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SELECTIVE CONSCIENTIOUS OBJECTION: THE PRACTICAL MORAL ALTERNATIVE TO KILLING

by H. Patrick Sweeney

A more moving and instructive lesson in America's scrupulous regard for the sacredness of conscience can hardly be seen than that of the troubled tenderness with which the nation has sought to treat conscientious objectors.¹

The above statement reflects the trend toward an ever-expanding immunity granted by statutory and decisional law to persons whose conscience compels them to object to war or bearing arms. The conscientious objector exemption provides an insight into the high place that the dictates of religion and conscience hold in our society.

The conscientious objector to military service presents neither an original nor a novel problem for our society. In addition, recent demonstrations and protests attest to the fact that it is not one which is likely to diminish in either scope or intensity. From the very beginning of national conscription, our country has provided an accommodation to the objector whose opposition is based upon religious commitments and is directed against war "in any form."² As to the present form of this accommodation, Congress has couched the exemption in the following terms:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code.³

Two of the restrictions of this section have long been under fire by those who seek to expand the conscientious objector exemption. The first is that which limits the privilege of conscientious objection to those who hold their conviction on the basis of "religious training and belief." This is in accord with the traditional practice of granting an exemption when the objector demonstrates a religious basis for his belief. However, the majority of church groups do not claim for their own members a special status which is denied other citizens who, equally conscientiously, do not consider themselves to be religious.⁴ The Supreme Court has mirrored this contemporary theological scholarship by recognizing that the "free exercise" clause of the first amendment tolerates no distinction among systems of belief.⁵

¹R. F. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 15 (1963).

²See Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78; Act of Sept. 16, 1940, ch. 720, § 5(g), 54 Stat. 889; Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 612; Act of June 30, 1967, Pub. L. No. 90-40, § 7, 81 Stat. 100.

³Act of June 30, 1967, Pub. L. No. 90-40, § 7, 81 Stat. 100.

⁴See NATIONAL SERVICE BOARD FOR RELIGIOUS OBJECTORS, STATEMENTS OF RELIGIOUS BODIES ON THE CONSCIENTIOUS OBJECTOR (5th ed. 1966).

⁵United States v. Seeger, 380 U.S. 163 (1965).

The second limitation requires that a conscientious objector be a person "conscientiously opposed to participation in war in any form." This limitation raises the problem of whether this provision of the law unreasonably restricts the free exercise of a citizen's conscientious belief.

The purpose of this comment is to explore the history of the first limitation on conscientious objector status with a view to solving the correlative problem of the second limitation: whether a person might, within the meaning of the congressional enactments, be an authentic conscientious objector to some wars, or to most wars, without being "conscientiously opposed to participation in war in any form." If the answer to this question is negative, should public law be revised to recognize freedom of conscience?

I. RELIGIOUS TRAINING AND BELIEF

Historically, the recognized ground for exemption from compulsory military service in this country was that of religious belief. The objectors were chiefly members of the historic peace churches, *i.e.*, the Mennonites, Quakers, and Brethren in Christ.⁶ These immigrants constituted a substantial portion of the population. It is, then, not surprising to find this concern for the principles of religious minorities—many of whom came to this country in search of religious liberty and toleration for their pacifist principles.⁷

Whatever hardship or discrimination was created by limiting the exemption to these groups was mitigated to some extent by the accepted practice of permitting the payment of fees or furnishing of substitutes in lieu of personal service. For example, the New York Constitution, adopted in 1891, provided:

[I]nhabitants of this state, of any religious denomination whatever, as from scruples of conscience may be averse to bearing arms, shall be excused therefrom by paying to the state an equivalent in money. . . .⁸

The real issues of the conscientious objector problem did not arise until 1917. In response to the need for troops, required because of the United States' participation in World War I, Congress enacted the first comprehensive national conscription act.⁹ This act did not contain a provision for substitution or commutation, but it did contain a conscientious objector exemption based upon the historical grounds of religious belief. It was framed in the following language:

[N]othing in this act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of a well-recognized religious sect, or any organization at present organized or existing and whose existing creed or principles forbid its members to participate in war in any form¹⁰

⁶Comment, *Freedom of Conscience and Compulsory Military Service*, 13 BUFFALO L. REV. 463, 464 n. 7 (1964).

⁷For a comprehensive analysis of these groups, their tenets and origins, see M. SIBLEY, CONSCRIPTION OF CONSCIENCE (1952); SELECTIVE SERVICE SYSTEM, CONSCIENTIOUS OBJECTION (1950). See also J. CORNELL, THE CONSCIENTIOUS OBJECTOR AND THE LAW (1943).

⁸R. F. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 16 (1963).

⁹Act of May 18, 1917, ch. 15, 40 Stat. 76.

¹⁰*Id.* § 4.

The Supreme Court emphatically affirmed the power of Congress to compel military service from every citizen under the war powers.¹¹ The privilege of conscientious objector status was merely a gesture of the sovereign's beneficence, conditioned on the needs of the nation rather than on the needs of the individual.¹² Several cases have supported this position.¹³ In *United States v. MacIntosh*,¹⁴ it was argued unsuccessfully by petitioner "that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so."¹⁵ The Court did not accept this position and expressed the view that relief on religious grounds from the obligation of bearing arms was a matter of congressional policy, not of constitutional right.¹⁶ The dictum in *MacIntosh* influenced the Court to deny a similar claim in the case of *Hamilton v. Regents of University of California*.¹⁷

In *Hamilton*, it was held that by electing to attend the state university, students accepted the condition of compulsory ROTC. Justice Cardozo's concurring opinion stated that military service had never been thought to constitute an interference with the free exercise of a religion.¹⁸ He continued:

. . . a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance . . . of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.¹⁹

Conscription became necessary again in 1940, and the Selective Training and Service Act was enacted.²⁰ Section 5(g) of this Act removed the requirement of membership in "a well-recognized sect" and substituted the criterion of objection based on "religious training and belief." However, it retained the requirement of conscientious objection to "participation in war in any form."²¹

The key phrase, "by reason of religious training and belief," was subjected to conflicting interpretations by the Second and Ninth Circuits. The Second Circuit view was presented in the case of *United States v. Kauten*.²² The court broadly construed this phrase, in light of the history of the conscription laws, by declaring:

[T]he provisions of the present statute . . . take into account the characteristics of a

¹¹Selective Draft Law Cases, 245 U.S. 366 (1918).

¹²*United States v. MacIntosh*, 283 U.S. 601 (1931).

¹³*Girouard v. United States*, 328 U.S. 61 (1945); *Hamilton v. Regents of Univ. of Calif.*, 293 U.S. 245 (1934); *Imboden v. United States*, 194 F.2d 508 (6th Cir. 1952); *United States v. Newman*, 44 F. Supp. 817 (E.D. Ill. 1942).

¹⁴283 U.S. 601 (1931).

¹⁵*Id.* at 623.

¹⁶*Id.* at 623 (dictum).

¹⁷293 U.S. 245 (1934).

¹⁸*Id.* at 266.

¹⁹*Id.* at 268.

²⁰Act of Sept. 16, 1940, ch. 720, 54 Stat. 885.

²¹*Id.* § 5(g).

²²133 F.2d 703 (2d Cir. 1943).

skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis for exemption.²³

The court then elaborated upon the distinction between opposition to a particular war and a "conscientious scruple against war in any form" by stating:

The former is usually a political opposition 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 persons at the present time the equivalent of that which has always been thought a religious impulse.²⁴

This view became known as the "compelling voice of conscience test" and was followed by later Second Circuit decisions. For example, in *United States ex rel. Phillips v. Donner*,²⁵ the court held that one who objected primarily on ethical and humanitarian grounds was entitled to an exemption. The court pointed out:

[I]f a stricter rule than was announced in the *Kauten* case is called for, one demanding a belief which cannot be found among the philosophers, but only among the religious teachers of recognized organizations, then we are substantially or nearly back to the requirement of the Act of 1917. . . .²⁶

Later cases in the Second Circuit followed this view and made it clear that sincere philosophical, moral, or humanitarian beliefs met the statutory conditions.²⁷

However, the Ninth Circuit was not in accord with the Second Circuit interpretation of "religious training and belief." In *Berman v. United States*,²⁸ the defendant contended:

. . . a person's philosophy of life or his political viewpoint, to which his conscience directs him to adhere devotedly, or his devotion to human welfare, without the concept of deity, may be religious in nature.²⁹

The court rejected this contention by adopting, in essence, the definition of religion set forth in Chief Justice Hughes' dissent in *United States v. MacIntosh*.³⁰ The *Berman* court described religion in these terms: "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."³¹

In 1948, Congress amended section 5(g) of the 1940 Act. This amendment, section 6(j) of the 1948 Act, is expressed in terms substantially in accord with Chief Justice Hughes' definition:

Religious training and belief . . . means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does

²³*Id.* at 708.

²⁴*Id.* at 708.

²⁵135 F.2d 521. (2d Cir. 1943).

²⁶*Id.* at 524.

²⁷*United States ex rel. Reel v. Badt*, 141 F.2d 845 (2d Cir. 1944); *United States ex rel. Brandon v. Downer*, 139 F.2d 761 (2d Cir. 1944) (dictum).

²⁸156 F.2d 377 (9th Cir. 1946), *cert. denied*, 329 U.S. 795 (1946).

²⁹*Id.* at 378.

³⁰283 U.S. 601, 633-34 (1931).

³¹*Berman v. United States*, 156 F.2d 377, 381 (9th Cir. 1946), *cert. denied*, 329 U.S. 795 (1946).

not include essentially political, sociological, or philosophical views or a purely personal moral code.³²

Since the Senate report which explained the new provision cited *Berman* as authority,³³ this appeared to be a congressional adoption of the Ninth Circuit view.

The Second Circuit, however, in interpreting the new section, did not follow *Berman*, but reapplied the rule of *Kauten*. In *United States v. Jakobson*,³⁴ the defendant believed in an ultimate cause, which he called "Godness," but which could not be realized through a one-to-one "vertical" relationship in the traditional sense. Rather, it called for a "horizontal" relationship to one's fellow man. The court once again construed the statute broadly to avoid the constitutional charge that it violated the "free exercise" clause of the first amendment.

The stage was set for the Supreme Court to determine the constitutional questions presented. In 1965, in *United States v. Seeger*,³⁵ the Court considered three cases involving conscientious objectors who did not belong to an orthodox religious sect. Two of these cases, *United States v. Seeger*³⁶ and *United States v. Jakobson*,³⁷ were on certiorari from the Second Circuit. The third case, *Peter v. United States*,³⁸ was on certiorari from the Ninth Circuit. All three petitions claimed that section 6(j) was unconstitutional on the basis of the first amendment (in that it allegedly did not exempt non-religious conscientious objectors) and the fifth amendment (in that it allegedly discriminated between different forms of religious expression). Mr. Jakobson and Mr. Peter claimed, in the alternative, that their beliefs came within the meaning of section 6(j).

Petitioner Seeger declared that he was conscientiously opposed to participation in war in any form by reason of his "religious" beliefs; however, he preferred to leave open the question as to his belief in a Supreme Being. He stated further that his "skepticism or disbelief in the existence of God" did not necessarily mean "lack of faith in anything whatsoever," but that his was a "belief in and devotion to goodness and virtue for their own sakes and a religious faith in a purely ethical creed."³⁹ His truthfulness and sincerity were not questioned.

Petitioner Jakobson believed in a "Supreme Being" who was the creator of man in the sense of being "ultimately responsible for the existence of man" and who was the "Supreme Reality" of which "the existence of man is the result." His most important religious law was that "no man ought ever to willfully sacrifice another man's life as a means to any other end"⁴⁰

³²Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 612.

³³S. 1268, 80th Cong., 2d Sess. § 6(j) (1948).

³⁴325 F.2d 409 (2d Cir. 1963), *rev'd*, 380 U.S. 163 (1964).

³⁵380 U.S. 163 (1965). Three Court of Appeals cases, *United States v. Seeger*, 326 F.2d 846 (2d Cir. 1964), *United States v. Jakobson*, 325 F.2d 409 (2d Cir. 1963), and *Peter v. United States*, 324 F.2d 173 (9th Cir. 1963), were consolidated for argument and decision.

³⁶326 F.2d 846 (2d Cir. 1964).

³⁷325 F.2d 409 (2d Cir. 1963).

³⁸324 F.2d 173 (9th Cir. 1963).

³⁹*United States v. Seeger*, 380 U.S. 163, 166 (1965).

⁴⁰*Id.* at 167-68.

Petitioner Peter claimed that his opposition to war derived from his acceptance of the existence of a universal power beyond that of man. As to whether his conviction was religious, he quoted Reverend John Haynes Holmes' definition of religion:

. . . the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands . . . [; it] is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best.⁴¹

When asked whether these convictions constituted belief in a Supreme Being, he stated: "You could call that a belief in a Supreme Being or God. These just do not happen to be the words I use."⁴²

The Ninth Circuit had followed its decision in *Berman* and had rejected this definition of religion by stating: "No matter how pure and admirable his standard may be . . . [it] cannot be said to be religion in the sense that the term is used in the statute."⁴³

The Supreme Court concluded that the history of the Act belied the notion that it was to be restrictive in application and available only to those believing in a Supreme Being in the traditional sense. In resolving the conflict between the circuits, it held that section 6(j) was merely a clarification of the 1940 provision, section 5(g). In doing so, it continued the congressional policy of providing exemption from military service for those whose opposition can fairly be said to be religious. The test of belief in a "Supreme Being" within the statutory language was held to require:

. . . a sincere and meaningful belief which occupies in the life of the possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption. . . .⁴⁴

This construction embraces an understanding of religion unrestricted to ethical cultures of any form as long as they concern ultimates.

In its discussion of the Government's argument, the Court made it clear that the Ninth Circuit's view had been rejected. The Government took the position that since *Berman* was cited in the Senate report on the 1948 Act, Congress must have intended to adopt the *Berman* interpretation of what constitutes religious belief. The Court did not agree with this contention and stated:

[W]e think it clear that an explicit statement of congressional intent deserves more weight than the parenthetical citation of a case which might stand for a number of things. Congress specifically stated that it intended to re-enact substantially the same provisions as were found in the 1940 Act. Moreover, the history of that Act reveals no evidence of a desire to restrict the concept of religious belief.⁴⁵

The Court in *Seeger* was thus presented with a dilemma: whether to accept the validity of section 6(j) with its apparent constitutional inconsistencies, or whether to find a violation of the first and/or fifth amendment and to do away with the exemption altogether. Justice Douglas, in his concurring opinion, recognized that

⁴¹*Id.* at 169.

⁴²*Id.* at 169.

⁴³*Berman v. United States*, 156 F.2d 377, 381 (9th Cir. 1946).

⁴⁴*United States v. Seeger*, 380 U.S. 163, 176 (1965).

⁴⁵*Id.* at 177.

to read the statute in another way would present constitutional difficulties. He stated: "It is, in my opinion, not a *tour de force* if we construe the words 'Supreme Being' to include the cosmos, as well as the anthropomorphic entity."⁴⁶

The *Seeger* decision postponed the consideration of a crucial question: whether a person ought to be released from military service because his personal code of behavior (be it philosophical, sociological, political, or economic) prohibits such service—irrespective of the religious basis of such code. The Court stated:

No party claims to be an atheist or attacks the statute on this ground. The question is not, therefore, one between theistic and atheistic beliefs. We do not . . . intimate any decision on that situation in these cases.⁴⁷

Justice Douglas' concurring opinion was more outspoken. He said in his final footnote that if the petitioner "were an atheist, quite different problems would be presented. Cf. *Torcaso v. Watkins*, 367 U.S. 488."⁴⁸ This is the only reference in *Seeger* to *Torcaso*.

In the *Torcaso* case, the Court struck down a Maryland statute requiring a declaration of a belief in the existence of God as a prerequisite to holding public office. The reasoning of the Court is expressed in this statement:

We repeat and again reaffirm that neither a state nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements *which aid all religions as against non-believers*, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.⁴⁹ (emphasis supplied).

The Court thus dispelled the notion that religious belief, under the religious liberty concept of the first amendment, is limited to theistic belief. The non-believer is also protected.

From the foregoing discussion, it is apparent that the Court in *Seeger* attempted to find a middle ground by which they could construe the statute broadly enough to avoid constitutional attacks and still provide a ground for exemption consistent with the legislative history of the conscription acts. The *Torcaso* opinion supports the view that belief in a system of ultimate moral values that bind the conscience is a form of religious belief within the meaning of the first amendment. *Seeger* supports the constitutionality of the present exemption. Therefore, it is submitted that the grant of a statutory exemption which is designed to implement religious liberty must be broad enough to protect any belief within the meaning of *Torcaso*.

The Military Selective Service Act of 1967⁵⁰ does not clarify the situation. The only significant change from the 1948 Act is the deletion of the statutory

⁴⁶*Id.* at 188.

⁴⁷*Id.* at 173.

⁴⁸*Id.* at 193 n.2.

⁴⁹*Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). It should be noted that note 11 following this quote states: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, and Secular Humanism and others."

⁵⁰Act of June 30, 1967, Pub. L. No. 90-40, § 7, 81 Stat. 100.

definition of "religious training and belief."⁵¹ If this was an attempt to express congressional disapproval of the broad definition of "Supreme Being" in *Seeger*, its effectiveness is questionable. At least one legal scholar has suggested that the broad judicial interpretation of "religious training and belief" was the causal basis for the 1948 amendment of the 1940 Act. He reasoned that this interpretation was determinative and stated:

The effectiveness of the congressional action is open to question since the liberal judicial interpretation of "religious training and belief" was probably the prime motivating factor in enacting the Supreme Being clause as a limiting device in 1948. Thus, the language of the new provision is no guarantee against a broad judicial interpretation. Furthermore, a strict interpretation raises serious questions of improper discrimination⁵²

This congressional enactment was shaped by the statement of the Director of Selective Service that *Seeger* represented an undue expansion of the provision relating to conscientious objection.⁵³ The Committee on Armed Services remarked:

The claim for conscientious objection must be based upon "religious training and belief" as has been the original interpretation of Congress in drafting this provision of the law.⁵⁴

In light of this expressed intent, it would seem that the only alternative to the *Seeger* liberalization would involve the constitutionality of the conscientious objector exemption.

Those who would uphold the constitutionality of section 6(j) would apply the legislative grace theory as expressed in the naturalization cases.⁵⁵ Justice Sutherland stated in *United States v. MacIntosh*:⁵⁶ "Naturalization is a privilege, to be given, qualified, or withheld as Congress may determine." The analogy is applied to our present inquiry as follows: since Congress can exclude aliens from citizenship, it may condition naturalization in any manner; since Congress can draft any conscientious objector, it may exempt any class of objectors it wishes.

Of course, this legal formula must be applied within the notion of rational regulation as the equal protection clause read into the fifth amendment⁵⁷ de-

⁵¹Religious "training and belief" was defined as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 612.

⁵²Rabin, *Do You Believe in a Supreme Being—The Administration of the Conscientious Objector Exemption*, 1967 WIS. L. REV. 642 (1967).

⁵³SENATE COMM. ON ARMED SERVICES REPORT, S. REP. NO. 267, 90th Cong., 1st Sess. 31 (1967).

⁵⁴*Id.*

⁵⁵*United States v. MacIntosh*, 283 U.S. 605 (1931); *United States v. Schwimmer*, 279 U.S. 644 (1929). It should be noted that both of these cases were overruled by *Girouard v. United States*, 328 U.S. 61 (1945). Congress then inserted a conscientious objector exemption into the Immigration and Nationality Act, adding the same requirements of "religious training and belief" and belief in a "Supreme Being." Immigration and Nationality Act, 8 U.S.C. § 1448(a) (5) (1964).

⁵⁶283 U.S. 601, 615 (1931).

⁵⁷*Bolling v. Sharpe*, 347 U.S. 497 (1954).

mands. Justice Frankfurter has said:

This is . . . not . . . [to say that] Congress in affording a facility can subject it to any condition it pleases. It cannot. Congress may withhold all sorts of facilities for a better life *but if it affords them it cannot make them available in an obviously arbitrary way.* . . .⁵⁸ (emphasis supplied).

The essence of equal protection is the prevention of unwarranted class differentiation. Governmental classifications based on race have been held to be inherently arbitrary.⁵⁹ Could it be logically contended that governmental classifications based on religion (or non-religion) are a more rational basis of differentiation?

An insight into the intent of Congress was given in *United States v. Bendik*.⁶⁰ This case upheld the religious conscience exemption on the basis of the legislative grace theory and declared:

. . . Congress may have felt that the extension of the act of grace beyond the traditional recognition of religious objectors, to the philosophic objector, would be too difficult of administration or undesirable in principle.⁶¹

Such a congressional attitude would appear to be arbitrary and unreasonable. It is clear that legislative power, and, *a fortiori*, legislative grace, must always be subsidiary to constitutional commands. This principle is especially true in that most stringently protected area of constitutional rights—the first amendment.

Seeger militates against such a conclusion with respect to section 6(j) by stating:

We have concluded that Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views.⁶²

It seems reasonable to interpret the Court's views as offering comfort to the objector whose conscience is not informed by religion. It is suggested that the logical application of *Seeger* demonstrates that distinctions between the religious beliefs, which the statute includes, and the social, moral, or philosophical beliefs, which it excludes, are legally impossible to define. What *is* important is the sincerity and conscientiousness of the objector's belief. This will lead us, now, to the problem of whether the distinction between the absolute pacifist to all war and the selective pacifist to a particular war should be abolished.

II. SELECTIVE CONSCIENTIOUS OBJECTION

For hundreds of young Americans, the Government's call to arms cannot be obeyed. A selective conscientious objector may base his objection on many grounds.

⁵⁸*American Communications Ass'n v. Douds*, 339 U.S. 382, 417 (1950). This is the same philosophy underlying the Court's decision in *Speiser v. Randall*, 357 U.S. 513 (1958) and in *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁵⁹*Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁶⁰220 F.2d 249 (2d Cir. 1955).

⁶¹*Id.* at 252.

⁶²*United States v. Seeger*, 380 U.S. 163, 165 (1965).

For example, he may be a believer in St. Augustine's "just war theory."⁶³ While remaining within the "compelling voice of conscience" theory of *United States v. Kauten*,⁶⁴ this ground for objection cannot be confined clearly within the meaning of religion in section 6(j), since the application of the "just war theory" to some degree necessitates the making of both political and social judgments.

It is relatively easy for a man to avoid the draft if he has money to attend college on a full time basis, or if he works in a local industry that his draft board wants to protect. Ironically, it is extremely difficult to escape war if his conscience tells him he cannot kill. Scattered throughout history have been men and women whose moral judgments precluded them from turning their consciences over to the state.⁶⁵

In the Nuremberg trials, our own Government, as well as the international tribunal, insisted that a man has a responsibility in the exercise of his conscience. If necessary, he must disobey his government. The Vatican Council, in the *Pastoral Constitution on the Church in the Modern World*, declared that "blind obedience" to authority was no excuse for committing military atrocities, and it praised "the courage of those who openly and fearlessly resist men who issue such commands."⁶⁶ A footnote to this discussion further explains this position:

The reference here is unmistakably to genocide and the post-World War II controversy over responsibility for "war crimes" and the culpability of subordinates under a corrupt regime. There can be no justification of the conduct of an Eichmann on the score that he simply executed commands from higher authorities. The praise given those who resisted unjust commands comes appropriately in the context of a document that stresses so repeatedly the importance of human dignity and the responsibility of a free human person.⁶⁷

As a solution to this problem, the Vatican Counsel suggested:

. . . it seems right that laws make humane provisions for the case of those who for reasons of conscience refuse to bear arms, provided, however, that they accept some other form of service to the human community.⁶⁸

These historical examples have a direct bearing on our consideration of selective conscientious objection. If we accept the principles which these examples engender, are we not required to say that in some times and places men have a moral duty to object to the war that their nation is fighting? The issue is not whether we agree with their judgment. It is whether we recognize their conscientious right to do that which we recognize to be their duty. Their duty to their country and the

⁶³This theory supposes that a war can only be supported by Christians if it meets certain standards: it must be 1) declared by legitimate authority, 2) waged to avenge injustice, 3) fought with maximum effort to distinguish fighters from civilians, and 4) a last resort after peaceful means have failed. H. DEANE, *POLITICAL AND SOCIAL IDEAS OF ST. AUGUSTINE* 160-63 (1963).

⁶⁴133 F.2d 703 (2d Cir. 1943).

⁶⁵SELECTIVE SERVICE SYSTEM, CONSCIENTIOUS OBJECTION 8 (1950). See FOXE'S *BOOK OF MARTYRS* (G. Williamson ed. 1965).

⁶⁶DOCUMENTS OF VATICAN II 292 (W. Abbott ed. 1966).

⁶⁷*Id.* at 292 n.255.

⁶⁸*Id.* at 292.

apparent contradictory duty to their conscience could be resolved by the performance of some alternative form of service.

A. *Statutory and Decisional Grounds for the
Selective Conscientious Objector*

As previously noted, section 6(j) of the Military Selective Service Act⁶⁹ exempts from combatant training and service any person who, by reason of religious training and belief, is "conscientiously opposed to participation in war in any form." It is submitted that "in any form" modifies "participation" and not "war." In *Taffs v. United States*,⁷⁰ the court averred:

The words "in any form," obviously relate, not to "war" but to "participation in" war. War, generally speaking, has only one form, a clash of opposing forces. But a person's participation therein may be in a variety of forms. He may be carrying a rifle, piloting a plane, working in a clerical staff behind the lines, or working in a defense plant on the home front.⁷¹

This view was followed in *United States v. Hartman*,⁷² where the court extended this principle by stating:

We are convinced that Congress intended by this section to exempt from service in the armed forces those persons who were conscientiously opposed by reason of religious training and belief to *any form of participation* in a flesh-and-blood war between political entities.⁷³ (emphasis supplied).

Further support for this statutory construction is found in the Selective Service Regulations. A comparison of the section defining Class I-A-O⁷⁴ and the section defining Class I-O⁷⁵ is illuminating:

1622.11. *Class I-A-O: Conscientious Objector Available for Noncombatant Military Service Only.* In Class I-A-O shall be placed every registrant who would have been placed in class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

1622.14. *Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.* In Class I-O shall be placed every registrant who would have been placed in Class I-A but for the fact that he has been found to be conscientiously opposed to participation in both combatant and non-combatant training and service in the armed forces.

It should be noted that one who will enter the military in a non-combatant capacity (Class I-A-O) is not described as one opposed to "participation in war in any form," whereas the person who refuses to have anything to do with the military in any capacity is, in effect, so described. If "in any form" relates to war, the phrase "participation in war in any form" would be equally applicable to both classes of conscientious objectors. But, if it relates to participation, it is only

⁶⁹Act of June 30, 1967, Pub. L. No. 90-40, § 7, 81 Stat. 100.

⁷⁰208 F.2d 329 (8th Cir. 1953), cert. denied, 347 U.S. 928 (1954).

⁷¹*Id.* at 331.

⁷²209 F.2d 366 (2d Cir. 1954).

⁷³*Id.* at 371.

⁷⁴32 C.F.R. § 1622.11 (1967).

⁷⁵32 C.F.R. § 1622.14 (1967).

applicable to Class I-O, where the individual will not serve in any capacity, *i.e.*, will not participate in any form.

Continuing this analysis, it should be apparent that while, grammatically speaking, "in any form" relates to participation, it is an awkward expression if intended to modify war. A more lucid expression of that intention would have been accomplished by the phrases "all wars" or "any war."

The Supreme Court decision in *Sicurella v. United States*⁷⁶ is consistent with the view that selective objection is encompassed within section 6(j). That case, involving a Jehovah's Witness, held that willingness to participate in a "theocratic war" and to fight in the defense of "his ministry, Kingdom interests, and . . . his fellow brethren"⁷⁷ does not preclude a conscientious objector exemption. This is so despite the fact pointed out by the dissent that the petitioner "reserves the right to choose the war in which he will fight."⁷⁸ *Sicurella* went further and held: "The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to participation in war."⁷⁹ The *Sicurella* view was restated in *Kretchet v. United States*.⁸⁰ In that case a Jehovah's Witness was willing to kill in defense of his brothers, or in defense of his home against an invasion, and to fight at the command of Jehovah. Section 6(j) is thus being applied to selective (and non-pacifist) conscientious objection.

It has been argued that, while one can conceivably have a "religious" basis for opposition to all war, once any particularization is made, this necessarily involves a political judgment. On the contrary, however, Christianity has always recognized that there are just and unjust wars.⁸¹ Moreover, it has placed upon its people the moral burden of distinguishing between the justifiable and the unjustifiable war.

Assuming *arguendo* that selective conscientious objection involves some form of political judgment, as long as there is a religious conviction as a substructure, the right to conscientious objector status should not be denied. The interaction between religious and political beliefs does not abrogate the duty to make moral judgments. It cannot abrogate the right to selective objection. Simply stated, should a religious basis for his objection be found, the selective pacifist should be protected under section 6(j).

B. Work Requirement

It is not suggested that the selective objector should be completely free from any requirement to render service to his country. As the present law provides, no conscientious objector is completely free from service. It is suggested, however, that both the nation and the objector would benefit from alternative service of a productive nature. To require any man to do what in his deepest faith is morally

⁷⁶348 U.S. 385 (1955).

⁷⁷*Id.* at 389.

⁷⁸*Id.* at 395.

⁷⁹*Id.* at 390.

⁸⁰284 F.2d 561 (9th Cir. 1960).

⁸¹ST. THOMAS AQUINAS, THEOLOGICAL TEXTS 241-42 (T. Gilby transl. 1955)

abhorrent is an offense against the freedom of us all. Freedom, if it means anything, means respect for dissent. We need not agree that the dissenter is right. Nevertheless, we must respect his right to dissent—not to withdraw from social responsibility, but to accept a form of responsibility that he can justify to his conscience.

The choice is between going to jail, fighting a war in derogation of conscientious scruples, and working in the interest of national health, safety, and welfare. By requiring objectors to serve in other vitally needed and equally burdensome service, we would impose substantial barriers which only the sincere would be willing to scale. An editorial in the magazine *America* suggests a solution to the problem:

We believe that a young man who feels that he cannot in conscience kill those whom his government has designated "enemies" . . . should not be required to kill. Neither should he be excused from alternative humanitarian work, even from work that may possibly demand his life. Surely, many of the vocal anti-war minority do not fear work or danger. They have shown their courage in the civil rights movement. This nation has nothing to lose by listening to them, and indeed has much to gain by giving legal recognition to their natural right of dissent.⁸²

There are many forms of alternative service, all of which render a valuable contribution in achieving our national goals. Both public and private agencies can provide this kind of social work. For example, the selective pacifist could be required to serve the same number of years and receive a similar compensation as his military counterpart for performing the following services: 1) work with children in the ghettos or in hospitals; 2) serve in the Peace Corps; 3) serve in Volunteers in Service to America (VISTA)—domestic peace corps; 4) work on Indian reservations. These are but a few jobs which show that the granting of conscientious objector status would not give the objector freedom from obligation; it would merely change the service he renders. It is submitted that those whose moral judgment compels them to resist service in a particular war are not, thereby, apathetic citizens. To suggest otherwise would be patently unjust if we assume these citizens remain willing to serve their country in another capacity.

C. *Arguments Against Selective Conscientious Objection*

The most common fear expressed is that should the selective pacifist be able to pick and choose the wars in which he will fight, this theory will be extended to nonpayment of taxes and disobedience to civil and criminal laws. This fear is unjustified.

There is something special about the call of conscience when the demand of the State is to help kill other men. (If I object to taxes for supersonic planes, moonshots, or poverty programs, the democratic theory demands that, having lost the fight in the decision making forum, the majority prevails and I must go along.) Here, the majority calls on him to kill for a cause which he believes to be wrong or worthless.⁸³

No logical extension can be made to protect the position of those who

⁸²Editorial, *The Selective Conscientious Objector*, 117 AMERICA, July 22, 1967 at 73.

⁸³Greenfield, *The Selective CO*, 157 NEW REPUBLIC, July 1, 1967 at 15.

conscientiously oppose civil rights legislation and consequently refrain from paying taxes for public housing. Selective conscientious objection is a practical moral alternative to that which to morally sensitive people is a portentous act: the killing of another human being.

Another argument advanced is that there will be a rush of unjustified claims which will make the administrative task of the Selective Service System impossible. Historically, there has been no evidence of such a rush for conscientious objector status. The public disfavor and labels of "coward" have prevented such a stampede in our socially oriented community. It has been noted:

The demanding character of alternative service (which could be rendered longer or more burdensome), the social pressure to conform, and the history of citizen support for all our wars, no matter how dubious, make a rush for conscientious objector status unlikely.⁸⁴

As to the administrative difficulties, it is not suggested that broadening the draft laws to include the selective objector would be an easy task. Freedom itself creates problems. Our society has not often avoided responsibilities merely because they were onerous. If we genuinely believe in the dignity of the individual, and if we respect conscience, we must be ready to go to some trouble to avoid compelling citizens to act contrary to their deepest convictions.

A more cogent argument against selective objection is, perhaps, that the national security would be impaired by the drastic reduction in the number of men available for the draft. At first blush, it is relatively clear that should national survival be at stake, the number of conscientious objectors would be small. The line must be drawn delineating the point at which national security is jeopardized. The pressing problem is where, and by whom, the line should be drawn. A man may believe in using force to defend himself, his family, or his nation if it is attacked; yet, he may not accept the domino rhetoric by which each ideological clash in Southeast Asia or Latin America is said to represent a threat to United States security.

For example, in the case of *Noyd v. McNamara*,⁸⁵ the petitioner specifically disavowed being a pacifist by "acknowledging a belief in the necessity to employ force to deter or repel 'totalitarian aggression'."⁸⁶

The threat to national security, should it in fact exist, could be remedied. If, at anytime, Congress makes a determination that either full mobilization is needed or that there is a drastic need for American troops, and the accommodation granted to the conscientious objector is terminated, a new constitutional problem might be presented which would be beyond the purview of this paper. In *Richter v. United States*,⁸⁷ the court, interpreting the war power, held:

Congress can call everyone to the colors, and no one is exempt except by the act of grace of Congress. . . . There is no constitutional right to exemption from military service because of conscientious objection or religious calling.⁸⁸

⁸⁴*Id.* at 16.

⁸⁵378 F.2d 538 (10th Cir. 1967).

⁸⁶*Noyd v. McNamara*, 267 F. Supp. 701, 703 (D. Colo. 1967).

⁸⁷181 F.2d 591 (9th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950).

⁸⁸*Id.* at 593.

It should be noted, however, that should the number of conscientious objectors become large enough to interfere with a particular war effort, that fact itself would provide sufficient reason to re-examine national policy. If a nation cannot convince the vast majority of its own citizens that its cause is just, then a searching examination is in order.

The tension created by dissent is healthy and regenerative and serves as a check on Congress. Congress' average member is over 50 years of age, and he votes and speaks for a war whose average soldier is under 21. If a war were so unpopular that huge numbers of citizens sought alternative service, perhaps this dissent would suggest that we should not be fighting it.

III. CONCLUSION

Throughout the country, one hears of young men who would rather go to jail than to Vietnam. For the purposes of this discussion, we have assumed that the majority of these men are neither lazy, cowardly, nor unconcerned. If, as we assume would be the normal case, only a few would be affected, the issue is none the less important. Surely, a society can find a better use for its citizens of sensitive conscience than to send them to jail.

The requirement of alternative work in the national interest presents a practical and honorable solution to the problem. The "compelling voice of conscience" test of the *Kauten* case should be applied to the selective objector, reducing the work of the local draft board to a determination of "sincere and meaningful belief."

A nation that has drawn much of its strength from freedom of conscience cannot afford to shackle the conscience of what may well be a "prophetic minority"—especially in time of war.⁸⁹

Societies are stronger, although less comfortable, if they keep alive the right of conscientious dissent. The difficulty which the American people agree to accept in the process of self-government is the measure of their devotion to freedom.

⁸⁹Editorial, *The Selective Conscientious Objector*, *supra* note 82.