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Author(s): Cheyney Ryan

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# Democratic Duty and the Moral Dilemmas of Soldiers\*

*Cheyney Ryan*

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This article explores the personal responsibility of soldiers for fighting in unjust wars. Its reference point is the position developed by Jeff McMahan in his recent *Killing in War*. I claim that McMahan fails to give sufficient importance to institutional justifications on this matter. I argue for this by developing what I call the *argument to democratic duty*, which I claim embodies much current thinking about the obligations of soldiers in a democratic culture. The upshot of my argument is that soldiers are placed in a contradictory position, between personal and institutional obligations. This is one sense in which soldiers can be victimized by the institution of war itself.

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It is in the nature of crime to create situations of moral conflict, dead ends of which bargaining or compromise are the only conditions of exit; conditions which inflict yet another wound on justice and on oneself. (Primo Levi, quoted in Simon Wiesenthal's *The Sunflower*)

The twentieth century was an era of unprecedented war-induced death. As historian Niall Ferguson has noted, the hundred years after 1900 were without question the bloodiest century in our history, far more deadly in relative as well as absolute terms than any previous era.<sup>1</sup> To give some figures: the twentieth century as a whole witnessed approximately 275 wars and 115 million deaths in battle. While averages can be misleading, since most of the deaths occurred in the two world wars, this equaled about 3,150 deaths per day, or about 130

\* For discussion of the original version of this essay, I am indebted to Jeff McMahan, Seth Lazar, Victor Tadros, David Rodin, Henry Shue, Lene Baumann-Larsen, Tony Coady, and the other participants at the Oxford workshop on *Killing in War*. I am especially indebted to McMahan and Lazar for their written comments, which led to substantial revisions of the original essay, and to the referees of *Ethics* for their suggestions.

1. Niall Ferguson, *War of the World* (New York: Penguin, 2006), xxxiv.

deaths per hour, 24 hours a day, throughout the entire century.<sup>2</sup> If you include civilian deaths, which are harder to estimate, total deaths due to war in the century may have approached 250 million, or almost 7,000 people a day, 300 people per hour. No other century in history approaches these numbers. The comparative figures are equally striking. If one looks at the proportion of people killed by war relative to total population, the eighteenth century saw five deaths per thousand, the nineteenth century six deaths per thousand, the twentieth century 46 deaths per thousand—that is, almost eight times higher than the previous century. As Isaiah Berlin remarked, “I have lived through most of the 20th century without, I must add, suffering personal hardship. I remember it only as the most terrible century in Western history.”<sup>3</sup>

A focus of Jeff McMahan’s new book, *Killing in War*, is one of the ideas that made such killing possible: soldiers do no wrong even if their cause is unjust; indeed, their participation in a war may be good, honorable, even heroic, even if the war is immoral.<sup>4</sup> This has been one of the most pernicious doctrines of the age of nation states, endorsed by some of its most respected figures. Consider this remark from Supreme Court Justice Oliver Wendell Holmes, a hero of American liberalism, from his speech “The Soldier’s Faith”:

I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has little notion, under tactics of which he does not see the use.<sup>5</sup>

2. Charles Tilly, *Coercion, Capital, and European States* (Cambridge, MA: Blackwell, 1990), 67. See also Jonathon Glover, *Humanity* (New Haven, CT: Yale University Press, 2000), 47, citing William Eckhardt in Ruth Leger Sivard, *World Military Expenditures*, 12th and 13th eds. (Washington, DC: World Priorities, 1987–88, 1989); Melvin Small and J. David Singer, *Resort to Arms, 1826–1980* (Beverly Hills, CA: Sage, 1982). A problem with these estimates involves the relation of wars, both international and civil, to genocides and other forms of mass killings. See Benjamin A. Valentino, *Final Solutions: Mass Killing and Genocide in the 20th Century* (Ithaca, NY: Cornell University Press, 2005), and Rudolph Rummel, *Statistics of Democide: Genocide and Mass Murder since 1900* (Charlottesville, VA: Center for National Security Law, 1997).

3. The quotation is from Eric Hobsbawm, *Age of Extremes* (New York: Pantheon, 1994), 1. Another excellent text on these issues is Bruce Mazower, *Dark Continent* (New York: Knopf, 1999).

4. Jeff McMahan, *Killing in War* (New York: Oxford University Press, 2009).

5. Richard Posner, *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* (Chicago: University of Chicago Press, 1992), 112.

The “faith” that Holmes speaks of is the idea that McMahan critiques: killing—and dying—in an unjust war can be “true” and “glorious.” The experiences of the twentieth century have discredited the grosser forms of such sentiments, but the philosophical doctrines associated with them endure.

McMahan’s argument against the permissibility of fighting in unjust wars is driven by the worry that it makes fighting an unjust war easier. By contrast, if people came to believe that participation in an unjust war was wrong, then soldiers might be more reluctant to fight in wars they believed to be unjust, and governments more reluctant to initiate unjust wars for fear of the resistance it might generate. McMahan acknowledges that it might be “absurdly utopian” to expect that people would resist war on these grounds. But the history of the twentieth century revealed the potential of war resistance. These are often overlooked because they happened at the end of wars, not the start; but they were significant nevertheless. The end of World War I was marked by mutinies of soldiers of all the major belligerents. Such acts of resistance had multiple causes, but they clearly included the belief that the war had lost all moral purpose.<sup>6</sup> An important factor in ending the Vietnam War was the unprecedented resistance of ordinary soldiers. In 1969, the *New York Times* wrote of President Nixon’s worries about a “full scale revolt” among ordinary soldiers, if asked to continue that struggle.<sup>7</sup> Moral beliefs *do* matter, including those of soldiers. McMahan’s book is a powerful plea for persons to take more personal responsibility for the justice of the wars in which they fight.

But I worry that McMahan’s view minimizes the contradictory position in which a democratic society can place its soldiers, ethically. Hence, it risks minimizing the wrong that we, as democratic citizens, are responsible for by placing soldiers in that contradiction through obliging them to fight in wars they know to be unjust. McMahan minimizes the contradictory position in which soldiers are placed in two ways. First, he gives insufficient weight to the institutional claims on soldiers in a democratic society. I develop this claim in the first half of this essay by developing what I term the *argument to democratic duty*

6. In Russia, the refusal of soldiers to fight was a key factor in causing the tsar to abdicate; it eventually led to Russia’s withdrawal from the war. Half the French army mutinied in 1917, refusing to undertake senseless attacks. The Wilhelmshaven mutiny in the German High Seas Fleet in October 1918 was a key factor in convincing German leaders to end the war. It eventually spread across Germany and ended in revolution. For a discussion of soldiers’ resistance, see David Stevenson, *Cataclysm: The First World War as Political Tragedy* (New York: Basic, 2004), 268–70, 380–83, noting that government leaders blamed mutinies on pacifist propaganda.

7. Rick Perlstein, *Nixonland: The Rise of a President and the Fracturing of America* (New York: Scribner, 2009), 551.

and consider what McMahan would say in criticism of it. McMahan acknowledges that holding soldiers to higher standards of responsibility has the potential of placing them in a contradictory position, imposing unfair moral burdens on them. Indeed, he speaks of placing them in a “terrible dilemma.” But he holds that such dilemmas can be resolved through policies of selective conscientious objection. I believe such policies *cannot* resolve the moral dilemma of soldiers and argue for this view in the second half of this essay. My view here echoes a traditional strain of pacifist thinking. Since the nineteenth century, pacifists have held that war wrongs all soldiers in part by placing them in impossible moral situations.<sup>8</sup> Pacifists have always believed in holding citizens and soldiers alike to higher standards of personal responsibility, but they have also believed that attempts to reconcile personal responsibility and war making will ultimately fall short. For the pacifist, then, pleas for more personal responsibility can only take us so far: taking personal responsibility seriously means abolishing the institution of war—not fixing it.

For several decades, Jeff McMahan has been developing a powerful account of just war theory, whose heart is the insistence that we take our responsibilities more seriously. His writings have wed penetrating analysis to a deep moral purpose; his achievement is one that should make us proud to be political philosophers. The questions I shall raise of his views proceed from the pacifist perspective. But they are driven by the sense of moral urgency about the terrible scourge of war that pacifism and just war theory share.

## I

Let me begin with some remarks on the history of thinking about soldiers’ responsibility, and how that responsibility is viewed in the United States today. This will provide some background for the argument to democratic duty developed in the next section.

### A

McMahan identifies the view that soldiers do no wrong even if their cause is unjust (assuming they abide by the rules of *jus in bello*) with the moral equality of soldiers. The moral equality thesis, as I shall call

8. The idea that states impose apparently contradictory demands on soldiers was a staple of idealist political philosophy in the nineteenth century, starting with Hegel. But they concluded from this that a coherent account of the state’s right to make war required the rejection of individualist notions of rights. See G. W. F. Hegel, *Elements of the Philosophy of Right* (Cambridge: Cambridge University Press, 1991), par. 324R. This is discussed in Michael Walzer, *Obligations* (Cambridge, MA: Harvard University Press, 1970), 89. I discuss this idealist view in “War and the State,” in *For and Against the State: New Philosophical Readings*, ed. Jan Narveson and Jack Sanders (Lanham, MD: Rowman & Littlefield, 1996).

it, holds that opposing soldiers have an equal right to kill, regardless of whose cause is just. The soldiers of an aggressor state have no special culpability for their acts of killing; the soldiers of a defender state have no special protection from being killed.<sup>9</sup> What soldiers may or may not do in combat is independent of whether or not their cause is just. The moral equality thesis is central to the most influential contemporary statement of just war theory, Michael Walzer's *Just and Unjust Wars*.<sup>10</sup> Indeed, he claims that "without the equal right to kill, war as a rule-governed activity would disappear."<sup>11</sup> Yet many philosophers, including McMahan, have recently found fault with the moral equality thesis. It has come to be regarded as the most problematic part of just war theory.<sup>12</sup>

One reason for all the attention to the moral equality thesis is the widely held view that it has always been central to just war thinking. Walzer's remark certainly suggests this. Some of McMahan's statements suggest it too, as when he writes that the moral equality of combatants "is almost universally accepted among those who are not pacifists, and has been for many centuries," or when he claims that the view that soldiers do no wrong merely by fighting in a war that is unjust has been "the dominant view in all cultures at all times," one that has been held by "most people in most cultures at all times in history" and one that "we share with the Nazis."<sup>13</sup> Mutual respect among warriors has always been an aspect of war as actually practiced. But as characterizations of how people have thought about war, and reasoned about its ethical dimensions, statements like these overstate the importance of the moral equality thesis—in ways that bear on the status of that thesis today.

Medieval just war thinking, for example, did not regard war as a conflict between moral equals. Quite the contrary: the asymmetry between just and unjust combatants was essential to how it reconciled classical just war thinking and Jesus's injunction to "turn the other cheek." Following Augustine, it did this in two ways: it held that le-

9. McMahan, *Killing in War*, 4. See David Rodin, *War and Self Defense* (Oxford: Oxford University Press, 2003), 128–29. The moral equality thesis also holds that soldiers have an obligation not to kill the other side's noncombatants regardless of which side is in the right.

10. Michael Walzer, *Just and Unjust Wars* (New York: Basic, 1977).

11. *Ibid.*, 41.

12. See David Rodin and Henry Shue, eds., *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (New York: Oxford University Press, 2008). An excellent discussion of these matters is Larry May, *Aggression and Crimes against Peace* (New York: Cambridge University Press, 2008).

13. McMahan, *Killing in War*, 38, 6, 3. McMahan writes, "Most people in virtually all cultures at all times [have] believed the a person does not act wrongly by fighting in an unjust war, provided that he obeys the principles governing the conduct of war" (104).

gitimate killing was in defense of innocent others, not oneself; and when one killed, one's act was punishment for the sins of the aggressor, meaning the sinful aggressor was really to blame for the violence. The first point highlights the interesting ambivalence of Christian-influenced thinking on personal self-defense. The second point shows its adherence to the crime-and-punishment model. Soldiers fighting an unjust war were akin to criminals, who had no more right to commit violent acts than an ordinary criminal; soldiers on the just side were like magistrates bringing the criminal to justice. As Stephen Neff writes in *War and the Law of Nations*, "Any killing done by [soldiers in an unjust cause] was mere homicide, with each soldier being individually responsible for his own guilty acts."<sup>14</sup> The soldiers fighting for a just cause were not regarded as acting in personal self-defense any more than the actions of police are ones of personal self-defense, or initiated for that purpose. In that regard, writes Neff, "It would be a great error to equate just war, in its medieval incarnation, with a defensive war."<sup>15</sup> Just wars were offensive in the way that the enforcement actions of a magistrate are offensive; a just war was licensed aggression.<sup>16</sup> Finally, medieval just war thinking did not distinguish between the actions of states and those of individuals; its rules applied to the rulers of states and ordinary persons equally.<sup>17</sup>

Initially, medieval thinking did not have firm notions of *jus in bello*. Because he regarded war as punishment for sinfulness, Augustine was sometimes quite lax in his views of who could be permissibly killed, going so far as to say that just warriors may even kill the morally innocent.<sup>18</sup> Later, doctrines of restraint in war arose from two sources. One was the "Peace of God" and "Truce of God" movements, where the Church prohibited violence at certain places and times and against certain peoples. These peace movements of the eleventh century reclaimed elements of Christianity's pacifist heritage and were a

14. Stephen Neff, *War and the Law of Nations* (Cambridge: Cambridge University Press, 2005), 63. He cites Francisco Suarez, *A Work on the Three Theological Virtues: Faith, Hope, and Charity*, trans. Gwadlys Williams (Oxford: Clarendon, 1944), 813. See also Greg Reichberg, "Just War and Regular War: Competing Paradigms," in Rodin and Shue, *Just and Unjust Warriors*, 193–213.

15. Neff, *War and the Law of Nations*, 59.

16. *Ibid.*, 60. Neff observes that soldiers on the unjust side did not lose the right of personal self-defense, but this did not entitle them to take offensive actions against the just side (64).

17. *Ibid.*, 56.

18. See Frederick Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1977), 19–20.

major source of the doctrine of noncombatant immunity.<sup>19</sup> The other was the codes of chivalry, which brought with them a distinct conception of what war was all about: war was a contest, whose participants fought well by fighting fairly and exhibited their honor by respecting—indeed, protecting—the defenseless. James Turner Johnson identified the chivalry tradition as the principal source of *jus in bello* doctrine.<sup>20</sup> It is certainly the origin of all those attempts to ground restraints in war in ideals of soldierly virtue, and implicit compacts between soldiers.

The moral equality of soldiers is implicit in the chivalry model, but it only becomes explicit much later, with the emergence of the European state system in the seventeenth and eighteenth centuries and the conception of international law associated with that system. The key figure here was Grotius, who contrasted the older “law of nature” (classical conceptions of just war, and their Christian appropriation) with the “law of nations,” which he saw as grounded in the mutual consent of states, as expressed in customary practices and international instruments like treaties.<sup>21</sup> Neff speaks of this as the greatest conceptual leap in the history of international law, engendering two changes essential to the topic at hand.<sup>22</sup> The laws pertaining to states were distinguished from those pertaining to interpersonal morality, with the relations between states coming to be seen as possessing their own unique character. From this, it followed that the laws pertaining to agents of the state, like soldiers, were distinguished from those of interpersonal morality. The relations between soldiers were seen as possessing their own unique character—specifically, they came to be seen as moral equals regardless of the cause for which they fought.<sup>23</sup> Soldiers fighting for an unjust cause could be seen as dutiful patriots, not evildoers. “Obstinate devotion to one’s party is not itself a cause for punishment,” wrote Grotius. By the eighteenth century, Vattel would claim that the moral equality of soldiers was one of the most fundamental principles of the laws of war.<sup>24</sup>

The link between international law and the European state sys-

19. These are discussed in James Turner Johnson, *The Just War Tradition and the Restraint of War* (Princeton, NJ: Princeton University Press, 1981), 124ff. See also his *The Quest for Peace: Three Moral Traditions in Western Cultural History* (Princeton, NJ: Princeton University Press, 1987).

20. Johnson, *The Just War Tradition*, 47.

21. See Reichberg, “Just War and Regular War.”

22. Neff, *War and the Law of Nations*, 85; for a summary of the changes brought about by the law of nations, see 111–12.

23. *Ibid.*, 111

24. *Ibid.*, 112. He cites Emmerich de Vattel, *The Law of Nations*, trans. Charles Fenwick (Washington, DC: Carnegie Institution, 1916), 305–6.

tem is a crucial one, as I have argued elsewhere.<sup>25</sup> Indeed, scholars like David Deudney and Phillip Bobbitt have suggested that international law was initially conceived as the “constitution” of Europe, conceived as a kind of republic in its own right.<sup>26</sup> This is key to understanding the importance of political stability in international law thinking. From the Thirty Years War to the post-Napoleonic era, a major reason for restraining the horrors of war was the social unrest such horrors generated, initially against the state system itself. The connection is also key to understanding the ethnocentric dimension that some have seen in international law from the start.<sup>27</sup> Thinking about war has always been plagued by parochialism. Rome believed in fair play toward warring states, hence Cicero’s insistence that promises be kept with one’s enemies, as with Carthage; but against truly foreign foes, that is, “barbarians,” such scruples did not apply, as in Julius Caesar’s genocidal war against the Gauls.<sup>28</sup> Medieval just war theory imposed constraints on wars between Christians, but not between Christians and infidels or heretics.<sup>29</sup> Though some of its early theorists insisted that international law applied to Europeans and non-Europeans alike, principles of conflict differed dramatically for the “civilized” and the “savage.” Soldiers on opposing sides possessed the same moral rights as long as they were Europeans, or Euro-Americans, but if the enemy was outside the European sphere, ideas of moral equality were qualified or displaced entirely.<sup>30</sup> Indeed, from earliest times, the two types of conflict were conceived in dramatically different terms. Conflicts between sovereign states were conceived as “wars” proper, with distinct beginnings and endings, while conflicts between sovereign states and those outside the European state system were conceived as permanent states of hostility, like the relation of

25. See my “Moral Equality, Victimhood, and the Sovereignty Symmetry Problem,” in Rodin and Shue, *Just and Unjust Warriors*, 131–53.

26. Daniel Deudney, *Bounding Power: Republican Security Theory from the Polis to the Global Village* (Princeton, NJ: Princeton University Press, 2008), and Phillip Bobbitt, *The Shield of Achilles* (New York: Anchor, 2003).

27. See, e.g., Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (New York: Cambridge University Press, 2005).

28. Neff, *War and the Law of Nations*, 24–25. See also Russell, *The Just War in the Middle Ages*, 7–8.

29. Johnson, *The Just War Tradition*, 69.

30. Such thinking has remained a central feature of strong prowar ideologies. In this regard, McMahan ascribes the moral equality view to the Nazis (*Killing in War*, 3). But this gives too much credit to the Nazis: the Germans regarded French soldiers as their moral equals but postulated no such symmetry in their dealings with Russians or Eastern European peoples generally. Distinctions between who is a moral equal and who is not have emerged in the United States’ War on Terror and its treatment of Arab peoples.

sovereign states to pirates.<sup>31</sup> (I shall draw the parallel later with the current “War on Terror.”)

This is not just historical quibbling. The tendency to regard the laws of war as timeless and universal can lead to reifying war as a social practice. It can lead us to ignore the extent to which war as an institution is not just constrained but constituted by its laws. And it can lead us to ignore the extent to which our “intuitions” about violence, so essential to our philosophizing about war, are themselves historical artifacts; consider, for example, how differently early just war theorists thought of personal self-defense.

Conversely, attention to the history of these matters helps illuminate and place contemporary changes in thinking on these matters. The Grotian conception of the law of nations emerged with modern notions of state sovereignty, but the experiences of the twentieth century have problematized this statist conception of politics and its notions of soldiering. The crimes of the twentieth century were such that not every soldier could be seen as just doing his patriotic duty. This is why I think McMahan overstates the hegemony of the moral equality view in popular consciousness. People may generally regard soldiers as doing no wrong simply by fighting in an unjust war, but there are limits. Ronald Reagan caused an uproar by his plans to honor the dead German soldiers (along with dead Allied soldiers) at Kolmeshohe Cemetery near Bittburg, Germany, on the fortieth anniversary of VE Day. Critics fastened onto the fact that the German dead included forty-nine members of the Waffen-SS. But others charged that the very idea of placing soldiers fighting for Nazi Germany in the same moral category as Allied soldiers disgraced the latter’s memory. Despite Walzer’s dismissal of the crime-and-punishment model of war, the return to that model has been a major strain in contemporary thinking. McMahan himself goes so far as to characterize his own position as “reactionary” in returning to the views of earlier centuries, though this minimizes the novelty of his arguments for his views.<sup>32</sup>

## B

But if the idea that one does no wrong simply by fighting in an unjust war is less secure than it once was, it remains central to the political consciousness of today’s dominant military power, the United States of America. For it stands at the heart of one of the fixed points of

31. See Neff, *War and the Law of Nations*, 25–26. This is also discussed in Doyné Dawson, *The Origins of Western Warfare: Militarism and Morality in the Ancient World* (New York: Westview, 1998), 45–107.

32. McMahan, *Killing in War*, 237–38 n. 26.

American politics: the idea that Americans must “support the troops.” This is reason enough for exploring the idea further, for reasons McMahan stresses. The insistence that Americans must support the troops seems to rid soldiers of personal responsibility for the justice of the wars they fight, in ways that seem to enable America’s fighting unjust wars.

It is hard to exaggerate the devotion to the support-the-troops view in the United States today. Every politician must proclaim that he or she supports the troops or risk political suicide. Even the strongest opponents of the Iraq War insist that, though the war is unjust to the point of criminal, we must still “honor” the troops fighting it and “thank” them for doing so. Before he was elected senator from Minnesota, Al Franken had a daily talk show. Most of it was devoted to critiquing the Iraq War as completely unjustified, a massive waste of resources, and the product of political deceit. Then he’d spend the last five minutes of the show talking by telephone to American soldiers in Iraq, thanking them profusely for what they were doing. Similar sentiments are found in other countries, though not every country. Germans, for example, reportedly evidence a general mistrust of their soldiers in uniform.<sup>33</sup> The United States seems exceptional in the vehemence with which it holds this view.

The claim that we must support the troops holds that we must do so whether or not we believe the war they fight is unjust. Indeed, it holds that we must support the troops even if the war they fight *is* unjust—as the Vietnam War clearly was. What does such “support” mean? In the Iraq War, it apparently means three things: Americans must *honor* their troops (celebrate their activities, for example, through parades, celebrations, etc.); Americans must *thank* their troops—specifically, for “defending their freedom”; and finally, Americans must provide their troops with the *resources* to “do their job.” On its face, this seems absurd. If one believes a war to be unjust, hence its killing to be unjustified, how can one possibly honor those who carry out that killing? How can one thank them for defending our freedom if a war has nothing to do with defending freedom? How can one be obliged to give them the resources to do their job—when that job is waging an unjust war?

The support-the-troops view is an artifact of post-Vietnam War culture. During that war, antiwar protestors were stigmatized for not supporting the troops; since then, urban myths have developed

33. See Nicholas Kulish, “No Parade for Hans,” *New York Times*, November 14, 2009.

around the mistreatment of soldiers by antiwar protestors.<sup>34</sup> All of this has contributed to a promilitary ideology that distinguishes the United States from most other countries.<sup>35</sup> Americans support a huge war establishment because they feel they must support the troops. This may explain the view, but it does nothing to dispel its absurdity. We can make more sense of it, though, if we recognize that the central thought at work in the support-the-troops view is the one McMahan criticizes—that soldiers may act permissibly, even honorably, though the war they fight is unjust. I do not think that this view presumes or implies the moral equality thesis in its strongest form. The fact that American troops should be honored for fighting in a war that is unjust neither presumes nor implies that every other country's troops should be honored by their own countries. Rather, it points to a special fact about the United States, and democracies like the United States, in the eyes of its proponents.

According to this view, American soldiers are obliged to kill in wars, even if a particular war is unjust, because by so doing they sustain the institutions necessary to protecting American democracy—institutions whose wars are generally just. I call this line of thinking the argument to democratic duty. Like earlier views, it links the responsibilities of soldiers to the claims of state sovereignty, but it differs in privileging a particular type of sovereignty, *popular* sovereignty (as embodied in democratic institutions). It is an “institutional” justification for the permissibility of killing in an unjust war of the kind that McMahan considers in the second chapter of his book, and so I shall consider McMahan's criticisms of such justifications after developing the argument further.

## II

I begin by sketching the argument to democratic duty, and then I turn to the considerations for and against it.

### A

The argument to democratic duty holds that once our democracy (or any democracy like ours, presumably) has made the decision for war:

34. The view that returning soldiers from Vietnam were abused by antiwar protestors has been criticized as an urban myth in Jerry Lembcke, *The Spitting Image: Myth, Memory, and the Legacy of Vietnam* (New York: New York University Press, 2000).

35. For a recent discussion of this, see James J. Sheehan, *Where Have All the Soldiers Gone?* (Boston: Houghton Mifflin, 2008), xiii–xx. This is also a theme in the writings of Andrew Bacevich.

1. Soldiers are obliged to fight it, whether or not they agree that the war is just; indeed, whether or not the war is just.
2. Citizens are obliged to pay taxes to support the war, and to provide other means of relevant support, whether or not they agree that the war is just; indeed, whether or not the war is just.
3. Both obligations can be enforced by punitive sanctions. The obligation of soldiers to fight can be enforced by military discipline, including military prison and, in extreme cases, execution. The obligation of citizens to pay taxes can be enforced by fines, involving the attachment of income and, in extreme cases, federal prison. These are the sanctions that the United States government currently has in place.

The argument for claims 1–3 goes roughly as follows. Our military institutions, and the political institutions in which they are imbedded (call these together our protective institutions) are necessary for defending what we cherish most—ourselves, our loved ones, and our deepest values as embodied in our democratic institutions. These institutions will sometimes go wrong, but they will not generally go wrong: democratic governments generally wage wars for just cause, and they generally wage wars justly. It is because of this that the defense and promotion of democratic arrangements are themselves in the interest of peace. In those cases where the institutions do go wrong, citizens are still obliged to abide by them as a way of “protecting their protection” (in Hobbes’s words), as a way of supporting and sustaining those institutions that generally serve the just end of defending themselves, their loved ones, and their deepest values as embodied in the democratic system.<sup>36</sup> Soldiers are obliged to fight, even though the particular war is unjust; citizens are obliged to support them with their taxes, even though the particular war is unjust; and the importance of protecting our protection generally means that these obligations can be enforced by strong sanctions.

Or so the reasoning goes.

It may help clarify the position here to contrast it with two other positions. One grounds the duty to serve and support those who serve in our wars even if they are unjust in considerations of patriotism. We owe a special loyalty to our country to stand by it, even when it errs, just as we stand by a loved one who has erred; this extends to serving in and supporting its wars. This position is identified with Michael

36. The phrase “protecting the protection” is found in Thomas Hobbes, *Leviathan*, pt. II, chap. 29.

Walzer. It differs from the argument just sketched in that it applies to nation states regardless of their political institutions, while the argument to democratic duty applies only to democracies like the United States. This is why I think it is a mistake to characterize “support the troops” as an expression of blind patriotism, akin to Nazi patriotism. A second view, developed by David Estlund, parallels the position I have sketched in grounding things in the specifics of democracy. In this case, Estlund appeals to the process by which democracies arrive at the judgment for war. He claims that a democracy can obligate its soldiers to fight, even if that judgment is a mistake, so long as that judgment is not too unreasonable based on the relevant considerations and that any errors in judgment could be regarded as honest mistakes.<sup>37</sup>

Estlund provides a compelling argument for this position. His view differs from previous democratic theorists in not grounding the duty to serve in the brute fact that “the people will it.” But his emphasis is different from the argument I have sketched. His appeal is to the specific process by which the decision for a particular war is reached. Hence, the soldier’s obligation to fight, despite injustice, will vary from war to war. My argument is more general, in appealing to the general duty to support democracy’s protective institutions. It makes assumptions (to be explored shortly) about how the decision for war is generally made in a democracy, but it does not rest the duty to serve on whether the decision was reasonable, and resulted in honest mistakes, in any particular case. If nothing else, this accords with the support-the-troops sentiment I am trying to capture. Many people believe that American soldiers that fight in Iraq should be honored for defending democracy while believing that the process by which America went to war was completely unreasonable and dishonest; indeed, fraudulent. Many soldiers I know believe this. They still believe they are obliged to serve, though, on the grounds I have described—doing so is necessary for protecting the protection of our democratic society.

1. To unpack the argument further, let me begin with some words on its empirical assumptions. Discussions in political philosophy always rest on empirical assumptions, but discussions of war are particularly problematic in this regard not just because people can differ so dramatically in their assumptions about war but also because the empirical reality is always changing, for reasons already noted (“war” is not a natural kind, but a socially constructed institution). My first concern is whether the argument to democratic duty *could* provide a

37. David Estlund, “On Following Orders in an Unjust War,” *Journal of Political Philosophy* 15 (2007): 213–34. My summary of his position is from 230.

justification for fighting an unjust war, if its empirical assumptions are valid ones. To this end, I begin by considering whether those empirical assumptions are reasonable ones. I shall go on to consider McMahan's criticisms of these assumptions and how a defender of the argument might respond. I generally agree with his skepticism about the integrity of our current war-making practices, but while he sees this as reason for greater vigilance on which wars are just or unjust, I see it as reason for questioning our participation in war generally.

The key empirical assumption is that a democratic government will generally go to war for legitimate reasons; more specifically, it will generally go to war for reasons of self-defense. This supports the further claim that defending and promoting democratic arrangements is not just defending and promoting one's own institutions, but ones that serve the universal goal of peace. This has been a persistent claim of prodemocratic (or prorepublican) theorists since the eighteenth century. Thomas Paine argued for it as a reason for overthrowing monarchies and replacing them with democracies. Kant held that the peaceful nature of republics meant that our duty to promote peace implied the duty to promote republican arrangements. Elements of this view are found in the "democratic peace thesis," the most widely held thesis in international relations today.<sup>38</sup> The peaceful nature of liberal societies is a central claim in John Rawls's *The Law of Peoples*.<sup>39</sup> A key element in these views is the link between those who decide about war, and those who must bear the bodily and financial costs of it: if the citizenry generally must bear the costs of war, then the citizenry generally will make the decision prudently, and generally opt for war only in cases of self-defense. In theory, this conception of why democracies should be peace oriented is compelling; in practice, I

38. On Paine, see Thomas Walker, "The Forgotten Prophet: Thomas Paine's Cosmopolitanism and International Relations," *International Studies Quarterly* 44 (2000): 51–77. On Kant, see "On Perpetual Peace," in *Kant's Political Writings*, ed. Hans Reiss (Cambridge: Cambridge University Press, 1970). For a comparison of Kant and the *Federalist Papers* on this issue, see Daniel Deudney, "Publius before Kant: Federal-Republican Security and Democratic Peace," *European Journal of International Relations* 10 (2004): 315–56. The discussion of the democratic peace thesis is, of course, enormous. For some book-length discussions, see Rudolph Rummel, *Conflict and War* (Beverly Hills, CA: Sage, 1975) and *Power Kills: Democracy as a Method of Nonviolence* (New Brunswick, NJ: Transaction, 1997); Bruce Russett, *Grasping the Democratic Peace* (Princeton, NJ: Princeton University Press, 1993); James Lee Ray, *Democracy and International Conflict* (Columbia: University of South Carolina Press, 1995); John Owen, *Liberal Peace, Liberal War: American Politics and International Security* (Ithaca, NY: Cornell University Press, 1997); Spencer Weart, *Never at War: Why Democracies Will Not Fight One Another* (New Haven, CT: Yale University Press, 1998).

39. John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999). An excellent recent discussion of this issue is Leif Wenar and Branko Milanovic, "Are Liberal Peoples Peaceful?" *Journal of Political Philosophy* 17 (2009): 462–86.

think it is quite a different matter. For example, the government of the United States has increasingly alienated the full costs of war from its citizens, undermining a key argument for why the citizenry will be prudent in these matters.<sup>40</sup> But proponents of the argument to democratic duty could say that any argument in matters such as these makes some controversial assumptions about our political arrangements. Their assumption—that democracies are generally peaceful—is as uncontroversial as one is likely to get, they could claim.

A second empirical claim is that the refusal of soldiers to fight in a particular unjust war can impair a democracy's capacity for war making generally. There is no question that the military takes this to be true in some cases. The U.S. military's response to the Vietnam experience of introducing an "all volunteer" force was driven by the conviction that soldiers' resistance to the Vietnam War had damaged the military generally.<sup>41</sup> The strategies of both the Allied and Axis powers in World War II were dictated by the desire to avoid the kind of soldiers' resistance that characterized the end of World War I. How much one can generalize from such experiences is unclear, though. The impact of refusals to fight depends on lots of specific conditions, hard to anticipate, which is probably why astute thinkers on this matter are often of two minds. McMahan notes that the specter of soldiers' resistance may actually improve the functioning of the military, insofar as it compels the protective institutions to take their responsibilities more seriously. At the same time, he suggests that the practice of such resistance might actually impair a country's ability to fight a war that is unjust. Surely there are situations in which this means impairing the military's functioning generally. I'll say more about these issues in discussing selective conscientious objection.

2. I suspect that the most controversial claim implicit in the argument to democratic duty is a normative one. That argument holds that a soldier's abiding by his or her democratic duty, and killing in a war, may be the *right* thing to do, even though the particular war may be unjust (hence, the killing in it is unjust). This seems wildly implausible: How can engaging in unjust killing ever be the right thing to do? Doesn't the duty not to kill unjustly trump all other duties?

One response to this problem might be to point out that even the most just wars involve unjust killing, even if soldiers are doing

40. I discuss this development in my recent polemic, *The Chickenhawk Syndrome: War, Sacrifice, and Personal Responsibility* (Lanham, MD: Rowman & Littlefield, 2009), chap. 2.

41. See Andrew Bacevich, *The New American Militarism: How Americans Are Seduced by War* (New York: Oxford University Press, 2006). I also discuss this in *The Chickenhawk Syndrome*, chap. 2.

their best to abide by the rules of war. The specter of this has led some to argue for a form of contingent pacifism. Such pacifism holds that since even the most just war can implicate us in unjust killing, we should refuse to participate in all war. But the more common response is to conclude that a certain amount of unjust killing is permissible if the war as a whole is just, and the unjust killing it involves is inadvertent and incidental to the enterprise. For many people, then, waging a just war means accepting a certain amount of unjust killing.

But this does not defuse the problem faced by the argument to democratic duty. For that argument asks us to believe that *all* the acts of killing in a war could be unjust, since the war as a whole is unjust—yet performing those acts is still the right thing to do.

The argument to democratic duty has another response available to defuse this problem, one that is implicit in how I have characterized that argument thus far. It could respond that fixating on individual unjust wars is too narrow. Consider this parallel: just war theory does not focus on individual battles; it focuses on the particular war as a whole. A war involves many battles, some of which may be unnecessary, even counterproductive. (One of the most famous battles in American history, the Battle of New Orleans, took place three weeks after the United States and Great Britain signed the peace treaty ending the war of which it was a part.) Individual battles may involve the needless killing of the enemy; indeed, they may involve the killing of soldiers who are not the “enemy” in any sense of the word. Any major war involves battles with people who just happened to be dragged into the conflict, through no particular fault of their own. This was certainly true of the American Revolution. But for just war theory, a few “unjust” battles do not render a war as a whole unjust, if the war has a just cause. Soldiers may permissibly engage in such battles; indeed, they are obliged to engage in them if it is necessary to the cohesion of the war effort generally, for such theory. If soldiers took it upon themselves to assess the legitimacy of each individual battle, no wars could be fought at all—no matter how just.

The argument to democratic duty raises things one level further. Its focus is not the individual war but the country’s war making generally. If its war making generally is just, then the importance of maintaining the ability to engage in it obliges the soldier to engage in the occasional unjust war. If this downplaying of individual wars seems exceptionally ad hoc, I would offer two comments.

One pertains to the nature of modern war. Most major wars have themselves been collections of individual wars, jumbled together.

McMahan makes this point, citing World War II.<sup>42</sup> This why it is so difficult to say when a war like World War I actually ended (if it ever did), and why a war like World War II actually began. The problem of individuating wars is implicit in modern war itself. This naturally raises the question of what if an individual war is unjust, but the larger enterprise of war of which it is a part is just. Most Americans are opposed to the war in Iraq; they regard it as unnecessary if not unjust. But they also regard that war as one “front” in the larger War on Terror, whose other front is the war in Afghanistan, which they generally regard as just. Soldiers are generally shuttled back and forth between these wars, meaning that disruptive actions toward one war could easily impair the ability to fight the other. Finally, most Americans believe that their country faces an ongoing threat from non-democratic forces throughout the world. The upshot is that, while citizens may do whatever they can to end the Iraq War, soldiers are still obliged to fight in it as part of their larger duty to maintain the country’s protective institutions.

This leads me to a further point, about the nature of just war theory. I have noted that, since Roman times, thinkers have distinguished conflicts between civilized peoples from conflicts with non-civilized peoples. The former were “wars” proper; that is, they had distinct beginnings and endings, and were regulated by principles of civilized warfare. The latter were permanent states of hostility that abided by entirely different principles (or no principles, to be precise). Thus, Cicero distinguished between the war between Rome and Carthage, and the state of hostility between Rome and the Gauls.<sup>43</sup> Medieval thinkers distinguished wars within Christendom from the state of hostility between Christendom and Islam. Political developments of the twentieth century have conspired to return us to another variation on this view—but with “democracy” replacing “Christendom” as that which stands in a permanent state of hostility with the outside world. This way of thinking has its origins in World War II and the Cold War, though in those conflicts the enemy was rather specific: fascism and communism. Contemporary thinking, and not just the more rabid proponents of the War on Terror, tends to conceive of the world as a permanent state of hostility between democracy and its enemies, akin to that between Christianity and the infidels. The insistence that we support the troops can only be understood in the context of a return to this other feature of Western thinking about war.

42. McMahan, *Killing in War*, 5; the problem of individuating wars is a theme of Ferguson’s *War of the World*.

43. See Neff, *War and the Law of Nations*, 24–25.

3. Thus construed, the argument to democratic duty allows us to reformulate the support-the-troops view to render it more coherent, if not completely so. That view holds that when we support the troops, even though their war is unjust, we do not honor the fact that they fight the war they fight; supporting the troops in Iraq does not mean honoring the fact that they fight the war in Iraq. Rather, we honor the fact that they abide by their democratic duty in ways that support and sustain the protective institutions generally necessary to defending ourselves, our loved ones, and our deepest values as embodied in our democratic institutions. We thank them for defending our freedom, not because the particular war they fight defends our freedom (Iraq, say) but because abiding by their democratic duty supports and sustains the protective institutions generally necessary for supporting our freedom. We honor them as peacemakers, not because the particular war they fight promotes peace, but because the protective institutions they support and sustain defend and promote democracy, the key to achieving world peace. Finally, this is why ordinary citizens should do their part in sustaining and supporting our protective institutions (by paying taxes first and foremost) even though they may oppose a particular war that those taxes sustain.

Essential here is the idea that the troops are honored for their *service*, for their performing their democratic duty. McMahan alludes to the support the troops issue in reference to the Vietnam experience. “During that war, soldiers were often greeted with insults when they returned to the United States.” McMahan agrees that this was wrong—on the grounds that we should distinguish our evaluation of persons, the troops in this case, from the evaluation of their actions.<sup>44</sup> But the claim that we must support the troops is the claim that we must support not just them but also their service, to the point of providing them the resources to perform that service. The emphasis on “service” differs from previous wars. In the past, the most celebrated soldiers were celebrated for their skill at killing. The most honored American soldier of World War I, Sergeant Alvin C. York, was celebrated for the number of Germans he killed despite his pacifist upbringing. The most celebrated soldier of World War II, Audie Murphy, was celebrated for his Mozartian abilities at gunning down the enemy. “Supporting the troops” downplays this dimension. The Vietnam War and subsequent conflicts produced no Sergeant Yorks or Audie Murphys. Until just recently, every Congressional Medal of Honor awarded in the Afghanistan and Iraq conflicts has been awarded to soldiers who have *been* killed, usually in assisting their

44. McMahan, *Killing in War*, 96.

fellow soldiers. Such acts are seen as tokens of protecting America's protection, generally.

### B

McMahan touches on issues raised by the argument to democratic duty in his second chapter, on institutions as sources of justification. He considers several grounds for the claim that institutional considerations may render it "rational or morally required for a soldier to subordinate his private moral judgment about the justifiability of going to war to that of his government,"<sup>45</sup> and presents forceful arguments against each of them. Not all his points bear on the argument to democratic duty, as I have presented it, but it's worth saying something about each of them.

1. The first argument he considers for the claim that institutional considerations may outweigh personal judgment holds that we have a "duty" to defer to the "epistemic authority of the government" on judgments about the justice or injustice of war. A parallel, he suggests, might be the duty to defer to the judgments of the court system in matters of criminal punishment. But *do* we have reason to believe that governments are more "reliable" in determining the justice or injustice of war? We might, he says, if "the political institutions charged with making decisions about the resort to war [are] structured to yield judgments that are presumptively more reliable morally than the private judgments of virtually all normally situated individuals."<sup>46</sup> But McMahan denies that this is the case in the United States today, or in any other country. "What procedural guarantees are there that the wars [the United States] fights will be just?" he asks. "The answer is: none." In contrast to the court system, with its mechanisms for generating just decisions, there are "no institutional or procedural mechanisms" to ensure that the United States government gives primary concern to moral considerations in deciding for war—or any concern to moral considerations at all. "When was the last time an administration contemplating going to war called in philosophers or even theologians schooled in just war theory to get expert counsel on matters of morality?" he asks.<sup>47</sup> Given the indifference of governments to moral concerns, there is no reason to assume that their judgments will be more reliable in these matters than the average moral person's.

I think this is a bit too dismissive of American institutions, at least with respect to how they are *supposed* to function. The U.S. Consti-

45. *Ibid.*, 70.

46. *Ibid.*

47. *Ibid.*, 69.

tution does not contain any provisions for ensuring that the wars we fight are moral ones per se. But it does seek to ensure that the wars we fight are primarily defensive ones, on the assumption that defensive wars are moral ones.<sup>48</sup> Its approach embodies the thinking sketched above, on why democracies are peaceful, as: the Constitution stipulates that the decision to go to war will be made by the legislative branch, the branch most expressive of popular will; and its provisions for a popular militia, and for the regular review of the military budget, seek to ensure that if the country goes to war, the people as a whole will bear the cost. The upshot, presumably, is that the country will be inclined to fight only defensive wars. Vesting the decision to go to war in the legislative branch is also meant to ensure that the decision was made slowly and deliberately, with ample time for popular input. It is important to appreciate these aspects of the Constitution, if only to appreciate how thoroughly they are ignored today. As recently as World War I, major political figures questioned whether the Constitution even permitted war making that had nothing to do with self-defense. Woodrow Wilson's secretary of state, William Jennings Bryan, resigned over this issue; the speaker of the House of Representatives, a member of Wilson's own party, said that the United States could only go to war if there was a national plebiscite approving it.

The dismal fate of these constitutional constraints certainly suggests that McMahan is right in his larger point that governments are ill suited to take moral considerations seriously in matters of war. McMahan concludes from this that soldiers should rely on their own moral judgments in deciding whether to participate in their country's wars. I would think that this supports a much deeper skepticism toward government war making generally. Consider the analogy with criminal punishment: if I were part of the criminal justice apparatus—as executioner, say—and if I knew that our criminal justice was incapable of weighing moral factors in deciding whom to execute, I would not conclude that I should rely more on my own moral judgment in deciding whether to participate in executions or not. I would oppose the whole idea of government killing, and refuse to be part of it. The problem with both war and capital punishment is that they take something that can only be deeply personal, given the profound moral issues they raise—the taking of another life—and turn them into a social (if not political) project. Arguing for more personal responsibility in these matters is the right thing to do; its upshot, in my

48. A good introductory discussion of this is Peter Irons, *War Powers* (New York: Metropolitan, 2005), 11–45; see also Deudney, *Bounding Power*, 161–93.

view, will be to undermine the legitimacy of the whole war-making system.

2. McMahan speaks to issues raised by the argument to democratic duty in speaking of a “more compelling” reason for a soldier’s subordinating his private judgment to that of the government. This reason involves “the necessity of sustaining the efficient functioning of institutions that enable people to act together in coordinated ways in the service of morally important ends”—the most important end, in this case, being self-defense.<sup>49</sup>

McMahan has several responses to this argument, not all of which bear on the argument to democratic duty. He points out that there can be such a role-based duty only when the protective institutions are just; the appeal to sustaining efficient institutions shows nothing if the institutions are those of Nazi Germany. True enough; this is why the argument to democratic duty does not seek to establish a general duty to fight in wars regardless of their justice. The duty applies to soldiers of a well-working democracy. McMahan further notes that even when the institutions are just, “there can be no a priori guarantee that the institutional duties will be overriding.”<sup>50</sup> I think this is true as well. The argument to democratic duty seeks to establish a *prima facie* case for subsuming personal moral judgments to larger institutional demands, but there can be exceptions to this as there are exceptions to any moral principle.

McMahan proceeds to a stronger claim—that our institutional obligations can *never* override our personal obligation not to participate in an unjust war, since participation in such a war violates our strong negative duty not to kill the innocent.<sup>51</sup> McMahan offers a parallel: suppose an executioner “knows, with certainty, that a particular prisoner is innocent”; suppose he can help the prisoner escape, and he knows that, once free, “the prisoner would soon be able to prove his innocence.” While there may be a duty to uphold the institution of capital punishment, the executioner must abide by personal duties not to execute, or enable the execution of, an innocent person.<sup>52</sup> Accordingly, if a soldier knows that a war is unjust, no role-based duty can justify participating in its unjust killing.

Proponents of the argument to democratic duty might respond that this parallel case is incomplete. They would respond with the following: suppose that the institution of capital punishment, like a democracy’s protective institutions, is necessary to protecting oneself

49. McMahan, *Killing in War*, 70–71.

50. *Ibid.*, 72.

51. *Ibid.*

52. *Ibid.*, 73.

and one's loved ones. Suppose that one's refusal (as executioner) to execute an innocent person would jeopardize the entire institution in ways that render oneself and one's loved ones vulnerable to unjust attack. Suppose, for example, that you know that if you fail to execute the innocent person, you and your loved ones will be set upon by a band of criminal marauders who are no longer deterred by the threat of capital punishment. At the very least, there is a real dilemma here. The duty not to kill unjustly comes into conflict with the duty to protect one's loved ones, in ways that Seth Lazar has perceptively explored in his important work on war and the claims of associative duties.<sup>53</sup> McMahan could still insist that the duty not to kill unjustly trumps the duties toward one's loved ones, in such cases. But my account of the argument to democratic duty suggests a further response to the executioner case.

A proponent of that argument could hold that, if McMahan's point holds, then a soldier's role-based duty toward a larger just war effort can never justify participating in a pointless battle, since that too involves needless killing. If role-based duties can never trump the imperative to refrain from needless killing, this must pertain to fighting in battles as well as wars (and to each individual killing in those battles). I should think that this would render fighting even the most just war all but impossible, which is just to say that if we believe in fighting war at all, we must allow for role-based duties trumping the obligation not to kill needlessly in some instances. If we believe in fighting war at all: one can still hold tight to the personal obligation not to kill unjustifiably—indeed, I believe we should—but once again, the upshot is a form of contingent pacifism which holds that war by its very nature is incompatible with abiding by one's most important moral duties.<sup>54</sup>

3. McMahan's fourth response to the institutional argument speaks most directly to the Argument for Democratic Duty. Suppose that the unjust war the soldier is ordered to fight is an aberration, he writes. Suppose that the military has served worthy goals in the past "and is likely to be necessary for other morally important purposes in the future." "Might the importance of preserving the integrity of the institution objectively justify the soldiers who are part of it fighting in this one unjust war?"<sup>55</sup>

McMahan's response to this is a compelling one. If society's pro-

53. See Seth Lazar, "War and Associative Duties" (DPhil thesis, Oxford University, 2009), esp. pt. 2.

54. See Larry May, *War Crimes and Just War* (Cambridge: Cambridge University Press, 2007), 124ff.

55. McMahan, *Killing in War*, 74.

tective institutions malfunction, resulting in an unjust war, who should bear the costs of that malfunctioning, he asks. “Those who are unjustly being warred against, or those whose institutions have gone off the rails?”<sup>56</sup> He suggests that it is clearly unfair for those who are warred against to bear that cost, especially since those whose institutions have “gone off the rails” have benefited from those institutions and will presumably benefit from them in the future. By participating in an unjust war, for reasons like those of the argument to democratic duty, a soldier unjustly imposes the cost of his protective institutions’ malfunctioning on others. Hence, soldiers should refuse to do this.

The soldier’s choice is a bit less clear, I think, if the decision not to fight in the unjust war places his or her loved ones in immediate danger, as a proponent of the institutional justification might claim. A further point is that, as the argument to democratic duty constructs it, the soldiers’ acts are not entirely self-regardful: they are not just defending themselves and their loved ones, or institutions that have only benefited them; they are defending *democracy*—an institution whose preservation and promotion potentially benefit everyone. Nevertheless, I think McMahan is right that there is something unfair about imposing the cost of our protective institutions’ malfunctioning on others. That unfairness heightens our duty to rectify such malfunctioning, when it occurs.

But my question concerns the fairness of McMahan’s alternative. If, as is the case, a soldier faces harsh sanctions for refusing to fight an unjust war, like a long prison sentence and even execution, doesn’t the obligation to resist impose an unfair burden on him or her? As McMahan notes, it would place soldiers in a “terrible dilemma” if they are encouraged to use their personal moral judgment in deciding whether a war is just, then condemned—and punished—if that judgment leads them to refuse.<sup>57</sup> I am not suggesting that the unfair burden this imposes on a soldier is equivalent to that imposed on those who are being unjustly warred against (they are not equivalent if the soldier’s punishment is not execution, at least.) Absent another solution to this “terrible dilemma,” we might tell the soldier to do the right thing and accept his or her fate. But obviously another solution must be found, for what does it say about a society that places those it claims to honor most, its soldiers, in this contradictory position?

This is a problem that Americans of my generation, the Vietnam War generation, are especially sensitive to. The moral dilemma imposed on young men in the military, or facing military service, is a constant theme of the literature of that war, in contrast to previous

56. *Ibid.*

57. *Ibid.*, 97.

American wars. One of the most admired books on this theme, which I have invoked in a previous discussion of these matters, is Tim O'Brien's *The Things They Carried*, a semifictionalized account of his own experiences with being drafted, deciding to serve (despite his personal opposition to the Vietnam War), and fighting in the war.<sup>58</sup> O'Brien writes of the shame he felt at the prospect of being called a traitor, and the like, should he refuse to answer his country's call; others have written of being caught between the claims of their country generally and the obligation to serve in that particular war. (Many young American men and women in the National Guard and Reserves have spoken of the same contradiction facing service in Iraq.) McMahan also speaks of O'Brien's book, in discussing the kind of social pressure that young people can face in deciding to fight in war. He seems to fault O'Brien's narrator for giving into such pressure, for lacking the "courage to be a coward"—for not wanting to be branded a "pussy."<sup>59</sup> But, as I read it, the shame that O'Brien's narrator feels is not just a matter of being (falsely) branded a coward, for it rests on acknowledging that the claims of one's country have a legitimacy that is not easily overridden by the claims of personal conviction. It is less like being called a "pussy," more like being called "ungrateful"—for the protective institutions that have served us in the past, and must continue to serve us, despite this particular (misguided) war. Lene Bomann-Larsen has aptly likened the soldier's predicament to Sartre's famous case of a young man torn between family and country.<sup>60</sup> He perceives a moral cost in whatever he chooses to do. The post-Vietnam insistence that we support the troops may express acknowledgment of the moral dilemmas in which they are placed; supporting them does nothing to dissolve the dilemma, though.

"As members of the society the soldiers serve and protect, the civilians owe it to them to reduce their burden in complying with the demands of morality," McMahan writes.<sup>61</sup> Indeed, I would think that the failure to find some way to reduce this burden would raise a fundamental problem for democratic society generally. Democracy claims to honor the moral integrity of the person; Rawls claims that a fundamental aim of a just society is nurturing the person's sense of fairness. But this is flatly incompatible with protective institutions that punish citizens harshly for abiding by the principles of fairness. Some

58. Tim O'Brien, *The Things They Carried: A Work of Fiction* (Boston: Houghton Mifflin, 1990).

59. Tim O'Brien, quoted in McMahan, *Killing in War*, 118.

60. See Lene Bomann-Larsen, *Reconstructing the Moral Equality of Soldiers* (Oslo: Acta Humaniora, 2007).

61. McMahan, *Killing in War*, 96.

in the pacifist tradition have claimed that democratic society is incapable of resolving this problem. Thoreau makes this point in his essay on civil disobedience. In this pacifist view (which I endorse), war making and its institutions are simply incompatible with the claims of individual conscience that democracy claims to respect. You can endorse war, or the claims of individual conscience, but not both. Trying to merge the two creates one of those irresolvable moral conflicts that constitute a “wound on justice,” in the words of Primo Levi cited at the start.

But proponents of just war theory believe that war and individual conscience *can* be reconciled through mechanisms like selective conscientious objection.<sup>62</sup> Let us consider this claim.

### III

McMahan acknowledges that allowing selective conscientious objection for soldiers, even those on active duty, strikes people as “plainly crazy,” so he tries to rebut this view.<sup>63</sup> I don’t think his defense of selective conscientious objection succeeds, but let me be clear on my purpose in so arguing. I am in favor of policies of selective conscientious objection because I support any mechanisms for people to escape from being soldiers. I also think that selective conscientious objection partially diffuses the “terrible dilemma” just discussed, but only partially, and certainly not enough to dispel the basic conflict between the claims of personal conscience and the institutional demands of war. Again, we can respect individual conscience or we can engage in war, but we cannot do both.

Here are some of the problems with selective conscientious objection:

1. Most soldiers that I knew from the Vietnam War only decided that the war was unjust when they got there. Many came to this conclusion in the midst of combat, when the significance of what they were doing was brought home. A policy of selective conscientious refusal must extend to the circumstances in which soldiers are best equipped to make such judgments. Hence, soldiers must have the right to refuse participation in an unjust war even in the midst of combat; they must have the right to put down their guns and walk away. Soldiers have done just this in wars throughout history. But the question is whether a society’s protective institutions can have a policy of allowing soldiers to do this in the midst of combat, and whether society’s larger morality is one that obliges soldiers to do this, and

62. *Ibid.*, 97.

63. *Ibid.*

chastises them if they do not. The issue is not just the impact on the war effort of a certain number of individual soldiers defecting, but also the impact on all soldiers of knowing that their fellow soldiers might defect at any moment.

2. McMahan is confident that a policy of selective conscience objection would be compatible with generating enough soldiers, and keeping enough soldiers—as long as the war is just. He suggests that worries about soldiers defecting, or never showing up, only pertain if the war is unjust. Indeed, “when a government threatens draconian penalties for refusal to fight in the wars it wages, this itself suggests that there are good reasons not to comply with its demands.” By contrast, “there are usually no shortages of volunteers for wars that are clearly just.”<sup>64</sup> Letting people opt out on conscientious grounds will cause no problems if the war is worth fighting.

I do not think that the historical record supports these judgments. The American Revolution was presumably worth fighting, as was the Civil War. But Washington’s army was plagued from the start by a chronic shortage of soldiers; so too was the Northern army in the Civil War, once the fighting got going. Both Washington and Lincoln faced the problem of their soldiers quitting at the first possible moment; both responded with rather draconian proposals for federal conscription—which were adopted in Lincoln’s case, though not Washington’s. (This led to the Civil War Draft Riots, the largest civil disturbance in American history.) More recently, France was clearly a legitimate government that was attacked in World War I. Yet it was compelled to institute conscription, with draconian policies for non-compliance. President Roosevelt and General Marshall both believed that the United States needed conscription to fight World War II, with harsh penalties for failure to comply. It is generally believed that the war could have been fought with volunteers. Conscription was just a more efficient way of processing young men. But the war effort was plagued in its final year by the unwillingness of the American people to pay for it. In the United States, voluntary enlistment declined almost immediately after 9/11, despite the widespread view of the Afghanistan conflict as a just one.<sup>65</sup>

I agree with McMahan’s larger point that the necessity to compel people to fight casts doubt on the legitimacy of the war. But I think that this supports a stronger skepticism toward war generally. The fact that people must be compelled to fight wars whether they are just or unjust should raise questions about the whole enterprise.

64. *Ibid.*, 34.

65. In *The Chickenhawk Syndrome*, I describe the great lengths to which the U.S. government has gone to compel soldiers to fight its War on Terror.

3. McMahan claims that the arguments against selective conscientious objection have also been raised against soldiers' discretion in matters of *jus in bello* and have proved bogus. Armies continue to function fine, though soldiers may permissibly refuse an unlawful order; indeed, they are required to do so.<sup>66</sup> Why not let them refuse to fight unjust wars? These do not strike me as parallel. Whether or not an order is unlawful is a much clearer question than whether or not a war is unjust. The problem of discretion is much less in the first case. Soldiers can point to official policies to show that they rightfully ignored an order. What can they point to in order to show that a war is unjust?

This raises the question of what a policy of selective conscientious objection would look like. A policy that allows soldiers to defect simply by saying "I regard this war as unjust" would obviously be unworkable. Thus, McMahan endorses "legal provisions for soldiers to refuse to fight in a war that they could *plausibly argue was unjust*."<sup>67</sup> I am unclear what such a policy of exempting people with "plausible arguments" would look like; who would make such judgments, and on what basis? The traditional policies of conscientious objection, as practiced in the United States, did not face this problem because exemption was granted on the grounds of documented membership in a pacifist church. Since exemption required opposition to war per se, it does not raise questions about good or bad grounds for objecting to a particular war. Since the objection was to serving at all, there was no question of soldiers changing their minds in the midst of battle.

A

These problems with the workability of selective conscientious objection harken back to the intrinsic problems of making killing a social project, noted above. A further problem is addressed by McMahan under the heading "symmetrical disobedience." "It seems that there should be a certain symmetry here. The permissibility of disobeying a command to fight in an unjust war suggests the permissibility of disobeying a command not to fight in a just war." McMahan allows, "in general it is morally impermissible for soldiers to fight a just war in opposition to lawful orders or even just in the absence of proper authorization."<sup>68</sup>

The challenge is to explain the asymmetry here. If we allow for selective conscientious objection, must we allow for selective conscientious initiation?

66. McMahan, *Killing in War*, 98.

67. *Ibid.*, 99 (emphasis added).

68. *Ibid.*, 92.

This is not just a theoretical puzzle. The question of private citizens initiating warlike actions was much debated at the start of the American republic. Writing as secretary of state, Jefferson strongly condemned the practice. "If one citizen has a right to go to war of his own authority, every citizen has the same. If every citizen has that right, then the nation (which is composed of its citizens) has a right to go to war, by the authority of its individual citizens. But this is not true either on the general principles of society, or by our Constitution, which gives that power to congress alone and not to the citizens individually."<sup>69</sup> Such thinking led to the Neutrality Act, which prohibited citizens from initiating warlike actions on their own. But this act has never been fully honored. In the nineteenth century, private initiation of wars was associated with so-called filibustering, in which bands of American citizens, often for acquisitive reasons, invaded and seized foreign territory. Andrew Jackson initiated this practice with his unauthorized invasion of Spanish-owned Florida. The Iran-Contra affair of the 1980s technically revolved around private participation in military actions against a foreign state, Nicaragua. As the number of private security firms increases, equipping private soldiers with the skills and weapons for nonstate military actions, the problem of privately initiated conflicts may only increase.

McMahan's first response to the symmetry problem speaks to the moral issue. There is a "basic moral principle" that underlies the asymmetry, he writes, the distinction between "doing and allowing, and in particular between killing and letting die." "To obey an order to fight in an unjust war is to violate the most stringent negative duty not to kill innocent people. By contrast, the objection to not fighting in a just war is that it involves a failure to promote a just cause, which includes a failure to prevent innocent people from being killed. To obey an order not to fight in a just war is to violate the weaker positive duty to prevent innocent people from being killed."<sup>70</sup> I agree that our duty to initiate a just war is not as strong as the duty not to participate in an unjust war, but the question is whether the duty to initiate a just war can be strong *enough* to ignore the government's order—thus obliging conscientious initiation. Posing the question abstractly—as "whether to protect innocents"—may understate the imperative involved here. Consider the following case, drawn from the history of the United States. Suppose I live on the border of country X, next to a part of country X that has been settled by large numbers of people

69. Letter from Thomas Jefferson, Secretary of State, August 16, 1793, cited in J. Lobel, "The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy," *Harvard International Law Journal* 24 (1983): 40.

70. McMahan, *Killing in War*, 94.

from my own country. Suppose that these people include close members of my own family, and there is good reason to believe that they are about to be unjustifiably attacked by the military of country X. My friends and I have access to weapons and are trained in their use. We know that if we attack the soldiers of country X first, we can protect our loved ones and other innocents. Yet the government orders us to do nothing. Or suppose that “protecting innocents” means crossing into another country to prevent immanent or ongoing acts of genocide. Here, the sheer number of people would seem to create an obligation to intervene that would override any government order to do nothing. McMahan allows for this possibility by suggesting that individuals may act to protect their loved ones if they are careful to remove their uniforms, if they are soldiers, so that they are not regarded as acting for the country as a whole. But invasion by citizens of another country is generally taken as an act of war, uniforms or not. Otherwise, states could covertly organize private citizens to attack another country, then disclaim responsibility by saying they were not officially soldiers. (This is what the Reagan administration did in the case of Nicaragua.)

McMahan amplifies his moral argument with considerations that are more purely political in character. Let me comment on two of them.

One reason for prohibiting conscientious initiation is that allowing soldiers to initiate a war on their own would violate the principle of civilian control of the military. If civilian control means the government and not the military deciding not just when to start a war but when to *stop* it, I would think that soldiers stopping to fight on reasons of conscience could undermine that principle just as much as soldiers starting to fight, for the same reasons. Moreover, the problem of civilian control over the military is only raised if those initiating the war are *in* the military. This was true of Andrew Jackson’s adventurism. But the problem of conscientious initiation still exists if the individuals are private citizens, with access to the means of war. This was generally the case with the nineteenth-century filibusterers, as it would be the case with members of private security firms today. The more interesting question, though, is why civilian control should possess the importance it does in determining when to wage war. This brings us to McMahan’s second political consideration.

He writes, “War has such serious consequences, both for those warred against and for those who are led into it, that it must be subject to institutional constraints designed to insure that it is not undertaken without moral justification. The military must not have the discretion to go to war on its own initiative”—presumably because military institutions lack the moral constraints that civilian institutions

possess. If the military were to go to war without civilian oversight, those attacked would understand it to be acting “as the agent of the state and its citizens,” exposing everyone to the dangers of war; yet “military decision-makers are neither chosen by the people nor representative of them.” Hence, they “have no claim to act on behalf of the nation they serve without authorization from an appropriate political source.”<sup>71</sup> This seems reasonable enough; the problem is that it seems to contradict McMahan’s previous claims about why soldiers have no duty to defer to the government in judgments of war’s morality. Before, McMahan held that the government has no mechanisms at all for bringing moral considerations to bear on war decisions. Now he suggests that the military, or its members, must defer to the government because it does have such mechanisms. His previous arguments ascribe little weight to the authority of representative institutions in deciding *for* war, but now he seems to ascribe great weight to their authority in deciding *against* war. I can imagine a proponent of conscientious initiation employing McMahan’s previous arguments to say: “Soldiers might be obliged to obey an order not to initiate a just war if the government’s decisions in these matters were more reliable, morally, if the institutions charged with making such decisions were structured to yield judgments that were presumptively more reliable morally than those of virtually all normally situated individuals. But this is not the case. So soldiers should rely on their private moral judgments on whether to start a war.”

The symmetry argument questions whether the proponent of conscientious objection is willing to carry the argument’s logic to its full conclusion. Let me mention another, rather perverse variation of the same sort of question. McMahan continually suggests that a soldier participating in an unjust war is like a killer of innocent persons: no considerations can warrant such participation, since the obligation not to kill an innocent is absolute. What if I am a soldier ordered to fight a war that has just begun; what if I have good reason to believe the war is unjust; what if the only way to avoid killing the “enemy” is to shoot my own officers (who don’t care whether the war is just or not)—wouldn’t I be not just permitted but obliged to do so? During the Vietnam War, the practice of shooting one’s own officers was called “fragging.” The question here is whether the logic of conscientious refusal compels us to engage in “conscientious fragging,” where that is the only way to avoid participation in an unjust war.

71. *Ibid.*, 93.

*B*

Policies of selective conscientious objection are meant to address the “terrible dilemma” in which soldiers threaten to be placed, if held to higher standards of responsibility. I have questioned how workable such policies are, given the realities of modern war. But suppose they were workable—how much would they really resolve the dilemma in which soldiers are placed?

Selective conscientious objection seeks to ensure that soldiers are not punished for deciding against fighting in an unjust war. But if there is an institutional obligation compelling them to fight nevertheless, this obligation—and the dilemma to which it gives rise—remains, even if the sanction behind it is abolished. Consider Sartre’s case of the soldier torn between country and family. It certainly improves things if the soldier does not face prison for choosing the latter over the former; but the moral dilemma remains, whether or not the prison element is present. This is why selective conscientious objection can defuse but not dispel the dilemma faced by soldiers, insofar as that dilemma arises from the conflict between personal and institutional obligations. Hence, the pacifist holds that we will only dispel the dilemma fully when we abolish war and the institutional structures that sustain it.

## IV

Let me offer two general remarks on McMahan’s project in conclusion, one bearing on the issue of soldier responsibility, the other on just war theory generally.

*A*

Opponents of war, or unjust war, have traditionally advocated two strategies for stopping it. One appeals to personal initiative: individual soldiers should refuse to serve, and individual citizens should withhold their support; eventually, they will bring the enterprise to a halt. Call this the individualist approach. Another appeals to political structures. Call it the internationalist approach. It holds that illicit war will be stopped by larger institutions of collective security, like the League of Nations or the United Nations in this century. This is the orientation that returns us to the crime-and-punishment model of war, discussed at the outset. Many partisans of peace have endorsed both, but they have always existed in tension because a strong ethic of individual resistance to war threatens to undermine the efficacy of those international institutions designed to keep the peace. This was a major point of discussion in antiwar circles in the nineteenth century, when these two antiwar traditions assumed their modern form. With

the advent of World War I, American antiwar forces split along these lines, often bitterly.

McMahan's approach to just war theory exhibits the same tension, I think. To put the matter crudely: his belief that war can be just commits him to obliging soldiers to act like good soldiers when the cause is a good one, specifically that they obey orders promptly and perform their roles with dispatch. At the same time, his concern about unjust war commits him to obliging soldiers to act like morally autonomous agents—and question their orders and roles, in ways that grate against the ideals of soldierly duty and solidarity that have always been seen as essential to a workable military. My discussion has made clear that McMahan is certainly aware of this problem. Recently, he has proposed the idea of an international tribunal of impartial experts that would rule on the justice or injustice of current wars, so as to relieve the burden on individual soldiers' judgment in these matters.<sup>72</sup> Like selective conscientious objection, I think this is a good idea, but one that will hardly solve the problem. What reason is there to think that the official judgments of this tribunal will not sometimes “malfunction” (just as the judgments of democratic governments malfunction) in ways that will just reproduce the dilemmas we have considered?

### B

Just war theory arose partially in response to pacifism, and their relation to each other has always been complex. I have always believed that characterizing the difference between them is itself a philosophical challenge; a great blessing of reading the work of Jeff McMahan over the years is how it has challenged me to clarify the difference between my views and a view like his, since we agree on practical matters over 90 percent of the time. In general, I think the difference between a pacifist and a just war theorist is that the latter believes that war can be made morally coherent, while the pacifist feels that war is essentially morally incoherent. This fits with the characterization of pacifism I advanced many years ago as a basically skeptical position.<sup>73</sup> Contemporary discussion of just war theory began with Michael Walzer's *Just and Unjust Wars*. A major aim of that book was to construct an account of just war doctrine around the notion of individual rights, and related notions of personal responsibility. Since that book's appearance, as I noted at the outset, discussion of just war

72. See Jeff McMahan's forthcoming article “The Prevention of Unjust Wars,” in *Reading Walzer*, ed. Yitzhak Benbaji and Naomi Sussman (London: Routledge, 2011).

73. Cheyney Ryan, “Self-Defense, Pacifism, and the Possibility of Killing,” *Ethics* 93 (1983): 508–24.

theory has centered on the difficulties of doing this, in particular, the inconsistencies to which it leads (in our judgments of individual soldiers, for example).

The difference between just war theorists and a pacifist like me is that they think these problems can be ironed out while I don't. When I read attempts to make just war theory coherent, I feel that they only solve one problem to create another, or rely on ever more arcane distinctions that have less and less relation to the reality of war they are describing. But since pacifism, as I understand it, is not a dogmatic view, the force of its position can only be established through an ongoing dialogue with just war theory of the kind that McMahan's work invites—and provokes.