

SELECTIVE CONSCIENTIOUS OBJECTION

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The purpose of this paper is to consider the following three problems:

- (1) Whether selective conscientious objection is morally reasonable in general; and if so,
- (2) Whether selective conscientious objection should be recognized as a constitutional right by judicial interpretation; or
- (3) Whether selective conscientious objection should become part of any new draft law that would be passed by Congress.

(1) Is Selective Conscientious Objection Morally Reasonable in General?

The answer to the first question in both American history and thought and in Western civilization has been that selective conscientious objection to wars is in principle morally right. In 1931, the Supreme Court considered the case of Douglas Macintosh who had applied for American citizenship in 1925. Although he had supported Canada's involvement in World War I and had served as a chaplain in its army, he affirmed that even though he would take the oath of citizenship promising to support and defend the Constitution and laws of the United States against all enemies foreign and domestic, he would not promise to bear arms in any future war unless he was convinced that the war was morally justified.¹ Although the Supreme Court decision went against Macintosh in a five to four vote, Chief Justice Hughes wrote the dissenting opinion which later was affirmed in a majority opinion in a similar case in 1946. Hughes noted in his opinion that Macintosh was ready to give to the United States "all the allegiance he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God;" Hughes further noted that it did not matter that Macintosh would only be a selective objector to unjust wars because: "There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression."² One such eminent statesman was Abraham Lincoln. When he was a Congressman from Illinois in the late 1840's, he opposed the Mexican-American War as morally unjustifiable since America was the aggressor, so he believed. But, of course, Lincoln was not opposed to the Civil War since this war was necessary to defend the nation from rebellion.

Although people generally agree that wars of aggression are not morally justifiable and that wars of national self-defense are, it is important to examine the traditional principles in Western civilization for distinguishing between just wars and unjust wars. Thomas Aquinas, the medieval theologian and philosopher, identified a number of conditions

for a war to be morally justified:

- (1) The war should be declared by those with authority to do so;
- (2) The war should be for a just cause, that is, for a morally right purpose;
- (3) The war should be conducted with a morally right intention; and
- (4) The war should be conducted with morally right means.

These four conditions come out of the very nature of the requirements for morally right action. For all conscious action involves four conditions parallel to the four conditions for a just war:

- (1) A human agent performs an action;
- (2) The agent acts to achieve a purpose;
- (3) The agent acts for a personal motivation or intention; and
- (4) The agent uses a means to achieve his purpose and intention.

(1) A human agent performs an action. For example, an individual attends college classes. For this agent to act in a morally correct way in this case, it is essential that this person attends the classes freely. It would not be morally right for someone else to force that student to go to college. The adult person has proper authority to make his own decisions in life, whereas the child does not have such authority. In a similar manner, those with proper authority in our country, namely, the Congress, should declare when war exists. It would be immoral for the Joint Chiefs of Staff to declare war or to force Congress to declare war. Only the person with proper authority should act freely and intelligently to fulfill his responsibilities.

(2) A human agent acts to achieve a purpose or end. For example, the college student wants to get a college degree. This purpose needs to be morally right. If the college student attended classes for the purpose of robbing the college cashier, the action would not be morally right as a whole. In a similar manner, a war should be fought to achieve a morally right purpose. An aggressive war which was fought in order to rob another nation of its wealth would not be morally right, but a war of self-defense against such an aggressive war would be morally right. A person and a nation should act for a morally right purpose.

(3) A human agent acts for a personal motivation or intention. For example, the college student may want to achieve a college degree because of his intention of getting a good job. This intention needs to be morally right. If the student wanted to achieve a college degree in engineering in order to become a terrorist, the action would not be morally right as a whole. In a similar manner, a war

should be fought with a morally correct intention. Thomas Aquinas notes that: it may happen that the war is declared by the legitimate authority, and for a just cause [purpose], and yet be rendered unlawful through a wicked intention. Hence Augustine says: The passion for inflicting harm, the cruel thirst for vengeance, . . . the lust for power . . . are rightly condemned in war."⁴ Both a person and a nation should act with a morally right intention.

(4) Finally, a human agent uses some means to achieve his purpose and intention. For example, the college student writes his papers and takes his tests in order to achieve the degree and get a good job. These means must be morally right in order for the action to be morally right as a whole. If the college student had someone else write the papers and take the tests, the student would not be using a morally correct means. In a similar manner, a war should be fought with morally correct means. The London Charter of 1945, agreed to by the United States and its allies and used in the Nuremberg trials, identified the following acts as war crimes, as immoral means for fighting a war: "murder, ill-treatment or deportation to slave labor or any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."⁵ Both a person and nation should use morally right means in their actions.

The conditions for a just war or morally correct war are in general the very same conditions for any morally correct action. An action or a war ought to be done: (1) by the agent who has the responsibility, (2) for a purpose or cause that is morally right, (3) with an intention that is morally right, and (4) with a means that is morally right. In general, from a Western moral point of view, we can say that those purposes, intentions, and means are morally right which respect the human person as an end in himself, in other words, which respect the human person as having inalienable rights.

Such is the general moral viewpoint which lies behind the claim that we need to distinguish between just and unjust wars. If we were to fail to make such a distinction by not judging the moral rightness or wrongness of the purposes of the war, the intentions of the nations, and the means used to achieve the purposes, we would prohibit ourselves from making any moral judgments about any of our actions. For moral judgments essentially concern themselves with the nature of the purposes and intentions of agents and with the nature of the means used by agents in their actions. Hence, we must make a distinction between just wars, wars whose purposes, intentions, and means are morally right, and unjust wars, wars whose purposes, intentions, and means are not morally right.

Lest this distinction between just and unjust wars be only a theoretical one and we conclude that all wars are unjust because they are judged to be destructive of the value of the human person, we must argue that war is sometimes necessary even though it has tragic consequences. Using the famous phrase of the Declaration of Independence on our inalienable rights, we may say, for sake of argument, that the state's natural purpose is to protect our rights to life, liberty, and the pursuit of happiness. If the state were forced into circumstances where the only way in which it could protect our rights as persons would be through war, then the state must have the natural right to protect our rights by war.⁶

However, since war has such tragic consequences, just war theorists have identified a number of further conditions for judging the moral quality of a proposed war:

1. There must be a sufficient proportion between the good to be accomplished and the accompanying evil. War is so horrible an evil that only the most serious reasons can make it permissible. . . .
2. War must be the last resort. Before a nation takes to war it must have exhausted every peaceful means consistent with its dignity. . . . Otherwise there is not proof that war is unavoidable and hence no sufficient proportion [between the good purpose to be achieved and the accompanying evil results].
3. There must also be fair hope of success. . . . To fight when there is not even possibility of victory is to impose evils on the nation to no purpose. . . .
4. The nation's cause must not only be just, but known to be just.

Using not only the criteria of (1) the proper authority for declaring war, (2) a morally right purpose, (3) a morally right intention, and (4) a morally right means but also these additional standards for judging the proportion between the good purpose to be accomplished and the many evil results of any war, we have the basic moral principles for distinguishing between just wars and unjust wars. The tradition of Western philosophy and religious thought gives a substantial defense to those individuals who claim a moral right for being able to judge between just and unjust wars. Of course, the decision as to whether or not a war is just should be the decision of the individual adult. No one else has the authority for forming one's conscience other than the individual. If the individual did not study the available facts about a proposed war or even about any proposed action and did not apply the relevant principles of morally right purpose, intention, and means, the individual would be failing to act with the ability that defines him as a human being namely, his rationality. It is primarily the individual conscience which must make the moral decision about the moral quality of any war.

Granted that we have defended the moral right to judge between just and unjust wars, we may turn to the second part of the paper which considers whether the Supreme Court should recognize the right of selective conscientious objection as a constitutional right.

(2) Should Selective Conscientious Objection be Recognized as a Constitutional Right by Judicial Interpretation?

The draft law permitting universal conscientious objection has undergone legislative and judicial development since World War I, and it was in the context of this development that the Supreme Court heard a case in the early 1970's of two men seeking to be selective conscientious objectors against the war in Vietnam.

At first, conscientious objection status required that the objector belonged to such historic peace Churches as the Quakers, the Brethren, and the Mennonites. When the draft was reinstated before World War II, the law did not restrict exemption to members of such groups. It provided exemption to anyone "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."¹⁰ The first Director of Selective Service, Clarence A. Dykstra, interpreted this law as not requiring membership in any religious group, much less in an historic peace Church. He even held that the phrase 'religious training and belief' did not require belief in God. His interpretation was: Any and all influences which have contributed to the consistent endeavor to live the good life may be classed as 'religious training.' Belief signifies sincere conviction. Religious belief signifies sincere conviction as to the supreme worth of that to which one gives his supreme allegiance.¹¹

But in March, 1942, the new Director of Selective Service, General Hershey required that 'religious training and belief' include "recognition of some source of all existence, which whatever the type of conception, is Divine because it is the Source of all things."¹² However, in 1943, a Federal Court of Appeals in the case of Mathias Kauten broadened conscientious objection again. It held: "A conscientious objection to participation in war under any circumstances . . . 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 what has always been thought a religious impulse."¹³

To clarify the confusion of these differing administrative and court interpretations, Congress passed a law in 1948 which attempted to repudiate the Kauten decision. The law read in part: "Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from

any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code."¹⁴ This law was more restrictive than the Kauten decision and more restrictive than the interpretation of the first Director of Selective Service in limiting conscientious objection to religious believers in a Supreme Being.

However, in two famous decisions in 1965 and 1970, the Supreme Court interpreted the 1948 law much more broadly. In the 1965 Seeger decision, the Court noted that the 1948 Draft Law:

adopted almost intact the language of Chief Justice Hughes in *United States v. Macintosh*, supra: "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." By comparing the statutory definition [of the 1948 law] with those words, however, it becomes readily apparent that the Congress deliberately broadened them by substituting the phrase "Supreme Being" for the appellation "God." And in so doing it is also significant that Congress did not elaborate on the form or nature of this higher authority which it chose to designate as "Supreme Being."¹⁵

Justice Douglas in concurring with the majority opinion noted that when the 1948 law was enacted "we were a nation of Buddhists, Confucianists, and Taoists, as well as Christians," and that it was difficult to say whether Buddhism believes in "God" or a "Supreme Being."¹² Hence, the Court held "that any person opposed to war on the basis of a sincere belief, which in his life fills the same place as a belief in God fills in the life of an orthodox religionist, is entitled to exemption under the statute."¹⁷

But then in the 1970 Welsh decision, the decision of the Supreme Court was that conscientious objection to all wars need not have even the general religious attitude behind Seeger's claim. Conscientious objection was to be legitimate if it was based in "deeply and sincerely [held] beliefs that are purely ethical or moral in content but that nevertheless impose upon [the individual] a duty of conscience to refrain from participating in any war at any time. . . ." ¹⁸ By this decision, the Court was returning in effect to the wisdom of the 1940 administrative interpretation of the law when Dykstra held, as we have already noted, that "Religious belief signifies sincere conviction as to the supreme worth of that to which one gives his supreme allegiance."¹⁹

In these last two decisions, the Court noted that the draft board is not to judge whether the deeply held beliefs are in fact the truth about the universe but rather whether the beliefs are truly held, that is, sincerely held. It is very clear the deeply held beliefs of the Christian, the

Hindu, the Buddhist, and the atheist about the existence and nature of the Supreme Being, cannot all be true. For they are in such obvious contradiction with each other. As Justice Black held in the Welsh decision, "'Intensely personal' convictions which some might find 'incomprehensible' or 'incorrect,' come within the meaning of 'religious belief' in the Act."²⁰

It was in the context of these decisions in which the Court broadened the basis for universal conscientious objection that the Gillette case came before the Supreme Court. Gillette was a selective conscientious objector to the Vietnam War. He was willing to participate in a war of national defense or in a war sanctioned by the United Nations as a peace-keeping action but not in the Vietnam War which he judged to be unjust. He refused induction. Joined to his case was the case of Negre, a Catholic in the Army, who refused to obey an order to go to Vietnam because he had finally come to the decision that the war there was unjust. Both individuals claimed that they should be exempted either under a broadened interpretation of the statute permitting conscientious objection or under the Free Exercise of Religion Clause of the First Amendment.²¹

Justice Marshall wrote the majority opinion which rejected the claim for a right to selective conscientious objection. One reason of Marshall for that rejection was that the Selective Service Act required opposition to all wars for conscientious objection status.²² Another reason was that the law in question did not violate the Establishment of Religion Clause of the First Amendment since it did not discriminate between religions and did not favor any religion over any other or even over atheism. He noted that: "for 30 years the exempting provision has focused on individual conscientious belief, not on sectarian affiliation. The relevant individual belief is simply objection to all war, not adherence to any extraneous theological viewpoint".²³

Justice Douglas dissented from the majority opinion and noted that the serious question of whether a conscientious objector can be required to kill has never been answered by the Court. Even the present majority opinion written by Marshall talked only of "serving in the armed forces of the Nation in time of war."²⁵ Douglas favored the line of reasoning of Chief Justice Hughes in his famous dissent in the Macintosh case which spoke of the moral tradition in our civilization which upholds the moral right to selective conscientious objection. Douglas wrote that he assumed "that the welfare of the single human soul was the ultimate test of the vitality of the First Amendment."²⁶ He wanted to go beyond the majority opinion which held that denial of selective conscientious objection did not affect matters of religious belief or ritual. Douglas saw a need to connect religious belief and the actions based on religious belief. Freedom to differ, in matters of conscience, Douglas argued, "is not limited to things that do not matter much. . . . The

test of its substance is the right to differ, as to things that touch the heart of the existing order."²⁷

Despite the Supreme Court's rejection of Douglas's reasoning, are there any possibilities that the Court could eventually recognize selective conscientious objection as a constitutional right? There are two possibilities for development in this matter. One possibility comes from the *Wisconsin v. Yoder* case, and the other comes from two cases dealing with the Vietnam War.

In 1972, in the *Wisconsin v. Yoder* case, the U.S. Supreme Court held that Wisconsin had erred in convicting two defendants, members of the Amish faith, for refusing to send their children to formal schooling beyond eighth grade. The Court held that the First Amendment right to free exercise of religion overrode the state of Wisconsin's legitimate interest in establishing and maintaining a compulsory education system. The essential point of the decision was that free exercise of religion did not embrace only freedom of religious belief and religious ritual. It also embraced the way in which the Amish practiced their faith in the way they formed a community which was in conscience to remain separate from the modern world.²⁸ A high school education would have substantially hindered "the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent state of development."²⁹

Justice Douglas noted in his opinion in the case that the "Court rightly rejects the notion that actions, even though religiously grounded, are outside the protection of the Free Exercise Clause of the First Amendment."³⁰ Previously the Court had distinguished between religious belief and actions based on such belief and in the *Reynolds v. United States* case had upheld the conviction of some Mormons who practiced polygamy even though the Court granted that the practice was based on religious belief.³¹ But now, Douglas noted, the *Yoder* decision was giving free exercise of religion a stronger interpretation and even raised the possibility that the *Reynolds* decision would be overruled someday.³²

If polygamy as an action based on religious belief could someday receive First Amendment recognition, so also could selective conscientious objection as an action based on religious belief also receive First Amendment recognition. However, such speculation must recognize that if selective conscientious objection would substantially inhibit the constitutional responsibility of Congress to raise and support armies, the Supreme Court would probably continue not to permit selective conscientious objection. However, if selective conscientious objection could be permitted without affecting that responsibility, then perhaps the Supreme Court should someday recognize selective conscientious objection as a constitutional right deeply rooted in the religious and

moral beliefs of our civilization. Of course, Congress itself could pass a law permitting both universal and selective conscientious objection if it decided that it could fulfill its Constitutional mandate to raise and support armies while permitting such exemptions in order not to force any man to kill against his conscience's mandate. We will examine the possibility of such legislation in the third part of the paper.

But before we turn to the third part of the paper, there is one other possible way in which the Supreme Court could recognize the right of selective conscientious objection. There were two cases dealing with the Vietnam war which the Supreme Court refused to review but which some of the Justices wanted to consider. In both cases, individuals were selectively objecting to the Vietnam War.

In the United States v. Mitchell case, David Mitchell refused induction into the armed services because he claimed that the armed conflict in Vietnam was being fought in violation of various treaties the U.S. had signed, especially the Treaty of London of 1945. This treaty had identified various war crimes and crimes against humanity. A war of aggression was such a crime against peace, and Mitchell claimed that the Vietnam conflict was such a war.³³ Furthermore, Article 8 of the treaty recognized individual responsibility for one's actions in waging such a war in the following words: "The fact that the Defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."³⁴ Justice Douglas held that the Court should have examined the important issues raised by Mitchell. Although the Court did not review the case and did let the conviction of Mitchell stand, Douglas in his dissent held as follows:

Article VI, cl. 2 of the Constitution states that "treaties are a part of "the supreme law of the land; and the Judges in every State shall be bound thereby."

There is considerable body of opinion that our actions in Vietnam constitute the waging of an aggressive "war."

This case presents the questions:

- (1) whether the Treaty of London is a treaty within the meaning of Article VI, cl. 2;
- (2) whether the question as to the waging of an aggressive "war" is in the context of this criminal prosecution a justifiable question;
- (3) whether the Vietnam episode is³⁵ a "war" in the sense of the Treaty. . . .

In a similar case, Mora et. al. v. McNamara in 1967, Justices Stewart and Douglas dissented when the Court refused to hear the case of three army privates who claimed that the Vietnam conflict was an unconstitutional³⁶ war being waged without declaration of war by Congress. Stewart and

Douglas wanted the following questions examined by the Court:

(I) Is the present United States military activity in Vietnam a "war" within the meaning of Article I, Section 8, Clause 11 of the Constitution?

(II) If so, may the Executive constitutionally order the petitioners to participate in that military activity, when no war has been declared by the Congress?

(III) Of what relevance to Question II are the present treaty obligations of the United States?

(IV) Of what relevance to Question II is the joint Congressional ("Tonkin Bay") Resolution of August 10, 1964?

(a) Do present United States military operations fall within the terms of the Joint Resolution?

(b) If the Joint Resolution purports to give the Chief Executive authority to commit United States forces to armed conflict limited in scope only by his own absolute discretion, is the Resolution a constitutionally impermissible delegation of all or part of Congress' power to declare war?³⁷

Both the Mitchell case and the Mora case raise issues that are right at the center of the just war theory. Our Constitution gives Congress the authority to declare war and makes treaties part of the supreme law of the land, and in some of our treaties such as the Treaty of London our country has recognized that war crimes and crimes against humanity are immoral means of fighting a war and are prohibited by international law. The authors agree with Douglas and Stewart that the two cases should have been reviewed by the Supreme Court. The cases raised such important issues that they should have had complete judicial examination. Perhaps these issues will come up again when the United States is again involved in an undeclared war, and then the Supreme Court will have the opportunity to apply the principles for discriminating between just and unjust wars that are already inherent in our Constitution and treaties. Such a Court decision may not decide that a specific conflict was unconstitutional or a violation of our treaties; but even if the Court were to decide that a specific conflict was constitutional and in accord with our treaties, there still remains the question of whether selective conscientious objectors who sincerely believe that a given war is unconstitutional or a violation of our treaties should be given exemption and alternative service by legislative act?

(3) Should Selective Conscientious Objection Become Part of Any New Draft Law?

In considering this last question, we need to keep in mind that actions or refusals to act based on an individual's

conscientious belief cannot be accorded an absolute right without destroying the basis for the authority of the state.³⁸ For example, if an individual believed that he had a right in conscience as a large employer to discriminate against some group, then the equal opportunity employment laws could be made null and void by that individual. To allow anyone to claim a conscientious objection against any law would be to make a law-abiding society impossible. Political authority requires that citizens be legally bound to obey the laws. Those who would in civil disobedience break a law for moral or religious reasons should be subject to the penalties of the law.

However, we have seen that it is possible to build specific exemptions into certain laws. For example, the Supreme Court has recognized that the Amish now have a constitutional right to withdraw their children from schools after eighth grade even though most others cannot legally do so. In a similar manner, Congress has allowed ministers to object conscientiously to the payment of the social security tax even though no one else in the private work force is exempted. Since there is ample precedent for building exemptions into laws, perhaps Congress should allow selective conscientious objection because to force a selective conscientious objector to kill against his conscience is a very serious matter.

However, in 1967, the National Advisory Commission on Selective Service considered the possibility of recommending legislation allowing selective conscientious objection, and a majority in the Commission rejected it for a number of reasons.

The first argument of the majority was:

. . . that the status of conscientious objection can properly be applied only to those who are opposed to all killing of human beings under any circumstances. It is one thing to deal in law with a person who believes he is responding to a moral imperative outside of himself when he opposes all killing. It is another to accord a special status to a person who believes there is a moral imperative which tells him he can kill under some circumstances and not kill under others. Moreover, the question of "classical Christian doctrine" on the subject of just and unjust wars is one which would be interpreted in different ways by different Christian denominations and therefore not³⁹ matter upon which the Commission could pass judgment.

This argument is very weak. The very nature of moral reasoning demands a moral right for selective conscientious objection. A moral agent must make a judgment on the moral quality of the purposes, intentions, and means involved in any action, and, as Justice Hughes pointed out in the *Macintosh* decision, it has long been a part of our tradition

to distinguish between just and unjust wars. Furthermore, the point of the majority about not being able to judge different interpretations of the just war doctrine is not relevant. For draft board decisions in the past were not based on the truth of the individual's religion but on whether the objector was sincere in his belief. So also, for the selective conscientious objector, the question should be whether he sincerely judges a particular war to be unjust.

The second argument of the majority was:

. . . that so-called selective pacifism is essentially a political question of support or nonsupport of a war and cannot be judged in terms of special moral imperatives. Political opposition to a particular war should be expressed through recognized democratic processes and should claim no special right of exemption from democratic decisions.

This argument has a misunderstanding of the nature of moral reasoning but still has some merit. A misunderstanding is involved in attempting to distinguish moral and political judgments. "All important political questions are also moral questions. For each requires judgments about what ought to be done, to which principles of morality are relevant".⁴¹ Obviously, the question of forcing a selective conscientious objector to kill is a serious moral matter as well as a political matter, and, as such, Congress should deal with it as both a moral matter and a political matter.

Despite the misunderstanding in the second argument, it still has some merit. One commentator on this matter has suggested distinguishing selective conscientious objection judgments into two kinds: those based on tests of consequences and those based on tests of principle. An example of the first kind would be a judgment that a particular war has evil consequences disproportionate to the good purposes being sought; an example of the second kind would be a judgment that one's nation is committing war crimes or crimes against humanity.⁴² The first kind of moral judgment "would not be allowed as a basis of a claim to exemption because, while equally a moral claim, such judgments would not be distinguishable from merely political opposition to a particular war. . . ." ⁴³ However, a sincere moral judgment claiming that a fundamental principle of the Constitution or of an international treaty against war crimes⁴⁴ is being violated should justify a claim to exemption.

The third argument of the majority was that:

. . . legal recognition of selective pacifism could open the doors to a general theory of selective disobedience to law, which could quickly tear down the fabric of government; the distinction is dim between a person conscientiously opposed to participation in a particular war and one conscientiously opposed to

payment of a particular tax.⁴⁵

This argument's conclusion does not follow. The Supreme Court's recognition of the constitutional right of the Amish to withdraw their children from formal education after eighth grade and Congress's creation of a legislated right for ministers not to pay the social security tax have not lead to a general theory of selective disobedience to law. Furthermore, there is the historical evidence of Great Britain in World War II on this issue. Britain allowed for both universal and selective conscientious objection in that war, and Britain's practice did not lead to a general theory of selective disobedience to law which tore down the fabric of government.⁴⁶

The fourth argument of the majority of the Commission was that it:

. . . was unable to see the morality of a proposition which would permit the selective pacifist to avoid combat service by performing non-combatant service in support of a war which he has theoretically concluded to be unjust.⁴⁷

This argument is very weak. If a universal conscientious objector can perform noncombatant service in a war he morally opposes, so also can a selective conscientious objector perform such service in a war he opposes. The selective conscientious objector would be asking for the same alternatives of service allowed to the universal conscientious objector.

The final argument of the majority of the Commission was:

. . . that a legal recognition of selective pacifism could be disruptive to the morale and effectiveness of the Armed Forces. A determination of the justness or unjustness of any war could only be made within the context of that war itself. Forcing upon the individual the necessity of making that distinction--which would be the practical effect of taking away the Government's obligation of making it for him--could put a burden heretofore unknown on the man in uniform, with results that could well be disastrous to him, to his unit and to the entire military tradition.⁴⁸

This argument also ignores the historical evidence of Great Britain's experience in World War II. The morale and effectiveness of its Armed Forces were not disrupted even though Britain allowed selective conscientious objection. Furthermore, the government can never take away from the individual the moral responsibility for judging whether a war is just or unjust. As the Treaty of London in 1945 and Nuremberg trials insisted, the individual must be held to be

responsible for war crimes and for crimes against humanity.

Since the arguments of the majority of the Commission are so weak, it is the conclusion of the authors that Congress should enact provisions in any future Selective Service Act which provide for both universal and selective conscientious objection. Ramsey's distinction between selective conscientious objection based on tests of consequences and that based on tests of principle may be very useful in placing limits on selective conscientious objection exemptions.

In summary, in this paper we have argued: (1) that selective conscientious objection is a moral right inherent in the very nature of moral action, (2) that there are some judicial considerations that could lead to a constitutional right to such exemption (a) because the Constitution limits the war-making powers of the President and makes treaties part of the supreme law of the land and (b) because actions based on religious belief are receiving broader constitutional protection now, and (3) that Congress should provide for selective conscientious objection because of the weak arguments of the National Commission on Selective Service against such objections and because of Britain's successful use of such exemptions in World War II.

ENDNOTES

- 1 Lillian Schlissel, ed., Conscience in America: A Documentary History of Conscientious Objection in America, 1757-1967 (New York: E. P. Dutton & Co., Inc., 1968) p. 193.
- 2 Schlissel, Conscience in America, pp. 201-203. (United States v. Macintosh. 293 U.S. 605 ff (1931)).
- 3 Thomas Aquinas, Summa Theologica, II-II, qu. 40, a. 10-4.
- 4 Thomas Aquinas, Summa Theologica, II-II, qu. 40, a. 1.
- 5 William V. O'Brien, "The Nuremberg Principles," A Conflict of Loyalties: The Case for Selective Conscientious Objection, edited by James Finn (New York: Pegasus, 1968) p. 142. The Charter of London also identified a list of crimes against humanity: "Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population. . . ." Ibid.
- 6 Austin Fagothey, Right and Reason: Ethics in Theory and Practice (St. Louis: The C. V. Mosby Company, 1963) p. 453.
- 7 Austin Fagothey, Right and Reason, p. 455-456.
- 8 John Courtney Murray, S.J., "War and Conscience," A Conflict of Loyalties, p. 21, affirms that the just war doctrine "is not exclusively Roman Catholic; in certain forms of its presentation, it is not even Christian. It emerges in the minds of all men of reason and good will when they face two inevitable questions. . . . when is war rightful, and what is rightful in war? One may indeed refuse the questions, but this is a form of moral abdication. . . . If one does face the questions, one must arrive at the just war doctrine in its classical form, or at some analogue or surrogate, conceived in other terms."
- 9 Alan Gewirth, "Reasons and Conscience: The Claims of the Selective Conscientious Objector," Philosophy, Morality, and International Affairs, edited by Virginia Held et alii (New York: Oxford University Press, 1974) p. 104.
- 10 Selective Training and Service Act of 1940, quoted in Sibley, Conscription of Conscience, p. 487.
- 11 Sibley, Conscription of Conscience, p. 68.
- 12 Sibley, Conscription of Conscience, p. 68.
- 13 Sibley, Conscription of Conscience, pp. 68-69.
- 14 Sibley, Conscription of Conscience, p. 546.

- 15 United States v. Seeger, 380 U.S. 176 (1965), Schlissel, Conscience in America, p. 265.
- 16 Schlissel, Conscience in America, p. 269.
- 17 Schlissel, Conscience in America, p. 270.
- 18 United States v. Welsh, 398 U.S. 340 (1970).
- 19 Sibley, Conscription of Conscience, p. 68.
- 20 United States v. Welsh, 398 U.S. 339.
- 21 United States v. Gillette, 401 U.S. 439-441 (1971).
- 22 United States v. Gillette, 401 U.S. 443-448.
- 23 United States v. Gillette, 401 U.S. 454.
- 24 United States v. Gillette, 401 U.S. 462.
- 25 United States v. Gillette, 401 U.S. 464-465.
- 26 United States v. Gillette, 401 U.S. 469.
- 27 United States v. Gillette, 401 U.S. 469-470.
- 28 Wisconsin v. Yoder, 406 U.S. 205 (1972), Compulsory Education and the Amish: The Right Not to Be Modern, edited by Albert N. Keim (Boston: Beacon Press, 1975) pp. 149-181.
- 29 Keim, Compulsory Education, p. 150.
- 30 Keim, Compulsory Education, p. 179.
- 31 Keim, Compulsory Education, p. 179.
- 32 Keim, Compulsory Education, p. 179; despite the Court's advancement of the Free Exercise Clause of the First Amendment in giving protection to practice based on religious belief, the Court "retreats when in reference to Henry Thoreau it says his 'choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clause.' That is contrary to what we held in United States v. Seeger, . . . where we were concerned with the meaning of the words 'religious training and belief' in the Selective Service Act," Douglas noted. He pointed out, as we have seen, that the Court adopted the following test: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of

those admittedly qualifying for the exemption comes within the statutory definition [of religious training and belief]." Douglas also pointed out that the Welsh decision had also broadened the interpretation of that crucial phrase.

- 33 Mitchell v. United States, Memorandum Case No. 1012, U.S. Supreme Court Reports, 18 L ed 2d., April 14, 1967, pp. 132-133, in Schlissell, Conscience in America, p. 294.
- 34 Schlissell, Conscience in America, p. 294.
- 35 Schlissell, Conscience in America, p. 295.
- 36 Mora et. al. v. McNamara, 389 U.S. 934 (1967), in Schlissell, Conscience in America, p. 316.
- 37 Schlissell, Conscience in America, p. 317.
- 38 Paul Ramsey, "Selective Conscientious Objection: Warrants and Reservations," A Conflict of Loyalties, p. 33.
- 39 In Pursuit of Equity: Who Serves When Not All Serve? Report of the National Advisory Commission on Selective Service, 1967, p. 50.
- 40 In Pursuit of Equity, p. 50.
- 41 Arnold S. Kaufman, "The Selective Service System: Actualities and Alternatives," A Conflict of Loyalties, pp. 247-248.
- 42 Ramsey, "Selective Conscientious Objection," p. 64.
- 43 Ramsey, "Selective Conscientious Objection," pp. 64-65. Ramsey writes that the tests of consequences "which would be excluded as bases of claims to status as a conscientious objector . . . are the test of justice in the overall 'cause,' the test whether the war was undertaken in 'last' reasonable 'resort,' and the test of proportionately greater good or lesser evil in the effects. To say that objection on these grounds would not be an admissible claim is not to say that opposition to the war for these reasons would be any the less moral. The proposal only recognizes that the course of the nation's policy was set by precisely these same considerations, on which men may disagree who are exercising the same conscience, and that in these respects conscientious moral objection cannot be distinguished from serious political opposition to that particular policy. The place of the interplay of conscience on these points is and must remain in the public forum, in continuing dissent until 'the conscience of the laws' is persuaded or in conscientious objection that bears the burden of refusing to serve." pp. 65-66. 'Conscience of the laws' refers back to the famous dialogue between Socrates and the Laws in the Crito where Socrates agrees with the Laws that he should

suffer the penalty of his execution because he had agreed to live in Athens and to abide by the laws which he helped to form. In a democracy, the laws are to be assumed to be a conscientious expression of the will of the people, and the primary place for changing such laws is in the legislature, not in civil disobedience or in rebellion.

- 44 Ramsey, "Selective Conscientious Objection," pp. 64-65.
- 45 In Pursuit of Equity, p. 50.
- 46 Denis Hayes, Challenge of Conscience: The Story of the Conscientious Objectors of 1939-1949 (New York: Garland Publishing, Inc., 1972) ch. 5.
- 47 In Pursuit of Equity, p. 50.
- 48 In Pursuit of Equity, pp. 50-51.
- 49 Of course, the wording of Britain's law for selective conscientious objection and its administrative and judicial interpretation of that law provide valuable evidences for any attempt at working out such a law in the United States. Such evidences would be a fitting subject for another paper.