

WAR BY AGREEMENT

A Contractarian Ethics of War

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Preface

As we write these lines in late 2018, dozens of wars are still raging around the globe while parallel to these wars a harsh and quite combative debate is being held. To put it perhaps over-dramatically, we could say that a ‘war about war’ is also in progress. We refer to the debate between a group of philosophers called ‘revisionists’ and a comparatively few opposing thinkers who seek to defend a traditional understanding of the ethics of war. The revisionists, led by Jeff McMahan, are challenging all fundamental tenets of traditional just war theory, such as the right granted to soldiers on both sides to kill each other and the requirement to maintain a strict distinction in warfare between combatants and noncombatants. In the revisionist view, if killing in war can ever be morally justified, it must be grounded in the same principle that justifies killing outside the context of war; namely, in accordance with the right to self-defense. They argue, however, that this cherished principle falls short of grounding the above tenets.

What would follow if the revisionists were to win this debate? What are the alternatives to traditional just war theory? One would be to give up the attempt to evaluate war in moral terms and adopt instead the message of the old Latin adage that in times of war, the law is silent; *inter arma silent leges*. But this realist view of war has been subject to strong criticism and does not seem a very promising avenue. A completely different alternative would be to go for pacifism. If the revisionist critique of traditional just war theory is sound, then although killing in war *might* be permissible, the odds are that it is not. Given the strong presumption against killing human beings, perhaps the only decent conclusion is to advocate restraint from war altogether.

Although at times revisionists seem to be going in this direction, in the end they refrain from doing so. Readers coming to the end of some revisionist writings feel as if they are watching the last minutes of a movie with an unexpected twist in the plot. The surprising twist is the revisionist acceptance of the basic teachings of just war theory. Yet from our perspective, after the powerful criticism that revisionists have mounted against these teachings in the lion's share of their writings, this return is impossible. The way back is blocked.

We believe that these developments have resulted in a stalemate. On the one hand, the revisionist criticism of traditional just war theory has made the older view seem ungrounded and, in a sense, naïve. On the other hand, revisionists have failed to propose a convincing alternative. The main purpose of the present book is to forge a way through this stalemate. We aim to show that wars can be morally justified at both the *ad bellum* level (the political decision to go to war) and the *in bello* level (its actual conduct by the military). The alternative to pacifism is not crude realism, but rather a rich theory that grounds the principles regulating war in a mutually beneficial and fair agreement between the relevant players. In other words, what we propose is to ground the accepted rules concerning war in a contractarian framework. Hence the title of this book—*War by Agreement*—which, as some readers must realize, is a variation on the title of a key book on moral contractarianism by David Gauthier from 1986, *Morals by Agreement*. While Gauthier aimed to ground all morality in agreement, our own contractarianism is more limited and, at any rate, is applied here mainly to the morality of engaging and harming in war.

Chapter Two: Foundations of a Non-Individualist Morality

In the previous chapter, we saw how the individualist approach to the ethics of war is informed by a general view on the nature of morality, according to which the distribution of moral rights is unaffected by the social role or affiliation of the relevant parties.¹ Against this view we posit that social roles are not at all superficial; rather, they play a crucial role in determining moral relations. The purpose of this chapter is to develop this idea and to elaborate on its theoretical commitments and underpinnings.

As an alternative to the robustness of rights entailed by *Individualism*, we propose that under given conditions, a person's acceptance of social rules can be seen as his/her granting consent to be governed by them, hence as a waiver of rights. This leads to:

Social Distribution: Under specified conditions, social rules partly determine the distribution of moral rights and duties.

The understanding that social rules determine a distribution of rights and duties is, of course, trivial within a Hobbesian view of morality. According to Hobbes, outside organized ('civic') society, people have no moral duties towards their fellow humans and may do whatever is needed to advance their own interests. But this view is widely dismissed in moral philosophy. Therefore, our starting point is Lockean. We assume the existence of 'natural' rights and duties; namely, rights and duties whose validity does not depend on any kind of social agreement. (We shall often refer to them as 'pre-contractual' rights and duties). But if our most fundamental rights are *natural* such that they are independent of any social framework, in what sense could social rules affect their distribution? The answer that we develop here appeals to our power to undertake duties towards others and exempt others from their duties towards us, by a voluntary (or at least non-coercive) habitual obedience to social rules.

¹ *Individualism:* The moral duty incumbent on each person to respect the most fundamental human rights of all other persons does not depend on the national, religious, or other affiliation of the person or of the right-bearer. Nor does it depend on the social role that any person might happen to have, qua citizen of a specific state, combatant of a particular army, or bearer of a specific role (such as policewoman, mayor, judge, banker, etc.).

Social rules, then, affect the distribution of rights if the rules are freely accepted by the relevant agents. Consider:

ACCIDENT1: Because of an unexpected threat, driver A must violate a basic traffic rule and move to the wrong side of the road, otherwise A will get herself killed. However, if A does so, she will hit and kill driver B who is following the rules and driving on the right side of the road.

Most people would agree that A is morally prohibited from moving to the opposite lane, even if she must pay with her life to remain in her lane. Now consider the matter from the point of view of the other driver:

ACCIDENT2: The same scenario as in ACCIDENT1, but out of fear of the threat posed to her, A decides to move to the other lane. This time, if B hits A's car, it is A who will die. B can prevent the crash by moving to the other side of the road, but she would then fall into an abyss and get herself killed.

B is under no obligation to move aside and risk her life. She may keep to her lane even though she realizes that she will hit A's car and kill her.

From a pre-contractual moral point of view, A and B are equally situated. They are both engaging in permissible activity (driving) and, insofar as they put the other in peril, it is on account of factors beyond their control. Nevertheless, in both ACCIDENT1 and ACCIDENT2, there is moral asymmetry between the two drivers, which is determined by thoroughly conventional traffic laws. To appreciate the crucial role of such laws in these cases, contrast them with the following law-less state of affairs:

ACCIDENT3: A is driving her jeep in the Sahara desert. There are no marked paths or routes and no accepted rules about right of way etc. Because of an unexpected obstacle—an animal standing on the path—driver A must move to the left side of the path, otherwise she will get herself killed. However, if A does so, she will hit and kill driver B who is approaching from the other direction.

Here, it seems that A is under no obligation to stick to 'her' lane in order to prevent B's death. Of course, the same would apply to B, if she faced a similar threat. This means that A and B are symmetrically situated vis-à-vis each other. We tend to believe that in these cases, each has a right to act in a way that would save his or her

life, definitely by merely moving aside, but probably even by directly attacking the other driver to avoid the risk of a lethal crash.² Others might offer other solutions that respect this symmetry, like fair procedure. The difference between ACCIDENT3 and the former cases is that in ACCIDENT3, neither driver could be said to be driving in ‘her’ lane. In the absence of social rules, no one has a moral claim on any particular lane as being necessary for his/her survival. Therefore, neither of the drivers can be said to have lost her right to life by driving in the lane of the other.

Note that this verdict would change if *both* drivers would die. In the Sahara circumstances, A has a natural right to prefer her own life over that of B, but not to act in a way that would uselessly kill both. If the only feasible option before A is to get herself killed by crashing into a standing animal or getting herself *and* B killed by crashing into B, she has no right to move into B's lane.

In response to the ACCIDENT cases, one might argue that of course traffic laws—a paradigm of social rules—make a moral difference, but this is simply because there is a moral obligation to obey the law. Whoever accepts the existence of this obligation is committed to the view that violation of the law is at once a legal offense and a moral wrong, and as such ACCIDENTS 1&2 merely flesh out some consequences of such violation. *Social Distribution*, therefore, is just a corollary of the obligation to obey the law and offers no interesting alternative to *Individualism*.

This argument, however, is a gross misunderstanding of the proposal we are making. To see why, consider again ACCIDENT1. If A's duty to stick to the right lane is just an instance of her general obligation to obey the law, then we'd have to describe the moral dilemma at hand in the following manner: On the one hand, driver A has a natural liberty-right to move to the other lane, just as in ACCIDENT3, even if that would lead to the killing of driver B. On the other hand, she has a moral duty to stick to her lane because that is the law and there is a moral obligation to obey the law. But this would mean that the moral wrong that A would commit if she chose to move to the opposite lane would be pretty minor indeed. Most of us violate the traffic

² For a defense of the free competition intuition, see Davis, 'Abortion and Self-Defense', 175-207, Yitzhak Benbaji, 'A Defense of the Traditional War-Convention', *Ethics* 118 (2008), 466-469, and Quong, 'Killing in Self-Defense', 507-537. If the drivers in this scenario could communicate, it would of course be better (it would actually be morally *required*) that they seek a fair way of reducing the expected harm—one that would guarantee each an equal chance of survival. But such communication is not possible in the cases we are imagining.

laws on a daily basis, and usually nobody considers such violations a serious moral issue. If this were the dilemma A faced, then if she moved to the opposite lane and killed B, her moral transgression would not consist of that killing, but rather would be limited to having violated the law. In contrast, we posit that traffic laws—as well as other social rules—determine (under specified conditions) *what we morally owe to each other*.³ Given the way the practice of driving is shaped by the traffic laws, if A moved to the opposite lane, she would be committing a moral analogy to homicide. Her moral dilemma, then, is not between preserving her life and violating the obligation to obey the law, but between preserving her life and *wrongfully killing a person*.

The Conditions for the Moral Effectiveness of Social Rules

Our analysis of ACCIDENTs was intended to provide initial motivation for the view that social rules partly determine the distribution of rights and duties. But surely, not all social rules have such a moral effect. We argue that to have such an effect, social rules must satisfy three conditions: *Mutual Benefit*, *Fairness*, and *Actuality*.⁴

We start with the condition of *Mutual Benefit*. As we indicated, traffic laws are mutually beneficial to all participants in this social practice, although in the cases discussed above some parties are doomed to lose because of them. The right question to ask is not whether the social rules benefit all parties in all possible circumstances, but whether given the evidence available when the parties agree on these rules, the expected benefit to them is higher than other feasible arrangements. The question to be asked about participants is what they would rationally conceive as mutually beneficial *before* they get themselves in all kinds of trouble like the scenarios described in ACCIDENTs.

Note that when parties to a contract take this *ex ante* position, they do not abstract themselves from their individual features (gender, social-economic status, religion, and so on), like in Rawls's Original Position. The kind of uncertainty that is built into the *ex ante* perspective is the uncertainty actual people share about the future. This uncertainty constitutes the prudential reason to enter into contracts. In

³ On the idea that traffic laws usually constitute moral duties, see also Mavrodes, 'Conventions and the Morality of War': "it seems likely that different laws would have generated different moral duties, e.g. driving on the left" (126).

⁴ For a discussion of similar conditions, see, Yitzhak Benbaji, 'The Moral Power of Soldiers to Undertake the Duty of Obedience', *Ethics* 122 (2011), 43-73

assessing the benefit of the contract, the parties maximize expected benefit (the sum of the value they attach to possible outcomes of entering a contract multiplied by the probability that these outcomes will transpire) rather than the value of the actual outcome of entering the contract. Although the parties have some knowledge about what might happen to them, they are unable to determine anything more than expected benefit.

That an arrangement is such that all relevant parties (all drivers, for instance) would accept *ex ante* is a major reason for regarding the outlook we propose as contractarian. The idea is that those affected by the arrangement accept it because they rationally expect to benefit from it.

Note that as the traffic laws example suggests, the set of rules governing some particular field of activity is not necessarily the only possible one, or even the best. It might turn out that, for some physiological reason, a convention of driving on the left side of the road is safer than a convention of driving on the right. Nonetheless, the latter is sufficiently good; therefore, if it is actually followed in a given society, it is morally effective.

Saying that some arrangement is effective although it is not the best possible one creates a troubling feeling of compromise. In a sense, this feeling is warranted. After all, there is a better social arrangement that would—had the world been different—contribute more to the wellbeing of the relevant parties and to the protection of their rights. But the world is *not* different; hence, in the actual world, affirming this less-than-ideal arrangement is often the right thing to do.⁵ Moreover, in many cases, major revisions in social arrangements are predicted to end up with more harm than benefit, with the weakening of these arrangements instead of their improvement.

So far, we have introduced no constraints on the kind of benefit that would satisfy the mutual-benefit condition. Surely, however, there are such constraints. This point paves the way for the second condition for the moral effectiveness of social rules; namely, *Fairness*. Imagine the following contract between slaves and masters:

⁵ Which is consistent with a cautious attempt to reform it, if one deems such reform necessary/possible. See Mavrodes, 'Conventions and the Morality of War', 127: "One might simultaneously have a moral obligation to conform to a certain convention and also a moral obligation to replace that convention."

the slaves subject themselves to the duty to comply with their masters' orders, while, in return, the masters undertake the duty to refrain from violent coercion.⁶ Both sides benefit from the agreement. The masters save the costs of using force, while the slaves are spared the cost of suffering. Given the actual circumstances under which the slaves and masters operate, accepting the arrangement would bring about a state of affairs that all parties prefer. Nonetheless, such a contract would not be binding because the background circumstances that it assumes are grossly unjust. Therefore, the expectation that the slaves respect the agreement has no moral bite. If the slaves can use force to drive their masters from power, they may do so.

To generalize, then, the fact that some social arrangement brings about a Pareto-improved state of affairs leaves open the possibility that the distribution of the relevant benefits among the parties is unfair. *Fairness* stipulates that an arrangement that creates or solidifies unjust inequalities in the distribution of a morally relevant good is invalid, and the contract in which it is embedded is not binding. The unfairness that invalidates a social contract is usually not merely the unequal distribution that benign free competition might generate. Rather, it manifests and advances unjust relations like exploitation, oppression, and subordination.⁷

We turn now to the third condition, *Actuality*.⁸ To be morally effective, social rules must be followed by most members of the relevant community, be they drivers, professors, police officers, or finders of lost items. When they habitually follow these rules, they waive the relevant rights in exchange for expected benefits, under conditions of fairness. Moreover, by merely belonging to a society and participating in the social practices within it, individuals vindicate the presumption that they freely accept the mutually beneficial and fair social rules that underlie these practices. Hence, *qua* members of society, individuals are subject to the mutually beneficial and fair social rules that underlie the social practices within this society.

To illustrate the relation between tacit acceptance of social rules (manifested in one's behavior) and waiver of basic rights, consider the moral permission that

⁶ See David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986), Chapter 7.

⁷ Some, most notably Elizabeth Anderson, argue that in and of itself, brute luck does not generate injustice. See Elizabeth Anderson, "What is the Point of Equality?" *Ethics* 109/2 (1999), 287-337.

⁸ We owe a profound debt to David Lewis's analysis of convention regarding this aspect of our theory. In particular, based on his analysis, we assume intimate relations between conventions, rules, and norms. Lewis noted in *Convention*, pp. 88-100.

boxers obtain to hit and often injure each other, in apparent violation of the adversary's natural rights. The permission is based on their voluntary relinquishment of these rights when they enter the ring. In most social contexts, such relinquishment is less conscious and less explicit; but it can, nonetheless, be ascribed to the relevant players. Similarly, by driving, or even getting into a car, a person joins a given social practice and undertakes to abide by the rules that govern it. Therefore, one can presume that she undertook the duty to follow them and allowed others to put her at risk, as long as they respect the driving convention.

Thus, contractarianism loads the Hartian concept of acceptance with normative significance. It offers a set of conditions under which the acceptance of rules is presumably free. Presumably, those who subject themselves to a system of social rules freely accept it, if and only if it is mutually beneficial and fair. Contractarianism asserts that by freely accepting a legal system, individuals implicitly consent to be governed by it and waive some of their pre-contractual rights. Along the way, we relaxed the constraints on what it is like to freely accept a legal system: people who accept a social rule do not have to be conscious of all its details and definitely not to explicitly endorse it. They accept the rule by virtue of having a standing disposition to follow it qua members of the society to which they belong.

Social Roles and the Moral Division of Labour

The rules that determine the relations between drivers apply equally to all of them. But some individuals—police officers, for instance—have a special status in regulating the practice of driving. Likewise in other fields. Some people—teachers, bankers, policemen, etc.—are assigned legal or professional duties, privileges, powers, and immunities not assigned to others. In this section, we argue that these roles are central in distributing moral rights and duties.

Let's start with the following case—

DEAN: As the dean of a small yet excellent law school, it is my job to feed the grades that the students got for their final papers into the university computer. I am aware of the fact that not all professors invest the required time and effort in marking the papers and, consequently, there is a non-negligible chance that some students will have received a lower grade than they deserve. Assume that I can revise the grades given by the professors without this ever being

disclosed.

Under these circumstances, do I have an obligation to review the papers of all students prior to feeding their grades into the university computer? Surely not. I have a right to suspend judgment about the quality of the papers and just feed the grades into the computer, or ask my assistant to do so. But what if I did look at some paper and was convinced that the grade was unfair? Assume that the relevant professor would never agree to change the student's grade and that I am the only person who could prevent this injustice from occurring. Nonetheless, we propose, I have a right not to change the grade. If I said to the student or to some colleague, "I'm sorry, but this is just not within my authority," that would be a perfectly good answer. We offer the same response to cases where the stakes are higher:

POLICEMAN: A policeman receives an order from his superior to go out and arrest a person who is suspected of having committed some crime. The policeman happens to know the person and also to know about the crime, and is almost positive that this is the wrong suspect.

As a descriptive matter, the policeman is under a legal (and professional) duty to submit to the order. Many people, we surmise, would think that the policeman also has a moral duty to obey this order and carry out what he suspects is an unjust arrest. Others would disagree. But almost everybody would concede that he has at least a moral *right* to do so, which amounts to a right to act in a way that seems to violate the rights of another person. In the spirit of *Social Distribution*, the role of a policeman as defined by a long list of rules and as actually practiced in modern society changes the distribution of moral rights. Qua policeman, a person has a moral right to do to others what he would be barred from doing to them qua a regular human being.

Finally, consider a case where the stakes are really high, a matter of life and death:

UNJUST EXECUTIONER: An executioner has good reason to believe that the prisoner he is about to execute is innocent of the crime for which he has been sentenced to death.⁹

⁹ We do not take a side in the debate about whether executions can be ever justified. We assume, though, that societies are not *indecent* by mere virtue of imposing capital punishment on occasion.

If the executioner does his job and kills the prisoner, he will probably be intentionally killing the innocent. Nonetheless, it seems that the prisoner does not have a right against the executioner that he refrain from killing him, just like the arrestee does not have such a claim against the policeman coming to arrest him. Neither the policeman nor the executioner is seen as violating the rights of his respective victims.

In these examples, the agents know, or at least have good reasons to suspect, that the rights of the arrestees, students, etc. are violated; yet they retain the right—once again, the moral right—to act within their social role. In the more typical cases, agents fulfilling social roles lack such knowledge; hence, they do not confront a clear conflict between the demands of their role and the requirements of justice. Still, their social role makes a significant difference: it grants them exemption from the standard moral demand to make sure that their action is morally justified. The dean is not expected to check the students' papers on his own; the policeman has no obligation to verify the evidence substantiating the arrest warrant; and the executioner is not expected to check for himself the evidence against the prisoners on the death row.

What emerges from these examples is a division of labor among various role-holders in society. The policeman is exempted from the duty to make sure that arresting the suspect is justified, since others in society are under a professional duty to do so.¹⁰ WE, thus, assume –

Moral Division: If a system of social rules encompassing defined social roles is mutually beneficial and fair, the moral rights that members in this society possess and the duties to which they are subject are affected by this system. In particular, role-holders might have a moral right to follow the package of social rules that define their role, and (qua holders of such roles) to disregard moral reasons that pertain to their actions.

We now appeal to the conditions for moral effectiveness presented above to ground *Moral Division*.

¹⁰ The connection between professional duties and the division of labor is central in Arthur I. Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton, NJ: Princeton University Press, 1999). In Applbaum's understanding, underlying this division is the claim "that some good ends are best produced under a form of social organization in which differentiated actors pursue more narrow aims, rather than aiming directly at the good end that is the purpose of the institution" (197-198).

First, a regime that institutes social roles through power-conferring rules is likely to bring about a better outcome than that in which individuals follow their pre-contractual duties and take advantage of their pre-contractual rights. Among other reasons, this is so because the division is sensitive to the assumed expertise of role-holders in the relevant fields. If the system is well designed, the agents assigned to specific jobs are better equipped than others to carry them out in terms of their professional knowledge, experience, and motivation. Judges, for instance, are in a better position to decide on whether A unjustly harmed B than B herself is, than any of her friends are, and probably than most members of society are. Thus, when policemen have a right to disregard first-order reasons pertaining to an arrestee's assumed guilt, it is because they can reasonably believe that the court issuing the warrant is (a) basically just and (b) epistemically more reliable than they are in reaching the right verdict in the case at hand.¹¹

Epistemic division of labor is not the only reason to act within the capacity of defined social roles within a well-designed regime. By dividing the labor, we also overcome coordination problems. Policemen assigned to maintain order in some public event have the legal authority—which immediately translates into moral authority—to arrest hooligans. In contrast, ordinary citizens standing nearby lack such power even if they have the same knowledge that the policemen have and the same capacity to ‘arrest’ the hooligans. The division of labor is mutually beneficial because if ordinary citizens had such power, that would open the door to social instability and violence. Hence, except for under extreme circumstances, ordinary citizens are barred from ‘arresting’ hooligans even when such arrest would be justified in terms of the protection of rights. At times, then, the reason for dividing labor—for assigning social tasks to specific agents or agencies—is that if the task were to be left to any and all, it would be carried out in a less effective way with potentially serious negative repercussions.

¹¹ For a similar argument, see Marquez Xavier, 'An Epistemic Argument for Conservatism', *Res Publica* 22 (2016), 405-422. Xavier rightly emphasizes the conservative implications of the above division of labor. For discussions about the division of cognitive labor in other areas of philosophy, especially in the philosophy of science, see Philip Kitcher, 'The Division of Cognitive Labor', *Journal of Philosophy* 87/1 (1990), 5-22; Johanna Thoma, 'The Epistemic Division of Labor Revisited', *Philosophy of Science* 82/3 (2015), 454-472; and David Eck, 'Social Coordination in Scientific Communities', *Perspectives on Science* 24/6 (2016), 770-800.

Second, to be morally effective, the division of labor embedded in social arrangements should not maintain or create unjust inequalities between groups or between individuals. One implication of the fairness requirement is that when social institutions such as courts or municipalities systematically discriminate on the basis of race, religion, or gender, the power-conferring rules that empower them to do so are morally ineffective.

Third, social rules by which social roles are instituted are ‘actual’ by definition. The social role of a banker would not exist if banks did not play the crucial role that they do in modern economies; the role of a policeman would not exist without a functioning police force that carries out well-known tasks; and so on.

In concurrence with *Individualism*, then, we cherish the value of human rights and regard the constraints they impose on behavior as crucial. But, unlike *Individualism*, we believe that people can lose these rights vis-à-vis specific role-holders in specified ways when they live in an organized society.¹² To join a social practice *is* to trade rights in exchange for critical benefits. Once this trading in rights is morally effective, the duties incumbent on those fulfilling social roles change. While private citizens are under an obligation to make sure that their actions do not violate the rights of any other person, when they act in the capacity of their social roles they are exempted from this duty and instead are expected *to do their job*; to arrest people against whom courts have issued warrants, to invest the money of rich clients with the aim of maximizing gains, and – as we show in detail later – to go to war.

A Moral Duty to Fulfil Professional Duties?

So far we have developed a version of contractarianism according to which its central proposition—*Moral Division*—entails a *right* to act in ways contrary to the pre-social distribution of natural rights, not an *obligation* to do so. However, one might claim that this conclusion is too modest. If society depends on a division of labor among its members, maybe role-holders—or at least some of them—have an *obligation* to stick to their professional roles, not merely a right to do so.

To start unpacking this question, we note an ambivalence regarding the nature

¹² In more technical terms, individuals have the Hohfeldian power to release other individuals from various duties that the latter owe them.

of that which right-holders have a right—or an obligation—to disregard. It might be the burden of *investigating* into the relevant first-order reasons, and it might be the burden of *acting* in accordance with what they believe to be the right thing from some morally impartial perspective. Consider again prison guards. The exemption granted to them might be interpreted as a permission to lock an inmate in his cell without first verifying his blameworthiness, or as a permission to do so even if they believe that the inmate is actually innocent of the crimes ascribed to him. When we ask whether *Moral Division* entails a right or an obligation, we should be careful not to conflate these two different meanings.

At face value, role-holders who decide to surpass their duty and to investigate the relevant first-order reasons could seriously undermine the practice in which they are participating. Hence, in contractarian terms, the parties would agree *ex ante* that under ordinary circumstances, role-holders have an obligation to abide by the rules that define their role and not waste time and energy in examining the related first-order reasons. This conclusion is strengthened given their weaker qualification to verify the relevant facts in comparison to that of the social institutes issuing the relevant orders.

On reflection, however, what could be so problematic if role-holders did take the trouble to investigate those odd cases in which they suspected that something might be wrong? Admittedly, carrying out such an investigation in all cases might undermine efficiency, but why not allow them (maybe even require them) to do so in a limited number of cases? We see no good reason to object to this caveat. Moreover, keeping alive the option of looking into the relevant first-order reasons might help to moderate the danger that role-holders become too loyal to their roles in a way that would erode their moral sensitivity. As a rule, then, role-holders are expected to stick to their roles and follow the instructions they receive from the relevant bodies—courts, police officers, cabinet ministers—but if, in rare cases, they wish to check the relevant first-order reasons themselves, they have a right to do so.

What about the rare cases in which role-holders happen to know—or to believe with high certainty—that what the authorities require them to do in some specific situation is against the dictates of morality? If following the professional requirement implies knowingly violating a serious prohibition, like the killing of an innocent person, then role-holders have the right to refrain from it. True,

contractarianism insists that by fulfilling their role, role holders do not violate a right that their innocent victim has against them. They do not *wrong* their victim, nor are they responsible for the violation that the victim suffers. Yet, when they know that the serious harm that they are about to inflict is unjust, role-holders ought to refuse to collaborate with the institutions they serve. On the other hand, if the moral prohibition is not that serious (for instance, the wrongful arrest of somebody for 24 hours), then the role-related demands might take precedence.

Note that the moral division of labor is morally effective only when the political regime in general—and, more importantly, the particular organization of which one is part—is essentially decent.¹³ If they are not, the roles assigned by the organization cannot change the distribution of natural rights and duties. In a country that is by-and-large decent, role-holders are justified in believing that the various public bodies within it—the legal system, the military, the academia, and so on—are also decent. But since it is well known that even in decent countries particular bodies might be corrupt, role-holders are expected to keep their eyes open and be alert to indications of corruption and of serious malfunctioning. If a prison guard notices that the prison manager accepts bribes from senior Mafiosi in his prison, or if he witnesses blatant lies told by the manager to his superiors, he must conclude that something is rotten in the system. Consequently, he loses the right to simply follow the orders he gets from his manager to lock inmates in their cells or to execute them.

To sum up, usually role-holders have a right to disregard the first-order reasons pertaining to their actions. They may do so, however, only insofar as they are justified in believing that the system they serve is basically decent.¹⁴ But this belief itself cannot be taken for granted; it should be reviewed and re-evaluated. If it turns out to be unreliable, the right to ignore the relevant first-order reasons loses its

¹³ For the claim that "justified institutions can function as independent sources of moral obligation for those acting within them," see also Tim Dare, 'Robust Role Obligations: How Do Roles Make a Moral Difference', *Journal of Value Inquiry* 50 (2016), 715. This is a central idea in the literature on 'role ethics.'

¹⁴ This helps to understand the fault in the claim made by people like Eichmann, who famously pleaded not-guilty on the basis of "just doing his job." Role-holders such as officers, policemen, and prison guards have a right to treat the orders of their superiors as exclusionary reasons only if the latter are reliable in their ability to deliver better advice on issues touching on justice and on human rights. This, of course, was not the case with the Nazi regime; hence, Eichmann had no right to treat the orders he received as reasons to disregard the obvious first-order reasons against his appalling crimes.

validity.¹⁵

Conclusion of Chapter Two

In Chapter One, we became aware of the spell that *Individualism* has woven on the philosophical discussion about the ethics of war in the last two decades or so, and we elaborated on the problematic implications of this spell. The purpose of Chapter Two was to outline an alternative to *Individualism* and to show that one can take moral rights seriously while acknowledging the role of organized societies in determining the actual distribution of rights and duties of citizens.

To understand how social rules can determine rights, it is particularly helpful to look at the way social roles provide their holders with a permission to diverge from what would be required from them pre-contractually. In decent societies, policemen, deans, bankers and other holders of public roles have an exclusionary reason to fulfill their professional duty, without deliberating on the merits of the case; namely, without being guided by first-order reasons that pertain to the cases with which they deal. The idea that role-holders have such an exclusionary reason is essential to understanding the moral status of combatants.

In concluding this chapter, we should be clear about its modest aspirations. One cannot develop a complete ethical theory in one chapter and we do not presume to have done so. What we hope to have achieved is to motivate a distinct moral perspective that explains widespread intuitions in a range of cases. The approach sketched here, we hope, coheres well with a plausible version of contractarianism. We believe that it will prove very helpful when we turn to the ethics of war. This will be our concern in the following chapters.

¹⁵ We note, furthermore, that the extent of this right depends on the nature of the role. In basically decent societies, policemen have a very broad right to follow arrest orders by their superiors without first verifying that the orders are warranted. By contrast, officials providing welfare services must not rely only on the procedures and protocols of their bureau, but must also show sensitivity to the unique features of the cases they deal with to prevent tragedies of the kind described in the 2016 film *I, Daniel Blake*.

Chapter Five: Contractarianism and the Moral Equality of Combatants

5.1 Introduction

The traditional *in bello* regime is comprised of three basic rules: (a) combatants may be attacked intentionally; (b) noncombatants may not be attacked intentionally; and (c) noncombatants may be attacked unintentionally if the attack is proportionate and an effort is made to minimize civilian casualties. These rules apply equally to Just and Unjust Combatants: Unjust Combatants may attack Just Combatants and be attacked by them, and both sides are allowed to inflict collateral damage on noncombatants of the other side.

Revisionists have strongly criticized the moral equality between Just and Unjust Combatants and between Just and Unjust Noncombatants. In their view, combatants fighting for the unjust side cannot claim a right to kill their adversaries in the battlefield, and definitely not to kill civilians as a side-effect of military operations. The purpose of the present chapter is to offer a contractarian defense of *Moral Equality*: the view that Just and Unjust Combatants have an equal moral right to kill and maim each other in war.¹⁶ In accordance with the principles laid down in Chapter Two, we seek to show that *Moral Equality* satisfies the conditions of *Mutual Benefit, Fairness, and Actuality*. The moral equality of soldiers is true by virtue of an agreement between states. By accepting this arrangement, combatants attain a right to take advantage of traditional *in bello* rules, thereby violating no duty against Just Combatants by killing them, even if these killings are pre-contractually impermissible.

Thus, according to contractarianism, the morality of killing in war is far more permissive than that endorsed by the revisionists. Notably, however, it is also more restrictive. If combatants violate these rules by targeting civilians and civilian objects, for example, they violate the rights of these civilians even if the latter would be legitimate targets under pre-contractual morality. In this chapter, we defend the moral

¹⁶ It is not insignificant that historically, the emergence of the idea of moral equality involved a contractarian way of thinking. As Ryan explains, the key figure in this emergence was Grotius, "who contrasted the 'law of nature' (classical conceptions of just war, and their Christian appropriation) with the 'law of nations' which he saw as grounded *in the mutual consent of states*, as expressed in customary practices and international instruments like treaties" ('Democratic Duty and the Moral Dilemmas of Soldiers', 16, italics added).

equality of combatants.¹⁷ In the next chapter we defend the moral equality of civilians.

5.2 *Moral Equality and the Importance of Obedient Armies*

The guiding idea of contractarianism is that moral rights can be traded by accepting social roles. In the context of war, combatants lose their pre-contractual right not to be killed when they fight with a just cause but gain a right to kill enemy combatants when the *enemy* fights with a just cause. Combatants lose and gain these rights by subjecting themselves to the legal regime that confers on soldiers a legal right to fight a war without first making sure that the war they are fighting is morally justified. By accepting this legal regime, soldiers allow each other to undertake the duty of obedience; i.e., to become instruments of their state.

Other writers have proposed versions of this understanding as well. Walzer argues that soldiers are morally equal because “military conduct is governed by rules [that] rest on mutuality and consent.”¹⁸ Tom Hurka suggested that “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.”¹⁹ Following these thinkers, we assume that as a social role, soldiery is shaped by treaty-based positive and customary international law, as well as by informal rules and widely shared attitudes. By enlisting in the military, combatants commit themselves to these rules—a commitment that is morally effective because this agreement is mutually beneficial, fair, and actual.

In most cases, decent parties have a weighty prudential reason to bargain rather than to fight in resolving conflicts between them. Hence, one might assume that the best way to advance the interests of all states would be to agree on mutual

¹⁷ The versions of the contractarian approach to the *in bello* regime that we explore here were offered in Benbaji, 'A Defense of the Traditional War-Convention', 464-495, Yitzhak Benbaji, 'The War Convention and the Moral Division of Labor' *Philosophical Quarterly* 59 (2009), 593-618, and Benbaji, 'The Moral Power of Soldiers to Undertake the Duty of Obedience'.

¹⁸ In fact, Walzer 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).

¹⁹ See Thomas Hurka, 'Liability and just cause', 210. See Christopher Kutz, 'Fearful Symmetry', in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors*, 69.

disarmament, thereby blocking the option of war altogether. However, in the absence of a universally recognized authority to enforce such an agreement and ensure that all parties do, indeed, disarm themselves, universal disarmament is impossible. The second-best alternative is a self-help based regime, under which states are allowed to use force against immediate threats to their sovereignty and territorial integrity.

The rule that equalizes Just and Unjust Combatants meets *Mutual Benefit* if a plausible empirical assumption is maintained, namely, that if soldiers have a right to go to war without verifying that it is just, that increases their ability to enforce the prohibition on the first use of force. By contrast, if soldiers had a right to fight only just wars, or a right to kill only Unjust Combatants, that would undermine the main objective of the contract, which is to deter potential aggressors from unlawful use of force. In other words, compromising the obedience of combatants would undermine the ability of states to act in self-defense.

Practically, everyone is expected to benefit from the national security that is gained thanks to soldiers' obedience—including the soldiers themselves. Like other members of the polity, combatants benefit from an *in bello* agreement that allows for their obedience because it makes national defense more efficient. Soldiers pay a higher price to maintain it, but they do so for a relatively short period, until others replace them. Hence, obeying orders is not only permissible for soldiers, but, as Joshua Green noted in passing, is a matter of virtue: “Just as personal loyalty makes one a more attractive friend or lover, a disposition to respect authority can make one a more attractive foot soldier within a larger cooperative enterprise... Good foot soldiers have the virtue of loyalty and humility. They know their place and dare not abandon it.”²⁰

Accordingly, states institute a regime under which combatants possess a legal right to participate in wars without first verifying that its cause is just. Under this regime, soldiers are responsible only for their compliance with the *in bello* rules, not for the war itself. Legal equality further grants *post bellum* immunity to enemy combatants in order to secure similar immunity for the combatants of one's own side.

Legal equality satisfies *Mutual Benefit* for a further empirically based reason. The rules to which states subject their soldiers are such that make it possible to agree

²⁰ Green, *Moral Tribes*, 43.

during the course of the war whether or not they were violated. This epistemic requirement is justified by the fact that the *in bello* rules can be enforced by the warring parties only. Consider, by contrast, wars governed by rules that fail the enforceability test, or rules that allow killing only Unjust Combatants or only Culpable Civilians. Under such rules, combatants would be guided by *jus ad bellum* considerations. Each side would regard itself as entitled to retaliate for what it takes to be the enemy violation of the *in bello* agreement: each side would take the other as violating the rule that allows killing only *Unjust* Combatants. Such retaliations would aggravate the apparent injustice in the eyes of the other, which would lead to more violence, and so on, in a dangerous spiral. War governed by unenforceable rules is, thus, prone to escalate and increase the risks to both parties, without any compensating advantage. Thus, a regime under which soldiers are guided by *jus ad bellum* considerations would bring about a worse outcome than a regime that allowed soldiers to follow the orders of their political leaders.

Does the rule that equalizes soldiers satisfy *Fairness*? We believe it does. The legal equality that the *in bello* contract commands cannot be known in advance to discriminate against any party. (Although it does discriminate against stateless nations that have no armies. We will address this complication in Chapter Six).

Legal equality meets the terms of *Actuality*. It is nearly consensual that armies have a legal right to obey the orders they get from their respective political authorities. Likewise, the legal right of individual soldiers to obey their political leaders without verifying that the war they are fighting is just is accepted and practiced everywhere.

5.3 Defending *Obedience*

How might one refute the claim that the *in bello* agreement that commands legal equality is mutually beneficial? The obvious option is to question the importance of obedience of soldiers in enforcing the prohibition on aggression. This is McMahan's approach. He argues that an asymmetrical regime that prohibits the participation of combatants in unjust wars would better protect the rights of states to sovereignty and to territorial integrity. He asks us to imagine how different things would be had Nazi soldiers avoided treating themselves as “functionaries who have been given a job to

do.’²¹ In effect, McMahan argues, the rule of legal equality that empowers combatants to undertake the duty of obedience fails the *Mutual Benefit* test, as it runs against the interests of combatants:

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.²²

McMahan believes that the ignorance attributed to combatants is exaggerated. The information that enables them to judge whether a war is just or not is often accessible and sufficient. There was no need for a scrupulous investigation on anyone's part to determine that the Nazi invasion of Poland was unjust.

We disagree. Most cases are unlike the Nazi invasion of Poland; and given the deception and propaganda of the Nazi regime, even that war could not have been so easily identified as unjust at its very beginning by the young Germans sent to fight in it. Furthermore, while combatants of liberal democracies might be able to reach well-informed judgments about the morality of military campaigns, these judgments are formed under a regime that allows states to require obedience. States do not need to use intensive indoctrination in order to secure the obedience of their army. By contrast, if soldiers were not under a duty of obedience, states would adopt various forms of manipulation to convince them that they ought to fight. What follows is that in regimes that rejected the legal equality of soldiers, fewer combatants would probably refuse to participate in unjust wars than in regimes governed by this principle. Massive exposure to disinformation would lead soldiers to believe that their war was actually just.

We concede that it would be harder for states to fight unjust wars under an asymmetrical regime that requires soldiers to make sure that their war is just. But it would be harder for them to fight *just* wars as well. Consider a pilot who is ordered to

²¹ McMahan, *Killing in War*, 101 quoting Stanley Milgram.

²² Jeff McMahan, 'On the Moral Equality of Combatants', *Journal of Political Philosophy* 14/4 (2006), 384.

initiate a permissible preemptive war by launching a surprise attack against the army of an aggressive state. Suppose that the pilot suspects that the war she has been ordered to initiate does not have a just cause. Or suppose that she thinks that the war does not satisfy the last resort requirement. Under an asymmetrical regime, she would be entitled to refuse to participate in the attack unless she was convinced that her suspicion was baseless. But convincing her would require time and effort, and would make self-defense less effective and more costly. There is, therefore, a reason to believe that under an asymmetrical regime, it would be harder for just states to fight just wars and easier for unjust states (who are less likely to respect international law and more likely to engage in propagandist misinformation campaigns) to fight unjust wars.

In response, revisionists could claim that “soldiers are disposed to trust the authority of their government... They are, moreover, less likely in general to judge that a just war is unjust than to judge that an unjust war is unjust.”²³ Hence, while an asymmetrical regime would have little effect on the willingness of combatants to participate in wars that turn out to be *just*, it might have a negative influence on their willingness to fight *unjust* ones. We doubt these speculations. Because of the risks involved in fighting, soldiers always have an obvious incentive to judge the war they are asked to fight in as unjust in order to spare themselves the risk involved in participating in it. Under a regime in which the authority of states over soldiers is compromised, many soldiers will probably take this route.

The main objection to the asymmetric regime that McMahan envisions has to do with its inability to achieve significant deterrence. Suppose that armies were not under a legal obligation to obey the political leadership and to wage war if ordered to do so. Now suppose that the politicians want to deter the enemy by bluffing. They want to convince the enemy that their combatants will go to preventive or disproportionate wars that the contract forbids. Such a threat would be far more difficult to impose under a regime in which soldiers were forbidden from fighting a preventive or disproportionate (and thus, unjust) war. As a result, the power of deterrence would be significantly weakened. Since states have a strong interest in maintaining the ability to deter potential aggressors, they will accept a regime that

²³ Jeff McMahan, 'Duty, Obedience, Desert, and Proportionality in War: A Response', *Ethics* 122 (2011), 145.

facilitates obedient armies.

To conclude, we offered three points in response to McMahan's objections to *Obedience*. First, under an asymmetrical regime, unjust states would invest more in propaganda to convince their combatants that their war is just. Hence, such a regime would reduce the number of unjust wars only marginally. Second, if states had to convince their combatants of the justice of their wars, fighting *just* wars would become costlier, thus making efficient self-defense more difficult. Third, and most importantly, under an asymmetrical regime, just states might lose the option of threatening (bluff-threats) to launch morally dubious wars.

The justification for obedient armies is connected to *Moral Division*. In states that are basically decent, only the government or the president has the authority to start a war by issuing orders to the army to do so. The army has no legal right to make such a decision, regardless of what it thinks about the threats posed by neighboring countries. Also, just as the initiation of wars is the job of politicians and not of the army, so is their ending. It is not the role of the military—certainly not the role of individual combatants—to decide on the termination or continuation of hostilities. As soldiers, they need not ask themselves whether the aims of war have been realized or not. Certainly, they ought not to make their continued participation in war dependent on their answer to this question. In the moral division of labor, the responsibility to end wars is allocated to politicians.

Contrast this view with a morality of killing in war that adopts *Individualism* and rejects the moral division of labor between politicians and combatants. Such a view would they impose on each individual combatant the responsibility to continually consult the principles of *jus ad bellum* to make sure that they justify each act of warfare she is ordered to carry out. The same applies to *jus ex bello*. The decision of individual combatants to continue fighting should be subject to the same principles governing the initiation of war; namely, *jus ad bellum*. This burden imposed upon members of the military might seem attractive if one believed, as does James Pattison, that “if a few more individuals begin to question the permissibility of their contribution, this would be a positive development.”²⁴ But Pattison's optimism seems unrealistic to us. An individual combatant who stops fighting because she

²⁴ James Pattison, 'When Is It Right to Fight? Just War Theory and the Individual-Centric Approach', *Ethical Theory and Moral Practice* 16 (2013), 53.

believes that the war should come to an end is like a prison guard who decides to let some convicted murderer go free because, in his estimation, she has suffered enough, or a policeman who disobeys an order to arrest a suspect because he believes her to be innocent. Social life would be unstable if individualist advice were taken seriously.

There is another reason for skepticism about the positive outcome of combatants deciding whether to begin or to end war by applying principles of individual morality. True, in some cases, such personal initiative might lead some combatants to refuse to participate in wars that, objectively speaking, happen to be unjust. But it might just as well lead to the opposite outcome—to combatants *initiating* acts of warfare, or to continuing a war even when their government has decided to cease fire.²⁵ If ordinary soldiers are morally required not to fight an unjust war even if this means disobeying orders delivered by the political leadership that represents them, then the converse must also be true. That is, they ought to wage a just war, even if they are not ordered to do so.²⁶ To conclude, there is no reason to think that the spread of individual morality would reduce rather than increase the number and the duration of unjust wars.

5.4 Do Combatants Accept Legal Equality?

According to contractarianism, when people within generally decent societies undertake social roles—as police officers, bankers, executioners, or combatants—morality confers on them the rights that are associated with these roles. By becoming combatants, soldiers accept the principle of legal equality and waive their right not to be killed by their adversaries. The obedience of soldiers and the legal equality that follows from it are a publicly recognized, integral part of the profession of armies, just as locking inmates in their prison cells is a publicly recognized, integral part of the profession of prison-guards and just as caring for the interests of clients is an integral part of the banking profession.

McMahan concedes that in joining the army, combatants undertake the duty to protect their country and, by implication, the risk of being unjustly but legally attacked. However, he argues, taking risks does not amount to waiving rights: “A

²⁵ For this problem of “symmetrical disobedience,” see McMahan, *Killing in War*, 92, and Ryan, ‘Democratic Duty and the Moral Dilemmas of Soldiers’, 36-39.

²⁶ Ryan Cheyney, ‘Moral Equality, Victimhood and the Sovereignty Symmetry Problem’, in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors*, 151-152.

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.”²⁷ Moreover, the undertaking of the *in bello* code can be understood with no reference to rights at all. Imagine, suggests McMahan, a Polish man, enlisted in 1939, arguing as follows:

There is a convention that combatants should attack only other combatants who are identified as such by their uniform. It is crucial to uphold this convention because it limits the killing that occurs on both sides in war. I will therefore wear the uniform to signal that I am someone the convention identifies as a legitimate target. In doing this I am not consenting to be attacked or giving the Nazis permission to attack me; rather, I am attempting to draw their fire toward myself and away from others.²⁸

In McMahan's view, there is no reason to think that by joining the army, combatants free their adversaries from the duty not to unjustly attack them. And iff the latter are not freed from this duty, then insofar as they fight for an unjust cause, they have no moral right to kill their enemies—in contrast to *Moral Equality*.

In response, we suggest that the nature of social roles transcends the self-understanding of any individual within or beyond the institution. It is like the implications of marriage, which depend not on the subjective perception of the partners, but on the social definition of the institution and the bundle of rights, duties, and liberties that it entails. Similarly, to determine the rights and the duties that combatants are subject to, it is not necessary to explore their inner minds; rather, one should look at the legal sources that define the role of soldiery—positive and customary international law—and the way they are commonly understood. Once an individual becomes a combatant, she thereby 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.”²⁹ The institutional norms that define this role emerge from the social structure within which this role is created and maintained. In Hardimon’s

²⁷ McMahan, *Killing in War*, 52.

²⁸ *Ibid*, 55.

²⁹ Applbaum, *Ethics for Adversaries*, 118.

words, “what one signs on for in signing on for a contractual social role is a package of duties, fixed by the institution of which the role is a part.”³⁰

One might still argue that the soldiers' consent to the rules embedded in the institution of soldiery is morally effective only if the soldiers are properly informed about the implications of such consent. Arguably, since most of them know little international law and do not understand the distinctive moral contours of their role, their decision to join the army cannot ground the waiver of important rights. But the marriage example again casts doubt on this objection. The lesson that this example conveys is that even if at the time of marriage, both individuals hold the erroneous belief that their marriage creates an indissoluble relationship, they nonetheless have a right to exit the marriage according to the conditions specified by the law. The formal acceptance of a social role is an authentic instance of consent to the norms that define it, even if detailed acquaintance with the legal boundaries of the relevant institution is lacking.

Of course, the very description of a f ceremony implies that the participants are aware of some aspects of the process they undergo and of the relations that are created by engaging in it. If the husband is “systematically deceived, so that during the marriage ceremony he believed that he was undergoing a mysterious ritual to become a Freemason,”³¹ he cannot be said to have consented to be married; therefore, he cannot be described as having waived any moral right he possessed. Under normal circumstances, however, individuals know that they are getting married although they are not always aware of all the normative implications that follow. Returning to soldiery, if a person enlists into the military “in the belief that he is joining the Freemasons,” then indeed, he has not consented to become a soldier and cannot be said to have undertaken the duties associated with the profession of soldiery. Nor can he be said to have waived his natural right not to be killed unjustly by enemy combatants. But this is hardly ever the case.

A closely related concern is that any consent-based argument for the moral standing of the *in bello* rules applies only to combatants who freely took on their status as combatants, not to conscripts. But, first, the fact that conscripts are required by law to join the army does not imply that they do so unwillingly. They might fully

³⁰ Michael O. Hardimon, ‘Role Obligations’, *Journal of Philosophy* 91/7 (1994), 354.

³¹ McMahan, ‘Duty, Obedience, Desert, and Proportionality in War: A Response’, 149.

identify with the law and find it justified. Second, even individuals whose enlistment into the army was a result of legal coercion can plausibly be said to have consented to the role of soldiery. As Margaret Gilbert argues, although in one sense the reluctant conscript signed up against his will, in another sense, which she calls the “decision-for” sense, his enlistment was not involuntary; the enlistee may have decided to join the army in order to avoid punishment.³² 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, we assume that, despite duress, the reluctant conscript accepts the rules that define the role he occupies because he decided to join the army.

To drive the point home, think of somebody who is coerced by his circumstances into entering a boxing ring and fighting against some adversary. He does so because he's desperate for the money to save his own life or the life of his child. Nonetheless, once he enters into the ring, he thereby undertakes to conduct himself according to the rules of the game. He can hit his adversary only within the range defined by these rules and cannot complain when his adversary (who is unrelated to his plight) hits him in return. The fact that his participation in the boxing match is a result of coercion does not invalidate his consent to be ‘unjustly’ attacked by his opponent. Thus, if one undertakes a package of norms by explicitly accepting a role, and the rules defining the role are mutually beneficial, fair, and habitually followed, then one thereby undertakes the duties, gains, and rights associated with the role, even if the acceptance of the role was a result of coercion.

One reason for this has to do with the fact that practices meeting the conditions of *Mutual Benefit* and *Fairness* create legitimate expectations among the relevant parties. When some individual wears a uniform and identifies herself as a combatant, she thereby creates expectations regarding her moral and legal status. In particular, she creates the expectation that she is subject to the regime that regulates warfare, within which all those wearing a uniform are legitimate targets for lethal attack. It will not help her to say that she had no intention of creating such expectations, just as it will not help a boxer to say something like that when entering the ring under well-defined circumstances.

³² Margaret Gilbert, 'Agreements, Coercion, and Obligation', *Ethics* 103/4 (1993), 685.

This argument does not deny the existence of some leeway for societies in constructing the role of a combatant. In particular, while states are entitled to subject their combatants to the duty of obedience, they are free to allow their combatants to refuse to participate in a war that they (the combatants) find unjust. What the contractarian view denies states is the right to treat *enemy* combatants as criminals. It asserts that the moral right of combatants to undertake the duty of obedience is a direct implication of the right granted to states to have obedient armies. States cannot benefit from the right to maintain obedient armies while treating the obedient combatants of their enemies as criminals—thus, in effect, denying those benefits to their enemies.

Another objection to the contractarian defense of *Moral Equality* runs as follows. According to the current *in bello* regime, if an aggressive army invades Nicaragua and is opposed by combatants of the Nicaraguan Army, the invaders violate no right in killing these combatants. If, instead, they unjustly invade a country that has no army, like Costa Rica, where they are countered by a bunch of civilians who take up arms as individuals, their acts of killing are impermissible. The problem is that this mere organizational difference between the defensive forces of Nicaragua and Costa Rica seems insufficient to explain the huge moral difference between the two cases.

We bite the bullet. Such ‘mere organizational’ aspects impact the distribution of moral rights and duties in all fields of social activity—universities, banks, prisons, and so on. In all these fields, societies have much to benefit from the establishment of the roles in question, but such roles come at a price; namely, vulnerabilities that would not apply to the same individuals engaged in the same act absent such a role. Thus, while individuals have a natural—and asymmetrical—right to defend themselves and others from unjust aggression, they are barred from exercising this right if they are part of a society that takes advantage of the right to institute an obedient army. If the society to which they belong decides to fight through recruiting combatants, then combatants and civilians become subject to a radically different packages of legal norms, that change their respective moral standing. While combatants have the right to kill enemy combatants regardless of whether the latter are on the just or the unjust side, civilians are prohibited of doing so – again regardless of the justness of the war. Civilians enjoy almost complete immunity from

intentional attacks, but it return they are not allowed to take part in the hostilities.

5.5 Contractarianism and Treachery

Contractarianism explains why even Just Combatants are legitimate targets, and it explains why *all* combatants are legitimate targets (regardless of their actual contribution to the war effort or to their moral responsibility). In addition, it sheds light on some particular rules concerning warfare that might otherwise seem mysterious. Here is one example:

WHITE FLAG: Bob is a Just Combatant fighting with his platoon against enemy forces. They cannot identify the source of the fire being shot at them. Bob has an idea. He'll come out of his shelter with a white flag and walk slowly towards the estimated location of the enemy. Then, when enemy soldiers come out to take him prisoner, Bob's comrades will kill them.

Would it be acceptable for Bob to do this? Almost everybody would answer this question in the negative and moreover would be disgusted by the mere idea. This is the paradigm of *treachery*. But given that Bob is fighting—as you recall—for the just side, this sense of revulsion is not that easy to understand. To see this point more clearly, consider:

DECEIVING HOSTAGE: Tamar is taken hostage with ten other innocent civilians by two terrorists who threaten to execute a hostage every hour if their demands are not met. She decides to act in order to save her own life and the lives of the others. She pretends to have fainted and when one of the terrorists comes over to help her, she snatches his pistol and shoots him and his friend.

Here, we assume that most readers would support Tamar and think that she acted bravely and admirably. Yet, as per *Individualism*, the difference between these two cases is incomprehensible. After all, both Tamar and Bob faced an unjust threat to their lives. So if Tamar is allowed to use deceit in order to overcome her kidnappers, why is Bob not allowed to do the same to overcome enemy soldiers who are unjustly maiming and killing his comrades (and collaterally killing civilians as well)? If, as *Individualism* has it, fundamental human rights are independent of affiliation or role, why should Bob be barred from doing to his attackers what he *would* have been entitled to do to them had he not been in uniform?

We believe that contractarianism provides a better way to think about such

cases. The reason that Bob is not allowed to play this trick is that by accepting the role of soldier, he accepted the rules associated with it, including the rules against treachery and perfidy, which means that he waived his pre-contractual right to use such methods in war and, moreover, that he undertook a commitment not to do so.

To repeat a point made in Chapter Two, it would be misleading to describe Bob's dilemma as one between his natural right to deceive his pursuer in order to save his life and the lives of his comrades, on the one hand, and his obligation to obey the law, on the other.³³ If that were the case then surely his right to defend his life from his (assumedly unjust) pursuer would take precedence. The law in this area defines not only legal duties but moral ones as well. To violate the law against treachery is not just wrong in some technical sense; it is an act of treason.

5.6 Responsibility for Killing Just Combatants

According to contractarianism, by accepting the rules that define their profession, combatants lose (or successfully waive) their moral claim against being unjustly attacked by enemy combatants. In response, individualists argue that even if the rules of war are mutually beneficial and fair, and even if combatants freely accept them, Unjust Combatants have no moral right to kill combatants who are justly defending themselves, their families, and their country. Since the killing of innocents is a fundamental violation of the moral standing of individuals, consent cannot render it morally legitimate. Neither tacit nor express agreement can change the fundamental moral standing of human beings.³⁴

Yet contractarianism seeks no such change. It treats the killings carried out by Unjust Combatants just as it treats the killings carried out by 'unjust' executioners who carry out mistaken verdicts issued by the courts. When an innocent inmate is unjustly executed, his right to life is violated; but it is the state, rather than the executioner, to whom this violation should be ascribed. Similarly, the rights of Just Combatants who are killed and maimed in aggressive wars are violated by the

³³ The relevant law is article 37(1) of the 1977 Additional Protocol I to the Geneva Convention: "Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence, shall constitute perfidy."

³⁴ For example, Tadros rejects the view that combatants have a right to harm each other because they consented to being liable to be harmed in the course of a war. In his view, "consent is neither necessary nor sufficient to create a conflict of permissibility" (*The Ends of Harm*, 114).

aggressive state rather than by the individual combatants who carry out the aggression. When combatants waive their claim against enemy combatants not to be unjustly attacked by them, they consent to a regime that locates the responsibility for such attack on states.

The significance of combatants' right to disregard the first-order reasons pertaining to the justness of their cause should not be overstated. First, as citizens, Unjust Combatants do carry some responsibility for the wrongs committed by their states—no more so than other citizens, but no less either. Second, as a matter of psychological fact, agents feel a special connection to their own actions and their results, which is distinct from the way they relate to the actions of others. This logic applies with special force to killing. Normal individuals engaged in the killing of human beings cannot avoid suffering the moral emotion famously described by Williams as “agent-regret,”³⁵ an emotion that gives them further reason to check the justness of the war they are called upon to fight.

Third, the fact that role-holders in general and combatants in particular have a right to act within the rules defined by their profession does not mean that they are under a duty to do so even if they are convinced that overall, such an act would be morally unjustified. Thus, we do not rule out the moral option of refusal on the part of role-holders—be they combatants, executioners, or policemen. Moreover, it is probably desirable that soldiers who are sure that their war is unjust do not take advantage of the right that they possess to participate in it. Note, though, that in a society that is already arranged in accordance with a division of labor, role-holders rarely have access to all the first-order reasons that pertain to the issues under their jurisdiction and rarely have the time and the ability to gather the required information.

5.7 Conclusion

The purpose of this chapter was to deal with a troubling challenge to the traditional *in bello* code; namely, that it grants combatants of both the just and the unjust sides an equal right to kill each other. It seems morally outrageous that Unjust Combatants have a right to kill Just Combatants.

³⁵ Bernard Williams, 'Moral Luck' in Daniel Statman (ed.), *Moral Luck* (New York, NY: SUNY Press, 1993), 42.

In response, we argued that within a contractarian view of morality, this arrangement makes perfect sense. Decent and self-interested states would prefer such an arrangement to an asymmetrical code that permitted killing only Unjust Combatants, because of the importance of obedient armies and the dangers involved in asymmetrical *in bello* rules. We sought to show that the legal equality of soldiers satisfies the three conditions we listed above: *Mutual Benefit*, *Fairness* and *Actuality*. If so, then by accepting this arrangement, soldiers generate *Moral Equality*; viz., a symmetrical distribution of rights and duties between Just and Unjust Combatants. Within the well-defined conditions of warfare, combatants of one side waive their right not to be attacked by combatants of the other. Thus, Unjust Combatants are not merely *excused* for killing Just Combatants; they have a *right* to do so.

Last Word

[The Concluding Section of the Book]

Wars are among the most irrational institutions of human society. In almost all cases, negotiation and compromise would achieve much better results for all sides involved. What's worse is that the sides often know this, but nevertheless, find themselves shedding each other's blood and wreaking terrible destruction and misery. The acknowledgment of this irrationality led thinkers in the age of the Enlightenment to assume that as human beings grow more enlightened, "there will be no war, no crimes, no administration of justice as it is called, and no government."³⁶

The wars of the 20th century undermined this optimistic picture and put an end to the illusion that institutional reforms on the international plain, like the establishment of the League of Nations and later of the United Nations, could guarantee world peace. The existence of evil individuals and of rogue states partially explains why war cannot be eradicated. More often wars are a result of benign self-interest coupled with epistemic shortcomings and constant suspicion of others who are justifiably seen as also self-interested and epistemically deficient.³⁷

³⁶ William Godwin, *An Inquiry Concerning Political Justice*, (London: G.G.J. and J. Robinson, 1793), 871.

³⁷ For similar skepticism about the possibility of eradicating war, see Nigel Biggar, *In Defense of War* (New York: Oxford University Press, 2013), 11, who contends that those who think

The link between war and such inherent features of human nature might explain why world peace is such a dominant theme in prophecies about the end of times, like the well-known one in Isaiah that refers to a time when nations will beat their swords into plowshares and their spears into pruning hooks (Isaiah 2, 2). Because the complete eradication of war necessitates a fundamental transformation of human nature, it can be achieved only in some miraculous reality marking the end of human history as we know it.

Until this Messianic reality comes into existence, states would be better off agreeing on rules to regulate war that would, on the one hand, facilitate effective self-defense, while on the other, reduce the killing and harm they cause. A version of these rules has already been agreed upon and inscribed in central international documents. They are acknowledged by most states and shape the global public debate about war. What is needed for wars to be more humane is not to undermine these rules or to replace them by a completely new system, but to strengthen the commitment to them among states, NSAs, and fighting forces. We hope that this book makes a modest contribution to the achievement of this goal.

that international conflicts can always be prevented by other means suffer from "the virus of wishful thinking."