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Conscientious Objector: Legal Definition of Religion and First Amendment Governmental Neutrality.

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COMMENTS

CONSCIENTIOUS OBJECTOR: LEGAL DEFINITION OF RELIGION AND FIRST AMENDMENT GOVERNMENTAL NEUTRALITY

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The United States, throughout its historical development, has considered itself progressively aware of religious freedoms for its citizens.[1] These concepts of religious freedom first crystallized within the foundation of our system of democratic government when the Constitution was drafted to include a separation of Church and State. The establishment of religion clause of the first amendment has been considered a progressively unique political tenet of the United States Government, and it has consequently afforded a comparatively high degree of religious freedom for its citizenry.[2] The concept of religious freedom is preserved by an avowed governmental neutrality in religious activities, as required by the free exercise and establishment clauses of the first amendment.[3] The first amendment, though perhaps deemed self-evident, has created a wide vista of judicial interpretation in reconciling the Government's and citizens' standpoints of view. This particularly comes to focus when the issues are keyed to the meaning of that elusive word: "Religion."

This comment will discuss the legal definition of "religion," in relation to draft exemption for the conscientious objector, by tracing the

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1 *See* Brodie and Southerland, *Conscience, The Constitution, and The Supreme Court: The Riddle of United States v. Seeger*, 1966 WIS. L. REV. 306 (1966).

2 Everson v. Board of Education, 330 U.S. 1, 15, 67 S. Ct. 504, 511, 9 L. Ed. 711, 723 (1947), stating that:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.

In Abington School Dist. v. Schempp, 374 U.S. 203, 222, 83 S. Ct. 1560, 1571, 10 L. Ed. 2d 844, 858 (1963), Justice Clark stated:

> [T]he Establishment clause . . . withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.

3 Abington School Dist. v. Schempp, 374 U.S. 203, 222-223, 83 S. Ct. 1560, 1572, 10 L. Ed. 2d 844, 858 (1963), where the Court held:

> The Free Exercise Clause . . . , withdraws from legislative power . . . the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by the civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.

judicial evolution of the concept from its initial stages to its present position and possible future.[4]

HISTORICAL BACKGROUND OF THE CONSCIENTIOUS OBJECTOR CONCEPT

The historical status of religion and its relation to the conscientious objector is best illustrated by the various federal statutes and corresponding judicial holdings.[5] The first exemption was enacted in 1869[6] and essentially provided exemption for members of religious denominations who by oath or affirmation declared that they were conscientiously opposed to the bearing of arms and that they were prohibited from doing so by the rules and articles of faith and of practice of their said religious denominations.[7]

The courts interpreted the general meaning of religion to embody a construction involving "one's views of his relations to his Creator, and to the obligations they impose of reverence for His being and character, and of obedience to His will."[8] This judicial interpretation of religion revolving around a belief in a deity (premised on membership in a known Church) met with little opposition.[9]

In 1917 Congress, through the Draft Act of 1917,[10] enacted the first comprehensive national conscription law, dropping the commutation provisions.[11] This Act clarified the meaning of religion in relation to conscientious objectors. The statute provided exemption as follows:

> . . . nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing whose creed or principle forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations . . . .[12]

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4 For a discussion of other religious freedoms, *see* Galanter, *Religious Freedoms in The United States: A Turning Point?*, 66 WIS. L. REV. 327 (1966).

5 *See* 2 Selective Service System, Special Monograph No. 11, Backgrounds of Selective Service (1947).

6 Act of Feb. 24, 1864, Ch. 13 § 17.

7 Also included in the statute were provisions for qualificants to pay a commutation fee of 300 dollars in lieu of serving.

8 Davis v. Beason, 133 U.S. 333, 342, 10 S. Ct. 299, 300, 33 L. Ed. 637, 639 (1890).

9 Estate of Hinckley, 58 Cal. 457, 512 (1881):

> As to the word "religion" used in connection with "learning and charity," if it can be given effect without violating any principle of existing law, it is our duty to give it such effect. . . . In its primary sense . . . it imports, as applied to moral questions, only a recognition of a conscientious duty to recall and obey restraining principles of conduct. In such a sense we suppose there is no atheist who will admit that he is without religion.

10 Act of May 18, 1917, Ch. 15, 40 Stat. 76.

11 *Supra*, note 7.

12 40 Stat. 78 (1917).

The only major attack upon the statute came in 1918 when, in the *Selective Draft Cases*,[13] the congressional power to compel military service from all citizens was upheld.[14] The congressional intent, requiring a belief in a deity and the favoring of those persons being members of recognized religious sects went unchallenged until the Department of War, itself, realized the narrow scope of the statute and in 1919 broadened the exemption by excluding the requirement that one must belong to a pacifist sect or a peace church.

> The Secretary of War directs that until further instructions on the subject are issued "personal scruples against war" shall be considered as constituting "conscientious objection" and such persons should be treated in the same manner as other "conscientious objectors . . . ."[15]

The question of belief in a deity was preserved in accordance with congressional intent in the famous *Macintosh*[16] case where the issue over the powers of Congress in relation to the individual and his personal religious scruples was finalized when the Court held:

> . . . that whether any citizen shall be exempt from serving in the armed forces of the nation in time of war is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides.[17]

The conscription statute was repealed in 1935,[18] and it was not until 1940 that it was proposed and adopted again in the form of the Selective Training and Service Act of 1940.[19] Many proposals were offered to expand the 1940 bill over the previous 1917 law[20] in hopes of broadening the exemption. The American Civil Liberties Union attempted to have the bill contain a provision exempting "those conscientiously opposed to war in any form."[21] An equally sympathetic group, the Society of Friends, proposed to exempt one "who by reason of religious training and belief is conscientiously opposed to participation in war in

13 245 U.S. 366, 38 S. Ct. 159, 62 L. Ed. 349 (1918). *See also* Black, *The Selective Draft Law Cases—A Judicial Milepost on The Road to Absolutism*, 11 Bos. L. Rev. 37 (1931).

14 *Id.*

15 U.S. Dep't of War, Statement Concerning the Treatment of Conscientious Objectors in the Army, 39 (1919).

16 United States v. Macintosh, 283 U.S. 605, 51 S. Ct. 570, 75 L. Ed. 1302 (1931).

17 *Id.* at 634, 51 S. Ct. at 574, 74 L. Ed. at 1309. The Court also said: "The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him."

18 40 Stat. 76 (1917), repealed by 49 Stat. 878 (1935).

19 Selective Training and Service Act of 1940, 54 Stat. 885 (1940).

20 For a good discussion of these proposals *see* Conklin, *Conscientious Objection Provisions: A View in the Light of Torcaso v. Watkins*, 51 Geo. L.J. 252 (1963).

21 *See* Hearing on the H.R. 10132 Before the House Committee on Military Affiairs, 73d Cong., 3d Sess. 191 (1940).

any form."[22] Congress accepted the latter group's proposals and adopted the act to read:

> Nothing in this act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.[23]

It is at this stage of conscientious objector development that the courts of the United States took divergent views of the meaning of religion.[24] The phrase "who by reason of religious training and belief"[25] proved too broad and nebulous to allow cohesive interpretations.

The split was first effected in the Second Circuit Court of Appeals in *United States v. Kauten*,[26] where a liberal meaning of religion was espoused by Justice Augustus Hand:

> It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.[27]

Various cases followed Hand's dicta and in *United States* ex rel. *Phillips v. Downer*,[28] the Second Circuit found the petitioner's beliefs to be sincerely in opposition to war although he could not specifically say from whom these beliefs were derived.[29] The idea of an "inward mentor, call it conscience or God"[30] becoming the basis of a conscientious objector exemption could not be sustained by the Ninth Circuit decision in *United States v. Berman*,[31] when the court held:

> It is our opinion that the expression "by reason of religious training and belief" is plain language, and was written into the statute

22 *Id.* at 211.
23 Selective Training and Service Act of 1940, 54 Stat. 885 § 5(g).
24 *See* Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 U. VA. L. REV. 1355, 1357 (1968).
25 Selective Training and Service Act of 1940, 54 Stat. 885, § 5(g).
26 133 F.2d 703 (2d Cir. 1943).
27 *Id.* at 708.
28 135 F.2d 521 (2d Cir. 1943).
29 *Id.* at 523; *see also* United States *ex rel.* Reel v. Badt, 141 F.2d 845 (2d Cir. 1944).
30 United States *ex rel.* Phillips v. Downer, 135 F.2d 521, 523 (2d Cir. 1943).
31 156 F.2d 377 (9th Cir. 1946), *cert. denied*, 329 U.S. 795, 67 S. Ct. 480, 91 L. Ed. 680 (1946).

> for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one.[32]

The following from the *Berman* case cements the Ninth Circuit's view of the meaning of religion regarding conscientious objectors:

> However, no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute.[33]

The question of congressional intent and the meaning of the phrase was theoretically solved in 1948 with an amendment to the Selective Service Act.[34] "By reason of religious training and belief" was explained to mean:

> 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 relationship, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.[35]

This amended clarification should have united the courts to adjudicate their cases following congressional intent, thereby resolving any circuit problems. This, however, was not the case when the Second Circuit Court of Appeals rejected the statute's validity and declared it to be unconstitutional.[36] The court concluded that there were grave constitutional issues raised by the 1948 Act. Those persons who claimed no religious belief or one that they could not identify with the standard concept of a deity, would be denied equal status with those who claimed a religious belief or could relate some belief to a theistic concept.

A serious conflict thus arose in that the Supreme Court in 1961 had addressed itself to the neutrality of the State in religious affairs:[37]

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32 Berman v. United States, 156 F.2d 377, 380 (9th Cir. 1946).
33 *Id.* at 381.
34 Selective Service Act of 1948, 62 Stat. 604 (1948).
35 *Id.* at § 6(j).
36 United States v. Seeger, 326 F.2d 846, 854 (1964). The court stated:
While we are therefore most reluctant to find that Congress, in a sincere attempt to balance the personal rights of a minority with the insistent demands of our national security, has transgressed the limits imposed by the Constitution, we are compelled so to hold.
See United States v. Jakobson, 325 F.2d 409 (2d Cir. 1963), for a prior holding of the court on this point.
37 Torcaso v. Watkins, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961).

> We repeat again and reaffirm that neither a state nor the federal government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers; and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[38]

Through the conflict between the Second and Ninth Circuits, the Supreme Court was faced squarely with the constitutionality of the statute. There was a problem of a possible first and fifth amendment conflict with the statute due to its requirement of belief in a deity.[39] The Court consolidated the *Jakobson* and *Seeger* cases in conjunction with the *Peter* case[40] and attempted to resolve the conflict.[41]

Jakobson was of the humanist school; his beliefs flowed not vertically, rather, horizontally towards his fellow man.[42] His beliefs fell in line with a concept of theism and the Court stated that his beliefs fell within the meaning of religion as defined by statute.[43] The Supreme Court therefore affirmed the court of appeals decision.[44]

Peter was convicted for failure to report for induction and his conviction was upheld[45] although the Court found that Peter, who could not relate directly to a belief in a Supreme Being, was entitled to exemption.[46] Seeger presented a more difficult question for the Court by not claiming protection under the statute, but rather by attacking its constitutionality.[47]

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38 *Id.* at 495, 81 S. Ct. at 1693, 6 L. Ed. 2d at 987.

39 *See Everson* at note 2 *supra* and *Schempp* at note 3 *supra.*

40 Peter v. United States, 324 F.2d 173 (9th Cir. 1963).

41 *See also* Brodie and Southerland, *Conscience, The Constitution, and the Supreme Court: The Riddle of United States v. Seeger*, 66 WIS. L. REV. 306 (1966).

42 United States v. Jakobson, 325 F.2d 409, 413 (2d Cir. 1963). The court stated:

> The way to arrive closer to Godness is by approaching the universals inherent in existence. The individual must deal with life, death, love, time—the "givens" of existence stemming from the Ultimate Cause—as he finds them in himself and others.

43 380 U.S. 163, 165, 85 S. Ct. 850, 854, 13 L. Ed. 2d 733, 736 (1965). The Court stated: "Jakobson claims he meets the standards of Section 6(j) because his opposition to war is based on belief in a Supreme Reality and is therefore an obligation superior to one resulting from man's relationship to his fellow man."

44 United States v. Seeger, 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965).

45 Peter v. United States, 324 F.2d 173 (9th Cir. 1963).

46 United States v. Seeger, 380 U.S. 163, 189, 85 S. St. 850, 865, 13 L. Ed. 2d 733, 749 (1965). The Court stated:

> It will be remembered that Peter acknowledged "some power manifest in nature . . . the supreme expression" that helps man in ordering his life. As to whether he would call that belief in a Supreme Being he replied, "You could call that a belief in a Supreme Being or God. These just do not happen to be the words I use."

47 United States v. Seeger, 326 F.2d 846, 847 (2d Cir. 1964). The court stated:

> Seeger asserts that the "Supreme Being" requirement, as applied to him constitutes a law respecting an establishment of religion, within the meaning of the First Amendent, and an arbitrary classification, violative of the due process clause of the Fifth Amendment.

Seeger's claim of exemption as a conscientious objector fell short of complying with the requisites for conscientious objector status because his beliefs were not based on a concept of religion in relation to a recognized deity. The Court held:

> Refusing to assert a simple belief or disbelief in a deity, Seeger felt compelled to express his convictions in more extensive terms. In a statement attached to the questionnaire, he explained his feelings that "the existence of God cannot be proven or disproven, and the existence of His nature cannot be determined. I prefer to admit this and leave the question open rather than answer yes or no."[48]

The Court in hearing Seeger anticipated the far-reaching constitutional problems inherent in his religious (non-religious) views; and, rather inarticulately, through a post-judicial reinterpretation of leading court decisions,[49] declared the issue to rest not on the constitutional question; but, rather on whether Seeger's beliefs were simply made up of a personal moral code and if so, whether they fell within the meaning of the exemption. To prevent invalidation of the statute, the real issue was skirted and altered by the Court making clear its intention of not considering or determining the status of the non-religious conscientious objector.

> We also pause to take note of what is not involved in this litigation. No party claims to be an atheist or attacks the statute on this ground. The question is not, therefore, one between theistic and atheistic beliefs. We do not deal with or intimate any decision on that situation in these cases.[50]

The Court continued:

> Our question, therefore, is the narrow one: does the term "Supreme Being" as used in Section 6(j) mean the orthodox God or the broader concept, a power or being, or a faith, "to which all else is subordinate or upon which all else is ultimately dependent?"[51]

The Court then analyzed Seeger's personal moral convictions and concluded by adopting the holding of the court of appeals:

> When Daniel Seeger insists that he is obeying the dictates of his conscience or the imperatives of an absolute morality, it would seem impossible to say with assurance that he is not bowing to

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48 *Id.* at 848.

49 For a discussion of these leading decisions *see* Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L. REV. 231, 239 (1966).

50 United States v. Seeger, 380 U.S. 163, 173, 85 S. Ct. 850, 858, 13 L. Ed. 2d 733, 741 (1965).

51 *Id.* at 174, 85 S. Ct. at 858, 13 L. Ed. 2d at 741 (1965).

> "external commands" in virtually the same sense as is the objector who defers to the will of a supernatural power.[52]

To lay the problem at rest the Court then devised its oft-quoted test for the benefit of the lower courts who would have to make a similar determination in situations like Seeger:

> The test might be stated in these words: 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.[53]

Thus, Seeger's religious or non-religious convictions made no difference. The Court held that sincere beliefs occupied in his mind the same position that religious beliefs occupied in the mind of a theistic conscientious objector and that these sincere beliefs fell within the meaning of religion. This became the broadest and most liberal interpretation of the religious attributes a registrant must possess to fulfill the requirements of conscientious objector status. Although the decision was a strained one,[54] the Court had successfully avoided striking the statute down as unconstitutional. With the *Seeger* decision, the meaning of religion and conscientious objector took an expanded step laterally giving once narrow views new light and freedom.[55] The lower courts could view *Seeger* in an equally expansive light thus allowing them new guidelines not permissible previously.[56]

Present Status of Religion and the Conscientious Objector

The question of non-religious conscientious objectors still stands unanswered by any Supreme Court decision. The lower courts seem to have met the problem head-on. *United States v. Sisson*,[57] offers a clear example of a new and turning trend within the judiciary regarding religion and the conscientious objector. John Sisson was prosecuted in Federal District Court (Mass.) for refusing to submit to

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52 United States v. Seeger, 326 F.2d 846 (2d Cir. 1964).

53 United States v. Seeger, 380 U.S. 163, 176, 85 S. Ct. 850, 859, 13 L. Ed. 2d 733, 743 (1965).

54 *See* Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 Cornell L. Rev. 231 (1966); Brodie and Southerland, *Conscience, The Constitution, and the Supreme Court: The Riddle of the United States v. Seeger*, 66 Wis. L. Rev. 327 (1966).

55 United States v. Seeger, 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965).

56 *Id.* at 184, 85 S. Ct. at 863, 13 L. Ed. 2d at 747, where the Court held:
In such an intense personal area . . . the claim of the registrant that his belief is an essential part of a religious faith must be given great weight. . . . The validity of what he believes cannot be questioned. . . . Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are in his own scheme of things, religious.

57 294 F. Supp. 511 (D. Mass. 1968).

induction in violation of the Military Selective Service Act of 1967.[58] The varied points in issue were disposed of by the district court in three separate opinions,[59] with the court refining the case to its constitutional questions in its fourth and final opinion.[60]

Sisson attacked section 6(j) of the 1967 Act[61] on the grounds that, as it applied to his being a non-religious conscientious objector, the Act violated the free exercise clause and the establishment of religion clause of the first amendment and the due process clause of the fifth amendment.[62] Chief Judge Wyzanski agreed with Sisson's argument and stated:

> In short, in the draft act Congress unconstitutionally discriminated against atheists, agnostics, and men, like Sisson, who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings.[63]

The court's reasoning pivoted on the rulings of the often cited cases that soundly profess "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[64]

Sisson's beliefs, not in the formal sense religious, were viewed by this court as genuine and persuasive:

> . . . Sisson's table of ultimate values is moral and ethical. It reflects quite as real, pervasive, durable and commendable a marshalling of priorities as a formal religion. It is just as much a residue of culture, early training and beliefs shared by companions and fam-

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58 50 U.S.C.A. § 462 (1968).

59 United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968), *jurisdiction postponed to hearing on the merits*, 38 U.S.L.W. 3127 (U.S. Oct. 14, 1969) (No. 305). United States v. Sisson, 294 F. Supp. 515 (D. Mass. 1968); United States v. Sisson, 294 F. Supp. 520 (D. Mass. 1968). *See* United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969), for a restatement of these findings.

60 United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969).

61 50 U.S.C.A. § 456(j) (1968). Subsection (j). PUB. L. 90-40, § 1(7), struck out the provision that religious training and belief stem from the individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relationship, and eliminated the requirement for a hearing by the Department of Justice when there is an appeal from a local board decision denying conscientious objector status.

Subsection (j) now reads:

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

62 United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969).

63 *Id.* at 911.

64 Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963); Torcaso v. Watkins, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961); Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947).

> ily. What another derives from the discipline of a church, Sisson derives from the discipline of conscience.[65]

The *Seeger* case[66] was used by this court as a foundation for Sisson's non-religious claims, although the *Seeger* case in the Supreme Court had made it clear that a different problem would be presented if the petitioner had been an atheist.[67] The reasoning of Judge Wyzanski on this point was basically unexplained except for his statement that Seeger had disclosed "wide vistas"[68] and that "the rationale by which Seeger and his companions were exempted under the statute is quite sufficient for Sisson to claim constitutional exemptions."[69] The court entered the Defendant's Motion to Arrest Judgment and stated in conclusion:

> All that this court decides is that as a sincere conscientious objector, Sisson cannot constitutionally be subjected to military orders (not reviewable in a United States Constitutional Court) which may require him to kill in the Vietnam conflict.[70]

Sisson is now pending before the Supreme Court on motion to affirm arrest of judgment.[71] However, the force of this particular district court decision and its future ramifications illustrates the most recent and direct attack upon the Selective Service Statute's exemption for conscientious objectors. The force of this attack has not been limited to one geographical area of the nation. The opinion was picked up quickly by other courts and has met with general approval.

On August 29, 1969, in a Pennsylvania district court, the present standard of conscientious objector exemption was declared defective in relation to non-religious claimants.[72] The case involved a petitioner seeking a discharge from the armed services based on his conscientious objection to war. The court made clear its feelings on the standard of "religious training and belief" when it stated:

> . . . we also hold that the standard of "religious training and belief" is violative of the First Amendment stricture against the establishment of religion and of the Fifth Amendment's guarantee of due process of law. See United States v. Sisson, 297 F. Supp. 902 (1969).[73]

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65 United States v. Sisson, 297 F. Supp. 902, 905 (D. Mass. 1969).
66 United States v. Seeger, 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965).
67 *Id.*
68 United States v. Sisson, 297 F. Supp. 902, 909 (D. Mass. 1969).
69 *Id.*
70 *Id.* at 912.
71 United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969), *jurisdiction postponed to hearing on the merits*, 38 U.S.L.W. 3127 (U.S. Oct. 14, 1969) (No. 305).
72 Koster v. Sharp, 303 F. Supp. 837 (E.D. Pa. 1969).
73 *Id.* at 844.

The court's reasoning was that:

> Under the *Everson* Test,[74] a regulation which makes exemption from military service dependent upon the applicant's religious belief, is on its face, defective. Further, a standard which exempts a religiously motivated conscientious objector from military service and denies the same relief to a person whose beliefs are just as sincere, but which are not motivated by any relationship to any religion is constitutionally defective under the Fifth Amendment's guarantee of the due process of law. We concur in Judge Wyzanski's assessment that ". . . it is difficult to imagine any ground for a statutory distinction except religious prejudice." *United States v. Sisson*, supra, 297 F. Supp. at page 911.[75]

In the United States District Court of New Jersey on October 21, 1969, another *Sisson* advocate raised his voice.[76] Like *Koster*, this was a situation where a habeas corpus release from the service was desired. The court granted the release stating:

> . . . we view the problem in its narrowest concept, the fundamental issue involved is the constitutionality of the standard employed by the legislative classification of conscientious objectors in Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. Append. § 456(j). It is not a mere matter of "accommodation" of certain religious beliefs. It is, rather, a legislative distinction between those of religious belief and those who are not of any such persuasion, but who are sincerely convinced that war is morally wrong, be they atheists or heretics. If the First, Fifth and Fourteenth Amendments to the Constitution do not protect the latter group by providing due process and equal protection of the laws, then the legislative standard ignores their right to object to the killing of their fellowman because they believed it to be wrong on the basis of abhorrence to any taking of life. The Constitution and its Amendments never provided for such discriminatory legislation by Congress. For while one is free to practice his religion under the First Amendment, he who does not is equally free in the exercise of his election not to do so, and his constitutional rights are not diminished thereby.[77]

On November 10, 1969, a United States District Court of Wisconsin heard the case of James Foran.[78] The defendant Foran had refused in-

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74 Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947) stating that:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another.

75 Koster v. Sharp, 303 F. Supp. 837, 845 (E.D. Pa. 1969).

76 Goguen v. Clifford, 304 F. Supp. 958 (D. N.J. 1969).

77 *Id.* at 961.

78 United States v. Foran, 305 F. Supp. 1322 (E.D. Wis. 1969).

duction into the Armed Forces on the basis that he was a conscientious objector. Foran previously had been denied the conscientious objector exemption because of the findings by his local board that he was not religious.[79] The court, in writing its opinion, quoted *Sisson* extensively in that Sisson's morality and the defendant Foran's were of the same nature.[80] *Sisson* was then combined with the *Shacter*[81] case for the court's use in drawing the conclusion that:

> The fact that the registrant is an atheist does not mean that he cannot qualify for conscientious objector classification. In both the *Shacter* and *Sisson* cases, registrant atheists were held to be entitled to conscientious objector classification.[82]

Then interestingly enough, the court continued by using the Supreme Court's *Seeger* test[83] to draw the finding that:

> . . . as a matter of law, that the beliefs of the defendant meet the *Seeger* test and that his aversion to war is based on religious training and belief as interpreted by the Supreme Court.[84]

The paradox of the *Foran*[85] case was that a registrant, self-declared to be an atheist, was judicially classified as religious enough to come within the exemption of the statute as defined by the Supreme Court. *Query*: Can this mean that courts can consider sincere, self-avowed, atheistic beliefs as equal to religious beliefs for purposes of conscientious objector exemption?

The above cases demonstrate the various judicial attitudes of lower courts in finding that the Military Selective Service Act is in discord with the first and fifth amendments.[86] However, there is a voice of

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[79] *Id.* Defendant stated in effect that objective principles of morality can be deduced from the order of the universe. One of these axioms is the principle that one should not kill. He asserted that he did not believe in God, but did not claim absolute certainty for his belief.

[80] *Id.* at 1326: " 'He was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion.' U.S. v. Sisson, 297 F. Supp. 902, 905 (D. Mass. 1969)."

[81] United States v. Shacter, 293 F. Supp. 1057 (D. Md. 1968).

[82] United States v. Foran, 305 F. Supp. 1322, 1327 (E.D. Wis. 1969).

[83] *See* United States v. Seeger, 380 U.S. 163, 176, 85 S. Ct. 850, 859, 13 L. Ed. 2d 733, 743 (1965), stating that:

> The test might be stated in these words: 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.

[84] United States v. Foran, 305 F. Supp. 1322, 1327 (E.D. Wis. 1969). The court stated further: "Foran's belief was in part a product of faith and most certainly occupied the same place in his life as normal religion occupies in the life of a religious person."

[85] United States v. Foran, 305 F. Supp. 1322 (E.D. Wis. 1969).

[86] United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969); Koster v. Sharp, 303 F. Supp. 837 (E.D. Pa. 1969); United States v. Foran, 305 F. Supp. 1322 (E.D. Wis. 1969); Goguen v. Clifford, 304 F. Supp. 958 (D. N.J. 1969).

opposition when the non-religious conscientious objectors have been granted small favor in other courts of like esteem.

The Ninth Circuit Court of Appeals on November 6, 1969, heard *Negre v. Larsen*,[87] where an inductee sought a habeas corpus release from the Armed Services. The petition was denied on the grounds that Negre's conscientious objector claim was a personal moral code based on sociological and philosophical views, rather than religious as required by the statute.[88]

The court used *Sisson* in denying the appellant's motion:

> Based on United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969), appellant argues that a denial of conscientious objector classification to him on the ground that his beliefs are purely "personal," as opposed to "religious," denies him equal protection of the law. We believe that *Sisson* was wrongly decided and decline to follow it.[89]

The reasoning of the court in declining to follow the *Sisson* judgment is unexplained in its decision; however, the lack of a simple retort can be seen as a silent momento to the *Sisson* argument as it lays waiting for Supreme Court interpretation.

CONCLUSION

2400 years ago the Greek poet Menander wrote, "Conscience is a God to all mortals." Recent court decisions embracing this principle indicate that it may become necessary to amend section 456(j) of the Selective Service Act to preserve the strictures of governmental neutrality demanded by the establishment clause of the first amendment.

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87 418 F.2d 908 (9th Cir. 1969).
88 *Id.*
89 *Id.* at 910.