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# When Fighting Is Impossible: A Contractual Approach to the Military's Conscientious Objection Rules

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# NOTES

# When Fighting Is Impossible

## A CONTRACTUAL APPROACH TO THE MILITARY'S CONSCIENTIOUS OBJECTION RULES

> Of all the enemies to public liberty war is, perhaps, the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies; from these proceed debts and taxes . . . known instruments for bringing the many under the domination of the few. . . . No nation could preserve its freedom in the midst of continual warfare.
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> —James Madison[1]

> Sometime they'll give a war and nobody will come.
>
> —Carl Sandburg[2]

## I. INTRODUCTION

Presently, the United States stands alone as the world's unquestioned global military leader.[3] Its military presence is felt through over 820 installments in at least 39 countries.[4] The United States' active duty military consists of approximately 1.38 million personnel equipped with the most advanced and effective combat-related technology in the world.[5] In order to maintain and further this global preeminence, the military relies on a constant and substantial influx of new members—men and women willing to dedicate themselves to serving their country, both in times of war and peace. At particular times in the past, most recently during the Vietnam War Era, the armed forces have relied on a

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[1] James Madison, *Political Observations*, *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 491-92 (J.B. Lippincott & Co. 1867).

[2] CARL SANDBURG, THE PEOPLE, YES 43 (Harcourt, Brace & Co. 1964) (1936).

[3] According to the Stockholm International Peace Research Institute, U.S. military defense expenditures reached approximately $547 Billion (USD) in 2007. This number is the highest in the world and accounts for almost half of the entire world's military expenditures as of 2007. The country with the next largest defense budget was the United Kingdom, spending approximately $60 Billion (USD) in 2007. STOCKHOLM INT'L PEACE RESEARCH INST., THE 15 MAJOR SPENDER COUNTRIES IN 2007, *available at* http://www.sipri.org/contents/milap/milex/mex_major_spenders.pdf (last visited May 31, 2009).

[4] OFFICE OF THE DEPUTY UNDER SEC'Y OF DEF. (INSTALLATIONS & ENV'T), DEP'T OF DEF., BASE STRUCTURE REPORT: FISCAL YR. 2007 BASELINE 6 (2007), *available at* http://www.defenselink.mil/pubs/BSR_2007_Baseline.pdf.

[5] DEP'T OF DEF., ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (Aug. 31, 2007), *available at* http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0708.pdf.

draft to fill their ranks, compelling involuntary citizens to become soldiers regardless of those citizens' wishes.[6] In 1973, however, conscription was abolished, leaving voluntary enlistment as the exclusive source of military recruitment.[7] Today, men and women choose to serve in the military, and their enlistment is the product of a contractual agreement.[8] Every year, the United States military actively recruits and enlists thousands of new members.[9]

That is not to say that maintaining current personnel numbers has been easy. Since the Iraq War began in 2003, the number of deserting U.S. soldiers has significantly risen.[10] In the midst of a largely unpopular war abroad,[11] more and more enlisters are now seeking discharge from their military duties, many times on the grounds of conscientious objection.[12] Under military regulation 32 C.F.R. § 75, these men and women are allowed to seek discharge from duty because of their anti-war beliefs.[13] This regulation requires the military to discharge objectors if,

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[6] The Vietnam War draft was the first instance of conscription in the U.S. since World War II. Norton Starr, *Nonrandom Risk: The 1970 Draft Lottery*, J. STATISTICS EDUC. (July 1997), http://www.amstat.org/publications/jse/v5n2/datasets.starr.html.

[7] Thomas W. Evans, *The All-Volunteer Army After Twenty Years: Recruiting in the Modern Era*, 27 ARMY HIST. 40 (1993), *available at* http://www.shsu.edu/~his_ncp/VolArm.html.

[8] For an example of a military enlistment contract, see Armed Forces of the U.S., Enlistment/Recruitment Document, DD Form 4/1 (Aug. 1998), *available at* http://usmilitary.about.com/library/pdf/enlistment.pdf.

[9] DONALD H. RUMSFELD, SEC'Y OF DEF., 2005 ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS 10 (2005), *available at* http://www.dod.mil/execsec/adr2005.pdf; News Release, Dep't of Def., DoD Announces Recruiting and Retention Numbers for January (Feb. 10, 2006), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=9308; News Release, Dep't of Def., DoD Announces Recruiting and Retention Numbers for September (Oct. 11, 2005), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=8944.

[10] *Army Desertion up 80 Percent Since Iraq War*, MSNBC, Nov. 16, 2007, http://www.msnbc.msn.com/id/21836566/.

[11] As of September 2007, an Associated Press poll of U.S. adults showed that only 33% approved of the United States' handling of the Iraq situation, while 65% disapproved. Ipsos Public Affairs, Associated Press-Ipsos Poll, July 31, 2004-Aug. 4, 2008, *available at* http://www.pollingreport.com/iraq.htm.

[12] The Selective Service System defines a conscientious objector as: "one who is opposed to serving in the armed forces and/or bearing arms on the grounds of moral or religious principles." *See* Conscientious Objection and Alternative Service, Select Service System: Fast Facts, http://www.sss.gov/FSconsobj.htm (last visited Apr. 13, 2009). Additionally, Professor Bernard M. Dickens distinguishes between conscientious objection and civil disobedience, saying: "Conscientious objection is refusal to undertake acts that would be lawful to perform . . . whereas civil disobedience is related to refusal to act in compliance with mandatory public laws, such as on conscripted military service." Bernard M. Dickens, *Ethical Misconduct by Abuse of Conscientious Objection Laws*, 25 MED. & L. 513, 514-15 (2006). Thus, to Professor Dickens, there is a legal difference between opposition to mandatory conscription laws, which he classifies as civil disobedience, and opposition to voluntarily-entered military service, which would fall under his definition of conscientious objection. *Id.* However, the law itself does not readily distinguish between the two situations. This Note argues that in the military context, the law should treat these positions differently.

[13] *See* 32 C.F.R. § 75.5 (2006); Harris v. Schlesinger, 526 F.2d 467, 469 (9th Cir. 1975) (recognizing "a national policy . . . not to subject bona fide conscientious objectors to combatant training and service in the armed forces"). As of June 19, 2007, 32 C.F.R § 75 has been removed as part of a Department of Defense exercise to remove CFR sections no longer required to be codified. The corresponding regulation is found at Dep't of Def. Instruction No. 1300.06, Conscientious Objectors (May 5, 2007), *available at* http://www.dtic.mil/whs/directives/corres/pdf/130006p.pdf.

inter alia, their anti-war beliefs are shown to be "sincere and deeply held."[14] While such requirements appear on their face to be straight forward, courts have continually found difficulty both in interpreting and applying these standards when reviewing the military's decisions to deny certain applicants of conscientious objection status.[15]

This Note advocates a perceptional shift in the way such applications for conscientious objection are considered by the military and reviewed by courts. Specifically, it argues that applications for conscientious objection should be assessed under a traditional contractual law paradigm, by importing the doctrine of impossibility as it relates to an individual's fulfillment of military duties. This approach would allow an enlisted member of the military to break his or her contractual obligation to the military if and when fulfillment of that duty becomes impossible due to new or changed circumstances. Such circumstances would include the development of anti-war beliefs that were not present at the time the parties originally contracted.

Part II.A provides background on the military's current conscientious objection rules as set forth in 32 C.F.R. § 75. It details the military's procedures regarding conscientious objection claims, from the filing of a claim by an individual through the military's evaluation and decision-making process, to the judicial system's treatment and review of such military decisions.

Part II.B discusses the current split among courts regarding the proper application of 32 C.F.R. § 75. It outlines the primary split into three camps, which differ regarding what is required of an applicant to successfully claim conscientious objection. It also discusses the possible sources of this divide and the ramifications of this split on how conscientious objectors are treated in various jurisdictions. Part II.B highlights the problems with the approach of two of these camps—namely, what will be termed the "sincerity camp" and the "modified depth of conviction camp"—and the policy issues that accompany these interpretations of the military's discharge rules.

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The language and structure of DoD Instuction 1300.06 is largely the same as its C.F.R. predecessor. For purposes of this Note, 32 C.F.R. § 75 will be referenced in lieu of DoD 1300.06 due to the fact that all case law on the matter references the C.R.F. version exclusively.

[14] *See* 32 C.F.R. § 75(a)(3); *see also infra* Part II.A. DoD Instruction 1300.06 alters this language slightly to: "Whose position is firm, fixed, sincere and deeply held." It is unclear at this time whether this slight alteration in language will have any legal consequences, as courts have yet to address the DoD Instruction when assessing conscientious objection claims.

[15] *See infra* Part II.B. The Seventh Circuit and Ninth Circuit require conscientious objection applicants to hold antiwar beliefs that are both sincere and deeply held. *See* Alhassan v. Hagee, 424 F.3d 518 (7th Cir. 2005); Roby v. U.S. Dep't. of the Navy, 76 F.3d 1052 (9th Cir. 1996). The First Circuit and Eighth Circuit, however, have rejected the "deeply held" requirement, analyzing only whether the applicant's beliefs are sincere. *See* Hager v. Sec'y of the Air Force, 938 F.2d 1449, 1459 (1st Cir. 1991); Kemp v. Bradley, 457 F.2d 627, 629 (8th Cir. 1971). The Fifth Circuit is unclear on whether it upholds the "deeply held" requirement. *See* Kurtz v. Laird, 455 F.2d 965, 967 (5th Cir. 1972) (rejecting depth of conviction as separate requirement). *But see* Lipton v. Peters, No. CIV.SA-99-CA-0235-EP, 1999 WL 33289705, at *2 (W.D. Tex. Oct. 12, 1999) (holding that sincerity and depth of conviction are separate and relevant inquiries).

Part III discusses the fundamentals of contract law, particularly the various theories of contract law and how they apply to today's military/enlister relationship.

Part IV focuses on the impossibility doctrine as a potential contractual defense to performing one's military duties in lieu of the various existing interpretations of the conscientious objection test embodied in 32 C.F.R. § 75. While acknowledging that this approach may, in a sense, beg the essential question by leaving open the issue of what determines when performing one's military duties should be deemed impossible, it is argued that this approach creates a more workable and consistent framework within which to assess conscientious objection claims. This is accomplished by requiring an applicant to prove that, in light of his or her sincere and deeply held anti-war beliefs, partaking in military service is utterly impossible. This "change of heart" or "revelation" that takes place after enlistment constitutes a new or changed circumstance that was unknown to the parties at the time of contracting, thus rendering any contractual obligations null and void.

Finally, Part V argues that this perceptional shift would have the primary effect of acknowledging and more accurately reflecting the contractual nature of today's voluntary military enlistment procedures and the military's reliance on such contractual commitments. In addition, the impossibility defense places an emphasis on the individual conscientious objector's actual ability to partake in military activities, while deemphasizing the role of the *source* of a potential conscientious objector's anti-war beliefs. In doing so, this approach eliminates any religious or nonreligious distinctions put forth by what will be termed the "modified depth of conviction" camp, by requiring the applicant to prove that his or her beliefs are of such strength and depth that performing military duty is impossible, regardless of the source of those beliefs. Additionally, the adoption of this approach would show deference to the military and make clear the appropriateness of the plain language of 32 C.F.R. § 75 by requiring conscientious objection beliefs to be both sincere and deeply held.

## II. BACKGROUND

### *A. The Winding Road to Conscientious Objection*

Initially promulgated in 1971, military regulation 32 C.F.R. § 75 sets forth the conditions under which the military must discharge one of its members due to conscientious objection to war.[16] It says in pertinent part:

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[16] Pursuant to Department of Defense Instruction 1300.06, each branch of the armed forces has implemented its own specific administrative codes and regulations for discharge. Dep't of Def. Instruction No. 1300.06, Conscientious Objectors (May 5, 2007), *available at* http://www.dtic.mil/whs/directives/corres/pdf/130006p.pdf. However, each branch contains a

> (a) Consistent with the national policy to recognize the claims of bona fide conscientious objectors in the military service, an application for classification as a conscientious objector may be approved . . . for any individual: (1) Who is conscientiously opposed to participation in war in any form; (2) Whose opposition is founded on religious training and beliefs; and (3) Whose position is *sincere and deeply held*."[17]

The burden is on the conscientious objector to "establish by clear and convincing evidence that" he or she satisfies each prong of the discharge test.[18] Regarding the first prong, "war in any form" means "*all* wars rather than" any particular conflict.[19] Regarding the second prong, the phrase "[r]eligious training and beliefs" is defined as any belief system, either traditionally religious or simply a non-religious ethical or moral code of conduct.[20]

In order to be granted discharge, a potential conscientious objector must file an application with his or her immediate commanding officer within his or her particular branch of the armed forces.[21] The application is then processed and sent to an agency at department headquarters.[22] In the Army, for example, this agency is called the Department of the Army Conscientious Objector Review Board (DACORB) or Conscientious Objector Review Board (CORB).[23] Once the application has been filed and processed, the person seeking discharge is interviewed by various individuals in an effort to determine

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conscientious objection code that is either identical to, or consistent with, 32 C.F.R. § 75. *See, e.g.*, Dep't of the Navy, Marine Corps Order 1306.16E (Nov. 21, 1986), *available at* http://www.marines.mil/news/publications/Documents/MCO%201306.16E.pdf; BUREAU OF NAVAL PERSONNEL, DEP'T OF THE NAVY, NAVY MILITARY PERSONNEL MANUAL ch. 11, § 1900-010(1)(e) (Apr. 13, 2005), *available at* http://www.npc.navy.mil/NR/rdonlyres/F1C39188-BF0E-41AE-8646-A3B015EADAD7/0/Milpers.pdf; Dep't of the Army, Army Regulation 600-43, Conscientious Objection § 1.5, at 1 (Aug. 21, 2006) , *available at* http://www.apd.army.mil/pdffiles/r600_43.pdf; Dep't of the Air Force, Air Force Instruction 36-3204, Procedures for Applying as a Conscientious Objector § 1.5, at 2 (July 15, 1994), *available at* http://www.e-publishing.af.mil/shared/media/epubs/AFI36-3204.pdf.

[17] 32 C.F.R. § 75.5(a) (emphasis added).

[18] *Id.* § 75.5(d).

[19] *Id.* § 75.5(b)(1) (emphasis added).

[20] *Id.* § 75.5(c). The Supreme Court, in separate opinions, interpreted the term "religious training and belief" broadly so as to include nontraditional as well as traditional religion expression. *See* Welsh v. United States, 398 U.S. 333, 343-44 (1970) (recognizing the validity of deeply held moral convictions, regardless of whether those convictions were tied to the traditional Christian god); United States v. Seeger, 380 U.S. 163, 165-66 (1965) (defining "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation"); *see also* Gillette v. United States, 401 U.S. 437, 449 (1971) (finding that the Military Selective Service Act dealing with conscientious objection does not violate establishment clause by working a *de facto* discrimination among religions).

[21] *See, e.g.*, Dep't of the Army, Army Regulation 600-43, Conscientious Objection § 2-1(a), at 2-3 (Aug. 21, 2006) , *available at* http://www.apd.army.mil/pdffiles/r600_43.pdf. Applications include relevant personal information of the applicant and an optional statement. *Id.* Since all military branches implement similar procedures regarding conscientious objection discharge, the Army and the Department of the Army Conscientious Objector Review Board will serve as primary examples for illustrating discharge protocol.

[22] *See, e.g.*, *id.*

[23] *See, e.g.*, Aguayo v. Harvey, 476 F.3d 971, 974 (D.C. Cir. 2007); Helwick v. Laird, 438 F.2d 959, 962 (5th Cir. 1971).

whether he or she qualifies for conscientious objector status.[24] In an effort to better understand the applicant's moral beliefs and perspectives, these interviewers often include a military unit chaplain.[25] Chaplains must forward the results of their interviews to the DACORB.[26] These results include the chaplain's opinions regarding the source and nature of the applicant's claims, the sincerity and depth of the anti-war beliefs, and any other comments regarding the applicant's general lifestyle and demeanor that are deemed relevant.[27] The chaplain does not, however, explicitly recommend for or against the applicant's conscientious objection discharge.[28]

Applicants are also interviewed by an Army psychiatrist or other medical officer in order to obtain an accurate picture of the applicant's overall physical and mental state.[29] While the psychiatrist must report any findings of psychological disorder, again, no outright recommendation for or against discharge is made to the DACORB.[30]

Other possible interviewers include various higher ranking officials within the applicant's training or battle groups.[31] Ostensibly, these officials have had the opportunity to observe the applicant on a day-to-day basis, and therefore have a basic sense of who the applicant is as a person.[32] Finally, the DACORB will assign its own investigating officer to the applicant's case.[33] This official will conduct an informal hearing with the applicant and collect any other information deemed relevant to the conscientious objection inquiry.[34] During this time, the applicant may submit a personal statement on his own behalf, along with any other evidence, such as recommendations or statements from family and friends.[35]

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[24] Dep't of the Army, Army Regulation 600-43, Conscientious Objection § 2-2(e), at 3 (Aug. 21, 2006), *available at* http://www.apd.army.mil/pdffiles/r600_43.pdf.

[25] *See, e.g.*, *id.*; *see also* Alhassan v. Hagee, 424 F.3d 518, 520-21 (7th Cir. 2005) (applicant met with Army chaplain, psychiatrist, and superiors); Roby v. U.S. Dep't. of the Navy, 76 F.3d 1052, 1054-55 (9th Cir. 1996) (conscientious objection applicant was interviewed by a psychologist and unit chaplain); Kemp v. Bradley, 457 F.2d 627, 628 (8th Cir. 1972) (petitioner interviewed with priest chaplain and other supervising officials).

[26] Dep't of the Army, Army Regulation 600-43, Conscientious Objection § 2-3(a)(2), at 10-11 (Aug. 21, 2006).

[27] *Id.*

[28] *Id.* § 2-3(a)(2)(h).

[29] *Id.* § 2-3(b); *Alhassan*, 424 F.3d at 520-21 (applicant met with psychiatrist and board of superiors).

[30] Dep't of the Army, Army Regulation 600-43, Conscientious Objection § 2-3(b), at 11 (Aug. 21, 2006), *available at* http://www.apd.army.mil/pdffiles/r600_43.pdf.

[31] *Alhassan*, 424 F.3d at 521 (applicant's file was reviewed by applicant's Commanding Officer and the Commandant of the Marine Corps).

[32] *Id.* at 521.

[33] Dep't of the Army, Army Regulation 600-43, Conscientious Objection § 2-4, at 11 (Aug. 21, 2006), *available at* http://www.apd.army.mil/pdffiles/r600_43.pdf.

[34] *Id.* § 2-5.

[35] *Id.*

The compiled information is submitted to the DACORB by the investigating officer, along with the officer's opinion on whether the applicant meets regulation definitions of a conscientious objector and the ultimate recommendation for or against discharge from duty.[36] An applicant may apply for one of two conscientious objector classifications: those willing to perform non-combatant military functions (classed 1-A-O) and those unwilling to serve in any capacity (classed 1-O).[37] Once an applicant has filed for discharge as a 1-O objector, he or she cannot then "compromise" by accepting a classification as a 1-A-O objector if the full application is denied.[38]

The investigating officer must assess an applicant's candidacy in light of military regulation requirements (as originally set out in 32 C.F.R. § 75, and echoed in each military branch's respective codes and guidelines), including whether the applicant's anti-war beliefs are "sincere and deeply held."[39] The terms "sincere" and "deeply held" have traditionally been regarded by the military as separate inquiries.[40] The term "sincere" means a belief is *truly* held. "Sincere" does not necessarily connote "deeply held," which means the belief is *strongly* held.[41] The Ninth Circuit Court of Appeals has explained that sincerity "distinguishes between military personnel who genuinely believe something, and those who lie about their beliefs" while the term "'deeply held' distinguishes, from among those who are telling the truth, those who feel strongly about their belief that participation in war is wrong, and those who do not."[42] The military has strong policy reasons for requiring an applicant's beliefs to be both sincere and deeply held, and

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[36] *Id.* § 2-5(k).

[37] *See* 32 C.F.R. § 75.3(a) (2006); *see also* Aguayo v. Harvey, 476 F.3d 971, 973 (D.C. Cir. 2007).

[38] Dep't of the Army, Army Regulation 600-43, Conscientious Objection § 2-9, at 14-15 (Aug. 21, 2006), *available at* http://www.apd.army.mil/pdffiles/r600_43.pdf.

[39] 32 C.F.R. § 75.5 (a)(3).

[40] *See, e.g.*, Alhassan v. Hagee, 424 F.3d 518, 521 (7th Cir. 2005) (The Marine Corps found that the applicant's anti-war beliefs were sincere, but denied conscientious objector status on the grounds that his views were not deeply held, and thus the applicant did not fall "within the definition of a conscientious objector as provided for in . . . the guidelines which govern classification of conscientious objectors.").

[41] Roby v. U.S. Dep't. of the Navy, 76 F.3d 1052, 1057 (9th Cir. 1996).

[42] *Id.* Factors commonly used to assess whether anti-war beliefs are deeply held include any signs that the views are temporary, infirm, or not fully developed. These signs often include, inter alia, the timing of the application, the amount of time the anti-war beliefs have been held by applicant, and all outward manifestations/steps taken by applicant in accordance with his or her beliefs. *See, e.g.*, *id.* at 1059 (The court found that applicant, who claimed to still be trying to "find" himself, lacked evidence of depth of conviction, saying: "[applicant's] beliefs are based only on his reading two or three books and watching two television documentaries. He does not plan to study further . . . . The only change in lifestyle that he foresees (other than leaving the military) is possibly to write letters for Amnesty International . . . ."); Jashinski v. Holcomb, 482 F. Supp. 2d 785, 793-95 (W.D. Tex. 2006) (The military and court inquired into applicant's changes in lifestyle in accordance with newfound anti-war beliefs. Denying discharge, the court analyzed applicant's statement that she was still "growing up and finding out" what she stood for, determining that it was evidence that her beliefs were "rapidly changing and evolving, rather than firm and fixed.") (internal quotation marks omitted).

some courts have noted that the intent of 32 C.F.R. § 75.5(a)(3) is to prevent already-committed soldiers from breaking their duties based on mere changes of opinion, however sincere they may be at the time at which they are expressed.[43] As Part II.B outlines, however, other courts have disagreed as to whether this military policy should be honored.

### *B. Reviewing the Military's Decision: The Judicial Split*

When the Army denies an application for conscientious objection discharge, its own regulations require the DACORB to provide its reasons for denial to the applicant and to make those reasons part of the record.[44] Once denied conscientious objector status, the applicant may turn to the courts for relief. This is accomplished by petitioning for a writ of habeas corpus, literally claiming that the applicant is being held in custody against his or her will.[45]

It should be noted that conscientious objection discharge is not a constitutionally protected right.[46] Though not required to discharge any current soldier, the military has nonetheless promulgated rules such as 32 C.F.R. § 75 to allow for conscientious objection status.[47] Generally speaking, courts have historically shown deference to military authority[48] and, more specifically, the plain language of 32 C.F.R. § 75.[49]

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[43] *Roby*, 76 F.3d at 1057 ("People sometimes have bursts of passion that amount to sincere convictions about their identities, loves, career choices, political preferences and other important matters . . . all based on little or nothing and changing frequently. The military has a justifiable interest in ensuring that fleeting beliefs do not serve as a basis for ending one's service commitment.").

[44] Dep't of the Army, Army Regulation 600-43, Conscientious Objection § 2-8(d)(3), at 14 (Aug. 21, 2006) , *available at* http://www.apd.army.mil/pdffiles/r600_43.pdf ("If a determination [is made] . . . that the person's request is disapproved, the reasons for this decision will be made a part of the record. It will be provided to the person through command channels.").

[45] 28 U.S.C. § 2241(c)(1) (2000) (The petitioner is "in custody under or by color of the authority of the United States," because he is an enlisted member of the United States Army); *see e.g.*, Aguayo v. Harvey, 476 F.3d 971, 973, 976 (D.C. Cir. 2007) ("[S]ervice members may challenge their custody by petitioning for a writ of habeas corpus in federal court . . . ."); Kwon v. Sec'y of the Army, 2007 WL 1059112, at *1 (E.D. Mich. April 9, 2007). Before habeas petition may be granted, the applicant must first exhaust all administrative remedies. *See* Parisi v. Davidson, 405 U.S. 34, 35 (1972). Alternatively, during the draft era, the military could seek to prosecute conscientious objectors for willful refusal to submit to induction into the armed forces, thus giving those convicted the opportunity to appeal in court and have their conscientious objection applications reviewed. *See, e.g.*, Clay v. United States, 403 U.S. 698, 700 (1971); Gilette v. United States, 401 U.S. 437, 439 (1971).

[46] *See Aguayo*, 476 F.3d at 978 ("In contrast to selective service registrants who request CO [conscientious objector] classification under the draft laws, however, those who have volunteered to serve in the military do not have a statutory right to apply for CO status."); Sanger v. Seamans, 507 F.2d 814, 817 (9th Cir. 1974) ("Discharge of conscientious objectors from military service is required neither by the Constitution nor by statute."). However, once the military has set its own conscientious objection regulations in place, it must follow them. *See* Hollingsworth v. Balcom, 441 F.2d 419, 421-22 (6th Cir. 1971) (as an administrative agency, the military must follow its own rules in order "to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures").

[47] *See* 32 C.F.R. § 75 (2006).

[48] For a more in-depth examination of the Military Deference Doctrine, see John F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66

This judicial deference to military decisions is embodied in the standard of review employed in such habeas cases. Courts review the military's factual findings of whether an applicant's beliefs constitute conscientious objection for a *basis in fact*.[50] This review has been described as the "narrowest known to the law."[51] While courts are left with little room to overturn the factual determinations of the military, they may review questions of law regarding the proper interpretation and application of the military's conscientious objection tests *de novo*.[52] This distinction between questions of law and fact has important consequences; if the military determines that an applicant does not qualify for conscientious objection on the grounds that his or her anti-war views, while sincere, are not deeply held, a reviewing court must apply *basis in fact* deference to the determination that the depth of conviction requirement was not met.[53] However, the court may decide not to apply the depth of conviction requirement at all in assessing a conscientious objection claim, determining that sincerity is all that is required of an applicant's anti-war beliefs to qualify for discharge.[54] In such situations, the applicant's habeas corpus petition is granted, thus reversing the military's decision to deny discharge on the grounds that the applicant satisfied all elements of the military's own conscientious objection test.[55]

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MD. L. REV. 668, 675 (2007) ("[T]he [Supreme] Court has found it appropriate to defer in reviewing regulations adopted by military officials acting as the proxies of those to whom control of the national defense has been constitutionally committed . . . .").

[49] *See* Meinhold v. U.S. Dep't of Def., 34 F.3d 1469, 1476-77 (9th Cir. 1994) ("As we consider . . . [32 C.F.R. § 75] in this case . . . we are guided by another long-settled rule: The military's 'considered professional judgment,' is 'not lightly to be overruled by the judiciary . . . .' It is difficult to conceive of an area of governmental activity in which the courts have less competence. . . . Our review, therefore, is as deferential as our constitutional responsibilities permit.") (internal citations and quotations omitted); *see also* Roby v. Dep't. of the Navy, 76 F.3d 1052, 1058 (9th Cir. 1996) ("Where a regulation is not being challenged on constitutional grounds we owe the military great deference."). For an overview of the existence of and reasons for the Supreme Court's deference to the military since WWI, see Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military*, *1918-2004*, 65 MD. L. REV. 907 (2006).

[50] Hopkins v. Schlesinger, 515 F.2d 1224, 1228 (5th Cir. 1975) ("The Army's determination that a serviceman does not meet its test of a conscientious objector is final if there is a basis in fact for it."). This is not to say that *basis in fact* review lacks all bite. As the First Circuit states, the military may not deny conscientious objection status merely because it disbelieves the applicant; it must show "hard, reliable, provable facts" for denying discharge in order to be afforded *basis in fact* review. Hager v. Sec'y of the Air Force, 938 F.2d 1449, 1454 (1st Cir. 1991). These facts must be "discoverable from the record." *Id*. at 1455.

[51] Dewalt v. Commanding Officer, Fort Benning, GA, 476 F.2d 440, 442 (5th Cir. 1973); Helwick v. Laird, 438 F.2d 959, 962-63 (5th Cir. 1971) ("[O]ur scope of review is limited to ascertaining whether there is any basis in fact for the Army's finding that an individual has not presented a valid conscientious objector claim.").

[52] *See* Morgan v. Dretke, 433 F.3d 455, 457 (5th Cir. 2005).

[53] *See* Helwick v. Laird, 438 F.2d 959, 962-63 (5th Cir. 1971).

[54] The court may reach this conclusion for reasons discussed *infra* Part II.B. *See also Helwick*, 438 F.2d at 963.

[55] There are several examples of courts reversing discharge denials due to lack of depth of conviction because the courts chose not to apply the depth of conviction requirement. *See, e.g.*,

The Supreme Court tackled the issue of reviewing conscientious objection decisions in a series of cases during the Vietnam War Era of the 1960s and 70s.[56] The Court in *United States v. Clay* set forth what it saw as the appropriate test for determining the validity of an individual's conscientious objection claim.[57] The Court said that to qualify for conscientious objection, an applicant "must show that he is conscientiously opposed to war in any form . . . [h]e must show that this opposition is based upon religious training and belief . . . [a]nd he must show that this objection is sincere."[58] Notably, the "deeply held" aspect of the current 32 C.F.R. § 75 test's third prong was absent. Underscoring this omission, the Supreme Court in *Seeger v. United States* stated that in determining whether a particular applicant qualified for conscientious objection discharge, "[the] task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in [the applicant's] own scheme of things, religious."[59] Furthermore, the Court in *Witmer v. United States* stated that the "ultimate question" is the applicant's "sincerity . . . in objecting, on religious grounds, to participation in war in any form."[60]

Despite the Supreme Court's omission of the depth of conviction test in these cases, the Court in *Welsh v. United States* later appeared to require conscientious objectors' beliefs to be deeply held.[61] Unlike *Clay*, the *Welsh* court did not explicitly enumerate the test for conscientious objection. The Court did, however, hint that depth of conviction was a required component of conscientious objection claims, saying:

> [Applicant's] objection to participating in war in any form could not be said to come from a 'still, small voice of conscience'; rather, for [him] that voice was so loud and insistent that . . . [he] preferred to go to jail rather than serve . . . . There was never any question about the sincerity and *depth* of . . . [his] convictions . . . .[62]

Additionally, the *Welsh* Court named two groups of applicants that may be denied conscientious objector status: those "whose objection to war does not rest at all upon moral, ethical, or religious principle . . . ." and "those whose [anti-war] beliefs are not *deeply held*."[63] Thus, an applicant who lacked traditional religious beliefs could still be awarded conscientious objector status as long as the applicant "deeply" felt anti-

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*Hager*, 938 F.2d at 1459; Kemp v. Bradley 457 F.2d 627, 629-30 (8th Cir. 1972); *Helwick*, 438 F.2d at 963-64.

[56] Clay v. United States, 403 U.S. 698, 698 (1971); Gillette v. United States, 401 U.S. 437, 439 (1971); Welsh v. United States, 398 U.S. 333, 335-36 (1970); *see also* Witmer v. United States, 348 U.S. 375 (1955).

[57] *Clay*, 403 U.S. at 700.

[58] *Id.* at 700; *see also Gillette*, 401 U.S. at 450; United States v. Seeger, 380 U.S. 163, 176 (1965); *Witmer* 348 U.S. at 376.

[59] *Seeger*, 380 U.S. at 185.

[60] *Witmer*, 348 U.S. at 381.

[61] *Welsh*, 398 U.S. at 342.

[62] *See id.* at 337 (emphasis added).

[63] *See id.* at 342 (emphasis added).

war convictions that were "purely ethical or moral in source and content."[64] Thus, the *Welsh* court, by extending conscientious objection status to anyone with deeply held beliefs regardless of whether they were religious, ethical, or moral in nature, appeared to place emphasis on the *strength* of the applicant's beliefs rather than the *source* of those views.

The ambiguous and seemingly contradictory sentiments expressed by the Supreme Court regarding the depth of conviction prong have created a rift among the Circuits. Courts generally fall into one of three camps regarding the application of the military's conscientious objection regulations: the first, treating the depth of conviction test as distinct from, and an additional inquiry to, the sincerity test;[65] the second, removing the depth of conviction test as either redundant, by equating it with the sincerity test, or unnecessary due to its subjectivity and difficulty of application;[66] and the third, employing the depth of conviction test solely as a means of evaluating an applicant's non-religious moral or ethical anti-war beliefs.[67]

The first school of thought, which will be referred to as the "depth of conviction camp," has been adopted primarily by the Ninth Circuit and Seventh Circuit.[68] The court in *Roby v. U.S. Department of the Navy* recognized the need for conscientious objection applicants' anti-war beliefs to be both sincere *and* deeply held, stating that the Ninth Circuit has "applied all elements of the military's conscientious objector test" for decades, and thus will continue to apply the "requirement that the applicant show that his beliefs are deeply held."[69] In its critique of other circuits which have failed to uphold the "depth of conviction" requirement, the *Roby* court stated that it was "puzzled" at "the lack of deference to the military's own regulations" in the circuits rejecting the depth of conviction test.[70] *Roby* stated that these opposing circuits fail to consider the issue of "whether the court has authority to disregard the military's test for conscientious objectors, but disregards it nonetheless."[71]

The Seventh Circuit has also recognized the military's need for conscientious objection beliefs to be deeply held.[72] The court in *Alhassan v. Hagee* claimed that courts do not have the authority to refuse to follow

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[64] *See id.* at 340.

[65] *See infra* notes 68-72 and accompanying text.

[66] *See infra* notes 74-84 and accompanying text.

[67] *See infra* notes 85-89 and accompanying text; *see also* Hackett v. Laird, 326 F. Supp. 1075 (W.D. Tex. 1971).

[68] *See, e.g.*, Roby v. U.S. Dep't. of the Navy, 76 F.3d 1052 (9th Cir. 1996); Alhassan v. Hagee, 424 F.3d 518 (7th Cir. 2005).

[69] *Roby*, 76 F.3d at 1058; *see also* U. S. v. Coffey, 429 F.2d 401, 404 (9th Cir. 1970) (saying only applicants whose anti-war beliefs are not "deeply held" may be denied conscientious objector status).

[70] *Roby*, 76 F.3d at 1056.

[71] *Id.*

[72] *See Alhassan*, 424 F.3d at 524-25.

the plain language of 32 C.F.R. § 75.[73] Thus, some courts have embraced the depth of conviction requirement and found the act of disregarding the test by other courts to be an inappropriate use of judicial discretion. The depth of conviction camp applies the most stringent standard for proving conscientious objection: that an applicant's views be both sincere and deeply held.

The second school of thought, which will be referred to as the "sincerity" camp, has held that applicants should not have to prove their anti-war beliefs are deeply held. This camp believes, for varying reasons, that the sincerity test is the only relevant inquiry required for accurately assessing one's conscientious objection to war.[74] This position has been explicitly adopted by the First Circuit and the Eighth Circuit.[75] While currently unclear, the Fifth Circuit has possibly accepted this view as well.[76] In *Hager v. Secretary of the Air Force*, the First Circuit opined that the depth of conviction test lacked an objective framework within which to work, stating that the inquiry "becomes an impermissible subjective look into . . . [one's] heart and soul."[77] The *Hager* court relied on the language of Supreme Court cases as the source of this interpretation.[78] Similarly, in *Kemp v.* Bradley, the Eighth Circuit found practical difficulty in applying the depth of conviction requirement, stating: "'[d]epth of conviction' requires theological or philosophical evaluation. We think it unwise to adopt this more complex concept as the requirement . . . ."[79] Finally, some Fifth Circuit decisions seem to characterize the depth of conviction test as redundant *vis-à-vis* the sincerity test,[80] as do the decisions of various other lower courts.[81]

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[73] *Id.* at 525 ("[J]udges are not military leaders and do not have the expertise nor the mandate to govern the armed forces.").

[74] For a survey of the reasons why courts find the depth of conviction test irrelevant, see Hager v. Sec'y of the Air Force, 938 F.2d 1449, 1459 (1st Cir. 1991).

[75] *See id.*; Kemp v. Bradley, 457 F.2d 627 (8th Cir. 1972).

[76] The court in *Hager* characterized the Fifth Circuit's position as understanding "depth of conviction to be equivalent to sincerity." *Hager*, 938 F.2d at 1459; *see also* Helwick v. Laird, 438 F.2d 959, 964 (5th Cir. 1971) (saying that "[d]epth and maturity" of views are not prerequisites to conscientious objection, so long as the claimant is sincere; conscientious objection has "no necessary relation to intellectual sophistication").

[77] *Hager*, 938 F.2d at 1459.

[78] *Id.* The court cited *Witmer v. United States*, 348 U.S. 375, 381 (1955) (stating that the "ultimate question" is applicant's "sincerity . . . in objecting, on religious grounds, to participation in war in any form"), and *United States v. Seeger*, 380 U.S. 163, 185 (1965) (stating that sincerity test is the "crucial issue"). *Hager*, 938 F.2d at 1459.

[79] *Kemp*, 457 F.2d at 629.

[80] *See* Kurtz v. Laird, 455 F.2d 965, 967 (5th Cir. 1972) (The Army's denial of conscientious objector status on the grounds that the applicant's anti-war beliefs, while sincere, were not deeply held was reversed by the court, which said: "[I]n this case we can ascribe no other meaning to the phrase 'lacks the depth of conviction required,' than that . . . [applicant] lacks sincerity. We find no basis in fact in the record to support a conclusion of insincerity."). The *Kurtz* court proceeded to describe the depth of conviction test as "a nebulous concept" and suggested that the test was being used by the Army as a "catchall" or "rubber stamp" to deny conscientious objection applications. *Id.* at 967 n.3 (quoting Quamina v. Sec'y of Def., No. SA 71-CA-155 (W.D. Tex. 1971)).

According to the depth of conviction camp, the positions of these circuits are problematic. As the Ninth Circuit in *Roby* argued, the fact that a rule is "complex" or "difficult to apply" does not provide an adequate reason for its rejection.[82] Additionally, the depth of conviction camp argues that the sincerity camp, by promoting an analysis that is contrary to the plain language of 32 C.F.R. § 75[83] and its various military branch progeny, ignores the history of judicial deference given to the military regarding its own regulations and procedures.[84] Compared to the depth of conviction camp, the sincerity camp employs a less stringent standard for proving conscientious objection; an applicant must merely prove that his or her anti-war beliefs are sincere.

The third school of thought, which will be referred to as the "modified depth of conviction" camp, limits the use of the depth of conviction test to instances where the conscientious objection applicant's anti-war views do not stem from traditional religious sources.[85] The modified depth of conviction camp is not representative of any whole circuits; rather, it is a school of thought that emerges sporadically in various district courts.[86] While this camp appears to directly contradict the plain language of 32 C.F.R. § 75,[87] it too seems to rely on Supreme Court precedent as its source.[88]

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[81] Chapin v. Webb, 701 F. Supp. 970, 978 (D. Conn. 1988) ("[T]he Navy's statement that continued service would not deny petitioner 'rest or peace' is speculative" and was not an appropriate consideration in determining "a conscientious objector discharge."); Masser v. Connolly, 514 F. Supp. 734, 740 (E.D. Pa. 1981) ("[T]here is no requirement that an applicant for a conscientious objector discharge must show that continued service would 'deny [him] rest and peace.' Petitioner need only show that he is sincere in his opposition to war in any form.") (second alteration in original); Reinhard v. Gorman, 471 F. Supp. 112, 113 (D.D.C. 1979) (saying "lack of philosophical depth . . . cannot be equated with insincerity of belief").

[82] *See* Roby v. U.S. Dep't. of the Navy, 76 F.3d 1052, 1057 (9th Cir. 1996) ("[I]t is not clear that we have the power to set aside a regulation based merely on its subjectivity or difficulty of application. We do not believe that these are sufficient grounds for ignoring our usual deference to the military's internal regulations.").

[83] That is, the conscientious objectors must have antiwar beliefs that are both "sincere and deeply held." 32 C.F.R. § 75.5(a)(3) (2006).

[84] *Roby*, 76 F.3d at 1056 ("We are puzzled at the lack of deference to the military's own regulation in . . . [the First and Eighth Circuits]. Neither opinion considers whether the court has authority to disregard the military's test for conscientious objectors, but disregards it nonetheless."); Alhassan v. Hagee, 424 F.3d 518, 525 (7th Cir. 2005) ("[J]udges are not military leaders and do not have the expertise nor the mandate to govern the armed forces.").

[85] *See* Hackett v. Laird, 326 F. Supp. 1075, 1078 (W.D. Tex. 1971) ("Therefore, it would seem that where one's objection to participation in war in any form is based upon traditional religious beliefs, 'depth' no longer serves as a meaningful criteria.").

[86] *See id.* ("[D]epth of conviction[] is a verbalism without any real meaning . . . . Therefore, it would seem that where one's objection to participation in war in any form is based upon traditional religious beliefs, 'depth' no longer serves as a meaningful criteria."). The *Hackett* court, having found that the depth of conviction test is superfluous in the case of anti-war beliefs grounded in traditional religion, concluded that: "'Depth' is used as a measuring device to determine the degree of or intensity of 'Sincerity' and only applies in cases where conscientious objection does not arise from a traditional religious belief." *Id.*

[87] 32 C.F.R. § 75.5 (a)(3) ("[A]n application for classification as a conscientious objector may be approved . . . for any individual . . . [w]hose position is sincere and deeply held.").

[88] This position represents a crucial misreading of Supreme Court precedent. While the Court stated that military regulations "exempt[] from . . . service all those whose consciences,

This position appears to be as problematic, if not more so, than that of the sincerity camp. It draws distinctions between anti-war beliefs that are rooted in traditional religious doctrine and those that stem from nonreligious moral and ethical codes of conduct, raising potential establishment clause conflicts.[89] This distinction is drawn by demanding a heavier burden of proof (i.e., satisfying the sincerity and deeply held tests) from those with nonreligious anti-war beliefs, while requiring religious applicants to meet the sincerity standard alone. This interpretation allows religious applicants to essentially bypass the depth of conviction test by invoking the name of traditional religion. It is precisely this sort of distinction that the *Welsh* court sought to avoid.[90] Thus, the stringency of this camp's conscientious objection requirements varies depending on the type of anti-war beliefs being claimed by the particular applicant.

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spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war," Welsh v. United States, 398 U.S. 333, 344 (1970), this sentence takes the "deeply held" requirement, separates it from the sincerity requirement, and inserts it directly in the "moral, ethical, or religious beliefs" requirement. Some subsequent courts have followed this lead, requiring that an applicant show: "(1) . . . he is opposed to war in any form; (2) . . . his objection is grounded in deeply held moral, ethical, or religious beliefs; and (3) . . . his convictions are sincere." DeWalt v. Commanding Officer, Fort Benning, GA., 476 F.2d 440, 442 (5th Cir. 1973). This subtle restating of the test has opened the door for courts to consider traditional religious convictions to be presumptively deeply held, by interpreting the phrase "grounded in deeply held moral, ethical, *or* religious beliefs," *id.*, to mean "grounded in religious beliefs or deeply held moral or ethical beliefs." *See supra* note 74 and accompanying text. This reading is bolstered by the language in *Witmer*, stating that sincerity is the "ultimate question" when dealing with "religious" beliefs. Witmer v. United States, 348 U.S. 375, 381 (1955). Read together, *Welsh* and *Witmer* may suggest that depth of conviction is only relevant when assessing non-religious anti-war views. However, contrast this reading with other language in *Welsh*, which says that conscientious objection, in order to comport with the First Amendment, must be "neutral" and include equally those whose beliefs emanate from both religious and non-religious sources. *Welsh*, 398 U.S. at 356-61. Thus, it appears the Court was ultimately requiring beliefs to have strength and depth, regardless of whether they were traditionally religious or not.

[89] The Establishment Clause of the First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I; *see also* Kent Greenawalt, *Moral and Religious Convictions as Categories for Special Treatment: The Exemption Strategy*, 48 WM. & MARY L. REV. 1605, 1629, 1635-37. Professor Greenawalt discusses the nexus of individual morality and the law, concluding that:

> [C]ourts should recognize a principle of prima facie equality between religious and nonreligious beliefs and activities, such that the government cannot treat religious activities more favorably than otherwise similar nonreligious ones, *unless* it has some substantial reason to do so *other than* a theological premise or popular opinion that religious beliefs and actions are more deserving than nonreligious views.

*Id.* at 1636 (emphases in original). Thus, according to Greenawalt, the Establishment Clause prohibits the law from favoring one form of religious expression over similar, nonreligious expression.

[90] *See Welsh*, 398 U.S. at 342-44; United States v. Seeger, 380 U.S. 163, 187 (1965). In these cases, the Supreme Court held that non-traditionally religious beliefs must be deeply held (just as traditionally religious beliefs must be), in order to eliminate the favoring by courts of any one religion, thus preventing the drawing of distinctions between religious and non-religious views. Modified depth of conviction courts have misinterpreted this Supreme Court language as requiring *only* non-traditionally religious views need be deeply held. *Cf.* Greenawalt, *supra* note 89, at 1626-27.

Therefore, the state of the law regarding conscientious objection to military duty is uncertain to say the least. With little substantial guidance from the Supreme Court on the issue, individual circuits have been free to apply the military's conscientious objection discharge regulations in a number of ways.[91] This has resulted in disparate treatment of conscientious objection claims by different courts, and this lack of uniformity may intensify in coming years as the United States' military activity abroad becomes more prolific.[92] It is time to set a clear and appropriate precedent. This precedent should take into account the contractual character of today's voluntary military enlistment agreements. Additionally, it should be consistent with the notions of judicial deference to the military regarding military matters and the constitutional view of treating non-religious ethical beliefs as equivalent to traditionally religious beliefs in terms of the amount of protection afforded to them by courts. Parts III advocates for such a shift, towards the application of traditional contract law to the military/enlister relationship.

## III. APPLYING CONTRACT LAW TO CONSCIENTIOUS OBJECTION

The Law of Contracts governs all aspects of human exchange.[93] Typically, these exchanges involve goods and services,[94] but may also include the exchange of promises.[95] Generally speaking, the tenets of contract law determine which of these exchanges create a cognizable legal duty between or among the exchanging parties.[96] While there have been many suggested theories for determining which obligations merit legal force and which do not, each theory of contract presents its own advantages and shortcomings.[97]

These theories may be applied to a given contractual relationship for the purpose of assessing the agreement's legitimacy as a legally-

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[91] *See supra* Part II.B.

[92] U.S. military expenditures have been steadily increasing since 1998 and have increased 2.84% from 2006 to 2007. *See* Christopher Hellman, *The Runaway Military Budget: An Analysis*, WASH. NEWSLETTER (Friends Comm. on Nat'l Legislation, Washington, D.C.), Mar. 2006, at 3, *available at* http://www.fcnl.org/now/pdf/2006/mar06.pdf (2005 data); Friends Comm. on Nat'l Legislation, Where Do Our Income Tax Dollars Go?, (Feb. 2008), http://www.fcnl.org/pdfs/taxDay08.pdf (2007 data); Chris Hellmen, Ctr. for Arms Control & Non-Proliferation, The FY 2007 Pentagon Spending Request (Feb. 5, 2006), http://www.armscontrolcenter.org/policy/securityspending/articles/fy07_dod_request/index.html (2006 & 2007 data); Chris Hellmen, Ctr. for Arms Control & Non-Proliferation, The FY 2007 Pentagon Spending Request (Feb. 5, 2007), http://www.armscontrolcenter.org/policy/securityspending/articles/fy08_dod_request/index.html (2008 data).

[93] MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 1 (5th ed. 2006).

[94] *Id*.

[95] *Id*. at 15.

[96] Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 269 (1986) ("We look to contract theory, in particular, to tell us which interpersonal commitments the law ought to enforce.").

[97] Some of the more commonly offered approaches include the will, reliance, efficiency, fairness, bargain, and consent theories. *Id*. at 270-77.

binding instrument.[98] Generally, courts implicitly use a combination of these approaches in order to analyze different angles of a contractual dispute.[99] This contractual approach is directly applicable to the military/enlister relationship. As discussed in Part I, the essential character of the modern military recruit is quite different than that of the Vietnam War Era draftee.[100] The draft has since been abolished and compulsory military service no longer exists.[101] Today, men and women voluntarily choose to serve their country, and do so by entering a contractual agreement upon enlistment in which they certify to have absolutely no conscientious objection to war.[102] While these enlisters receive training and education at the government's (and thus taxpayers') expense, the military has justifiable reasons for wanting to prevent these men and women from abusing conscientious objection discharge rules.[103] Surprisingly, there is a paucity of cases which address at length this fundamental change in the nature of the conscientious objector from mandatory draftee to contractual volunteer.[104]

After applying the various theories of contract law to the issue of conscientious objection, it is clear that the modern military/enlister relationship is one deserving of formal legal protection. By signing an agreement, the military enlister has outwardly manifested a subjective

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[98] *Id*.

[99] *Id*.

[100] *See supra* notes 6-8 and accompanying text.

[101] *See supra* notes 6-8.

[102] *See* Armed Forces of the U.S., Enlistment/Recruitment Document, DD Form 4/1 (Aug. 1998), *available at* http://usmilitary.about.com/library/pdf/enlistment.pdf. For an example of modern military enlistment contract, see Armed Forces of the U.S., Enlistment/Recruitment Document, DD Form 4/1 (Aug. 1998), *available at* http://usmilitary.about.com/library/pdf/enlistment.pdf ; *see also* Alhassan v. Hagee, 424 F.3d 518, 520 (7th Cir. 2005); Roby v. U.S. Dep't of the Navy, 76 F.3d 1052, 1054 (9th Cir. 1996) (both cases illustrating examples of applicants who, at time of signing enlistment contract, guaranteed, in no uncertain terms, that they were non-conscientious objectors); Jashinski v. Holcomb, 482 F. Supp.2d 785, 787 (W.D. Tex. 2006). In *Jashinski*, the applicant signed an Army National Guard enlistment contract, which contained the question "Are you now or have you ever been a conscientious objector?" *Id.* at 787. The applicant answered "No." *Id.*

[103] For examples of conscientious objection abuse, see DeWalt v. Commanding Officer, Fort Benning, Ga., 476 F.2d 440, 442 (5th Cir. 1973) (applicant claimed objector status only after receiving education and training at government's expense); Kwon v. Secretary of the Army, No. 06-14825, 2007 WL 1059112, at *1 (E.D. Mich. Apr. 9, 2007) (petitioner filed for objector status upon graduation from medical school, for which Army had paid approximately $106,000); Lipton v. Peters, No. CIV.SA-99-CA-0235-EP, 1999 WL 33289705, at *1 (W.D. Tex. Oct. 12, 1999) (applicant filed for conscientious objector discharge three days before completing medical school at the expense of the military).

[104] *See* Aguayo v. Harvey, 476 F.3d 971, 978 (D.C. Cir. 2007) ("[J]udicial precedents involving claims to exemption from entry into military service because of conscientious objection are applicable to requests for discharge on the same ground by those who voluntarily entered the service."). *But see Alhassan*, 424 F.3d at 524 (distinguishing between draftees and enlisters, and finding that precedent regarding draftees was not applicable in the case of an applicant who voluntarily signed a document stating that he or she had no "firm, fixed, and sincere objection to participation in war in any form or to the bearing of arms because of religious belief or training") (internal quotations omitted).

intent to be bound by an obligation to the military.[105] This manifestation takes the form of a signed enlistment contract[106] and accompanying statement, whereby the enlister states that he or she does not have, nor ever had, an objection to the participation in war in any form.[107] Thus, the enlister is asked to explicitly announce that he or she is not a conscientious objector at the time of entering service.[108] In addition, the enlister makes a promise to render present and future services to the military.[109] More specifically, the enlister agrees to follow military enlistment procedures, to comply with training and other requirements, and to be available to serve in whatever capacity agreed upon for a pre-determined period of time.[110] The military in turn reasonably relies on such outward manifestations by the voluntary enlister.[111] In exchange for the enlisters' promises, the military trains, houses, and many times educates these enlisters.[112] The military also provides other benefits once the enlister has retired from active duty.[113]

While not a topic of discussion for this Note, there may be potential asymmetry regarding the parties' respective bargaining power.[114] Under a bargain theory model of contract law, however, adequate consideration is given by both sides of the agreement.[115] The enlister's promise to serve induces the performance of the military to provide benefits.[116] Likewise, such performance by the military (or promise of performance) induces the enlister to pledge his time and

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[105] *See* Barnett, *supra* note 96, at 272. Barnett outlines the will theory of contracts, concluding that legal force should be given to the subjective intent of contracting parties as expressed by their outwardly-manifested actions.

[106] Armed Forces of the U.S., Enlistment/Recruitment Document, DD Form 4/1 (Aug. 1998), *available at* http://usmilitary.about.com/library/pdf/enlistment.pdf.

[107] In the Army, for example, the recruit must sign Army Regulation Form 3286, which includes the following paragraph: "I am not conscientiously opposed by reason of religious training or belief to bearing arms or to participation or training for war in any form." Dep't of the Army, DA Form 3286-67, Statements of Enlistment (June 1991).

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] Barnett, *supra* note 96, at 274. Reliance theories of contract lend legal force to an agreement that gives rise to one party's "foreseeable" or "justifiable" reliance on the promise of another.

[112] Pursuant to the Montgomery G.I. Bill, voluntary enlisters who meet certain active duty requirements entitled to educational benefits at the government's expense. Montgomery GI Bill: Active Duty: (U.S. Dep't of Veterans Affairs), http://www.gibill.va.gov/pamphlets/CH30/CH30_Pamphlet_General.htm (last visited Apr. 13, 2009). For detailed information on benefits for military service, see Military Benefits, Military.com, http://www.military.com/benefits (last visited on May 31, 2009).

[113] *See supra* note 112.

[114] *See* Aguayo v. Harvey, 476 F.3d 971, 974 (D.C. Cir. 2007) (applicant claimed to have been "misled by the recruiter, and [that] he expected to work in a hospital"). However, this type of claim does not seem to occur often in conscientious objection cases.

[115] Barnett, *supra* note 96, at 287. Under this theory, the premium is placed on mutuality: "what solely matters is that each person's promise or performance is induced by the other's." *Id.* at 287. One criticism of this theory is that by relying on the formal component of consideration, bargain theory neglects to enforce informal, yet otherwise serious promises between fully-intending parties. *Id.* at 289.

[116] *See supra* 112.

surrender his legal freedom.[117] Thus, whether the will, reliance, or bargain theory of contract is employed, the result is a fully formed and binding agreement between the military and the voluntary enlister that appears worthy of full legal force and protection. Once an exchange is legally protected, the contractual obligations of the parties may be excused only if certain contractual defenses are raised and satisfied.[118] Part IV introduces and advocates for one such defense in the context of conscientious objection: the doctrine of impossibility.

## IV. WHEN MILITARY DUTY IS IMPOSSIBLE

Once a legal agreement has been established between an enlister and the military, there are several ways in which the contractual obligations of one or both parties may be excused.[119] These methods include the contractual *defenses* of duress, incapacity, fraud, and unconscionability,[120] and the contractual *excuses* of mistake and impossibility.[121] Unlike the defenses, which deal primarily with how the actions of the contracting parties support or fail to support a breach by one side of an agreement, the contractual excuses contemplate situations in which some outside event serves to explain and/or justify a party's contractual breach.[122] This Note attempts to apply the excuses doctrine to the military/enlister relationship.

First, the doctrine of mistake does not adequately fit this relationship. As demonstrated in the seminal *Peerless* ships case,[123]

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[117] *See* Armed Forces of the U.S., Enlistment/Recruitment Document, DD Form 4/1 (Aug. 1998), *available at* http://usmilitary.about.com/library/pdf/enlistment.pdf; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981). In order to induce more enlisters to join, the military has had to increase incentives targeted at voluntary enlisters. Fewer Army Recruits Have High School Diplomas, MSNBC, Jan. 22, 2008, http://www.msnbc.msn.com/id/22779968/ ("Strained, in part, by military operations in Afghanistan following the Sept. 11, 2001, terrorist attacks and the 2003 invasion of Iraq, the military has had to increase the number of waivers and raise enlistment bonuses to fill its ranks.").

[118] RESTATEMENT (SECOND) OF CONTRACTS §§ 152-177, 261-272 (1981).

[119] *Id.*

[120] These defenses arise when a contract, through its formation, is deemed to be fundamentally unfair. CHIRELSTEIN, *supra* note 93, at 74-93. These doctrines are inapplicable to the case of the military/enlister agreement, which is not seen as fundamentally unfair, either by its terms or general formation.

[121] *Id.* at 155.

[122] *Id.*

[123] CHIRELSTEIN, *supra* note 93, at 36-38. (citing Raffles v. Wichelhaus, (1864) 159 Eng. Rep. 375 (L.R. Exch.)). In this case, the plaintiff agreed to sell bales of cotton to defendant with payment to be made after the arrival of the cotton in Liverpool. The agreement between the parties stated that the shipment was to arrive on the ship named *Peerless* that was sailing from Bombay. *Id.* at 36. However, there were two different ships named *Peerless* that regularly sailed from Bombay to Liverpool, one leaving in October and the other leaving in December. While plaintiff shipped the cotton on the December *Peerless*, the defendant refused to accept the cotton, arguing that the agreement was that the cotton would be shipped in October. *Id.* at 36-37. The court concluded that there was no binding contractual agreement between the parties. Thus, since the parties ultimately meant two different ships, there was no "*consensum ad idem*" (agreement as to the matter). *Id.* at 37 (emphasis added) (internal quotation marks omitted).

mistake is invoked in situations where the parties "misunderstand each other's initial intentions" and, as a result, find "that their apparent relationship does not exist and never did."[124] Such situations undermine the will and bargain theories of contract, as there is no mutually understood exchange of inducements between the parties.[125] This is not true of the military/enlister relationship. Both parties, at the time of contracting, are presumably well aware of each other's intentions.[126] For the military to claim any mistake is absurd since it is the party that drafted the actual written agreement.[127] On the other hand, an enlister's claim of mistake would have no merit unless it is accompanied by an additional defense claim such as fraud or unconscionability because, unless the enlister was somehow deceived or pressured into believing the terms of the agreement were different than those contained in the actual contract, a claim of mistake is simply not supported.[128] Generally, voluntary enlisters are made privy to what is being signed and know the consequences of such signing. Failure to make oneself aware of these facts may be considered negligence or lack of due care.[129] Thus, the mistake doctrine is not a viable contractual escape to military duty for the conscientious objector.

The doctrine of impossibility, on the other hand, may provide an appropriate defense to the military/enlister contractual agreement. Impossibility deals with the reality that human foresight is limited, and thus not all future events can be accurately contemplated by a contracting party at the time of negotiation.[130] The *Restatement (Second) of Contracts*, section 261 states that once a contract is formed, a party's performance "is made impracticable without his fault by the occurrence

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[124] *Id.* at 155.

[125] Barnett, *supra* note 96, at 271-72, 287.

[126] According to the military's own website, military.com, the first step for a person hoping to enlist is to "Learn about the military." 10 Steps to Joining the Military, http://www.military.com/Recruiting/Home/ (last visited Apr. 13, 2009) (providing detailed information about the military recruiting process).

[127] *See* Armed Forces of the U.S., Enlistment/Recruitment Document, DD Form 4/1 (Aug. 1998), *available at* http://usmilitary.about.com/library/pdf/enlistment.pdf.

[128] Courts generally decline to order cancellation of a contract due to unilateral mistake "unless some special ground for the interference of a court of equity is shown." Bishop v. Bishop, 961 S.W.2d 770, 775 (Ark. 1998); 13 AM. JUR. 2D *Cancellation of Instruments* § 28 (2007) ("Thus, courts may decline to cancel or rescind an instrument unless the mistake is not the result of negligence or the lack of due care, or the enforcement of the contract would be unconscionable.") (internal footnotes and citations omitted). *But see* Aguayo v. Harvey, 476 F.3d 971, 974 (D.C. Cir. 2007) (applicant claimed he was "misled" by a recruiter when deciding whether to enlist).

[129] 13 AM. JUR. 2D *Cancellation of Instruments* § 30 (2007) ("[C]ourts generally require the party seeking rescission of an instrument to show that he or she has acted with due or reasonable care.").

[130] CHIRELSTEIN, *supra* note 93, at 162-63. There is a distinction in the law between the defenses of impossibility and of impracticability. Impossibility refers to situations in which performance by one party is physically impossible, while impracticability means that adequate performance of one party's obligations may be substantially frustrated physically, financially, or otherwise. BRIAN A. BLUM, CONTRACTS; EXAMPLES AND EXPLANATIONS § 15.7.3 (3d ed. 2004). In the context of applying these doctrines to the conscientious objector situation, there is little meaningful significance in this distinction. Thus, for purposes of this Note, impossibility and impracticability will be treated as the same doctrine.

of an event the non-occurrence of which was a basic assumption on which the contract was made," and in such cases the "duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."[131] As Chirelstein explains: "Every future contingent state of the world cannot be predicted . . . . But even if the contract is planned and drafted with the greatest care and patience, 'things' may happen that are not explicitly dealt with and that make performance difficult or impossible to carry out."[132] The modern doctrine of impossibility (sometimes referred to as commercial impracticability) is illustrated in the famous case *Transatlantic Financing Corp. v. United States*.[133] However, courts apply the standards for the impossibility/impracticability defense strictly.[134] A party may invoke the doctrine by showing that it had the ability to perform a duty at the time at which the contract was made, but that circumstances changed due to events beyond the control of either party which rendered performance impossible or impracticable.[135] Generally, the impossibility defense has only been held to apply in circumstances of *objective* impossibility; that is, "only when destruction of the subject matter or the means of performance makes performance objectively impossible."[136] A number of

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[131] Thus, under the Restatement, in order for a party to be discharged from their contractual duties due to impossibility, there must be: (1) no fault on the part of the party claiming impossibility; (2) the occurrence of an event which was assumed not to occur at the time of contracting; and (3) the contractual language or circumstances indicate otherwise. If these elements can be shown by a conscientious objection applicant, the applicant's contractual duties should be excused. RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

[132] CHIRELSTEIN, *supra* note 93, at 163; *see also* Vincent v. Mut. Reserved Fund Life Ass'n, 51 A. 1066, 1067 (Conn. 1902) (Performance was "rendered impossible through the existence of such facts as by the law of contract will excuse the performance of such a condition.").

[133] 363 F.2d 312 (D.C. Cir. 1966); *see also* Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUDIES 83, 103-04 (1977). In *Transatlantic*, the plaintiff shipping company signed an agreement to ship wheat. The contract stated that the wheat would be moved 10,000 miles from Gavelston to Iran by way of the Suez Canal in Egypt. Once the ship had departed, Egypt closed the canal to all vessels as a response to international conflict. Plaintiff had no choice but to re-route the ship around the Cape of Good Hope, an extra distance of over 3000 miles, and arrived in Iran several weeks behind schedule. Plaintiff eventually sued the defendant United States to cover the additional expenses of travel. *Transatlantic Financing*, 363 F.2d at 314-15. The court found the new route to be an "unexpected development," the risk of which had not been assumed by either party in the contract. *Id.* at 316. However, the court found that the United States should have been on notice of "abnormal risks" involved in shipping through Egypt, and thus the impracticability doctrine was applied to discharge plaintiff's contractual obligation to ship through Egypt. *Id.* at 319. This case illustrates the unusual situation of a *seller* seeking impracticability, but the court's reasoning on the issue of impossibility discharge is applicable in all contexts.

[134] Mortenson v. Scheer, 957 P.2d 1302, 1306 (Wyo. 1998); 17A AM. JUR. 2D *Contracts* § 667 (2007) ("[A] party claiming impossibility has the burden of proving the defense.").

[135] Seaboard Lumber Co. v. United States, 41 Fed. Cl. 401 (1998), *aff'd*, 308 F.3d 1283 (Fed. Cir. 2002). In other words, the contracting parties enter an agreement that rests on a basic assumption but later face an event so contrary to that assumption that the very basis of the agreement is altered. The U.C.C. describes this event as an "unforeseen supervening circumstance not within the contemplation of the parties at the time of contracting." U.C.C. § 2-615 cmt. 1 (2001).

[136] 17A AM. JUR. 2D *Contracts* § 661 (2007). Types of events that have regularly been found to constitute unforeseen events for impracticability purposes include war and natural disasters, while mere changes in market conditions have not. BLUM, *supra* note 130, § 15.7.3(b).

cases have held that "subjective impossibility," that is, the type of impossibility that is "personal to the promisor and is not inherent to the nature of the act to be performed," generally does *not* excuse a party from failing to perform his or her contractual obligations.[137] However, these cases do not deal with "changes in heart" or mental inability as a contractual defense, but rather concern one party's ability to compensate the other with money.[138] A well-accepted exception to the objective impossibility rule is the physical death of an essential party to the contractual transaction.[139] Thus, the physical change of death will relieve a contracting party, and its successors, of otherwise binding duties.[140] Likewise, courts have held that "supervening physical or mental disability" of a person who is under a contractual duty is "similar in its effect to death."[141] The failure to perform a contract that does not require personal performance is not excused, but where the act to be performed is one that only the promisor is competent to perform, the obligation is discharged if performance is prevented by mental disability.[142] If the existence of a particular person is necessary for the performance of a contractual duty, that person's incapacity, which makes performance impossible, may be regarded as "an event," the nonoccurrence of which was a basic assumption on which the contract was made.[143] Thus, if a party that had contracted to perform personal services at some point becomes disabled, then the obligation to perform that duty is considered "extinguished."[144] Additionally, it has been concluded by courts that "sickness is an act of God that will excuse the failure to perform."[145]

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[137] 17A AM. JUR. 2D *Contracts* § 661 (2007).

[138] *E.g.*, Marshick v. Marshick, 545 P.2d 436 (Ariz. Ct. App. 1976) (discharge due to impossibility was not allowed due to husband's financial inability to pay money pursuant to divorce agreement); Martin v. Star Pub. Co., 126 A.2d 238 (Del. 1956) (voluntary discontinuance of publishing company did not discharge contractual duty to financially compensate plaintiff).

[139] 17A AM. JUR. 2D *Contracts* § 670 (2007) ("[E]ven without a provision in the contract excusing performance, the death of a party will excuse further or subsequent performance if the acts to be done are of a personal nature . . . .").

[140] *Id.*

[141] *Id.* § 672; *see also* Wasserman Theatrical Enter. v. Harris, 77 A.2d 329 (Conn. 1950) (holding that actor, who had throat ailment, had "reasonable apprehension that his health would be seriously jeopardized if contract was performed, and that therefore defendant, was not liable for cancellation of contract"). The *Wasserman* court stated that "an agreement for personal services, in the absence of a manifested contrary intention, is always subject to a condition implied by law, that a person who is to render services shall be physically able to perform at the appointed time." *Id.* at 330; Holton v. Cook, 27 S.W.2d 1017 (Ark. 1930) (holding that because a young student became wholly incapacitated from pursuing her studies at the school by reason of defective eyesight, she was relieved of any contractual duty to pay tuition to the school).

[142] *See* Salvemini v. Giblin, 125 A.2d 732, 734 (N.J. App. Div. 1956), *aff'd*, 130 A.2d 842 (N.J. 1957) (An agreement, dealing with personal services, was deemed no longer possible of performance because of one party's confinement in a mental institution: "[The contract] is deemed dissolved by disability which renders its performance impossible according to the evident intention, just as in the case of death.").

[143] 17A AM. JUR. 2D *Contracts* § 672 (2007).

[144] *Id.*

[145] *Id.*

In applying the impossibility doctrine to the conscientious objection context, the voluntary enlister must first show that the impracticability of performing the contractual obligations came about through no fault of his or her own.[146] In essence, this means that the applicant must demonstrate that the claim was not the result of his or her own choosing.[147] Implicitly, discharge cases have already been dealing with this issue when assessing conscientious objection applications.[148] The military requires a conscientious objection applicant to be honest and forthright about the reasons for seeking discharge and this requirement is embodied in the "sincere and deeply held" prong of 32 C.F.R. § 75.5.[149] Therefore, if an applicant were to claim newfound anti-war beliefs based on moral or religious conscientious objection, he or she must not have ulterior motives under either the existing 32 C.F.R. § 75.5 or the proposed impossibility doctrine.[150] Such ulterior motives would cast doubt upon the sincerity of the applicant's assertion that the request for discharge is based solely on a belief that war is wrong.[151] Similarly, under the impossibility doctrine, any ulterior agenda or motivation for release would fail the "no fault" requirement since the applicant is, in essence, actively *choosing* to value personal desires to avoid combat over the duty to serve. To put this more in more exact terms, the applicant cannot claim that the impracticability of performance was brought about

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[146] RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

[147] The Supreme Court in *Welsh* said that conscientious objector status should be denied to anyone who makes a claim based on personal or political reasons. Welsh v. United States, 398 U.S. 333, 342-43 (1970).

[148] *See, e.g.*, Alhassan v. Hagee, 424 F.3d 518, 523 (7th Cir. 2005) (placing weight on evidence that petitioner applied for discharge status only after his unit had been activated in support of Iraqi Freedom); Kwon v. Sec'y of the Army, No. 06-14825, 2007 WL 1059112, at *2 (E.D. Mich. Apr. 9, 2007) (petitioner, after attending medical school at the Army's expense, applied for discharge status upon receiving word "that he was to report to active duty . . . upon the completion of his residency"); Jashinski v. Holcomb, 482 F. Supp. 2d 785, 788 (W.D. Tex. 2006) (denying applicant discharge due in part to the fact that she did not apply for discharge until after her unit was activated for combat and "she was taking no supportable actions in support of her new beliefs").

[149] The factors that courts consider in determining an applicant's depth of conviction include timing of application, opposition to a specific war rather than war in general, whether the applicant had confided in close friends and relatives regarding the beliefs, and whether there has been some outward indication of, or change of lifestyle in accordance with, the newfound anti-war beliefs. These factors deal with whether the applicant is making good faith claims about his or her reasons for desiring discharge from military duty. *See infra* note 151.

[150] This sentiment is embodied in the requirement that conscientious objection beliefs may not be based on personal or political beliefs, or as a result of any one specific war. *Welsh*, 398 U.S. at 342-43; *see also* 32 C.F.R. 75.3(b) (1999) (Applicants may not claim conscientious objection based upon "a belief which rests solely upon considerations of policy, pragmatism, expediency or political views.").

[151] *See, e.g.*, *Alhassan*, 424 F.3d at 525 (denying discharge when application filed shortly after receiving deployment to combat order and applicant held ant-war beliefs for a suspiciously short period of time and had to tell anyone else in his life of his newfound beliefs); Roby v. U.S. Dep't of the Navy, 76 F.3d 1052, 1059 (9th Cir. 1996) (denying discharge because applicant claimed conscientious objection only after being notified of impending transfer to sea duty); Koh v. Sec'y of the Air Force, 719 F.2d 1384, 1285-86 (9th Cir. 1983) (denying applicant discharge in part because she had made two previous applications for discharge on grounds other than conscientious objection to war); *Jashinski* 482 F. Supp. 2d at 793, 795 (denying applicant discharge due to suspicious timing of application and lack of outward signs that belief was deeply held).

through no fault of his or her own, because the applicant has consciously decided to leave the military once other circumstances are viewed as more attractive. In contrast, an applicant's genuine conscientious objection beliefs are not viewed, either by the military or courts, as a personal choice.[152] Rather, true conscientious objection is regarded as something that develops in applicants regardless of intent.[153]

Second, the conscientious objection applicant must show that an "event" occurred, the future existence of which was not contemplated by either of the parties at the time of contracting.[154] Thus, the question is whether an enlister's "change of heart" may be considered an "event" and, more importantly, whether it can constitute the type of "event" suggested by the Restatement. Historically, the impossibility doctrine has been used in response to unexpected natural events.[155] The classic example of impossibility, outlined by Chirelstein, is *Taylor v. Caldwell*.[156] Decided in 1863, the plaintiff rented a "rickety old music hall" from the defendant for four summer days.[157] Once plaintiff had expended a relatively large sum of money in order to publicize a series of musical and entertainment events that he planned to produce at the location, the old hall suddenly and unexpectedly (and through the fault of no one) caught fire and burned to the ground.[158] Because defendant could no longer provide the music hall to plaintiff on the days agreed upon, plaintiff sued defendant for breach of contract.[159] The court held that the defendant should be excused from performing his contractual obligation, as such performance had been rendered impossible by the fire.[160] Both parties simply assumed the music hall would still exist on the days agreed upon, and such existence was essential to the performance of the contract.[161] Since, due to the fault of neither party, this essential element of the contract no longer existed, the court discharged the contractual duties of both parties.[162]

Aside from supernatural acts of God and Mother Nature, there are other situations in which the impossibility doctrine may be applied. The Restatement says that "[i]f the existence of a particular person is necessary for the performance of a duty, *his death or such incapacity* as makes performance impracticable is an event the non-occurrence of

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[152] *See Welsh*, 398 U.S. at 340; Wiggins v. Sec'y of the Army, 751 F. Supp. 1238, 1240 (W.D. Tex. 1990) (Bona fide conscientious objection beliefs cannot be "merely excuses for avoiding combat.").

[153] *See supra* note 149. In other words, an applicant may not choose when and where to become a conscientious objector.

[154] RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981).

[155] BLUM, *supra* note 130, § 15.7.3(b).

[156] CHIRELSTEIN, *supra* note 93, at 162-65.

[157] *Id.* at 162.

[158] *Id.*at 163.

[159] *Id.*

[160] *See id.*

[161] *Id.* at 163.

[162] *Id.* at 163-64.

which was a basic assumption on which the contract was made."[163] This would seem to suggest that the Restatement takes a similar approach as earlier common law cases regarding physical and mental deficiencies or alterations occurring to one of the parties subsequent to contracting; that is, that such alterations, like death, affecting an essential party may be used to excuse the obligations of either or both parties.[164]

A conscientious objection applicant's "change of heart" or "epiphany" concerning war and killing may be regarded as an agreement-altering "event," and thus a mental impediment to the fulfillment of contractual military duties. Like other mental ailments recognized by courts, a sincere and deeply held realization that fighting is impossible is a drastic and often unavoidable change in mental state.[165] This change in mental state (again, when felt both sincerely and deeply), comes about through no fault of the affected party and may have an equal or stronger effect on the individual's ability to perform than any purely physical impediment.[166] In such circumstances, it seems appropriate to consider such a change as an unintended and unforeseeable event, the occurrence of which renders the enlistment contract incapable of being honored.

Finally, a party seeking to invoke the impossibility defense must not have borne the risk of the unforeseen event occurring.[167] In other words, if the party seeking discharge of contractual duty based on an "event" had either "expressly or impliedly assumed the risk of [the event's] occurrence," performance may not be excused regardless of whether the other elements of impossibility have been satisfied.[168] The clearest way to determine risk allocation is to examine the actual contract between the parties.[169] Many times, contracts contain risk allocation provisions (also termed force majeure clauses) designed to protect one party from the undesirable effects of a future unlikely event.[170] In the military enlistment contract context, there is no such clause.[171] While it is true that modern military enlisters oftentimes must certify in writing that they are not conscientious objectors,[172] this does not necessarily qualify

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[163] RESTATEMENT (SECOND) OF CONTRACTS § 262 (1981 ) (emphasis added).

[164] *See supra* notes 138-144.

[165] *See supra* note 61 and accompanying text.

[166] *See supra* note 61 and accompanying text.

[167] BLUM, *supra* note 130, § 15.7.3(d) ("As with mistake, the risk allocation is often the dispositive issue in impracticability cases."); 17A AM. JUR. 2D *Contracts* § 665 (2007) ("Impossibility is not an excuse where the promisor has indicated an intent to assume the risk of performing despite it, or where the language or the circumstances of the contract indicate that the risk has been allocated to the party asserting the defense.").

[168] BLUM, *supra* note 130, § 15.7.3(d).

[169] *Id.*

[170] *Id.*

[171] *See* Armed Forces of the U.S., Enlistment/Recruitment Document, DD Form 4/1 (Aug. 1998), *available at* http://usmilitary.about.com/library/pdf/enlistment.pdf.

[172] *See id.*

as an explicit assumption of risk.[173] Even if such a certification was found to be an assumption of risk, that assumption is undermined by the military's own codes and regulations, which explicitly provide procedures to allow for conscientious objection discharge.[174] While conscientious objection discharge is not a constitutionally-mandated right, the military has nevertheless explicitly provided for such discharge through statute.[175] The existence of such regulations may be viewed as an admission of acknowledgement on the part of the military regarding the existence of future instances of conscientious objection, and thus an assumption of risk on its part that such instances will continue to occur from time to time.[176] When recruiting large numbers of men and women to perform war-related duties, it is reasonable to assume that some will develop a sincere and deeply felt aversion to the agreement such that performance is substantially, if not entirely, frustrated. Therefore, since the discharge applicant has not been made to bear the risk of later developing conscientious objection beliefs, he or she may raise the impossibility defense to be excused from contractual duty.

In sum, this Note argues that a contractual paradigm is the most appropriate framework through which to assess the military/enlister relationship.[177] Within that framework, the contractual defense of impossibility becomes the most viable option for conscientious objectors seeking discharge from their military obligations.

## V. CONCLUSION

As alluded to earlier, it is conceded that this contractual approach to the military conscientious objector issue is, at best, a subtle departure from current practice, in terms of practical importance.[178] At worst, it begs the very question being asked: the initial question of "How do you know when someone is worthy of conscientious objector status and discharge?" has been replaced by the equally ambiguous "How do you know when performing one's military duties is impossible?" While this very real criticism is acknowledged, it is proposed that the true advantage to the contractual approach lies not in its day-to-day application, but in the collateral effects it would produce.

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[173] "The question is whether the nature of the contract *and the surrounding circumstances* show that the risk of subsequent events, whether or not foreseen, was assumed by the promisor." 17A AM. JUR. 2D *Contracts* § 665 (2007) (emphasis added).

[174] *See supra* note 17 and accompanying text.

[175] *See supra* notes 46-47 and accompanying text.

[176] Similarly, the existence of insurance is often viewed as an admission of assumption of risk. Thus, in the case of the music hall burning down in *Taylor v. Caldwell*, (1863)122 Eng. Rep. 309 (K.B.), it may be argued that had the hall's owner insured the property, he would have assumed the risk of it being destroyed and thus caused the fulfillment of certain agreements impossible. BLUM, *supra* note 130, § 15.7.3(d).

[177] *See supra* Part III.

[178] *See supra* INTRODUCTION.

First, the contractual approach to conscientious objection discharge, unlike the current military regulation, would accurately reflect the character and nature of today's military/enlister relationship. This relationship is purely contractual, based upon the enlister's willful intent to be bound by the terms of the agreement, and the military's reasonable reliance on that expression of intent when providing extensive resources and benefits.[179] This element of exchange between the parties is something that should be recognized.[180] The current approach to conscientious objection discharge does not adequately contemplate this relationship, by giving undue advantage to the enlister in breaking his or her contractual duties in some jurisdictions.[181]

Second, and more importantly, the contractual impossibility defense to military duty would mend the judicial split regarding the proper application of 32 C.F.R. § 75.[182] By requiring an applicant to prove that military service is *impossible*, courts implicitly would be asking applicants to prove that their anti-war beliefs are of such sincerity *and* depth of conviction that denial is not an option. Applicants would be required to demonstrate, for example, a willingness to go to jail rather than betray their beliefs, or point to significant and appreciable changes in their lifestyle in accordance with this new mindset. These factors have already been employed by courts in an effort to determine depth of conviction.[183] These factors make particular sense for prima facie non-objectors, who have already certified that they have no conscientious objections to war at the time of enlistment.[184]

Thus, the contractual impossibility doctrine would eliminate the conflicting views held by different courts in various circuits by reinforcing the "depth of conviction" camp.[185] It would overrule the

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[179] *See supra* 100-108 and accompanying text.

[180] RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981); Barnett, *supra* note 96; *supra* text accompanying note 96.

[181] The sincerity camp of courts requires only that a conscientious objector have sincere anti-war beliefs, thus allowing soldiers to break their contractual duties based on mere whims or changes of opinion. *See supra* notes 70-80 and accompanying text.

[182] *See supra* Part II.B.

[183] *See, e.g.*, Welsh v. United States, 398 U.S. 333, 337 (1970) ("[Applicant's] objection to participating in war in any form could not be said to come from a 'still, small voice of conscience'; rather, for [him] that voice was so loud and insistent that [he] preferred to go to jail rather than serve in the Armed Forces. There was never any question about the sincerity and depth of [his] convictions . . . ."); Roby v. U.S. Dep't of the Navy, 76 F.3d 1052, 1059 (9th Cir. 1996) (finding no legitimate outward signs of depth of conviction when "[applicant's] beliefs are based only on his reading two or three books and watching two television documentaries" and applicant did not "plan to study further"); Jashinski v. Holcomb, 482 F. Supp. 2d 785, 794 & n.80 (W.D. Tex. 2006) (After the military and court inquired into applicant's changes in lifestyle in accordance with newfound anti-war beliefs, the court Denied discharge, focusing on applicant's statement that she was still "'growing up and finding out . . . what [she] stood for,'" and determining that it was evidence that her beliefs were "rapidly changing and evolving, rather than 'firm and fixed.'" (quoting the Administrative Record of the case)).

[184] *See* Armed Forces of the U.S., Enlistment/Recruitment Document, DD Form 4/1 (Aug. 1998), *available at* http://usmilitary.about.com/library/pdf/enlistment.pdf.

[185] *See supra* Part II.B.

"sincerity" camp by requiring courts to inquire deeper into the strength of a conscientious objection applicant's anti-war beliefs, rather than allowing courts to stop after a mere sincerity inquiry.[186] To prove that military service is impossible, an applicant must not only be sincerely opposed to war, but must also evince signs that this opposition is more than mere "fleeting beliefs" or momentary "bursts of passion" described in *Roby*.[187] Ultimately, the more stringent requirements of the impossibility doctrine protect the military by requiring conscientious objectors to show more than a simple change of opinion regarding war.[188] This protection is proper given the contractual character of today's voluntary military enlister and the reliance of the government in such relationships.[189] Thus, the impossibility doctrine tips the scales slightly in favor of the military, in light of the changed nature of its recruiting from compulsion to volunteerism.[190]

The impossibility doctrine may also protect conscientious objectors. Under the existing law, applicants for conscientious objection discharge are assessed differently in different jurisdictions.[191] What may pass as adequate proof of anti-war beliefs in one court may be deemed insufficient in another.[192] Treating conscientious objection claims as analogous to the defense of contractual impossibility provides uniformity among the courts, which, in turn, creates predictability for those seeking discharge.[193] Such predictability may increase the overall efficiency of the conscientious objection discharge process.

Perhaps more importantly, the impossibility doctrine would effectively eliminate the "modified depth of conviction" camp.[194] The contractual impossibility defense would require courts to examine whether performance of the applicant's military duties is impossible (i.e. whether applicant's anti-war beliefs are so strong that they physically and mentally preclude performance), regardless of the source of the anti-war beliefs. Thus, anti-war beliefs rendering duty impossible, which stem from traditionally religious bases, are treated identically to anti-war beliefs that have the same practical effect on the applicant but which are borne out of purely moral or ethical codes of conduct. A purely contractual approach wipes out any distinction in source created by the modified depth of conviction camp because the impossibility doctrine focuses solely on the *strength* and *character* of the applicant's beliefs,

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[186] *See supra* notes 67-72 and accompanying text.

[187] *See supra* note 43.

[188] *See supra* note 43 and accompanying text.

[189] *See supra* note 43 and accompanying text.

[190] *See supra* Part III.

[191] *See supra* Part II.B.

[192] *See supra* Part II.B.

[193] *See supra* Part II.B. Given the current split among courts, it is difficult to predict what level of anti-war beliefs qualifies for conscientious objection protection.

[194] *See supra* notes 85-88 and accompanying text.

not their *source* of development.[195] Thus, the disparate treatment of religious and non-religious beliefs, which Professor Greenawalt warned against, disappears.[196] Further, any potential establishment clause violations disappear under this new standard as well, as there would be no favoring of any one form of religion.[197]

Finally, the impossibility doctrine is consistent with the military deference doctrine.[198] By requiring applicants to have beliefs that are both sincere and deeply held, courts will be honoring the military's discharge procedures that require beliefs to be both sincere and deeply held.[199] Similarly, the contractual approach remains true to the plain language of the military's current regulation 32 C.F.R. § 75, which explicitly states that an applicant's beliefs must be "sincere and deeply held."[200]

In conclusion, the contractual approach to conscientious objection discharge is more appropriate than the current regulation and its various judicial interpretations given the current character of the modern enlister and the nature of the military/enlister relationship. This new approach would provide a more comprehensive and streamlined application of the military's conscientious objector assessments as it is devoid of superfluous analyses.[201] Finally, such an approach provides appropriate protection to both sides of the military/enlister relationship and ultimately promotes uniformity of interpretation and application within the military and among the courts.

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[195] *See supra* notes 85-89 and accompanying text.

[196] Greenawalt, *supra* note 89, at 1635-37.

[197] *See supra* note 89.

[198] *See supra* note 48 and accompanying text.

[199] *See supra* notes 17, 39-43 and accompanying text.

[200] *See supra* note 17 and accompanying text.

[201] The impossibility approach will require conscientious objection applicants to prove that their anti-war beliefs are both sincere and deeply held in every instance. Thus, courts will no longer be confronted with the issue of how to properly apply the military's standards for discharge (as discussed in Part II.B). In addition, courts will no longer be tempted to examine the source of an applicant's anti-war beliefs to see whether the beliefs developed from traditional religious views. Under the contractual paradigm, courts simply need to analyze whether a person's beliefs make performing his or her military duties impossible, regardless of how or from where those beliefs developed.

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