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Selective Conscientious Objection and the *Gillette* Decision

The Military Selective Service Act provides for the deferment, on condition of alternate civilian service, of those "who, by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form." In recent years considerable effort has been devoted to the interpretation of this clause, and in particular to the question of whether objectors to a particular war, so-called selective conscientious objectors, may qualify for exemption.

Many draft-age opponents of the Vietnam War have tried to convince their Selective Service Boards that, though not (necessarily) opposed to all wars, they are conscientiously opposed to the war the United States is now fighting. They and their lawyers have argued that (a) they are entitled to deferment under the existing provision *properly interpreted*; or (b) the Selective Service Act is unconstitutional to the extent that it discriminates against them. In 1968 a federal judge accepted the second claim and dismissed an indictment against a registrant who refused induction into the armed forces.[1] Several other favorable decisions followed.[2] But for the most part, the courts did not consider the claims of selective conscientious objectors favorably. The matter was decided by the Supreme Court last year in the case of *United States* v. *Gillette*. The Court upheld the denial of deferment to Gillette and his subsequent conviction "not because of doubt about the sincerity or religious character of his objection to

1. United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1968).

2. United States v. Bowen, 2 SSLR 3421 (N.D. Calif. Dec. 24, 1969); and United States v. McFadden, 309 F. Supp. 502 (N.D. Calif. 1970).

military service, but because [his] objection ran to a particular war."[3]

The *Gillette* decision is questionable on several grounds. I hope to show this. But I am not primarily interested in the question of the constitutionality of the Selective Service Act. My layman's reply to the decision is rather a vehicle for the discussion of various claims about the difference between universal and selective conscientious objection and about why one, but not the other, should be grounds for deferment.

I

As a first line of defense, selective objectors have claimed that they qualify for deferment under the existing statutory provision, properly interpreted. The statute speaks of those who are "opposed to participation in war in any form." A first argument exploits the grammatical ambiguity in this clause. "In any form" seems to modify "war." If so, only universal objectors, that is pacifists, are eligible. But "in any form" may modify "participation." In this case the criterion of applicability is that the objector must oppose any form of participation in war. Such objection may then be interpreted plausibly as objection to any form of participation in some particular war, such as the war being waged at the time of conscription. This argument was accepted by at least one circuit court in a case dealing with a Jehovah's Witness. In fact, the court thought it *obvious* that "in any form" modified "participation."[4]

According to another interpretation of the disputed clause, "in any form" should be read as "in at least one form."[5] Hence the requirement is objection to participation in some war or other, presumably the one in which the objector would serve if drafted.

3. United States v. Gillette, 401 U.S. 437 (1971).

4. Taffs v. United States, 208 F.2d 331 (8th Circuit 1953). The relevant portion of the decision reads: "we are inclined to think that Congress did not intend such an unreasonable construction to be placed on this phrase. . . . 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" (italics mine).

5. See Brief for Defendant, p. 21, United States v. Kurki, Crim. No. 65-CR-135 (E. Dist. Wisc.), cited in Ralph Potter, "Conscientious Objection to Particular Wars," *Religion and the Public Order*, ed. Donald A. Gianella (Ithaca, N.Y., 1968), p. 62.

Both these interpretations are, I think, farfetched. Justice Marshall, writing for the majority in *Gillette*, noted the possibility of alternate readings of the relevant clause but quickly dismissed it.[6] The debate in the Congress over the Selective Service Act suggests no reasonable doubt as to what was intended. It should be admitted that Congress had in mind both the common parse and the universal quantifier.

A second argument for qualification under the existing provision turns on the interpretation of "war." Many would-be conscientious objectors have told their draft boards that they would, under certain circumstances, "use force." The question obviously arises as to whether those circumstances constitute states of *war*. There are numerous judicial decisions to the effect that willingness to defend oneself, or a member of one's family, or a friend, or a stranger attacked on the street does not compromise the position of a conscientious objector. Nor do these decisions draw the line at defending groups of people or the immediate community in which one lives.[7]

On the basis of these precedents the argument is made that opposition to participation in war in any form is consistent with willingness to defend the country against attack. If the conscientious objector may legitimately defend his immediate community, then why not his entire town, or county, or state? Perhaps it is possible to defend oneself and one's family and neighbors only by banding with others and repelling invasion along national borders, rather than waiting for the invaders to reach Main Street.

A large class of would-be selective conscientious objectors would be protected if this argument were accepted. An opponent of the Vietnam War might take the position that while prepared to defend the country against attack, he would not fight in a war halfway around the world against a weak power with negligible air and naval capacity.

6. 401 U.S. at 443.

7. See, e.g., United States v. Purvis, 403 F.2d 563 (2d Circuit 1968), where it was held that: "Agreement that force can be used to restrain wrong doing especially as the last alternative, has little bearing on an attitude toward war. We would not expect a full-fledged conscientious objector to stand by while a madman sprayed Times Square with machine gun bullets, or while an assassin took aim at the President." See also United States v. Haughton, 413 F.2d 742 (9th Circuit 1969): "Haughton's willingness to use force to protect the community or to stop another from taking a life is consistent with conscientious objector status."

Whatever one thinks of the justice of the Vietnam War, it is surely wrong to think of it as a war of national defense against external attack.

Even if it were accepted, however, the argument would not be available to those would-be conscientious objectors who distinguish between just and unjust wars, declare their willingness to fight in behalf of a just cause, and also concede that there might be just wars which are not wars of national defense. Neither would it be available to Gillette, who in his request for classification as a conscientious objector stated his willingness to fight not only in a war of national defense but in a war sponsored by the United Nations as a peace-keeping measure as well. In the majority decision, the Supreme Court curtly dismissed this line of defense for Gillette. The language used suggests that the Court would not be impressed by the extrapolation from immediate and personal acts of defense to wars of national defense even if this were relevant to Gillette's case.[8]

Two further arguments have been advanced to the effect that certain types of selective objectors should qualify for deferment under the existing provision. One has to do with counterfactuals, the other with contingencies. Applicants for conscientious objector status are invariably asked by their boards whether they would have been willing to use force against Hitler in World War II, or whether they would use force under certain hypothetical conditions. Presumably an unequivocal negative answer is required of an applicant if he is to receive a deferment. Otherwise the applicant is merely a selective objector. But the argument can be made that unwillingness to answer these questions in the negative should not be grounds for disqualification.

An applicant might well reply to these questions by saying simply that he does not know what he would do. This answer, far from being evasive, might reflect the critical uncertainty of an honest man unwilling to make facile declarations about what he would do under extraordinary counterfactual conditions. This would-be conscientious objector feels certain that the particular war he faces is senseless, cruel, and immoral. He is quite sure that his conscience would give

8. 401 U.S. at 448.

him no peace were he to participate. He is furthermore drawn to the belief that all wars are futile and wrong, just as this particular one is. But he cannot dispel residual doubt about how he would react in the face of the excruciating circumstances that his draft board describes.

This hypothetical self-critical applicant recognizes that his principled rejection of war has never been put to a severe test. He recognizes that in the case of a genuine invasion his pacifist sympathies would come into conflict with strong impulses to defend other people. He cannot be sure how the conflict would resolve itself. In despair he might reach the conclusion that the alternative to war would be even worse than war itself.

These possibilities would plague the applicant faced with the question "what would he do if." Because of his personal integrity he would have to answer that he did not know. Some have argued that he should be considered a conscientious objector nonetheless. *As of the time of his application* he *is* opposed to participation in war in any form. That is the proper test, according to this argument, not what his position would be if the times were different.

There is something by way of precedent for this line of defense. In one case a registrant was asked by his board whether he would "change his mind" if the country were attacked. The registrant replied that it was *possible* that he would. On this basis the board denied his application for classification as a conscientious objector. But the district court ruled in his favor, saying that his reply should not disqualify him, "as it clearly relates to a contingency and provides no inference as to [his] state of mind when the incident occurred."[9]

This defense was dismissed as irrelevant in the *Gillette* decision. Thurgood Marshall saw an obvious difference between a universal objector who cannot exclude the possibility of a subsequent change of mind and an objector such as Gillette, who at time of application can name circumstances under which he would fight.[10]

A final argument for qualification of certain selective conscientious objectors under existing law concerns what might be called "contin-

9. United States v. Owen, 415 F.2d 390 (8th Circuit 1969). See also Miller v. Laird, 3 SSLR 3146 (N.D. Calif. April 28, 1970).

10. 401 U.S. at 448.

gent pacifism." A selective service registrant might well distinguish in principle between just and unjust wars, declare his willingness to fight in the former, and yet firmly believe that no actual war such as he might face would be just. This position might originate in a radical critique of American foreign policy. It might be based on the judgment that no war is just when waged with indiscriminate aerial weapons. Or it might derive from a theological doctrine which maintained that only a war ordained by God would be just and that God will (probably) not ordain such a war. This third possibility seems contrived, but it is in fact the example considered and considered favorably by several courts. It is more or less the position taken by Jehovah's Witnesses. Judges have wanted to consider them as conscientious objectors. There has never been any question of the sincerity of their rejection of secular war, or of their willingness to accept jail rather than conscription. But they will not declare opposition to participation in war in any form.

In 1955 the Supreme Court upheld the right of exemption of a Jehovah's Witness despite his declared willingness to participate "in defense of his ministry, Kingdom interests, and in defense of his fellow brethren."[11] Justifying the exemption, the Court noted that Jehovah had not commanded war of his Witnesses since Biblical times. But the Court did not seem to accept the implications of the decision. It later refused to hear a case involving a Roman Catholic who professed belief in the just war doctrine yet maintained that "there had never been a just war in history and there never could be."[12] Here denial of deferment and subsequent conviction for refusing induction were permitted to stand.

This line of defense, that an objector to a particular war is really a universal objector, contingently, is not directly relevant to *Gillette*. It is, however, interesting in its own right. The position is by no means contrived, and large numbers of objectors to the Vietnam War could in all honesty embrace it. At the same time the defense was not explicitly rejected by the Court in *Gillette*.

11. Sicurella v. United States, 348 U.S. 385 (1955).

12. United States v. Spiro, 384 F.2d 159 (3d Circuit 1967), *cert. denied*, 390 U.S. 956 (1968).

II

These four arguments may suggest how attorneys earn their fees but skirt the crucial question. What of the objector to a particular war such as the one in Vietnam who distinguishes that war from others that are just, who can say that he would fight in just wars, and who furthermore admits the possibility of such a war occurring within his lifetime? I think it must be conceded that it was not the intention of Congress to exempt such an objector. The question, then, is whether the draft law is unconstitutional insofar as it denies consideration to those "who, by reason of religious training and belief, [are] conscientiously opposed to participation" in the particular war they face. This is the question in *Gillette*.

The constitutional challenge is framed in two different ways. According to the first, forcing a man to fight in violation of religious conscience denies him his basic right to the "free exercise of religion" as guaranteed in the First Amendment. It is no less unconstitutional to deny this right to selective objectors than to universal objectors. Numerous religions forbid participation in particular wars without teaching pacifism. One thinks immediately of Catholic followers of the just war teachings of Augustine, Aquinas, Victoria, Suarez, and others.[13] Also, the United Church of Christ, the United Presbyterian Church, the American Baptist Church, and the World Council of Churches have passed resolutions recognizing the right of conscientious objection to particular wars.

In one recent case involving a Catholic, *United States* v. *McFadden*, a district court judge accepted the claim that the free exercise clause protected the defendant against prosecution for refusing induction.[14] The judge acknowledged that the government may abridge free exercise in the interests of "society's health and morals" by *proscribing* acts required by religious faith. But he distinguished these cases from those in which the state *coerces* action in violation of religious con-

13. For example, the Dominican Francisco Victoria, who helped formulate canon law in the sixteenth century, wrote: "If a subject is convinced of the injustice of a war, he ought not to serve in it, even on the command of his prince. This is clear, for no one can authorize the killing of an innocent person" (401 U.S. at 471 [Justice Douglas' dissent]).

14. 309 F. Supp. at 505, 506.

science. He further acknowledged that the killing of another human being without just cause, i.e., murder, is probably the most extreme violation of conscience that the government could coerce.

The government has consistently taken the position in response that exemption from military service on grounds of religious scruples is not a right protected by the free exercise clause or any other part of the Constitution.[15] Rather, exemption is a matter of "legislative grace," extended in particular circumstances for particular reasons. In *Gillette* and elsewhere the government argued that even the exemption available to Quakers is not absolute and that the Congress might withdraw it without violating the Constitution.

According to the second challenge, even if exemption for conscientious objectors is a matter of grace rather than right, the Selective Service Act is still unconstitutional because it creates invidious distinctions, rendering grace to some while denying it to others. Even if Quakers need not be exempted, in fact they are. And since they are, other sorts of religious objection to participation in war must receive the same protection they do. This challenge is framed in terms of the First Amendment stipulation that "Congress shall make no law respecting an establishment of religion," or under the "equal protection" clause. In another recent case, *United States* v. *Bowen*, an indictment against a Catholic draft refuser was dismissed on these grounds.[16]

The majority in *Gillette* rejected these challenges, but it made concessions along the way. The Court acknowledged that even if there is no absolute right to conscientious objector exemption, there are good reasons why the Congress might provide it. The Court recognized a public interest in protecting the individual conscience wherever possible. It conceded that "fundamental principles of conscience and

15. It has been argued that there is a "right not to kill" to be found in the Ninth Amendment, which states: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." See Norman Redlich and Kenneth R. Feinberg, "Individual Conscience and Selective Conscientious Objection: The Right Not to Kill," 44 *New York University Law Review* 875-900 (Nov. 1969).

16. 2 SSLR at 3422, where Judge Weigel said: "In denying conscientious objector status to Bowen based upon his religious opposition to the Vietnam War but permitting it to one whose religious opposition is to all wars, the effect of Section 6j is to breach the neutrality between religion and religion as required by the mandate of the 1st Amendment."

religious duty may sometimes override the demands of the secular state." It acknowledged that there are relevant pragmatic considerations as well, such as "the hopelessness of converting a sincere conscientious objector into an effective fighting man."[17] It even conceded that these reasons for legislative grace apply to objection to particular wars just as much as they do to universal objection. The Court *insisted, however, that the interest in protecting the free exercise of* religious conscience is not absolute and must be balanced against competing constitutional interests, namely "providing for the common defense" and insuring that the burdens of defense are distributed equitably.

In response to the second challenge, the Court ruled that the line drawn between selective and universal objection does not establish or favor one religion over another. Clearly any number of laws may exercise an incidental discrimination among religions without doing so unconstitutionally. Criminal codes favor garden-variety religions over other, more zealous creeds which would wreak vengeance upon unrepentant sinners. But they do so for good secular reasons having nothing to do with an intent to found or foster or establish a religion. The line drawn between different sorts of religious objection to participation in war is justified similarly. We are told that "there are neutral secular reasons to justify the line," and as a result "it is neither arbitrary nor invidious."[18] These reasons, again, have to do with the national defense and the need to provide for it equitably. Both governmental interests are sufficiently weighty to justify any incidental discrimination between religious beliefs that the Act may require.

The Court's position is that provision for exemption of conscientious objectors must be evaluated in the light of conflicting legitimate interests, and that this is a proper matter for legislative determination. The Congress, presumably, had found that this balance of interests warranted exemption of only the universal objectors. It would have been neither "irrational" nor "unreasonable" for the Congress to have extended exemption to selective objectors.[19] But in acting as it did the Congress did not violate the Constitution.

In the *Sisson* case, the first important case won by a selective conscientious objector, Judge Wyzanski also found that "this is not an

17. 401 U.S. at 445, 453. 18. *Id.* at 449. 19. *Id.* at 460.

area of constitutional absolutism." He insisted that any and all men might be justly conscripted "in the last extremity." He held, however, that when Sisson refused induction we were nowhere near the last extremity, and that the public interest in conscripting Sisson *then* was clearly outweighed by the public interest in protecting the freedom of religious conscience.[20] In other words, the balance arrived at by the Congress was sufficiently lopsided to justify judicial intervention.

At least for the purposes of this essay, that is the position I take as well. According to the *Gillette* decision, Congress reasonably assumed that serious governmental interests would be jeopardized if conscientious objection privileges were extended to selective objectors. I shall argue that it is not at all clear that this would be the case. The government makes several different claims to this effect, but all are questionable.

III

Two governmental interests are mentioned in the decision. The first is that of fair administrability. The government warned that a program excusing selective objectors would be "impossible to conduct with any hope of reaching fair and consistent results." It would "involve a real danger of erratic and even discriminatory decision-making in administrative practice." The second interest is that of maintaining the effectiveness and morale of our armed forces.[21]

The test for eligibility as a conscientious objector which Gillette challenged consists of three parts: objection must be conscientious; it must be based on "religious training and belief"; and it must apply

20. 297 F. Supp. at 908. Judge Wyzanski stated: "The sincerely conscientious man, whose principles flow from reflection, education, practice, sensitivity to competing claims, and a search for a meaningful life, always brings impressive credentials. When he honestly believes that he will act wrongly if he kills, his claim obviously has great magnitude. That magnitude is not appreciably lessened if his belief relates not to war in general but to a particular war or a particular type of war. . . . It is equally plain that when a nation is fighting for its very existence there are public and private interests of great magnitude in conscripting for the common defense all available resources, including manpower for combat. *But a campaign fought with limited forces for limited objects with no likelihood of a battlefront within this country and without a declaration of war is not a claim of comparable magnitude*" (italics mine).

21. 401 U.S. at 456, 455.

to participation in war in any form. The government's central claim, accepted by the Court, was that if the third part of the test were dropped, it would be essentially more difficult to administer fairly and consistently than it is as it now stands. In Thurgood Marshall's words:

> A virtually limitless variety of beliefs are subsumable under the rubric, "objection to a particular war." All the factors that might go into nonconscientious dissent from policy, also might appear as the concrete basis of an objection that has roots in conscience and religion. Indeed, *over the realm of possible situations, opposition to a particular war may more likely be political and nonconscientious than otherwise. The difficulties of sorting out the two, with a sure hand, are considerable.* . . . In short, it is not at all obvious in theory what sorts of objections should be deemed sufficient to excuse an objector, and there is considerable force in the Government's contention that a program of excusing objectors to particular wars may be "impossible to conduct with any hope of reaching fair and consistent results. . . ."[22]

The Court is concerned about the administrative difficulty of answering two questions: first, whether an objection is conscientious, and second, whether the objection is religious in the proper sense, rather than political. The Court seems to accept the claim that these determinations would not be merely more difficult to make in the case of selective objection, but so much more difficult that fair administration of the Selective Service Act would be impossible. In order to evaluate this claim, which is central to the Court's decision, it is necessary to review how the Court has previously interpreted the first two parts of the three-part test for eligibility as a conscientious objector.

The first federal conscription bill that made provision for conscientious objectors was enacted during World War I. It provided exemption only to members of historic peace churches, such as Quakers and Mennonites. The next bill, in 1940, made no mention of membership in a traditionally recognized religious organization, but provided exemption for those "who, by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form." In 1948 a qualifying sentence was added: "Religious training and

22. *Id.* at 455-456 (italics mine).

belief in this connection means an individual's belief in a 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."

The qualification was added to clarify matters, but it had the opposite effect. In a series of cases the "Supreme Being" test was challenged as being prejudicially narrow, since it excluded such religions as "secular humanism." The distinction between religious beliefs and those stemming from a "personal moral code" was also challenged as being vague, arbitrary, or discriminatory.

The Supreme Court came to accept these challenges in the *Seeger* decision in 1965. In his application Seeger had refused either to affirm or deny belief in a Supreme Being. He had crossed out the words "training and" in the phrase "religious training and belief" and put quotation marks around "religious." The Court decided that he qualified as a conscientious objector nevertheless. It formulated what has become known as the "equivalency test" of religious belief. What is required is "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 exemption."[23]

In response to *Seeger* the Congress deleted the Supreme Being clause in 1967, but left the second half of the qualification, that religious training and belief "does not include essentially political, sociological, or philosophical views, or a merely personal moral code." The Selective Service Act was in that form when Gillette violated it and it has not been changed since.

In its decision in *Welsh* in 1970 the Court went further and interpreted away some of the force of the restrictive clause about merely personal moral codes. Welsh simply struck out the words "religious training and belief" when filling out his application and described himself as a humanist, much as Gillette did. The Court decided, nonetheless, that his position was religious in the proper sense and that he should not have been denied his classification. It applied the following test: "If an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content but which nevertheless impose upon him a duty of conscience to refrain from participat-

23. United States v. Seeger, 380 U.S. 176 (1965).

ing in any war at any time, he is entitled to deferment as a conscientious objector."[24] As of the time it heard Gillette's appeal, this was the Court's criterion for eligibility as a conscientious objector. It reaffirmed this position in the course of its decision in *Gillette*. Thus if the Court is to distinguish political from religious objection, and contend further that selective objection is "likely to be political," it is bound to interpret religion in this sense, which does not exclude secular conscience.

What is the distinction? The Court never gives an example, but I assume it would consider political the following reasons for opposing a particular war: (a) the war is one of imperialist intervention; (b) it is contrary to the interests of the international working class; or (c) it is contrary to the national interest (of the country in whose army the objector is asked to fight). I further assume that it would have to consider an objection based on the Christian just war doctrine to be properly religious. According to one formulation, the doctrine forbids participation in a war when any of the following conditions are not met: "(1) The cause must be just. (2) War must be the last resort, the only possible means of securing justice. (3) War must be made by lawful public authority. (4) There must be a reasonable hope of victory. (5) The intention of the government declaring war must be just, that is, free of vindictive hatred, greed, cruelty, or glee. (6) There must be a due proportion between the good probably to be accomplished and the probable evil effects of the war. (7) The war must be rightly conducted through the use only of just means."[25] The question is how these conditions, or rather their respective negations, are different from (a), (b), and (c).

I do not question that objections such as (a), (b), or (c) are in a good sense political in character. So are all normative judgments about the affairs of a national state, polis, or other body politic. The Christian doctrine that defines the conditions under which war is justified is itself political. But the sense in which these judgments are political is not incompatible with derivation from "religious training and belief" as the phrase is interpreted in *Seeger* and *Welsh*, or even

24. United States v. Welsh, 398 U.S. 340 (1970).

25. Potter, "Conscientious Objection to Particular Wars," *Religion and the Public Order*, p. 68.

in the most traditional interpretation. God might reveal his will concerning the affairs of state and command men to act accordingly. He often did so in Biblical times. Jehovah's Witnesses are still waiting for Him to do so again.

A draft-age registrant might oppose a war on grounds (a), (b), or (c) precisely because of his "religious training and belief." An observant Catholic might refuse to participate in what he considered to be a war of imperialist intervention because he also thought such wars violated at least several of the conditions defining a just war. Another citizen who believed his country to be of divine importance might refuse to participate in a given war if he felt the war threatened the interests of the country.

It should also be clear that normative principles concerning warfare which we traditionally associate with religious sects can be shared by nonbelievers. The Christian just war doctrine, which the Court must recognize as a possible religious foundation for selective objection, is not at all sectarian.[26] Quite the contrary. Some of the principles of the doctrine have even been incorporated into the body of international law which defines the permissible circumstances and means of war. One might embrace the just war doctrine as the will of God as revealed in personal mystical communion or through the mediation of a long heritage of religious teachings. But one might also embrace its criteria within a different framework: as a secular moral intuitionist, as a contractarian,[27] or as a utilitarian of one sort or another. And one might do so with such depth of conviction as to satisfy the Court's "equivalency test" that belief be religious.

Of course not every objection to war couched in political language need reflect deeply felt moral obligations or the dictates of conscience. But neither is this necessarily the case with objection couched in what the Court would probably consider religious language. In worrying

26. According to John Courtney Murray, S.J., who served on the National Commission on Selective Service (in dissent), "it is not a sectarian doctrine. It 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. First, what are the norms that govern recourse to the violence of war? Second, what are the norms that govern the measure of violence to be used in war? . . . The . . . doctrine . . . insists, first, that military decisions are a species of political decisions, and second, that political decisions must be viewed, not simply in the perspectives of politics as an exercise of power, but of morality and theology in some valid sense" ("War and Conscience," *A Conflict of Loyalties*, ed. James Finn [New York, 1968], p. 21).

27. See John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), sec. 58.

about whether objection is political the Court is worrying about the wrong question.

The force of *Seeger* and *Welsh* was to collapse the condition that objection be based on religious training and belief into the condition that it be conscientious, i.e., that it be deeply and sincerely held and derive from the binding obligations of conscience, divinely inspired or not. The proper question for administrative determination is whether a draft-age opponent of a given war is conscientious in this sense.

The government's central claim, accepted by the Court, is that this determination is harder to make when objection is framed with respect to a particular war than when it is framed with respect to all wars. The determination, in fact, is so difficult that a program excusing selective objectors would be "impossible to conduct with any hope of reaching fair and consistent results." I cannot see why it would be harder to conduct than the present program. I certainly cannot see why it would be "impossible" to conduct. And yet surely only insuperable administrative difficulty, not mere administrative inconvenience, is the sort of governmental interest which may be weighed against basic rights as guaranteed in the free exercise, nonestablishment, and equal protection clauses of the Constitution.

Admittedly, in individual cases it may be difficult to determine whether a would-be conscientious objector is truly conscientious. But in these cases the difficulty has nothing to do with whether his objection is particular or universal. There is a confusion here between the substance of a position relating to the justifiability of war and the sincerity of an applicant who claims to embrace the position on grounds of conscience. The fact that a man *claims* opposition to all wars is no proof that he qualifies for deferment. It simply happens to be the case that people who have traditionally claimed opposition to all wars—Quakers, for example—have more than proven their conscientiousness in our eyes. We naturally tend to associate all objectors with them.

The Selective Service System does not accept claims to conscientious objection at face value. A personal statement, references, and an interview are required. The local draft boards have the responsibility for judging depth and sincerity of belief on the basis of this

evidence. Decisions may be appealed and all determinations are subject to review in the federal courts. The mechanisms whereby we evaluate sincerity and intent are surely fallible and subjective, but they are not more so in the case of claims of selective objection than in those of universal objection. In fact a would-be selective objector, unlike his counterpart, may properly be held accountable for substantive information about the nature of the war he opposes. This might actually facilitate an evaluation of his conscientiousness. Furthermore, however imperfect our ability to judge states of mind, juries make such judgments every day in cases where intent or sincerity is a factor in the determination of guilt.

The Court elaborates upon the difficulty of processing would-be selective conscientious objectors by listing three specific worries. First, "an objector's claim to exemption might be based on some feature of a conflict which most would regard as incidental, or might be predicated on a view of the facts which most would regard as mistaken."[28] For instance, one might oppose the war in Vietnam *simply* because it threatened the extinction of rare flora in the Mekong Delta, or because Ho Chi Minh was a Sagittarius. These would indeed be difficult cases to administer. It would have to be determined whether the applicant was possessed of a deeply felt moral obligation to preserve rare flora or to act in accord with cosmic command. But such cases would not be more difficult to administer than one in which a registrant opposed *all* war out of concern for the natural flora, rather than for human beings, or because he himself was born under a pacific sign.

Furthermore, it should be recognized that very few objectors, if any, would base their objection "on some feature of a conflict which most would regard as incidental." The overwhelming majority of draft-age opponents of the Vietnam War base their opposition on the belief that, at the very least, it is causing death, injury, destruction, and human misery completely out of proportion to any good that might come of it. These "features" are not incidental.

Neither does it seem especially significant that objection to a particular war might be "predicated on a view of the facts which most would regard as mistaken." As long as objectors to the war are in the

28. 401 U.S. at 456, 457.

minority this will surely be the case. But the majority, of course, may be wrong about the facts. There was a time when the majority in this country accepted the government's claim that it was defending the sovereign state of South Vietnam against unprovoked attack from the North. Perhaps the majority still does. Further, even if we could say objectively that the majority view was correct, those who failed to recognize this might still be conscientious. Speaking to this very point, the Court held in *Seeger* that: "the 'truth' of a belief is not open to question"; rather, the question is whether the objector's beliefs are "truly held."[29]

Second, the Court notes that "the belief that a particular war at a particular time is unjust is by its nature changeable and subject to nullification by changing events."[30] Admittedly an objection to a particular war might change as the war evolved. For example, at the outbreak of World War II there were British socialist conscientious objectors who opposed the war because it pitted working men against one another. Some of them may have changed their minds after Germany invaded Russia in the summer of 1941. They may have then felt that the interests of the international working class, on balance, would best be advanced by Germany's defeat. But the fact that they did change their evaluation of the justness of the war does not necessarily compromise the initial conscientiousness of their objection. Had they meant simply to ride out their deferments they would not have aired their views publicly. They certainly would not have propagandized them.

Changeability of beliefs is a possible difficulty in the evaluation of claims to universal objection as well. A person might be opposed to participation in all wars because he has concluded after long historical research that in fact all wars cause more evil than good in the end. Yet during the course of the particular war he faces he might learn of new enemy atrocities more horrid than any he had ever imagined possible. As a result he might come to believe that this was an instance, a first instance, of a war which was just. Bertrand Russell, who considered himself more or less a pacifist during World War I

29. 380 U.S. at 185.

30. 401 U.S. at 456.

and at the outbreak of World War II, eventually came to support the latter.[31]

Though objectors to particular wars, even when conscientious, may change their positions, it does not follow that they should not be deferred. Rather it follows that conscientious objector classifications should be subject to periodic review in precisely the way certain medical, occupational, and hardship deferments are. The Selective Service System manages to review these claims regularly even though their number dwarfs that of conscientious objection claims.

Third, the Court acknowledges the government's claim that expansion of exemption provisions would discriminate in favor of the "articulate, better educated, or better counseled." The proper response to this is the same as to the first and second difficulties outlined by the Court. Whatever advantage a well-counseled college graduate might have before his board he will have whether he tries to convince it of the conscientiousness of his objection to one war or to all wars.

The government that here professes such concern for the inarticulate and poorly educated might better have occupied itself with suggesting improvements in the administrative procedure for evaluating conscientious objection claims. The tribunals that evaluate such claims should be separate from the draft boards, whose principal concern is one of filling monthly quotas and whose members are rarely known for their tolerance or judicial insight. England maintained a separate tribunal system until it ended conscription in 1960.

In summary, I do not see why it should be essentially more difficult to judge the conscientiousness of a selective objection to military service than it is to judge the conscientiousness of a universal objection. Concern for the possibility of fair administration might have been more appropriate when the Court by its interpretation liberalized the sense in which it is required that objection derive from "religious training and belief." If church affiliation were the test, as was formerly the case, then applications would be comparatively easy to process. But the Court was reluctant to construe religious conviction narrowly and thereby risk favoring one religion over another. For precisely

31. Bertrand Russell, *Autobiography: The Middle Years* (New York, 1968), p. 275.

this reason it should not now favor one sort of conscientious objection to war over another.

IV

The second substantial government interest mentioned by the Court in *Gillette* is that of maintaining the effectiveness and morale of our armed forces. If selective objectors were permitted to perform alternate civilian service or noncombatant military service, it is possible that there would not be enough men left to fill army quotas. Even if soldiers were available in sufficient numbers, some might resent the exemption of others, and this resentment would "weaken the resolve" required of fighting men.[32]

The first contention, that deferment of selective objectors would significantly deplete available manpower, is, of course, an embarrassing one for the government. Relative to the total numbers available for service, very few men have been drafted to fight in the Vietnam War. In considering the government interest in maintaining the effectiveness of the armed forces the Court refers to the Report of the National Advisory Commission on Selective Service, released in 1967. In April 1967, the month in which Gillette applied for conscientious objector status, Burke Marshall, Chairman of the Commission, testified that the problem before the Selective Service System was how to select 110,000 men out of the 730,000 available.[33] Actually the figure of 730,000 is misleading, since the selection process begins long before that figure is reached. In 1968, of 20,829,000 registrants aged 18½ to 26, some 2,200,000 had student deferments, 4,126,000 were deferred on the basis of fatherhood or hardship, 471,000 had

32. 401 U.S. at 459-460: "The fear of the National Advisory Commission on Selective Service, apparently, is that exemption of objectors to particular wars would weaken the resolve of those who otherwise would feel themselves bound to serve despite personal cost, uneasiness at the prospect of violence, or even serious moral reservations or policy objections concerning the particular conflict."

33. Hearings of the Senate Committee on Armed Services, 12-19 April 1967, cited in Brief for Defendant, p. 53, United States v. Sisson, *cert. denied*, 399 U.S. 267 (1970).

occupational or agricultural deferments, and some 424,000 were unclassified.[34]

If so many men were conscientiously opposed to a given war that it became impossible to fill even a small quota, then it would be questionable whether the government was justified in going to war in the first place, or in using conscripts to do so. In fact, however, much to the disappointment of war opponents, the number of men conscientiously opposed to service in recent years has never been large enough to threaten army quotas. Volunteers have always been in the majority; their proportion might have been still larger if the army had raised its salaries and benefits, as it has done more recently. Furthermore, many of the men who might have been selective conscientious objectors qualified simultaneously for student or occupational deferments.

It can be said in response that the government is concerned about manpower needs not only under present circumstances, but also in anticipation of future war on a larger scale. Deferment of selective objectors might set a bad precedent. I do not find this argument compelling either. For one thing, the nature of modern warfare is such that vast infantry forces may never be used again. "War on a larger scale" is likely to be conducted by remote control by highly trained technicians and experts, none of whom will be conscripts. Even now the army is moving toward an all-volunteer status, and the savage air war over Indochina is increasingly automated.

However, even if there were a future conflict in which the national defense required the conscription of large infantry forces, the government would not then be crippled by a precedent from the period of the Vietnam War, when conditions were essentially different. To rule that it is unconstitutional to withhold conscientious objector status from Gillette under present circumstances is not to deny that all men, including Gillette and Quakers, might be justly conscripted "in the last extremity."

Though conceding for purposes of argument that conscription of all available manpower might be justified under conditions of extreme emergency, of clear national danger, I should think that those conditions would make conscription unnecessary. The extent of the danger

34. *Statistical Abstract of the United States*, 90th edn. (Washington, D.C., 1969), p. 260, table 383 (cited in Sisson brief, p. 54).

would be clear to the vast majority of citizens and they would accept the burden of self-defense voluntarily. Indeed, a national plebiscite in the form of a call for volunteers is probably a better test of the extent to which war is necessary and justified than an executive order to raise draft calls and commit troops, or even a Congressional declaration of war. I am far more concerned about men agreeing to fight when they are not endangered simply because their government orders them to do so than about them refusing to fight when genuine need arises. This is an argument against conscription, but it is also an argument for the recognition of selective conscientious objectors. Under those rare conditions of national emergency when conscription is justified, few men will be conscientiously opposed to participation.

The experience of the British during World War II is significant in this context. Their provision for conscientious objection made no mention of religion, nor did it specify that objection must be to all war as against the one war at hand.[35] The National Service Act of 1939 provided that any person who claimed that: "he conscientiously objects (a) To be registered in the military service register, or (b) To performing military service, or (c) To performing combatant duties . . . may apply . . . to be registered as a conscientious objector." If found to qualify, objectors of the first sort would be unconditionally exempted; those of the second would be exempted from military service on condition of civilian service; those of the third would have to perform noncombatant military duty.

Up to the end of hostilities in August 1945, 67,000 men had provisionally registered (i.e., applied for recognition) as conscientious objectors. This figure represents about .8 percent of the total number registered. The percentage fell from 1.8 percent in the prewar registration to under .6 percent of all registrations after June 1940 and to under .5 percent of all registrations after February 1941. The British local and appellate tribunals that heard these cases found in favor of

35. Fenner Brockway (now Lord Brockway) describes it as follows: "The test was not the ground of objection but the depth of the objection. If an applicant convinced them that he held his convictions so rootedly that they represented to him an issue of right and wrong in his own conduct they exempted him, despite the fact that in another war he might take up arms" (in his preface to Denis Hayes, *Challenge to Conscience* [London, 1949], cited in Brief for Defendant, p. 76, United States v. Gillette, 401 U.S. 437).

approximately 80 percent of all those who applied.[36] By way of contrast, in June 1971 there were in this country 34,202 selective service registrants classified as conscientious objectors. They represented 1.11 percent of the total number registered, and between 40 to 60 percent of the number who had applied for the deferment. Hence between 1.9 to 2.8 percent of all registrants applied for classification as conscientious objectors despite the more stringent requirements.[37] Great Britain, at a time when it was seriously endangered, when there was even a possibility of invasion, managed to tolerate the conscience of selective objectors. The United States is not comparably endangered now, nor was it so even during World War II.

The British system did not work flawlessly. Particularly in the beginning, there were discrepancies between local tribunals, so that, for instance, some were more likely to be lenient toward socialist objectors than others.[38] But in time the policies became more uniform, at least as measured statistically. Even the outspoken, militant leadership of the conscientious objection movement acknowledged that the tribunals "with some exceptions, fulfilled their impossible task with sympathy and insight."[39]

The example of Great Britain is relevant not only to the government's concern about having available sufficient manpower for an army, but also to its claim that deferment of selective objectors might cause resentment and corrode morale among conscripts within the

36. The breakdown by type of classification was as follows:

Percentage of CO claims accepted	79.4
(a) unconditionally	6.1
(b) conditionally	48.5
(c) for noncombatant service	24.8
Percentage of claims rejected	20.6

All figures are from *Conscription: A World Survey*, ed. Devi Prasad and Tony Smythe (London, 1968), p. 59.

37. Figures released by the Selective Service System and reprinted in the *Reporter for Conscience Sake* (published by the National Interreligious Service Board for Conscientious Objectors) 28, no. 9 (Sept. 1971): 3.

38. See the *CO's Hansard* (London), a series of reprints from parliamentary reports of matters concerning the conscientious objector, published by the Central Board for Conscientious Objectors; e.g., Pamphlet no. 3 (April 1940), p. 10.

39. Fenner Brockway, *Objection Overruled*, the Ninth Annual Report of the Central Board for Conscientious Objectors (London, 1948), p. 6.

army. Britain's army managed well enough even though there probably was some resentment of "conchies."

Granted the problem is much more serious when a war is as unpopular as the present American war and has produced so great a national polarization. There are undoubtedly large numbers of conscripts who are not prepared to declare themselves as conscientious objectors but who nevertheless serve only because they feel it their duty. They may have reservations about the justice or necessity of the war, or may simply be concerned about the inconvenience or danger involved in military service—quite rightly so. This reluctant conscript might well think it unfair that his more zealous neighbor, even if conscientious, is permitted alternate service or noncombatant military service. Once such a conscript is ordered to Vietnam, or when he first sees combat, he might well be resentful.

This objection could be directed to the deferment of universal objectors as well as to selective objectors, but not with the same force. Pacifists, like celibates perhaps, are considered odd but usually tolerable. The selective objector, however, presents a more focused dissent and may arouse greater anger. There is a difference between telling a businessman that all business is corrupt and telling him that a particular business practice in which he is engaged is dishonest.[40]

A reluctant conscript may feel duty-bound to serve, but only if the onerous duty is shared fairly. His position is entirely justified. The question is whether *fairness* is compromised when the selective objector is permitted alternate service. Though he may not recognize it, even the reluctant conscript has an interest in the public tolerance of conscientious objection, selective or universal. Could he abstract himself from the given war and knowledge of his own response to it, he might well imagine being in the intolerable position of the conscientious objector himself. He might consider the awful choice of going to jail or fighting in conflict with conscience. As he would want to be protected in that situation, so he would recognize the need to protect others and to institutionalize a third possibility. True, some shirkers might slip through. But they would probably not be many, and their escape would be less important *to him* than the possibility of imprison-

40. The example is used in Brief for Defendant, p. 111, United States v. Sisson, 297 F. Supp. 902.

ment for himself—or his son. This, I think, might be the view of an objective representative citizen. To the extent that he would endorse deferment of selective objectors wherever possible, the practice is not unfair.

It might be argued, however, that idealized considerations of fairness are irrelevant. Even if army morale *should* not be influenced by the deferment of selective objectors, in fact it might be. The government's concern, the argument repeats, must be considered against the bitter background of the Vietnam War and not against idealized models of political justice.

This sort of cynical realism deserves a response in kind. There *is* widespread bitterness in the army; morale is low, at times mutinously so. Soldiers returning from Vietnam tell stories of men refusing direct orders and shooting officers. Drug abuse is common. Men are deserting in large numbers. The Pentagon concedes that over 98,000 men deserted in 1971 and that over 350,000 have done so since 1967, when Gillette was denied his conscientious objector classification.[41] Morale is probably as low as it has ever been. And the condition is certainly exacerbated by the presence within the army of vocal opponents of the war who express their feelings, turn out GI newspapers, and organize open resistance. The center of the antiwar movement has in fact shifted from the college campuses to military bases on the one hand, and to the federal prisons on the other. The government, so concerned about morale, must weigh the disruption that might result from the quiet deferment of conscientious war opponents against the disruption that results even now from their presence in the army or from their conspicuous imprisonment. It is a grim utility calculation indeed.

If my argument is sound, neither of the two governmental interests weighed by the Supreme Court in *Gillette* would be seriously jeopardized should conscientious objector deferments be made available to selective objectors. These interests would be no more compromised than they are under the present system. In the absence of such overriding considerations it is unconstitutional to recognize one sort of religious objection to partipation in war but not another. Guy Gillette should not have been sent to prison.

41. *New York Times*, 28 Dec. 1971, p. 9.