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"SELECTIVE REFUSAL, CONTINGENT PACIFISM, AND INTERNATIONAL LEGAL THEORY"

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Selective Refusal, Contingent Pacifism, and International Legal Theory

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During the Vietnam War, in the United States many young adults, myself included, filed for selective conscientious objector status when they were drafted to serve in the military. We were not opposed to all wars, but objected to the Vietnam War on moral grounds. Some of us relied, at least in part, on Just War criteria to show that the war was initiated unjustly, since the war was not a matter of U.S. self-defense, and was being waged unjustly as well, especially with the use of such chemical weapons as Agent Orange. Most of us did not consider ourselves pacifists since we recognized that a war like World War II might be justified. We did not see that there could be a form of pacifism that fit with our selective refusal to fight. In more recent years, a relatively new view has arisen – contingent pacifism. In this paper I will explain what selective refusal is based in and how it might fit with the emerging theory of contingent pacifism, especially in light of international law.

Contingent pacifists believe that given what is known of contemporary wars and of those likely to fight them, any war in the foreseeable future will not be a just war. According to this view, those who are drafted or who are asked to volunteer should refuse to fight on selective conscientious grounds. This is not an in principle objection to fighting in war but one that is contingent on the kind of wars that are likely to be fought and the kind of people likely to fight them for the foreseeable future. I have written about

this doctrine before, and here wish to explore its relationship to selective refusal.[1] In addition, as I will argue, contingent pacifism is similar to the position one can find in the UN Charter and in some accounts of human rights law.

In the first section of this paper I briefly discuss two cases. In the second section, I rehearse some views I have expressed about the experience and value of conscience. In the third section, I begin to set out the case for selective refusal by focusing on why conscientious objections to war should relieve individuals from the duty to fight. In the fourth section, I address various objections to selective refusal by qualifying the account so that it requires a long-standing conscientious position that is grounded in moral reasons, not merely prudential ones. In the fifth section, I consider several U.S. court cases on selective conscientious objection to participation in war, where practical concerns are further developed. In the sixth section, I give an overview of the position of the contingent pacifist and link selective refusal with contingent pacifism. In the seventh section, I explain how contingent pacifism is consistent with United Nations Charter and human rights law. Finally I respond to several objections that have been, or could be, offered to my views. Throughout I offer reasons to favor selective conscientious refusal to fight based on contingent pacifism even as I remain not completely convinced by the contingent pacifist position.

I. Two Recent Cases

The topic of this paper may appear to be dated, since there has not been a conscription draft in the U.S. or other Western democracies for many years. Yet, there

[1] See especially, Larry May, War Crimes and Just War, Cambridge UP 2007, Ch. 2; and Larry May Aggression and Crimes Against Peace, Cambridge UP 2008, Ch. 2; as well as Larry May, "Contingent Pacifism and the Moral Risks of Participating in War," Public Affairs Quarterly, volume 25, number 2, April 2011, pp. 95-111.

have been recent cases that raise similar issues to those raised in the Vietnam era. Recently, soldiers who experience combat, or who come to the realization of what modern war requires, are refusing to serve or trying to get out of their commitments in Iraq and Afghanistan due to conscientious objections to these wars, but not necessarily to all wars. As a result there is an increasing interest in the issues of conscientious refusal to fight, especially selective conscientious objection. Let me briefly discuss two cases here at the beginning of the paper.

First, consider the case of Ehren Watada who initially joined the US Army out of "a desire to protect our country." He served one year in South Korea and was then reassigned to Fort Lewis, Washington. In preparation to deploy to Iraq with others in his unit he did some research and concluded that the Iraq War was unjustified. As a result, he refused to be deployed to Iraq claiming that the war was illegal. Watada claimed that the President had lied about the situation in Iraq, and hence that there was no basis in international law for this war to be seen as a just war. He also claimed that if he commanded soldiers in such a war he would be guilty of a war crime. He was the first commissioned officer to refuse to deploy to Iraq. Court martial proceedings were initiated against Watada. The prosecutor claimed that "Lt. Watada betrayed the Army by making his issues public." During the trial one of Watada's superior's testified that Watada said he would rather go to jail than betray his conscience. The court martial proceedings ended in a mistrial due to procedural irregularities and Watada was eventually released from the military.[2]

[2] Most of the factual information in this paragraph derives from the Wikipedia website entry under Ehren Watada.

Second, consider the case of Augustin Aguayo who said he began having doubts about participating in the Iraq War shortly after enlisting. In 2004 he applied for conscientious objector status but before his case could be heard he was ordered to deploy to Iraq. He served a year in Iraq during which time he said he refused to carry a gun. After his tour of duty was over, he returned to the military base in Mannheim Germany. When he was ordered to redeploy to Iraq, he deserted and was subsequently arrested. His conscientious objection appeal was turned down because, as the judge wrote, "Though Aguayo stated that his Army training caused him anguish and guilt, we find little indication that his beliefs were accompanied by study or contemplation, whether before or after he joined the Army."[3] Aguayo was convicted in a court martial proceeding and sentenced to some jail time as well as dishonorably discharged from the United States military.

Both of these cases are presented as contemporary cases of selective refusal. Watada and Aguayo did not object to serving in the military in all wars, but only refused to fight in the Iraq War. Indeed, both had volunteered to join the military knowing that there were ongoing wars they would probably be sent to fight. They came to be opposed to the Iraq War only when they learned more about it after initially thinking that they could conscientiously fight in that war. So Watada and Aguayo seem to be good illustrations of those who today are selective conscientious objectors. The question I will pose in this paper is whether Watada or Aguayo could have availed themselves of the position of contingent pacifism to buttress their claims of selective refusal on conscientious grounds.

[3] Most of the factual information in this paragraph came from the Amnesty International Website, reporting from March 8, 2007.

Many if not most people who have refused to fight in war have been selective conscientious objectors, not those who are opposed to participation in all wars. Yet, the discussion of conscientious objection is often linked to traditional pacifism, where the adherents of this doctrine would not have grounds for opposition merely to one war instead of all wars. As we will see, there is a type of pacifism that is much better suited to supporting some of those who refuse to fight in a certain war but who recognize the justifiability of fighting in some other wars. That view is called contingent pacifism. Before describing that view, let us examine why conscientious judgment should count as a reason to refuse to serve in the military and fight in war or armed conflict. Initially it is not clear why a person's conscientious judgment should be allowed effectively to trump the judgment of the society concerning whether a certain war, or war in general, can be justifiably participated in.

II. Conscientious Judgments

Immanuel Kant provided a good beginning at understanding the value of being conscientious when he said:

> Does not a righteous man hold up his head thanks to the consciousness that he has honored and preserved humanity in his own person and its dignity, so that he does not have to shame himself in his own eyes or have reason to fear the inner scrutiny of self examination? This comfort is not happiness.... But he lives and cannot tolerate seeing himself unworthy of life.[4]

Kant gives voice to one of the salient facts about conscience – that for many people thwarting conscience brings a person to feel shame or guilt and not to be able to tolerate

[4] Immanuel Kant, The Critique of Practical Reason, tr. by L. W. Beck, Indianapolis: Bobbs-Merrill, 1956, p. 90-91.

seeing himself or herself in this dishonored position. In this way conscience places barriers in our way that move us to act honorably so as to live up to standards that we feel we cannot but live up to.[5]

When some people consider serving in the military, they experience the shame or dishonor of failing to do what they conscientiously judge they should do. Such a reaction normally only occurs when there is a matter of importance that is the subject of such a conscientious judgment. Conscientious judgment can be of matters great and small, and conscience can also be false in the sense that it is too influenced by a concern for the egoistic interests of the self. But there is a range of conscientious judgment that is of the utmost importance for the inner harmony of the self and that has been well recognized as providing exemptions from military service in many Western democracies for more than a century.

Conscience, like virtue, is a capacity that leads to socially beneficial consequences in those who develop it. As Philippa Foot has said, virtues are "corrective, each one standing at a point at which there is some temptation to be resisted or deficiency of motivation to be made good."[6] Similarly, conscience places barriers in one's path that can contribute to the avoidance of wrong-doing. Yet conscience, unlike the virtues, seems to be grounded in a concern for the self, for the self's inner harmony, rather than directed toward the proper end of human action. While it is quite likely that Foot is right in claiming that there is no general virtue of self-love, conscience does seem to be different from virtue in that it proceeds from and remains closely allied with a certain kind of

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[5] This section draws on, and expands, a discussion from my paper, "On Conscience," American Philosophical Quarterly, Vol. 20, No. 1, Jan., 1983, pp. 57-67.

[6] Philippa Foot, "Virtues and Vices," in Virtues & Vices and Other Essays in Moral Philosophy, Berkeley: University of California Press, 1978, p. 8.

concern for the self. Conscience begins as a concern for the self, not necessarily a psychological concern so much as a fundamental concern, a concern for the self's integrity, which nonetheless leads to restraints on selfishness.[7]

Peter Winch came to the following understanding of conscience. "To will the good is to see a limit beyond which one cannot (or will not, I do not think it matters which one says here) go. There are certain actions which such a man could not (would not) perform, whatever the considerations in their favor."[8] Winch sees the main function of conscience to be the setting of barriers, such as the barrier against doing harm to another person. Winch claims that one's recognition of wrongness is experienced as a "voice" or as an intuitive insight rather than a calculation. To achieve this realization, one must open oneself up to what can be discovered through reflective thinking, instead of narrowly focusing on means-end deliberation. Winch's account of the experience of conscience is meant to be similar to the account provided by Socrates.[9]

The reflective move that characterizes conscience is the reflective judgment about how one will view oneself after one has done that which is seen as wrong. This is why when one says "my conscience won't let me do it" one means that conscience has provided such a strong motivation that it seems to disallow the putatively wrongful conduct altogether. This motivational experience seems to be fairly constant among those who have conscientious experiences, but the standards of rightness and wrongness generally vary.

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[7] I am grateful to Saba Bazargan for discussion of this point.
[8] Peter Winch, "Can a Good Man Be Harmed?" reprinted as Chapter 10 of his book Ethics and Action London: Routledge and Kegan Paul, 1972, p. 203.
[9] Ibid., p. 196.

While conscience is not straight-forwardly cognitive, its conative aspect does result from a reflection, not from a straightforward emotional response. The feeling of shame or guilt that accompanies conscience is what occurs after one has acted wrongly, but the role of conscience is much more concerned with projected actions. Here guilt and shame are not the main motivational components. Instead, a person fears or worries that she will experience guilt or shame, and this is much more like a predictive judgment than an emotional response.

Initially it is difficult to see how conscience could motivate effectively based on guilt or shame. The guilt or shame, which arises only after one has acted, can obviously not affect the conduct which one has already engaged in. For conscience truly to place barriers in one's path concerning future conduct it must operate independently of the actual guilt or shame that is the emotional response to doing what is perceived to be wrong. Only if one predicts that one will be guilt-ridden or shamed later and that that will cause internal disharmony (which is itself disvalued), will one be motivated by conscience against doing wrongful acts in advance of actually doing them. There is an important difference between the expressions "my conscience won't let me do it" and "my conscience is bothering me for having done it." Both are properly the actions of conscience but only the first will actually provide the kind of barriers to conduct that would cause one to avoid doing that which one sees as wrong.

Consider the example of a person who is faced with the question of whether he should serve his country in the military. It is often thought that the conscientious objector decides not to serve because he places conscience over the interests of one's society. Indeed this is precisely the way that C.D. Broad characterized it in his essay "Ought We

to Fight for Our Country in the New War."[10] Conscientious objectors value their honor more than the collective good, Broad said. But he also admitted that some may genuinely object to serving in the military because it is thought that the military is not the sort of enterprise that is good for society.

In my view, the conscientious objector often risks great harm to himself or herself, such as being imprisoned, so as to sway the majority from engaging in a course of conduct that is believed to be wrong for them.[11] Insofar as this is a truly conscientious move, then it clearly is not merely a question of choosing one's honor (seen as a purely egoistic concern) over the collective good. Instead, we have a good example of the merger of concern for the self with concern for society within conscience. It is a merger because it is still the case that the motivation to act conscientiously is the worry about the integrity of the self, what Broad calls one's honor. But instead of honor being opposed to the interest of society, the two have merged together in some important sense. But, of course, the interest of society here is not necessarily the declared interest of that society but the putative interest of what that society would or should value according to the conscientious objector.

Judgments of conscience have been seen as some of the most important for a person's sense of integrity. And also in this sense these judgments are connected to a concern for the self. But insofar as one's integrity connects with doing what one perceives to be the right thing to do, this type of concern for the self is very often a concern for what is right for the society. This has been true of philosophical accounts of

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[10] C. D. Broad, "Ought We to Fight in for Our Country in the Next War," and also "Conscience and Conscientious Action," in C.D. Broad, Critical Essays in Moral Philosophy (N.Y.: Humanities Press, 1971).

[11] In this sense, conscientious refusal is similar to civil disobedience. I am grateful to Kimberley Brownlee for discussion of this point.

conscience as far back in time as arguably the first account provided by Plato in his portrayal of Socrates' final speech in the Apology.

Conscientious objectors often see themselves as doing the honorable thing, indeed as doing what they know to bring on difficulties for themselves so as to advance the collective good. This is especially true of conscientious objectors who act out of principle. I will argue that selective conscientious objectors often act in no less honorable ways than those who are general conscientious objectors. The selective conscientious objector also can act on principles that are seen to be serving the collective good.

And now we come to the issue of why being forced to violate one's conscience is so disvalued in society. There is a core commitment of the self to act in ways that do not bring dishonor on the self. Integrity of the self is only maintained when there are not things that one does that are at odds with one's core beliefs. Being forced to act in ways that violate those core beliefs is to undermine the value of a given person's life in terms of how one sees oneself. Once the core beliefs that are fundamental to who one is are undermined there is a violation of the person, or the self, that is one of the worst things that can happen to a person.[12]

III. Selective Conscientious Objectors

One way to understand how the selective conscientious objector differs from the general conscientious objector concerns the character of the principles appealed to. General conscientious objectors normally appeal to religious principles that absolutely forbid the use of violence, or some other activity that rules out participation in war.

[12] For more discussion of this point see my book, The Socially Responsive Self, Chicago: University of Chicago Press, 1996.

Selective conscientious objectors do not appeal to principles that forbid violence altogether. But they could appeal to the general principle that violence should not be inflicted on the innocent. Such a principle is sometimes grounded in religious creed, or sometimes grounded in secular moral beliefs. In both cases the principles adhered to will not countenance that the believer serve in a particular war, although the reasons for this position can be either moral or religious.

Another type of selective conscientious objector could apply different principles than general conscientious objectors. These moral principles appealed to could be ones that call for nuance in application and are not absolute principles at all, although they are important principles nonetheless. One such principle is that only violence necessary for averting a worse tragedy should be employed. Application of such a principle would mean that the selective conscientious objector is not opposed to serving in all wars, just those that fail the test of necessity. Here the conscientious objector could also be appealing to religious or secular principles, such as those of the Just War tradition.[13]

Draft boards and military tribunals have had an easier time accepting exemptions from military service for general conscientious objectors than for selective conscientious objectors. Their acceptance of an exemption is based on the view that it is a straightforward violation of religious creed for those from traditional pacifist religions to serve in the military. And especially in the United States, with its strong separation of church and state, political and military officials are reluctant to force people to do that which would be a clear violation of their religious creeds. In addition it is thought to be a violation of a person's integrity for that person to be forced to do that which is abhorrent

[13] See the excellent essay by C.A.J. Coady, "Objecting Morally," The Journal of Ethics, vol. 1, no. 4, 1997, pp. 375-397.

and contrary to very deeply held beliefs. But in this latter case the door is seemingly left open for selective conscientious objection since all conscientious objection will have this characteristic of being grounded in a concern for the integrity of the self.

Selective conscientious objectors have often had a difficult time gaining exemptions from military service because their conscientious beliefs seem to be less integral to their dignity and overall conception of who they are, than do those of the general conscientious objectors. To force someone to do something that person is opposed to is often what is necessary to provide for the collective good. In some respects, the selective conscientious objector resembles the person who says that he or she has made a moral judgment that a particular law should not be obeyed. If the law is in the public interest and if it would be difficult to achieve the public interest by allowing exemptions, then granting exemptions could thwart the collective good.

Philosophers at least since Hobbes have warned that exemptions based on conscience could ultimately thwart the rule of law.[14] A sovereign ruler really cannot allow people generally to decide which laws they want to obey and which they claim they should have a conscientious exemption from obeying. Seeking conscientious objection from traffic laws would generate chaos. Conscience, in this view, is unpredictable and even fickle – open to be manipulated by the one who claims to be caught in its throws. Indeed, in this view conscience is so manipulable that nearly anyone could claim to be conscientiously opposed to nearly any law. And granting conscientious exemptions would create an intolerable situation from the perspective of law enforcement officials in a society. In addition, even if not manipulable, matters of conscience are often seen to be

[14] See Hobbes. Leviathan, as well as A Dialogue Between a Philosopher and a Student of the Common Laws of England. For my own interpretation of Hobbes's views on conscience, see chapter one of my book, "Limiting Leviathan: Hobbes on Law and International Affairs" forthcoming.

too easy intentionally to mischaracterize when a person does not want to be inconvenienced with having to conform to a law that others in similar circumstances are obeying.

It is thought to be harder to mischaracterize what are the tenets of one's religion than to mischaracterize one's individual moral beliefs. Religious tenets have a kind of public access, at least for most religions, which seems not to be true of a person's moral beliefs. Here it is often thought to be especially open for abuse to claim that one's moral beliefs are so strong that they are of the same stringency and commitment as tenets of religious faith. What draft boards and military tribunals have worried about is that selective conscientious objectors will claim that their consciences will not let them fight when in fact it is merely a calculation of prudence or even a cowardice that is really driving the selective conscientious objection appeal. And it is thought that there is no easy way to test for stringency of moral belief as opposed to religious belief. I will challenge this view in the next few sections.

The problems with conscientious objection of the selective variety are exacerbated by the fact that conscience is, as I said at the beginning, deeply connected to a concern for the self and hence sometimes hard to distinguish from simple self-interestedness or even selfishness. And in the case of refusal to fight in war, it is rare that people do not have at least mixed motives, where any normal person would indeed be afraid of going off to battle. Concern for the self is hard to parse in terms of whether its true origins are conscientious or merely self-interested. And if it is difficult to test for sincerity and stringency of belief, it will also be very hard to justify selective conscience-based exemptions to laws that require people to serve in the military. I next discuss some

of the ways that these practical objections can be countered even as I recognize that such problems and their solutions need to be taken seriously in order to offset the possibility that obedience to law is undermined by granting conscientious refusal exemptions.

IV. Testing for Sincerity of Belief

One practical problem with allowing exemptions from military service to those who are selective conscientious objectors is that it is open to abuse. In this section I will discuss several ways to make selective conscientious objection more palatable to those who must decide about its sincerity. While it is desirable not to force people to do that to which they are conscientiously opposed, there needs to be some kind of test for sincerity of belief in such cases. Nonetheless, it may still turn out that there are so many people who have sincere conscientious objections to a particular law that the law cannot be enforced. And this may even be true of draft laws, or laws concerning desertion, since it may turn out that many people have sincere and well grounded moral objections to serving in a particular war. Even so, it is important to rule out those who merely do not wish to be inconvenienced or who are cowardly, rather than those who have sincere moral objections to serving in the military.

In considering a test of sincerity of belief, the first and most important thing to say is that any plausible view of conscientious refusal of the selective variety must require that refusal be grounded in a long-standing and verifiable belief. Without such a showing, it is not clear that being forced to violate one's conscience will indeed bring on a crisis of integrity. Such a test must allow for a public determination of the sort that occurs when conscientious refusal is grounded in religious beliefs. As I said, it is

normally thought that one's moral beliefs are private matters whereas religious beliefs are linked with tenets of a religion that normally can be ascertained by the public.

Yet, it should be noted that religious beliefs are often not completely transparent in terms of public scrutiny and ease of gaining knowledge. Some religions have an enormous amount of arcane texts and practices that while not hidden and in that sense "available" to the public are not often easy to decipher unless one is a member of that religion and has studied the texts for a long time. This is certainly true of many of the world's major religions such as Hinduism, Islam, Catholicism, Judaism, and Buddhism. The so-called peace religions - the Quakers, Mennonites, and Church of the Brethren - may have somewhat less arcane traditions, but the tenets of these religions may not be easily knowable by the general public.

Individual secular moral beliefs often are grounded in texts or practices that have as much public accessibility as do religious beliefs. Consider the person whose moral beliefs have been influenced by the writings of Martin Luther King or Mahatma Gandhi. These texts are as open to public scrutiny and are thus as accessible as religious texts are. Indeed, the more recent are the texts in question the more accessible they are likely to be. Recent philosophical or normative texts are actually quite likely to be more publicly accessible than the ancient texts of various mainstream religions of the world, including the traditional peace religions.

There is though, even in these cases of conscientious belief influenced by accessible secular texts the question of degree of adherence to the beliefs espoused in these texts. I will address this important issue directly in a moment. But we should note that this is not a problem that is unique to secular as opposed to religious adherents.

Many of the adherents of the world's major religions are really only nominal adherents. So, it is not always easy to infer one's religious beliefs merely from one's religious associations. Indeed, this is just as true of adherents of traditional peace religions as adherents of more mainstream religions. It still makes sense to inquire into more than merely which associations one has in order to determine sincerity of the belief that not serving in the military is grounded in.

For those who claim conscientious objection status on the basis of religious affiliation, although not of traditional peace religions, nearly the same problems occur, and not necessarily worse, in these cases than in those who are members of traditional peace religions. Consider a person who has been raised a Roman Catholic, as I was. One of the tenets of this religion, held for over a thousand years, is that some wars are just and can be participated in, and other wars are unjust and ought not to be participated in. If one is a staunch adherent of the Catholic faith, this should provide grounds for selective conscientious objection in a similar way to those who base general conscientious objection on being staunch adherents of traditional peace religions. But there is a potentially important dissimilarity between these cases.

A person whose religion dictates non-participation in all wars can easily claim to be opposed to participation in a particular war. But a person whose religion dictates non-participation in only some wars cannot so easily use this as a basis for opposing participation in a particular war, since that war may be justified according to the tenets of that religion. So, there is more needed than merely a showing that one is an adherent of a religion like Roman Catholicism to claim selective conscientious objector status to a particular war. And in the case of the Vietnam War, the U.S. Catholic Bishops

Conference made it especially hard to do this by declaring that the Vietnam War was an example of a just war according to Catholic teaching. Some U.S. Catholic bishops dissented from this position, thereby somewhat helping those who tried to get selective conscientious objector status in the Vietnam War.

In cases where the selective conscientious objector declares this status on the basis of secular moral beliefs things get more complicated yet, but not necessarily worse for the claimant. Secular moral beliefs can be as firmly and sincerely held as are religious beliefs. So this is not the problem. Rather the problem comes in terms of proving that one has a firm and sincere secular moral belief that would be violated if one participated in a given war. Also, of course, it will matter which moral beliefs one holds, since only some beliefs will support the prohibition on participating in a particular war.

To prove that a person has a stable and sincere belief grounded in certain secular or religious moral principles, it is best if there is some kind of a paper trail. Having written an essay or series of letters on the subject of one's beliefs is perhaps one of the best indications of especially secular moral beliefs. Regular attendance at a certain church that espouses the moral principles in question could also be a good indication of a person holding a stable and sincere belief. A less strong indicator, but still acceptable as a form of evidence, would be the testimony of close acquaintances or family members with whom a person has discussed, over a long period of time, one's convictions. These were some of the main indicators used by U.S. draft boards in the Vietnam War era.

It is interesting to consider cases where the more obvious indicators, discussed in the previous paragraph, do not exist. Consider someone who has come to hold various moral beliefs through a rigorous rational process. Imagine that this person has held these

beliefs for several years but has never had occasion to write or speak about them to acquaintances or family members. Assume that this is a genuine case of sincere belief. How can this person's beliefs be proven in such a way that fraudulent claims of others are still ruled out?

One strategy is for a panel to discuss the person's views with him or her to try to elicit how firm and sincere the beliefs are. Again this method was often used during the Vietnam War, with a person's draft board engaging in this inquiry with the claimant. But this strategy is open to many problems not the least of which is that those who are more articulate, or educated, will have a greater chance of proving their case than those who cannot easily defend their beliefs in a rigorous process of investigation. Additional problems concern bias on the part of the board of inquiry and deception on the part of claimants who are not sincere in the espousal of their beliefs. Yet, it may nonetheless be true that a claimant can present himself or herself as a non-standard kind of pacifist, paralleling the way that general conscientious objectors present themselves.

V. Legal Standards and Conscientious Objection during the Vietnam War

While there have been important legal expansions of the grounds of conscientious beliefs, in my view, several court decisions relied on flawed reasoning that I will attempt to identify. In a 1943 Second Circuit Court of Appeals decision, *United States v. Kauten*, the relevant distinction was characterized as follows:

> There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participating in any war under any circumstances… The former is usually a political objection, while the latter, we think may justly be regarded as a

> response of the individual to an inward mentor, call it conscience or God, that is for many people at the present time the equivalent of what has always been thought a religious impulse.[15]

This argument is flawed because, as we saw in the first section of this paper, for some people the two perspectives, political and conscientious, thought to be opposed, can sometimes merge. In addition, as we will see in the next section, there is a third option that we will explore, namely the view that is grounded in reasoning resulting in the conscientious judgment that most, but not all, wars should not be participated in.

During the Vietnam era, several U.S. Supreme Court cases considered the question of selective conscientious objection to participating in war. The decisions before the 1960s were grounded, as was the 1946 Circuit Court opinion, in the idea that conscientious objectors must base their opposition to serving in war on a belief in a higher authority.[16] But in 1963, another U.S. Circuit Court allowed a conscientious objector to claim an exemption to military service because of the dictates of what was termed "Godness" where humans stand to this being in a horizontal rather than vertical relation, making the religious authority not one that is strictly "higher."[17]

In 1970, in *Welsh v. United States*, the U.S. Supreme Court moved even further from demanding a belief in a traditionally understood idea of God when it held:

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war, those beliefs certainly occupy in the life

[15] *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943).
[16] See *Berman v. United States*, 156 F. 2d 377 (1946).
[17] *United States v. Jakobson*, 325 F.2d 409, 412 (1963).

> of that individual "a place parallel to that filled by … God" in traditional religious persons.[18]

The Welsh court also explained the general idea behind allowing conscientious objection as follows:

> Section 6(j) [of the Selective Service Act] … exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they were to become part of an instrument of war.[19]

This standard seems to me to be largely the correct one to use in such cases, but I do think the idea of "no rest or peace" needs to be explicated in terms of conscience rather than prudential or other considerations. And, importantly, it is not at all clear why both selective and general conscientious objectors could not meet this standard in terms of intensity of belief. Indeed, in a 1970 case from the Southern District of Maine, an exemption was granted to a selective conscientious objector who believed that any current war, but not necessarily all wars, were unjustified under the Catholic doctrine of a "just war."[20]

Yet, the 1971 U.S. Supreme Court case of *Gillette v. United States*,[21] held that selective conscientious objectors should not be granted the same exemption from military service that general conscientious objectors have. This case was primarily decided on the basis of a rejection of an equal protection argument. The claim that was rejected was that it was a denial of equal protection to discriminate against selective conscientious

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[18] *Welsh v. United States*, U.S. 333, 339-40 (1970).
[19] Ibid., at 343-44.
[20] *United States v. Berg*, 310 F. Supp. 1157 (S.D. Maine 1970).
[21] *United States v. Gillette*, U.S. 437 (1971).

objectors and in favor of general conscientious objectors. Since my object in this paper is to examine philosophical rather than constitutional arguments, I will not rehearse the constitutional arguments in *Gillette* here, except to note the philosophical arguments seemingly implied by some of the constitutional analysis.

The conceptual point that seemed to hold sway in *Gillette* was that while it might have been unconstitutional for the U.S. government to discriminate on the basis of various strongly held pacifist beliefs, between those that are religiously-based and those that are morally-based, it was not unconstitutional to distinguish between general and selective conscientious objection. Indeed, the court virtually equated selective conscientious objectors with non-pacifists. This is important since in my view there can be selective conscientious objectors who come to this decision out of sincerely held contingent pacifist moral (or religious) beliefs. I discuss such matters in more detail in the next section.

I wish to end this section with a comment on an interesting legal wrinkle in these matters concerning arguments advanced in international law that are relevant to my overall aims in this paper. It may be that international law prohibits participation in wars that are, or are likely to be, unjust. The injustice could be either because of the non-defensive character of the war itself (the *jus ad bellum*), or due to the unjust tactics and weaponry employed (the *jus in bello*). If there is such a prohibition in international law, as almost surely there is, then there is an obligation not to participate. This seems to be one of the main lines of argument advanced by Ehren Watada, discussed at the beginning of this paper. If there is an obligation not to participate then there also must be a

correlative liberty-right not to participate.[22] And corresponding to the liberty-right not to participate in certain wars would be a claim of selective conscientious objection against participation in a particular war.[23] I take up this issue in greater detail in Section VII.

One might wonder though whether either Watada or Aguayo could meet the standard I set out earlier of having a long-standing and verifiable belief that led to their selective refusal. In both cases, there was initially a belief that the on-going wars were ones that they could participate in. So there wasn't a long-standing and verifiable belief that the Iraq war was unjust. What Watada and Aguayo needed to show, in my view, was a strong conscientious belief that most wars were not just and should not be participated in. They needed to show that they had long-standing opposition to most if not all foreseeable wars. I do not know whether either of them did hold such a belief. But if they did, then it could be that their assessment of the contingencies changed to such an extent that they now did not see the Iraq War as an exception to their general belief that wars were not justifiable today.

The legal standards and principles that I have considered in this section are meant only to give a slightly different take on the problem I addressed in earlier sections of this paper. The idea is that courts in the U.S. have struggled with the topics we have been examining, at certain times accepting and at other times rejecting the claims of selective conscientious objectors. In the debates about the disposition of these legal cases, one of the salient concerns has been whether secular moral belief can rise to the level of being a sufficiently conscience-driven objection as to make it inhumane for the government to

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[22] For a fascinating discussion of these issues see William V. O'Brien, "Selective Conscientious Objection and International Law," Georgetown Law Journal, vol. 56, 1968, pp. 1080-1131.

[23] Also see Soran Reader, "Cosmopolitan Pacifism," Journal of Global Ethics, vol. 3, no. 1, 2007, pp. 87-103.

force the objector to participate in war. As we will next see there is a form of secular moral belief that seems to be especially well suited for those who declare selective conscientious objector status.

VI. Contingent Pacifism

The difference between general and selective conscientious objectors mirrors the difference between traditional and contingent pacifists. Traditional pacifists appeal to universal moral principles against inflicting violence on other humans, or on the killing of the innocent. Contingent pacifists also appeal to moral principles such as the principle against killing the innocent. But the application of this principle is contingent on certain facts being true, and may have a different application if other facts obtain. In this sense the principles may be the same but the difference between types of conscientious objector has to do with the scope of application of the principles. Contingent pacifists can apply the same moral principles as traditional pacifists. Yet, contingent pacifists find the application of these principles sometimes, at least hypothetically, to justify war, whereas traditional pacifists make no exceptions in applying their moral principles.[24]

Contingent pacifism is the view that whether war is justified is a matter contingent on certain facts. The contingent pacifist believes that given what we know of how contemporary wars are likely to be fought, and of how political leaders are likely to fight these wars, wars will not be justifiable into the foreseeable future. The burden of proof thus falls upon those who support a particular war to defeat the presumption of the contingent pacifist. The presumption has shifted today because of certain facts about the character of contemporary war and armed conflict. In this view, our attitudes toward war

[24] See Jeff McMahan, "Pacifism and Moral Theory," Diametros, vol. 23, 2010, pp. 44-68.

should be pacifist in that we start from and constantly return to placing strong value in pacifist attitudes. War then becomes a last resort, not a first resort, or even a penultimate resort.

One type of contingent pacifist is the so-called "just war pacifist."[25] Such a pacifist does not hold to a principle such as the prohibition of inflicting violence on other humans. Instead, contingent pacifists hold to a principle that is much more nuanced, such as that the infliction of violence can only be justified if it is necessary for achieving a proportionately greater good. But unlike traditional just war adherents, the just war pacifist believes that there will not be any such cases, at least for the foreseeable future, given certain facts about contemporary war and those people who will wage them. So the waging of war is contingently unjust.

If one is a contingent pacifist, one can recognize the possibility of a war that it would be just to fight, such as World War II and yet since none is now recognized to be like World War II, this version of pacifism is not as fraught with the practical problems we saw above, where one objected only to serving in a current war. And this is true whether one thinks that contingent pacifists really are "pacifists" in the true sense of the term, or merely Just War theorists who have taken the Just War position to what they believe to be its logical conclusion.[26] The position based on the judgment that wars now, and into the foreseeable future, are wrong, may or may not be properly called pacifism.

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[25] See Emily Crookston, "Strict Just War Theory and Conditional Pacifism," Proceedings of the Catholic Philosophical Association, vol. 79, 2005, pp. 73-84; James P. Sterba, "Reconciling Pacifists and Just War Theorists," Social Theory and Practice, vol. 18, no. 1, Spring 1992, pp. 21-38; and George Lucas, Jr., "From *Jus ad Bellum* to *Jus ad Pacem*," in Larry May, Erik Rovie, and Steve Viner, The Morality of War, Upper Saddle River, NJ: Prentice-Hall, 2006. Also see Aleksandar Jokic, "Against Anti-War Pacifism," Sociological Review, vol. 33, nos. 1-2, 2000, pp. 43-68.

[26] See Brian Orend, "A Just War Critique of Realism and Pacifism," Journal of Philosophical Research, vol. 26, 2001, pp. 435-477.

But whatever this set of beliefs is called it can play a major role in grounding selective conscientious refusal.

Contingent pacifism is not prone to the objection that it is really just a pretense for politically or personally judging that a particular war should not have been entered into,[27] rather than a conscience-based objection that is deeply grounded in the "individual's inward conviction of what is morally right or morally wrong."[28] If one subscribes to contingent pacifism it is easy to see that one has a conscientious basis for objecting to participation in a particular war, since such a belief is grounded in the larger objection to serving in all foreseeable wars. And because of this, believing in contingent pacifism is not at all similar to someone who is conscientiously opposed only to a particular war, with its attendant practical worries about insincerity of belief.

Indeed, a draft board or military tribunal that is enquiring into sincerity of belief should be easier to convince if the person refusing to serve grounds his or her objection in contingent pacifism rather than on a moral objection only to this particular war. Believing in contingent pacifism is perhaps not as free from worries about sincerity of belief as is believing in traditional pacifism. But both of these forms of pacifism have in common that they ground much more than an objection to participation in one particular war. And from our considerations about the court cases on selective conscientious objection above, one can see that someone who declares selective conscientious objection grounded in contingent pacifism will be highly likely to have a conscientious objection to

[27] See Andrew Alexander, "Political Pacifism," Social Theory and Practice, vol. 29, no. 4, 2003, pp. 589-606.
[28] See Kent Greenawalt, "All or Nothing at All: The Defeat of Selective Conscientious Objection," The Supreme Court Review, Vol. 1971, 1971, pp. 34-94, p. 58.

war that extends forward in time and hence does not look like a pragmatically driven belief reached merely concerning current circumstances.

It is not completely clear that contingent pacifism is really a form of pacifism as the doctrine of pacifism has often been understood. Contingent pacifists are not necessarily opposed to all wars throughout all time, for people and circumstances may change radically, or may have once been radically different from how they are now. And it may even be true that while people are very unlikely to change radically in the near future, circumstances may change radically in the near future, in ways we cannot now anticipate, just as it was very hard to anticipate the rise of Nazi Germany and its campaigns of genocide as well as its destabilization of most of the world. So, contingent pacifism, despite seeing pacifism as the default position, does not absolutely rule out recourse to war. Thus, for the contingent pacifist, if a people or a State is attacked and cannot defend itself successfully but for the use of armed violence, contingent pacifists need not retreat or surrender, or only employ non-violent resistance that seems futile.

Indeed, there is a strong connection between selective refusal and contingent pacifism, where there is so much overlap and mutual support that it is almost as if the two views were made for each other. John Rawls made just this connection in an often-overlooked passage in A Theory of Justice. He said:

> Indeed, the conduct and aims of states in waging war, especially large and powerful ones, are in some circumstances so likely to be unjust that one is forced to conclude that in the foreseeable future one must abjure military service altogether. So understood a form of contingent pacifism may be a perfectly reasonable position: the possibility of a just war is conceded but not under present

circumstances. What is needed, then, is not a general pacifism but a discriminating conscientious refusal to engage in war in certain circumstances.[29]

Here Rawls discusses but does not develop the point I have been defending in this paper.

Traditional pacifism and general conscientious objection fit well together because of the link to absolute moral principles inspired by certain religious creeds. Contingent pacifism and selective conscientious objection also fit well together, especially when they are connected to Just War principles. Just War principles are not absolute moral principles but ones that are premised on the idea of a lesser evil. For over a thousand years, pursuing the lesser evil meant that some wars were considered justified, and in some cases young adults were even morally required to fight in those wars. Now, though, some people who have been strongly inclined toward the Just War tradition, such as I am, have seen that the lesser evil is not that war should be fought but that it should not be fought, despite the fact that there might be some rather serious moral wrongs in not fighting wars.

VII. International Legal Theory

The United Nations Charter embodies something similar to contingent pacifism, or nearly so. The U.N. Charter embodies the idea, in Articles 2/4 and 51, that wars should not be fought by States except when the U.N. has sanctioned them or in emergencies involving individual or collective State self-defense, and even then only until the U.N. can respond. This is at least similar to a contingent pacifist position since States are nearly outlawed from engaging in war. It is only nearly a contingent position because there is one class of exceptions, where a State's self-defense is involved and the U.N. has

[29] John Rawls, A Theory of Justice, Cambridge: Harvard University Press, 1971, pp. 381-382.

not yet acted. And while this is thought to be a rare instance it could occur in the foreseeable future.

True contingent pacifism holds that there are no instances of justified war in the foreseeable future. The U.N. is thus only "nearly" a contingent pacifist institution, in that war is ruled out for States in nearly all cases – and this becomes the default position. Contingent pacifism, nearly so, is on the continuum between a robust Just War position and a traditional pacifism. Both this view and regular contingent pacifism are middle positions that are contingent on the current conditions of political leaders and military tactics, often understood from a Just War perspective, but with the conclusion that very few if any wars are justified today.

Many believe that this nearly pacifist position of the U.N. is misguided or unrealistic. I do not agree and see the fact that the U.N.'s position is nearly a contingent pacifist one as its strength. But to see this one must argue that contingent pacifism, or nearly so, is plausible in just the way the U.N. Charter indicates. Support for contingent pacifism, or near contingent pacifism, provides support for those who refuse to fight in specific wars today, or who counsel people not to fight in these wars. One need not be opposed to all wars, as is true of traditional pacifists, justifiably to refuse to fight in particular wars today. Indeed, except in emergency cases, where self-defense requires armed conflict temporarily, no one should fight in today's wars.

Two things need to be said from a *jus ad bellum* perspective in defense of the U.N. position. First, individual self-defense is not best accomplished by a war that seeks to defend a State. There are nearly always other things the State can do, other than initiate war, in order to defend itself. In addition, a State rarely has a right of self-defense that

requires it to force its citizens to fight. State self-defense is not sufficiently analogous to personal self-defense.[30] State self-defense is the defense of territorial integrity or sovereign immunity. These characteristics of a State are not like the life of a person. A State can cease to exist today and tomorrow another State can rise from the old State's ashes. Contrary to mythology, human lives do not regenerate in such a fashion. And the new State may be better able to protect the lives of people in the State than the old one.

Secondly, humanitarian wars are almost always a bad idea. Again, there are almost always better options than war and armed conflict to counteract a humanitarian crisis. Police actions, such as a peace-keeping force, are often more likely than armed conflict or wars to have the result of ending humanitarian crises. And while it is sometimes necessary for a war to be waged to protect a people from mass atrocity, especially if it is an atrocity that is instigated by a State, these cases are very rare indeed. The reason for this, as I have argued elsewhere, is that the use of massive military force characteristic of war is not often effective in stopping a mass atrocity that is being carried out by neighbor against neighbor. One of the reasons for this is that humanitarian crises rarely are instituted in such a way that there are military targets for humanitarian war to be directed toward.[31]

From a *jus in bello* perspective, a few additional things need to be said. First, the risk of civilian casualties is very high in today's armed conflicts. While some weapons have achieved a greater level of accuracy, thereby potentially reducing the likelihood of collateral damage, it is also true that war and armed conflict is increasingly fought in cities where civilian casualties remain very high indeed. And civil wars are the most

[30] See David Rodin, War and Self-Defense, Oxford: Oxford University Press, 2002.
[31] On this point see my book, Genocide: A Normative Account, Cambridge UP, 2010, Ch. 12.

common type of war at the moment and also into the foreseeable future. In civil wars, civilian casualties are very difficult to minimize since combat operations often proceed by means of terrorizing tactics aimed at civilian centers, as I have also argued elsewhere.[32] And the use of human shields also exacerbates *jus in bello* concerns,

Second, contemporary wars are increasingly not being fought by States but by non-State actors. The American Society of International Law has recently focused its annual conventions on the fact that the old rules of engagement do not seem to be relevant to the kind of armed conflict today. Insurgent combatants from non-State actors are not being trained in the rules of war, and are often ignorant of these rules. Rules such as those found in the Geneva Conventions are designed to make wars less likely to violate *jus in bello* considerations. But when combatants do not know of such rules, as is increasingly true today, wars will not be likely to be just wars from the perspective of tactics and weaponry.

Another approach to take in international law concerns the connection between international humanitarian law and human rights law. International humanitarian law has largely followed the Just War tradition in regarding some wars as just even though war involves the intentional killing of humans. As long as the cause is just, normally these days understood as self-defense and selected cases of defense of innocent others, and the war is a last resort as well as proportional, war is recognized as a just war. So even though war involves a massive violation of rights, according to international humanitarian law, war is seen as justifiable today. Hence, the tradition of international humanitarian law is decidedly not pacifist. Judith Gardam captures the current state of international humanitarian law on combatants:

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[32] See Larry May, War Crimes and Just War, Cambridge U P, 2007, Ch. 5.

> Combatants are legitimate targets in armed conflict, whereas civilians are not. For this reason, the level of combatant casualties never became an issue in IHL and remains a matter for the probability equation in the *ius ad bellum*. In IHL, it is the prohibition of means and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering that today purports to limit the impact of armed conflict on combatants.[33]

Proportionality is not seen to be one of the requirements of *jus in bello* concerning the lives of enemy soldiers in armed conflict.

In recent years, international human rights law has arisen and has provided a challenge to traditional humanitarian law. Human rights law puts great weight on the prohibition on violating rights, especially violations of the right to life. In this respect, if not in others as well, human rights law starts from a different position than does humanitarian law. From a human rights perspective war is difficult to justify given that war involves the intentional taking of innocent life, even if it is often a matter of collateral damage rather than directly aimed at. In addition, the killing of soldiers can be seen as initially problematic from a human rights perspective, since clearly soldiers have human rights too.[34]

Some have held that the lives of some enemy soldiers should be dismissed in cases where the enemy lacks just cause. If the enemy lacks just cause then, in this view, nothing the enemy does can satisfy necessity and proportionality.[35] The reason for this is

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[33] Judith Gardam, Necessity, Proportionality and the Use of Force by States, Cambridge University Press, 2004, p. 14.
[34] See Reuven Ziegler and Shai Otzari, "Do Soldiers Lives Matter?" Israel Law Review, vol. 45, no. 1, 2012, pp. 53-69.
[35] See Brian Orend, "Jus Post Bellum: A Just War Theory Perspective," in Carsten Stahn and Jenn Kleffner, editors, Jus Post Bellum: Towards a Law of Transition from Conflict to Peace, The Hague: T. M. C. Asher Press, 2008, p. 38.

that all of the actions by the enemy State are tainted by the lack of justification of initiation of war or armed conflict in the first place. In this view, it is acceptable to dismiss the lives of enemy soldiers, and perhaps also enemy civilians.

But it is my view that we must distinguish the moral and legal status of soldiers from that of their States. Of course there is some link between the soldier and the soldier's State. But the stringency of the link will depend on an assortment of factors, most especially whether the soldier has been conscripted or volunteered, as well as whether the State hid its true reasons for initiating war or not. It will also matter what the reasons are that the soldier had when they signed up. In many cases soldiers do not have a sense of the nuances of geopolitics and the only motivation is one of doing one's patriotic duty. The State may indeed be engaging in aggressive war, but the soldiers that fight for that State cannot be easily ascribed the same status, namely the status of aggressors, as their States.

Even those who volunteer may not be so clearly linked with their States as one might think. Few volunteer soldiers would think that what they did by volunteering was to waive or forfeit their right to life and instead now be seen as simple cannot fodder. Boxers may waive some rights when they enter the boxing arena, but it would be odd indeed for a boxer to think that voluntarily entering the ring was a waiver of the right to life. And even if this is the way the boxer, or the soldier, views their voluntary acts, there is still a good question of whether one can waive or forfeit basic human rights such as the right to life or the right not to be killed.[36]

[36] See Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," Philosophy & Public Affairs, vol. 7, no. 2,Winter 1978, pp. 93-123.

When we turn our attention to conscripts the connection between the status of soldiers and that of their States is even less clear. If people generally should be held responsible for what they voluntarily and intentional do, it is hard to see why the conscript would be blamable for serving in the military in an aggressive war. Of course, it matters what options were available and how draconian they were compared with allowing oneself to be drafted. But without further special considerations it seems to be something of a category mistake to say that the conscript has waived or forfeited any rights let alone the right not to be killed. And so it will be hard indeed to make the enemy soldier, even one fighting an aggressive war, into someone whose life should be dismissed in a proportionality calculation.

Human rights law seemingly does not recognize the category of a just war, at least not given the way that wars are fought today. In this sense, human rights law can be seen as similar to or even supporting contingent pacifism. Indeed, William Schabas has argued that there is a "pacifist strain within human rights law."[37] And some other theorists have linked this human rights approach to the United Nations Charter, where as I explained above war is virtually outlawed. There remains one category of war that is supported by the United Nations Charter, namely self-defensive war. But if the UN Charter embodies a consistent human rights doctrine even this exception would be difficult to justify, at least if self-defensive war is understood as war fought for the self-defense of a State without the authorization of the United Nations.

For human rights law, grounded in the rights of individual human persons, there is no straightforward right to self-defense of States. Of course, if the rights of States are

[37] William Schabas, "*Lex Specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*," Israel Law Review, vol. 40, no. 2, 2007, pp. 592-613.

merely short-hand for the rights of individuals reside in States, or who are citizens thereof, there can be self-defense rights of States in human rights law. But the rights of States will be derivative rights. Yet, as I explained above, war is hard to justify as a matter of the rights of self-defense of individuals rather than States. In this sense, human rights law is in line with contingent pacifism – only when war seems to be necessary for preserving the rights of individuals is it justified. And this is so rare a circumstance that we are left in a position of contingent pacifism, or at least near enough. This is perhaps a surprising result. But it means that selective conscientious objectors such as Watada have a plausible case when they say that a given war is contrary to international law.

Concerning the cases I began this paper by discussing, we might also note that human rights law also strongly endorses a right to conscience. Already in the Universal Declaration of Human Rights, in Article 18 we find the right to freedom of conscience. And while there is some controversy about whether this right extends to cover the right to refuse to kill, a strong argument can be made to include this right as falling under Article 18, especially given the strong pacifist leaning of the UN Charter. So, there is not only support for contingent pacifism in international law but also support for selective refusal.

One final consideration in international legal theory concerns *jus post bellum*. In the last century, the conditions of *jus ad bellum* and also *jus in bello* were thought to be relatively easy to meet. If the war was one fought with a just cause as a last resort and the tactics were ones that satisfied the conditions of distinction (or discrimination), necessity and proportionality, the war could be a Just War. But recently, considerations of *jus post bellum* have complicated these calculations in favor of forms of contingent pacifism.

Jus post bellum calls for, among other things, a consideration of the exit strategy of war or armed conflict. As I have argued in my most recent book, After War Ends, such issues as reconciliation, reparations, and rebuilding take center stage in *jus post bellum* reflections.[38] But if wars need to meet *jus post bellum* conditions in order to be all things considered Just Wars, there will be far fewer Just Wars than is normally assumed. Indeed, it is hard to imagine many wars in the foreseeable future that would meet *jus post bellum* conditions. The wars in Iraq and Afghanistan do not seem to meet these *jus post bellum* conditions given the clear lack of any exit strategy linked to providing a clear path to a just and lasting peace in those two countries.

Because of the above considerations, international legal concepts can be seen to support contingent pacifism, or near enough, since participation in any war today is highly problematic. So, young adults trying to decide whether to leave the military, or young adults faced with a conscription draft, would have strong reasons grounded in international legal theory not to serve in a war today. As I have indicated, contingent pacifism rules out contemporary participation in war. And so, somewhat like the adherent of a traditional peace religion, adhering to contingent pacifism, or that variant supported by international legal theory, can be used to support the claim that one should be granted an exemption of selective conscientious objection in every contemporary war, assuming that one's belief in contingent pacifism is sincerely held.

VIII. Some Objections

The view of selective conscientious refusal to fight in war that I have sketched above is open to several objections that I will now take up. First, consider the objection

[38] Larry May, After War Ends: A Philosophical Perspective, Cambridge University Press, 2012. I present a defense of *jus post bellum* principles not as *lex lata* but as *lex ferenda*.

that Jeff McMahan has recently voiced. McMahan used to support contingent pacifism but now does not, largely because of a concern that mere risk of harm to innocent persons does not outweigh the great good that some contemporary wars can accomplish. He argues that there are many activities that involve a small risk of killing the innocent. The case of driving is brought up as an analogy. [39] There is always a risk of killing innocent people when we drive, "yet no contingent pacifist … argues that it is impermissible to drive."[40] From this McMahan concludes that there is not as strong a prohibition on risking the killing of the innocent as there is on the killing of the innocent. McMahan then adds that when soldiers fire their weapons they rarely know that they are killing the innocent, rather than merely risking the killing of the innocent. But then the acts of soldiers, which merely risk the killing of the innocent, do not violate a stringent moral requirement of the sort of thing that unqualifiedly lends support for contingent pacifism.

My view is that it would be odd indeed if there was a strong prohibition on killing the innocent but a much weaker prohibition on risking the killing of the innocent. My argument here is fairly straightforward. What is needed is an argument that shows the difference between a very, very great risk of doing x and the doing of x. And one of the most serious problems is that the doing of x is almost always preceded by acts, necessary for the doing of x, which are themselves also instances of acts that risk the doing of x. There must be something about the completion or certainty of x that is vastly more important than the necessary acts that precede the doing of x. And at least so far as I know, McMahan has not given those reasons.

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[39] Jeff McMahan, "Pacifism and Moral Theory," Diometros, vol. 23, March 2010, pp. 44-68, 67.
[40] Ibid., p. 66.

Yet, risk of harm is especially problematic from a contingent pacifist position. For there is a heightened possibility that fighting in any war will involve the risk of killing the innocent, thereby strengthening the case for conscientious refusal to fight. A significant part of McMahan's argument against the contingent pacifist is that a small or even great risk of killing the innocent is outweighed by the very great good that is normally associated with waging a just war.[41] But in each case, the very great good that could be done by waging a just war is not a certainty either and must be discounted by the likelihood that a seemingly just war is actually an unjust war.

Second, it might be objected that it is too hard to tell, merely through the means of probing discussion, whether a person holds a sincere conscientious belief for this discussion to be used as a test of whether a young adult should get an exemption from fighting in the military. Not only will the glib and educated have an unfair advantage in this test, but so will those who are good at telling lies or at least twisting the truth. In any event, the test is too easily manipulable to be a reliable test for sincerity of conscientious belief.

One kind of response is to begin by pointing out that lawyers, especially those who are good at cross-examination, often seem to be able to tell when a person is lying merely by asking probing questions. There will undoubtedly be cases of people who fool their inquisitors. But this is true for any test, even for a test that looks merely to what religious creed one grew up believing, and whether one is still a believer. So, the question is not whether there will be people who fool the system, but how many are likely to do this compared to other tests that are available. So, the mere fact that the test is not foolproof is a poor reason to think that the test is not a good one.

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[41] Ibid., p. 67.

Third, it might be said that I have put too great a weight on the judgments of conscience over what is good for the society as a whole. Judgments of conscience are no better than judgments of taste. They do not tell us anything other than what a person believes or prefers at the moment, hardly a good basis for exemption from military service at a time when a person's nation might need him or her. Conscience is not necessarily a good judge of what is right by either objective or subjective standards. Indeed, it is quite odd to think that one person's judgment could be definitive for what is right in a way that could justify overriding what the society at large thinks.

Conscience can display the collective good but it is true that this does not necessarily happen in all cases. And it is also true that conscientious judgments should not always be seen as overriding what the society judges to be best for all of its members. If society believes that a certain member must serve in the military for the good of the society, then there is indeed a conflict if that member refuses to serve on conscientious grounds. Of course, someone forced to serve in the military is not going to be the best soldier, and so this should be calculated into the mix when ascertaining whether someone's conscientious judgment should be overridden.

Fourth, it might be objected that there are wars at the moment that are so clearly justified that we should not allow contingent pacifists to act as if no contemporary wars can satisfy the criteria of the Just War tradition. Wars of self-defense still exist as do wars that must be fought to prevent an innocent State from being subjugated by another State, or a people to be subjected to genocide. And it is also not clear why it is thought to be inconceivable today that States could fight wars justly. This objection goes to the heart of the question of whether or not contingent pacifism really is a form of pacifism. Why

think that as a contingent matter there are no wars today even conceivably to be called Just Wars into the foreseeable future?

In the end, all the contingent pacifist can say is that he or she judges that war in the foreseeable future will not be justified. And I myself hold the view that at best one can say that it is highly probable that wars today will fail the *jus ad bellum*, the *jus in bello*, or *jus post bellum* conditions. In my view one must be open to the possibility that a war could be just today. And perhaps that is why I should not be counted as a contingent pacifist. But because the likelihood is so low, I need not change the advice to young adults about whether the moral risks of fighting in a contemporary war are worth it. And given this calculation that I have not given sufficient evidence for here but have addressed elsewhere, then it makes the most sense also to endorse selective conscientious refusal to fight in wars today.[42]

I end with two caveats. First, if a contemporary soldier forms the conscientious judgment that he or she should refuse to fight after experiencing battle, and decides to leave the military there is at least one issue that needs to be addressed. Those who are in the midst of battle have very strong associative duties to their comrades, who may depend on them for their very livelihoods. Deserting from combat, even on highly laudable moral grounds, should be restricted so that one's comrades do not suffer thereby. My view is that there must be a waiting period – soldiers should not leave an active military unit unless there is a low risk that their leaving will cause suffering to their comrades. What this will normally mean is that the soldiers who become convinced not to fight during battle will have to wait until the battle is over, or replacements have arrived, before they

[42] See Larry May, "Contingent Pacifism and the Moral Risks of Participating in War," Public Affairs Quarterly, volume 25, number 2, April 2011, pp. 95-111.

are relieved of their associative duties to their comrades that they voluntarily incurred by initially joining the military.

Finally, let me add a second caveat. I have not yet decided to embrace contingent pacifism, proper, rather than what I have called contingent pacifism, nearly so. I have defended the Just War position for many years and find it hard to let go of it completely.[43] The specter of World War II is hard to ignore. Perhaps there will be the need for another war like that one yet in our lifetimes. Or perhaps there will be a lesser war that nonetheless truly needs to be fought in the foreseeable future. I cannot rule this out, so I cannot fully embrace contingent pacifism proper. But since I nonetheless believe that justified war in the foreseeable future is rare indeed, I can still support something near enough to contingent pacifism as a ground for selective refusal.[44]

[43] But see Andrew Fiala, The Just War Myth, Lanham, MD: Rowman & Littlefield, 2008.

[44] This paper was first presented at Middlebury College in November 2011 and then as the Presidential Address of the American Society for Value Inquiry in December of 2011. I am grateful for the audiences at each occasion for constructive and stimulating comments. Parts of this paper just appeared under the title "Contingent Pacifism and Selective Refusal" in the Journal of Social Philosophy, vol. 43, no. 1, Spring 2012, pp. 1-18. The current longer paper will be a chapter of a planned book on contingent pacifism.