August 2013

The Conscientious Objector Under the Selective Service Act of 1940

Joseph T. Tinnelly C.M.

Follow this and additional works at: http://scholarship.law.stjohns.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.stjohns.edu/lawreview/vol15/iss2/6

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact cerjanm@stjohns.edu.
NOTES AND COMMENT

THE CONSCIENTIOUS OBJECTOR UNDER THE SELECTIVE SERVICE ACT OF 1940

In the celebrated Selective Draft Cases it was held that the very conception of a just government includes the right to compel its citizens to render military service in case of need. Yet from the beginning of our history, Quakers and other conscientious objectors have been exempted as an act of grace from military service. Such exemption, however, "is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides. No constitutional provision . . . but only the policy of Congress (exempts the conscientious objector)." Moreover, this exemption has been strictly limited to military service and no conscientious objector can claim exemption from war taxes, from military training required by a state university which the conscientious objector may wish to attend, or from the clause in the naturalization oath regarding the bearing of arms in defense of the nation.

In the Selective Service and Training Act of 1940, the clause requiring the registration of all male citizens and resident aliens between the ages of 21 and 35 made no provision for the designation of a registrant as a conscientious objector. But prior to the registration day, October 16, 1940, the Acting Director of Selective Service notified all State Directors of Selective Service that registration cards should not be considered invalid if a registrant wrote on the card that he was registering as a conscientious objector.

Little opposition to the registration had been anticipated, but a number of individuals refused to register, and after trial and con-

1 Arver v. United States, 245 U. S. 366, 38 Sup. Ct. 159 (1918).
2 The words "conscientious objector" are commonly abbreviated to c. o.
11 Most publicized was the case of a group of students from the Union Theological Seminary who resigned from the Seminary in order to avoid being exempted as students for the ministry [54 STAT. — 50 U. S. C. A., App., § 305(d) (Supp. 1940] and then announced their conscientious objection to the
viction were sentenced to a year and a day in a federal penitentiary and, in one Oregon case, to a road gang.

For the most part, however, it has been the policy of the conscientious objectors to accept the registration as a sort of census and to look to the further provisions of the Selective Service Act for the vindication of their rights. The Selective Service Act of 1917 had provided exemptions only for those members of any well recognized religious sect or organization whose creed or principles forbade its members to participate in war in any form. The 1940 Act, however, while not so liberal as the English conscription act, provides for the exemption from combatant service of all those who by reason of religious training or belief are conscientiously opposed to participation in war in any form.

II

Foremost among those whose training and belief inclines them to conscientious objection to war are members of the Society of Friends. The Friends, or Quakers, believing that there is "that of God, in every man," and recognizing the "Inner Light" as the presence of God in every human being, have maintained for almost 300 years that no Quaker is conscience-free to destroy another human life, no matter what the provocation. Other religious bodies such as the Church of the Brethren and the Mennonites have likewise been historically opposed to war.

During the World War there were many individual conscientious objectors. They were tried, convicted and sentenced to a year and a day in a federal penitentiary. N. Y. Times, Nov. 15, 1940, p. 30. A similar sentence was received by James Ball in Des Moines, Iowa. N. Y. Times, Dec. 1, 1940.

Such, also, was the attitude of the Civil Liberties Union which advised the Union Theological students to register and then claim exemption as conscientious objectors. (1940) 151 THE NATION 328.

The National Service (Armed Forces) Act, (1939) 2 & 3 Geo. VI, c. 81, § 5, provides complete exemption for those proving absolute objections to military service.

It is an error, however, to assume that Quakerism is completely pacifist. There are Quaker Meetings where the military viewpoint has a majority.

During the last war, in addition to four bodies of Friends, 16 bodies of Mennonites and the Church of the Brethren (Conservative Dunkers), the following religious organizations were listed as holding the doctrine of non-resistance: Brethren in Christ, Christadelphians, Amana Society, Churches of Christ, Old Order German Baptist, Brethren Church (Progressive Dunkers), German Seventh Day Adventists, Church of God (New Dunkers). 2 REP. PROVOST-MARSHAL-GEN. (1919) 56-57.
tious objectors among the Protestant denominations and, since that time, Protestant groups in general have taken an active part in the parades, meetings, and other activities of the pacifist movement. Although the nature of Protestantism and its emphasis upon the doctrine of private judgment precludes an official or authoritative position on the subject of war, the House of Bishops of the Episcopal Church declared in November, 1939, that war is "wholly incompatible with the teachings of Our Lord Jesus Christ." The majority of Protestants are not pacifists, but the number of conscientious objectors is considerable and most denominations have authorized the establishment of a system of registration for the conscientious objectors among their members.

Conscientious objection has found little support in Orthodox Judaism. There is some support for the movement among the Reform and Conservative branches of Judaism, but here also there

---

21 Prominent among these was John Haynes Holmes who stated on March 17, 1915 that "war is never justifiable at any time or under any circumstances. No man is wise enough, no human interest is precious enough, to justify the wholesale destruction and murder which constitute the essence of war." Dr. Holmes still retains these convictions: "I would rather die than kill, and see my country conquered than a conqueror." (1940) 57 CHRISTIAN CENTURY 1546-9.

22 Fourteen Protestant organizations took part in the Peace Parade of May 19, 1934 in New York City. N. Y. Times, May 20, 1934.

23 Peace Conference held at Broadway Tabernacle Church, New York City. N. Y. Times, May 8, 1934.


25 For a representative account of present-day Protestant opinion, see series of articles by "ten Christian leaders, five pacifists and five non-pacifists." (Dec. 4, 1940-Feb. 5, 1941) 57 CHRISTIAN CENTURY.

26 (1940) 57 CHRISTIAN CENTURY 1548.

27 Protestant groups prepared to register affiliated noncombatants are: Episcopalian Fellowship Against War, Northern Baptist Council, General Council of Congregational and Christian Churches, Church of the Brethren, Disciples of Christ, Evangelical Synod of America, Presbyterian Church in the United States, Protestant Episcopal Church, Reformed Church in America, American Unitarian Association, Executive Committee of Federal Council of Churches, Oxford Conference on the Church Community and State, World Council of Churches, United Lutheran Church in America, The Society of Friends, The Mennonite Church. Hearings before Committee on Military Affairs on S. 4164, 76th Cong., 3d Sess. (1940) 308-10. But since the passage of the bill some have thought such registration unnecessary.

28 In 1940 the Central Conference of American Rabbis reaffirmed the right of the conscientious objector to refuse on religious and humanitarian grounds to bear arms. But great opposition met the statement that "participation in war is irreconcilable with the highest implications of Judaism." Finally a motion that the C. C. A. R. refuse to participate in the registration of the conscientious objectors was carried 50-20. C. C. A. R. 1940 YEARBOOK 119, 125.

29 In June, 1934 the Rabbinical Assembly of America Convention recognized the right of the conscientious objector to claim exemption from military service in any war to which he cannot give his moral assent, and pledged itself to support him in his determination to refrain from any participation in it. PREPARED STATEMENT OF THE R. A. A. ON THE CONSCIENTIOUS OBJECTOR. Cf. also Ben Zion Bokser, The Jews and War (1940) 6 THE RECONSTRUCTIONIST 7.
is no official, and little unofficial, encouragement for conscientious objectors. An effort was made to set up machinery for registering Jewish conscientious objectors, but the proposal has been abandoned.

The Roman Catholic Church has made no definitive pronouncement on the morality of war. Some of the early Christians entertained some doubt concerning the morality of war, in view of the emphasis which Christ placed on the love that men ought to have for one another. Gradually, however, it became more obvious that the State, as well as the individual, may resort to force in defense of its rights, and that at times the State may be morally obligated to defend the rights of its citizens even though the citizens as individuals might lawfully waive those rights. Today, the opinion is universal


31 After the passage of the Selective Service Act it was felt that the provisions for the conscientious objectors therein contained, made registration of Jewish conscientious objectors by the Rabbinical Assembly unnecessary. Form Letter of the Rabbinical Assembly of America, Oct. 1, 1940.

32 It seems to be the policy of the Church to leave to its moral theologians the discussion and tentative interpretation of the natural moral law (that part of the Eternal Law of God which governs the actions of men) until the special exigencies of the times or the danger of false moral teachings evoke an authoritative declaration.

33 Tertullian (though only after he had embraced the heresy of Monatanism, c. A. D. 211) De Corona II; De Idolatria, c. XIX. Hippolytus of Rome, CANONS OF HIPPOLYTUS, cans. 13, 14. Lactantius, De Divinis Institutionibus, c. VII, 20. Origen, CONTRA CELSUM, c. VII, 25-6, but cf. note 35, infra.

34 Christ had addressed Himself mainly to the individual whose chief purpose in life was to win eternal salvation. Therefore it sometimes happened that a literal and indiscriminate application of His words to the state which has no such exalted purpose, gave rise to misconceptions concerning the morality of war. These misconceptions were finally corrected by applying to the problem of war the doctrines derived from the other ("Many other things . . . Jesus did, which if they were written . . . the world itself . . . would not contain the books which should be written." JOHN XXI, 25.) source of Divine Revelation which the Church recognizes in addition to the Sacred Scriptures, viz., the body of truths preserved and promulgated through the teaching office of the Church. ("Going, therefore, teach ye all nations . . . to observe whatsoever I have commanded you." MATT. XXVIII, 18-20.) But during the first few centuries of the Church’s existence, other and weightier problems claimed the attention of the theologians and prevented for a time their formulating a complete and concrete doctrine on the morality of war. Cf. EPSTEIN, THE CATHOLIC TRADITION OF THE LAW OF NATIONS (1935) 28. For a detailed and technical treatment see Newman, JOHN H., ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE (1845).

35 In the middle of the third century Origen speaks of “just and unjust wars” (CONTRA CELSUM, VIII) and by the end of the fourth century the doctrine of the lawfulness of war had become sufficiently clear to enable St. Athanasius to declare, “. . . We find that certain distinctions must be made. Thus it is not permitted to kill; but to kill the enemy in battle is both lawful and worthy of praise.” EPIST. AD AMUNEM MONACHUM, P.G., 26, COL. 1173.

36 An individual, for instance, might, for a higher motive (e.g., supernatural charity), decline to resist a thief who intended to steal the individual’s property. A police officer, however, as a representative of the state would have no such election but would be bound to defend the rights of the individual, even at the cost of personal injury or death.
among Catholic theologians, that war is not essentially \textit{(per se)} evil and that a just war is possible.\textsuperscript{37}

In recent years many Catholic moralists have seriously questioned the practical possibility of a just war on the grounds that the evils of modern war are so great as to outbalance, by far, the good to be derived therefrom.\textsuperscript{38} And so, since participation in an \textit{unjust} war is morally \textit{wrong},\textsuperscript{39} a Catholic conscientious objector is not an impossibility. The objector would have to be certain of the injustice of the war, however, because otherwise his duty as a soldier or as a conscript would be to obey the commands of his lawful superiors.\textsuperscript{40}

Another ground upon which several Catholics have indicated their intention to base their conscientious objections is summarized by Msgr. Barry O'Toole as follows: “Christ's injunction against bloodshed or violence under any form, while not a \textit{commandment}, is nevertheless a \textit{counsel of Christian perfection} proposed to all the faithful and imposed by Canon Law\textsuperscript{42} upon the clergy. Consequently Cath-

\textsuperscript{37} 2 PRÜMMER, THEOLOGIA MORALIS § 130. The conditions necessary and sufficient to justify a state in entering in a war are laid down by St. Thomas Aquinas, \textit{Summa Theologica}, II, Iæ qu. 40, and, in more detail, by later theologians as follows:

1. Actual or certainly imminent violation of national rights; 2. moral certainty that this is really the situation; 3. a degree of evil in the injury or danger proportionate to the evils involved in war; 4. inefficiency, or failure, of peaceful means; 5. a well grounded hope of bringing about better conditions.”


\textsuperscript{38} 2 PRÜMMER, op. cit. supra n. 37; STRATMANN, op. cit. supra n. 37, p. 71; REV. JOHN K. RYAN, op. cit. supra n. 37, p. 104. But Fr. J. K. Ryan defines “modern war” not as “present day war” but as “a war that employs means that are objectively evil” (e.g., the direct bombing and killing of civilian populations to destroy morale). Of course there can be no controversy with his conclusions concerning “modern war” in that sense of the term.

\textsuperscript{39} No Catholic can unqualifiedly assent to Stephen Decatur's cry, “... right or wrong, my country.” Cf. \textit{REV. ROBERT I. GANNON, S.J.} (1940) 38 THE CATHOLIC MIND 431.

\textsuperscript{40} REV. CYPRIAN Emanuel, O.F.M., ETHICS OF WAR 54; 2 NOLDIN, THEOLOGIA MORALIS § 354.

\textsuperscript{41} Cf. CODEX JURIS CANONICIS, c. 121. “All clerics are immune from military service...”; c. 987, § 5, “They are impeded (from receiving Holy Orders)
olics have the right, though not the duty, to be conscientious objectors. The only condition upon which this right hinges is that their motivation must be a sincere desire for Christian perfection and not simply a trumped-up pretext for evading military service.”

There will undoubtedly be claims to exemptions based on grounds not usually recognized as religious. But whether broad interpretations of the word religious, such as those suggested, by the War Resisters League will be accepted by the government, remains to be determined. The validity of objections on grounds of loyalty to humanity, to the international working class or to political philosophies is also in doubt. A number of Jehovah’s witnesses have indicated their intention to claim exemption either on grounds of conscientious objection or as ministers of the gospel. Because of

who have not yet fulfilled a term of military service which the civil law demands of them.” c. 141 forbids clerics to volunteer for military service or to take part in civil wars. Any infraction of this rule is punished (in the case of clerics in minor orders) by ipso facto deposition from the clerical state.

In addition to the War Resisters League there are a number of other civic or non-religious groups interested in the welfare of conscientious objectors including the Civil Liberties Union, the Ethical Culture Society and the Peace House. The Peace House, founded in 1926 by Mrs. J. Sergeant Cram, has been an ardent advocate of the “passive resistance” theory of Mahatma Gandhi. The Civil Liberties Union takes no official position on the subject of conscientious objection but interests itself in cases of alleged injustice towards conscientious objectors. The Ethical Culture Society maintains an attitude of official neutrality similar to that of most of the Protestant Churches and its support for the conscientious objectors among its members is limited to that of a moral nature. Cf. The Conscientious Objector, which will soon appear in the (May, 1941) STANDARD published by the American Ethical Union, 2 W. 64th St., New York City.

Cf. (1940) 151 THE NATION 328. No opinion upon the construction of the word “religious” as used in the Selective Service Act of 1940 has been rendered by the Attorney General. But in answer to an inquiry addressed to the Dept. of Justice, it was stated in a letter of March 21, 1941 by an Assistant to the Attorney General, that the Act permits the classification as conscientious objectors of those who base their stand “upon a personal religious, moral, ethical or humanitarian conscientious objection to participation in war, regardless of sectarian affiliation.”

The witnesses of Jehovah deny that they are a sect or even an organization, but claim to be individuals who have made a pact with Almighty God, whose name is Jehovah, to do His will and who devote themselves “faithfully and sincerely to the worship and active service of God and His King, Christ Jesus.” (1940) 22 CONSOLATION 24, 30. For a more complete treatment see J. F. Rutherford, THEOCRACY 18. For a different viewpoint, cf. H. C. Mcgimms (1941) 64 AMERICA 481, 512, 542, 569; Stanley High, ARMAGEDDON, INC. (Sept. 14, 1940) SATURDAY EVENING POST 18.

their singular definition of "religion"; however, and because they claim that there are as many ministers of the gospel as there are witnesses of Jehovah, the problem of their classification promises to be a difficult one.

III

In the process of classifying registrants, conscientious objection is the last ground of exemption to be considered. But if the other grounds have been exhausted an individual claiming exemption as a conscientious objector may fill out form 47 and if the claims therein are verified by his local board, he "shall be assigned to noncombatant service or to work of national importance under civilian direction." Noncombatant service has been defined: "1. Service in any unit which is unarmed at all times; 2. Service in the Medical Department wherever performed; 3. Service in any unit or installation, the primary function of which does not require the use of arms in combat, provided the individual's assignment within such unit or installation does not require him to bear arms or to be trained in their use." The alternative for those whose consciences will not even allow them to participate in noncombatant work of this sort is to be assigned to "work of national importance under civilian direction under such rules and regulations as may later be prescribed". The provision for civilian, rather than military supervision, was included to prevent the infliction of excessive or even illegal punishment at the hands of overzealous officers such as was alleged to have been meted out to individual conscientious objectors during the last war.

49 "Religion" is defined by J. F. Rutherford as "Doing anything contrary to the will of God." Theocracy 18, (1940) 22 Consolation 30.
50 One witness of Jehovah was forcibly put into an army truck and taken to Camp Upton after having refused to salute the flag, answer questions or take the oath. (N. Y. Times, March 20, 1941, p. 16, col. 3.) His case will probably be appealed.
51 There were reports that a number of conscientious objectors were hung by their hands in the Leavenworth Barracks at various intervals between early November and December, 1918. It was also charged that on Angel Island, in San Francisco Bay, conscientious objectors were "tortured, drenched with cold water in the middle of the night and flung on an icy floor to lie in their wet clothes". Oswald Garrison Villard, They Know War Is a Failure (July 8, 1939) Christian Science Monitor. Four Seventh Day Adventists were court-martialed and sentenced to 20 years in Leavenworth for their repeated refusals to pull up weeds on the Sabbath Day, on the grounds that such work was not so essential that it could not be deferred to a week day. Hearings before Com-
The work of national importance will probably be some sort of soil conservation, reforestation, etc., in camps erected through the joint efforts of the Director of Selective Service and the National Service Board for Conscientious Objectors. The government may furnish the camp sites as well as bedding, tents, tools, etc., but no food will be supplied and no salary will be paid to the workers. Since the number of conscientious objectors will average about 20,000 per year for five years, the cost of maintaining camps for them at the estimated rate of $35 per man per month, will amount to some $40,000,000 over the five-year period which marks the duration of the present Act. The burden on the individual conscientious objector will be a crushing one unless aid is forthcoming from organizations interested in the welfare of the conscientious objectors. Whether those religious bodies whose members are for the most part not opposed to military service will contribute substantial financial, as well as moral, support to the individual conscientious objectors among their numbers, is one of the vital factors upon which the continuance of the camps will depend.

IV

Should an individual’s claim to exemption from military or non-combatant service be disallowed by his local board, recourse may be had to an appeal board. The appeal will be referred by the board to the Department of Justice for a hearing and inquiry, and upon the completion of its investigation, the Department of Justice will then

mittee on S. 4164, 76th Cong., 3d Sess. (1940); Norman Thomas, The Conscientious Objector in America, c. 8, pp. 143–64.

56 The work of “national importance” has been put in charge of the Director of Selective Service. Executive Order 8075 (1941) 9 U. S. L. Week 2477.

57 Membership in the National Service Board for Religious Objectors includes: American Friends Service Committee, Brethren Service Committee, Commission on World Peace of the Methodist Church, Disciples of Christ (Dept. of Social Welfare), Fellowship of Reconciliation, Mennonite Central Committee, Molokan Advisory Committee. A consultative member is the Committee on the Conscientious Objector of the Federal Council of the Churches of Christ in America.

58 (1941) 2 Bulletin on the Conscientious Objector 2, 3 (published by the Federal Council of Churches of Christ in America); (1941) 3 Id. 3, 4. Neither the government nor the National Service Board is irrevocably committed to the camp program as the best or only means of carrying on the “work of national importance under civilian direction”. At the end of the first year of the program, both parties may reconsider the plan and decide whether a continuance is advisable. In the meantime, five camps have already been established and it is expected that ultimately the number will reach 35 or 40 under the direction of the Friends, Mennonites, Church of the Brethren or (perhaps) the Catholic Worker group. This last group has eleven farms which are part of its agrarian program and some of these may be utilized for the conscientious objectors among the members.
make a recommendation to the appeal board. Such recommendation is purely advisory, however, and the board need not follow it.59

Because the adjudication of another man’s conscience is always a delicate task and often an impossible one, the provisions for determining and classifying conscientious objectors will never be entirely satisfactory. The formulation of determined methods of procedure and rules of evidence in the examination of those claiming to be conscientious objectors would undoubtedly lessen, but could hardly eliminate, the dissatisfaction and charges of injustice that will inevitably arise. The chief difficulties, however, will probably grow out of the human element in the machinery of administration and in this regard the close cooperation which has been effected between the Director of the Selective Service Act and the National Service Board for Conscientious Objectors seems to indicate that the treatment of those, at least who are finally classified as conscientious objectors, will be as satisfactory as can reasonably be expected.

Rev. Joseph T. Tinnelly, C.M.

The Projector's Remedies to Enforce a Property Right in an Idea*

Recently, the courts of New York have rendered several decisions which involved the problem as to whether there is a property right in an idea. All the courts have sustained the general rule of law that an idea cannot be the subject of a property right unless the projector creates a contract protecting it,2 or reduces it to concrete form in order to subject it to patent or copyright. The word "idea" covers a wide range of possibilities but, for convenience sake, it is capable of being classified under three general divisions: (A) Literary ideas, i.e., in a strict sense an artistic or dramatic writing or thought, as all ideas are literary until set into concrete form; (B) mechanical ideas, i.e., new devices or inventions; (C) business ideas, i.e., plans for development of business, trades secrets, etc. The


* Acknowledgment is given to Andrew C. Hartnett, presently a member of the St. John's Law Review staff, for his helpful co-operation.
