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THE INSTITUTIONAL CONSCIENCE: A STUDY IN THE ADMINISTRATIVE PROCESS

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On June 23, 1947 the United States Supreme Court made its decision in the case of *Sunal v. Large*,[1] three justices dissenting. The majority opinion, on superficial examination, seems to limit rather rigidly the remedial possibilities of the writ of habeas corpus, and it certainly does little or nothing to clean up the "untidiness" in this area of our law.

In all likelihood, the decision will be greeted with widespread criticism on the part of those commentators who make a living second-guessing the judges. Legalists primarily interested in the symmetry of headnotes will find that Mr. Justice Douglas did a lot of backing and filling trying to justify the court's position, and left the rule of habeas corpus pretty completely within the realm of "gastronomic jurisprudence." Even more vociferous will be those self-appointed guardians of civil liberties who sometimes give the impression that they feel that a minority is virtuous for no reason other than that it is a minority, and who will see in the *Sunal* case a diabolical trap to enable a slow-moving, slower-thinking society to gobble up enlightened freethinkers whose only sin is that they are ahead of their time.

Both bases of criticism will be plausible. Certainly the opinion of Mr. Douglas is no gem of literary coherence, and it is true that at some points of his logical pursuit he does little more than merely throw up his hands in despair at unraveling past experience with the sacred writ of habeas corpus. In defense of the opinion, it might be pointed out that historically habeas corpus has generally been that vehicle whereby a human institution made an effort to view itself objectively, and that only a rudimentary knowledge of psychology—plus a reconciliation to the sad fact that there are no earthbound angels available to administer our institutions for us—would lead an honest critic to admit that some incoherence on the part of the majority holding was a symptom of candor rather than confusion. But such tolerance is not to be expected from the crusading textbook liberal, who may be something of a phenomenon in the field of dyspepsia more than the field of jurisprudence, for he seldom exhibits less scorn for his client's intelligence than for his opponent's.

Sunal v. Large cannot be defended on the level of its performance in furnishing new headnotes for the digests and new footnotes

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1. 67 Sup. Ct. 1588 (1947).

for the professional bleeding hearts. The dissenting opinions make far better literature if the proper measure of legal opinion is their contribution to the syllogism of the logician. But if the purpose of litigation is to do justice to the humans involved, the majority holding in *Sunal v. Large* is correct. Unfortunately for Mr. Justice Douglas, much of the background that is relevant to a full understanding of the situation is irrelevant to a legal opinion; but the history of the religious pressure group as it developed over a period of almost seven years preceding the decision in the *Sunal* case was well-known to the Supreme Court, and was properly borne in mind by the six justices adopting the majority view. Because of the importance of historical background to a true appreciation of the majority opinion, the specific facts of the *Sunal* case will be related below; it will now be relevant to discuss the religious pressure group of World War II.

ADMINISTERING THE IMPOSSIBLE

During the decade antedating the outbreak of the war our government was forced many times to use its sovereign power as a makeweight on the side of disadvantage. Sometimes governmental authority was properly invoked, sometimes its invocation was questionable. A government unable or unwilling to use its authority is a government without authority: i. e. no government at all; so there is nothing immoral or vicious about government intervention in private affairs. But when a psychology develops that eventually leads to the policy of "writing a law" or "hiring an expert" at the first hint of friction in human affairs a state of emotional unbalance has obviously developed that needs correction. And when, in the course of the administration of Selective Service, the government commissioned some of its agents to "read the hearts" of men who claimed to be conscieniously opposed to participation in warfare it would seem that our presumptuousness in the field of governmental administration had become monumental indeed.

No one in his right mind wants to see a true conscientious objector impressed into service. But no one in his right mind thinks that there is any way of setting up a bureau, with blank forms and procedural routine, that will tend to make it any easier to separate the sincere from the insincere; such a ritual only tends to muddy the water. Since time immemorial sincerity has had to make its own way in the world, using only its intrinsic appeal, and a twentieth century phobia for materializing the spiritual was never shown up in brighter light for the phoney that it is than in the recent experience of administering the religious objector. (Strictly speaking, the issue involved with an applicant for exemption as a conscientious objector and the issue involved with an applicant for ministerial exemption were different; in practice they were quite similar: sincerity was the

basis for the local board's determination, and properly so. Especially in the case of certain religions that demanded the right to self-ordination on the part of "ministers", was a valid determination of ministerial status almost exclusively a determination of sincerity.)

But the performance in the field of religious exemption from the draft added little to the sum total of human experience merely in that it disclosed that many people will dissimulate in order to achieve ends they deem desirable. That fact was well known long ago. The spectacular item in the picture of the draft for World War II was the religious pressure group, which treated us to the uncomfortable realization that in no field of endeavor—even that of our would-be spiritual leaders—is there enough self-restraint to resist the temptation to utilize any means to achieve the end. And many of the ends, in themselves, appeared a good deal less than spiritual. At the same time that many bitter complaints of "Caesar's" tactics were piously expressed it appeared that Caesar's critics were not above adopting tactics that astonished Caesar himself.

SINCERITY AND GLIBNESS

The religious objector to military service presented a problem in the legal field known as "civil liberties." Everyone is in favor of civil liberties, just as everyone is in favor of prosperity, but in practice it is very difficult for everyone to agree on what specific actions, in any given case, best serve the cause of civil liberties. One basis for confusion seems to be that many people think there are no civil liberties to be enjoyed by members of the majority, in any given situation. While it is true that civil liberties of minorities are generally in more immediate danger, and therefore in need of more immediate attention, it is also true—though not as widely recognized—that over-protection of minorities can at some later date mean underprotection to majorities.

When the issue of the civil liberties of religious objectors arose, there arose with it the religious advocate. In many cases the registrant himself was articulate to a degree that he was able to raise an eloquent plea in his own defense; in many, many more cases the registrant secured the assistance of an advocate to talk on his behalf. Though the issue, basically, was the sincerity of the registrant, the battle was frequently done on the field of glibness. Perhaps the shift in standards was not to be deplored; perhaps it was part of the same scheme of evolution that seemed to favor success for the male birds with the brightest plumage over less colorful rivals. Perhaps the human race is wrenching itself no more to evaluate sincerity on the basis of glibness than it would be doing to waste too much time trying to read each other's minds. But to understand the legal dilemma of the religious objector—to return to the point of departure for this

paper: the *Sunal* decision—one must realize the subtle twist that appeared on the scene with the arrival of the religious advocate.

The writer's personal opinion, for what it is worth, is that glibness is more likely than not hurtful to the cause of the religious objector. Mental turmoil, the inescapable accompanist of a sincere effort to analyse that which is beyond human understanding, does not lend itself to glibness. It is surprising to observe the ease with which some religious arguments rested their case, confident that every I was dotted and every T crossed; such complacency seems to the writer to indicate a desire to be rid of the burden of trying to make sense out of the insensible more than a desire to continue the task that could never be finished.

But it is undeniable that headnotes fall into line more easily with help from the glib than they do when they are buried under the stumbling, tentative uncertainty of the groper. And it is true that no bureau can close its cases with any degree of symmetry in an atmosphere wherein there is no pretense of finality, or of arriving at the right answer. Glibness as an earmark of religious composure was inevitable when America decided that a group of professional administrators were to take upon themselves the responsibility of determining which of their brethren were sincere in expressing a religious point of view. And perhaps, with all its failings, the effort was worth all of its weird concomitants in the sense that a futile try to make a rational administration of the problem of the conscientious objector was better than no try at all. At any rate its dramatized the Bill of Rights, and symbolized one of the Four Freedoms.

INSTITUTIONALIZING THE NONINSTITUTIONAL

Sunal, the petitioner in the case discussed above, was a member of the Jehovah's Witness sect. This group, and an organization known as the National Service Board for Religious Objectors, represent a dual example of the religious pressure group that well illustrates the dilemma that was presented to the government when it attempted to read a man's "heart." Of course there were other pressure groups at work, but the two chosen will sufficiently exemplify the principle herein discussed. Although the primary objective of the Jehovah's Witness group was to secure for each client-registrant a ministerial classification, and while the Service Board was more often aiming at exemption for the conscientious objector, in practice the issues that came up were practically identical and the two organizations can legitimately be lumped together without oversimplification.

In discussing the adventures of the Jehovah's Witnesses it is pertinent to return to the *Sunal* opinion. Briefly, the decision in the case was this: Sunal was applying for a writ of habeas corpus as a means for securing a court review of the action of his local board in

denying him ministerial exemption, and argued that he was entitled to a court review (one way or another) because one of his fellow witnesses named Estep had succeeded in winning his point on an appeal to the Supreme Court where in the rule of law that formerly prevented judicial review of local board actions was changed. With some plausibility, Sunal argued that if he had been stubborn enough to appeal rather than content to abide by the conviction on the lower level, he would have had a day in court; since he missed that day on appeal he should have it via habeas corpus.

Mr. Justice Douglas disagreed. Pointing out that the same lawyer was handling things for both Estep and Sunal he said, in short, that if a man had an appeal available but declined to use it he would stand on that election. Especially since picking and choosing on the part of a single lawyer seemed to be the only basis of distinction between the man who received a full measure of justice in the ordinary routine and the man who needed the help of extraordinary measures to secure the same consideration. Indeed, if anything is definitely proven in the *Sunal* case it is that many times the civil liberty litigant needs protection from his own lawyer's preoccupation with headnotes to the injury of the practical situation. If Estep's problem received better attention than did Sunal's, the records of Selective Service show that many of the brethren witnesses got even less legal assistance than Sunal. One report had it that the press of business so harassed the witnesses' legal staff that no individual could expect help in a legal sense unless his problem involved "broad principle." Civil liberties used to contemplate themselves as concerned with individual rights—where the "broad principle" was individual justice.

At many times it seems that those busily attacking bureaucracy are more bureaucratic than the bureaucrats. Interesting to note, also, is the fact that the lawyer for the Jehovah's Witnesses was classified, by Caesar, as a minister of religion. It was no loss to the Army, but a bit of something to put your teeth into when you contemplate the order of things in that world "not of this world" where temporal affairs are unimportant.

It is impossible not to see the humor in the situation presented by the Jehovah's Witnesses, who certainly had the bureaucrats on the run. Blessed with that cardinal virtue of complete complacency, characterized by courage and utter disregard of the social pressure of the opinion of the man in the street, members of this sect were quite impervious to all appeals "of reason". The English language had the same flexibility in their custody that it did to that character who assured Alice that it was foolish to let yourself be mastered by words. It was obviously impossible to come to terms with them for it was quite impossible even to define terms. Each member of the

sect would pedantically picture biblical parallels which had either real or fancied application to the situation in which the indivdual found hmself; each member implied that he was endowed with not only an equal opportunity, but also equal capabilities, to become a latter-day St. Paul; and to top it all off the embattled bureaucrat had to (1) argue that somehow or other the biblical parallel was faulty, (2) argue that there was no good reason to assume that each Witness was a St. Paul reincarnate, and (3) use the "tongues" of a new language to do it, since all English words suddenly became quite fluid in definition when used in discussion with any Witness.

But the humor in each individual case becomes grim when the whole picture focused. The aspect of one private citizen, quite possibly an under-educated (though by no means stupid) one, putting a horse over on a G-man is pleasing; but multiply that by hundreds and the trick of intellectual dishonesty is no longer cute. At one stage in the pressure campaign letters poured in from Jehovah's Witnesses to draft administrators, each one of which pictured the writer as a modern martyr in the clutches of Caesar, alone and unbefriended save by God and enjoying only the moral support of earlier martyrs; the effect was just a bit sullied when it was found that not only were all letters from scores of witnesses identical—every single one shared the common misfortune to misspell "Ammended" with two 'M's'. It is no longer a question of civil liberties when it appears that the harassed little man is not striving to protect his freedom of religion, but is following the instructions of a general headquarters. Pacifism and passive resistance have common characteristics, but widely divergent aims. Only a sentimentalist notion that the presumption of innocence must be conclusive when the individual has the shrewdness to cloth his problem in religious camouflage will justify disregarding circumstantial evidence that is, itself, conclusive.

No less efficiently did the National Service Board for Religious Objectors institutionalize the consciences of its clients. Self-described as "the organization set up at the request of the government to help deal with the problems of conscientious objectors" this agency nevertheless made no bones about the businesslike aspect of riding herd on the problems of sensitivity. In the course of its protection of freedom of religion for its customers it published a semi-monthly periodical "containing news of C. P. S. and Washington developments relating to problems of conscience." Oh yes, it cost one dollar a year to keep up with Washington developments relating to problems of conscience and there was a very clear overtone suggesting that no well-kept conscience would willingly be left in the dark with respect to Washington developments. Although the United States Supreme Court had admonished bureaucrats that freedom of religion was not to be limited

to those fortunate enough to be able to pay their own, Washington developments with respect to problems of conscience were sold F.O.B.

By February 1944 this Board had printed seventeen impressions of a pamphlet discussing the status of the conscientious objector under the draft. One recommendation in that pamphlet was that a registrant wishing to claim exemption because of his conscientious objection should not be content to take a presidential appeal in the ordinary course, but should mail his material to the Board which would "submit the original material personally to the proper official at National Headquarters of Selective Service. This insures more rapid delivery and personal attention." The connotations—particularly the negative implication that personal attention was not ordinarily forthcoming from officials of the government unless a special pressure group was called into the picture—were not lost on men who were intensely interested as were those to whom this message was addressed. Nor would the message qualify as a completely spiritual message. Query: Where in the field of religious literature would one find a discussion of the philosophical implications of a conscientious objection to warfare that would demand seventeen printings in as short a time as did this pamphlet?

"In union there is strength" is a curious slogan to be adopted by people who profess to be interested only in protecting the right of each man to worship as he chooses, and institutionalizing a conscience is a philosophical anomaly. But, after all, the flesh is weak in the best of us and if the limit of the operations of the National Service Board was to institutionalize the noninstitutional the matter would be merely an example that fire is fought with fire even by people who profess never to have seen flame. But, to the discredit of the cause of intellectual honesty in the field of civil liberties, the Service Board did not limit itself to fighting the good fight—fighting clean though hard. Along with institutionalizing the noninstitutional, the Board made a diligent effort to complete the cycle and destroy the institutions of the majority.

ICONOCLASM AND CATACLYSM

The pamphlet of the National Service Board, published by an agency that represented itself as being a quasi-official member, adopted a bland attitude with respect to criminality on the part of religious objectors. Getting in—and out of—prison was just another one of those things in the eyes of the pamphlet-writers, who calmly advised: "Once in prison the man himself should initiate requests for parole through the parole officer and warden of the institution to which he is sent. Two types of parole are available to him." Clearly, in the eyes of the Service Board the presumption of innocence is conclusive for a conscientious objector. Such zealous advocacy may have the virtue of

enthusiasm, but so does the activity of the cook who sets the kitchen on fire to cook the chicken—or perhaps it is the goose.

What civil liberties will be left to minorities who deliberately undertake to breed contempt for our institutions, imperfect though they are? What good would it do the National Service Board to go to court to protect the inalienable rights of client number 1001 if their efforts to instill in clients numbered 1 through 1000 contempt for our unenlightened penology had been so successful that the trial judge had thrown over his work, the constabulary had done likewise, and the barbaric horde of the wicked majority had reverted to lynch law? The baseball player, very likely not an object of admiration by many intellects of the type that profess to be conscientious objectors, has no difficulty in appreciating that although his afternoon's employment would be jeopardized if he hooted too boisterously at a sour decision by the umpire, his whole career would certainly go down the drain if he should decide to eliminate the umpire—even if the umpire were clearly wrong and he was right.

The analogy of human governmental institutions and human sporting events is not a bad one, despite the different atmospheres in which they operate. (Have you ever noted what an athletically-minded city is Washington? Is that not of significance?) Sportsmanship is, indeed, the only basis on which any government ever survived. Or even any human activity on a less pompous level. The town cop, who couldn't catch a cold, is treated with a tolerance almost approaching respect—not because his neighbors don't know his limitations, but because they know that respect for authority is not merely etiquette —it is the only basis for authority. Two cars approaching an intersection respect sportsmanship almost exclusively—the rules of the road are so superficial, when added up with the complexities of even a simple traffic development, that to all intents and purposes they are nonexistent. The car coming on the right knows that the other fellow should expect his initiative—and that's just about all there is from the little green book. The rest is sportsmanship. Certainly no lawyer, knowing how a fifty-mile speed can be reduced in the courtroom, would trade sportsmanship on the road for a loose-leaf service of all the latest tort headnotes. The stupid, unenlightened majority—so it is chronically pictured by professional advocates of "civil liberties"—do, on the whole, have a sporting tolerance; often to a far greater degree than many terriers who crusade for "liberalism" without the least vestige of tolerance.

ARE THERE ANY MAJORITY RIGHTS?

Would-be jurists who believe that the intellect has done all that is to be expected of it by touching all the bases of a syllogism, seem to have developed a notion that the majority is disfranchised so far as

civil liberties are concerned. Apparently their reasoning, symmetrical but illogical, goes thus: Everyone is for majority rule, everyone is also for minority rights; Everyone is against minority rule, ?????? The last part of this rhythmic dogma is apparent. And syllogistic. And wrong. Everyone is *not* against majority rights—in fact a majority are for them!

But somehow or other, it frequently develops that a minority, in its legitimate effort to make itself a majority (which is about all that is involved, after all) works things around to the point where apparently the majority is expected to assist in making itself a minority. The fact of the matter, of course, is that you are not automatically a second-class citizen because you happen to be in the majority. You have as much right to *continue* in the majority as you have to *get there.* A minority is not necessarily right merely because it is the minority.

Nine times out of ten this argument is merely academic—generally a member of the majority is unconcerned, if not actually unconscious, with respect to the problem. But on occasion it can develop that tyranny by the minority results from faulty analysis. For example, during the war a young mother, whose husband was overseas, was forced to take employment that kept her away from home for several hours in the late afternoon after her young daughter had returned from school. Two neighbors, members of a radical religious group whose doctrines viewed as sinful some of the religious omissions of the routine of the young mother, decided that it was their Christian duty to save the soul of the little girl. With the best of motives, and that cruelty that is unfortunately so often the hallmark of the righteous, the religious reeducation of the little girl was begun. The mother was alarmed. Finally, one of her friends contacted an organization professing to be interested in civil liberties, after the worried mother had asked for advice. With a bureaucratic brushoff, she was shown that the organization had scant interest in the case—possibly diligence would have aroused action when it was pointed out that the framework of the incident had reversed the spots on the overall picture and that the overall minority was, in the particular situation, a temporary majority, but the situation was one that called for action more rapid than that possible under a course of instruction to the champions of civil liberties. As luck would have it, the child was old enough to understand reason once the situation got the attention it demanded, and the religionists were, fortunately, not so religious as to be fanatical, so the incident was not of any great moment. But it did light up the civil liberties picture with a new significance.

The writer thinks of himself as a tolerant individual. He agrees that there is a duty on the part of a majority to wear a hair shirt at

times, in the name of tolerance—which is, after all, just about a complete defiinition of civil liberties. But he becomes irritable when he thinks that he sees a subtle little twist being made, wherein a majority's duty to take it blurs into the notion of a minority's right to dish it out. The two aren't the same. Motivation creeps into the picture, and motivation is important. Justice Holmes pictured the basic, almost animal, significance of motivation when he pointed out that even a dog can distinguish between being being stumbled over and being kicked, and adapts his behavior accordingly. A man can be heckled by an innocent act, and must hold his temper—but a deliberate heckler never operates except by design, and is never entitled to a clear field.

Sunal, the petitioner in the case under discussion, was up for his third helping of judicial consideration when he applied for habeas corpus. The chain of events leading to the decision in question began on October 25, 1944, when Sunal refused to report for induction—but in 1942 Sunal had been order to camp *as a conscientious objector,* ignored this order, and went to prison to serve a term which he had completed by the fall of 1944. The writer would have no objection to a rule whereby under a sort of rationing theory a man who had gone to prison once for his "religious" beliefs would have qualified as sincere. Not because the writer thinks that stiff-neckedness is necessarily religious, but because the penalty of a draftee is, after all, not the electric chair (as might be implied from the howls that went up) but becoming a member of a team wherein the other team-mates likewise have some civil liberties—though they often seemed to be forgotten—and one of them appropriately would be to take advantage of experience in choosing manpower correctly. Mr. Sunal's nonappearance on October 25, 1944 did the Army damage that could properly be described as infinitesimal. And no one would have been happier than Caesar if some arrangement would have seemed workable whereby all alleged concsientious objectors were rationed to a single prosecution on that count. In short, Sunal's nuisance value was far more than one hundred percent, yet in legal literature he will go down as the victim of a strict ruling on a problem of civil liberties, a man hunted down with the relentless lack of pity of a Javert. A veteran of the courts, the headnotes will indicate that he was an innocent victim caught in the toils of an unfamiliar and malignant fate.

ARE THERE ANY CIVIL LIBERTIES OUTSIDE A COURTROOM?

Those who limit their range of vision to courtroom conduct in evaluating civil liberties imply that you have no civil liberties until you get into trouble with them. They paint a curious situation: a sacred "liberty" is nonexistent until it is extinguished. Of course, liberty is pretty much like health—there is no tingling sensation of pleasure while you enjoy it, only pain when you lose it; so it is not

difficult to understand how the focus of study in the field of civil liberties has become needle-sharp.

But an overspecialized perspective is dangerous. Courts can only dramatize that tolerance which is necessary for the day-today survival of minorities, if litigation has to bear the brunt of protecting all civil liberties, civil liberties will live for only a very short time. The pressure group has pretty nearly taken over our economic life—and made a horrible mess of it; if professional crusaders are also going to take over civil liberties they will find that they are taking on a job that is far too big for them. Civil liberties offers a burden of self-restraint that must be pro-rated along the same line as the elective franchise: one share to a citizen. Civil liberties lawyers, whose performance indicates that they have spent a good deal more time technicalizing the nontechnical than in trying to psychoanalyse that society they continually scold, do a disservice to society when they confuse the issue of civil liberties: which is nothing more or less than tolerance for one's brother, and possibly a sense of humor in observing his ridiculous conduct.

One tiny omission in a recent law review article illustrates this point. Julien Cornell, a civil liberties champion who incidentally was widely read during the war by registrants claiming religious exemption who felt that legalistic documentation would improve the saleability of their piety, wrote an article entitled "Exemption From The Draft: A Study In Civil Liberties" which appeared in 56 Yale Law Journal at page 258. At one point in this article Mr. Cornell stated that the Director of Selective Service "persisted" in an unlegal point of view regarding the meaning of the word "religion" even after the Second Circuit Court of Appeals had defined the meaning of the word for the benefit of the Director. One little item, however, Mr. Cornell thought unimportant: assuming that the Director of Selective Service did differ from the Second Circuit in his definition of "religion", the calendar shows that the definition of the Director was written more than two months *prior* to the decision of the court. Since Mr. Cornell himself participated in the decision of the court, being of counsel, this oversight on his part is difficult to excuse; very likely in preparation for the case, or at least during that period of waiting for the decision, he had occasion to come across the Director's definition to which he takes exception.

It may be that, as a bureaucrat, General Hershey had no civil liberties that were being violated when he was taken to task for failure to enjoy prophetic powers; possibly he was on notice, some time prior to December 5, 1942 when his objectionable definition went to press, that on February 8, 1943 a dictum in the *Kauten*[2] case would be read thus and so. If he was, it is a pertinent commentary on the

2. U. S. v. Kauten, 133 F. (2d) 703 (C. C. A. 2d 1943).

burden of government that the civil liberties lawyers demand in their scheme of things. But even more to the point is the fact that the records show that, in fact, General Hershey's intellect was quite able to appreciate the "legal" point of view of "religion". Indeed, General Hershey anticipated the Second Circuit. Reminding the reader that the portion of the *Kauten* opinion is *dictum only,* whereas the decision on appeal to the President was the *holding*—putting General Hershey, indeed, more on Mr. Cornell's side than was Judge Hand—two quotations will be reprinted at this point: the first from the Second Circuit Court of Appeals and the second from a decision made in the appeal to the President (General Hershey) by a conscientious objector back in October 1941.

> ". . . the provisions of the present statute . . . take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegience to a definite religious group or creed, the basis of exemption. . . . A compelling voice of conscience . . . we should regard as a religious impulse. . . . 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...There is a disinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."
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> "The evidence in this case leaves no room to doubt the sincerity and reality of the registrant's belief that he is a conscientious objector to war. The only questions presented, therefore, is whether or not his conscientious objections are founded upon 'religious training and belief' as the phrase is used in the Selective Training and Service Act of 1940.
>
> "The Department of Justice contends, with careful attention to and expressed acceptance of that belief, that because no religious affiliation and no background of religious training and belief has been proven, the requirements of the law have not been met. The definitions of religion and the variety of religious experiences are almost infinite. From the deep well of time man has received them; and to say that

this draught or that meets the law is to engage upon endless discussion and boundless concepts.

"The Congress had in mind, no doubt, that men should not acclaim lightly, nor for self-serving reasons, their conscientious objections to war; that social and political ideas should not be made a refuge from military service. It may well be doubted that the intention went further, or that the Congress had in mind a definite and limited meaning of the phrase 'religious training and belief'. If a man's experience in the world leads him to a sincere conviction that he may not and must not participate in war it cannot be maintained that his conviction is invalid because he arrived at it along other than accepted and defined paths of religious training. If his experience leads him to a belief and a course of conduct compatible with and, as in this case, practically identical with the belief he would undoubtedly have reached with accepted forms of religious training, considering his mode of thought, may it be said not to meet the law? If it is held, as it logically may be from the position taken by the Department of Justice, that such a belief as the registrant's may be arrived at only under compulsion from a Divine Power above and beyond his human experience, then it may also be accepted that the believer, obsessed with his belief, is the unconscious recipient of his conviction from the same source, no matter how devoid he may be of spiritual grace.

"The evidence in this case is that, essentially, the registrant bases his conviction against participation in war upon a love of his fellow men. Surely the substance of 'religious training and belief' may reasonably be considered the source of such a concept."

"YOU COME TO RESEMBLE WHAT YOU HATE."

Of course, Mr. Cornell did not really believe that Caesar was congenitally unable to appreciate the opponent's point of view. Mr. Cornell, in the course of his practice, must have become quite familiar with the original St. Paul, as well as with many modern imitators, and must be held to know that the original St. Paul appealed "unto Caesar" where he expected that he would get gentler treatment than would be forthcoming from his neighbors.

What Mr. Cornell does not underline in his report of the activities of the modern Caesar and the modern St. Pauls is that even in the incident where the original apostle appealed to the military to protect him in his religious operations did his twentieth-century prototypes ape him. As was implicit from one of the statements from the pamphlet of the National Service Board quoted above, all conscientious objectors (and other religious registrants) hastened to appeal unto Caesar, and bitterly fought for the right to have their classifications removed from the amateur civilian levels of the classification process to the military top drawer of the bureau. Small wonder: statistics show that the actions of Caesar were far more lenient than those of

the neighbors on the local boards and boards of appeal. And this is in no way a defense of the point of view of the military in this respect, it is merely to underline the basic inconsistency—or maybe even more—of a pressure group strategy wherein they insisted on talking one way while acting another: using up most of their energy deploring "militarists" while planning every possible way to get the military to do the classifying.

When psychologists tell us that "you come to resemble what you hate" the pretty paradox which lends glamor to their profession is by no means mysterious. It is only natural to assume that various intellects, concentrating on the same problem—even though from opposing points of view—will come to share many notions of principle as well as tactics. And although the lobbyist may assume that he will be able to earn more money by hurling vile epithets at the bureaucrat blocking the path of his client, and building up his job to the point where it seems to call for all sorts of skill, it is certain that the lobbyist is the last one really to want to see his opposite-number eliminated; that will likewise result in the elimination of the lobbyist. Lobbyists and bureaucrats are interdependent.

As a final illustration from the experience of administering the conscientious objector in World War II, one that carries a moral that needs no preface, is the curious incident that took place in connection with a young man who was working with the National Service Board for Religious Objectors. This young man had been placed in Class IV-E (conscientious objector) and had been placed on detached service with the Service Board, processing the claims of brother objectors. Philosophically, of course, his attitude was to consider that any participation in the war effort would be to share a fate worse than death. Yet the Service Board approached Selective Service to ask that this young man be reclassified into Class II, on the grounds that he was important to the war effort!

While it is easy to admit that the Service Board honestly thought its employees were doing work that was important to a world at war, it is quite impossible to appreciate any legitimate interest they might have in securing such a change in classification unless—perish the thought!—contact with Caesar had infected them with a military mind! From a purely practical point of view, indeed, the Service Board was asking for trouble in making this request: as a IV-E man on detached duty the young man would never be bothered by his local board; as a II-A man he would have to submit additional justification for continued deferment at least every six months.

There are two lessons to be drawn from the whole picture of this example of the administrative process in action. (It must be remembered that the administrative process is not completely observed by looking only at the administrators, you must also examine the ad-

ministered.) One is that no bureaucratic procedure, which makes bureaucrats on the side of the private citizen as well as on the side of the government, can substitute for good citizenship—on the part of the government-employed citizen as well as the government-petitioning citizen. The other is that there is so much good in the worst of us and so much bad in the best of us that it is intellectually dishonest to assume that you can stereotype people as being righteous or unrighteous merely by spotting which side of a conference table they occupy.

In an age of pressure groups, it is not surprising that individual rights should become appropriated by groups who should attempt to make them into group rights. The wicked-majority-virtuous-minority notion stems directly from the fact that organization has taken place only on one side of the "dispute." While the writer would be the first to advocate that a makeweight be given the side of disadvantage, in the case of a legitimate controversy such as occurs continually in the field of economic endeavor, he deplores a situation where fuzzy thinking merely develops a gratuitous field of "battle". The danger involved in selling false martyrdom is that it can initiate a self-generating martyrdom that can become real. When minorities, who have been handed a shield to protect *individual* liberties of each member, attempt to fashion it into a sword for group advancemnt, a definite threat has been developed—but it is not the majority that is threatened. The minority "group" will find that instead of a sword they have fashioned a boomerang.

No amount of procedural symmetry can take away the curse of intellectual dishonesty. And if the atom bomb blows us all to Kingdom Come uranium will be only one of the basic ingredients—intellectual dishonesty will be the other. The chemist, who knows that he must think in a straight line if he is to do much future thinking in his laboratory is, unfortunately, not matched in the laboratory of our social thinkers who continue to produce such things as Technocracy and the Townsend Plan,[3] unaware that physical power has now become so concentrated that a single individual can now secure direct revenge on society as a whole.

Of course, the traditional picture of an individual wielding a bomb is that a bewhiskered bolshevik, member of an unappreciated minority, who wishes to wreak vengeance on everyone who is cluttering up his environment. But there is no way of reading a man's mind —possibly this theme is by now tiresome—and the only treatment society can now indulge in is to make an extra effort to feed everyone out of the same spoon, hoping that mankind's inherent stability and

3. Criticism of the Townsend Plan is not a criticism of a notion that modern society must assume socialized support of the superannuated. It is merely a criticism of phoney intellectual exercises where a burden is camouflaged so as to pass as a blessing, where symptoms are confused with causes, and where a sow's ear is passed off as a purse.

sportsmanship can survive atomic power and bacterial bombs. If the net result of an overtechnicalized notion of civil liberties has encouraged pressure groups to spring up in a field where each individual must stand on his own feet, as the writer believes it has, the equilibrium of man's individuality with his social responsibility has been upset. That is an unhealthy climate in which to enter upon the atomic age.

THE REAL ESTATE BROKER AND HIS COMMISSION

JAMES MUNRO

A problem that seems to arise with fair frequency is that of the real estate broker and his rights to a commission. More precisely, the familiar pattern of litigation, almost infinitely varied as to form and emphasis, is along the following lines: A, a broker, lists B's property for sale at X dollars. A obtains a prospect, but the price is too high. B deals directly with the prospect, reduces the price, and makes the sale. B refuses to pay a commission on the ground A did not procure a purchaser who would pay the asking price. A sues.

The fact situations do not, of course, reduce themselves readily to a formula. Suppose, for example, that a vendor lists his ranch known as the "Razor Bill" place with a broker for a price of $22,000, agreeing to pay a commission of 5% ($1100) to the broker.[1] The terms are cash. Broker procures a prospect who is interested but cannot meet the terms. Broker contacts vendor and latter agrees to one-half cash, balance at 6%. Prospect cannot meet these terms. Thus matters stand as of June 1. On August 27, vendor notified broker he is withdrawing ranch from sale "for the present". On August 28, vendor sells to prospect for $22,000, terms of $2,000, terms of $2,000 cash, with balance payable over several years. The broker had judgment in the trial court. The Wyoming Supreme Court reversed, one judge dissenting, on the grounds that the plaintiff had not succeeded in bringinig the parties together on the terms of the original listing. On the question of possible bad faith, the majority held that the mere fact of a sale one day after the termination of the agency was not sufficient of itself to show bad faith. The burden, if any, was said to be on the plaintiff to show bad faith or fraud.[2]

Generally, although it may be changed as the parties so desire, a real estate "listing" is indefinite in duration. It is presumably a standing offer. The vendor agrees to sell his property, or if he does not sell, to pay the broker's commission, if the latter during the life of

1. Havens v. Irvine, 157 P. (2d) 570 (Wyo. 1945).
2. Havens v. Irvine, 157 P. (2d) 570, 575 (Wyo. 1945).