

Conscientious Objection

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The recent war in the Persian Gulf has brought once again to the fore an issue that has, for a number of years, been relatively dormant—the question of conscientious objection. This issue has gained such urgency as it has by recalling the possibility of the conscription of American youth into military service. Without conscription, those who believe military service is wrong, and even those who are not certain, can simply refrain from enlisting. With conscription, the evaluation of the permissibility of waging war is forced upon them.

It is unlikely that conscription was ever envisioned as part of the American response to the problems in the Persian Gulf. But there were a large number of people who were concerned that the burden of fighting the war would fall too heavily on the poorer members of our society and on racial minorities. If the critics were sincere in that criticism, they will not let the matter drop now that the war is over. And the most obvious, if not the only, solution to the problem they raised is conscription.¹ So, the end of the Second Persian Gulf War in no way diminishes the relevance of the topic of conscientious objection.

Conscientious objection can be defined as the refusal either to enter military service or to fight in a war when the refusal is made for reasons of conscience (namely, because one believes that entering military service or fighting in wars or in a particular war is *per se* wrong). The practice raises two questions, one at the level of individual ethics, and one at the level of politics. The question of individual ethics is this—is refusing to enter military service or to fight in a war a right, or even a duty? The political question is this—should refusal to serve² (or to fight) on the basis of conscience be recognized as an option by the government? In approaching these questions, this paper will lean heavily on the insights of St. Thomas. That will not, however, make the answers of interest only to Thomists.

1. The Ethical Question.

On the level of the individual facing the prospect of conscription, the question of conscientious objection is just an instance of a more general problem, that of disobedience to the positive human law. There are three situations in which the case is sometimes made for such disobedience. The first is equity (or, to avoid confusion,

¹ Obviously, not *any* system of conscription will remedy this problem—the American draft did not do so during the Vietnam war, for example.

² The phrase “refusal to serve” is used in place of “refusal to perform military service” only for brevity. It should lead no one to think that someone who refuses to do military service is refusing to serve his country *simpliciter*. There are, obviously, many other ways to serve one’s country and a conscientious objector might be perfectly willing to perform such alternative service. Indeed he may already be doing so.

perhaps we should say *επικεια*). Sometimes obedience to the letter of the law will undermine the very common good at which the law is aimed.³ The second is conscientious refusal to obey an unjust law, which will be discussed shortly. The third is civil disobedience. Some people argue that it is permissible to disobey even a just law in order to draw people’s attention to an injustice which everyone is ignoring.

Conscientious objection, insofar as it is not just availing oneself of an option in a conscription law, is disobedience of the second type. It is easy to imagine someone refusing to serve or to fight as a protest against some other injustice, i.e., as a form of civil disobedience. But that would not count as *conscientious* objection as defined above since it is not a refusal on the same kind of reason of conscience. Whether it would be permissible would depend on the permissibility of civil disobedience, which will not be taken up in this paper.

So what is an unjust law and when is it permissible to disobey it? St. Thomas is helpful on both questions.⁴

Laws may be unjust in two ways, first by being opposed to the human good...

(1) in respect to the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory; or

(2) in respect of the author, as when a man makes a law that goes beyond the power committed to him; or

(3) in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good.

Secondly, laws may be unjust, through being opposed to the Divine good: such are the laws of tyrants inducing to idolatry or anything else contrary to the Divine law.

Examples of laws deficient in the first of these respects would be porkbarrel projects, attempts by a state to regulate interstate commerce, and unfair exceptions to tax policy. These, according to St. Thomas, are more like acts of violence than they are like laws. We are not bound in conscience to obey them *as laws*, though there might be other reasons why we ought to obey them. For disobedience might itself damage the common good. It might for example cause scandal, i.e., induce other people to think that it was permissible to disobey laws which they found not unjust, but only inconvenient. Refusal to obey an unjust law might thus undermine respect for law itself and do more damage to the common good than insistence on one’s right not to obey would justify. Sometimes, in other words, one must forego insisting on one’s right (not, for example, to pay an unfair tax) for the common good.

The cases considered in the previous paragraph are what might be called the generically less serious kind of unjust laws. Though they may be serious enough,

³ St. Thomas defends this point in the *Summa Theologiae* 1a2æ, Q. 96, a. 6.

⁴ *Summa Theologiae* 1a2æ, Q. 96, a. 4. He also takes up the question of obedience at 2a2æ, Q. 104, a. 5.

they are cases in which ordinary acts (paying taxes, sitting in a certain seat in a bus, refraining from keeping a horse, or whatever) are ordered by the wrong person, or to the wrong end, or in an invidious manner. Other kinds of unjust law are generically more serious. In the second kind of unjust law, the law requires us to do what it is (intrinsically) morally wrong to do or it forbids us from doing what is morally required.

St. Thomas’ characterization of these as laws which are opposed to the Divine good or laws which command acts which violate the Divine law may at first seem out of focus or even too narrow. But a second look suggests that his characterization is not too narrow and that the focus problem is only a result of some historical differences between his time and our own.

First, on narrowness. Despite what St. Thomas’ example (idolatry) might lead one to think, the divine law does not focus exclusively on religious issues. St. Thomas understands the Divine law to be moral principles explicitly revealed by God.⁵ The most obvious case would be the Ten Commandments. Although some of the precepts of Divine law are about obligations of which we would not otherwise be aware (precepts concerning the supernatural end of man), many of them merely repeat (for certainty or emphasis) natural law principles, i.e., moral principles knowable independent of revelation. In other words, St. Thomas’ example, idolatry, could equally well have been murder, or punishing an innocent person, for these acts also would violate the Divine law.

But why did St. Thomas say “Divine law”? After all, these latter acts also violate the natural law. Would it not have been better for him to say, “Secondly, laws may be unjust, by inducing to anything contrary to the *natural* law”? Here we have the focus problem. There are two reasons why St. Thomas might have chosen to put the point as he did. First, he thought that the Divine law not only included all the precepts of the natural law, but extended beyond it. Thus, for him, restricting the principle to violations of the natural law would have been too narrow. And citing both would have been redundant. Second, he believes the precepts of the Divine law to be more certain than the relevant precepts of the natural law.⁶ Indeed, according to St. Thomas, providing certainty about some important features of our moral lives is one of the reasons why God promulgated the Divine law in the first place.⁷ The intended audience of the *Summa*, a Christian audience in a Christian society, may provide a third reason why St. Thomas found it most natural to mention the Divine rather than the natural law on this point. Given the change in audience between his time and our own, it may be more appropriate to a general discussion of the question of unjust laws, to restrict ourselves to one part of St. Thomas’s point—laws which command a violation of the natural law are also unjust.

⁵ *Summa Theologiae* 1a2æ, Q. 91, a. 4.

⁶ The *first* precept of the natural law—that good is to be done and pursued and evil is to be avoided—is certain enough. But what is relevant here is the exceptionless precept against the killing of innocent people, &c. And people do differ over these.

⁷ *Summa Theologiae* 1a2æ, Q. 91, a. 4.

These unjust laws differ from the previous ones in an important respect. Here there is no option, or, to speak more precisely, no countervailing considerations. Disobedience is obligatory.

How does all this apply to conscientious objection? The application requires us to distinguish between two kinds of conscientious objection, general and selective.

a. General Conscientious Objection. General conscientious objection, refusal to enter military service or to fight in any war, would be a logical consequence of pacifism. If waging war is always wrong, then a law conscripting people to fight a war would be an unjust law of the more serious type, i.e., one which ordered people to violate the natural law, and conscientious objection would be not just a right but a duty.

The situation would be only slightly more complicated in peacetime. There might be considerations in favor of performing peacetime military service. For one thing, a strong military might, by its very existence, deter war. The Swiss and Swedish armies would be good examples of deterrent forces of this type. The same arguments given in defense of an anti-city system of nuclear deterrence could, if they are sound, be given by the pacifist in defense of participating in the military during peacetime.⁸ But there are also reasons against such participation. First, it would be likely to cause scandal by encouraging others to think that there was nothing wrong with waging war. Second, it could be seen as including making a promise (to obey orders) that it would be wrong to carry out. These points, may well outweigh the considerations in favor of service.

Pacifism, if true, would provide a ground for general conscientious objection.⁹ A discussion of whether pacifism is true would be a full topic in its own right. But what if it is false? What are the implications of the most plausible non-pacifist account of morality & war?

St. Thomas argues that a war would be permissible if, and only if, it met several criteria:

In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged.... Secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault.... Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good or the avoidance of evil.¹⁰

Later scholastics, preeminently Vitoria and Suárez, emphasize in addition that the war must be a last resort and that war must be a proportionate response to the wrong committed. These might be combined with the concept of just cause as

⁸ For a discussion of such arguments, see Kenneth W. Kemp, “Nuclear Deterrence & the Morality of Intentions,” *The Monist* 70 (1987): 276-297.

⁹ Complete pacifism is not, however, the only possible grounds. An alternative possible grounds is discussed in Kenneth W. Kemp, “Vocational Pacifism” (in progress).

¹⁰ *Summa Theologiae* 2a2æ, Q. 40, a. 1.

explicated by St. Thomas to get a comprehensive account of a moral *casus belli*. If these authors are right, then general conscientious objection is at least not an obligatory, and perhaps not even a permissible, response to conscription.¹¹ But that is not the end of the matter. On this account, only some wars are just. What if one is ordered to fight in a war which is unjust?

b. Selective Conscientious Objection. That possibility raises the issue of *selective* conscientious objection, or refusal to fight in a particular war. Laws can be unjust either in general or in a particular application. Socrates, for example, did not think that arresting people was unjust in general, he just thought that arresting Leon was (manifestly) unjust, so he refused to do it. His conscientious refusal to assist in the arrest of Leonidas was like the refusal to obey inherently unjust laws because in each case the law orders the citizen to violate the natural law. In each case, obedience is forbidden. In selective conscientious objection, the possibility of an unjust application of a law that is not in itself unjust is created by the fact that the just-war theory sketched above establishes only a limited right to wage war. War is only permissible if certain conditions are met. If these conditions are not met then the war is unjust, and citizens have no right to participate in it. Just as pacifism, if true, would make general conscientious objection the proper response to conscription to fight in any war, so the just-war theory makes selective conscientious objection the proper response to unjust wars.

The fact that some wars are unjust raises three practical questions: (1) Who decides whether a war is unjust? (2) How exactly is the decision to be made? and (3) How should one respond to conscription in the context of an unjust war?

First, who decides whether a war is unjust? In one sense, the answer is that each individual must do so for himself, for each individual is responsible for his own actions. That is the first word that needs to be said on this question, but it is not the last. We must be clear about what “for himself” means. Sorting out the details requires distinguishing four distinct kinds of agent—the leader who is deciding whether to commit the nation to war; the soldier who has been given orders to go to war; the pre-induction draftee; and the citizen who is thinking about enlisting.

The requirement to decide “for oneself” is most stringent for political leaders. They are in the best position to inquire about all the relevant details of the situation. And if they are not going to make the decisions themselves, to whom is it that they are supposed to turn?¹²

The soldier, the citizen facing conscription, and the citizen considering enlistment stand in contrast to the leaders. Unlike the leaders, the individual soldier or citizen is not in a good position to know (or to find out) all that needs to be known. They are moral agents, responsible for their choices, but they lack the time, the experience, and the resources to make a fully informed choice. There are then, as always, two ways of going wrong.

¹¹ The question whether it is, if not obligatory, at least permissible, is discussed in Kemp, “Vocational Pacifism.”

¹² One possible, though perhaps not practical, answer is that they are to turn to the people as a whole. In one sense that just makes the people as a whole the “leaders.” In another sense, it changes nothing. For the people as a whole are not in an especially good position to inquire about all the relevant details of the situation. They will have to depend on their leaders (and the advisers to whom the leader has to turn) for advice. So, the leaders re-emerge.

At one extreme is the minimalist position. The response of Shakespeare’s soldiers—“We know enough if we know we are the king’s men. Our obedience to the king wipes the crime of it out of us”¹³—is wrong in two respects. First, the citizen must be satisfied that his nation’s leaders are committed to justice. Shakespeare’s soldiers seem to reject even this obligation:

KING HENRY (in disguise): Methinks I could not die anywhere but in the king’s company, his cause being just and the quarrel honorable.
WILLIAMS: That’s more than we know.
BATES: Aye, or more than we should seek after.

Second, the entitlement to trust one’s leaders is a presumption only. In any situation in which the injustice of the commanded course of action is manifest, the citizen must choose justice over obedience and loyalty.

But also wrong is the maximalist alternative—that the soldier or citizen must know all before going into combat. The impracticability of this can be made clear by means of two examples. The first points to general limits on the citizens’ ability to inform themselves about the background of emergent crises. In the recent war, Iraq claimed that Kuwait was properly part of Iraq. Kuwaitis denied it. But facts about the relevant incidents—the 1899 treaty between Sheik Mubarak and the British, the drawing of the Saudi-Kuwaiti-Iraqi borders in 1922, and the 1963 treaty between Kuwait and Iraq—are not easy to come by, even in the library of a mid-sized university. The second points to limits on their ability to know what is going on as the crisis develops. The leaders often have information the public revelation of which would compromise their sources and methods of collection. This point was brought forcefully home during the American invasion of Grenada in October, 1983. Shortly after the invasion, Charles R. Modica, Chancellor of the St. George’s University School of Medicine, who was in the United States when the war broke out, held a news conference in which he asserted that the American medical students at his university (whose safety was cited by the Reagan Administration as one of the reasons for the invasion) had not had been endangered by the recent events in Grenada and that the invasion was “very unnecessary.”¹⁴ But the next day, after attending a private State Department briefing on the situation, he publicly retracted his earlier views.¹⁵

Perhaps soldiers and citizens are not as different from their leaders on this point as they first appear. For even leaders do not make decisions completely on their own. With respect to many morally relevant particulars—the history of the problem, the prospect of success, the probable cost—they must rely on the expertise of others. But leaders can do more than just turn to their advisers, they can interrogate them, or get further advice from others. The citizens must often merely do their best to elect leaders they can trust, and then make a judgment about whether they can in fact trust the leaders they get.

¹³ *Henry V*, Act 4, scene i, lines 132-5.

¹⁴ *New York Times*, October 26, 1983, I, 20:5.

¹⁵ *New York Times*, October 27, 1983, I, 20:5.

Although the soldier, pre-induction draftee, and the prospective recruit all must avoid the extremes of being from Tennessee and being from Missouri, the locus of the mean varies for the three cases. Consider first the soldiers. They get their orders to deploy, perhaps to a place they have never heard of—Kuwait, Grenada, Katanga—on short notice. There is hardly time for 2000 soldiers to run to the base library and read through the appropriate area handbook. Nor can they be expected to know in advance all the relevant facts about all of the world’s potential trouble spots. They need to make their moral judgment at the time they enlist. That does not turn them into Shakespeare’s soldiers. If they have time, they should satisfy themselves about the justice of the cause. Some situations (though mostly those at the level of the conduct of war rather than with respect to the initiation of it) do not need time. The soldier has no right to perform actions that are clearly immoral. Pre-induction conscripts have more time than do soldiers to satisfy themselves that the presumption in favor of their leaders is justified. And would-be enlistees have more time yet.

To summarize, the question of who should decide whether a given war is just can be divided into two parts. May the citizen decide for himself? Surely. Must he do so? Only to the extent that his time, talent, and resources (all of which may be limited) allow.

The next question is how one should decide whether a given war is just. This forces us back to the just-war theory with some questions of application. Standard formulations of the just-war theory gloss over one important consideration—*viz.*, the fact that the theory can be used in two distinct ways. First, it can be used to make an historical judgment about a war as a whole. E.g., World War II (or, more precisely, the Allied operations) might be judged a just war; Iraq’s invasion of Kuwait, an unjust one. Second, it can be used as a moral theory to help a person determine what he may or may not do in a particular situation. The importance of this distinction lies in the fact that the answer to the question, whether all the criteria must be met, depends on the kind of judgment being made. In answering the historical question we usually make approximate judgments. Someone might reasonably call the Allied effort in World War II a just war, for example, but not mean that all the operations that it included were justifiable. But in answering the moral question, we must be more rigorous. No one may perform an act that violates any of the criteria. But even here there are some complications. As in the previous question, we need to distinguish the four types of agents.

The government leader makes a decision to initiate a war. For him, application is the simplest, but also the most stringent. He must satisfy himself that all the criteria are met. There must be a just cause. War must be the only efficacious way of doing justice and it must be proportionate to the injustice being resisted. The leader must ensure that he is really aiming at justice. And he must ensure that he is not acting beyond the scope of his authority. If there is no just cause, or not a grave one, he may not go to war. If there are alternative remedies, he must try them first. If his intentions are askew, he must replace them. If he fails in any of these respects, he does wrong.

The soldier must decide whether to obey his deployment orders. He too must ensure that all his actions meet the criteria of the theory, but for him the application

is in some respects different. He is not initiating a war, but deciding whether to participate in one. That raises new questions. To what extent do moral mistakes by the leader make the whole war (and hence the soldier’s participation in it) unjust? And to what extent do the perceived mistakes of others permit or require the soldier or citizen to refuse to serve? The questions are complicated and must be answered separately for each criterion.

First, legitimate authority. This is perhaps the hardest of the criteria with respect to the questions being asked. American law is clear on one point—not only does a soldier have no duty to obey illegal orders, but obedience to an illegal order is no excuse for wrongdoing. This is the Nürnberg Principle. Orders or no orders, Lt. Calley had no right to shoot Vietnamese villagers at My Lai. But its application is not always so clear. Do we really want soldiers making their own judgments about the constitutionality of the War Powers Act? Although it might seem dangerous to suggest that soldiers need not concern themselves about such things, permitting them to do so opens the door to an equally, if not more, dangerous breach of the principle of civil supremacy over the military. In principle, a soldier should not go to war except under lawful orders (i.e., those issued by the competent authority) to do so. In practice, we must insist on a strong presumption in favor of the legality of one’s deployment orders.¹⁶

Second, just cause. This is the easiest of the criteria to consider. If the cause is unjust, the war is unjust. The soldier may presume that there are things about the situation which he does not know, but the presumption has its limits. If it is clear to him that the war is unjust in this respect, then it would be wrong of him to fight in it.

Third, last resort. What should a soldier do if, in his considered opinion, war was not a last resort? Suppose, to make the example concrete, some soldier thought that economic sanctions alone might have succeeded in securing the liberation of Kuwait. What should he do if the nation goes to war anyway? Here, the answer is ordinarily that he should fight, and this for two reasons. First, in taking the oath to serve, he implicitly heightens the level of presumption in favor of the government. If he thought the government was trigger-happy, he should not have enlisted. Second, and more important, the soldier must take the situation as he finds it. What is the last resort is so relative to the present situation. Past diplomatic bungling may limit the range of options open to the leaders. But present leaders are not precluded (or excused) from seeking justice because of someone’s (or even their own) past errors. (Even less are the direct victims of the injustice left with no recourse because of someone else’s mistake. And, in general, if they are entitled to fight, others are entitled to help them.¹⁷) The soldier may find himself in a situation in which the leader’s morally mistaken decision has made war a last resort. The leader did wrong in going to war too soon; but the soldiers do not do wrong in fighting it. The

¹⁶ For a more detailed discussion of this question, see Kenneth W. Kemp & Charles Hudlin, “Civil Supremacy over the Military: Its Nature & Limits,” *Armed Forces & Society* 19 (1992):1: 7-26.

¹⁷ There are exceptions to this rule. For example, the intervention of a global power into a regional conflict might lead to counter-interventions by other global powers in ways that would risk violating the criterion of proportionality.

alternative, that the victims practically forfeit their right to redress as soon as their rescuers make a moral mistake, is absurd.

Fourth, proportionality. Here the proper response depends on the nature of the alleged disproportionality. If the problem is a manifest disproportionality between war (or this war) and the injustice being rectified, then it would be wrong of the soldier to fight. If, on the other hand, the disproportionality is not so much in the conduct of the war itself as in the prospective consequences of going to war on future diplomacy, there would seem to be no obligation not to serve, and perhaps not even a justification for refusing to do so. For in the former case, the lack of proportion consists in excessive civilian casualties or the like and one has a strong obligation to be careful about those.¹⁸ In the latter case, the putative disproportionality is a matter of precipitating long-range problems. While one has some obligation to avoid doing such things, the obligation is intrinsically weaker (because of the uncertainty of the remote effects) and in any case the damage will probably already have been done as soon as the war has begun. Since participation in such a war would do little to increase the damage, the case for participation would be stronger than in the first case.

Fifth, right intention. Intentions properly characterize individual human actions, not composite enterprises like war. Thus the wrongful intentions of the some participants (i.e., the fact that they are doing the right thing for the wrong reason) do not automatically make it wrong for others (who want to do the right thing for the right reasons) to cooperate with them. Nevertheless, the intentions of the leaders can easily become formative (or should we say deformative?) of the entire enterprise. Thus, while it would not be *per se* wrong for a soldier to participate in a war led by a wrongly intentioned ruler, a soldier in such a situation would have to be especially careful lest he be caught up in operations which serve not justice, but the private (and wrongful) ends of his unjust leaders.

The citizen's decision whether to accept conscription or to enlist must be made in light of substantially the same considerations as were relevant to the decision of the soldier. The most salient difference is in the application of legitimate authority. Failure to enlist does not jeopardize the principle of civil supremacy, so the strong presumption in favor of legitimacy is gone. The claim that there is a strong presumption in favor of the government are similarly inapplicable. The volunteer soldier heightens his duty to trust the government somewhat by offering to serve. The conscript and civilian may still have some obligation to take seriously the considered views of the community in a particular situation, but the fact that they did not *volunteer* to serve makes them less vulnerable to the maxim, “You took the King's shilling; now pay the King's price.” The private citizen retains more right to think through details for himself.

The third question brings us directly to the question of selective conscientious objection—how should one respond to orders to serve (or fight) in an immoral war? Let us ask about conscription first. Should a draftee report for military service when his nation is fighting in a war he believes to be unjust? He has three options.

¹⁸ Failure to do so would run afoul of the principle of double effect.

First, he could refuse to serve. But this, unless it were justified as an act of civil disobedience, not conscientious refusal *per se*, would be going too far. The selective conscientious objector does not believe that military service is in itself wrong. So his orders to report for induction, basic training, &c. do not yet order him to do anything morally wrong. There are three reasons that might be cited in favor of refusing conscription: (1) his willingness to serve (in general) might give scandal; (2) taking the oath might be making a promise which he cannot fulfill; and (3) entering the military might place him in a near occasion of wrongdoing. But these are outweighed by the fact that, he has an obligation to serve. How the problems just mentioned can be handled will be taken up in consideration of the remaining two options.

Second, he could accept service (in general) and make explicit statements about his reservations to whomever might listen. First, this will mitigate any problem of scandal, which should not in any case be taken by the bare fact of military service. Indeed, the citizen's insistence on the consistency of accepting the duty to serve and rejecting the duty to fight in an immoral war might have as much salutary as negative effect. Second, the explicit statement of reservations will avoid the problem of false promises. And third, the pressure to do wrong during military service may not in fact be substantially greater than at the time of induction. Punishment may be more certain on refusal to obey orders than on dodging the draft altogether, but it need not be greater. Unfortunately, avoiding serious punishment is currently somewhat tricky.¹⁹ In time of war,²⁰ both desertion and willful disobedience of the orders of a superior officer are capital offenses. But in fact, offenders are rarely sentenced to die²¹ and there are safer offenses, namely, absence without leave²² and missing movement. The maximum penalties for these lesser offenses are a dishonorable discharge, forfeiture of pay and allowances, and one and a half to two years in prison. By contrast, the maximum penalty for violation of the selective service law is a \$10,000 fine and 5 years imprisonment. Nevertheless, despite the way these articles are in fact being enforced, the fact that straightforward refusal to fight could be construed as a capital offense makes the qualified willingness to serve more risky than it should be. This is a place where American law should be changed. In any case, one is not always entitled to avoid near occasions of wrongdoing.

Third, he could accept service (in general) and hope for the best. There is, after all, no certainty that the war will not end before he is prepared to fight it and no

¹⁹ The relevant laws are Uniform Code of Military Justice, Articles 85-92, and 50 United States Code §462.

²⁰ The *Manual for Courts-Martial, United States, 1984*, Rule 103 (19) defines “time of war” for the purposes of implementing the punitive articles of the UCMJ to mean “a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a ‘time of war’ exists.” The Second Gulf War was not a time of war in this sense.

²¹ There was one such case in World War II and there have been none since then. For a discussion of the Marine Corps treatment of this problem in the Second Gulf War, see *The New York Times*, May 3, 1991, p. A8.

²² The distinction between this and desertion is that desertion requires intent never to return or intent to avoid hazardous duty or important service. The conscientious objector would thus in fact be deserting (since he intends to avoid important service), but by keeping his own counsel he may be able to keep the government from being able to prove that fact.

certainty that he will be sent to fight the war rather than to perform garrison duty somewhere else.

Selective conscientious objection cannot, then, be used as a license to refuse to perform military service.²³ What selective conscientious objection does do is to require that soldiers refuse to participate in unjust wars and in morally objectionable operations even in just wars. Particular military operations run the gamut from the clearly permissible (performing garrison duty in another part of the world) to the clearly impermissible (shooting at enemy soldiers who are justifiably defending their homeland against aggression). In between those extremes lie a myriad of middle cases, all of which involve some kind of participation in the unjust war, but none of which involve actually shooting the enemy. For example, one could be serving as

- a graves registration worker,
- a medic,
- a personnel or finance clerk,
- a cook or quartermaster supplying food,
- a military policeman,
- an infantryman, but refusing to fire one’s weapon, or
- a truck driver transporting oil or ordnance.

Some of these cases are virtually indistinguishable from the active infantryman. But others are very different. Do all of them count, nevertheless, as illicit participation in an unjust war? The principles that will help us sort these cases out are the principles regulating cooperation in the misdeeds of others.

The general operative principle is that it is not wrong to do things that materially assist someone to do something wrong (this was traditionally called material cooperation) provided that three conditions are met. First, the cooperator’s act may not be wrong in itself. Second, there must be an important (or proportionate) reason for performing it despite the fact that it contributes to the wrongful acts of someone else. Third, the cooperator must not intend to help in the accomplishment of the unjust act. (The intention to help would make the cooperation formal. Formal cooperation in the wrongdoing of others is always wrong.) Doing clerical work (in contrast to killing soldiers who are defending their country from an unjust attack) is not wrong in itself. The threat of a prison sentence would provide a sufficient reason for doing Army clerical work. The analogue would be a gas station attendant who, knowingly but at gun point, repairs the tire on a gangster’s getaway car. Shooting enemy soldiers in an unjust war to avoid a prison term, and more difficult but nevertheless correct, even to avoid being killed oneself, would not be justified. The analogue to that case would be shooting a bank guard in the course of a forced participation in a robbery.

²³ This fact was noted by Mr. Justice Marshall in the Supreme Court’s refusal to exempt selective conscientious objectors from military service. *Gillette v. US* 401 US 437, 456 (1970). Both Guy Gillette and Louis Negre (in an associated case) had requested complete exemption from military service on the basis of their conscientious objection to service in the Viet Nam War. Gillette had refused induction. Negre entered the service (as a draftee) and applied for discharge as a conscientious objector after receiving orders for Viet Nam War duty.

2. The Political Question. The political questions about conscientious objection are two. First, does a state which conscripts its citizens for military service (and which, therefore, thinks that military service is not *per se* wrong) nevertheless have a duty to exempt conscientious objectors from military service? Second, if there is no duty, are there other good reasons for doing so?

First, does the state have a duty to permit conscientious objection? This is a question of distributive justice: How can the burden of military service be fairly distributed? Let us begin by looking at an incident of conscientious objection from the state’s point of view, i.e., from the point of view of the agent who must respond to a citizen’s refusal to fight.²⁴ Assuming that the state is conscientious itself, i.e., that it is not indifferent to its moral duties, the state finds itself attempting to respond to an instance of aggression or other injustice (i.e., fighting a just war).²⁵ It attempts, by means of conscription, to distribute this burden equitably across the citizenry. The conscientious objector (whether selective or general) is a citizen who refuses to accept his share of the burden. This refusal is not based on laziness, cowardice, or lack of concern for justice, as might be the case of some who dodge the draft; it is, for the conscientious objector, rather a matter of conscience. Nevertheless, as the government sees it, this is a case of erroneous conscience.

Even the conscientious objector must concede that that is the way the situation looks from the government’s point of view. For a conscientious objector is making two claims. First, he claims war (or at least the war in question) is wrong and that no one should be required (or permitted!) to fight it. This is the claim that he makes in the political debate that precedes and accompanies the war. He must have lost this debate, for otherwise he would not find himself being forced to act against his conscience. Having failed to win acceptance for his first claim, the conscientious objector makes a second, the one at issue here—he asks the state to grant him a liberty to act on beliefs which he holds but which the state believes to be erroneous. In the generalized form that it must take if it is to be a public policy, this claim asserts that everyone (or at least everyone relevantly like the conscientious objector) should have liberty to act on an erring conscience.²⁶

There are a number of analogues which it is helpful to call to mind. One is what to do about parents who refuse to provide medical care for their children for reasons of conscience. The Philadelphia measles epidemic of 1991 has provided only the most recent case of this. The refusal of Christian Scientists to see doctors and the refusal of Jehovah’s Witnesses to allow blood transfusions for their children keep such cases in the courts. Another example of the same type is Amish conscientious refusal to send their children to state-approved schools and to display brightly-colored slow-moving vehicle signs on horse-drawn buggies. It is easy to imagine

²⁴ In order to avoid softening the full implications of the claims that lie ahead, the situation considered will be that in which the citizen is ordered to fight, not merely to serve in a peacetime deterrent force. Everything said about this case will apply, *mutatis mutandis*, to the case of peacetime conscription.

²⁵ On the assumption that the state is wrong about either morally permissible means or about the situation at hand, the problem disappears. The state should not even send volunteers to fight if, either in general or in this case, waging war is wrong.

²⁶ James Childress has a nice discussion of this point in “Appeals to Conscience” *Ethics* 89 (1979): 315-335, esp. pp. 328-329.

more extreme analogues. How should we respond if some group claimed that it was conscience-bound to engage in child sacrifice or ritual cannibalism?

There are three basic kinds of response which the government can make in such cases. The first is constitutional protection of a religious (or similar) exemption from some of the duties of citizenship. This might be by explicit stipulation, as was proposed by James Madison in the draft of the Second Amendment which he submitted to Congress.²⁷ Or it might be judged by the courts to be implicit in the Free Exercise Clause of the First Amendment. An example of such an exemption would be the exemption from Wisconsin’s compulsory school-attendance laws which was granted to the Old Order Amish in *Wisconsin v. Yoder*.²⁸

The second kind of response is statutory exemption. This has been the usual American response to the question of conscientious objection. It was cited as the preferred option by some of the opponents of Madison’s initial proposal²⁹ and has been a feature of every American federal conscription law.³⁰ It is also a common response to the problem of vaccination of religious refusers. Such a statutory exemption might be a recognition of a constitutional requirement, but could also be granted in cases where there were good policy reasons, but no constitutional requirement, for doing so.

The third kind of response is to refuse exemption. Such refusal of exemption has been upheld by the courts for vaccination³¹ and for blood transfusions,³² as well as on other issues. Is this a constitutionally permissible response to conscientious objection to military service in the United States? In the late 1920’s, Yale University Professor Douglas Macintosh, then a Canadian citizen, applied for US citizenship. When asked whether he would be willing to take up arms in defense of the country, he replied that he would, provided that the war be just. The government complained that this was a qualified acceptance of the responsibilities of citizenship and refused to naturalize him. The Supreme Court upheld the government in its refusal.³³ In his opinion in this case, Mr. Justice Sutherland wrote:

²⁷ The text of the draft was as follows: “A well-regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.” A similar exemption was already explicit in the constitutions of Pennsylvania, Delaware, Vermont, and other colonies.

²⁸ 406 US 205 (1972).

²⁹ Relevant portions of the debate are available in Bernard Schwartz, *The Bill of Rights* (New York: Chelsea House, 1971), p. 1109.

³⁰ For details, see *US v. Macintosh* 42 F (2d) 845, 847-848 and 283 US 605, 632-633 (1931).

³¹ *Jacobson v. Massachusetts*, 197 US 11 (1905).

³² *Rayleigh-Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 201 A. 2d 537 (1964).

³³ *US v. Macintosh*, 283 US 605 (1931). This case was later reversed (*Girouard v. US*, 328 US 61 (1946)), but on the basis of statutory interpretation (of what it means to be willing to “support and defend the Constitution”) alone and hence for reasons which do not affect the passage cited here. Related cases are *US v. Schwimmer*, 279 US 644 (1928), another naturalization case not substantially different from *Macintosh*; *Hamilton v. Regents*, 293 US 245 (1934), in which the court upheld a university requirement that all students participate in the ROTC; and *In re Summers*, 325 US 561 (1945), in which the court refused to overturn the exclusion of a pacifist from membership in the state bar.

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. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional principle, express or implied.³⁴

The passage cited is, however, not dispositive. It was an *obiter dictum*, not a holding, and some scholars have wondered whether the Court would really find against general conscientious objectors if they were ever to lose their statutory protection. The statutory refusal to exempt selective conscientious objectors was upheld in *Gillette v. US*.³⁵

How do we decide which of the three possible responses to a mistaken appeal to conscience to adopt? The answer depends in part on what the real obligation of a person with an erring conscience is. This problem can be divided into two questions. First, does an erring conscience bind when it requires one to do something that is not in fact required? Another way of asking this question is—Does a person do wrong if he fails to do something that he wrongfully thinks he is obliged to do? For example, suppose a driver incorrectly thinks he must stop before driving out of an alley, but nevertheless neglects to do so. Has he done wrong? Second, does an erring conscience excuse a person from fault when it does not recognize the obligation to do what is in fact required? Or, does a person do wrong when he fails to do something which he (unbeknownst to him) is obliged to do? For example, suppose a driver believes that he can turn right on red and does so in a city where such turns are prohibited. Has he done wrong? St. Thomas considers both of these questions.³⁶

His answer to the first question is that “every will at variance with reason, whether right or erring, is always evil.” The properly acting will chooses what it believes to be good and rejects what it believes to be evil. But if the conscience mistakenly interprets a real good (using military force to liberate Kuwait, say) as evil (here, unjustified killing) and proposes it to the will as such, the will would be malfunctioning if it chose the use of military force anyway. St. Thomas suggests the following analogy. “Suppose a provincial governor commands something that is forbidden by the emperor....If a man were to believe the command of the proconsul to be the command of the emperor, in scorning the command of the proconsul he would scorn the command of the emperor.” A person should always do what *he thinks* is right.

In light of that first answer, his answer to the second question may be surprising. The erring conscience, for the most part, does not excuse one from doing what is objectively required.

If reason or conscience err with an error that is voluntary, either directly, or through negligence, so that one errs about what one ought

³⁴ *Ibid.* at 623.

³⁵ 401 US 437 (1971).

³⁶ *Summa Theologiae* 1a2æ, Q. 19, aa. 5-6.

to know; then such an error of reason or conscience does not excuse the will that abides by that erring reason or conscience, from being evil. But if the error arise from ignorance of some circumstance, and without any negligence, so that it cause the act to be involuntary, then that error of reason or conscience excuses the will, that abides by erring reason from being evil.

St. Thomas’ examples concern adultery: No one can be innocently unaware of the fact that adultery is wrong. But someone might be innocently unaware that a certain woman is not really his wife. (Perhaps his marriage to her is invalid because of her previous valid marriage to someone else, but he knows nothing about all this.) In the second case, the man’s ignorance excuses; in the first case, it does not. It all depends on whether the ignorance itself is excusable or culpable.³⁷

How does all this apply to conscientious objection? First, the conscientious objector is bound to follow his conscience. He would be doing wrong to serve. But, unless the case can be made for an entitlement to lead a nonviolent lifestyle,³⁸ he really does have the obligation to use force to rescue the victims of aggression if called upon to do so. So, second, he also does wrong if he refuses to serve. His erroneous conscience does not excuse him from this duty. He both should and should not serve. Following a venerable tradition, when faced with a contradiction, we should make a distinction. Objectively speaking, he should serve; subjectively speaking, he should not. The way out of the dilemma is, of course, for the citizen to reform his conscience so that his beliefs about his duties come into conformity with his real duties. But he does not recognize that lack of conformity, of course, and there is no way of guaranteeing that a person in such a situation will be able to do so. He could watch for deviations between his own views and those of most other people.³⁹ But even if he disagreed with everyone else, he still could not be sure that he was mistaken, rather than ahead of his times. Or he could try to improve his skill at thinking about moral issues by enrolling in an ethics course. But he would have to be careful to pick a course taught by a just-war theorist, and not one taught by a pacifist. It is an unfortunate fact about the human condition that moral certainty is not *certainly*.

That completes the moral assessment of the conscientious objector. Is the government morally required to respect the beliefs of those whom it believes to have erroneous consciences? No one believes that this is so for extreme cases. We would not respect the beliefs of anyone who practiced child sacrifice or cannibalism. We do not respect the beliefs of polygamists,⁴⁰ segregationists,⁴¹ snake-handlers⁴² or

³⁷ St. Thomas distinguishes culpable and blameless ignorance in *Summa Theologiae* 1a2æ, Q. 6, a. 8.

³⁸ The American Catholic Bishops, in *The Challenge of Peace: God’s Promise & Our Response* (1983), sketch such a possibility on the basis of Christian witness alone, but perhaps a secular counterpart could be developed. Gandhi is surely a model for such a secularist version.

³⁹ C. S. Lewis emphasizes the importance of this check on precisely this issue in “Why I am not a Pacifist.” This talk was published posthumously in *The Weight of Glory*, revised & expanded edition (Macmillan, 1980).

⁴⁰ *Reynolds v. US* 98 US 145 (1878).

⁴¹ *Brown v. Dade Christian School*, 556 F.2d 310 (1977), rejected the right of Dade Christian School to refuse admission to non-whites based on what the Court saw as “social or political belief.” *Bob Jones University v. US*,

those who refuse to provide blood transfusions for themselves⁴³ or for their children.⁴⁴ Perhaps a case could be made to the effect that conscientious objection, even if wrong, is different from all those cases in a morally relevant way. It is obviously different from the first few in this respect at least, that it does not involve *direct* harm to or even rejection of others. It has a strong similarity to the transfusion case (each is a refusal to help by a possibly efficacious means), but the government’s refusal to respect the Witnesses on this point is itself not uncontroversial.

The second political question, again from the state’s point of view, is this: Even if all citizens have a duty to respond to the call to military service, whether they recognize that obligation or not, and even if the state is under no general obligation to respect the erring conscience of the conscientious objector any more than the conscience of those who erred in the above-cited analogous cases, is there a good reason for making an exception anyway? Accommodation is made in other analogous cases. Many states allow for conscientious refusal to undergo otherwise compulsory vaccination against infectious diseases. Many allow for conscientious refusal to receive medical treatment. And many Amish are allowed to run their own schools in ways which do not meet the ordinary statutory requirements.

With respect to conscientious objection, the case against making an exemption has centered on three issues.⁴⁵ The first is the manpower problem. The government has the responsibility to provide for the common defense. The question is sometimes raised whether exemptions (especially for selective conscientious objectors) will make it practically impossible to do so. The second is the fairness problem. The question is who must serve when not all serve and whether scruples makes some citizens relevantly different from others. The third is the practical problem of distinguishing the scrupulous from the lazy, the selfish, the cowardly and similar vicious sorts who would be perfectly willing to pretend that they had scruples if that would keep them home. On the other hand stand the importance of the demands of conscience and the respect due to others when accommodation of their mistake is possible. Attempting to force someone to act against conscience will not ordinarily improve them. Further, forcing conscientious objectors to serve is not likely to promote the common good. They are not likely to be good soldiers, since they believe that soldiering (at least here and now) is morally wrong. Their unwilling presence in military units may even lower the morale of other soldiers.

461 US 574 (1983), upheld the denial of tax-exempt status to schools which practice racial segregation even on religious grounds.

⁴² *State v. Massey et al.*, 51 S.E.2d 179 (1949).

⁴³ *JFK Memorial Hospital v. Heston*, 279 A.2d 679 (1971). In slightly different circumstances, another court refused to force a patient to undergo a blood transfusion (*Estate of Brooks*, 205 N.E.2d 435 (1965)).

⁴⁴ *State v. Perricone*, 181 A.2d 751 (1962).

⁴⁵ For an official consideration of the possibility of accommodating selective conscientious objectors, see the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* (US Government Printing Office, 1967), which rejects a minority report favoring accommodation. John P. Langan, “The Good of Selective Conscientious Objection,” (in Michael F. Noone, Jr., ed., *Selective Conscientious Objection: Accommodating Conscience and Security* (Westview, 1989)) argues against the commission’s conclusions.

Which set of considerations is the stronger? Let us address them separately for the general and the selective conscientious objector.

As an historical matter, the United States has always exempted at least some general conscientious objectors, and this has never created any difficulty with respect to manning the armed forces. The US has simply never had such a high percentage of the nation under arms, and the number of conscientious objectors has always been fairly low. With respect to fairness, two points can be made. First, the current draft law exempts others, e.g., divinity students, sole surviving sons, and those doing essential work. Surely the general conscientious objector has as reasonable a claim as do these. Second, current law does not provide an exemption from service, but only an exemption from military service. Those exempted are required to perform some kind of alternative service. As long as such alternative service is sufficiently lengthy or sufficiently arduous, those who are required to do military service are not being treated unfairly. On the third point, also, experience is relevant. The Selective Draft Act of 1917 conditioned exemption on membership in one of the traditional peace churches. Subsequent legislation and Supreme Court interpretation loosened the requirement first to “religious belief and training” generally (i.e., not tied to any particular denomination), as opposed to a “merely personal moral code,”⁴⁶ and then to merely a genuine belief in pacifism, independent of its religious character.⁴⁷ Although these extensions complicate the determination of sincerity somewhat, it remained fairly clear what a person had to believe in order to qualify for exemption, and the Selective Service System had developed some guidelines to the draft boards who were responsible for granting such exemptions.⁴⁸

For the selective conscientious objector, the situation is more complicated. The manpower issue cannot be addressed on the basis of American experience, since such an exemption has never been enacted. But some people argue that a high percentage of *bona fide* objectors to the morality of a given war would be a sign that there might well in fact be something morally objectionable about the war and that in any case the fact that so many citizens objected to it would be a good reason for a democracy to refrain from fighting it. The fairness issue can be met in the same way that it was for the general conscientious objector. The problem is going to be determining criteria for the identification of such objectors. The criterion for general conscientious objectors is, as was suggested above, fairly clear. If one believed that it was permissible to defend the country, or to fight in a war declared by the United Nations, then one did not qualify as a conscientious objector.

⁴⁶ The Selective Service & Training Act of 1940. Similar wording occurs in Military Selective Service Act of 1967, 50 USC App. §456(j).

⁴⁷ *US v. Seeger* 380 US 163 (1965) and *Welsh v. US* 398 US 333 (1970).

⁴⁸ SSS Form 150 (Special Form for Conscientious Objectors), which was used in the 1970’s includes, among others, the following questions:

4. Explain what most clearly shows that your beliefs are deeply held.
5. Do your beliefs affect the way you live? Describe how the beliefs affect the type of work you will do to earn a living or the types of activity you participate in during non-working hours.
6. Describe any specific actions or incidents in your life that show you believe as you do.

What would a person have to believe to qualify for exemption for fighting in a particular war? Can we construct a corresponding criterion for selective conscientious objection? The Supreme Court, in rejecting cases brought by Guy Gillette and Louis Negre, worried that we could not. There are two problems. First, the “bad theory” problem. Would one have to accept the just-war theory or would just any theory of justifiability do? Suppose someone said that he had no objection to killing foreigners in defense of some direct American interest, but did not think it was morally permissible for him to risk his life to protect any other nation from aggression. Suppose they said that they had nothing against killing Africans or Asians in a war, but thought it was morally wrong to make war on any European nation.⁴⁹ Should these beliefs entitle the bearers to exemption? Second is the “good theory, bad facts” problem. Suppose a person accepted the just-war theory and then advanced bizarre beliefs about history or politics. Suppose someone thought that the Second Gulf War failed the criterion of last resort because President Bush neglected this peace plan: flying Air Force One to Baghdad and then prostrating himself before President Hussein and begging him to withdraw from Kuwait. Suppose someone thought that the attack on Panama failed the criterion of proportionality because General Noriega had a huge arsenal of nuclear bombs which he would use on the rest of the world if we tried to overthrow him. Or suppose that someone wrongly believed that the Army was using biological weapons. Recall the Court’s ruling about application of the current exemption—“the ‘truth’ of a belief is not open to question; rather the question is whether the objector’s beliefs are ‘truly held.’”⁵⁰ The acceptance of this kind of objection could deteriorate into what Kent Greenawalt has called a reward for stupidity.⁵¹ Establishing such a criterion, and then applying it fairly, would be a difficult task.⁵²

But difficult is not insuperable. Perhaps the establishment of arduous alternative service would deter frivolous claims.⁵³ And perhaps the few bizarre claims could be accommodated. The same concerns about respect for conscience that were raised above will apply here also. Selective conscientious objectors will be better served and will better serve their country at Thule than at Ft. Leavenworth.

3. Conclusion. If the just-war theory is correct about morality and war, then general conscientious objection is not the correct response to military service.

⁴⁹ Sen. Robert LaFollette proposed exempting German and Austrian Americans from the draft in World War I. (55 *Congressional Record* 1474 (1917).)

⁵⁰ *Gillette v. US* at 457, but relying on earlier decisions, *viz.*, *US v. Seeger*, 380 US 163 (1965) and *US v. Ballard*, 322 US 78 (1944).

⁵¹ “All or Nothing at All: The Defeat of Selective Conscientious Objection,” *The Supreme Court Review* (1971): 31-94, at p. 55

⁵² Nevertheless, there are some who are hopeful that the problem can be overcome. See, e.g., Paul Ramsey, “Selective Conscientious Objection: Warrants & Reservations” in James Finn, ed. *A Conflict of Loyalties* (Pegasus, 1968); Ralph Potter, “Conscientious Objection to Particular Wars,” in Donald A. Gianella, ed., *Religion & the Public Order*, No. 4 (Cornell, 1968); and Theodore J. Koontz, “A Public Policy Case for Permitting Selective Conscientious Objection,” *Public Affairs Quarterly* 3 (1989): 49-74.

⁵³ This possibility is advanced by Kent Greenawalt in “Accommodation to Selective Conscientious Objection: How and Why.” Greenawalt’s suggestions are discussed by William J. Wagner, “The Right to Accommodation: Should It Be Recognized?” Both essays are in Michael F. Noone, Jr., ed., *Selective Conscientious Objection: Accommodating Conscience and Security* (Westview, 1989).

However, since that theory permits participation only in just wars, it makes selective conscientious objection the correct response to unjust wars. The requirement that one not fight an unjust war does not entitle anyone to a general exemption from military service, even while the unjust war is being waged. The just-war theory does not commit one to believe that the state is morally required to respect the conscience of those whom it sees as refusing to serve in an unjust war. Although the government is not obliged to respect what it believes to be erroneous consciences, including those of conscientious objectors, there are good policy reasons to respect an erroneous conscience, as long as exemptions from the ordinary duties of citizenship can be replaced by other duties in a way that is fair to all. This is not difficult to do with respect to general conscientious objection. It is harder to do with respect to selective conscientious objection, but continued thought on this problem may yield a practicable way of implementing a policy that would respect the right even of selective conscientious objectors.