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however, if the legislatures are unwilling to act, then the retaliation defense might be allowed by the courts[63] on any number of grounds.[64] Whether it be by judicial or legislative action, each state must secure legal protection for every tenant who exercises his right to secure safe and sanitary living accommodations.

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SELECTIVE SERVICE LAW—PURELY ETHICAL OR MORAL BELIEFS HELD GROUNDS FOR CONSCIENTIOUS OBJECTOR EXEMPTION

On April 24, 1964, petitioner, Elliott Ashton Welsh, II, applied for a conscientious objector exemption from military service by filing an application with his local draft board. Petitioner claimed that the basis for his conscientious objector beliefs had been formed "by reading in the fields of history and sociology."[1] Upon completion of the application he affixed his signature to the statement, "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form," after he had stricken the words, "religious training and."[2] On the same application, petitioner denied that he believed in a Supreme Being, but later amended this, stating that he preferred to leave the issue open. The peti-

63. "[T]he need for judicial action is strongest in the areas of the law where political processes prove inadequate, not from lack of legislative power but because the problem is neglected by politicians." Cox, *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 122 (1966).

64. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969), raises three theories:

1. the landlord's improper motive deprives the tenant of his first amendment right to petition the government for a redress of grievances;
2. a citizen's right to inform the government of violations of law is constitutionally protected;
3. retaliatory evictions are contrary to public policy as enunciated by the legislature.

A fourth theory would allow retaliatory motive to be raised under state statutes which permit equitable defenses. Portnoy v. Hill, 57 Misc. 2d 1097, 1110, 294 N.Y.S.2d 278, 281 (Binghamton City Ct. 1968).

A fifth theory could be to argue that the use of the judicial process to order evictions, where a landlord's principal reason to evict the tenant is for having reported the violations, constitutes an unconstitutional chilling effect on the exercise of First Amendment rights of the tenants.

Finally, it can be argued: "A normally unrestricted right to sever or refuse to renew a contractual relationship may be restricted where the reason for such severance or refusal is contrary to public policy, usually as expressed by some statute. Such cases tend to occur in labor law. . . ." Moskovitz, *supra* note 7, at 6.

1. Welsh v. United States, 398 U.S. 333, 341 (1970) [hereinafter cited as instant case].

2. To qualify for conscientious objector exemption, the applicant must file Selective Service form SSS 150 with his local draft board. This form, which contains the statement in the text, must be signed by the applicant before he may be considered for conscientious objector exemption.

tioner was subsequently classified I-A-O.[3] On November 16, 1965, after considering petitioner's appeal for I-O status, the Appeal Board reclassified him I-A. Based on this reclassification, his local draft board ordered him to report for induction, and, upon his refusal to step forward, he was indicted and later convicted in the United States District Court for the Central District of California[4] for failure to submit to induction into the Armed Forces.[5] This conviction was affirmed by the Ninth Circuit Court of Appeals in a divided opinion.[6] Certiorari was granted[7] and the United States Supreme Court, per Mr. Justice Black, reversed, in a five-to-three decision. *Held,* if an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content, but which nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, such individual is entitled to a conscientious objector exemption. *Welsh v. United States,* 398 U.S. 333 (1970).

Throughout American history, provisions have existed for exemption from military service on religious grounds.[8] One rationale for this has been that the "free exercise clause" of the first amendment requires Congress to provide a method whereby religious conscientious objectors may obtain exemption from military service.[9] Opponents of religious conscientious objector exemptions have maintained that they are illegal violations of the "establishment clause" of the first amendment.[10] In dismissing the existence of a viable constitutional issue, Congress has chosen to grant exemptions to religious conscientious objectors, and although the wording of the exemption provisions has changed over the years, the general intent of Congress has not. The Selective Training and Service Act of 1917,[11] provided exemption solely for members of certain pacifist religious sects. The scope of

3. Under Selective Service classification, a conscientious objector available for noncombatant duty is classified I-A-O. A conscientious objector who is exempted from *all* duty is classified I-O. This is to be contrasted with a classification of I-A which indicates that the registrant is available for induction at any time.

4. Welsh v. United States, Criminal No. 36138 (C.D. Cal., June 1, 1966).

5. Failure to submit to induction is a federal crime under § 12(a) of the Military Selective Service Act of 1967, 50 U.S.C. § 462(a) (1967).

6. Welsh v. United States, 404 F.2d 1078 (9th Cir. 1968).

7. 396 U.S. 816 (1969).

8. For an early reference to this exemption, *see* 2 JOURNALS OF THE CONTINENTAL CONGRESS 189 (1905). *See also* Smith and Bell, *The Conscientious Objector Program—A Search for Sincerity,* 19 U. PITT. L. REV. 695 (1958).

9. Under the first amendment, Congress is prohibited from requiring anyone to act contrary to the dictates of his religion. Thus, under the "free exercise clause" theory, if the doctrine of his religion prohibits his participation in war, he must be provided with an exemption from compulsory military service.

10. This paradox was stated by Mr. Justice Brennan in his concurring opinion in Abington School District v. Schempp, 374 U.S. 203, 247 (1963), where he noted: ". . . the logical interrelationship between the Establishment and Free Exercise Clauses may produce situations where an injunction against an apparent establishment must be withheld in order to avoid infringement of rights of free exercise."

11. Military Selective Service Act of 1917, ch. 15, §§ 1, 4, 40 Stat. 76, 78.

exemption was expanded by the Act of 1940[12] which provided that no one would "be subject to combatant training and service . . . who, by religious training and belief, was conscientiously opposed to participation in war in any form."[13] This change shifted the emphasis from specific religious sects to the applicant's beliefs. It was recognized that mere affiliation with a particular religion did not necessarily indicate a total adherence to that religion's doctrines. Further, a member of a religion which did not forbid participation in war could, through personal religious studies, develop deep convictions against war or other forms of violence. Although this shifted the focus from the particular religious affiliation to the beliefs of the individual, Congress retained the requirement that the beliefs be of a religious nature.[14] In recognizing this, the Ninth Circuit in *Berman v. United States*[15] held that the specific purpose of the phrase "religious training and belief" was to distinguish "between a conscientious social belief, . . . and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one."[16] In contrast, the Second Circuit in *United States v. Kauten*,[17] had previously construed "religious training and belief" as being the relationship of man "to his fellow men and to his universe" through a rule of conscience.[18] However, the courts in both *Kauten*[19] and *Berman*[20] stated that beliefs based on non-religious philosophical, political, and social views would not, in themselves, provide a basis for exemption. The Draft Act of 1948 as amended in 1967,[21] provides the present basis for allowing exemption from military service for conscientious objector beliefs.[22] Two major considerations are dictated in the application of the statute to each individual seeking an exemption.[23] First, the applicant's beliefs must be sincerely held. Second, the applicant's objections to training and service in the Armed Forces must be based on "religious training and belief." Sincerity is a subjective concept and the courts have preferred to

12. Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 885, 889.
13. *Id.*
14. *Id.*
15. 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946).
16. *Id.* at 381.
17. 133 F.2d 703 (2d Cir. 1943).
18. *Id.* at 708.
19. *Id.*
20. 156 F.2d at 380.
21. Military Selective Service Act of 1967, 50 U.S.C. § 456(j) (Supp. IV, 1964), *amending* 50 U.S.C. § 456(j) (1948).
22. 50 U.S.C. § 456(j). This section reads in part:
Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in the subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code.
23. United States v. Seeger, 380 U.S. 163, 176 (1965).

yield to the discretion of the local draft boards and appeal boards on this issue.[24] The interpretation of the phrase "religious training and belief," however, has been the cause of much controversy.[25] Initially, the courts interpreted this phrase to require a belief in a Supreme Being,[26] but the modern religious community has caused a broadening of this interpretation.[27]

The definition of "religious training and belief" was the issue before the Supreme Court in *United States v. Seeger*.[28] Although Seeger did not belong to an orthodox religious sect, he claimed that his was a "religious faith in a purely ethical creed . . . without [a] belief in God, except in the remotest sense."[29] In consideration of this statement, the Supreme Court noted the Court of Appeals assertion that it was impermissible to distinguish between internally derived and externally compelled religious beliefs.[30] Although Seeger's conscientious objections resulted from a personally formulated religious creed, the Court concluded that his views were based on religious training and belief in the liberal sense, and that he should be granted a conscientious objector exemption. In *Seeger*, the Court established a test to be applied to the applicant's beliefs when considering his qualification for exemption. The test is: "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[31] The Court emphasized, however, that the exemption did not apply to persons whose opposition to war stemmed from essentially political, sociological or economic considerations[32] nor those who were opposed to war on personal moral grounds.[33] The Court also noted that Seeger had not claimed to be an atheist, and that they were not suggesting any decision concerning litigation involving atheism.[34]

In the instant case the plurality opinion cites *Seeger* as controlling.[35] As has been discussed, the test in determining an applicant's qualification for conscientious objector exemption under section 6(j) is whether a given belief that is sincerely held by the registrant is "in his own scheme of things,

24. *Id.* at 185.
25. *E.g.*, United States v. O'Brien, 391 U.S. 367 (1968); United States v. Seeger, 380 U.S. 163 (1965); United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969).
26. Berman v. United States, 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946).
27. 380 U.S. 163, 179-85 (1965).
28. *Id.*
29. *Id.* at 166.
30. *Id.* at 167.
31. *Id.* at 166.
32. *Id.* at 173.
33. *Id.*
34. *Id.* at 173-74.
35. Instant case at 335. Mr. Justice Black announced the judgment of the Court and delivered an opinion in which Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Marshall joined.

religious."[36] In applying this test to the instant case, the plurality noted that although petitioner could not characterize his beliefs as "religious" in the conventional meaning, he did claim that his beliefs were "certainly religious in the ethical sense of that word."[37] This fact, coupled with the court of appeals' concession that Welsh's beliefs were held "with the strength of more traditional religious convictions,"[38] enabled the plurality to conclude that petitioner's beliefs brought him within the exemptive scope of section 6(j).[39]

In a concurring opinion, Mr. Justice Harlan agreed that petitioner should be exempted from induction based on his beliefs. He reached this conclusion, however, only after consideration of the constitutional issue of whether granting exemptions only to those whose pacifist views are based on religious considerations "runs afoul" of the first amendment.[40] Justice Harlan argues that even a simple reading of section 6(j) indicates a congressional intent to distinguish between religious beliefs and those beliefs which are "essentially political, sociological or philosophical" or a "personal moral code."[41] He thus reasons that Congress intended to distinguish between the concepts of morals and religion and to provide conscientious objector exemptions solely for those whose beliefs were religious in nature.[42] Justice Harlan notes that under the establishment clause of the first amendment, distinctions may not be made between religious beliefs and secular beliefs for purposes of exemption. Faced with this constitutional question, the issue of remedies becomes important. Justice Harlan concedes that constitutional provisions would permit Congress to eliminate all exemptions for conscientious objectors.[43] If exemptions are granted, however, then they must encompass individuals whose beliefs result from a purely moral source as well as a religious source. Thus, according to Justice Harlan, the Court is faced with two alternatives. They must either deny exemption to all by nullifying section 6(j), or extend the coverage to include those originally excluded. Noting the statutory severability clause,[44] the concurring opinion reasons that Congress intentionally provided for future alterations if the court found them necessary. Thus Justice Harlan reasons that to implement the congressional intent of providing conscientious objector exemptions on

36. United States v. Seeger, 380 U.S. 163, 185 (1965).
37. Instant case at 341.
38. *Id.* at 343.
39. Military Selective Service Act of 1967 § 6(j), 50 U.S.C. § 456(j).
40. Instant case at 345.
41. *Id.* at 351.
42. *Id.* at 354.
43. *Id.* at 356.
44. *Id.* at 364. The Universal Military Training and Service Act of 1951, 65 Stat. 75, 88 § 5, *amending* 62 Stat. 604 (1948), reads in part:

> If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provisions to other persons and circumstances shall not be affected thereby.

religious grounds, exemption should be extended to those whose conscientious objection is based on sincere moral, ethical, or philosophical beliefs. Since the pluralities' conscientious objector test satisfies this result, Justice Harlan concurs in the decision.

In dissent, Mr. Justice White, with whom Chief Justice Burger and Mr. Justice Stewart joined, addressed both the interpretation of section 6(j) and the constitutional issue discussed by Justice Harlan. Without evaluating the "*Seeger* test," the dissent reasons that "construing [section] 6(j) to include Welsh exempts from the draft a class of persons to whom Congress has expressly denied an exemption."[45] The dissent concludes that the majority decision does not accurately reflect the intent of Congress and that Welsh should be denied an exemption.[46] Turning to the constitutional issue, the dissent notes that even assuming the existence of a constitutional issue, Welsh would still be required to submit to induction. The dissent's reasoning is, that if section 6(j) constitutes an establishment of religion in violation of the first amendment, then this section would have to be declared void and all exemptions withdrawn.[47]

The Supreme Court's ruling in *Welsh* has broadened the scope of section 6(j) of the Universal Military Training and Service Act. In reaching its conclusion, the plurality primarily relied on the "test" developed in *Seeger*. Great emphasis was placed on the similarities between the development of pacifist views of Welsh and Seeger.[48] Based upon these similarities, and the fact that Seeger had been granted an exemption, the plurality concluded that Welsh should also be exempted from military service. The fundamental problem in this approach is that a critical evaluation of the Court's rationale in *Seeger* was not made. The Court in the instant case interpreted the holding of *Seeger* to mean that *any* belief which is "sincere and meaningful" and "which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."[49] As mentioned above, however, the Court in *Seeger* specifically noted that it was not dealing with just "any belief" and that beliefs based on a personal moral code, sociological considerations, or atheism were excluded.[50] They continued by considering those beliefs which were to be included within the scope of exemption. In doing this, they went to great lengths to develop a liberal interpretation of the concept of "God" or "Supreme Being" in accordance with the modern religious community. Including this interpretation of God in the definition of atheism,[51] it be-

45. Instant case at 368.
46. *Id.*
47. *Id.*
48. *Id.* at 335-44.
49. *Id.* at 339.
50. United States v. Seeger, 380 U.S. 163, 173-74 (1965).
51. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 92 (1964). Atheism is the denial of the existence of a "God" or "Supreme Being."

comes evident that the Court in *Seeger* was not concerned with beliefs which deny the existence of a "supernatural power." Conversely, they were only concerned with applicants who believed in some *form* of "supernatural power." Thus a prerequisite to the application of the *Seeger* test is that the registrant has a belief in a "supernatural power," *i.e.,* he must have a belief in some form of religion. If taken in context, the *Seeger* test becomes a test as to the *role* that religious belief plays in the applicant's life, not a test as to the *existence* of a religious belief. With this interpretation of the *Seeger* test, the plurality in the instant case would have found it difficult to establish a basis on which to hold that Welsh qualifies for conscientious objector exemption. This appears to lead to the same result reached by the dissent. Specifically, under the present wording of section 6(j), Welsh does not qualify for conscientious objector exemption. If the plurality had arrived at this conclusion, they may have considered the constitutional issue raised in the concurring opinion, and mentioned in the dissent. As previously discussed, the constitutionality of section 6(j) has been questioned on the ground that it violates the "establishment clause" of the first amendment. Justice Harlan argues that to correct this violation, exemptive coverage should be extended to all conscientious objectors, not limited to religious conscientious objectors.[52] Although the dissenting opinion did not acknowledge the existence of a constitutional conflict, the issue was discussed in hypothetical terms,[53] resulting in a conclusion contrary to Justice Harlan's. The reason for this conflict appears to lie in the interpretation of legislative intent regarding section 6(j). If the intent of Congress was to prevent Welsh and others of similar view from obtaining an exemption based upon their beliefs, as the dissent contended,[54] and the constitutional question is relevant, then the intent of Congress must be honored, and section 6(j) nullified. If, however, as according to Justice Harlan, the intent of Congress was to provide exemptions for *religious* conscientious objectors, then, in order to resolve the conflict and still honor congressional intent, section 6(j) would have to be extended to cover *all* conscientious objectors. It is conjecture to attempt to predict whether the plurality would have, if agreeing to the presence of a constitutional issue, resolved the issue in agreement with Justice Harlan, or turned to the rationale of the dissent. Regardless of what might have occurred, however, the effect of the holding in the instant case is to extend the scope of the coverage of section 6(j) to include any applicant who holds beliefs which operate in his life as religious beliefs operate in the lives of others. The major consideration in future applications for conscientious objector exemption will not be the source of the beliefs which dictate pacifistic principles, but rather the strength of those beliefs and the

52. Instant case at 356.
53. *Id.* at 368.
54. *Id.*

sincerity with which the applicant abides by them. Under these criteria, it is conceivable that an applicant who objects to participation in a particular war, rather than war in general, would also qualify for exemption. If, for example, an applicant sincerely believes that the present war in Viet Nam is immoral based on his personal system of beliefs, and if those beliefs govern his way of life, he would qualify for exemption. Thus, in addition to expanding the scope of exemption to include beliefs of other than traditional religious origin, the instant case may have paved the way for granting exemptions from individual wars or conflicts.

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TAXATION—TAX BENEFIT RULE APPLICABLE TO SECTION 337 LIQUIDATIONS

Taxpayer, Anders, was the sole transferee of the proceeds of the sale of assets of Service Industrial Cleaners, Inc., and as the sole stockholder of the corporation, was liable for tax deficiencies assessed against the corporation. The corporation had distributed the proceeds from the sale of its assets pursuant to a properly executed section 337[1] liquidation plan. The gain from the sale of the corporation's assets, $446,601, was treated by the corporation as gain entitled to non-recognition under the provisions of section 337. Of the gain, $233,000 was allocable to the sale of certain rental items, the cost of which had been fully deducted by the corporation in the year of purchase under section 162 (a).[2] The taxpayer's position was that the proceeds from the sale of previously expensed rental items was gain entitled to non-recognition under section 337. This was contested by the commissioner, who contended that the non-recognition provisions of section 337 were subject to the tax benefit principles,[3] and therefore, the gain from the

1. INT. REV. CODE of 1954, § 337 (a) reads as follows:

§ 337. GAIN OR LOSS ON SALE OR EXCHANGES IN CONNECTION WITH CERTAIN LIQUIDATIONS.

(a) GENERAL RULE.—If—

(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims,

then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

2. *Id.* § 162 (a) reads as follows:

§ 162. TRADE OR BUSINESS EXPENSES.

(a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . .

3. The tax benefit rule states that amounts deducted from ordinary income in one year will be treated as ordinary income in the year of recovery.