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Constitutional Law - Conscientious Objector - Effect of Failure to Believe in Supreme Being

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such as found in the instant case, is a wilful and malicious injury to property and is not discharged by bankruptcy. Illinois statutory and case law, as well as the *Uniform Commercial Code*, are substantially in accord with this view. However, even in jurisdictions holding to the majority view, there is no unanimity in the basis for their holding. Some of these courts put greater emphasis on the actor's intent, state of mind, and his reason for the conversion, while other courts give only passing attention to the tortfeasor's intent or wilfulness, but place their emphasis on the act of conversion itself looking primarily to the injury to property or property rights.

The instant case may be distinguished from earlier Illinois decisions on wilful and malicious injury to property as constituting a bar to a discharge in bankruptcy, in that these earlier decisions stressed the actor's intent, emphasizing the wilfulness and maliciousness of the act. The *Padjen* decision paid little note to how wilful or malicious the conversion was, but emphasized the injury to the mortgagee's property right in the secured chattel on account of the mortgagor's conversion of such chattel. Perhaps the court was influenced largely by Illinois statutory law, and the *Uniform Commercial Code*, which recognizes that a mortgagee has a protectable property right in mortgaged property, and which contains various provisions designed to protect the holder of a security interest against conversion of the secured property by a mortgagor.

Joel Lipscher

CONSTITUTIONAL LAW–CONSCIENTIOUS OBJECTOR–EFFECT OF FAILURE TO BELIEVE IN SUPREME BEING

Irving Stolberg was denied conscientious objector status by his local draft board. Acting upon the recommendation of the Department of Justice, the appeal board sustained his 1-A classification. Stolberg refused to submit to induction and was convicted of violating the Universal Military Training and Service Act.[1] He appealed from said decision, and the court of appeals reversed, granting him the conscientious objection exemption despite the fact that he did not believe "the Supreme Being constituted a force outside of man."[2] *United States v. Stolberg*, 346 F.2d 363 (7th Cir. 1965).

[1] Universal Military Training and Service Act. § 6(j), Stat. (1948), 50 U.S.C. § 456(j) (1964).

[2] United States v. Stolberg, 346 F.2d 363, 364 (7th Cir. 1965).

The *Stolberg* case initiates a trend of conformance to the judicial mandate issued by the Supreme Court in *United States v. Seeger*.[3] The mandate stated that a "sincere and meaningful belief [which] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God"[4] qualifies one to receive the conscientious objector exemption. However, in restricting its discussion to sincere and meaningful beliefs, the Court bypassed the following two issues which are implicit in a contemporary consideration of the conscientious objection: whether atheistic views are acceptable to the dictates of section 6(j) of the Universal Military Training and Service Act;[5] and whether section 6(j) is repugnant to the first and fifth amendments of the federal constitution. The *Stolberg* decision, by its lack of comment on the above two issues, conforms to the mandate.

Such conformance has a four-fold result: section 6(j), which bases the conferral of conscientious objector status on belief in a Supreme Being, was usurped, and the requisite of "religious belief" as demanded by the 1940 Act[6] was reinstated; the definition of a "religious belief" as set out in *United States v. Kauter*[7] was reestablished as the applicable criteria for determining whether one qualifies for exemption; agnostic views were certified as being acceptable for conscientious objection; and the question of whether 6(j) is repugnant to the first and fifth amendments of the federal constitution was considered premature for judicial interpretation.

The usurpation of section 6(j) in favor of the 1940 Act was brought about through judicial interpretation. The Supreme Court, in deciding the *Seeger* case, was faced with the problem of interpreting the conscientious

[3] United States v. Seeger, 380 U.S. 163, 166 (1963), wherein the mandate is stated as follows: ". . . Congress in using the expression Supreme Being [was] clarifying the meaning of *religious training and belief* so as to embrace all religions. [U]nder this construction, the test of belief . . . is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God . . ." (emphasis added).

[4] *Ibid.*

[5] *Supra* note 1 at § 456(j), which allows an exemption to conscientious objectors. The section defines "religious training and belief" as "an individual's belief in relation to a Supreme Being involving duties superior to those arising from an human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

[6] 58 Stat. 136 (1940), 50 U.S.C. § 305(g) (1940), wherein no person was to be subjected to training and service by reason of religious training or belief.

[7] 133 F.2d 703 (2d Cir. 1943). "Religious belief" was defined as that which "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 martydom in preference to transgressing its tenets." (*Id.* at 708).

objector provision with respect to three petitioners whose deistic concepts (though religious in orientation) were by no means equivalent to the traditional interpretation of God demanded by 6(j).[8] The Court solved the dilemma by considering a sincere and meaningful *religious belief*, which occupied a position "parallel to that filled by the orthodox belief in God,"[9] to be sufficient to satisfy the statute. Conscientious objector status was granted all three petitioners. The Court's failure to enforce the Supreme Being requirement not only resulted in the *usurpation* of section 6(j), but also the revival of the "religious belief" criteria as set out in section 5(g) of the 1940 Act.[10] The Court's intent to bring about the usurpation is clearly evidenced by Justice Clark's reference to the Senate report on section 6(j), which specifically stated that it "was intended to re-enact *substantially* the same provisions as were found in the 1940 Act [which] refers to *religious training and belief without more*."[11] The Court justifies its rejection of the Supreme Being test by stating that "the history of the act belies the notion that it was to be . . . available only to those believing in a traditional God."[12] However, the rejection of section 6(j) is supported not only by "the history of the act,"[13] but by decisions conferring conscientious objector status on the basis of a sincere religious belief[14] (as

[8] In United States v. Seeger, 326 F.2d 846 (2d Cir. 1964), petitioner refused to assert a simple belief or disbelief in a deity. He said he respected and believed in devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed. In United States v. Jakobson, 325 F.2d 409 (2d Cir. 1963), the petitioner insisted that man could know nothing about God, because God was "unknowable" to man. In Peter v. United States, 324 F.2d 173 (9th Cir. 1963), petitioner stated he felt "love" towards other human beings and other living objects, and insisted that this feeling was equivalent to a belief in a Supreme Being or God.

[9] *Supra* note 3. [10] *Supra* note 6. [11] *Supra* note 3 at 176 (emphasis added).

[12] *Id.* at 178. The Supreme Being clause was an innovation. It had no predecessor in any of the colonial provisions, those of the Civil War, or the draft laws of either World War. The first federal conscription act was adopted in 1863 without any provision specifically exempting conscientious objectors. 12 Stat. 731 (1863). However, in 1864, Congress enacted a provision stating that members of religious denominations whose articles of faith prohibited the bearing of arms, could, upon affirmation of their conscientious objection and the payment of $300, be exempt from combatant military service. 13 Stat. 9 (1864). In the Selective Service Act of 1917, 40 Stat. 78 (1917), Congress provided an exemption limited to members of any well-recognized sect or organization whose existing creed forbade its members to participate in war in any form. The burden was placed on the individual registrant to show that his personal religious convictions against war were aligned with the creed of his pacifist church. The Selective Service Act of 1940, *supra* note 6, ended the necessity of the conscientious objector being a member of a pacifist church and broadened the possibility for exemption to include anyone who by reason of religious training and belief had conscientious scruples against participation in war.

[13] *Ibid.*

[14] See, *e.g.*, Witmer v. United States, 348 U.S. 375 (1955) and Sicurella v. United States, 348 U.S. 385 (1955), wherein the applicants' sincerity is the question. See also,

opposed to belief in a Supreme Being), and by scholarly commentaries condemning the Supreme Being test as being repugnant to the first and fifth amendments of the Constitution.[15]

The usurpation actually occurred when the *Stolberg* court granted the conscientious objector exemption on the basis of an "opposition to combat [and a *religious* belief regarding] human life [as] essential."[16] The requirement of the conscientious objector provisions were thereby satisfied in the *Stolberg* case, but such language, while applicable to section 5(g) of the 1940 Act, is in opposition to the language of section 6(j).

Stolberg's compliance with the Supreme Court decision not only ratified the usurpation of section 6(j), but re-established the definition of "religious belief" set out in *United States v. Kauten.*[17] Prior to the enactment of section 6(j), there existed a judicial dispute as to what constituted "religious belief" as demanded by the conscientious objector statute. The Second Circuit followed the *Kauten* case criteria, defining the belief as one which disregards "elementary self interest and [accepts] martyrdom in preference to transgressing its tenets."[18] The Ninth Circuit, however, relying on the definition set down in *Berman v. United States,*[19] specifically based "religious belief" on a Supreme Being whose "power [is] distinct and above human reason."[20] This dispute was *seemingly* resolved (in favor of the *Berman* definition) by the 1948 Congressional amendment of section 6(j) which is worded substantially in the same terms employed by the Court in the *Berman* case.[21] However, issue was again drawn to the dis-

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United States v. Hinkle, 348 U.S. 970 (1955); Williams v. United States, 216 F.2d 350 (5th Cir. 1954); Gonzales v. United States, 212 F.2d 71 (6th Cir. 1954), *rev'd.*, 348 U.S. 407 (1954); United States v. Hartman, 209 F.2d 366 (2d Cir. 1953); Roberson v. United States, 208 F.2d 166 (10th Cir. 1953); Tafts v. United States, 208 F.2d 329 (8th Cir. 1953), *cert. denied,* 347 U.S. 928 (1954); Head v. United States, 199 F.2d 337 (10th Cir. 1952), *cert. denied,* 345 U.S. 910 (1953); Artherton v. United States, 176 F.2d 835 (9th Cir. 1949), *cert. denied,* 338 U.S. 938 (1949); United States v. Knappke, 125 F.Supp. 303 (W.D. Pa. 1955); United States v. Bortlik, 122 F.Supp. 225 (M.D. Pa. 1954); United States v. DeLime, 121 F.Supp. 750 (D.N.J. 1954), *aff'd,* 223 F.2d 96 (3d Cir. 1955); United States v. Heni, 112 F.Supp. 71 (1953).

[15] See, *e.g.*, Conklin, *A View in the Light of Torcaso v. Watkins,* 51 GEO. L.J. 252 (1963); Clancy & Weiss, *Problems in Conceptual Clarity,* 17 MAINE L. REV. 150 (1965); Rabin, *When is Religious Belief Religious,* 51 CORNELL L.Q. 237 (1966); Tiltz, *Deity Belief,* 38 So. CAL. L. REV. 529 (1965). See also, Comment, 18 RUTGERS L. REV. 925 (1964); Comment, 50 VA. L. REV. 178 (1964).

[16] *Supra* note 2 at 364. [17] *Supra* note 7. [18] *Id.* at 708.

[19] 156 F.2d 377 (9th Cir. 1946), *cert. denied,* 329 U.S. 795 (1946).

[20] *Id.* at 381.

[21] Both Congress and the *Berman* Court relied on Chief Justice Hughes' dissent in United States v. Macintosh, 283 U.S. 605 (1930), wherein he stated that "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relations." (*Id.* at 633-34).

pute by a trilogy of cases tried subsequent to 1948. The cases[22] were tried in the Second and Ninth Circuits, with both circuits respectively relying on the *Kauten* and *Berman* definitions of "religious belief." The Supreme Court granted certiorari and the trilogy was determined in one decision, *United States v. Seeger.*[23] In handing down its decision, the Supreme Court not only caused the usurpation of section 6(j), but unequivocably rejected the *Berman* definition of religious belief in favor of the *Kauten* case criteria.[24] The *Stolberg* court, by granting an exemption to a petitioner who "did not believe [that] the Supreme Being constituted a force outside of man,"[25] displayed judicial sanctification of the Supreme Court's edict that the *Kauten* case is once again the applicable test in determining whether or not one qualifies for conscientious objector status.

The *Stolberg* court's adherence to the Supreme Court mandate not only establishes sincere "religious belief" as the only requisite to the conferral of conscientious objector status, but in effect certifies agnostic beliefs as acceptable for the conscientious exemption. The granting of conscientious objector status to an agnostic is not limited to recent case development. In 1943, the Court, in *U.S. ex rel. Philips v. Downer,*[26] employing the *Kauten* definition of religious belief, conferred conscientious objector status on an admitted agnostic whose opposition to war was "deep rooted, based not on political grounds but on general humanitarian concept."[27] In 1944, the *Kauten* case rationale was again employed to grant exemptions to two petitioners whose religious views classified them as agnostic.[28] However, none of the above cases discussed atheistic versus theistic views in relation to conscientious objectors. In essence, the courts chose to circumvent petitioner' doubts, as to the existence of a *traditional* God, by finding a *sincere* "religious belief" which qualified them for exemption under the criteria established in the *Kauten* case. However, in granting exemption to the petitioners in the *Seeger* case, the Supreme Court *expressly* avoided the issue of whether an absolute belief in a Supreme Being is a necessary incident to the granting of conscientious objector status.[29] The effect of said silence, in light of the fact that the petitioner's "deistic beliefs" readily fit the traditional definition of agnostic,[30] viewed along with the usurpation

[22] United States v. Jakobson, *supra* note 8, and Peter v. United States, *supra* note 8.

[23] *Supra* note 3. [24] *Supra* note 7. [25] Supra note 2 at 365.

[26] 135 F.2d 521 (2d Cir. 1943). [27] *Id.* at 523.

[28] U.S. *ex rel.* Reel v. Badt, 141 F.2d 845 (2d Cir. 1944); U.S. *ex. rel.* Branden v. Downer, 139 F.2d 761 (2d Cir. 1944).

[29] *Supra* note 3 at 173: "The question is not . . . one between theistic and atheistic beliefs. [We] do not deal with or intimate any decisions on that situation in this case."

[30] An agnostic is one "who maintains a continuing doubt about the existence of God or any ultimate [and applies] to one who does not take an orthodox religious

of the "Supreme Being" test inherent to section 6(j), leads to the conclusion that the Court has offered to the judiciary the discretionary power of granting conscientious objector status to an agnostic. The only requisite to such a conferral is an *agnostic belief* "parallel [to that] of the orthodox belief in God."[31] The *Stolberg* court, by exempting a petitioner who "does not believe the Supreme Being constitutes a force outside of man,"[32] displays an acceptance of the Supreme Court decision in *U.S. v. Seeger.*

With the exceptions of the Draft Law Cases[33] (dealing with the 1917 Conscription Act) and the lower court *Seeger* decision,[34] the judiciary has summarily refused to consider the constitutionality of a conscientious objector statute based on either a "religious belief," or belief in a Supreme Being.[35] The mere fact that *Stolberg* follows this pattern would have been of no startling importance had it not been for the Supreme Court decision with which it so *completely* agrees. The Court, when afforded the opportunity, refused to offer any commentary on the constitutionality of an exemption to military service based on religious grounds.[36] *Everson v. Board of Education*[37] ruled that "neither State nor Federal Government can pass laws which aid one religion and [or] all religions."[38] *Torcaso v. Watkins*[39] held that a statute demanding belief in a Supreme Being as requi-

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position." WEBSTER, THIRD NEW INTERNATIONAL DICTIONARY (1961). *Webster's* indicates that "atheist" is synonymous with "agnostic," and this argument is set out in Davidson v. United States, 218 F.2d 609 (9th Cir. 1953).

[31] *Supra* note 3.

[32] *Supra* note 2.

[33] See, *e.g.*, Arver v. United States, 245 U.S. 266 (1917). These cases are cited as standing for the proposition that the Supreme Being test does not violate the guarantee of the first amendment. See, however, KURLAND, RELIGION AND THE LAW (1962), wherein the author states the first amendment issue was only one of several raised in the case, and the Supreme Court appeared to treat the first amendment defense merely as an insincere defensive play not worthy of real consideration.

[34] *Supra* note 8. Seeger was granted conscientious exemption on the basis that section 6(j) limiting the conscientious objector status to persons who believe in a Supreme Being violates the due process clause of the fifth amendment by creating an impermissible classification as applied to one whose abhorrence of war was sincere and was predicated on religious training and belief.

[35] Analysis of the constitutionality of the Supreme Being test involves a consideration of whether such a test violates the guarantee of the first amendment, and also whether limiting exception to those who acknowledge belief in a Deity has a real and substantial relation to the object sought to be violative of the due process clause of the fifth amendment.

[36] The issue of whether section 6(j) is unconstitutional was directly before the Court in the Seeger case. All three petitioners argued that section 6(j) was repugnant to both the first and fifth amendments of the Constitution, and the lower court ruled that section 6(j) violated the guarantees of the first amendment.

[37] 330 U.S. 1 (1946).

[38] *Id.* at 8.

[39] 367 U.S. 488 (1963).

site to holding public office was unconstitutional.[40] In view of these decisions, the Court's silence regarding constitutionality can *only* be interpreted as a contemporary mandate directing lower courts not to become involved with the constitutionality of section 6(j). Yet, the doctrine that "neither [state nor federal government] can aid these religions based on a belief in the existence of God as against . . . religions founded on different beliefs,"[41] when applied to section 6(j), implicates the unconstitutionality of the conscientious objector provision.[42]

The repetitious silence of the *Stolberg* court, in light of the fact that it too had the constitutional issue directly before it,[43] indicates a strict adherence to the Supreme Court's reaffirmation of the judicial attitude to recognize the "time honored principle of construing a statute not only to escape unconstitutionality but to avoid grave and doubtful constitutional questions."[44]

In conclusion, it can be said of the *Stolberg* case that it is a vehicle by which lawyer, jurist and litigant may evaluate current, judicial temperament in regard to the granting of the conscientious objector exemption. Inasmuch as it is a first reaction to the Supreme Court mandate of effects of its compliance with that edict are not conclusive. However, in view of recent case holdings, contemporary social climate, and the unwillingness of the Supreme Court to declare the constitutional issue regarding section 6(j) ripe for decision, it is most probable that the adherence demonstrated by *Stolberg* is indeed the initiation of a modern trend of conformity to the holding of the Supreme Court in the *Seeger* case.

Robert Sulnick

[40] *Ibid.* [41] *Id.* at 492.

[42] The doctrine has been successfully applied in School District of Abington Township, Pa. v. Schempp, 374 U.S. 230 (1963); Sherbert v. Verner, 374 U.S. 398 (1963); Boling v. Sharpe, 347 U.S. 497 (1954); Zorach v. Caluson, 343 U.S. 306 (1952). See also, Conklin, *supra* note 15.

[43] Brief for Appellant, p. 4, United States v. Stolberg, *supra* note 2. Petitioner argued that section 6(j) is repugnant to both the first and fifth amendments of the Constitution.

[44] United States v. Jakobson, *supra* note 8 at 415.

DOMESTIC RELATIONS–LEGITIMACY OF OFFSPRING–PRESUMPTION OF MARRIAGE SUBSEQUENT TO MERETRICIOUS RELATIONSHIP

The plaintiff's husband died intestate survived by the plaintiff and two children of a former marriage. Sixteen days prior to his marriage to the plaintiff, the decedent had executed a trust agreement leaving his entire estate to his children. The plaintiff commenced an action to set aside the