

Nos: 71-1176  
71-1177

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHT CIRCUIT

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UNITED STATES OF AMERICA,  
PLAINTIFF-APPELLE  
VS.

FRANCIS X. KRONCKE AND  
MICHAEL D. THERRIAULT

DEFENDANTS-APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

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BRIEF FOR APPELLANT FRANCIS X. KRONCKE

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*This appeal was guided by attorney Charles Bisanz of Minneapolis, MN. Part of this appeal is published as, "Resistance As Sacrament," **Cross Currents** (Volume XXI, Number 4) Fall 1971. "Cross Currents" is currently published by the Association for Religion and Intellectual Life [www.aril.org](http://www.aril.org)*

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*ISSUES PRESENTED FOR REVIEW*

1. Did the court err in striking the evidence of the defendants and refusing to instruct the jury relative to the defendants' defense of necessity?
2. Did the court err in not ruling on instructions or on the evidence until after the completion of all final arguments?

Note: Citations use a "T" to refer to trial Testimony and in the trial transcripts.

## **STATEMENT OF THE CASE**

This brief, presented by defendant Francis Kroncke, incorporates the brief filed by attorney Kenneth E. Tilsen on behalf of both defendants in this case, and is intended to supplement the Issues Presented for Review, the Statement of the Case, the Statement of Facts and the Arguments raised therein.

## **STATEMENT OF FACTS**

Defendant Kroncke requested and was granted permission to defend himself and to present his defense of justification based on religious necessity. He explained to the court:

"Without being facetious, I am probably the only person qualified in the courtroom to present my approach to this, being I am a theologian and I will take specific religious stands on this." (T. December 9, 1970, p. 4)

A motion for a writ of habeas corpus ad testificandum was made to bring to court Fathers Daniel and Philip Berrigan to aid in Kroncke's defense of justification based on religious necessity. Kroncke explained to the court that the Berrigans "are absolutely essential to the defense I am presenting." (T. Vol. I, p. 6) In supporting this motion, Kroncke explained to the court the basis of his defense of religious necessity and the importance of the Berrigans to a proper understanding of the Catholic Radical tradition, and to his entire defense. (Testimony. Vol. I, pp. 6-13; pp. 18-20) Kroncke explained to the court: "I am not alleging that I committed a political act from religious inspiration, but I am saying I committed a religious act in itself..." (T. Vol. I, p. 19) The court denied this motion.

Kroncke presented a detailed pre-trial brief to the court explaining his defense of justification based on religious necessity. Further, in his opening statement to the jury, Kroncke detailed the basis of his religious defense which would be presented during the trial (T. Vol. II, pp. 44-59)

Francis Kroncke is a theologian. He has a Masters Degree in theology from the University of San Francisco and has worked towards his doctorate in theology at the University of Chicago. (T. Vo. VI, P. 48) He has taught theology at the San Francisco College for Women (T. Vol.

VI, p. 40), at Rosary College near Chicago, Illinois (T. Vol. VI, p. 48), and at St. Catherine's College in St. Paul, Minn. (T. Vol. VI, p. 77).

As a theologian, Kroncke came to realize that the task of a theologian was not going to be a comfortable way of life, and that he would probably be involved with conflict in trying to bring the understanding of the principles of the Second Vatican Council to other people. (T. Vol. VI, p. 46) In his testimony, Kroncke quoted the following passage of Christian Scripture as an explanation of his responsibility as a theologian:

" . . . First Peter, Chapter 4 and it says 'And now dear friends of mine, I beg you not to be unduly alarmed at the fiery ordeals which come to test your faith as though this were some abnormal experience. You should be glad because it means that, you are called to share Christ's sufferings. If you are reproached for being Christ followers that is a privilege, for you can be sure that God's spirit of glory is resting upon you.' And just another example like from Matthew in Chapter 6, it says that 'No one can serve two masters. He is bound to hate one and love the other or support one and despise the other. You cannot serve God and the powers of money at the same time.'" (T. Vol. VI, p. 46)

Kroncke also explained the special role of a theologian as articulated by the Second Vatican Council, quoting from the Documents of the Second Vatican Council (Defendants Exhibit 6)

"With the help of the Holy Spirit, it is the task of the entire people of God, especially pastors and theologians, to hear, distinguish and interpret the many voices of our age and to judge them in light of the divine word. In this way revealed Truth can always be more deeply penetrated, better understood and set forth to greater advantage." (T. Vol. VI, p. 59)

Kroncke was unarmed and offered no resistance when arrested in Little Falls, Minnesota. (T. Vol. II, pp. 80-81) There were no Selective Service files destroyed. (T. Vol. II, p. 145)

In his testimony, Frank Kroncke explained that he was

twenty-six years old and had been raised in an Irish-German Catholic family of nine children in Bayonne, New Jersey. (T. Vol. VI, p. 3) His father was a chemist and is now deceased, but Kroncke recalled that:

"It was my father's overriding concern that we always be confronted with and guided by spiritual concerns." (T. Vol. VI, p. 3)

Kroncke related a personal incident in his life which impressed on him the fragility of human life. He recalled that he saw his two year old brother Joseph, while resting by his side, stricken by convulsions and be turned, in a matter of seconds, from a happy two year old into a non-intelligent human vegetable. He observed,

"... it just profoundly changed my lire, about my way of perceiving of what was the value of life and how life could be plucked away from you and when life was taken away from you what that means to people, and I guess ever since that time it is very honest for me to say to you that whenever I do read a statistic that one person has died, you know, I begin to understand what that can mean to people." (T. Vol. VI, p. 5-6)

Kroncke was educated in the Catholic school system and he attended a Franciscan seminary and Novitiate from 1959-1962. He left the seminary because he was bothered by the contradiction of the wealth surrounding him. (T. Vol. VI, p. 9) He felt that this wealth would destroy his concept of service,

" . . so I left the seminary but I still had the ideals of living in a community of trying to serve people." (T. Vol. VI, p. 10)

He attended St. John's University, Collegeville, Minnesota, and graduated with special honors in 1966. While at St. John's University, Kroncke wrote his honors thesis for graduation on the French Jesuit priest Pierre Teilhard de Chardin, who brought together

"... an understanding that the way to be with God was to be actively involved in what goes on in the world . . ." (T. Vol. VI, P. 14)

The Catholic Church's renewal in the Second Vatican Council was strongly influenced by the spirituality of Father Teilhard, and the spirituality of the social action school of theology which holds

". . . that somehow, even though we didn't know exactly how, that the way to build the earth effects what



religious people call the kingdom of God . . . many people began to realize what the consequences of this was, that to be a religious person meant to be involved in the world and that religious acts were acts that you committed in the world that we talk about every day." (T. Vol. VI, pp. 19-20)

After graduation from St. John's University, Kroncke worked in the summer of 1966 for the Easter Seal Camp for Crippled Children and adults in California. (T. Vol. VI, p. 29) This was another experience of the fragility of human life. (T. Vol. VI, pp. 29-30) During this same summer, Kroncke requested a conscientious objector classification from his local board. (T. Vol. VI, p. 28) In the spring of 1967, his local draft board, against his wishes, classified him 2-A since he was contracted to teach theology full time at San Francisco College for Women.

In 1968 Kroncke received his Masters Degree in theology from the University of San Francisco. There his studies had shown extensive periods of history in which Christians were persecuted because "what they believed came in conflict with the State." (T. Vol. VI, p. 43) In his testimony, Kroncke explained that many early Christians were killed because they refused to obey a Roman law forbidding their religious sacramental services. Many of these Christians risked death rather than give up their daily sacramental meal. (T. Vol., VI, p. 43)

Through his graduate work, Kroncke was given and through his teaching he was interested in "giving people the vision of life." (T. Vol. VI, p. 43)

"What we could do with science, what we could do with the world and what became more aware to me as other people pointed out was that in order to do this I must respond, that every individual must respond, is that if mankind is to advance no one else is going to do it. It's not going to happen from outside of the world. We are going to do it, you see. God is within us and we find God by relating to other people. We don't find God by going off in some corner of the world and sitting down and try to say, "God, where are you?" We find God among other ways, by being involved with other people and the Catholic Church seemed to carry that across most vividly at this period when I began to teach and try to relate this in a concept they called the Body. The word is usually the Body of Christ and what they meant by this was the

fact that all people must look at one another in a different way, a new way. This is how I understood it, is what St. Paul says, which was something that I was—which really affected me—he says, when you look at one another, he says, realize that you are muscles and bones of one another.

That was a strange thing, you know, look at other people, not just realize that they are your friends or you should like them but that you're muscles and bones with one another, that you are intimately connected with them, that, you know, what happens to their life happens to your life." (T. Vol. VI, p. 43-44)

In 1968, Kroncke was accepted at the University of Chicago's Divinity School to do his doctoral work. (T. Vol. VI, p. 40) During this same year, he taught as a full time faculty member, at Rosary College, River Forest, Illinois. Among his responsibilities were courses in sacramental theology, the spirituality of Teilhard de Chardin, and contemporary theology courses embracing areas such as religion and politics. (T. Vol. VI, p. 48, p. 53)

In the fall of 1969, Kroncke received his conscientious objector classification (T. Vol. VI, p. 62), and interrupted his theological studies in order to perform his alternative service. He became Program Director at the Newman Center (the Catholic student Center on the University of Minnesota campus. (T. Vol. VI, p.63) At the Newman Center, many young men came to Kroncke and raised questions about the morality of the war. (T. Vol. VI, p. 66.) He was asked ". . .how could a Christian . . . pick up a gun and kill people." (T. Vol. VI, p. 66) The war in Vietnam was an "overriding moral question" that Kroncke was continually confronted with. (T. Vol. VI, p. 67) Kroncke explained that he could speak to the questions from a political tradition within the American experience, and from the theological tradition highlighted by the Second Vatican Council. (T. Vol. VI, pp.67- 68) The merging of these political and theological traditions is the hallmark of the Catholic Radical tradition in America.

Kroncke was arrested while teaching at St. Catherine's College in St. Paul. He was teaching sacramental theology: how to make God's presence visible in the world. (T. Vol. VI, p. 77) At the conclusion of his testimony, Kroncke explained:

"My personal whole life as a theologian has been to

speak the words—that's what a theologian means, to speak the word to the people—and I'd like to speak the word of peace." (T. Vol. VI, p. 90)

Father William C. Hunt testified for the defendants. Father Hunt is a Catholic priest, and the present Director of the Newman Center on the University of Minnesota campus in Minneapolis. (T. Vol. V, p. 132) He attended the Second Vatican Council as a *peritus*, an official expert in theology. (T. Vol. V, p. 134) Father Hunt has been chairman of the Theological Questions Committee of the Presbytery of the Archdiocese of St. Paul and Minneapolis (T. Vol. V, pp. 134-135), and is an expert on what the Second Vatican Council did and meant. (T. Vol. V, pp. 135-136) Father Hunt stated that the topic of war was a central issue discussed among the Catholic theological experts at the Second Vatican Council (T. Vol. V, p. 136). He explained that the documents issued by the Council concerning war were intended to guide all of the people of the Church in developing their lives. (T. Vol. V, p. 136) Father Hunt testified that there have been symbolic acts in response to violent cultures indicated in the Christian Scriptures, stating that the most notable one is Jesus Christ's own act of overturning tables, whipping and chasing the money changes from the temple. He further commented on the scriptural importance of this passage as a paradigm for protestation of violation through symbolic action. (T. Vol. V, pp. 139-140)

As part of his testimony, Father Hunt quoted from a document of the Second Vatican Council (Defendant's Exhibit 6), "The Pastoral Constitution of the Church in the Modern World", Chapter 5, Paragraph 40, as follows:

"Any act of war aimed indiscriminately at the destruction of entire cities or of extensive areas along with their population is a crime against God and man himself. It merits unequivocal and unhesitating condemnation. The unique hazard of modern warfare consists in this, it provides those who possess modern scientific weapons with a kind of occasion for perpetuating just such abominations. Moreover, through a certain chain of events, it can urge men on to the most atrocious decisions. That such in fact may never happen in the future, the Bishops of the whole world in unity assembled beg all military leaders to give unremitting thought to the awesome responsibility which is theirs before God and the entire human race."  
(T. Vol. V, p. 142)

Referring to this document of the Second Vatican Council, Father Hunt stated that "This particular document made a special attempt to enter into dialogue with the whole human community." (T. Vol. V. p. 143)

Mark L. Jesenko, a Catholic lay theologian with a Masters Degree in theology from the University of San Francisco, testified for the defendants. (T. Vol. V. D. 84) He is director of religious education for a local Roman Catholic parish, and is on the faculty of the College of St. Catherine's in St. Paul, Minnesota, engaged in teaching Sacred Scripture. (T. Vol. V, p. 84) He explained that the work of a theologian includes "a spiritual responsibility as well as an intellectual responsibility for the people." (T. Vol. V, p 86) Mr. Jesenko testified that Christians believe in the Body of Christ, that is, "We are all members of one another. Each of us have a specific function to perform with regard to one another." (T. Vol. V, p. 92) This idea changed their lives. (T. Vol. V, p. 93) He further stated that:

"... the chief priority for Christian life and value is life itself, the life which was created, which we believe was created and which we equally believe was redeemed or saved. . .There is nothing any more important than life itself, every man's life, your life, everyone's life." (T. Vol. V. p. 93)

Mr. Jesenko explained how the Christian community has always expressed the reality of the meaning and of the understanding of Christian life through the concept and reality of the sacraments:

"I believe that from the Christian perspective, the appearance of an individual named Jesus of Nazareth introduced a radically new relationship, quality of relationship between man and God, which we normally refer to as a relationship of intimacy, a friendship."

"The central regard and concern of that intimacy is the preservation, the development and protection of life itself. That is the first and final priority, life."

"Within the tradition stemming from belief in this particular individual, certain methods and modes of expressing their understanding, that qualitative new relationship between God and man have been established. We call those sacraments, or they are signs or symbols which

effect what they signify.

"For example, I am sure most of us are aware of the Eucharist or Last Supper. Here we take the ordinary symbols of bread and wine as symbols of the sustaining of life itself, and we use them to express through consecration the very preservation and continuance of life between man and God, which, by the way, we do not separate from life as we are living it at the present time, as we are living it here in this courtroom.

"Now, we also ask ourselves how many or what types of symbolic or sacramental actions can we actually derive, and we found that there really is no limit.

We have to speak specifically of sacraments, first of all, in the sense of this individual Jesus of Nazareth, because in a most unique and perfect way he symbolized God's effective presence among man or with man in time and space. The continuance of that effective presence is achieved through the church, the second sacrament.

"Then we have what we call specific sacraments, a set of sacraments, specific sacraments, Baptism, Eucharist, penitence, etc., etc., but also, our everyday lives and actions in virtue of the fact that we share in that divine life can also be sacramental." (T. Vol. V, pp. 90-92)

Mr. Jesenko spoke of the early history of the Christian tradition in which the Christian's concept of community caused them to come into conflict with the predominant culture they were living in. (T. Vol. V, p. 95) He testified that Christians expect from their belief's that they will come into conflicts with the culture they live in and explained:

"...conscience will often come into conflict with law when the law violates the higher religious or moral standards or values." (T. Vol. V, p. 99)

Further, Mr. Jesenko quoted from the encyclical of Pope John "Pacem In Terris", Paragraph 51, as follows:

"Since the right to command is required by the moral order and has its source in God, it follows that if civil authorities legislate for or allow anything that is contrary to that order, and therefore contrary to the will of God, neither thy: laws made nor the authorizations granted can be binding on the consciences of the citizens since we must obey God rather than man; otherwise, authority breaks down completely and results in shameful abuse." (T. Vol. V, pp. 102-103)

The task of the theologian, Mr. Jesenko testified, "is to study and to reflect upon the origin and the tradition of our religious belief and practice and to articulate that meaning, the meaning of that tradition to our own contemporary situation." (T. Vol. V, p. 107) In conclusion, he testified that faith ". . . is not just simply intellectual consent or assent to propositional truth, but is primarily a life style. It's not simply an attitude. It's a whole way of life, a life lived in obedience and love of God, or openness and love for one another." (T. Vol. V, p. 105)

Father Alfred Janicke, a Roman Catholic priest, testified for the defendants. Father Janicke was arrested in September, 1968, as a member of the "Milwaukee Fourteen" for burning draft files in Milwaukee, Wisconsin. Father Janicke considers himself to be within the Catholic Radical tradition, and explained the values of that tradition as follows:

". . . the basic value, of course, is the value that's been talked about during this whole trial, and that is the basic value of life, life being of prime importance, life being important not only to the individual who is on trial but to all the individuals in the United States as well as in the world.

"If we deviate from that basic premise, then everything else begins to make sense, but if that becomes the basic premise upon which the Catholic Radical tradition is founded, namely, that life is important, then everything else is secondary and all the material, all the files, all the different aspects of the Selective Service System in total does not equal one life." (T. Vol. V, p. 116)

He explained that draft raid actions such as undertaken by the defendants in this case bring moral issues to

peoples consciousness. (T. Vol. V, p. 120) Father Janicke supported his testimony by quoting from a document of the Second Vatican Council (Defendants Exhibit 6), "The Pastoral Constitution of the Church in the Modern World", Chapter 1, Paragraph 30; Chapter IV, Paragraph 42:

"Let everyone consider it his sacred obligation to count social necessities among the primary duties of modern man and to pay heed to them. Christ, to be sure, gave his church no proper mission in the political, economic or social order. The purpose which he set before her is a religious one, but out of this religious mission itself came a function, a light and an energy which can serve to structure and consolidate the human community according to divine law. . . . Moreover, in virtue of her mission and nature, she is bound to no particular form of human culture nor to any political, economic or social system." (T. Vol. V, p. 121)

In explaining that his own involvement in social and political activity was impelled by religious necessity (T. Vol. V, p. 123), Father Janicke stated that as a priest, the Second Vatican Council gave him a new direction. The renewal in the Church demanded that a priest's actions correspond to his words. Father Janicke's actions of September 24, 1968, were a symbolic act of Christian witness. It was a moral act witnessing to the breadth of non-violent and peaceful means available through the Gospel tradition for a proper and measured human resolve of conflict and injustice. (T. Vol. V, pp. 124-125)

During the course of the trial, the court deferred any ruling on the objections of the prosecutor as to the defendants testimony and evidence supporting the defense of "religious necessity." The court took these objections under advisement. At the conclusion of the testimony, the court, over the objection of the prosecution, formally received in evidence Defendants Exhibit 6, a volume containing the documents issued by the Second Vatican Council. (T. Vol. VI, p. 93) At the close of the evidence, the defendants presented to the court three proposed instructions to the jury. Defendants requested instruction No. 3 dealt specifically with the defense of religious necessity. These instructions appear in the transcript at Vol. VI, pp. 160-162. There was no indication by the court whether the defendants instructions would be granted or refused. Defendant Kroncke then proceeded to present his

final argument to the jury in the terms of his defense of justification based on religious necessity. (T. Vol. VI, pp. 114-129)

During the argument to the jury, Kroncke emphasized his defense of religious necessity and referred to quotes from the documents of the Second Vatican Council. (Defendants Exhibit 6; T. Vol. VI, pp. 115-118) After the completion of his argument to the jury, the court denied the defendants' instructions and only then made known its decision to instruct the jury to disregard the testimony forming the basis of Kroncke's defense of justification based on religious necessity. The court in its instructions to the jury stated,

"In addition both defendants, though the testimony was presented briefly by defendant Francis Kroncke, claim that they were compelled or moved by religious and theological motives and that what they did is characterized in some way as a religious act ...."

"I am now going to instruct you that all of what has been received along this line is immaterial. The government has moved to strike the testimony of all of the defendants' witnesses, except the testimony of the two defendants and as to their testimony all references to the Vietnam war and theology and religions.

"The court, after reflection and after hearing all the evidence, has concluded that this motion should be granted and I do now so rule and strike all of the testimony offered by both defendants except for their own personal testimony, and I strike that part which attempts to rely on a justification on account of the Vietnam war or religious oriented reasons. Consequently, all that you have before you for consideration are the facts concerning what occurred at little Falls, Minnesota, on the late evening of July 10, 1970. You have a very limited responsibility in this case." (T. Vol. VI, pp. 148-149)

Further, the court instructed the jurors as follows:

"I further instruct you that the defense articulated by defendant Francis Kroncke but joined by both defendants, i.e., assertion of a religious, theological motivation, is not a defense in this case. Religious doctrine or



belief of a person cannot be recognized or accepted as an excuse or justification for his committing an act which is a criminal offense against the law of the land." (T. Vol. VI, pp. 151-152)

Defendants objected to the court's instructions and to the striking of the defendants' testimony supporting the defense of justification based on religious necessity. (T. Vol. VI, pp. 158-164) The jury, after two hours of deliberations, returned for further instructions and asked the court:

"What testimony—evidence on behalf of the defendants is admissible? What are not?" (T. Vol. VI, p. 165)

The court repeated its instructions to the jury striking "all of the testimony offered by both defendants except their own personal testimony." (T. Vol. VI, p. 166)

The Foreman then questioned the court as to the documents admitted to the jury room; namely, the documents of the Second Vatican Council admitted into evidence as Defendants' Exhibit 6, and a paper written by defendant Therriault. The court instructed the jury not to consider these documents. (T. Vol. VI, p. 166). The defendants objected to the supplementary instructions of the court. (T. Vol. VI, p. 166-167)

## ARGUMENT

### ***I. THE DEFENDANT'S INDIVIDUAL ACT OF CONSCIENCE IS JUSTIFIED BECAUSE OF "RELIGIOUS NECESSITY" WHERE HIS PERSONAL ACT WAS MORALLY PROMPTED, IT INVOLVED A RELIGIOUS ACT, HE BELIEVED IT TO BE NECESSARY, AND IT WAS REASONABLY MEASURED AND CALCULATED TO INFLUENCE AND CHANGE AN ILLEGAL AND IMMORAL NATIONAL POLICY.***

Defendant Kroncke is a Roman Catholic Theologian (T. Vol. II, PP. 31, 46, 47). He was compelled by religious conviction to commit the act with which he is charged. He claims justification based on religious necessity. This act, characterized by the defendant as a "religious act", was committed in response to the continuation of the illegal and immoral war in Indochina. (T. Vol. I, pp. 6-8) His act was prudently measured and reasonably calculated to accomplish his goal of increasing public awareness to the immorality of the Indochina war and the use of the Selective Service System to provide manpower for this undeclared war. (T. Vol. III, p. 11; Vol. VI, pp. 78-79) The evil sought to be avoided by the act of the defendant is far greater than the unlawful act sought to be prevented by the statute defining the offense for which he is charged. (T. Vol. III, p. 85)

### ***A. THE DEFENDANT'S BELIEF IN THE NECESSITY TO ACT AS HE DID WAS REASONABLE IN VIEW OF THE ILLEGAL AND IMMORAL CHARACTER OF THE WAR IN INDOCHINA.***

The character of the war being waged in Indochina was described in detail by the witnesses appearing for the defense. The scale of damage and violence to human life and property was described in detail. The "search and destroy" missions were described (T. Vol. III, p. 104), which involved killing cattle, water buffalo and chickens (T. Vol., p.122), the destruction of farm implements such as saws or small tools so that they cannot be used again (T. Vol. III, p. 124), the scattering of the rice and earthen pots on the ground so that there would be no food (T. Vol. III, p. 124), and the indiscriminate burning of homes. (T. Vol. III, pp. 104, 106)

Witnesses testified that these activities were carried on at the direction of officers. (T. Vol. III, pp. 109, 124) Other witnesses testified as to the astronomical number of refugees which has been created by the war, and the total damage to the Vietnamese society. (T. Vol. III, pp. 142-146)

Testimony was also received as to the extensive use of biochemical warfare. (T. Vol. IV, pp. 15-16) The United State government has gone beyond reason in waging war in Indochina. The government has violated its own hallowed constitutional tradition by, without precedent, waging an undeclared war. (T. Vol. III, p. 156) This constitutional violation only points to the other inevitable fact, that the government has violated many international laws and treaties.

The International War Crimes Tribunal (1967) has been one of many international and American investigators of the Indochinese war who have cited the United States' violation of international and moral laws. (T. Vol. V, pp. 5-8) The illegal and irrational character of the Indochina war makes support of government policies and institutions directly relating to this war a moral issue to the defendant and to all Americans.

***B. THE DEFENDANT'S BELIEF IN THE NECESSITY TO ACT IN THE MANNER HE CHOSE WAS REASONABLE SINCE THE NORMAL LEGAL PROCESSES WITHIN OUR GOVERNMENTAL SYSTEM HAD FAILED, BOTH IN RELATIONSHIP ONE TO ANOTHER (I.E., "THE BALANCING OF POWERS") AND IN RELATIONSHIP TO OTHER GOVERNMENTAL POWERS, VIZ., NORTH AND SOUTH VIETNAM.***

Since 1960, there has been growing an increased knowledge of and participation in the democratic political processes by the young, especially the students. The main thrust from 1960-1967 was that of a non-violent legal dissent. (T. Vol. II, p. 53) The burning issues of an undeclared, constitutionally doubtful, and judicially untested Indochina war drew the "Peace Movement" into the streets. Always the dissent was seen as a companion to the vote; and, as a lobbying power for those not old enough to vote. (T. Vol. IV, p. 48; Vol. VI, p. 53) Almost American political classics, the picket-line and the sit-in tactics were used. People began to sign petitions to the President and the Congress issuing "A Call To Resist Illegitimate Authority". (T. Vol. IV, pp. 48-51) Many began to set up "Draft Information Centers" to inform Selective Service registrants of their legal rights. (T. Vol. III, pp. 77-79) During these years, and subsequently, many political candidates offered themselves as "Peace Candidates". This came to historical symbology in the "Eugene McCarthy Movement" (1968), and with the last of our present three Presidents styling themselves as "Peace Presidents" who would "Bring Us All Together" by ending the war and changing the Selective Service System.

A disturbing pattern began to develop in February, 1965

(T. Vol. V, p. 45), when Lyndon B. Johnson increased the bombing of North Vietnam and began the major escalation of American military forces in Vietnam. This "credibility gap" pattern indicated that such "Peace Presidents" would declare withdrawal while ordering increased induction quotas (T. Vol. V, p. 46), and initiate invasions of other Indochinese countries, e.g. Cambodia and Laos. (T. Vol. IV, p. 57) Consequently, strikes and more massive non-violent rallies were held in the major cities and the nation's capitol. (T. Vol. III, pp. 153-154, Vol. IV, pp. 57-58, 61) Meager efforts were made on the part of the elected political bodies to meet with the "Peace People" and to discuss the issues. Arising from these frustrated protests were the symbolic and legal resistances to the Selective Service System through draft card burnings and refusals of induction. (T. Vol. V, p. 49)

The induction refusals pointed to many young peoples' realizations that the Executive and Legislative powers were not going to even listen to the moral outrage of the young nor would they even begin to balance one another out. Here, then (1967), America had a still undeclared war never put to the direct vote of either Congress nor in referendum to the people. While speaking "Peace" out of one side, the political mouth's other side voted "Yea" on all Vietnam oriented military appropriation budgets. The government committed itself to a "total victory" strategy without bringing the issue to the people. Student indignation over the government's seeming dishonesty in not giving the facts about Indochina to the public resulted in massive nationwide "Vietnam Teach-Ins". (T. Vol. III, pp. 151-153)

The thrust of Daniel Ellsberg's testimony went to this deception of the public by the government; and to the need for every man to take a stance of moral resistance. (T. Vol. IV, p. 120) His subsequent release of the famous "Pentagon Papers" detail this pattern of deception which students intuitively sensed back in 1965. (T. Vol. IV, pp. 114-115)

When the government failed in its responsibility, the American youth took to educating the general public to political and moral responsibility. (T. Vol. III, pp. 151-155) Small wonder, indeed, that many began to despair over the elected political leadership. This despair was not so much from ideological or military science differences (i.e., most protestors were not pacifists nor radicals) (T. Vol. V, p. 45), but in the main from the obvious lack of moral sensitivity and courage on the part of that leadership. But true to their idealistic American beliefs in a lawful and just society, particular individuals attempted to force a balancing of powers by taking the issues of the war and the Selective Service System into the courts. (T. Vol. III, pp. 79-83; Vol. V, p. 49)

In light of the constitutional provisions giving Congress the power to declare war, one can at the very minimum make a very strong argument that the war is illegal. (See, Note, "Congress, the President, and the Power to Commit Forces to Combat." 81 Harv. L. Rev. 1771 (1968). See also, Velvel, "The War in Vietnam" Unconstitutional, Justiciably and Jurisdictionally Attackable." 16 Kan. L. Rev. 449, 450-479 (1968) Congress had abdicated its responsibility to the Executive in allowing him to continue to wage the Indochina war.

In addition, the federal courts, relying on the doctrines of political question, standing and sovereign immunity, have resolutely refused to decide whether the Executive has acted unconstitutionally in carrying on a large-scale and sustained War without a Congressional declaration of either limited or general war. It is notable that there has been no Congressional declaration of either limited or general war. It is notable that the United States Supreme Court also has been applying, sub silentio, the political question doctrine (Vol. VI, p. 71), and thereby avoiding having to pass on the validity of the Indochina war. (T. December 9, 1970, p. 71) *Mora V. McNamara*, 389 U.S. 934 (1966); *Luftig V. McNamara*, 252 F. Supp. 819 (D.D.C. 1966), aff'd per curiam, 373 F. 2d 664 (D. C. Cir. 1967) cert. denied 387 U.S. 945 (1967); *United States v. Mitchell*, 369 F. 2d 323 (2d Cir., 1966), cert.denied, 386 U.S. 972 (1967).

See, also, "Civil Disobedience and the Political Question Doctrine," 43 N.Y.U.L. Rev. 1 (1968). The courts have announced that even though it is possible to make a very strong argument that this war is unconstitutional, they will not even consider the legality of a government action which has brought death to tens of thousands of Americans and death and destruction to the people of Indochina.

From the young person's perspective, the only people who did not attempt to "make the system work" (T. Vol. VI, p. 53), were those who had power in the system. (T. Vol. VI, p. 75). What was the proper legal recourse? Voting was always and remains one way. The other forms of lobbying dissent were continued but seemed destined to fall on deaf ears and itching political hands. It is honest, and a proper description, to say that non-violent dissent could continue, but could legal dissent continue? Formally, yes; substantively, no. This was so, because the government itself, in all three branches, had taken away the breadth of possible legal and democratic redress. (T. Vol. VI, p. 71) In a most clear and distinct way the three branches of government had negated the possibility for legal dissent. By their actions they negated and abolished the full range of the democratic

processes for the average person. They had reduced the citizenry to the vote, only. For many, since they were actually robbed of their citizen's powers, they knew that a serious time had come for America, and only the power (hopefully, the mercy and not the wrath) of God would save the government and the people of America. (T. Vol. VI, p. 73) Conscientious Americans faced the dilemma: their acts could be non-violent but not legal.

Faced with the existence of the illegal and immoral war in Indochina, and the failure of the normal legal processes to eradicate the immoral activity, defendant Kroncke was compelled to act because of his religious convictions in order to bring the issues of the war to the attention of the public and to the Congress. He chose a measured dramatic, symbolic, and religious act to accomplish this purpose.

***C. THE MORAL DECISION POSES A MORAL QUESTION; AND THE CHARACTER OF THE ACT INDICATES AN ANSWER THROUGH THE VALUES AND TRUTHS OF THE DEFENDANT'S RELIGIOUS TRADITION.***

*1. The moral decision in reference to the Indochina war and the Second Vatican Council.*

Central to the defendant's act was his attempt to pose in a dramatic fashion a moral question and to offer an answer to that question from his religious tradition. (T. Vol. VI, pp. 72-80) The character of the war in Indochina and the existence of the involuntary Selective Service System to provide manpower for this war was the moral issue. The defendant's decision to perform a "draft raid" act was not based on personal whim but on the religious pronouncements of his Christian church, and in particular, on the documents of the Second Vatican Council (T. Vol. VI, p. 6C), which, as a theologian, he had a special office to uphold. (T. Vol. VI, p. 59)

See, Abbott, "Documents of Vatican II" (Corpus Books, 1965), received in evidence as Defendants' Exhibit 6. One of the documents of this Council (Defendants' Exhibit 6), "The Pastoral Constitution of the Church in the Modern World", at Chapter 5, Paragraph 80, pp. 293-294, points out the immoral propensities of, and condemns, modern warfare. (T. Vol. V., p. 121) The document also states that the religious mission of the Church serves the socio-political realm of society in that it "structure(s) and consolidate(s) the human community according to divine law." (Defendants' Exhibit 6, "The Pastoral Constitution of the Church in the Modern World", Chapter 2, Paragraph 30 pp. 228-229; Chapter 4, Paragraph 42, p. 241; quoted at T. Vol. V, p. 121)

Reflecting upon this Catholic moral tradition and faced with the overwhelming evidence that the Indochina war was

immoral, defendant Kroncke believed that he was compelled to take some action. At this point in the history of the United States' involvement in Indochina (1970), it was necessary for him to act to show his own moral opposition to the immoral war, to create awareness in other Christians of the breadth and depth of this moral question, and to offer (from his Catholic moral tradition) a positive religious solution to the immoral political situation. (T. Vol. VI, pp. 59, 62, 66-68) As a citizen he had to speak to his public about the violations of international treaties and the American Constitution. As a theologian he had to speak to his fellow People of God as to the violations of the guidelines and doctrines of the Second Vatican Council.

Motivated by this "religious necessity" he chose a measured dramatic and symbolic religious act (T. Vol. VI, pp. 76, 79, 89-90) by attempting to remove records of persons classified 1-A and who were subject to imminent induction into fighting in the Indochina war. (T. Vol. IV, pp. 34-36) The act that defendant Kroncke chose was directed at public awareness. The attempted act was prudently measured in terms of non-violence and could have little significant disturbing effect on the operation of Little Falls' draft board in actually inducting persons to carry on the war. The draft raid action, then, was aimed, primarily, at offering, through public witness, a religious solution to the immoral war. The immediate effect of the disruptive action on the local draft board was of minimal importance, and had value only as a symbolic act. (T. Vol. III, pp. 36-38) In order to judge the defendant's action, it is critical that the character of the act chosen is understood in the perspective of a "religious act."

*2. The character of the act as symbolic and non-violent grew from the developing "Catholic Radical" tradition in America.*

Defendant Kroncke places himself within a Catholic theological tradition called the "Catholic Radicals". (T. Vol. V, p. 88) This "Catholic Radical" tradition is a merging of two distinct historical traditions.

Firstly, the socially concerned Catholic theological tradition stemming from Pope Leo XIII (his encyclical "Rerum Novarum" (1880) to Pope John XXIII (his encyclical "Pacem In Terris" (1961). (T. Vol. V, p. 102; Cf. Defendants' Exhibit 6 "Introduction" to the "Pastoral Constitution of the Church in the Modern World", pp. 183-198) In the United States this tradition has expressed itself through Dorothy Day's "Catholic Worker' movement. (T. Vol. IV, p. 61) Many cities, and millions of the poorest of poor, are served by her internationally famous "Hospitality Houses." In Minnesota Archbishop John Ireland's work with immigrants and the labor union movement stand within this socially concerned theological tradition.

Secondly, the political tradition of American radicalism. (T. Vol. V, p. 39-60) Though the term "American Radicalism" has been used, academically, to cover a variety of beliefs, it is used here to refer in particular to those Americans who interpret the Constitution primarily in human terms, not in property terms (T. Vol. V, pp. 52-55); and who use non-violence as their means for social change. (T. Vol. IV, pp-47-54)

During the 1960's, the issue of the Vietnam liar and the Selective Service System brought these two traditions together into a working identity because of the traditions' mutual goal (viz., end of the war and abolishment of the involuntary draft), and their shared techniques of communication and social change (viz., non-violent, symbolic personal witness). (T. Vol. IV, pp. 130-133) The merging of "religion and politics" in Catholic Radicalism was possible because of the political tradition's tactic of non-violence as opposed to the tactic of armed insurrection or violence. In a positive sense these radical political people were quasi-religious (T. Vol. IV, p. 131) in their emphasis on the dignity of the person as the basis for Social Order (T. Vol. IV, p. 135), and the need to preserve the person through nonviolent direct actions rather than violence.

To American Catholics disturbed by the immorality of the undeclared war, their religious tradition offered an historical and theological analysis of how moral people should act. The difficulty for many Catholics was that of interpreting their ideas of the primacy of person, as expressed theologically in terms of "sacramental actions," into socio-political terms and acts understandable by non-Catholic Americans. (T. Vol. V, pp. 124-125) The supreme teaching body of the Catholic people in the Second Vatican



Council wrestled with this problem of war (T. Vol. V, p. 142), and the problem of proper moral responses. In their pronouncement in "The Pastoral Constitution of the Church in the Modern World" (Defendants' Exhibit 6), the Council Fathers determined what would be the characteristics of proper Christian acts in the world today. (T. Vol. V, p. 143) Examples of how thousands of American Catholics interpreted these doctrines through the means of non-violent political protest is that the Civil Rights and anti-war Peace Movements (and thus the American jails) were always heavily people by Catholics, clerical and lay.

Forms of Christian moral protest merged happily with the political non-violent methods of mass marches, picketing and civil disobedience. Many of the draft resistance cases took their moral impetus from the Council's documents (Defendants' Exhibit 6). For a nation which placed little value on the thousands of Indochinese dead, some Catholic Radicals spoke that when human life is held so valueless that "some property has no right to exist. " (T. Vol. V, pp. 50,55) They spoke this religious-political principle through the symbolic, non-violent draft raid. Specifically in 1967, with the draft raid actions of the "Baltimore Four" and the

Catonsville Nine" (viz., pouring blood on draft files; burning 1-A files) (T. Vol. V, p. 55), the nation was made aware of how this appropriate and reasoned response to the immoral war was being made from the Roman Catholic tradition. (T. December 9, 1970, pp. 63-65) These draft raid actions were properly religious because they spoke to the issues raised by the Second Vatican Council and acted on a model of moral responsibility (viz., the model of active moral witness) (T. Vol. V, p. 122) enunciated by the Council. These sociopolitical actions are directly religious responses and religious acts, though the Catholic Church has traditionally been, and in the Second Vatican Council continues to be, unattached to any specific political ideology. (T. Vol. V, p. 121)

3. *The Second Vatican Council's emphasis on the individual's responsibility to act in matters of social morality.*

This Catholic religious renewal emphasized, centrally, the Christian responsibility in the modern world, (Defendants' Exhibit 6, "The Pastoral Constitution of the Church In the Modern World," pp. 199-308) The Second Vatican Council's message was addressed not only to "all Christians"

but "to the whole of humanity." (T. Vol. V, p. 143) "For the Council yearns to explain to everyone how it conceives of the presence and activity of the Church in the world of today." (Defendants' Exhibit 6, "The Pastoral Constitution of the Church in the Modern World," "Preface," Paragraph 2, p. 200)

The Council spent considerable time discussing, and finally condemning, total war, the nuclear arms race, cultural imperialism, and any form of slavery (viz., physical, cultural, economic or religious). (Cf. Defendant's Exhibit 6, "The Pastoral Constitution of the Church in the Modern World," Chapters 3-5, pp. 271-308) The Council placed the responsibility for Christian witness not just in the hands of the visible institutional Church (i.e., the Papacy and other clerical offices), but laid it directly upon the shoulders and hearts of the everyday Catholic. (T. Vol., V, p. 105) In so emphasizing the individual's responsibility to act, the Second Vatican Council brought forth the true traditional understanding of Catholic morality. Previous to the Council, American Catholics had been stereotyped as morally immobile people who never acted without a direct order from the Pope or a priest.

The true Catholic model is for the individual to live his Christian witness, but to live it through an active interrelationship with his Church. Theologically, the Council vividly expressed the personalism of Catholic morality by describing Herself as Church, throughout the Documents (Defendants' Exhibit 6) in the term "People of God." Therefore, each individual is the person of God. The individual experiences most fully his personhood when he is acting with his fellow humans, i.e., when he lives with others as Body. (T. Vol., V, p. 92; Vol., VI, p. 44)

A person is a member of the Body of Christ by actively witnessing to the truth of the Gospels, i.e., the value of life (T. Vol. V, p. 91, 93) through loving his neighbor. The richness of thought here is the principle that the realm of the personal is the realm of God's true presence; as the person so acts to fulfill himself as a mature and responsible person, so is God's presence proportionately manifest and full in the world. Therefore, any problem which threatens the dignity and value of the person directly attacks the religious possibility for effecting and allowing God's presence to be manifest and experienced in the world. Exploitive economic systems, racism, the nuclear arms race, and total war prevent the individual from growing in fullness and so prevent the fullness of God's loving presence to be

understood and lived by vast amounts of people. (T. Vol. VI, pp. 43-47) God's peace and love is present primarily through the People of God's peaceful living and loving. This is a Catholic theological principle applicable to the situation of Americans involved in Indochina. The responsibility for initiating moral witness lies with the individual as the earthly member of the Body of Christ.

*D. THE MORAL ACT IS MEANINGFUL, NECESSARY AND JUSTIFIABLE IF UNDERSTOOD AS A MEANS OF EFFECTING THE SACRAMENTAL ACT.*

As in the Second Council, to best show the positive relationship of Catholic moral responsibility to the socio-political responsibility evoked by the undeclared Indochina war, some explanation of the general principles of Catholic theology must be made.

*1. Jesus is the sacrament of God. The Church is the People of God, the Body of Christ, a sacrament. The individual is a full person insofar as he is an intimate member of the Body of Christ, i.e., a truly sacramental person.*

Within the Roman Catholic theological tradition there is a development of what is called Sacramental Theology. Jesus Christ is defined as the sacrament of God. (T. Vol. V, p. 90) The Church herself also defines herself as a kind of sacrament. (T. Vol. V, p. 91) The principle underlying these assertions is that there are "things and acts" which when properly used, i.e., used symbolically within the believing community, "effect what they signify." (T. Vol. V, p. 91)

This means that these things and acts" signify God's presence with His people and the acts effect His presence. By Her relationship with Christ, the Church in the Second Vatican Council described herself as "a kind of sacrament or sign of intimate union with God, and of the unity of mankind." (Emphasis added) (Defendants' Exhibit 6, "The Dogmatic Constitution of the Church," Chapter 1, Paragraph, p. 15) The different offices within the Church, for example, teaching, preaching, administration, are understood to be one, this oneness achieved only through the actions of Jesus Christ, which actions are understood (theologically, in terms of the presence of the Holy Spirit) (T. Vol. V, p. 94) to be still happening insofar as the People of God act. This centers tremendous dignity and value upon the individual's actions, for his act is not only personal but sacramental. (T. Fol. V, p. 92) That is, his actions in union with the actions of the Church, and therefore with Jesus, effect God's Truth and loving peaceful presence.

*2. Truth is a sacramental experience, i.e., a human reality effected through moral action.*

For the Catholic, truth is not something reached just through rational analysis, but truth is an experience of a person acting through the Body of Christ within a loving relationship with God. This means that truth is primarily an act of witness, as Jesus is called "the Way, the Truth and the Life" because he does publicly the will of the Father. Jesus is the "Son of God" because he loves the Father; he is our Savior because he loves us. Christians are those, then, who are assured that they will find personal fulfillment, maturity and truth only if they act, and ground that act against the truth of Jesus now present in the life of his People of God.

Catholics thus believe that through their historical experience as Church that, after years of worship, reflection and understood responsibility, they could clarify and make explicit for all mankind what were the intentions and truths of Jesus' Gospel. The truths deposited by this activity are called doctrines and form what is called the Tradition. The Second Vatican Council was the latest depositing of the Christian truths in language and concepts appropriate to the modern world. (T. Vol. V, p. 102)

Catholics, as distinguished from other Christian Churches, value the Tradition as equal in truth and authority with Scripture. So, in its truth rendering activity, the Second Vatican Council has articulated for the Catholic the proper and right meanings and ways of expressing the eternal truths of Jesus' Gospel. For the Catholic it is true that the Holy Spirit (T. Vol. V. p. 94) who inspired the Apostles is at work in the Church, and the Church is the place where Christ manifests his presence.

Theologians have the task (T. Vol. V, p. 107) of attempting to articulate the spirit of the times and to open new vistas of insight into the truths of Scripture and Tradition through speculation and experimentation. (T. Vol. VI, p. 59) More so than other offices does that of theologian entail venturing out into experimentation. The draft raid action of defendant Kroncke is understood as such an experiment in truth. To the evil of the Indochina war is spoken the truth of the basic goodness of life and the brotherhood of all mankind. (T. Vol. V, p. 116) This truth is the explicit meaning of the theological reality of the Body

of Christ. To further understand defendant Kroncke's act some understanding of sacraments as means of sanctifying and reconciling human relationships is necessary.

*3. Sacramental actions effect the sanctification and reconciliation of the personal and of the world.*

The symbols and rituals which enter into Catholic religious acts are taken from the cultures in which Catholics find themselves living. As when the Second Vatican Council addressed itself to all of mankind, so when the Church develops new understandings and new symbolic rituals she intends that they serve all of mankind. Sacramental acts, then, are inclusive actions, not exclusive. The more familiar Catholic sacramental acts (T. Vol. V, p. 92), for example, Baptism, Eucharist and Marriage, were intended to convey the sanctification and reconcilability of everyday life with the life of God. Through their symbols each sacrament sanctified, and reconciled with God, aspects of personal growth. (T. Vol. VI, pp. 49-50) That is, Baptism through a water ritual sanctified the birth process; the Eucharist through bread and wine sanctified and reconciled everyday living; marriage through the public witnessing to a bond of love sanctified sexuality. Through these specific sacraments, Catholics have shorn Jesus' sanctification and reconciling of the whole realm of personal growth and maturation with God's intention in creating life. These specific personal sacraments have always been understood as sanctifying the personal in a further definition of the term, for example, any structures, institutions, and laws which have the effect of preventing personal growth can be sanctified and reconciled through sacramental actions.

In the Roman Empire, infanticide and the exposure of infants was only too common; and the Christian practice of baptizing infants affirmed and secured protection for infants and children, who, after Baptism, belonged not only to their parents but also to Christ and his Church. From this historical fact, then, one sees the socio-political nature of all sacramental acts. (T. Vol. VI, p. 74) Sacramental acts inevitably appropriate "Things and Acts" particularly to the socio-political realm, and either uses them as symbols to communicate values and truths; or as objectives to be sanctified and reconciled. As with the relationship of infanticide to Baptism, in all its sacramental acts the Catholic People expect their sacraments to have personal and socio-political effects.

The waging of the Indochina war points up the presence

of evil within the family of man. The reality of an undeclared war as the policy of the United States' government points to a compounded evil present within America.

Using American symbols (viz., the files of the Selective Service System) in public acts of witness to point out and attempt to remove and avoid, this evil, then, is a proper task of a Catholic person, especially a Catholic theologian. As with non-violence (T. Vol. IV, p. 131), the sacramental draft raids strive to speak out to the evil at hand and to open means of reconciliation to the parties involved.

The draft raid action of defendant Kroncke was a proper, reasoned and measured response to the immorality of the Indochina war and to the moral imperatives and guidelines of the Second Vatican Council. The act through its symbolism and non-violence posed a moral question to the American public, Catholic and non-Catholic, and offered a positive answer to this problem by calling upon the values and truths of the Roman Catholic moral and theological traditions.

*E. THE CATHOLIC RADICAL'S ANALYSIS OF THE INDOCHINA WAR AND THEIR RESPONSE, IN PARTICULAR, IN DRAFT RAID ACTIONS.*

To some American Catholics the time had come in 1967, when the political system, for all practical purposes, had indicated its acceptance of moral indecision, to respond with the values and truths of their Scripture and Tradition in a appeal to the higher ethical values of the American people. (T. Vol. V, p. 50)

*1. America's loss of self-identity indicated by the moral vertigo surrounding the undeclared Indochina war and the constitutionally unjustifiable Selective Service System.*

At the present time, during this undeclared war, many Americans have raised legal and political questions as to the constitutionality and propriety of many of the military's interests and operations. Most specifically, they center on the worth and morality of the Selective Service System. (T. Vol. V, p. 53) Many despaired after years of dissent that these contradictions of an undeclared war and an involuntary draft would die from moral indifference and indecision on the

part of the elected government. This is indeed the sad and dishonorable state of our present political situation.

Turning into the second decade of the Indochina war, no decisions have been made yet whether such a war legally can exist. In the third decade of the involuntary Selective Service System no direct testing of its constitutionality has yet been allowed nor decided. The undeclared war and the involuntary draft stand glaringly as signs that America, as a nation, staggers, groping for her self-identity. (T. Vol. VI, p. 70-71) This is a period of moral vertigo. This moral dizziness has its effects on thousands who have died in the war while elected and appointed men of power remain lawless and immoral. It seems that life is expendable at the whim and fancy of the government's political expediency. The government speaks directly in violation not only of its own most hallowed ethical ideals, but directly to the primary value of the Christian Scripture and Tradition, that of the sanctity of human life. (T. Vol. V, p. 116) When the political system fails to balance itself, then the overriding balancing power must be that of morality.

*2. The Selective Service System is an immoral and evil system which voids human choice and destroys human life.*

The American government has created an immoral and evil system, i.e., the involuntary military system. (T. Vol. VI, pp. 74, 79) Several bleak realities point to the sober truth of this statement. By law, every alive American male, regardless of his mental, physical or spiritual condition, when he turns eighteen, must sign up with the Selective Service System and carry his little card. Under questioning by defendant Kroncke, Colonel Robert P. Knight, State Director of the Selective Service for Minnesota (T. Vol. II, p. 149), **testified that it is absolutely impossible for an American male, regardless of his physical or mental condition, to avoid signing up with the draft.** (T. Vol. III, p. 19)

This System is, next to the Post Office System (which, since the trial, has become a private concern), the most widely dispersed arm of the government. (T. Vol. III, p. 21) The System is involuntary, and the records kept are not the private property of the registrant. (T. Vol. III, p. 21) The "freedom of choice" which the young man is guaranteed is either to so register or else leave the country or take up residence in a federal jail. (T. Vol. III, p. 20) It is not

a play for colorful rhetoric to say that a young man's "choice" is either cultural life or cultural death. There is no other such involuntary and all pervasive system in America; not even the taxation system nor the public education system is that involuntary and inescapable.

Obviously, the Selective Service System is of bedrock importance to the recent governments' idea of self-development and to their ideal of what should be the American experience. However, this is a recent tradition in American governmental policy, stemming from 1940. Understood in this manner, the Selective Service is a "very peculiar system," (T. Vol. VI, p. 69) which can be judged as immoral and evil because it both denies free choice in reference to the ultimate human and religious questions of the value of life; and because it is the main bloodline for continuing the morally abominable war in Indochina.

### *3. The character and meaning of draft raid acts as sacramental.*

From their moral and sacramental traditions, Catholic Radicals like the Fathers Berrigan of the "Catonsville Nine" and defendant Kroncke of the "Minnesota Eight," understood it as their task to seek socio-political acts which, they hoped in faith, would begin the removal of the evil present in America, and allow God's sanctifying and reconciling presence to be felt and discerned. They were not self-righteous, egotistical men seeking fame or profit. (T. Vol. VI, p. 77) Indeed, most of the Catholic Radical draft raiders were over thirty and into some standard profession. They were people who believed that the meaning of their Catholic sacramental system extended through and beyond intra-personal acts into social acts. They believed that God's loving peace will infallibly be present through prophetic moral acts of sacramental willfulness.



They believed that sacramental actions, for example, the Eucharist which effects the religious solidarity of, what is called theologically, the "Body of Christ," carries over concretely into and through the State's socio-political body.

In a liturgical way, these Catholics removed the evil pro-arty (the 1-A files) and destroyed it. This destruction is both a negative and a positive act. Negative, in terms of sacramental exorcism, where the 1-A files are discerned as the demonic elements, and so must be destroyed. The destruction and disruption of the money-lenders in the temple, both symbolically and actually, by Jesus, is precedent. (T. Vol. V, pp. 139-140) Destruction is positive, i.e., in reality non-violent, understood as sacramentally symbolic. That is, Catholic theology holds that Jesus accepted the death on the Cross to give witness to the style of the Christian life; and to effect the new truth of God's presence with his people in Jesus as his Son.

In Catholic theology, the belief in the Resurrection of Jesus from the dead stands as the affirmation of these truths about life and living for which Jesus himself lived and died. In its attempt to join religious methods with political methods the symbolic destruction of the 1-A files proclaims, and forces the American people to hear, the main tenets of the government's demonic principle, viz., that property is more important than people. This demonic principle has worked itself into the fiber of the government's life-style; this no more vividly portrayed than in the acceptance of an undeclared war, the perpetuation of an involuntary draft system, and the continuing Orwellian slogan of double-think which has become the new Great Seal of America: "War is Peace."

The draft raid action is a response to the Second Vatican Council's statement that Jesus' being in the world makes it the Catholic's primary religious obligation to care for "and to build up the world and fulfill its purpose." (Defendants' Exhibit 6, "The Pastoral Constitution of the Church in the Modern World," "Conclusion," Paragraph 93, p. 307)

4. *The draft raid act is first, as to origin and goal, a sacramental act; second, as to means, a political act.*

The defendant Kroncke's act can be described and defined on several levels of awareness and responsibility. For some, the draft raid can be a violent, illegal and primarily political act; for others, a non-violent, highly moral, sacramental and reconciling act. For the former there is no justification for this act because it is not of an immediate necessity, (for example, see statement of Judge Philip Neville, Vol. VI, pp. 149-150), while for others it is justified as a social and religious necessity, the perennial necessity being to preserve life and develop a justly ordered society. This latter necessity has been the thrust and highest goal of every society ever found.

Americans exist at a time when thoughtful and sincere people see the nation establishing herself as Caesar without God. This is a deviation both from the ethical and humanistic values of the Constitution and from the moral guidelines of the Second Vatican Council. By its actions, the government has negated the rights of religious peoples to live according to the highest and central values of their beliefs, viz., the dignity of human life. The government has set up an evil Selective Service System by which it forces, by threat of life or death consequences, young men to kill in a war she refuses to declare. The abomination is that the government declares:

"Peace, Peace, when there is no peace. Were they ashamed when they committed abomination? No, they were not at all ashamed; they did not know how to blush. Therefore, they shall fall among those who fall; at the time that I punish them, they shall be overthrown," says the Lord." Jeremiah 6:14-15.

#### *F. CONCLUSION*

The act performed by defendant Kroncke as specifically understood in reference to the Roman Catholic theological tradition is a sacramental religious act. His act was based on a bona fide belief in the illegality and immorality of the Indochina war and the evil of the Selective Service System. He was compelled by religious necessity to raise a moral challenge to this

immoral situation. He was compelled by necessity to attempt a sacramental act removing the evil present and offering an avenue of reconciliation via religious truths. This belief and this action was reasonable, moral and religious; he has not willfully violated any law, and therefore, he is guilty of no crime.

If this court determines that the religious necessity of the defendant's act does not constitute a justification for his conduct, I challenge the court to articulate guidelines to determine in what extreme circumstances people who act in a measured way for reason of conscience, and for the purpose of effecting their religious truths, may resist the immoral acts of their government.

*II. THE COURT ERRED IN FAILING TO ADVISE COUNSEL OF HIS RULING ON REQUESTED INSTRUCTIONS UNTIL AFTER FINAL ARGUMENTS TO THE JURY.*

Before the close of the evidence, defendants presented in writing to the Court three proposed instructions to the jury (T. Vol. VI, pp. 16e-162). Proposed instruction No. 3 dealt specifically with the defense of religious necessity. The court gave no indication whether the defendants' instructions would be granted or refused.

At the conclusion of the testimony, the Court, over the objection of the prosecution, formally received in evidence defendants' Exhibit 6, a volume containing the documents issued by the Second Vatican Council (T. Vol. VI, p. 93). Defendant Kroncke then proceeded to present his final argument in the terms of his defense of justification based on religious necessity (T. Vol. VI, pp. 114-129). During this argument, Kroncke emphasized his defense of justification based on religious necessity and referred to quotes from the documents of the Second Vatican Council (Defendants' Exhibit 6; T. Vol. VI, pp. 115-118).

After completion of his final argument, and during the Court's instructions to the jury, Kroncke for the first time discovered the Court's decision to deny the defendants' instructions and to instruct the jury to

disregard the testimony forming the basis of his defense of justification based on religious necessity. The Court instructed the jury:

"I further instruct you that the defense articulated by defendant Francis Kroncke but joined by both defendants, i.e., assertion of a religious, theological motivation is not a defense in this case. Religious doctrine or belief of a person cannot be recognized or accepted as an excuse or justification for his committing an act which is a criminal offense against the law of the land." (T. Vol. VI, pp. 151-152)

Rule 30 of the Federal Rules of Criminal Procedure required the Court to advise Kroncke of its proposed action. on his instructions to the jury prior to Kroncke's final argument to the jury. The Court committed clear-error in failing to rule on defendant's proposed instruction until after Kroncke had completed his final argument to the jury.

*RELIEF SOUGHT*

For the foregoing reasons, defendant Kroncke requests an order of this Court granting a new trial.

Respectfully submitted,

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Dated: July 28, 1971