead them to kill innocents. If this objection is valid, Waiver is false.

In order to rebut the deontological objection, we must draw a distinction between two kinds of contractarianism. On its unrestrained reading, contractarianism insists that the killing of just combatants does not involve violating their right to life. They have no such right because they waived it by signing up and undertaking the institutional duties that define soldiery. On this reading, although the war might be unjust, soldiers’ acts of killing within the war are not

33. McMahan’s argument is somewhat different. He thinks that a person’s consent is by itself insufficient to make it permissible to kill him; there must also be a positive moral reason to do so. In effect, McMahan’s objection is not intended to target Waiver; Waiver implies that if its antecedent is true, unjust combatants do not violate the right-claim just combatants hold against them that they won’t unjustly attack them. As far as Waiver goes, these killings might be impermissible on other grounds.

34. McMahan, *Killing in War*, 56.

unjust, because the victims do not retain the rights that would otherwise have been violated. Unrestrained contractarianism is unimpressed by the objection that I presented above—it denies that the right against being unjustly attacked cannot be waived by accepting a mutually beneficial and fair set of rules.

On its restrained reading, contractarianism offers a more subtle account. Usually, individuals do not have the moral power to waive their right against being unjustly killed, just as they have no power to enslave themselves or to allow others to treat them as a commodity. They have no moral power to change their fundamental status as subjects of basic rights merely by entering a contract that commands them to do so. Restrained contractarianism describes unusual circumstances in which waiving fundamental rights is possible. The right against killing held against enemy soldiers can be waived by the universal acceptance of a system that transfers the responsibility for the war from soldiers who fight the war to states which administer it. Thus, soldiers' moral power to waive the claim (held against enemy soldiers) that the enemy soldiers not unjustly attack them is, in fact, the power to transfer the responsibility for the aggressive war and its unjust consequences from soldiers (who fight the war) to states and statesmen (who order them to do so). In accepting the rules that constitute soldiery, a state's soldiers free enemy combatants from the duty to avoid unjust attack by transferring the responsibility for the war to the enemy soldiers' state, or rulers.

The morality of the institutional scheme that allows for obedience presumes the bipolarity and directionality of Hohfeldian rights. A person can waive his right against being killed with respect to one person but not with respect to another; I can give you permission to attack me without giving anyone else permission to do so. Particularly, restrained contractarianism argues that soldiers waive their right vis-à-vis enemy soldiers but not vis-à-vis the enemy state or its leaders. And it suggests that soldiers do have the power to waive the claim they hold (specifically) against enemy soldiers that they won't unjustly attack them, if states undertake the duty to make sure that the wars they fight are just.

On this account, soldiers waive their claim against enemy soldiers by agreeing not to treat one another as the responsible source of the harms they may suffer at one another's hands. It follows that unjust killing of soldiers by unjust combatants does involve a violation of their rights. Yet, the norms that define the role of soldiers pick out those who are the ultimate source of the commands that bind combatants as the violators of these rights. This reflects the commonsense view of war. Suppose that the recent Gulf war was unjust. The rights of Iraqi combatants killed by U.S. and other combatants during this

invasion were violated, not by the soldiers who committed these killings but by the states that ordered them to do so. Thus, an aggressive state has no right to kill just combatants, and yet, its agents, acting vicariously for it, do. Political leaders have no right to send their unjust combatants to kill just combatants, despite the fact that just combatants have waived their right not to be killed vis-à-vis unjust combatants.³⁵

Restrained contractarianism treats the killings that unjust combatants commit as civil society treats the killing committed by an “unjust” executioner who carries out a mistaken or even corrupt verdict. The right of the innocent victim was violated. Still, it is the state, rather than the executioner, which violated the victim’s right. Restrained contractarianism offers a simple explanation of this intuition: in accepting the system that divides the labor between the executioner and the state, the victim waives the claims he holds against the executioner that the executioner won’t kill him. The victim does so by accepting a scheme that transfers the responsibility for the execution to the state.³⁶ Hence, the executioner is accountable only for the technical and humane aspects of the execution, not for the execution itself, just as soldiers are responsible for the way they fight the war, not for the war itself.³⁷

B. Transferred Responsibility and Honoré’s Outcome Responsibility

McMahan unequivocally rejects the transferred responsibility account: the conventions that sustain social cooperation cannot exempt agents

35. Note that unjust combatants merely violate no right in killing just combatants, while just combatants are also justified in killing unjust combatants. It follows that they are equal at the level of rights, rather than at the level of overall justification. Compare my discussion of the right to do what is overall unjustified in Yitzhak Benbaji, “Culpable Bystanders, Innocent Threats, and the Ethics of Self-Defense,” *Canadian Journal of Philosophy* 35 (2005): 585–622, 615–21, and “The War Convention and the Moral Division of Labour,” 614–16. The discussions in these essays are indebted to Jeremy Waldron, “A Right to Do Wrong,” in *Liberal Rights* (Cambridge: Cambridge University Press, 1993).

36. As I note in “The War Convention and the Moral Division of Labour,” it might be argued that there is a crucial difference between the informed executioner, who knows that the convicted person is innocent, and the uninformed executioner, who does not know it. But the following conditional seems true: if an informed executioner is under a duty not to execute the innocent prisoner, then the uninformed executioner has no moral right to kill this person without first making sure that the prisoner deserves the punishment.

37. Compare to Applbaum, “Professional Detachment: The Executioner of Paris,” in *Ethics for Adversaries*, 15–43. My argument for the executioner’s right differs from the argument attributed by Applbaum to Sanson (the executioner of Paris during the revolution) in two respects. I argue for a right-privilege in a fair and mutually beneficial social structure (waiving this right by refusal or resignation might be justified and honorable); Sanson argues for an obligation in all social structures.

from moral responsibility for the intentional killings that they actively commit. He seems to argue that not only the state but the executioner, as well, has no liberty-right to execute an innocent victim. He observes that like unjust executioners, unjust combatants take the lives of innocent people, and they do so intentionally. So, they are the agents of the victims' deaths, and they are therefore morally responsible for them.³⁸

I will not be able to develop here a full theory of responsibility that proves McMahan's convictions to be false. Instead, I will challenge them by offering a case for the claim that, despite appearances, agency and responsibility as commonly understood are primarily conventional. For facts about agency and responsibility are intrinsically related to facts about morally reasonable social expectations. I further argue that the conventionalist conception of responsibility allows for a mechanism by which the causal agent's responsibility for an outcome is transferred to the institutions that she represents.

My starting point is Tony Honoré's theory of outcome responsibility (which I develop in my own way).³⁹ Honoré's analysis appeals to convictions about moral luck. Following Bernard Williams, he observes that commonsense morality would recognize the moral relevance of the distinction between two cases: "Negligent Killing" and "Negligent Letting Die."⁴⁰ In Negligent Killing, a person negligently kills an innocent victim: he was in a hurry, so he pushed the victim off the sidewalk; the victim was hit by a passing car. In Negligent Letting Die, the agent could have easily pulled the victim back to the sidewalk after she was pushed by someone else. He was in a hurry, so he negligently failed to do so; again, the victim was hit by a passing car. The difference between the agents is—I hereby stipulate—a matter of luck: their intentions, virtues, or vices are indistinguishable; they are both negligent to the same degree; they do differ, of course, but only in factors that are beyond their control. The commonsense moral judgments in such cases are clear: the negligent killer is causally and hence morally more responsible for the death of the victim than the agent who negligently allowed the victim to be killed. But this judgment cannot be explained through facts about internal mental states that usually ground attribution of moral responsibility.⁴¹

38. McMahan, *Killing in War*, 84–92.

39. Tony Honoré, *Responsibility and Fault* (Oxford: Hart, 1999).

40. Bernard Williams, "Moral Luck," in *Moral Luck* (Cambridge: Cambridge University Press, 1981), 20–39.

41. It might be argued that, despite the stipulation, it cannot be true that the only difference between the agents in this case is luck, for they know that they have a stronger duty to take care not to kill people than to take care not to allow people to be killed. In order to accommodate this complication, I should further stipulate that both agents are

Honoré's explanation of the difference between these cases appeals to the notion of introducing a change into the world. In the usual case, a person is treated as the agent of the outcomes that result from her actions (i.e., bodily movements) because "we have a picture of the world as a matrix into which, by our movements and especially our manipulation of objects, we introduce changes."⁴² The killer in Negligent Killing is the agent of his victim's death, while the subject of Negligent Letting Die introduced no change into the world.

I believe (here I might go beyond Honoré) that it would be mistaken to attribute outcomes solely to their causal agents or to analyze the concept of introducing a change through the notion of agent causation. At the fundamental level, Honoré's concept of introducing a change, and hence his concept of outcome-responsibility, is not causal. Consider an example which Honoré discusses in some detail: a physician on duty who could have saved a severely wounded person but negligently failed to do so. His omission is conceived by the law and by commonsense morality as morally equivalent to active killing: "Disruptions of the normal course of events are similar to interventions that bring about change. . . . If, as . . . is often the case, the break in routine violates a norm . . . it . . . is a potential ground of responsibility. . . . If the human routine is required by a norm, the violation of it is an omission that will entail responsibility."⁴³ Physicians are under a professional duty to provide medical care to the severely wounded, and this is why they are expected to do so. Why does a professional duty make such a moral difference? It is, after all, a merely professional duty; what is the source of its moral standing? Honoré's answer is this: a physician who failed to fulfill this duty is the author of the victim's death because he disrupted the normal course of events. In this context, the normal course of events is defined by the social expectations from physicians. The fact that the negligent physician introduced a change into the world is related to the fact that he frustrated the expectations that he will fulfill his professional duty.

Why do these social expectations matter? The answer is that a regime under which physicians are obligated to assist the severely wounded creates expectations, which are morally reasonable. Ultimately, morally reasonable social expectations, rather than causal agency per se, ground the difference between Negligent Killing and Negligent Letting Die. Unlike the person who negligently allows someone to be killed, the killer is expected to bear the bad conse-

not aware of, or deny, that there is a difference between killing and letting die. I am indebted to Jeff McMahan for pressing this point.

42. Honoré, *Responsibility and Fault*, 52.

43. *Ibid.*, 53.

quences caused by his actions. This is why he is outcome-responsible for them.

Why are these social expectations morally reasonable, despite the fact that they track morally neutral differences between the agents in Negligent Killing and Negligent Letting Die? Honoré's answer to this question is inspiring and compelling: we are held responsible for our bad luck, but, in return, we benefit from holding others responsible for unwelcome outcomes of their actions. We are entitled to our achievements (i.e., we take credit for the good outcomes of our choices despite the fact that success is often a matter of luck), but we are expected to bear the unintended bad outcomes of our actions. That is, the social expectations by which the notion of introducing a change is defined are generated by mutually beneficial assignments of responsibility and, thus, of praise, blame, and liability.

Honoré insists that mutual benefit is insufficient. The expectations generated by the outcome responsibility system are morally reasonable, because the system is not only mutually beneficial, it is fair as well: "It must in its operation be impartial, reciprocal and over a period, beneficial. It must apply impartially to all those who possess a minimum capacity for reasoned choice and action. It must be reciprocal in that each such person is entitled to apply it to others and they to him. It must work so as to entitle each person to potential benefits that are likely on the whole to outweigh the detriments to which it subjects him."⁴⁴

The complex concept of introducing a change, which underlies the outcome-responsibility system, is both expectations-dependent and normative, in the sense that the expectations on which attributions of responsibility depend are morally constrained. This is why outcome responsibility "is the basic type of responsibility in a community: more fundamental than either moral responsibility as generally understood (which requires fault), or legal responsibility."⁴⁵

Restrained contractarianism links responsibility and rights; it asserts that the morally reasonable expectations which entail facts about agency and responsibility affect the distribution of moral rights and duties. In particular, the expectations that ground attributions of agency and responsibility for an outcome subject a person to a set of moral duties with respect to this outcome. And vice versa—if one is not responsible for an outcome, it follows that one enjoys a set of moral liberties with respect to it. This is suggested by a standard contractarian formula: one is wronged if one is treated in a way to which one has a legitimate objection. Arguably, if you reasonably expected

44. *Ibid.*

45. *Ibid.*, 26.

me to act in one way and I failed to do so, then you have a reason to complain. This complaint can be translated into the language of rights: you have a claim against me that I won't frustrate your morally reasonable expectations of me. Morally reasonable expectations are, therefore, a source of bipolar claims and directional duties—ethical concepts squarely within the family of contractarian ideas.⁴⁶

Turn back now to unjust executioners and unjust combatants and consider their outcome responsibility for the killings that they commit. Following Honoré, I have insisted that physicians might be outcome-responsible for a death caused by their omissions. For similar reasons, combatants are not responsible for certain outcomes caused by their actions. Suppose the arguments of Sections II and III are sound, so that states and most soldiers do expect other soldiers to conform to the rules of war, and these expectations are morally reasonable. The rules of war allow for obedience: just and unjust combatants are not expected to act in their capacity as individuals. They are expected to act qua soldiers; as such, they are treated by their enemies as carrying out the actions of the state that they serve. Since these expectations are morally reasonable, they shape the agency of soldiers as the medium through which the state acts: it is the aggressive state, rather than the unjust combatants, which is the author of the war that its troops fight. Soldiers are responsible only for the way they treat their enemies, or for the way they fight in war, not for the war itself or its consequences. Moral symmetry and equality (at the level of Hohfeldian rights and duties) follow immediately: by accepting a system that transfers the responsibility for the war to states, just combatants free unjust combatants from the claim (that they hold against unjust combatants) that unjust combatants not attack them in war.⁴⁷

The transferred responsibility account which restrained contractarianism offers elucidates the difference between the symmetrical regime sustained by the rules of war and the practice of dueling that I described above. Within the latter, it is the responsibility of individuals to make sure that duels are used as a measure for enforcing vital just

46. This sketch is indebted to David Lewis, *Convention* (Cambridge, MA: Harvard University Press, 1969), 97–100; Stephen Darwall, *The Second Person Standpoint: Morality, Respect and Accountability* (Cambridge, MA: Harvard University Press, 2005); and to contributors to a symposium on Darwall's book: R. Jay Wallace, "Reasons, Relations, and Commands," *Ethics* 118 (2007): 24–36; and Gary Watson, "Morality as Equal Accountability," *Ethics* 118 (2007): 37–51.

47. Compare to David Luban, *Lawyers and Justice* (Princeton, NJ: Princeton University Press, 1988), 78–81; and to Francis Kamm, "Responsibility and Collaboration," in *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (New York: Oxford University Press, 2007), 312, discussed by McMahan, *Killing in War*, 90.

claims; as a judge of her own case, a person who challenges another person to a duel acts in her capacity as an individual. Contrast this with the social meaning of the role occupied by executioners and soldiers. Their agency is conceived as the medium through which the state acts. Under this division of moral labor, it is the responsibility of the state to make sure that the combatants' use of force is just.⁴⁸

The shift to the second-person standpoint could explain why Waiver might be true of conscripts, whose consent to take on the status of soldiers was unfree, and of soldiers whose consent to the *in bello* rules was uninformed. In light of this shift, the insistence on free and informed consent might seem "far too individualistic, far too voluntaristic."⁴⁹ If Mutual Benefit and Fairness obtain, the role of a soldier is an aspect of a social order that we can reflectively endorse.⁵⁰ By signing up, a soldier creates morally reasonable social expectations, and in at least some circumstances, the fact that she was forced to join the army does not change this. Despite the coercion, the expectations from her are morally effective in virtue of the "reflective acceptability" of her role. Basically, the same is true of uninformed consent.⁵¹

Let me be precise. Unlike fair-play theorists, I do not argue that a citizen, who benefits from living in a decent state, need not consent to taking on the soldier's role, in order to be bound by the rules that define soldiery. Quite to the contrary: nuanced contractarianism insists that consent is necessary for generating the moral duties and the moral rights which the soldier's role involves. In particular, a reluctant conscript lost her right against being attacked by unjust combatants because of the expectations that her coerced consent to be bound by the role of soldier generated. But, doesn't the legal duress that produces the expectations from the reluctant conscript undermine their moral reasonableness? The answer offered here is negative—the reasonableness of the relevant expectations is related to Fairness and Mutual

48. The view presented here is an instance of what John Simmons calls the standard view, reformulated in order to include permissions and burdens: we lose our natural right against adversaries' actions by taking on an institutional role only when this is required by a moral principle that is not itself a principle internal to the institution in question ("External Justifications and Institutional Roles," 30).

49. Hardimon, "Role Obligation," 361–62.

50. *Ibid.*, 348.

51. The role-based version of contractarianism might suggest a distinction between nonuniformed combatants, from weapons scientists to armed partisans. It might be asked, do the latter have a responsibility for their killings that role-compliant soldiers lack? Due to scope restrictions, I won't be able to explore these questions here.

Benefit: soldiery is an element in a fair and mutually beneficial institutional scheme.⁵²

C. Roles and Causal Responsibility

A straightforward objection to this account merits close attention. The objector argues that morally reasonable expectations are relevant to determining agency and responsibility only when the other dimensions of responsibility are apparently absent—causation is indeterminate, the party was innocent, it was an accident, and so on. But when active causation is as plain as a finger on a trigger and a combatant knows that his cause is unjust but nevertheless deliberately aims and shoots, it would be very hard to believe that he is not responsible for what he does.⁵³ According to this objection, deliberate agent causation is sufficient for responsibility—while the fact that we attribute responsibility on the basis of morally reasonable expectations shows only that it is not necessary for responsibility.

I will try to cast doubt on this view by analyzing a case that brings out the interesting relations between roles and agent causation: Burning Building.

A person trapped atop a burning building leaps off. Seeing this, a firefighter quickly stations a self-standing net underneath and then dashes off to assist with other work. A second firefighter sees that two other persons have also jumped from an adjacent window. He therefore moves the net over to catch the two, with the consequence that the other jumper hits the ground and dies.⁵⁴

Some philosophers—most notably McMahan himself—classify the withdrawal of the net in Burning Building as letting die rather than killing. McMahan insists, however, that if a person who removed the net is not a firefighter (but, say, a bystander who wanted to save his son), we would classify the withdrawal of the aid as killing.⁵⁵

These convictions would be hard to explain had the firefighter's deliberate action been sufficient to render him the agent of its direct consequences. After all, he intentionally removed the net, knowingly (and immediately) causing the death of the falling man. In insisting

52. Probably, there are roles—like the role of a son or a daughter—which bound their occupiers without consent: daughters are subject to role-based duties and possess role-based rights without having consented to be bound by their roles. The expectations from them are reasonable, whether or not they undertook the duties intrinsic to their roles.

53. Thanks to Seth Lazar for this helpful formulation.

54. Jeff McMahan, "Killing, Letting Die, and Withdrawing Aid," *Ethics* 103 (1993): 250–79, 263.

55. This is McMahan's explanation in *ibid.*, 263–65.

that a person is necessarily responsible for the immediate causal consequences of her intentional bodily movement, the objection cited above allows for no distinction between the way the firefighter is related to the death of the falling man and the way a bystander who removed the net would have been related to it.

On the other hand, the distinction is easily explained by a theory that accounts for the notion of introducing a change into the world through morally reasonable social expectations. Arguably, the firefighter who provided the aid acted in a capacity that is role-based, rather than in his capacity as an individual. And, it is the role—and the social expectations associated with this role—that identifies the agent of the withdrawal. The agency of the firefighter, in his capacity as a firefighter, is the medium through which the unit (to which he belongs) introduces changes into the world. Hence, the agent who stationed the net (i.e., the unit of firefighters) is the agent who removed it.⁵⁶

D. A Final Remark

Two further critical points that McMahan levels against the transferred-responsibility account should be addressed. McMahan rhetorically asks, “would it be sensible, in deciding whether it is morally permissible to obey, to consider who will have responsibility if you do? . . . How could it be relevant to what you ought to do?”⁵⁷ He further observes that “unless the reasons that support obedience are absolute, so that there could be no reason to disobey that could outweigh the reason to obey, soldiers have a moral choice. . . . If they make the wrong choice, they cannot plausibly deny their responsibility, claiming that responsibility lies solely with their commander.”⁵⁸

But neither of these points threatens the idea of transferred responsibility. McMahan is right that the mere fact that an agent is free of responsibility for the consequences of acting in a certain way does not give him reason to act in this way; similarly, the fact that one is at liberty (has a right) to *X* (i.e., one has no duty not to *X*) does not give one a reason to *X*. But both facts are nevertheless important in the deliberative process. For, in a case in which one is responsible for the morally undesirable consequences of *Xing*, one has strong moral reason not to *X*. This moral reason does not exist if one would bear no responsibility for the undesirable consequences of *Xing*. Obviously,

56. In introducing McMahan’s view that acting in a role can turn what would otherwise be a killing into letting die, I am not claiming that the soldier’s role effects this transformation. Regarding soldiers, acting in a role makes their agency a medium through which the state acts.

57. McMahan, *Killing in War*, 89.

58. *Ibid.*, 88.

the fact that such reason does not exist is relevant to one's deliberation. Similarly, if by Xing the agent will violate a moral claim that is held against him, he has a very strong moral reason not to X; if the agent is at liberty to X, such reason does not exist. Again, this is important for the agent's deliberation.

As for the second point, McMahan is correct in claiming that the fact that a soldier can deliberate about whether to join the army entails that if he decides to do so, he is responsible for joining the army. Yet, this does not imply that he is responsible for the unjust aggression that the army to which he belongs exercises. Rather, this merely implies that he is responsible for being part of this army. Indeed, one has a good moral reason not to be part of an army that carries out an aggression. This is perfectly consistent with the contractarian elucidation of the war convention and the transferred responsibility account that underlies it.

V. CONCLUSION

The contractarian case for moral symmetry can be summarized as follows. First, obedient armies are the vehicle through which the society of decent states optimally and fairly enforces the prohibition of aggression. Hence, states define the role of soldiers through the duty of obedience. Obedience of armies is achieved by the symmetrical *in bello* code, and soldiery is an element in a fair and mutually beneficial institutional scheme. Second, the acceptance of this scheme by soldiers is morally effective. They acquire the right to participate in war because their adversaries freed them from the duty not to attack them. That is, by joining the army and accepting the rules that define the profession of arms, soldiers free one another from the moral duty not to kill one another in wars. I have further analyzed the mechanism by which this exchange of rights is accomplished. Soldiers subjected themselves to a system that transfers the responsibility for wars and their unjust consequences to the states that initiated them.