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ETHICS, FORCE, AND POWER: ON THE POLITICAL PRE- CONDITIONS OF JUST WAR

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ABSTRACT. Benbaji and Statman’s contractarian ethics of war offers a powerful new philosophical defence of orthodox conclusions against revisionist criticism. I present a two-pronged argument in reply. First, contractarianism yields what I call ‘decent war theory,’ a theory in which war between decent states is paradigmatic. I argue, by contrast, that states should treat wars against indecent states as paradigmatic, resulting in a Rawlsian alternative that issues in an ethics closer to revisionism. The second prong argues that the symmetrical international distribution of power required by contractarianism throws into doubt the viability of war as an instrument for securing just ends. But I argue that there is a very important lesson to take from Benbaji and Statman’s analysis here. Even if contractarianism is arguably weakened by its political assumptions, revisionists frequently fail to pay any attention to the vagaries of power and their effects in shaping the outcomes of different accounts of ethics. I therefore argue that just war theory in general ought to develop an ethics with sufficient versatility to respond to shifts and variations in the distribution of military power. In particular, philosophers must consider morally defensible ways in which decent states can challenge rising indecent powers.

I. DUELS AND WAR

In *The Journal of a Tour to the Hebrides*, James Boswell records a remark by Samuel Johnson about the practice of duelling:

We talked of the ancient trial by duel. He did not think it so absurd as is generally supposed: ‘For,’ said he, ‘it was only allowed when the question was *in equilibrio*, as when one affirmed and another denied; and they had a notion that Providence would interfere in favour of him who

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was in the right. But as it was found that in a duel, he who was in the right had not a better chance than he who was in the wrong, therefore society instituted the present mode of trial, and gave the advantage to him who is in the right.¹

Historically, war has often been imagined as a duel writ large, but the current prominence of ‘just war’ approaches has largely eclipsed the idea.² Just war theory presupposes questions of justice that aren’t ‘in equilibrio’; its central concern is with cases where one party has a clearly discernible claim of justice and, by hypothesis, its opponent does not. Given its commitment to harnessing the means of war to the ends of justice in cases like this, its proponents have an interest in distinguishing the practice of just war quite sharply from the impartial contest of the early-modern duel for the reason Johnson indicates.

In this article, I consider a range of different ways in which theorists might envisage yoking the practice of war to the pursuit of justice. One of the most powerful recent contributions, Yitzhak Benbaji and Daniel Statman’s contractarian account in *War By Agreement* (2019), explicitly distances the institutions of war from duelling: ‘Duels,’ it argues, ‘likely amount to one of the worst conflict resolution methods.’³ And yet, as I shall argue, in some important respects, the conception of ‘justified’ war that arises from Benbaji and Statman’s contractarian analysis isn’t so very far removed from the practice described by Johnson. In fact, the commitment to normative egalitarianism that motivates the contractarian account models just war in a way that bears a close resemblance to duelling in important respects. I argue in Sect. 2 that, by imagining the social contract not only as an agreement between decent states but also as a framework to regulate conflict between them, the idea of ‘war by agreement’ supports an egalitarian *jus in bello* at the cost of deep contradictions in the theory of *jus ad bellum*. Moreover, by making war between decent states paradigmatic, the

¹ Samuel Johnson and James Boswell, *A Journey to the Western Islands of Scotland and The Journal of a Tour to the Hebrides*, ed. Peter Levi (London: Penguin, 1984), p. 167.

² Diego Panizza, ‘Political Theory and Jurisprudence in Gentili’s *De Iure Belli*: The Great Debate between “Theological” and “Humanist” Perspectives from Vitoria to Grotius’, *International Law and Justice Working Papers*: <file:///D:/Downloads/SSRN-id871754.pdf>; Carl von Clausewitz, *On War*, tr. Michael Howard and Peter Paret (New York: Knopf, 1993), p. 83: ‘War is nothing but a duel on a larger scale.’

³ Yitzhak Benbaji and Daniel Statman, *War by Agreement* (Oxford: Oxford University Press, 2019), p. 63.

contract side-lines the most salient types of real-world case, pushing them to the theoretical margins in favour of cases where opposing claims of *jus ad bellum* are more closely matched.

Whereas the argument in Sect. 2 concerns the contractarian account in particular, a second line of argument prompted by the contractarian view and concerning the linkage between war and justice is applicable to just war theory more generally. In Sect. 3, I argue that it is unclear how the wars permitted within the terms of 'war by agreement' can be expected, on the whole, to serve justice rather than injustice. While this problem is thrown into sharp relief by Benbaji's and Statman's adoption of a systematic, international perspective and their careful attention to war's institutional dimensions, it is also, I suggest, a matter that just war theorists more generally ought to take seriously. Work on the ethics of armed conflict has paid insufficient attention to the theme of power and its relationships with force and morality. I argue that a serious attempt by just war theorists to envisage armed force as a means of supporting justice must pay greater attention to the vagaries of power balances in the international order. Doing so is not only a matter of *applying* just war ethics but also requires rethinking them in substantive ways. In particular, the just war idea (whether contractarian in form or not) has to confront a Kantian objection that the outcomes of war are decided by factors that act independently of the merits of the causes for which they are fought. To have any chance of formulating a convincing reply, I argue, theorists of just war must be prepared to ask whether pursuing and defending a balance of international power favourable to decent states ought to be considered legitimate concerns of *jus ad bellum*.

II. THE DOCTRINE OF THE DECENT WAR: BENBAJI AND STATMAN

Benbaji and Statman's idea of 'war by agreement' is offered as a credible alternative to both pacifism and realism, showing how, 'wars can be morally justified at both the *ad bellum* level [...] and the *in bello* level.'⁴ As such, it is characterized as an account of the 'just war.'⁵ It isn't quite clear, however, that this characterization is right, as I will try to show. In doing so, I will focus mainly on its theory of

⁴ Benbaji and Statman (n.3), p. x.

⁵ *Ibid.*, p. 110.

jus ad bellum and, in particular, on the just cause criterion, but the consequences of a successful challenge to this part of the theory are likely to extend to the *jus in bello*, whose egalitarianism is motivated by it. I will argue in Sect. 2.A that the contractarian theory of just war amounts to a peculiar new thing, *decent war theory*, and I raise questions (Sect. 2.B) about the coherence of its underlying assumptions. In Sect. 2.C, I argue that reframing the contract around *indecent* wars (wars where one party is indecent) avoids these difficulties but at the cost of conceding a non-egalitarian *jus in bello*.

A. Decent and Indecent Wars

That Benbaji and Statman's contractarian theory assumes that decent states might agree on rules among themselves for the exigency of war is itself entirely reasonable. What sets their theory apart, however, is the fact that it takes wars between decent states as theoretically paradigmatic. According to Benbaji and Statman, the framework of law stemming from the UN Charter and International Humanitarian Law

is best understood as a contract between decent states whose aim is to maintain the peace of the status quo ante. As part of this contract, states agree to outlaw the use of force. They waive their precontractual moral right to use force even where force is necessary to achieve certain just aims. And they allow each other to go to war in defence of their contractual right against the first use of force.⁶

Yet, although the heart of the social contract is an agreement between decent states to outlaw war, the pact is nonetheless premised on the expectation that its signatories won't be able to guarantee *their own* full compliance. The 'threat of armed conflicts between decent states comprises a permanent element of international life'.⁷ This is what motivates decent states to agree to a social contract and the resulting *jus in bello* is, it seems, modelled on wars of this sort. This is because 'under conditions of minimally just symmetrical anarchy, wars between decent parties that are governed by the traditional war convention are less harmful and involve fewer violations of rights than wars governed by precontractual morality'.⁸ In fact, when Benbaji and Statman hypothesize an ideal international

⁶ Ibid., pp. 2-3.

⁷ Ibid., p. 72.

⁸ Ibid., p. 163.

society in which there are *only* decent states, they still believe in the need for a theory of war. Even were the entire globe populated only with decent states, the need for a convention to govern the outbreak, conduct, and termination of wars would be an indispensable part of its normative structure.⁹ As it is, however, the realities of contemporary international politics are characterised in more modest terms. The states that design the social contract assume a world 'divided into mostly decent states, a minority of indecent states, a minority of very small and weak states, and a minority of decent and indecent stateless nations (some of which are entitled to political independence in their own states).'¹⁰ The war convention that Benbaji and Statman envisage is reasonable against an empirical background in which decent states predominate but some indecent states still exist.

Motivation for a theory of just war arises from the partiality of decent states, which in an anarchical condition could give rise to conflict. Decent states cannot rule it out entirely *ex ante* because:

First, they prefer the promotion of their own interests to the promotion of the interests of other states. Second, they care about protecting their own rights more than they care about protecting the rights of others. Finally, partial states are biased towards themselves. They tend to judge the normative and factual issues at stake in a way that is consistent with their own interests.

These factors account for the occurrence of war in the current international order, motivating and to a certain extent excusing the emergence of threats. Without a 'global government that could enforce the rights and entitlements of states,' all are animated by a 'prudent suspicion [...] towards other players' and rightly fear the prospect of 'a real explosion'.¹¹

Absence of global government is one feature of the 'minimally just anarchy'. Another is the assumption that 'thanks to the minimal decency of the parties, most of the perceived injustices in international relations are only moderately unjust in the sense that an impartial observer will find it hard to determine whether it is morally justified to remove the injustice by using lethal force'. The anarchy is also 'symmetrical,' in that even the strongest parties have 'a prudential reason' to resolve differences about justice 'by bargaining

⁹ Ibid., p. 166. Cf. p. 103.

¹⁰ Ibid., p. 191.

¹¹ Ibid., p. 72.

rather than fighting'.¹² In effect, this means that the war agreement is modelled on a set of causes of conflict most of which are more moderate, while graver causes such as the threat of genocide are relegated to a normative space outside the paradigmatic structures of the theory. The details of the resulting ethical code—particularly the *jus in bello*—are worked out against a baseline of seriousness defined by decent states falling out, by and large, over moderately unjust threats rather than of decent states (or individuals) responding to deadly serious threats from indecent parties.

Given these circumstances of international justice, Benbaji and Statman think it would be both rational and reasonable for decent states to agree among themselves a pair of major amendments to the precontractual morality of resort to war. On the one hand, a suite of 'justice-implementing war[s]' that precontractual morality sometimes justifies are prohibited—'subsistence wars, preventive wars, [and] wars of humanitarian intervention'.¹³ On the other, all decent states are granted a right to fight wars of national defence against violations of territorial integrity, even violations that would fall short of justifying war under precontractual morality. Underpinning both is the agreement to prohibit the first use of force, an agreement intended to counteract the tendency of partiality to lead decent states into conflict with one another:

Because of states' partiality, they are sometimes misguided about the facts or about their moral significance. Conjoined to their partiality, their ignorance might bring about armed conflicts between states; decent states could find themselves in armed conflicts with other decent states. [T]o minimize armed conflicts that under symmetrical circumstances are mostly bad for all parties, states should undertake a sweeping prohibition against first use of force. If such a rule were followed, that would create a better world in terms of both the promotion of the parties' interests and the protection of human rights.¹⁴

There are other types of war, of course, but these are seen as derogations from the paradigm case. On the one hand, humanitarian intervention has been ruled out along with other 'justice-implementing wars'. But, on the other, wars against attempts to inflict mass murder or 'severe oppression'¹⁵ can occur outside the system, as it were—as Benbaji and Statman emphasize, '[i]n those cases, one

¹² Ibid., p. 73.

¹³ Ibid., p. 73.

¹⁴ Ibid., p. 73.

¹⁵ Ibid., p. 75.

of the parties is indecent'.¹⁶ Such attempts might be justifiable, but the paradigm case is one of decent-on-decent war.

B. *The Coherence of Decent War Theory*

The result of agreement is a practice we might call 'Decent War'. One of its most peculiar features, then, is that according to 'Decent War Theory,' decent states seem to be expected to sign up to an agreement premised on the expectation that they will violate the agreement.

The tensions within this view are apparent from the strain it puts on Benbaji's and Statman's vocabulary: rules of international order intended to deter first-strike wars are sometimes described as being designed to prevent decent states from *becoming* indecent;¹⁷ but the same rules are often described as being intended to regulate armed conflicts between *decent* states.¹⁸ Similarly, the degree to which wars between such states can truly be judged by third parties to be justified on one side or the other is left in some doubt. On the one hand, the whole contract is based on the inability of even decent states to guarantee that they can behave decently. The wars that they will consequently become embroiled in and for which they must legislate are motivated not by a wilful rejection or violation of international order, but by reasonable partiality and uncertainty—the factors that made the contract necessary. And so the basic model is that of a war between two decent states, each acting in good faith, albeit that at least one side is likely to be in the wrong (even if in a way that might never be clearly perceptible). On the other hand, the *ad bellum* prohibition on first-strike war is intended to identify an objectively visible criterion by which to determine whether someone has broken a rule. Yet if decent states are identified as those that will follow rules in good faith and will only break them when partiality combines with indeterminacy to run them into error, then it would seem odd to expect them to violate a clear and visible rule. Surely such a rule would be violated only by indecent states. Hence the phrasing Benbaji and Statman use according to which decent states might *become* indecent through acts of aggression.

¹⁶ *Ibid.*, p. 75, n. 10; pp. 170–171.

¹⁷ *Ibid.*, pp. 171, 175, 188.

¹⁸ *Ibid.*, e.g. pp. 72, 73, 163.

How might it be possible to have it both ways? How can decency be associated with compliance while just war is modelled on decent-on-decent conflict? One way might be by using the word 'decent' to make substantive, empirical, claims rather than to indicate norm compliance. For the most part, Benbaji and Statman use it in the latter way:

Despite their partiality, [decent] states acknowledge that individuals are subjects of rights and that each other member state within international society is entitled to sovereignty. States are decent in another sense: they tend to respect the contractual duties they undertake. The fact that they placed themselves under a contractual duty amounts to a weighty reason for them to respect it.¹⁹

So decency equals *mutual respect* as expressed by *moral compliance* in external relations. Understood in this sense, 'decent' states are those who respect the law; therefore, those violating the law are 'indecent' by definition; and it is only trivially true that decent states don't break the law. But, understood as a characterization of the internal constitution of a state, it is often supposed that 'decent' states are *ipso facto unlikely* to violate the law. Putting two and two together, it might then be argued that states that are decent in the international, behavioural, and definitional sense, have common features that explain their decency, e.g. the accountability of their governments might explain a reluctance to be seen as aggressive. John Rawls, for instance, characterizes a class of internally and externally benign states as 'well-ordered peoples': 'both liberal and decent, [they] do not initiate war against one another; they go to war only when they sincerely and reasonably believe that their safety and security are seriously endangered by the expansionist policies of outlaw states'.²⁰

Although 'decency' generally refers in *War By Agreement* to the external behaviour of states, Benbaji and Statman sometimes use it to characterize the inner life of states. In discussing deterrence, for instance, they argue that the internal complexion of 'partially decent states' renders them susceptible to an international regime of self-help penalties: 'Public opinion in decent states is flexible and sensitive to the costs individuals have to bear as a result of mistaken political decisions. In turn, the political decisions in these states are

¹⁹ Ibid., p. 72.

²⁰ John Rawls, *The Law of Peoples* (Cambridge MA: Harvard University Press, 2001), pp. 90–91.

sensitive to public opinion'.²¹ If we use the word 'decent' to indicate well-ordered states whose internal character makes them unlikely to aggress, then we can imagine ways in which decent states (in this sense) might nevertheless end up behaving indecently (in the dominant external sense). It could be, for instance, due to an expectation that, in a long-range historical perspective, all states—however decent—eventually decline internally and become corrupt.²² And so they lose their external decency too as their proneness to aggression consequently increases. But, if we make this move, then why explain the need for just war theory with reference to the behaviour of *decent* states and the effects of reasonable partiality? And why model *jus in bello* on decent-on-decent wars? Surely the only justified wars that ought to arise on the premises adopted by Benbaji and Statman are between decent victims and indecent (albeit sometimes formerly decent) aggressors.

Tensions between the various presuppositions of 'war by agreement' explain some apparent equivocation within the theory as set out here between two models of just war—between decent war proper (decent on decent) and just war by decent states against formerly decent but now indecent states. A partial reply to this criticism might be to distinguish between two types of rule violations by states. One is based on precontractual morality and applies in precontractual circumstances, the other on contractual ethics under a social contract.²³ This schema permits us to envisage an anomalous case where a state honours precontractual rights but at the expense of contractual duties. Such a state might be seen as at the same time decent in one sense and not in another.²⁴ Insofar, however, as it violates the *contractual* morality currently in force, the state that strikes first would still be indecent in that particular sense. There might therefore be two different sorts of indecency: (a) where a state pursues a pre-contractually just war that is prohibited by the social contract;²⁵ or, what might be regarded as worse all else being equal,

²¹ Benbaji and Statman (n.3), p. 105.

²² David Hume, *Essays, Moral, Political, and Literary*, ed. Eugene Miller (Indianapolis: Liberty Fund, 1985), p. 51.

²³ Benbaji and Statman (n.3), p. 72.

²⁴ Benbaji and Statman occasionally treat such cases as being, to a degree, 'decent'. *Ibid.*, pp. 103, 203.

²⁵ *Ibid.*, p. 103.

(b) where a state pursues war that is unjust *both* pre-contractually *and* contractually.

For Benbaji and Statman, however, the contract is supposed to supersede precontractual morality rather than subsisting alongside it in a two-tiered ethics. *War By Agreement* models just war on a conflict between two decent states fighting in good faith, each believing itself to be in the right according to contractual morality. Doing so is attractive as a way of justifying an egalitarian *jus in bello* by indicating how opposing combatants could reasonably suppose themselves to be engaged in justified violence. But the theory faces something of a dilemma on this point. On the one hand, clarifying international ethics by way of a rule prohibiting first-strike wars upholds the possibility of just war but does so in such a way as to render doubtful the description of any state that violates it as 'decent'. On the other, highlighting sources of uncertainty and indeterminacy might explain how a state could claim to be evidence-relatively decent even when it is fact-relatively in breach of the rules. But if the epistemic fog is dense enough to make it impossible for rival parties to know who has just cause, the resulting theory will lean more towards 'regular war' than just war. War would become a legitimate means of asserting a claim when opposing states that honestly believe themselves justified have exhausted all available means of peaceful resolution (as long as they follow formal requirements of *jus in bello*). Benbaji and Statman do not make this move. Instead, they plausibly believe, simply, that international aggression is, in fact, more readily discernible. But, having adopted this position, it leaves us wondering why we would consider those who flout an *objectively* clear rule as 'decent' states. And, if we really shouldn't, should we not model the *jus in bello* on conflicts between decent states and their *indecent* attackers?

C. *Are Decent Wars Ideal or Non-Ideal?*

In any case, modelling ethics on decent wars renders the theory less relevant to those cases that seem like they ought to be paradigmatic: cases in which at least one side is unambiguously indecent. It is surely the frequency of threats from indecent states—projected externally as aggression or internally in genocides and violent

oppression—that compels philosophers to contemplate the possibility of legitimate armed force in the first place. The non-paradigm status of such cases in Benbaji’s and Statman’s war agreement means they are less salient in determining the shape of the ethics and law that emerge from the social contract than they ought to be. They are instead relegated to a theory of exceptions or caveats attached to the general rules. Before I turn to the relation between war as a means and the ends of justice (Sect. 3), I’ll conclude this part with a comment on the question of where this places just war theory in relation to ideal theory. Benbaji and Statman’s theory implies an unexpected answer.

Rawls, of course, locates just war in the *non-ideal* theory of the Law of Peoples. One of non-ideal theory’s central concerns is with the means by which outlaws may be brought into eventual alignment with ideal theory.²⁶ It thus deals with ‘questions of transition, of how to work from unfavorable conditions to a world in which all societies come to accept and follow the Law of Peoples’.²⁷ For Benbaji and Statman, by contrast, the international law of war and the social contract that it expresses aim ‘to maintain the peace of the status quo ante’.²⁸ This is markedly less ambitious, normatively speaking. And, not only does *War By Agreement* therefore set aside a defining ambition of non-ideal theory, but it arguably then elevates the theory of the justified war to a position within ideal theory. Fundamentally, the economy of violence that Benbaji and Statman’s contractarian account encapsulates is generated by insecurity arising from the natural partiality of reasonable parties and the enduring uncertainties and indeterminacy of norms.²⁹ Consequently, even if we envisaged the elimination of unabashed aggression from international affairs, it would still be necessary to allow for a legitimate resort to violence. The problem of legitimate war thus seems to arise as part of what appears to be an *ideal* theory. Occurring between decent states, the problem isn’t expected to disappear but occurs as a perpetual accompaniment of best-case international compliance. But there is also a codicil to the theory addressing *non-ideal* war—war

²⁶ Rawls, *Law of Peoples*, p. 89.

²⁷ *Ibid.*, p. 90.

²⁸ Benbaji and Statman (n.3), pp. 2–3.

²⁹ On the idea of ‘economy of violence,’ see Sheldon Wolin, *Politics and Vision*, expanded edition (Princeton: Princeton University Press, 2004), p. 198.

where one party fails to comply with the decent war ideal. So rather than falling neatly within the bounds of non-ideal (i.e. non-compliance) theory, as it does in Rawls's division of the Law of Peoples, Benbaji and Statman's just war theory spreads across normative international political theory as a whole, having both ideal and non-ideal forms.³⁰

One way to simplify matters and address the tensions within Decent War Theory is to follow Rawls in proposing a two-part theory with war located in the second and not the first part. The first would propose terms by which decent states should engage with one-another. Since they are decent, they will not wage war with one-another. This has to do with their internal make-up and how it motivates them. They might also wish to insure themselves against lapsing into indecency by binding themselves to an agreement now not to engage in war with one-another later even if a subsequent generation became more belligerent.³¹ But the same states recognize the likelihood of wars with *other* parties, parties outside the contract insofar as they haven't complied (or haven't been able to) from the start (or have slid a long way from decency). As part of non-ideal theory, just war theory would arise *in the first and last instance* as a consequence of the need to regulate relations between decent adherents to the essentially pacifist social contract and those that reject it or are unable to satisfy its provisions.

If the wars that a social contract must provide for involve decent states in conflicts caused by indecent opponents, then its terms are likely to differ from those based on decent war. Since indecent-on-decent conflict would then be paradigmatic, Just Cause would be a graver, more substantive matter, doing much more to drive the conduct of war. No longer a matter of asserting conventional rights in sometimes relatively minor territorial contests, winning war would generally be a deadly serious matter. And if just war is paradigmatically war against *indecent* states, then the grounds for granting combat rights to enemy soldiers wouldn't be based on a common right to serve one's state in pursuing legitimate interests.

³⁰ Cf. James Pattison, 'The Case for the Nonideal Morality of War: Beyond Revisionism versus Traditionalism in Just War Theory,' *Political Theory*, 46.2 (2018): 242–268. There are, of course, rival accounts of the ideal/non-ideal distinction. For a critical review, see Zofia Stemplowska and Adam Swift, 'Ideal and Nonideal Theory,' *Oxford Handbook of Political Philosophy*, ed. David Estlund (Oxford: Oxford University Press, 2012).

³¹ My thanks to Cécile Fabre for pressing me to clarify this aspect of the agreement.

Instead, the focus would be on epistemic reasons why some soldiers might believe erroneously that their war is just when it isn't. Rather than thinking them *justified*, we would think of them as being excused to a greater or lesser extent for engaging in objectively wrongful violence. So far as the law is concerned, then, unjust warriors might well be granted indemnity from punishment for fighting but only as a trade-off granted for the sake of compliance with *jus in bello*.³²

III. WAR, JUSTICE, AND POWER

As I have just argued, one way in which the contractarian idea comes close to modelling war on the duel is by foregrounding cases where the justice of opponents' respective claims is closest to being 'in equilibrio'. A second has to do with the ways in which war is understood as a means capable of serving rightful ends. By definition, any theory of 'just' war must show how the means of violence can be made to serve at least some ends of justice. So even if we followed contractarianism in rejecting 'justice-implementing war,' we would still expect war to serve as a justice-preserving instrument.³³ In this section, I argue that the contractarian stipulation that power be distributed in a fairly even way internationally as a precondition for the war agreement undermines the utility of war as a justice-preserving means. But while this worry is thrown into particularly stark relief by contractarian analysis, it is a problem that rival schools of just war theory also face. To distinguish just war sharply from an international contest by duel, I argue that just war theory in general has to pay closer attention to the effects of the balance of power between decent and indecent international actors. In particular, it needs to find a place in its ethical provisions to respond to indecent states whose power is growing.

³² That is, something like what McMahan envisages in 'The Morality of War and the Law of War,' in Henry Shue and David Rodin (ed.) *Just and Unjust Warriors* (Oxford: Oxford University Press, 2008).

³³ Cf. Walter Benjamin, 'Critique of Violence,' in *Selected Writings, Volume 1*, ed. Marcus Bullock and Michael Jennings (Cambridge MA: Harvard University Press, 1996).

A. *War and the Ends of Justice*

Just war theory supposes that war is a legitimate means of securing just ends in certain circumstances. But it might be imagined doing so in subtly different ways. Tommie Shelby, for example, distinguishes four parts to Rawlsian non-ideal theory; war might be imagined contributing to each of them:

- (1) Principles of *reform and revolution* are standards that should guide efforts to transform an unjust institutional arrangement into a more just one.
- (2) Principles of *rectification* should guide attempts to remedy or make amends for injuries and losses victims have suffered as a result of ongoing or past injustice.
- (3) Principles of *crime control* should guide the policies a society relies on when attempting to minimize and deter individual noncompliance with what justice requires.
- (4) *Political ethics* are the principles and values that should guide individuals as they respond to social injustices and that serve as the basis for criticizing the failure of individuals to promote just circumstances and to avoid complicity with injustice.³⁴

Benbaji and Statman consider war in relation to all these functions at one point or another. Their explicit rejection of ‘justice-implementing war’ rules out war in the service of (1). Instead, their account sees war contributing to (4) in its provision for defensive wars and (3) insofar as international law is enforced by means of military self-help by individual states. War might also be seen as serving justice in sense (2) insofar as defensive wars sometimes seize back something that was taken just now (or is being taken in the present moment or about to be). But Benbaji and Statman’s conceptions of just cause and imminence prohibit wars to remedy wrongful historic annexations and other injustices presently built into international order, so (2) is largely rejected.

If we bundle Shelby’s categories together, then, and map them onto the analytical categories set out by Benbaji and Statman, we get three distinct ways in which war might serve justice:

- (i) War to implement justice transformatively by changing the international order, e.g. by reforming the constitution of some states within that order and by remedying historic injustices (corresponding to (1) and (2) above);
- (ii) War to defend *precontractual* rights and values (a variant of (4) above that incorporates elements of (2) and (3));
- (iii) War to defend *contractual* rights (a second variant of (4) above that incorporates elements of (3)).

It’s explicit in Benbaji’s and Statman’s account that (i) and (ii) are ruled out. The social contract protects inherited distributions of power and position within the international order from revisionary warfare; and precontractual moral claims are regarded as invalid

³⁴ Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* (Cambridge, MA: Harvard University Press, 2016), p. 12.

causes for war except when they coincide with the terms of the contract itself. So that leaves just (iii) as a legitimate possibility according to the war agreement. But I also want to add a fourth (iv) which I think has a bearing on Benbaji and Statman's theory. This is because, as I shall argue, it's ultimately the one way in which war might be expected to serve justice with any consistency once we take into account the effects of the background distribution of power:

(iv) War as a safety valve that serves justice by allowing pressure to vent, forestalling the greater destruction that would occur if it were allowed to build.

The thought here is that the current international system will inevitably experience frictions leading to war—this is true with or without a contract. But without regulation by contract, wars will be greater in number and more indiscriminate and destructive. To address this unregulated violence, the contract imposes restrictions that prohibit some precontractually permissible wars and regulate the remainder. And to induce parties into accepting these restrictions, all states are granted a contractual permission to fight across a limited range of cases. This range is the smallest that states can realistically be asked to limit themselves to, encompassing only those where states believe their territory to be under imminent threat of aggression. But, even so, this range exceeds the remainder of precontractually permissible wars: most contractually permissible wars are also precontractually permissible, but some are not. And the contract grants to all combatants in such wars—whether fighting for a just cause or not—privileges and immunities that precontractual morality would grant only to some. Taken as a whole, this bundle of contractual permissions is, in effect, a concession to incorrigible causes of violence in the international system made for the sake of overcoming the corrigible causes. Contractually permissible war could therefore be seen as venting pressure insofar as the contract leaves open just enough normative space to allow the incorrigible minimum of violence to express itself. If it failed to do so, then states believing themselves to be faced with intolerable international aggression would violate its terms citing precontractual morality, and the contract's normative authority would eventually give way to the unrestricted conflict it was instituted to curtail.³⁵

³⁵ I make no claim as to whether this system would succeed. For instance, permissible wars might themselves build 'pressure' of a certain kind if they give rise to vendettas (as Alec Walen has suggested to the author).

Notably, function (iv) sees war as serving justice in a fundamentally different way from any of the other three. Comparing it with the rest, we might think, following Ludwig Wittgenstein, ‘of the tools in a toolbox: there is a hammer, pliers, a saw, a screwdriver, a rule, a glue-pot, glue, nails, and screws. – The functions of [war] are as diverse as the functions of these objects.’³⁶ Number (iv) gives war a function that is as different from its function in (i), (ii), and (iii), as that of a valve is from that of a hammer. Consider, for instance, a conflict in which state B wrongfully attempts to seize territory from state A. If the function of war is understood as either (i), (ii), or (iii), it serves justice if and only if, by using it, A successfully blocks B’s attempt at expansion. But if the function of war is understood as (iv), then war could serve justice regardless of the outcome of A and B’s war. It would serve justice indirectly if the permission to contest their respective claims in this case by force of arms had successfully induced both states to refrain from the wider array of other wars and tactics that they would have been likely to engage in had they followed precontractual morality rather than the terms of the agreement.

My argument is that Benbaji and Statman’s contractarian account ultimately gives strongest assurances that war will serve justice in sense (iv) and only a much weaker assurance that it will do so in sense (iii). In doing so, it runs the risk of treating war as a final arbiter in contestations of right and thus renders war even more like a duel on their account than a matter of justice in the sense envisaged by just war theory. To see why, it is necessary to turn to Benbaji and Statman’s analysis of the political conditions under which ‘war by agreement’ can function effectively and, in particular, to their treatment of the theme of power.

B. ‘Giving the Advantage to Him Who is in the Right’

The contractarian war agreement functions correctly only when certain political conditions prevail internationally. A symmetrical distribution of power renders most potential armed conflicts resolvable to everyone’s greater advantage without recourse to war. Further conditions specify why decent states nevertheless need a war

³⁶ Ludwig Wittgenstein, *Philosophical Investigations*, tr. G E M Anscombe (Oxford: Blackwell, 2009), p. 9.

agreement. And they set out conditions necessary for the contract agreed to work. They include the condition that the terms of the contract must be enforceable and that, though there is no unified state-like enforcer, there is a viable alternative enforcement mechanism through self-help.³⁷ The viability of the regime as a whole therefore depends on enforcement in this way: 'it is in states' self-interest to enter a contract that condemns first use of force, *if and only if other parties join the treaty and (for the most part) observe it*' (emphasis added).³⁸ These conditions are 'likely to be satisfied only if the contractual duties that the agreement contains—especially the contractual duty not to wage pre-contractual wars—are enforceable'.³⁹ And the only way of enforcing the rule against first-strike war is by defensive war.⁴⁰

The contractarian view offered by Benbaji and Statman therefore relies on the assumption that war will serve justice in sense (iii) outlined in the previous section, i.e. not as a valve but as a hammer. To serve the contract as a whole, just war must serve justice directly as an instrument for purposes of defending and enforcing contractually agreed rights. But why would we expect institutionalising the practice of 'war by agreement' to enable just sides to secure these aims? To do so, it would need to offer them a better than 50% chance of success; otherwise, it would not be self-enforcing and therefore wouldn't be binding. But it's not clear to me that 'war by agreement' satisfies this condition.

Whereas Benbaji and Statman assume an even distribution of power, just war theorists often seem to rely tacitly on an assumption that the states that are likely to have just cause for war will also be the most powerful, best armed, and most likely to win. Absent this assumption, it's hard to see why just wars are likely to succeed more often than unjust wars. If so, the institution of war suffers from the flaw identified by Johnson in the duel: it doesn't particularly favour those with justice on their side, leaving the vagaries of skill, force, and sheer luck to determine outcomes. In fact, the more even the distribution of power between potential rivals, the closer war comes to acting like a duel. This is because, based on a law of averages, in

³⁷ Benbaji and Statman (n.3), pp. 75–76.

³⁸ *Ibid.*, p. 75.

³⁹ *Ibid.*, p. 76.

⁴⁰ *Ibid.*, p. 76.

those circumstances war will serve both *justice and injustice* with equal frequency, proving itself an instrument of justice in sense (iii) only 50% of the time. In fact, the result of equal power might actually be worse than that. Those wrongfully initiating first-strike wars have the initiative in determining when to fight, enabling them to ensure that the timing best suits them. All else being equal, this should raise their rate of success above 50%. By contrast, because they have prohibited themselves from initiating first-strike wars, decent states lack agency in determining which causes will be contested by force and in deciding the timing of war.⁴¹ War is permissible to them only when indecent states aggress. In such cases, the only *ad bellum* choice available to decent states is whether to fight back or capitulate. Of course, the decent victims of aggression can decide not to fight when their chance of success falls below a certain level or when they fear that fighting would be disproportionate. But doing so won't materially improve their average rate of success. To conclude that it would, we would have to treat all those cases where decent states capitulated without resistance as if they weren't at the same time military victories for the aggressors. It would surely be perverse to do so. Either way, the degree to which war serves justice directly depends on the background distribution of power. If power tilts towards states prone to lapse into indecency, then it will tend to serve injustice. But if power in the best case is only evenly distributed, then whether it serves justice or not in any given case will be determined by luck.

War By Agreement carefully addresses questions of power but it does so in order to address quite a different problem.⁴² Benbaji's and Statman's worry is that the social contract will be accused of cementing existing asymmetries of power in the international system. It might do this if some states had sufficient power to be able to shape the bargaining range in any potential conflict in such a way that their advantage was always served:

Alas, by its very definition, the bargaining range of a conflict is determined by might rather than by right; that is, by the probability that one of the parties will win the war and by the costs of the war to each of the parties. Both factors are mainly a function of military power; the peaceful resolution that the Charter favours over fighting will reflect the power of states rather than the

⁴¹ It would be a different matter, of course, if humanitarian interventions were more widely permissible than Benbaji and Statman envisage since decent states could deliberate carefully about which cases to pursue and when. See *ibid.*, pp. 73 & 170–171.

⁴² *Ibid.*, chapter 3.

implementation of justice between them. The worry, then, is that even if a contract that condemns justice-implementing wars is expected to benefit all parties [it] might still be unfair.⁴³

This is a worry about the wars that *aren't* fought more than about those that *are*. Benbaji and Statman fear that a contract applied in an unevenly balanced international system would effectively prohibit otherwise just wars by weaker states while giving a freer hand to more powerful ones. My worry, by contrast, is about the effects of different possible power distributions on the outcomes of wars that the social contract *does* permit. In the absence of some guarantee either from the enduringly superior power of just sides or from a global order normatively and institutionally equipped to enforce justice collectively, war itself will be left to decide between opponents in a way that is wide open to influence by factors not answerable to justice.

A possible reply to this objection might cite the contractarian theory of *jus ex bello*. Victorious defenders of *justice* are permitted to inflict additional deterrent costs on aggressors. This, it might be argued, answers the worry that self-help in enforcing the law will fail: if only just sides are permitted this, then unjust sides face potential costs of defeat + *n*. This would further narrow the range of cases within which would-be aggressors might see war as presenting advantages.⁴⁴ But it isn't clear that adding these costs will skew the practice of war and its constitutive norms to the advantage of *justice*. In conditions of symmetrical anarchy, there is no reason *ex ante* to believe that the defender will win a particular war. Nor does the international society envisaged in the social contract have any means of *post bellum* adjudication or enforcement. So when unjust sides win, it seems likely that they'll claim just cause and impose additional costs on the decent states they defeat. It is therefore doubtful that adding the right to impose additional costs to the right of self-defence adds value. In the absence of a theory about how defensive war can be guaranteed (a greater chance of) success by comparison with aggressive war, it doesn't add any deterrence that wouldn't have been there already without a social contract.

So it's not clear, then, that, on the contractarian view, war will generally serve justice directly in sense (iii). Optimistically, it might

⁴³ *Ibid.*, p. 80.

⁴⁴ *Ibid.*, pp. 105, 110–111.

be expected to do so 50% of the time. If so, then it's hard to see how the rules of war set out in the social contract can be self-enforceable, a condition set out by Benbaji and Statman. In which case, if war could still be said to prove instrumental in securing justice, it looks like it's more plausible as a candidate for function (iv): rather than serving directly, it might do so indirectly like a pressure valve. If states don't commit to an institution of war with built-in constraints of the sort envisaged in the contractarian view, then it is to be feared that there will be more wars as they pursue precontractual rights and seek to implement unilaterally what they believe is demanded by natural justice. And those wars will be more destructive if each side decides on questions of *jus in bello* in light of precontractual morality. But if this means that permitting limited cases of legally restrained war serves justice by way of a valve from the perspective of the global order as a whole, it doesn't, of course, mean that war loses its direct instrumentality in pursuing ends from the perspective of particular belligerents. And when it is used to pursue them, there is, I think, no guarantee in the system of rules put in place by the social contract to ensure that just rather than unjust ends will be vindicated. The war becomes rather like one of Johnson's duels.

C. Power and the Theory of the Just War

The problem of power is readily identifiable in the contractarian account because Benbaji and Statman analyze explicitly the political preconditions of just war. But, even if it isn't always as clearly visible, the same problem is implicit in just war theory more generally. One reason for its obscurity might be the common habit of devising ethical recommendations from a unilateral perspective. If we theorize from the point of view of a single, decent state and consider only singular, hypothetical threats, then it can distract from questions concerning the overarching effects of different ethical models of war globally.⁴⁵ These effects are likely to vary according to facts about power and its distribution. If just war theorists shift perspective from the unilateral to the global and consider how war functions as a practice, then they are faced with an urgent question: how might just war theory address the disconnection between the vagaries of power

⁴⁵ Cf. Allen Buchanan, 'Institutionalizing the Just War,' *Philosophy and Public Affairs*, 34.1 (2006): 2-38.

and force, and the realization of justice? If it can't, then it might be necessary to concede Arthur Ripstein's Kantian objection to just war theory. For Kant, just war theorists, 'fail to grasp the fundamental moral problem with war: it resolves matters through force, and so determines results independently of the merits'.⁴⁶ As such, war is fundamentally unsuited to guaranteeing rights and the only way to ally it with justice is if belligerents are understood to have agreed implicitly that, whatever its outcome in each case, it will decide the issue under dispute. To reply convincingly to the Kantian objection, theorists need to reconsider further measures that could increase the rate at which the decisions of war match the decisions of moral judgement. Insofar as securing fundamental rights by means of war is likely to present itself sometimes as a moral duty, this is not only a matter of strategic importance but also, crucially, of ethics.

To begin with, if we stepped outside the contractarian framework and reintroduced the pre-contractual permissibility of unilateral humanitarian intervention, then it might already alleviate somewhat the problem of equalized chances of success identified in 3.B. In such cases, it would be up to decent states which cases for war to take up and when to do so.⁴⁷ They could therefore decide against some wars with insufficient chance of success or with disproportionate costs without conceding an immediate 'victory' to an international aggressor. Prudent timing would increase the rate of success across those cases where decent states decided to intervene. But the deeper problem of power would remain. Even in a normative framework that granted greater agency to decent states, a sufficient shift in the balance of power in favour of indecent states would equalise or further vitiate the rate at which war could be expected to serve just ends.⁴⁸

Responding to this problem as fully as possible therefore requires that theorists confront the problem of power itself and think about the morality of waging wars that are partly orientated towards

⁴⁶ Arthur Ripstein, 'Just War, Regular War, and Perpetual Peace,' *Kant Studies*, 107.1 (2016): 179–195, pp. 184–185.

⁴⁷ My thanks to Alec Walen for pointing this out. On pre-contractual permissibility, see Benbaji and Statman (n.3), p. 73.

⁴⁸ For a treatment of the implications of a 'post-liberal order' for the Responsibility to Protect doctrine and consequently for humanitarian intervention, see James Pattison, 'The International Responsibility to Protect in a Post-Liberal Order,' *International Studies Quarterly* (2021): <https://doi.org/10.1093/isq/sqab081>

defending or bringing about an international balance of power favouring justice—perhaps by encompassing preventive goals in the case of rising, aggressive powers, and transformative aims in cases where indecent states are susceptible to progressive internal change.⁴⁹ This is a matter of establishing and maintaining the political preconditions of just war *in general*. Less controversially, just war theory must at least ensure that *particular* just wars are underwritten by appropriate alliances to try to prevent individually or collectively powerful indecent states from leveraging the vagaries of international power in their favour. From an ethical point of view, fighting in coalition is clearly permissible. But if the only way to align war with morality in a particular case is for decent third parties to contribute their forces to a wider coalition, then it is likely that doing so is a *pro tanto* moral duty.⁵⁰ Moreover, the duty to enhance chances of success in the war in question will be even stronger if winning is also important for supporting a favourable background balance of power. This would be true, for instance, if the political complexion and allegiance of a decent state (or even of a state that is neither positively decent nor indecent) was likely to be determined by the outcome of war.

A systematic treatment of either preventive or transformative goals in relation to just war will have to await another time. But insofar it is necessary to provide a global environment within which decent states are able to defend fundamental rights against aggression, an overarching strategic orientation towards supporting a favourable balance of power appears to have *prima facie* moral justification. This would be something quite different from eighteenth-century balance of power theory in which war was seen as a remedy to any emerging asymmetry of power between states. Its aim was to ensure that no single state gained hegemony over Europe as a whole.⁵¹ The possibility to consider is rather that war might sometimes serve the purposes of maintaining or creating an asym-

⁴⁹ Such amendments to the 'just war norm' are explored by Allen Buchanan in 'Institutionalizing the Just War.' For an account of limited transformative aims in war, see Christopher Finlay, 'Assisting Rebels Abroad: The Ethics of Violence at the Limits of the Defensive Paradigm,' *Journal of Applied Philosophy*, 39.1 (2022): 38–55.

⁵⁰ Benbaji and Statman consider coalitions, (n.3), p. 171, but as a requirement designed to ensure legitimacy in certain cases by demanding that protagonists demonstrate that consensus exists on the need for war.

⁵¹ Cf. David Luban, 'Preventive War,' *Philosophy and Public Affairs*, 32.3 (2004): 207–248, p. 220.

metry that favours decent states and challenging any emerging preponderance favouring indecent states.⁵²

IV. CONCLUSION: POLITICAL THEORY AND THE ETHICS OF WAR

As it stands, then, the theory of ethical war offered in *War by Agreement* leaves the question of whether war will serve justice in any direct sense vulnerable to the vagaries of power. But, in doing so, it calls attention to a more pervasive problem in contemporary just war theory. If so, then what might be needed goes further in methodological terms than a narrowly *ethical* approach to the question of just war takes us. An *ethical* theory, as I intend the term, asks what a given actor might do, given a certain problem and faced with certain circumstances. That actor, we may assume, is innocent and the problem comes to it, as it were, from the outside. By contrast, a political theory of the ethics of war should situate ethical questions within a wider account of how war can be expected to serve as an effective means of securing justice. In that perspective, the question of whether just sides are likely to win or not is not wholly separable from the normative problem that the theory tries to solve. *War by Agreement* goes a considerable distance in the right direction and, in many ways, points the way forward.

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⁵² It also differs from the Bush doctrine's more narrowly defensive motivation. See Buchanan, 'Institutionalizing the Just War,' p. 8.

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