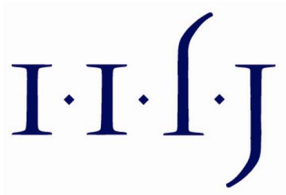

Institute for International Law and Justice

IILJ International Legal Theory Colloquium Spring 2011
Convened by Professor Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown

NYU Law School
Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

SCHEDULE OF SESSIONS:

February 9	Yitzhak Benbaji, *Bar-Ilan University* "The Moral Power of Soldiers to Undertake the Duty of Obedience"
February 16	Michael Walzer, *Institute for Advanced Study in Princeton / Tikvah and Straus Fellow at NYU School of Law* "Can the Good Guys Win"
February 23	No Colloquium
March 2	Doreen Lustig, *NYU School of Law* "Doing Business, Fighting a War: Non-State Actors and the Non State: the Industrialist Cases at Nuremberg"
March 9	Gabriella Blum, *Harvard Law School / Tikvah Fellow at NYU School of Law* "States' Crime and Punishment"
March 16	No Colloquium – SPRING BREAK
March 23	Matthew C. Waxman, *Columbia Law School* "Regulating Resort to Force: Form and Substance of the UN Charter Regime"
March 30	Paul Kahn, *Yale Law School* "Imagining Warfare, or I know It When I See It"
April 6	David Kretzmer, *Hebrew University of Jerusalem and Academic Center of Law and Business, Ramat Gan* "The Inherent Right to Self-Defense and Proportionality in Ius ad Bellum"
April 13	Andreas Zimmermann, *University of Potsdam,* and Philip Alston, *NYU School of Law* "Enforcing International Humanitarian Law in Asymmetric Armed Conflicts - the Case of Gaza"
April 20	No Colloquium
April 27	J.H.H. Weiler, *NYU School of Law* "Not So Quiet on the Western Front: Reflections on the Bellicose Debate Concerning the Distinction between Ius ad Bellum and Ius in Bello"

DRAFT

The Moral Power of Soldiers to Undertake the Duty of Obedience: A Contractarian Case for the War Convention

Yitzhak Benbaji (Bar-Ilan University)

1. Introduction: Nuanced Contractarianism

The basic rules of engagement in war—the rules that constitute the "*jus in bello* code"—are well known: if necessary, combatants may be intentionally attacked, 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,"[1] which states that "the justifiability of a nation's engaging in war is independent of the permissions and restrictions binding its troops".[2] This in turn generates the symmetry principle, according to which "the normative permissions and restrictions binding co-combatants in a single conflict are identical."[3] If just combatants (those whose war is just) have a right to kill their enemies in combat, as they do, 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."[4] 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.[5] 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.[6])

Can the legal equality of soldiers reflect a deeper moral equality? This paper discusses 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."[7] 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."[8] 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 an aspect of treaty-based positive and customary international law, as well as of widely accepted ethos and informal rules. 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.[9] Their acceptance of their status is "morally effective"—i.e., 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 decent states. 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 on its own is not sufficient; it has to be consent to a regime that is mutually beneficial and fair.

More specifically, the view explored here consists of four claims, three of which ("Mutual Benefit", "Fairness" and "Consent") have an important empirical dimension:

> *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 and individuals.
>
> *Consent*: soldiers took on the status of soldiers and thereby accepted 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.

As the conditional expressed by Waiver asserts, 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 like 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. They therefore lack the moral power to undertake a duty of obedience to their state, whereby they offer themselves as instruments for whatever wars the state chooses. However, if soldiers can reasonably expect 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 existing 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. After all, aggressors, whose life is threatened by the defensive attacks of their victims, have no right to defend themselves against these just attacks; when their victims rise up against them they do not enjoy a permission to use force in 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 to decent states, in terms of 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 tolerate a different interpretation. Moreover, even if this set of rules embodies symmetry—that is, allow unjust combatants to kill just combatants in war—there is no empirical evidence that soldiers actually accepted it, or take it to be essential to their role.

Finally, McMahan develops powerful objections against 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; they kill soldiers who exercise their right of self defense. The legal rights and duties that the morally optimal law confers on unjust combatants cannot change this moral fact.

This essay aims to show that contractarianism, properly understood, avoids McMahan's objections to Mutual Benefit, Consent, and Waiver. McMahan criticizes presuppositions of a rather crude form of contractarianism, while he does not really 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.

Three 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 is a based on 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.[12] 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.[13]

Second, in order to complete a contractarian case for symmetry, we should explain another crucial normative permission that is given to unjust combatants—the permission to cause necessary and proportionate harm to unjust combatants as a side effect of military actions. One might believe—as I do not—that civilians are not part of the contractarian scheme. And, "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 outsider]."[14] Due to lack of space, I won't deal with this aspect of symmetry. The argument that follows shows merely that moral symmetry could be contractually justified among combatants.

Third, 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 purist revisionism 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 revisionist 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 the moral rights of those who are governed by this scheme.

As noted, the remainder of this essay addresses McMahan's critique: it shows that McMahan's objections to contractarianism leave the attractive, nuanced, version of this doctrine untouched.

2. Mutual Benefit

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

Section 3A 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. 3B shows that McMahan's empirical argument does not address, let alone rebut, the counterfactuals that could refute or verify Mutual Benefit. 3C 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's 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.[15] In such a society, if everyone 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 the ideal solution—mutual disbarment—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, it would most like everyone else to disarm, while it alone retains its military capacity. This would enable it to enforce what it takes to be its rights. 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 six first assumptions I have just laid out, a society of decent states will optimally enforce the prohibitive *jus ad bellum* code only if they allow for obedient soldiers at their disposal: decent states design a scheme within which soldiers possess a legal right to participate in a war whatever its cause is. In obedient armies, soldiers are only responsible for the way they treat their enemies, not for the war itself, or its consequences.

Now, 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 accept it. Contractarians justify symmetry by showing that a symmetrical in bello code could have been a contract among decent

states, which take the seven factual and moral assumptions stated above as given.

A mutually beneficial contract which decent states would enter in order to regulate the use of force will secure their capacity to fight just wars (i.e., eliminate aggression) and will determine rules whose aim is minimizing rights violation within these wars. Under such a regime, the most fundamental legal duty to which combatants are subject is the *in bello* prohibition on 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 a 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 self-defense. Mutual Benefit asserts, in other words, that 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 only enjoy that moral power if, in virtue of consenting to a symmetrical legal regime that is mutually beneficial and fair, their adversaries have waived their rights not to be unjustly attacked.

B. Are Obedient Armies Efficient?

How could we refute the argument that the war convention is mutually beneficial? Although each of the assumptions in 2A might be disputed, the obvious approach 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 injunctions to go to war. Indeed, this is the line McMahan takes. He challenges Mutual Benefit on the basis of the following conviction: 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 allowed 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.[16]

After sketching a well known story about a German soldier who covertly aided the partisans in Warsaw's Ghetto, McMahan 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".[17]

Yet, I submit, even if things would have been different 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 or not Mutual Benefit is true is how different things would be, had states and soldiers been governed by the asymmetrical regime that McMahan envisions. The right question is, therefore: How would states and their soldiers behave in circumstances in which they are governed by 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 variables. Neither McMahan nor I are qualified to assess these risks. What I can do, though, is show how shaky McMahan's empirical claims are, and bolster my own with prima facie plausible empirical conjectures.

In order to defeat Mutual Benefit, an initially plausible speculation should be refuted: absent a powerful, impartial institution that is able to provide information 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.[18] 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 (unless there was some authoritative source of judgment that could contradict them).

It is common among purist critics of the traditional war convention to insist that the ignorance that is usually attributed to soldiers is a myth; the information that enables them to judge whether a war is just is, they claim, pretty accessible. After all, we did not need a transnational institution to determine that the Nazi invasion of Poland was unjust. This, however, is too hasty: first, even with respect to the exceptionally clear case of Nazism, critics of the convention seem to be too optimistic. It is far from clear that ordinary German soldiers who invaded to Poland could have known with certainty that the war they were fighting was aggressive.[19] Second, it is true that Western soldiers could reach well-informed judgments about the morality of recent military campaigns. Yet, these judgments were formed under a regime which allows states to require obedience, so 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 their resources to convincing them that they ought to fight.[20]

But consider a more modest argument against Mutual Benefit. According to

contractarianism, in designing the regulations of 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".[21] 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 downsides in the asymmetric regime that might cancel out this advantage. First, not only unjust wars, but also just wars, would require convincing soldiers that their war is just. Consider, for example, a pilot fighting a just war who has been ordered to bomb a munitions factory, knowing that if he does so, the explosion will kill a group of innocent civilians. Suppose that the pilot groundlessly suspects that this collateral damage would tip the scales: it would make the whole war his side fights jus-ad-bellum-disproportionate. Our pilot suspects that the relevant bad effects of the war, would outweigh the goods that the war might bring about, just because of the collateral damage he is about to inflict on civilians. Under the asymmetrical regime, he is entitled to refuse to kill any civilians, unless he is convinced that his suspicion is baseless. And this requires resources that, under the current regime, states fighting just war do not have to deploy.

In arguing against Mutual Benefit, another empirical speculation that supports the symmetric regime should be refuted. The threat to go to disproportionate (and hence unjust) war might deter an unjust attack and as such may 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 one's deterrent threat will be diminished. To take an example that McMahan himself construed, suppose that an

adversary wants to invade without having to engage in significant combat, so its soldiers are ordered to strap ten innocent civilians on every tank. In this way they might make any effective military response to their invasion automatically disproportionate. 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 set things up so that those attacks would be disproportionate.[22]

Another example that might support Mutual Benefit is nuclear deterrence during the early cold war period, when nuclear retaliation had to be against enemy cities. Such retaliation would clearly have been immoral, as it would have involved killing millions of innocent people for no purpose whatever, since the attack that was intended to be deterred would already have occurred. Yet it was essential for effective deterrence to convince the other side that one would retaliate in this way. I speculate that such a threat would have been far more difficult to impose under a regime in which soldiers were forbidden to fight unjustly. (Note that in order to secure the ability of states to deter their unjust opponents by imposing such threats, they do not have to actually legalize disproportionate wars. The threat posed by the just side could be a bluff and yet be credible to the enemy, and, if soldiers are free to disobey an order to fight disproportionate wars, the government's ability to bluff would be diminished.)

Purists might question the very permissibility of a scheme that secures stability and peace by allowing threats to fight indiscriminate wars: such a threat cannot be just. Suppose we could deter a massive rights violation from happening by threatening to rape and kill all the women of the enemy state; arguably, this threat is clearly unjust even if it is effective. The nuclear deterrence debate invokes the same lesson: to many, the threat to carry out radically immoral acts like killing men, women and children indiscriminately and in great number seems deeply immoral – even if no violence was eventually exercised.

However, this objection changes the subject; it does not count against Mutual Benefit. A scheme that is expected to maximize welfare and realization of rights, and as such satisfy a Mutual-Benefit-like condition, might require committing other, lesser injustices. Moreover, I am unsure that the threats under discussion are immoral. After all, the aim of the disproportionate wars that are here under discussion is just – i.e., eliminating clearly unjust threat. True, the indiscriminate killing is an impermissible means: the intentional killing of innocents would make it disproportionate. Yet, I cannot see why the very threat to wage such a war is an impermissible means, or why it would be impermissible for statesmen to take the moral risk and pose such a credible threat.

To summarize, in addressing McMahan's critique of Mutual Benefit I have offered four points. First, he argues for his view by appealing to historical cases when more conscientious refusal would have led to less wrongdoing, but these were exceptions to a symmetrical regime—they tell us nothing about how an asymmetrical regime would look like. 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, going to just wars will be more costly. Fourth, under the asymmetrical regime, just states might lose the option of credibly threatening to fight unjustly.

Again, I did not deny that both the symmetric and asymmetric regimes carry risks. The asymmetric regime, under which soldiers have no right to fight unjustly, has more difficulties in deterring certain kinds of aggression; the symmetric regime, which allows soldiers to obey even wrongful orders, risks armies acting in seriously wrongful ways. Nuclear deterrence illustrates both risks: there's the risk of being unable to deter a nuclear attack and the risk that if deterrence fails, one's own forces will commit mass murder pointlessly.[23] Which is preferable? As I have emphasized, the answer to this sort of questions depends on exceedingly complex questions of

social psychology, international relations, availability of information, strength of transnational institutions etc. 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. The conjectures I have discussed are important as they reveal a fatal problem in McMahan's critique of the empirical dimension of contractarianism. Namely, it contains no serious empirical analysis of how effective the symmetrical and asymmetrical regimes would be in deterring unjust states, and 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. Clearly, 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. And 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, whose full defense is beyond the scope of this paper. To illustrate it, consider the rule that allows driving 70 mph on highways. Suppose that if the speed limit on highways were 40 mph, driving would be a much safer activity. In particular a very harmful accident that would have been prevented under a low-speed-limit-regime. The downside of the low-speed-limit-regime is obvious: in an outcome in which it is widely respected, transportation is less pleasant and more time consuming. Still, the victims of this accident were not in fact benefited by the permissive rule.

Still, if we think of such conventions as mutually beneficial, we assess them from an *ex ante*, rulemaking standpoint. We explore a quasi-Kantian question: what

risks would individuals take, if they were to determine the rules of the road? And, from this standpoint, the outcome in which everyone conforms to a high speed-limit rule on highways, might well be better for all concerned than any other alternative. If so, it is contractually justified.

Now, contracts are necessarily arrangements made in advance in the face of uncertainty, when the relevant parties have to be guided by the expected outcomes, not the actual outcomes. The ex ante perspective is necessarily the one that a contractarian view takes to be action-guiding. Obviously, ignorance is built into its methodology: the victims of the accident might be ex ante beneficiaries of the high-speed limit regime, despite the fact that a low-speed-limit regime would be in their ex post interest. Contractarianism treats the war convention in the same way. The rulemaking states are denied some information—how the *in bello* code will specifically affect them—and asked to assess whether it will, on balance, be beneficial to its soldiers and citizens.

Does the symmetrical legal regime actually offer the greatest expected benefits for all states and all soldiers (even though in the actual outcome it will turn out to be worse for some)? 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? I should like to concede that, if certain forms of knowledge are available, if, for example, some states know that they can protect their legitimate interests under an asymmetrical legal regime, and the asymmetrical regime is feasible, there is no way of getting agreement on a symmetrical legal regime. In such circumstances, contractarianism of the sort employed here may not be able to generate a case for symmetry.

4. Consent as a Sociological Thesis

Consent says that by taking on their status as soldiers, soldiers accept the symmetrical *in bello* code, according to which they can be permissibly killed in the course of war.

They accept "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."[24] This is a publicly recognized part of the profession of arms.

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."[25] 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."[26] 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…[27]

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 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 which permits unilateral exit from these relationships. Think of a religious couple that 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 only ground legal norms in themselves. They say nothing about morality in general or about moral right-claims and duties in particular. Yet, once individuals consent to get 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 set out in a military ethos and in the positive and customary international law; once an individual chooses to become a soldier, she consents to those terms. I suggest, in other words, that signing up to the military forces is an act "such as participation, compliance, or acceptance of benefit that *constitutes* tacit consent to the rules of an adversary institution".[28] 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."[29]

It might 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 from individuals 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 define their role; these rules allow other soldiers to undertake the duty of obedience, i.e., to unjustly attack them. Now, the justification for defining soldiery in this way, rather than some other, is simply the justification for contractarianism itself: for the system to be optimal with respect to individuals' and states' rights, states must be able to expect their soldiers to obey their commands. Again, soldiers can undertake the duty of obedience only if other soldiers waive their rights against unjust attack, and this can occur only if the role of soldiery involves a waiver of those rights.

Needless to say, soldiers might believe that the scheme that allows their adversaries 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 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 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.

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 army nevertheless would not join the army 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 a soldier whose consent was genuinely unfree, one who consented only because of her fear of the legal sanction for noncompliance. Still, if signing up to the military forces constitutes an acceptance of the rules of war, the coerced soldier accepts the rules that define her role. I will later, in discussing Waiver, explain why even a coerced acceptance of the rules might, in some circumstances, involve waiving moral rights.

In sum, 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 was engaged in a tacit mental act whose content is, "I hereby waive my moral right against being unjustly attacked in war." 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. (But note that this is not 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 a 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 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."[30]

I disagree. True, "role concepts are …'interpretative', … people can reasonably argue about the proper interpretation or understanding of role terms and concepts".[31] I submit, however, that 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 strongly suggests that symmetry is part of what defines the role of the soldier in law, whether or not soldiers are aware of it.

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

5. Waiver and Transferred Responsibility

A. Restrained vs. 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. The most powerful objection to contractarianism denies that on deontological grounds. A person's claim against being unjustly killed is not alienable just by her consent to morally optimal rules.[32]Yet, the war convention allows active, intentional killing of innocents. Thus, even if the rules 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 intentional killing of innocents, the right against unjust attack that the victim possesses was violated, even if she explicitly requested 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."[33] 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 easiest way a soldier defends himself and other innocent people from being killed by unjust combatants is by playing 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 this objection, we must draw a distinction between two kinds of contractarianism. On its unrestrained reading, contractarianism insists that the killing just of 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 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, merelyby entering a contract that commands them to do so. Waiver 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. 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.

In effect, 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. In this view, 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 obedient unjust combatants as the violators of these rights. Soldiers' moral power to waive the claim (held against enemy soldiers) that the enemy soldiers not unjustly attack them is 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). It seems that this reflects the common sense thought about war. Suppose that the second Gulf war was unjust. The rights of Iraqi combatants killed by US and UK combatants during this invasion were violated, not by the soldiers who commit 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.[34]

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 ontractarianism offers a simple explanation to 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 killing to the state.[35] 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.[36]

B. Transferred responsibility and Honoré's outcome responsibility

McMahan unequivocally rejects the transferred responsibility account: the conventions that sustain social cooperation cannot exempt agents 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.[37]

I will not be able to develop here a full-blown 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. Facts about agency and responsibility are intrinsically related to facts about morally reasonable social expectations. 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).[38] Honoré's analysis utilize 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."[39] 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 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.[40]

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."[41] 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.[42]

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? Honoré's answer is this: a physician who failed to fulfill this duty is the author of the victim's death by virtue of the fact that 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 simple 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 consequences caused by his actions. This is why he is (outcome) responsible for them.

Why are these social expectations morally reasonable, despite the fact that it tracks 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 a 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.[43]

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."[44]

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 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

from me. Morally reasonable expectations are, therefore, a source of bipolar claims and directional duties – ethical concepts squarely within the family of contractarian ideas.[45]

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 2-3 are sound, so that states and most soldiers do expect each other 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 their agency 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 only responsible 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/equality (at the level Hohfeldian rights and duties) follows 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.[46]

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 duelling 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 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.[47]

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".[48] If Mutual Benefit and Fairness obtain, the role of a soldier is an aspect of a social order that we can reflectively endorse. [49] By signing up, a soldier creates morally reasonable social expectations, and in at least some circumstances, that 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.[50]

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 etc. 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. 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 merely shows that it is unnecessary.

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 other two persons have also jumped from adjacent window. He therefore moves the net over to catch the two, with the consequence that the other jumper hits the ground and dies.[51]

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 tend to classify the withdrawal of the aid as killing.[52]

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 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.[53]

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?"[54] 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." [55]

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, 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.

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 would 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.

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[1] For terminological comments that I fully adopt here, see David Rodin, "The Moral Inequality of Soldiers: Why *Jus in Bello* Asymmetry is Half Right," in D. Rodin and H. Shue (eds.), *Just and Unjust Warriors: the Moral and Legal Status of Soldiers* (Oxford UP, 2008), 44-68, at pp. 44-6.

[2] C. Kutz, "Fearful Symmetry," in *Just and Unjust Warriors*, pp. 69–86 at p. 69.

[3] See McMahan on the distinction between the law of war and the deep morality of war in his "The Morality of War and the Law of War," in *Just and Unjust Warriors*, pp.19-43.

[4] Kutz, "Fearful Symmetry," p. 44.

[5] See, for example, Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), p. 33 ff.

[6] See Walzer's treatment of the obedience of Nazi soldiers in *Just and Unjust Wars* pp. 37-40. Reasons for treating Nazism differently, and to distinguish World War II from other unjust wars like Vietnam war, were offered in Michael Walzer "World War II: Why Was This War Different?" *Philosophy and Public Affairs* 1 (1971): 3-21, Avishai Margalit and Gabriel Motzkin, "The Uniqueness of the Holocaust" *Philosophy and Public Affairs*, Vol. 25 (1996): 65-83, and others.

[7] 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*, p. 37. Contractarianism, as developed here, intentionally blurs Walzer's distinction (cf. Section 5).

[8] Thomas Hurka, "Liability and Just Cause," *Ethics and International Affairs* 20 (2007): 199–218, p.210.

[9] References omitted for blind review.

[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 [References omitted for blind review.]

[11] Arthur Isak Applbaum, *Ethics for Adversaries* (Princeton University Press, 1999). p. 120.

[12] Compare Mutual Benefit to Applbaum's Mutual Advantage: "The game is a mutually advantageous cooperative venture in that, considering all benefits and burdens, including the burden of becoming a target, and compared with the baseline alternative of there being no game, the game provides all its players positive expected net benefits. Players are those who voluntarily seek the venture's benefits" (p. 121). Compare Fairness to Applbaum's Justice "the venture is just in three ways: (a) on some reasonable conception of justice, this particular target is to receive a just share of the venture's benefits and burdens; (b) the venture generally distributes benefits and burdens justly to its players; and (c) the venture imposes no unjust externalities on those who are not players" (*ibid.*).

[13] 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: "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" (A. John Simmons, "External Justifications and Institutional Roles" *Journal of Philosophy* 93 (1996), 28-36 , p. 29). This can be true even where "we have not strictly 'accepted' those roles at all, but have only freely accepted the benefits provided by the schemes within which those roles are defined (*ibid.*). Another difference is that my argument is less individualistic. See below at 5A.

[14] Applbaum, *Ethics for Adversaries*, 134.

[15] Note that 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 the police of another state from committing crimes against humanities.

[16] McMahan, *Killing in War*, p. 60. Note that McMahan rejects the contractarian approach to morality; his point here is merely that asymmetrical regime would better fulfill the desiderata of contractarianism.

[17] *Ibid.* p. 101, quoting Hannah Arendt and Stanley Milgram respectively.

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

[19] See, for example, References omitted for blind review.

[20] 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,* p. 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.

[21] *Ibid.* p. 98.

[22] Personal communication

[23] McMahan, personal communication.

[24] McMahan, *Killing in* War, p.53.

[25] *Ibid.*, p.55.

[26] *Ibid.*

[27] *Ibid.*

[28] Applbaum, *Ethics for the Adversaries*, 118

[29] Michael O. Hardimon, "Role Obligations", *Journal of Philosophy* 91 (1994), pp. 333-363, at 354.

[30] McMahan, *Killing in War*, p.55.

[31] Hardimon, "Role Obligations", p. 336.
[32] 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.
[33] McMahan, *Killing in War*, p.56.
[34] 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, on the account Cf. References omitted for blind review.
[35] I here draw on References omitted for blind review. It might be argued that there is a crucial difference between the informed executioner, who *knows* that the convicted person is innocent, and the *un*informed executioner, who does not know it. But the following conditional seems obviously 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. Again, I draw on References omitted for blind review.
[36] Compare to Applbaum, "Professional Detachment: The Executioner of Paris" in his *Ethics for Adversaries*, pp. 15-43. My argument for the executioner's right differs from Sanson's 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.
[37] *Killing in War* Sect. 2.6, pp. 84-92.
[38] Tony Honoré, *Responsibility and Fault* (Oxford: Hart Publishing, 1999).
[39] Bernard Williams, "Moral Luck", repr. in his *Moral Luck* (Cambridge UP, 1981), pp. 20-39.
[40] It might be argued that, despite the stipulation, it is not 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 (Jeff). In order to accommodate this complication, I should further stipulate that both agents are not aware of, or deny, that there is a difference between killing and letting die.
[41] Honoré, *Responsibility and Fault*, p. 52.
[42] *Ibid.*, p. 53.
[43] *Ibid.*
[44] Honoré, *Responsibility and Fault*, p. 26
[45] This sketch is indebted to Lewis, *Convention*, pp.97-100; Stephen Darwall, *The Second Person Standpoint: Morality, Respect and Accountability* (Cambridge, MA: Harvard UP, 2005); and to contributors to a symposium on Darwall's book: Jay Wallace, "Reasons Relations and Commands," *Ethics* 118 (2007): 24-36; and Gary Watson, "Morality as Equal Accountability," *Ethics* 118 (2007): 37-51.
[46] Compare to David Luban, *Lawyers and Justice* (Princeton, N.J.: Princeton University Press, 1988), pp. 78–81 and to Francis Kamm, ''Responsibility and Collaboration,'' *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (New York: Oxford UP, 2007), p. 312, discussed by McMahan, *Killing in War*, p. 90.
[47] The view presented here is an instance of what John Simmons calls, the standard view, reformulated in order to includes 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).
[48] Hardimon, "Role Obligation" p. 361-2.
[49] Ibid., p. 348.
[50] The role based version of contractarianism might suggest a distinction between non-uniformed 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.
[51] Jeff McMahan, "Killing, Letting Die, and Withdrawing Aid," *Ethics* 103 (1993): 50-279, p. 263.

[52] This is McMahan's explanation in his "Killing, Letting Die, and Withdrawing Aid," pp. 263-5.
[53] In introducing McMahan's view that acting in a role can term what was otherwise be a killing into a 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.
[54] McMahan, *Killing in War*, p. 89.
[55] McMahan, *Killing in War*, p. 88.