

Symposium: Emergencies

Consent-Based Permission to Kill People and Break Their Things

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1. Introduction

In wartime, members of the military kill people and break their things. In the case of a just war, it intuitively seems that this is morally permissible. At issue is what justifies the killing and destruction. In this article, I discuss the view that the justification is consent-based.

The idea that members of opposing militaries may kill each other and break other people's things because the two sides have consented to combat in accord with certain rules parallels the way in which boxers may hit each other because they have consented to combat within certain rules.¹ The consent authorizes members of the militaries to be killed in the sense of its not being wrong and not warranting punishment or compensation because members have consented to obey the laws of their country and the laws of their country include international treaties concerning when and how countries may go to war. This is true whether the members consented by voluntarily joining the military or by having consented to be led by a government that has a draft or that allows a draft to be enacted.

The notion that wartime killing and destruction can be justified by consent initially struck me as ridiculous and offensive, but closer inspection has led me to think that the argument is plausible even if it is ultimately incorrect. I explore it here for that reason.

The issue matters because its main rival, forfeiture theory, is subject to a number of serious objections.² The forfeiture theory asserts that an

¹ This idea can be seen in Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), p. 37; and Thomas Hurka, "Liability and Just Cause," *Journal of Political Philosophy* 21, no. 2 (2007), pp. 199-218.

² A forfeiture theory of just war killing can be seen in David Rodin, *War & Self-Defense* (New York: Oxford University Press, 2002), pp. 70-77. People who assert that a criminal forfeits some of his moral rights include Stephen Kershner, "The Structure of Rights Forfeiture in the Context of Culpable Wrongdoing," *Philosophia* 29 (2002), pp. 57-88; A. John Simmons, "Locke and the Right to Punish," in *Punishment*, ed. A. John Simmons et al. (Princeton, NJ: Princeton University Press, 1995), pp. 238-52;

individual engaging in an unjust attack forfeits his right against defensive violence and this is what makes defensive violence permissible. Applied to war, members of a nation's military who cooperatively engage in an unjust war collectively forfeit their rights, thereby making wartime defensive violence permissible.

Consider objections to forfeiture theory. First, there are issues regarding how rights can be forfeited when what justifies them (for example, the right-holder's autonomy or interest) is still present. Consider a simple case of using lethal force in self-defense against a villainous attacker. The objection is that because the attacker retains whatever property grounds his right to body, property, or life (for instance, autonomy), he retains his rights to these things and thus may not be killed in virtue of having given up these rights.

Second, forfeiture has to explain a lot. Specifically, it has to explain why military violence is limited by requirements, including depending on the account, necessity, imminence, proportionality, and discrimination.³ This is a lot of explanatory work.

Third, there are discrimination issues. It intuitively seems that many civilians, such as legislators who intentionally cause the military to unjustly attack others, are unjust threats and thus forfeit their rights. Yet they are often considered inappropriate targets. If intention to contribute to an unjust attack is not necessary for forfeiture, then it is unclear why military support staff (for example, truckers, cooks, and construction workers) forfeit rights against attack, whereas non-military support workers (for example, farmers) do not.

Fourth, forfeiture theory asserts that forfeiture occurs following an attempted attack, rather than a completed one, but it is unclear why an attempt by itself is an injustice at all, let alone one that warrants lethal violence. By itself, an attempt need not trespass on another's body or property. If any of these problems are fatal, then we need another account of permissible wartime killing.

Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), pp. 365-66; Vinit Haksar, "Excuses and Voluntary Conduct," *Ethics* 96 (1986), pp. 317-29; Murray Rothbard, *The Ethics of Liberty* (Atlantic Highlands, NJ: Humanities Press, 1982); Alan Goldman, "The Paradox of Punishment," *Philosophy and Public Affairs* 9 (1979), pp. 30-46; Roger Pilon, "Criminal Remedies: Restitution, Punishment, or Both?" *Ethics* 88 (1978), pp. 348-57. These theories differ with regard to whether rights-forfeiture is a fundamental feature of rights or explained by a more fundamental principle.

³ Forfeiture provides a unified account of these constraints, perhaps as primitive features of how forfeiture works. For a discussion of these constraints independent of forfeiture, see Brian Orend, *The Morality of War* (Orchard Park, NY: Broadview, 2006), chap. 4.

Fifth, there are puzzle cases that forfeiture has trouble handling, such as the issue of what happens to the rights of two people who simultaneously launch unprovoked attacks against the other.

Another rival theory, threshold deontology, asserts that consequentialist reasons can justify wartime killing and destruction. A consequentialist override occurs when action is justified because it brings about very good results and the value of these results trumps a non-consequentialist side-constraint. Even if this is correct, the results must be very good for it to override stringent side-constraints against killing and destruction. Given that standard trolley and surgeon's harvest cases indicate that a net saving of five lives is not weighty enough to do so and that many wartime killings do not generate a benefit worth more than five lives, the consequentialist override will not justify many instances of wartime killing. In addition, if someone's right is overridden, compensatory justice requires that the person whose right is overridden be given an apology, if not compensation. However, unjust wartime aggressors intuitively seem to be owed neither. Thus, there is reason to doubt that wartime killing is justified by an overriding of military members' rights.

Perhaps consent theory can justify wartime killing. If so, perhaps consent theory makes an important contribution not just to our understanding of the ethics of warfare, but also to the ethics of extreme circumstances generally, including emergencies.

2. The Nature of Consent

a. How consent works

Consent, roughly, creates a liberty in the consent recipient (that is, no duty not to do an act), where the act was previously wrong because of the consenter's right (that is, claim).⁴ More specifically, it has the following structure.

Consent: Necessarily, one person consents to a second's act only if the first intentionally or knowingly waives a claim against the second's act and the act satisfies the description associated with the waiver.⁵

⁴ An objector might argue that the definition seems to allow me to consent to my adult son's marriage, but this restatement seems to rule that out, since my son would not wrong me if he married without my consent. The problem with this is that the adult son's marriage was not previously wrong because of the consenter's right.

⁵ The idea for this account comes from work by Heidi Hurd and Larry Alexander. Heidi Hurd gives a sufficient condition for consent that reduces consent to a fine-grained intention that must match what the second person does. See Heidi Hurd, "The Moral Magic of Consent," *Legal Theory* 2 (1996), pp. 121-46, esp. p. 134. Larry Alexander provides a sufficient condition that reduces consent to a forgoing of objection to, roughly, what the second does. See Larry Alexander, "The Moral Magic

This is only a necessary condition because it is an analysis of consent rather than valid consent or morally transformative consent. In some areas, such as political obligation, “consent” refers to promises as well as the above consent-notion.⁶

A promise, roughly, creates a claim in the promise-recipient. More specifically, it has the following structure.

Promise: Necessarily, one person promises to a second to do an act only if the first intentionally or knowingly waives his liberty against the second to refrain from doing the act and the act satisfies the description associated with the waiver.

Because what appears to be a promise is often a combination of promise and consent, the distinction between the two is not always clear.

It is worth noting that having consented provides only a necessary condition for consenting to be moral transformative. The same goes for a promise. These accounts can be converted into sufficient conditions for moral transformation by adding further conditions. The additional conditions are that the person making the waiver is competent and informed, and that her waiver is voluntary.⁷

Terminology differs, but on one account the speech-act that is given by a person without satisfying one of these conditions (competence, information, or voluntariness) is not consent. On another account, because the speech-act alone is consent, such an act is consent, but not valid consent. I will use the second locution, although nothing turns on it.

Valid consent occurs when one person waives a claim by using a term (or behavior) with conventional meaning to communicate to another her intention to waive the claim under conditions that result in such a waiver.⁸ Consent, like promise, has a bootstrap-like quality.⁹

of Consent (II),” *Legal Theory* 2 (1996), pp. 165-74, esp. p. 168.

⁶ See A. John Simmons, “Political Obligation and Consent,” in *The Ethics of Consent: Theory and Practice*, ed. Franklin Miller and Alan Wertheimer (New York: Oxford University Press, 2010), pp. 305-28.

⁷ See John Kleinig, “The Nature of Consent,” in *The Ethics of Consent*, ed. Miller and Wertheimer, pp. 3-24; Franklin Miller and Alan Wertheimer, “Preface to a Theory of Consent Transactions: Beyond Valid Consent,” in *ibid.*, pp. 79-106.

⁸ The idea for this comes from John Searle, “What Is a Speech Act?” in *Philosophy in America*, ed. Max Black (Ithaca, NY: Cornell University Press, 1965), pp. 221-39.

⁹ See Charles Fried, *Contract as Promise* (Cambridge, MA: Harvard University Press, 1981).

If this is correct, then consent requires the consentor to have certain thoughts (specifically, intentions). In particular, an individual must have the following thoughts to give consent:

- I intend to temporarily eliminate a claim held against another.
- I intend to use a particular conventional expression.
- I intend to eliminate the claim via the conventional expression.

An individual can also consent by promising to follow a set of rules. These might include rules of which the consentor is not aware. On this account, the consent is morally transformative despite his not having an intention about the particular rule of which he was unaware. By analogy, when a customer is in a restaurant, the soup-or-salad rule allows him to order only one without paying extra, even if he is not aware of this particular rule. A customer is bound by it insofar as he consents to obey default restaurant rules.

b. Consent-thresholds

There are different models of the thresholds required for valid consent. By thresholds, I mean the degree to which a consentor must be competent or informed and her consent voluntary for her consent to be valid. Here is the first model.

Model #1: Constant Threshold. The conditions for valid consent do not vary with context.

On this account, there are set thresholds for competence, knowledge, and voluntariness that hold across all contexts. The legal recognition attached to the consent or its moral weight might vary, but this is due to considerations other than those that make consent morally valid or invalid. For example, this might include the consequences of allowing consent to be legally recognized in various contexts.

Here is a second model.

Model #2: Variable Threshold. The conditions for valid consent vary with the context.

Analogous models to the thresholds address the issue of whether there is a constant threshold for the quality of consent (the degree to which all three conditions—competence, knowledge, and voluntariness—are present) and the stringency of consent (the degree of moral obligation that consent undermines or overrides).

By analogy, consider the contextual thresholds for legally valid consent. First, consider knowledge. The law allows people to gamble despite being presented with little, if any, information on gambling odds or how the games work. It requires much more information for consent to medical

treatment. The law also allows people to marry with little disclosure from the would-be spouse, but requires considerable disclosure to buy a house. Second, consider voluntariness. The law allows intoxicated people to consent to gamble, but not to get tattooed. Third, consider competence. Confused thought patterns that are found in some elderly people legally might not invalidate consent to life-saving surgery, but might invalidate an attempt to revise a will.

The issue is whether the threshold for morally valid consent varies with context or whether it is constant with a context-dependent threshold for legally valid consent. On both models, it is difficult to see how there can be a borderline region of competence, knowledge, and voluntariness, where consent is neither morally valid nor invalid. This is because such a region would be one in which another individual neither has nor lacks a duty to a consenter and this intuitively seems incoherent.

If autonomy justifies consent, then there is a reason to accept the *Variable Threshold* model. On almost every account, the demands of consenting in a way that make the consenter morally responsible depend on situational factors that vary with context. They so vary because different contexts place different demands on competence, knowledge, and voluntariness. For example, the knowledge of options required for autonomously deciding to buy a house might be greater than that for autonomously making a medical decision, because medical contexts more often have parties whose interests align with the consenter's. Hence, if a moral-responsibility-based feature explains the morally transformative function of consent and if moral responsibility in different areas sets different demands for competence, knowledge, and voluntariness, then the threshold for these conditions will vary with the context.

Parallel reasoning applies to interest-based accounts of the morally transformative function of consent. On this account, the transformative role of consent is tied to its role in protecting or promoting people's interests. Similar to the above reasoning, the demands of consenting in a way that makes the consenter's life go better (or promotes people's interests more generally) depend on situational factors that vary with context.

A similar thing is true for a fairness-based justification of consent. This is again because the demands of consenting in a way that is fair depend on situational factors that pose different threats to fairness. For instance, it might be fairer, given the information asymmetry involved, to require that a consenter have a knowledgeable agent when it comes to plea-bargaining, but not when it comes to marriage.

Quality of consent is a function of the degree to which an individual is morally responsible for his consent. This might be seen in turn as, roughly, a function of the degree to which his consenting reflects his psychology and the degree to which he is responsible for his psychology. Lack of knowledge or voluntariness lessens the first condition; lack of competence lessens the second. On my account, while a specific quality-level of consent can be met by having these features in different degrees (more knowledge and less voluntariness or vice versa), the required level of each component feature

varies with context. Specifically, the aggregate level also varies with the contextual threat to a self-shaping life. Self-shaping decisions might, for example, require a quality of consent much higher for sex than buying yogurt.

Were the moral force of consent to be justified by something other than autonomy (for example, interest), the argument is the same. The same is true even if consent-based change is justified by a relational property such as fairness or justice, rather than a monadic one such as interest, because these factors also vary with context. Consent likely does not depend on these relational properties because the most likely candidates (fairness, justice, and comparative desert) depend on the moral force of consent and thus cannot also justify it. For example, voluntary sex is fair while rape is not because of the role of consent. If this is correct, then consent is not justified by fairness.

This opens the door for a scalar-level account of consent whereby the moral force of consent might not be enough to change a moral relation, but it can change the net effect of the consent on an opposed duty. Consider this case:

Underage Consent

A bright 13-year-old girl who knows something about sex and who very willingly consents to have sex with a 25-year-old teacher might not be able to give consent with sufficient quality to make it permissible, but the sex is less wrong than that involving a slow 13-year-old who knows little about sex and consents out of fear.

We are now in a position to explore whether members of the military have validly consented and what the implications are for wartime killing.

3. Consent to Wartime Killing

a. Consent is irrelevant to killing enemies and breaking their things

Whether a person gives valid consent depends on whether she performs the relevant speech-act and whether she is sufficiently competent and informed and her doing so is sufficiently voluntary. Members of the military consent to something when they take the military oath and when they sign a contract with the government regarding military service.

Here is my argument:

(P1) If a member of the military's consent (or promise) is not made to a potential enemy or is ineffective, then it does not justify wartime killing and destruction.

(P2) A member of the military's consent is not made to a potential enemy or is ineffective.

(C1) Hence, a member's consent does not justify wartime killing or destruction. [(P1), (P2)]

The first premise rests in part on the notion that if a potential target did not consent to being attacked, then his rights remain in effect and hence killing him or breaking his stuff would (other things equal) be wrong. It also rests in part on the notion that even if a potential target waived his right, if the waiver is weak enough, then it likely does not override consequentialist concerns and hence killing would be wrong even if it does not wrong the target.

There is also an issue as to whether duties and permissions can conflict. On one account, such as that of W. D. Ross, *prima facie* duties (and permissions) can and often do conflict.¹⁰ For example, where one considers breaking a promise to help an injured motorist, the duty of beneficence conflicts with the duty to keep one's promise. This is also true if, as John Searle asserts, merely *prima facie* duties have normative force (that is, constitute a moral reason to do something) even if they are overridden.¹¹ This is not true on Ross's account, where *prima facie* duties provide epistemic, but not metaphysical, justification for a moral duty.

On Robert Nozick's account, *prima facie* duties cannot conflict. This is because natural claims (and correlative duties) are negative and do not conflict. On this account, all positive duties are derived from natural ones and hence cannot conflict. If one adopts this account, then oath-based duties take place within the framework of pre-existing duties and hence cannot conflict.

There is an issue as to whether duties can appear to conflict even if they do not actually do so. For example, if John promises Big Paul to kill a witness, it might be thought that John has a duty relative to Paul to kill the witness, but not permission relative to the witness. These deontic states are consistent because they involve different interpersonal moral relations. If a duty to do something is understood as a reason to do it and a reason can rest on one person's relation to a second, then the duties are consistent even if they call for conflicting acts.

b. Is consent made to a potential target?

An American soldier's oath or other promise might be seen as largely irrelevant to wartime killing. A promise cannot affect rights of third parties because third parties neither make it nor receive it. This is true even with regard to a person whom the promisor pledges to help but is not the one to whom the promise is made. Oaths are promises that affect the claims and liberties of the promise-maker and -recipient. They do not affect others' claims and liberties because others have neither waived a moral relation nor accepted another's waiver. If this is correct, then the oath does not make permissible any act that is not already permissible.

¹⁰ See W. D. Ross, *The Right and the Good* (Indianapolis, IN: Hackett, 1988), chap. 2.

¹¹ See John Searle, "Prima Facie Obligations," in *Practical Reasoning*, ed. Joseph Raz (New York: Oxford University Press, 1978), pp. 81-90.

Here are cases in which the purported duty to obey U.S. military orders is morally irrelevant because of the effect on third parties.

Burning Down a Village

There is controversy over whether an order is immoral. Consider, for example, an order to burn down a village found hiding weapons for the Viet Cong.

Water Boarding

There is a controversy over whether an order is illegal. Consider, for example, an order to water-board irregular combatants who are taken prisoner.

It might be objected that, for many countries, members of the military consent to be killed in virtue of their consenting to governments that in turn have consented to international laws that set forth various rules about when and how nations may go to war. They have thus consented to rules about killing in the case of international conflict as part of their consent to their government's authority. Consider, for example, the rules of war found in the Hague and Geneva Conventions. This is analogous to the way in which, on some theories, offenders consent to be punished in virtue of their having consented to a government that either contains a particular penalty system or a more fundamental procedure by which a penalty system is chosen and implemented.¹²

This assumes that government authority is justified by consent. I think this is correct, although it should be noted that many theorists deny this. They argue that citizens don't consent and, if they did, the supposed consent would be invalid because it was done involuntarily or without adequate knowledge. In addition, A. John Simmons argues that consent cannot justify government because the government's proposed deal (for a given territory, an individual and government trade consent for government-dependent benefits) presupposes that the government already has legitimate authority over the territory and thus may offer such a deal.¹³ This, Simmons argues, pushes the issue of government authority one step back.

There is a further problem with consent theory in that, on some accounts, asking people to consent to certain arrangements is wrong, even if the consent is informed and free. For example, it seems wrong to ask women

¹² The consent theory of punishment is defended in C. S. Nino, "A Consensual Theory of Punishment," in *Punishment*, ed. Simmons, pp. 94-111; C. S. Nino, "Does Consent Override Proportionality?" *Philosophy and Public Affairs* 15, no. 2 (1986), pp. 183-87; and C. S. Nino, *The Ethics of Human Rights* (Oxford: Clarendon Press, 1991).

¹³ See A. John Simmons, "Political Obligation and Consent," in *The Ethics of Consent*, ed. Miller and Wertheimer, pp. 305-28.

to consent to marriages that permit marital rape even if this is made clear to them and they are not coerced into marrying. That is, on some accounts, valid consent is not sufficient for a just agreement, even if it is necessary.

Assuming that the problems with consent legitimating governments can be overcome, and I think they can, the issue is whether the international war-fighting conventions are binding on citizens, especially members of the military. A concern is that above-the-threshold consent is effective only if the consented-to arrangement is reasonable, fair, or non-exploitative and that the military's consent does not meet this condition. Here are two examples of supposedly invalid consent because the deals fail to meet this criterion.¹⁴

Lecherous Millionaire

A Pakistani businessman pays for the life-saving surgery of five Pakistani children each year. An attractive Indian woman wants him to pay for her Indian daughter rather than a Pakistani girl. They agree that the businessman will pay for the expensive surgery that alone can save the child's life provided that the woman becomes his mistress for a period of six months. No one else will pay for the life-saving surgery. The businessman makes the offer.

Boat (Robert Nozick)

B's boat has capsized and he has been swimming for hours near the center of a large and seldom frequented lake. He is nearing exhaustion when A's boat approaches. A says to B: "You may climb into my boat and avoid drowning if and only if you promise now to pay me \$50,000 within three days."¹⁵

In the past, an objector might argue, states have permitted marital rape and slavery-like state punishment and this does not show that married women consented to rape or that offenders consented to be temporarily enslaved.¹⁶

There is reason to think that consent is valid even in unfair or exploitative contract situations such as the above ones. It is difficult to see

¹⁴ The first example comes from Stephen Kershnar, *Pedophilia and Adult-Child Sex: A Rights-Based Exploration* (Lanham, MD: Lexington Books, forthcoming).

¹⁵ This example comes from Robert Nozick, "Coercion," in *Philosophy, Science, and Method*, ed. Sidney Morgenbesser et al. (New York: St. Martin's Press, 1969), pp. 440-72.

¹⁶ The Thirteenth Amendment does not rule out slavery imposed as punishment. It says, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." There is an issue of whether one can consent to rape if rape is unconsented-to sex. If this is impossible, then the notion is that women did not consent to forced sex that is not rape.

why the party in the stronger position wrongs the one in the weaker one if the former does not have a duty to save the latter and if merely forming an agreement with someone to whom one does not owe a positive duty does not by itself create positive duties other than those contained in the agreement.¹⁷ There is further reason to think that such consent is valid if there is no defensible notion of an unfair or non-exploitative price.¹⁸

Even if there is a defensible notion of an unfair or exploitative price, it is unclear that the waiver of the right against being injured or killed in wartime is an unfair or exploitative contractual condition, especially for people in more desirable countries. The benefit of being part of some countries (for example, the U.S., Canada, and Great Britain) is substantial. The chance that a citizen will be a young adult during wartime and that his country will draft him, put him in a combat unit, and put his unit into actual combat is quite small.¹⁹ As a result, it is unclear whether this price is too high, *ex ante*, for the benefit of being a member of the world's more desirable countries.

An analogy here is an organ lottery. In such a lottery, a person who signs up is guaranteed an organ if he needs it to live provided his lottery number does not come up. If it comes up, and this is very unlikely, and organs for others who need them cannot be recovered from the newly dead, then he is killed and his healthy organs redistributed. If, *ex ante*, the expected value of the organ transplant greatly exceeds the expected disvalue of his being killed for organ-redistribution purposes, then entry into the lottery is a good deal. Even if it is not a good deal, such lotteries do not intuitively seem to wrong those who are killed, assuming that they consented and did so with sufficient knowledge, voluntariness, and competence.

The problem is that in at least some countries, the draft is not part of what citizens consent to. In the U.S., for example, if the Constitution disallows the draft, and I think it does, then it is not part of what citizens consent to. It should be noted that the U.S. Supreme Court has found that the Constitution permits the draft, although its reasoning is shoddy.²⁰ The draft is

¹⁷ For a development of this argument, see Kershnar, *Pedophilia and Adult-Child Sex*. Even if there is a duty to save, unfair or exploitative contracts will fail to generate a duty based on a duty to save only if the duty is perfect, specifically owed to the person in the above type of case, rather than imperfect.

¹⁸ See *ibid.*

¹⁹ Capitalist democracies almost never go to war against one another. See, e.g., Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (New York: Penguin Books, 2011).

²⁰ See *Arver v. United States*, 245 U.S. 366 (1918) (known as the Selective Draft Law Cases); and *United States v. Holmes*, 387 F.2d 781 (7th Cir.), cert. denied, 391 U.S. 936 (1968).

a part of the practice of many contemporary countries, including Israel, Switzerland, and both North and South Korea.

In summary, then, even if people consent to their government and their government consents to various international rules of law, it is unclear whether this constitutes consent to allow members of other militaries to kill them in wartime in the sense that it is not punished under international law. It seems that consent to one's government does not directly do so, but it still might indirectly do so. This, then, raises the issue of whether indirect consent is of sufficient quality to permit an attack by unjust forces. Note that with respect to unjust forces, rules of law (or the moral underpinnings for them) might themselves prohibit an attack, but they still might not hold accountable the soldiers fighting for the unjust side in virtue of their participating in the unjust attack.

c. Even if consent is made to a potential target, it would be too defective to be valid

The problem with the above consent to the laws is that it likely lacks sufficient quality to be valid. Given the threat to the right-holder's autonomy (or interest), the threshold for quality of consent is quite high. This is similar to the requirement that the patient be sufficiently informed in order for her to provide valid consent to surgery. Even if a young adult consents to be bound by the laws of his country, he might not, and in many cases does not, know that this includes international laws and treaties. Even if he did know this, he is even less likely to know that this includes laws of war that make him a legitimate target in war, if he is in the military, even if his side is engaging in a just war.²¹

In addition, a young adult's consent often has a low degree of voluntariness. While he might be free to go to another country (and this is not always the case), the price he would pay for leaving is significant, whether in terms of distance from family and friends, cultural difficulties, or financial loss.

Now an objector might argue that a high price does not make consent involuntary. To see this, consider the following case:

Black Mamba

During an expedition into Africa, a highly venomous black mamba bites a wealthy scientist. He is quickly taken to the house of a local doctor who offers to sell him the doctor's only portion of mamba antivenin for the market price. The scientist quickly agrees and signs a contract. He is then given the antivenin. After a month of lying near death, the scientist

²¹ For the notion that consent to wartime killing has to be informed, see Helen Frowe, *The Ethics of War and Peace: An Introduction* (New York: Routledge, 2011), pp. 118-24.

recovers. He then refuses to pay, arguing that the contract is invalid since his consent was coerced.²²

A high price for mamba antivenin does not by itself make it involuntary and the price is still far less important to the scientist than is his staying alive. Still, it has the same payoff structure as a robber's your-money-or-your-life proposal and it reduces voluntariness for much the same reason. Why it does so depends on an explanation of why a serious threat makes choices less voluntary and an explanation of why an offer with a payoff structure similar to that of a serious threat also reduces a choice's voluntariness. It is unclear whether theories of responsibility, rather than justice, provide an adequate account of these issues, but perhaps we can rely on relatively clear intuitions about these sorts of cases to know that the consent of young adults drafted into the military is not especially voluntary.

If the above argument is correct, then even though people consent to the laws of war and in so doing consent to make themselves targets when serving as members of the military, their consent might not have sufficient quality to be valid consent. Similar to the consent of those with dementia to a change in a will, uninformed consent to surgery, and intoxicated consent to a business transaction, such consent might be invalid given what is at stake.

Here is an argument for this. Consider the following case:

Indian Bride

An Indian-American woman whose family lives in the U.S. meets an Indian physician in medical school and moves to India to marry him. She explicitly consents to obey Indian laws, including its marital laws, although she knows next to nothing about them. In the first few months of marriage, her husband rapes her. The prosecutor rejects her attempt to get him prosecuted and a trial court throws out her civil suit for pain and suffering on the ground that he did not violate a legal duty owed to her. Under Indian law, marital rape is not a crime.

While she does consent to obey India's laws, including its marital laws, her consent has a low level of quality because of her ignorance of the law. It intuitively seems that her consent does not legitimize forced sex because of the low quality of consent. If this is true of the woman, then it is also true of the young adults of draft age in countries that have not had a draft for years. They likely do not recognize that remaining in the country makes them legitimate targets in wartime. What's more, the price they would have to pay to leave is (on average) more than the price the Indian woman would have to pay in order to avoid marrying and living in India. Rape, while horrible, is (on average) less bad than being killed or mutilated in wartime. Hence, if the

²² See Stephen Kershnar, "A Liberal Case for Slavery," *Journal of Social Philosophy* 34 (2003), pp. 510-36.

woman's consent does not authorize the forced sex, then living in a country with a previously dormant draft does not authorize military targeting by wartime opponents.

Cases of countries that regularly draft their citizens and voluntary members of the armed services involve less ignorance, but it is still unclear whether they have sufficient knowledge to warrant becoming legitimate targets. In the draft case, there is also an issue with voluntariness that is not present in *Indian Bride*.

If consent eliminates duties owed to potential military targets, then there is no conflict between those duties and the duty to participate in military destruction that might be owed to one's government or fellow citizens. In some places, citizens don't and can't consent. Also, in some places, large numbers of citizens lack the requisite competence, knowledge, or voluntariness to give valid consent. In these cases, members of the opposing military do not consent to be killed nor do citizens consent to have their things broken. It is worth considering, then, which duties are stronger.

d. Even if consent is given, it is still too weak to justify killing and destruction

Even if promise-based duties to kill people and break things on command can compete against duties owed to people who do not consent to be killed, the former duties are relevant only if they are strong enough to override the latter duties. If a promise-based duty is strong, then it has strength in its content ("I hereby incur a strong duty to do . . ."). The American military oath does not have this content.

Military Oath of Enlistment

I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the regulations and the Uniform Code of Military Justice. So help me God.

Oath for Officers, Upon Commission

I, _____, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

Note that these two oaths do not include a strength-condition. Note that such an oath could include a strength-condition, but does not. The "true faith and allegiance," "well and faithfully discharge," and "help me God" provisions do

not contain strength conditions. Other agencies, such as the Federal Bureau of Investigation, have nearly the same oath.²³

Still, it might be argued that the strength-condition is implicit in the common understanding of the oath. Alternatively, the strength-condition might be implicit in the solemn manner in which the oath is taken or the context in which it is taken. Alternatively, the serious subject matter (risking one's own life and promising to take others' lives on command) either alerts the promise-maker to the strength of the commitment or would do so for a reasonable person.

A promise does not have implicit content. If the above account is correct, a promise is the way in which a person intentionally binds himself and his intention determines the promissory content. The promise can refer to things that are opaque to the promisor, but they are still set by his conscious intention. For example, when I play Monopoly, I intend to be bound by the rules of the game even though I don't know all of them. Here the rules are explicit. In other cases, the rules might be set by the nature of the thing (constitutive rules), meaning of a term, or understanding of the relevant community of experts. An example of a constitutive rule is that a chess match is over when one player captures the other player's king. This rule in part makes chess what it is.

In the context of a military oath, the promise-based obligation is not strong. First, a member of the military makes a single promise to obey orders. If he makes only one promise, then there is a single ground for any duties the promise generates. If the ground for any duties the promise generated does not vary, then the strength of the duty does not vary across settings. That is, it is the same in different settings. Hence, if the duty is weak in some cases, then it is weak in all. Here is a case in which it is weak:

Strawberries

A ship captain orders his men to search a ship from top to bottom that afternoon in pursuit of stolen strawberries. He specifies that every single inch of space be searched. The lieutenant decides not to search his own locked closet. The captain is frazzled and mistaken about whether any strawberries were stolen. The lieutenant knows these things as well as the fact that no one has unlocked or broken into his locker.²⁴

²³ The FBI oath is the following: "I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

²⁴ The idea for this example comes from the film *The Caine Mutiny*, directed by Edward Dmytryk (Columbia, 1954).

Here is another such case:

Potato-Peeling

A newly minted West-Point-educated lieutenant orders an enlisted man to peel potatoes and, in particular, to peel off every fleck of skin. He does so because a classmate theorized that establishing command on trivial matters effectively communicates who is the boss. If a lowly but excellent enlisted man follows this order, his peeling time will triple and he will miss dinner. He skips peeling small-and-very-hard-to-peel flecks.

Even if the enlisted man violates a *prima facie* duty, he does not infringe on a stringent one.

An objector might claim that the duties in these examples are in fact strong—being cases of obeying military orders—despite the fact that they might intuitively seem weak. In the absence of an argument to overcome the intuitive seeming in this case, it is not clear what supports the claim.

By analogy, consider the duty to obey laws against murder and jaywalking. If the duty to obey both laws is equally strong, because they flow from the same promise (whether explicit or implicit), and the duty to obey the law against jaywalking is weak, then the duty to obey the law against murder is weak. The duty to obey the law against jaywalking *is* weak. This can be seen in both the intuitive notion that jaywalking is not very wrong and the notion that it does not warrant a severe punishment. Note there are strong duties against murder, but they are independent of the law. Similarly, there might be strong duties to satisfy the content of an order (for example, “I hereby order you not to shoot these Vietnamese civilians”), but they are independent of the order.

The at-most weak duty is also true for contradictory orders and orders that are vague or ambiguous. A separate problem occurs when the Constitution is vague or ambiguous because one who takes the U.S. oath is only bound with regard to constitutional orders (see the requirement of true faith and allegiance to the Constitution). Also, it is unclear whether unconstitutional orders satisfy the Uniform Code of Military Justice. Constitutionally contested orders include acts that are part of an undeclared war or a war that Congress has refused to fund. This is not a matter of mere theoretical interest, given that Presidents Clinton and Obama ordered attacks on Serbia in 1999, Libya in 2011, and ISIS in 2014 that were unaccompanied by a declaration of war and did not meet requirements of the War Powers Act.

In summary, the duty to obey military orders is weak in the sense that it does not override duties against killing and property destruction. Hence, if the members of an opponent military retain claims against being attacked, these claims override competing duties that members of the military owe to their government or fellow citizens.

e. Other objections

Jeff McMahan, Uwe Steinhoff, Helen Frowe, and others object to the consent argument for wartime killing and destruction on a number different grounds.²⁵ Let's consider their objections.

First, an objector might argue that the argument does not apply to the involuntary soldier.²⁶ The objection strengthens if one thinks that the reason a soldier on the just side can kill an involuntary soldier unjustly attacking his homeland is the same reason he can kill a voluntary soldier doing the same. The idea here is that the aggressor's consent plays no role in justifying defensive violence in the involuntary case and that the justification is the same in the voluntary and involuntary cases.

As mentioned in the beginning of the article, the justification for killing an involuntary attacker has to rest on a right being lost (waived or forfeited) or overridden because such an attacker does not consent to fight, let alone consent to be targeted as a price for doing so. If forfeiture works, there is good reason to reject the consent model because forfeiture can explain why and when defensive violence is permitted. Arguably, it can do so in both individual and collective violence cases. The price of this move, though, is to adopt the forfeiture model generally and not just in the context of war. As noted above, this theory has been subject to a series of criticisms.

A related objection is that even if consent does justify killing members of the military, it does not justify killing civilians or breaking their things, even if done so indirectly. The problem with the related objection is that if soldiers can consent to be destroyed in wartime so long as it is done within international rules, the same can be said for the indirect death and destruction done to civilians. That is, civilians might consent to indirect harm so long as it occurs within the rules. After all, if governments in advanced nations are justified by consent and what people consent to is a set of rules that allows for indirect harm within certain parameters, then it is not clear why civilians' consent does not authorize this harm.

Second, McMahan argues that even if soldiers in standing armies consent to allow opponents to try to kill them, this is not true for soldiers who volunteer for a particular war.²⁷ Consider, for example, people who volunteered to fight in World War II. McMahan asserts that they didn't volunteer to be targeted. This objection misunderstands how consent works. If the consent argument works, it is the soldiers' consent to their government and its laws that permits them to be targeted. Consent operates in the same

²⁵ See Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), pp. 51-60. Uwe Steinhoff discusses the need to defend noncombatants as the justification of wartime killing. See Uwe Steinhoff, "Debate: Jeff McMahan on the Moral Inequality of Combatants," *Journal of Political Philosophy* 16, no. 2 (2008), pp. 220-26.

²⁶ See Frowe, *The Ethics of War and Peace*, p. 120.

²⁷ See McMahan, *Killing in War*, p. 53.

way whether the soldier is consenting to serve in a standing army or to fight in a particular war and, also, whether or not he recognizes that it permits opposing soldiers to target him. This can be seen in the fact that volunteers for a standing army and a particular war take the same oath (at least in the U.S.). In addition, it is not clear why we should think they have different intentions. After all, they consent to obey the same set of laws that in fact incorporates international agreements, even if they may not know, or even think about, this feature of the laws any more than NFL players know, or even think about, some of the obscure rules that govern NFL football.

Third, McMahan argues that the consent argument confuses consent with taking the risk of being killed by enemy soldiers.²⁸ *Contra* McMahan, if what soldiers consent to are laws that include a legal permission for opponents to target them, then it is actual consent to be targeted and not a mere recognition of a risk.

McMahan or others might respond that giving another moral permission is different from giving him legal permission. In this context, though, consent theorists might assert that what is being consented to is a waiver of a right to punishment or compensation against opponents and that this waiver has both moral and legal aspects. By analogy, when boxers consent to a match, they waive both moral and legal claims against being battered by the other.

Fourth, McMahan argues that even if soldiers did consent to allow enemy soldiers to try to kill them, consent is not sufficient to make an act permissible.²⁹ In particular, McMahan argues that a lesser-of-two-evils condition must also be present for an act to be permissible.

There are different pictures of how side-constraints work. Here is what I think is the best picture. Leaving aside consequentialist considerations, a plausible view is that an act is right if and only if it does not infringe a side-constraint. On this account, a side-constraint simply is a duty one person owes another.³⁰ On this account, a two-person duty (one person owes another a duty) just is a claim viewed from the perspective of the person to whom the duty is owed. If this is correct and if valid consent eliminates a claim, which is its function, then there is no other wrong-making feature present. That is, absent consequentialist considerations, valid consent is sufficient to make an act permissible. McMahan and others might disagree.

A variant on this objection is that even if members of the military waive their right against others trying to kill them, this does not justify unjust

²⁸ *Ibid.*, p. 52.

²⁹ See *ibid.*, p. 56.

³⁰ I am assuming here that there are no free-floating wrongs. These are acts that are wrong on non-consequentialist grounds, but do not wrong anyone. For a discussion of them, see Joel Feinberg, *Harmless Wrongdoing: The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1988), chap. 28.

aggression.³¹ Even if this is correct, it still is true that the worst features of war are killing and property destruction. If these things are permissible in virtue of the two sides having waived rights against them, then while unjust aggression is not thereby made permissible, it is far less wrong than ordinarily thought. It is far less wrong in virtue of the deactivation of the strongest wrong-making reasons—namely, those against killing people acting justly and destroying their property. Also, if wrongness is not a matter of degree, then the conclusion can be restated in terms of the weakening of the normative force of the reasons against such aggression.

Still, it might be argued that voluntary members of the just side of a war at most waive their right to punish or receive compensation from members of the unjust side. This is not the same as waiving one's right against being attacked. By analogy, a homeowner might sell his legal right to punish or receive compensation from trespassers without waiving his legal right against their trespassing. The homeowner is still legally free to try to prevent their trespassing through the use of force, threat, or fence. By analogy, members of the military engaged in unjust aggression still act wrongly even if those they wronged may not legally (and, perhaps, morally) punish or receive compensation for the wrongdoing. This is a good reason to think that consent theory does not warrant unjust aggression even when done within the confines of international warfighting rules. I am assuming here that rights against trespass and aggression are possible even when disconnected from derivative rights such as the right to punishment or compensation for infringement of the primary rights.³² In contrast to killing in war, boxers and voluntary gladiators have waived the primary right against aggression and not merely the secondary right concerning responses to the aggression.

4. Conclusion

If a member of the military's consent is not made to a potential enemy or below the quality-threshold to be effective, then it is irrelevant to wartime killing and destruction. On the other hand, if members of the military consent to their government and their government consents to various international rules of war, including ones that allow opponents to try to kill them in wartime, then they have consented to be so targeted. This does not make aggression permissible because the consenters still have not waived their right against unjust aggression; they likely have at most waived their

³¹ See McMahan, *Killing in War*, p. 59.

³² An argument that the derivative rights are justified by the same ground as the primary right and thus necessarily accompany them, can be seen in Jan Narveson, "Pacifism: A Philosophical Analysis," *Ethics* 75, no. 4 (1965), pp. 259–71; and Jan Narveson, "Is Pacifism Consistent?" *Ethics* 78, no. 2 (1968), pp. 148–50. This is not the case if they are distinct moral relations and the ground (e.g., autonomy) allows them to be separately maintained or alienated.

right to take certain punitive and compensatory actions in response to the aggression.³³

³³ I am very grateful to James Delaney, Neil Feit, David Hershenov, Jason Rourke, and Dale Tuggy for their comments and criticisms of this argument.

