

The Catholic Lawyer

Volume 15
Number 3 *Volume 15, Summer 1969, Number 3*

Article 7

December 2016

Selective Conscientious Objection

Gaillard T. Hunt

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Catholic Studies Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Gaillard T. Hunt (1969) "Selective Conscientious Objection," *The Catholic Lawyer*. Vol. 15 : No. 3 , Article 7.
Available at: <https://scholarship.law.stjohns.edu/tcl/vol15/iss3/7>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

SELECTIVE CONSCIENTIOUS OBJECTION

GAILLARD T. HUNT*

"such men as had the fear of God before them, and made some conscience of what they did."

—Cromwell on his army.¹

THE AMERICAN CATHOLIC BISHOPS have asked for recognition of selective conscientious objection to the draft,² and much other comment has appeared lately supporting this view.³ I will show in this article that the Selective Service System's rule against selective objection is not supported by legal authority, and indeed has been rejected by the Supreme Court. It is possible the draft will go away soon.⁴ If so, we should not let the impression stand that selective objection was legally excluded during the extraordinary twenty-one year peacetime draft we are leaving behind us as a precedent.

Selective objection, of course, is only a tiny part of the conscien-

* LL.B., Columbia University.

¹ SIR CHARLES FIRTH, OLIVER CROMWELL AND THE RULE OF THE PURITANS IN ENGLAND 84 (1953).

² *Human Life in Our Day*, PASTORAL LETTER OF THE AMERICAN CATHOLIC BISHOPS, Nov. 15, 1968, issued from Washington, D.C., available as a supplement to 18 CATHOLIC STANDARD (1968).

³ The World Council of Churches has endorsed selective objection. N.Y. Times, July 17, 1968, at 1, col. 3, and 10, col. 1. See also Cohen, THE NATION, July 8, 1968, at 11; E. B. Haskell, CHRISTIAN CENTURY, Oct. 30, 1968, at 1373. Some members of the Marshall Commission proposed this, but the majority rejected this idea. REPORT OF THE NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE 48-51 (1967) (hereinafter the MARSHALL REPORT). Rep. Edward I. Koch of New York has introduced several bills to remove doubt that selective objection is recognized. Those first introduced are: H.R. 7885, H.R. 10500, and H.R. 10501, 91st Cong., 1st Sess. (1969). Mr. Koch believes these bills are only declaratory, and that the present law allows selective objection. 115 CONG. REC. G. 303 (Feb. 27, 1969); N.Y. Times Magazine, April 13, 1969, at 14.

⁴ See, e.g., Mr. Koch's "Volunteer Military Service Act" H.R. 10174, 91st Cong., 1st Sess. (1969).

tious objector problem. The procedure for claiming a conscientious objection itself changes the nature of the privilege.⁵ The applicant must convince his local board he is "sincere,"⁶ a test so global as to strike at the very hope of equal treatment. The

⁵ Comment, *The Selective Service: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123 (1966). When a registrant tells his board he objects to service, he is given Selective Service Form 150, asking the exact nature of his objection, where he learned it, etc. 32 C.F.R. § 122.11 (1962). The local board grants or denies the exemption on the basis of the form or any other information they have. 32 C.F.R. §§ 1622.11, 1622.14 (1962). If the exemption is denied, the registrant has thirty days in which to demand a personal appearance before the board, at which he must appear alone unless the board consents to hear someone on his behalf. 32 C.F.R. § 1624.1 (1962). If he is again refused his exemption, the objector can go to an appeal board, 32 C.F.R. § 1626.2 (1962) and if he is refused there with a dissent, he can go to the Presidential appeal board. 32 C.F.R. § 1627.3 (1962). Before the 1967 amendments, cases were referred to the Justice Department when the registrant appealed from a local board denial of an exemption. Formerly 50 U.S.C. APP. § 456(j) (1964). There a hearing was held before an unpaid volunteer hearing officer, whose findings were sent to the conscientious objector section, which wrote a formal Justice Department recommendation. The recommendation went to the appeal board, which made the actual decision, and the registrant could send the appeal board a rebuttal to the Justice Department recommendation. The F.B.I. made an investigation before the hearing, and their report was given to the hearing examiner. The registrant had a right only to a summary of anything derogatory in the F.B.I. reports. *Gonzales v. United States*, 364 U.S. 59 (1960); *United States v. Nugent*, 346 U.S. 1 (1953). The Justice Department procedure was eliminated in 1967 because it was causing delays "exceeding 2 years." 90th Cong., 1st Sess. 1308, 1334 (1967) (reporting on S. 1432).

⁶ Smith & Bell, *The Conscientious Objector Program—A Search for Sincerity*, 19 U. PITT. L. REV. 695 (1958).

1967 amendments⁷ removed the Justice Department's advice from the process, so that now the decision is made at a local board meeting, with no right to counsel,⁸ with amateur administrators,⁹ in an inquisitorial rather than adversary proceeding, with a record to be used against the registrant built up over the years since he turned 18, and with any right to appeal sharply limited by the lack of transcript.¹⁰ The basic test, that the registrant be opposed to military service by reason of religious training and belief,¹¹ is also an anomaly in our law, even as broadened by *United States v. Seeger*.¹²

We might then be critical of the Bishops for passing by all these problems. Their only procedural thought is the naive observation that, if selective objection is recognized, it should be "not easy"¹³ to

⁷ Pub. L. No. 90-40, 81 Stat. 100 (June 30, 1967). The appeal now goes to the appeal board only on what is in the file, plus whatever written statement the registrant might add. It may seem a boon to have the F.B.I. out of the process, but this will mean the registrant's statements must be subject to extra scrutiny for inconsistencies and unlikelihoods. No doubt many F.B.I. reports were favorable, and the unfavorable ones at least gave the registrant something to argue about.

⁸ 32 C.F.R. § 1624.1(b) (1962).

⁹ Local board members are unpaid, part-time volunteers. The Marshall Commission found many of them do not approve of the conscientious objection exemption at all. MARSHALL REPORT 108-09 (1967).

¹⁰ 32 C.F.R. § 1624.2(b) (1962). Some boards have let in stenographers hired by the registrant, or tape recorders. 1 SELECTIVE SERVICE LAW REPORTER 27.

¹¹ 50 U.S.C. APP. 456(j) (1964).

¹² 380 U.S. 163 (1964).

¹³ *Human Life in Our Day*, CATHOLIC STANDARD, SUPP. No. 47, Nov. 21, 1968, at 8, col. 3.

get the privilege, and the recommendation that full alternative service¹⁴ should be exacted from any objector. The Bishops seem unaware that an objector who followed their guides for judging the war might be refused the exemption not because he was selective but because the local board thought he was not religious enough, or simply did not believe him.¹⁵

But there are reasons the Bishops might single out the issue of selective objection. The requirement that a registrant object to all wars is often a trap at the very threshold. The Director of Selective Service for New York City, for instance, has told his local boards to ask men who apply for the exemption:

If this country were invaded by a strong, powerful nation which was being popularly lead by an irresponsible, irrational leader intent upon subjecting the people of the United States to his will, and with whom all conceivable methods of peacefully negotiating the situation had failed, would he, the registrant, comply with a call to arms issued by the President of his Country?¹⁶

¹⁴ The Bishops do not seem to be aware of the suggestion that alternative civilian service may be harder to justify under the Constitution than military service, which has tradition and necessity to back it up. The problem is a marginal one now, but suggestions have been made to replace the draft with a program of national service, where every young man would spend two years in the Peace Corps or some other useful program, or go into the army. This would require a new view of the United States as the font of all social usefulness, or else a new view of young persons as something less than citizens.

¹⁵ The Bishops' naivety is distressing both intrinsically and for what it shows about their contact with the peace movement within their own Church.

¹⁶ Memorandum, dated October 10, 1967, sent

A question like this, or a question whether the registrant approves of the war against Hitler or the Civil War,¹⁷ is likely to keep the board from reaching questions like whether the objection is religiously motivated. Remember that no local board is likely to have more than an occasional objector, and that members have no way of accumulating experience with the problem;¹⁸ it may be insurmountable if the registrant admits his religion would let him fight under some circumstances. So the issue is important: does an admission that he believes there may be times when it is all right to make war block a registrant, automatically and without chance of exception, from an exemption he would otherwise get?

Hugh C. Macgill,¹⁹ John H. Mansfield²⁰ and Ralph Potter,²¹ have ably covered the policy merits of this problem. They argue

by the Director of the Selective Service of the City of New York to all appeal boards in that area, cited in Reisner, *The Conscientious Objector Exemption: Administrative Procedures and Judicial Review*, 35 U. CHI. L. REV. 686, 701 n.88 (1968).

¹⁷ "[T]hey all want to fight Hitler, but you see we don't have him in stock." *Hearings on Extension of the Universal Military Training and Service Act Before House Armed Services Committee*, 90th Cong., 2d Sess. pt. 1, at 2636 (1968) (testimony of Gen. Hershey).

¹⁸ Conscientious objectors are a fraction of one percent of the draft pool. See the Annual Reports of the Director of Selective Service.

¹⁹ Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 VA. L. REV. 1355 (1968).

²⁰ Mansfield, *Conscientious Objection—1964 Term*, 3 RELIGION AND THE PUBLIC ORDER 50 (1965).

²¹ Potter, *Conscientious Objection to Particular Wars*, 4 RELIGION AND THE PUBLIC ORDER 44 (1968).

that no purpose is served by excluding from the privilege a genuine selective objector, and that there may be constitutional reasons why he cannot be excluded if those who object to all wars are allowed the privilege. But I would like to go back and pick up a preliminary question: does the law as it stands now necessarily exclude a selective objector?

At the outset we should note that there is little hope of understanding or cataloguing the varieties of selective objectors. Some rest on grounds other than the obvious evils of war: there are objectors who think America's racial history makes their service in the American army wrong;²² others object to the medical treatment in the army;²³ the Harshamites of Illinois are said to object to being "yoked with unbelievers"²⁴—and so on. The just war theorists take a variety of positions on what the just war theory means: some say it excludes all modern wars,²⁵ while others say Vietnam is a just war,²⁶ so just war

objectors must differ among themselves as to why they are objecting. Even among the traditional peace churches there are pacifists who are reluctant to say they would never fight in extraordinary circumstances to prevent a greater evil.²⁷ For the time being, however, we may lump all those selective objectors together, since a general rule against selective objection would refuse them all.

Also at the outset we should reaffirm the validity of a conscientious objection exemption. I suggest that the exemption has a more specific rationale than the balancing of religious liberty against social needs.²⁸ I offer the theory that the public mind has accepted a draft from time to time because it felt on those occasions that there was a great national purpose which the draftees would share. The drafts were coercive only in that the men were forced to lay aside their private preoccupations. It was believed that once the man left his job, once he was coerced enough to break loose from his routine and to overcome practical obstacles, he would then see himself as part of something well worth fighting in. For instance, when Holmes undertook to apologize for his pride in having fought in the Civil War, he said something the most inconvenienced or frightened draftee would find consoling: "I think that, as life is ac-

²² *Clark v. Gabriel*, 393 U.S. 256 (1969); *United States v. Lewis*, 275 F. Supp. 1013 (E.D. Wis. 1967).

²³ *United States v. Carson*, 282 F. Supp. 261 (E. D. Ark. 1968).

²⁴ See *Smith & Bell*, *supra*, note 6; 19 U. PITT. L. REV. 695, 721 (1958). II Corinthians 6:14.

²⁵ J. RYAN, *MODERN WAR AND BASIC ETHICS* (1940). See Spiro's beliefs from *United States v. Spiro*, 384 F.2d 159 (3d Cir. 1967), discussed below.

²⁶ Fr. John Courtney Murray, in a commencement address in the spring of 1967, 113 CONG. REC. 15779-81 (1967), said he could make out the case for Vietnam as a just war. He seems to rely on an argument that a declaration of war is presumptively valid. There are, of course, two presumptions: a presumption against war and a presumption in favor of solemnly promulgated congressional or executive findings.

It is the extension of the latter presumption to protect implicit findings that would nullify the traditional requirement that the just war be declared.

²⁷ Some see an element of presumption in any such universal assertion. M. Friedman, *The Covenant of Peace*, PENDLE HILL PAMPHLET No. 110, at 17 (1960).

²⁸ See Macgill, *supra* note 19, at 1389-93.

tion and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived."²⁹ But this consolation is not available to a conscientious objector, and in the same passage, though conscientious objection was far from his subject, Holmes exempted from his words men with religious scruples.

The conscientious objection, then, has been a recognition that some men are genuinely inhibited from sharing in the passion of their time. They have thought too deeply, and in the wrong direction, to be reached by the rhetoric of war or the realities behind it so we do not force them to come and give mere physical service. A society which sees itself only in terms of coercible citizens, coercing laws, and coerced behavior, would not have a conscientious objector privilege. But if the nation thinks of itself as having a purpose clear enough to command the assent of citizens with minds of their own,³⁰ then it sees no point in coercing those who genuinely do not share the national purpose. Our society of course is not firmly committed to

²⁹ When it was felt so deeply as it was on both sides that a man ought to take part in the war unless some conscientious scruple or strong practical reason made it impossible, was that feeling simply the requirement of a local majority that their neighbors should agree with them? I think not. I think the feeling was right—in the South as in the North. I think that, as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived. Address to the Grand Army of the Republic post at Keene, N.H., Memorial Day, 1884. 1 O. HOLMES, SPEECHES 6-7 (1962).

³⁰ T. GILBY, O.P., BETWEEN COMMUNITY AND SOCIETY, ch. 20 (1953).

either of these two views of itself— we coerce taxes without the slightest hesitation.³¹ But before Vietnam we always started drafting people during moments of rare concord, and we could make a concession worthy of the ideal state: we could excuse those who dissented from the concord. In this sense we have never had a compulsory draft in the way the criminal law or taxes are compulsory. Before Vietnam the draft was a way of shaking loose and channelling the community's enthusiasm, and there was no need to caulk up the seams, as there is with taxes and the criminal law.³²

This theory, of course, would admit a selective objector as freely as any other. But let us put aside the merits of the quarrel and ask the simpler question: does the law now bar selective objection?

³¹ It is not that we respect such objections less, but that paying a tax is not a participatory activity. We do not expect taxpayers to wear ribbons and show their wounds to their grandchildren. *But see* the proposal co-sponsored by Sens. Clark, Scott, Goldwater and Lausche to exempt Amish from the Social Security tax. 110 CONG. REC. 21354-60 (1964). The rationale I offer also suggests that conscientious objection should be more closely tied to the registrant's life-style than to the abstract content of his conviction. *Cf.* the enunciation of the standard in terms of what place the belief occupies in the registrant's life in *United States v. Seeger*, 380 U.S. 163, 166 (1964). The registrant in *United States v. Lewis*, 275 F. Supp. 1013 (E.D. Wis. 1967), for instance, had gone south to put his commitment to his people into practice; it would make more sense to exempt him from the nation's wars than a person who had honestly reached a theoretical pacifism, but had gone on living as before.

³² Judge Wyzanski would carry this to its fullest implication: that we do not really have a draft, at least not in the final analysis of each case.

I. Where Does the All-Wars Requirement Come From?

The rule that a conscientious objector must object to all wars was invented by Judges Clark, Frank and Augustus Hand of the Court of Appeals for the Second Circuit in 1943.³³ They needed it because they read the conscientious objector exemption to include socialists, agnostics, and others not conventionally religious. They had to set some boundary or their liberality would have exempted almost anyone.

The statute does not clearly require that the objection be to all wars:

Nothing in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . .³⁴

The phrase *in any form* could modify *war* or *participation*. Grammar would argue it modifies the thing it is next to, *war*, but some courts have said it modifies only *participation*.³⁵ Also arguing that it modifies

³³ United States *ex rel.* Phillips v. Downer, 135 F.2d 521 (2d Cir. 1943); United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).

³⁴ 50 U.S.C. APP. § 456(j) (1964), 81 Stat. 100, 104.

³⁵ "The words 'in any form' obviously relate, not to 'war' but to 'participation in' war" Taffs v. United States, 208 F.2d 329, 331 (8th Cir. 1953), *cert. denied*, 347 U.S. 928 (1954). This statement has been quoted by T. Oscar Smith, head of the Conscientious Objector Section at the Justice Department. See his recommendation in Spiro's case, set out as Appendix F to petition for certiorari, Spiro v. United States, 384 F.2d 159 (3d Cir.), *cert. denied*, 390

only *participation* are the cases denying the exemption to men because they have worked in defense factories, or have said they would not mind contributing to defense in some non-military role.³⁶ If such indirect participation can bar the exemption, *in any form* must exhaust its force on *participation* before it gets to *war*.

The phrase *war in any form* would be quite awkward and uninformative since a recognized conscientious objector need not object to violence,³⁷ and the difference between war and violence is a matter of form.³⁸ Most selective objectors lay down criteria that do not turn on the form of the war—the Thomistic just war criteria, *e.g.*, most of which concern the circumstances of the war. So, if the statute meant the objector must object to participation in all wars, it should have said "all wars"

U.S. 956 (1967). And, of course, *see* Sicurella v. United States, 348 U.S. 385 (1955), discussed below.

³⁶ De Remer v. United States, 340 F.2d 712 (8th Cir. 1965), *aff'g* 221 F. Supp. 553 (D. Minn. 1963); Witmer v. United States, 348 U.S. 375, 382 (1955); United States v. Moore, 217 F.2d 428 (7th Cir. 1954), *rev'd on other grounds*, 348 U.S. 966 (1955); Roberson v. United States, 208 F.2d 166 (10th Cir. 1953). *But see* Attorney General Kennedy's memo of March 12, 1963, Appendix B to government's brief confessing error in Harshman v. United States, 372 U.S. 607 (1963) and Parker v. United States, 372 U.S. 608 (1963).

³⁷ Sicurella v. United States, 348 U.S. 385 (1955); Fleming v. United States, 344 F.2d 912 (10th Cir. 1965); United States v. Lauing, 221 F.2d 425 (7th Cir. 1955).

³⁸ "War, generally speaking, has only one form, namely a struggle between opposing forces; whereas a person's participation therein may be in a variety of forms." Judge Medina in United States v. Hartman, 209 F.2d 366, 371 (2d Cir. 1953).

rather than "participation in war in any form."

Thus the statute does not dictate an all wars requirement, or at least not with a clarity that compels judicial acceptance.³⁹

Apparently the all-wars requirement was never suggested before World War II. The World War I statute required that the objection be one that the objector's church had held before the war.⁴⁰ This was an implicit all-wars requirement, but of course it is not found in the present statute. I find no pre-World War II case suggesting either logic or the Constitution makes the all wars requirements necessary.⁴¹ Then, in 1943 the Court of Appeals for the Second Circuit produced a pair of cases embracing the all wars requirement as the essence of religion. The theory behind these cases seems to be that an objection held with enough fervor will spread to cover all wars.

³⁹ There is yet another reading of the statute which I concede there is no authority for: "conscientiously opposed to war in any form" could mean, opposed to any one of the divers forms of war. This would make sense if the statute were meant to protect someone from being drafted when there was a danger that a war he might object to might arise later, after he was already under military discipline.

⁴⁰ 40 Stat. 76, 78, ch. 15, § 4 (May 18, 1917). The state militia laws usually took similar institutional criteria. *See, e.g.*, MASS. STAT. ch. 73 (1799) and ch. 103 (1809) requiring certificates from a Quaker meeting. The Civil War draft was similar, 13 Stat. 9, ch. 13, § 17 (Feb. 24, 1864). (The first Civil War draft, 12 Stat. 731, March 3, 1863, had no conscientious objection clause).

⁴¹ *Dole v. Allen*, 4 Me. (4 Greenl.) 527 (1827); *Lees v. Childs*, 17 Mass. 351 (1821); *White v. McBride*, 7 Ky. (4 Bibb) 61 (1815). *See, e.g.*, *Commonwealth v. Fletcher*, 12 Mass. (11 Tyng) 441 (1815).

It is not explained why so much fervor is demanded. I suggest it is because the second circuit was extending the privilege to worldly objectors, and needed some safety device to keep the exemption from becoming promiscuously available.

The first case was *United States v. Kauten*⁴² which upheld a conviction for refusal to report for induction, and added the all-wars requirement by way of lyric dicta. The findings are not too clear on the content of Kauten's philosophy. He opposed war because he was against infringements on the "individual qualities of a person,"⁴³ and he was distressed by the animosities loose in Europe. Kauten thought Roosevelt wanted the draft because of unemployment; the hearing officer said Kauten's opposition to the "present war is greatly influenced by his dislike of our present administration."⁴⁴

The court, per Augustus Hand, said Kauten had not qualified because he was not religious. But rather than let the matter rest there, they then enthused on the nature of religion:

It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as means of relating the individual to his fellow-men and to his

⁴² 133 F.2d 703 (2d Cir. 1943). Registrants often assume that killing is the principal vice of war from the religious point of view, but the idea that military discipline is contrary to a proper respect for man's nature is also capable of religious expression.

⁴³ *Id.* at 707.

⁴⁴ *Id.*

universe—a sense common to men in the most primitive and the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets. A religious obligation forbade Socrates, even in order to escape condemnation, to entreat his judges to acquit him, because he believed it was their sworn duty to decide questions without favor to anyone and only according to law. Such an obligation impelled Martin Luther to nail his theses on the door of the church at Wittenberg and, when he was summoned before Emperor Charles and the Diet at Worms, steadfastly to hold his ground and to utter the often quoted words: "I neither can nor will recant anything, since it is neither right nor safe to act against conscience. Here I stand. I cannot do other. God help me. Amen."

Recognition of this obligation moved the Greek poet Menander to write almost twenty-four hundred years ago: "Conscience is a God to all mortals;" impelled Socrates to obey the voice of his "Daimon" and led Wordsworth to characterize "Duty" as the "Stern Daughter of the Voice of God."⁴⁵

Lyric passages make bad law.⁴⁶ "Religion" here is broad; we canvass religions on a cross-cultural tour, from primitive

man to Wordsworth. This gives the passage an air of openhanded toleration. But because of this toleration of differing Gods, the passage is rather demanding of man: it asks a fervor and stubbornness few men ever reach.

The all-wars requirement seems to be only an implicit part of this fervor:

There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.⁴⁷

No reason is given why religion should be equated with generality. There is no discussion, for example, of the problem the Bishops now raise: what if the inward mentor, call it conscience or God, should say, take no part in wars that have grown far beyond their justification. We are given only an *ipse dixit*: conscientious objections run to war under any circumstances, political objections run to particular wars.

If the *Kauten* case stood alone it could be read as resting on the worldly or political nature of Kauten's objection. But shortly thereafter, in *United States ex rel.*

⁴⁵ *Id.* at 708.

⁴⁶ Potter sees this decision as a "misstep possessing the marks of tragedy in which two worthy but incompatible demands collide." RELIGION AND THE PUBLIC ORDER 44, 60 (1968). Prof. Potter thinks the breach in the all-wars requirement, which he never questions as the present law, could best be made by a clearly religious objector.

⁴⁷ *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).

Phillips v. Downer,⁴⁸ two of the same judges, Clark and Augustus Hand, distinguished *Kauten* and reemphasized that it rested on the particularity of *Kauten's* objection.

The *Phillips* case is often cited for its liberality in interpreting "religious." Phillips' opposition to war admittedly came from a reading of "philosophers, historians and poets from Plato to Shaw."⁴⁹ The hearing officer said it was hard to tell whether his objection came from "philosophical and humanitarian concepts which are deemed to have the essence of religious thought, or whether they more largely result from his political convictions and his dissatisfaction with our present way of life."⁵⁰ The court said there was no evidence that his political conviction excluded all religious feeling, and thus gave the exemption to a man who was religious only in a very wide reading of the word.

But Phillips did oppose all wars, and all violence for that matter, and the second circuit relied on that to distinguish *Kauten*:

It is to be noted that the facts differ from those upon which we relied in the *Kauten* case as an alternative ground for affirmance of the conviction there. For here the opposition to war was a deep-seated one applying to war in general and was not based upon political objections to this particular war.⁵¹

Then the court quoted the above language

⁴⁸ 135 F.2d 521, 523 (2d Cir. 1943).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

from *Kauten* equating particularity with politicalness, adding nothing to it to explain why God and conscience cannot speak in specifics. We have only the implication that a belief held with enough fervor would blur out to condemn all wars.⁵²

Thus the two cases together do spell out a requirement that the objection be to all wars. But they do so while saying the privilege would be available to many men whose thinking is, in the common estimation, secular, not religious. The second circuit's liberality has been rejected,⁵³ and the exemption is limited to religious persons, so this peculiar safety device should be obsolete. It was never more than an ambitious gloss on the word "religious," supported not by judicial or philosophical citation, but by an assumption as to where enthusiasm would run if it outran reason. The assumption was only an *ipse dixit*, and events have flatly discredited it: religious impulses do sometimes lead to objections to particular wars. So *Kauten* and *Phillips* need no longer command respect for an all-wars requirement.

II. Where Does the All-Wars Requirement Stand Now?

When the statute was re-written in 1948,⁵⁴ nothing was done to adopt the all-

⁵² Macgill has reviewed all the possible reasons in support of this view. The reasons are all his, however, not the courts'; the courts have given no reason at all for this. See Macgill, *supra* note 19.

⁵³ That is, by the 1948 re-writing of the statute, discussed in the next section.

⁵⁴ 62 Stat. 604, 612-13 (1948).

wars requirement. And the second circuit's wide view of the word "religious" was disapproved, so with it, by implication the all-wars requirement was rejected.

The Court of Appeals for the Ninth Circuit had expressly rejected the second circuit's view of religion in 1946. In *United States v. Berman*,⁵⁵ Berman was a socialist, and he claimed religion by a letter from a theologian saying that any theory for the betterment of mankind is a religion. This would probably have worked in the second circuit, since Berman definitely opposed all wars, but the ninth circuit turned down his claim. They quoted the words of Chief Justice Hughes, which were later added to the statute almost verbatim:

The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.⁵⁶

And since the ninth circuit was comfortably limiting the exemption to traditional God-fearing religionists, it had no need to ask them hypothetical questions about when their God might let them fight.

In 1948 the draft was revived, and the ninth circuit's view was written into the statute:⁵⁷

Religious training and belief in this con-

nection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.⁵⁸

The Senate report on this cites *Berman*, and does not cite any of the cases from the second circuit which require that the objection be to all wars.⁵⁹

More direct is the silence of the statute. Congress was dealing quite clearly with the question of what kind of religion is needed, and never said it must be a religion that rejects all wars under all circumstances. Again in 1967 Congress re-wrote this section without clarifying the all-wars issue.⁶⁰ By then *Sicurella v. United States*⁶¹ had been on the books twelve years, and Congress could not have been unaware that objections to a specific war were becoming a problem.⁶² So the failure to spell out an all-wars requirement shows legislative intent to leave it out.

Judicial authority on the all-wars question is scarce. The Supreme Court has faced the problem once, in *Sicurella v. United States*,⁶³ and rejected the require-

⁵⁵ 156 F.2d 377 (9th Cir. 1946).

⁵⁶ *Id.* at 381, quoting Mr. Justice Hughes' dissent in *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931).

⁵⁷ In *United States v. Seeger*, 380 U.S. 163, 177-79 (1964), the Court claims to see no conflict between the 9th and 2d circuits. But this is on the issue of belief in God, and the whole opinion is distorted by the attempt to save the constitutionality of the statute, as admitted by Mr. Justice Douglas, 380 U.S. at 188.

⁵⁸ 62 Stat. 613, as amended, 50 U.S.C. APP. 456(j), 81 Stat. 104 (1967).

⁵⁹ S. REP. NO. 1268, 80th Cong., 2d Sess. 1989, 2002 (1948) (accompanying S. 2655).

⁶⁰ Pub. L. No. 90-40, 81 Stat. 100 (June 30, 1967).

⁶¹ 348 U.S. 385 (1955).

⁶² H. REP. NO. 267, 90th Cong., 1st Sess. 1308, 1333 (1967); CONFERENCE REP. NO. 346, 90th Cong., 1st Sess. 1359 (1967).

⁶³ 348 U.S. 385 (1955). This case came out of the insistence by T. Oscar Smith, head of the Conscientious Objector Section in the Justice De-

ment. There are three recent cases in lower courts going the other way: two are ambiguous, *United States v. Kurki*,⁶⁴ and *United States v. Shermeister*,⁶⁵ and the third, *United States v. Spiro*,⁶⁶ suggests a purely sectarian limit to *Sicurella*, but the third circuit affirmed without discussing this point, and certiorari was denied.⁶⁷ So the case law, far from supporting an all-wars rule, is dominated by the Supreme Court's rejection of the requirement of *Sicurella*.⁶⁸

Sicurella was a Jehovah's Witness who accepted the rule of the Witnesses that they will not serve in the army, but under certain circumstances they will use violence personally. Their teaching is unclear to a pragmatic mind searching their literature for factual ethics, because they are interested in a literal interpretation of scripture and tend to give unusual values to words. They take "pacifist," for instance, as a

partment, that Jehovah's Witnesses were not to get the exemption if they agreed with their sect's published views on self-defense and theocratic wars. Appendix B to the Petition for Certiorari, *Sicurella v. United States*, 348 U.S. 385 (1955); *United States v. Close*, 215 F.2d 439 (7th Cir. 1954). The Courts of Appeal reversed many such cases. *Taffs v. United States*, 208 F.2d 329 (8th Cir. 1953), *cert. denied*, 347 U.S. 928 (1954); *United States v. Hartman*, 209 F.2d 366 (2d Cir. 1954). The story is set out in *United States v. Hagaman*, 213 F.2d 86 (3d Cir. 1954).
⁶⁴ 255 F. Supp. 161 (E.D. Wis. 1966).

⁶⁵ 286 F. Supp. 1 (E.D. Wis. 1968).

⁶⁶ 384 F.2d 159 (3d Cir. 1967).

⁶⁷ 390 U.S. 956 (1967).

⁶⁸ *Noyd v. McNamara*, 267 F. Supp. 701 (D. Colo.), *aff'd*, 378 F.2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022 (1967), dealt with a selective objector in the service, but the merits were never reached. There is a rejection of selective objection in *United States v. Valentine*, 288 F. Supp. 957 (D.P.R. 1968), but it is only dicta. One of the many charges against Cassius Clay

derogatory epithet.⁶⁹ But apparently two general categories of violence are approved by the Witnesses: they will personally fight to defend themselves, other Witnesses, or "Kingdom interests," such as the right to preach; and they see themselves as the modern-day chosen people, and they will fight when Jehovah orders them out, as He often ordered out the Jews in Old Testament history.⁷⁰

There is much authority saying that a belief in personal violence, as in self-defense, does not bar the exemption,⁷¹ so the first of these two doctrines could not have barred *Sicurella*. But the second form of fighting, the theocratic war, is inescapably a kind of war, and if *Sicurella* got the exemption the Supreme Court had to reject the all-wars requirement.

The Court rejects the requirement expressly. In speaking of two articles from the February 1, 1951, *Watchtower*, the Jehovah's Witness magazine, they say their admissibility as evidence need not be decided because the articles are not dispositive of the controversy:

Granting that these articles picture Jehovah's Witnesses as antipacifists, extolling the

is that his objection is selective, but the Court of Appeals for the Fifth Circuit also ruled against his sincerity and the all-wars requirement is not discussed beyond a citation to *Kauten*. *Clay v. United States*, 397 F.2d 901, 918-21 (5th Cir. 1968).

⁶⁹ *Why Jehovah's Witnesses are not Pacifists*, WATCHTOWER, Feb. 1, 1951, at 67.

⁷⁰ *Id.*

⁷¹ *Sicurella v. United States*, 348 U.S. 385 (1955); *United States v. Lauing*, 221 F.2d 425 (7th Cir. 1955); *Clark v. United States*, 217 F.2d 511 (9th Cir. 1954).

ancient wars of the Israelites and ready to engage in "theocratic war" if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war.⁷²

A clearer rejection of the all-wars requirement could not be asked.

But the clarity of this is elsewhere obscured. The Court seems to say that the theocratic war of the Jehovah's Witnesses is a spiritual conflict, a war only in a metaphorical sense. On his Form 150, the application for exemption, Sicurella suggested this: "Inasmuch as the war weapons of the soldier of Christ Jesus are not carnal, I am not authorized by his commander to engage in carnal warfare of this world"; in using force for defense of others and defense of Kingdom interests, "we do not arm ourselves or carry carnal weapons in anticipation of or in preparation for trouble or to meet threats I do not use weapons of warfare in defense of myself or the Kingdom interests."⁷³ But all of Sicurella's statements were directed to self-defense and defense of Kingdom interests, things admitted permitted a conscientious objector, and none of them expressly limited the holy war ordered by Jehovah. Nor is there anything else in the record showing a modern holy war would differ from the wars Jehovah ordered in the Old Testament. There is a great deal of mythical language showing a reluctance to face the

issues in operative terms; but precisely because of this reluctance the Witnesses do not meet the all-wars requirement in its pure sense. They cannot assure us that they will never fight in a war.

In *Kretchet v. United States*⁷⁴ a dissenting judge wanted to distinguish *Sicurella* on the ground that Sicurella would never have used carnal weapons whereas Kretchet expressly said he would if Jehovah ordered him to. The majority on the ninth circuit rejected this reading of *Sicurella*.⁷⁵

The Court also suggested it might be influenced by the unlikelihood of Sicurella's theocratic war:

As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not appear to contemplate one in the future.⁷⁶

But this is thin ground on which to limit the case. True, there was no evidence in the case that a call to war by Jehovah was imminent, waiting only on some combination of political events. But the government's brief included some Old Testament prophecies the Witnesses have read into political events. According to one book,⁷⁷ the Witnesses saw the First World War as

⁷² 348 U.S. at 390.

⁷³ Government exhibit 2W, Record in *Sicurella v. United States*, 348 U.S. 385 (1954).

⁷⁴ 284 F.2d 561 (9th Cir. 1960).

⁷⁵ The Jehovah's Witness in *United States v. Stankewicz*, 124 F. Supp. 27 (W.D. Pa. 1954), was also explicit in his willingness to fight in a war authorized by Jehovah.

⁷⁶ *Sicurella v. United States*, 348 U.S. 385, 390-91 (1955).

⁷⁷ SIBLEY AND JACOB, *CONSCRIPTION AND CONSCIENCE* (1952).

a fulfillment of the prophecy of Daniel of a great war between the "King of the North" and the "King of the South." Once they admit the possibility of finding Old Testament prophecies in the actual affairs of the contemporary world, it seems to my logic at any rate, that they admit the possibility of a real theocratic war. Again *Kretchet* provides a clarifying note: the defendant there expressly said that someone on earth might be the spokesman for Jehovah in the declaration of holy war. The holy war is then no more unlikely than a just war, but *Kretchet* was granted the exemption.

Thus *Sicurella* allowed the exemption to men who cannot assure us they will never fight. Perhaps their inability to make this assurance is due more to reluctance to speak factually about their religious structure than to an actual reservation in favor of war in certain situations. But still the case disposes of the all-wars requirement: an admission that he might at some time fight, or a refusal to say he will never fight in a war, need not always bar a registrant from an exemption to which he is otherwise entitled.

But this does not shut out the possibility that there is some other kind of all-wars requirement conditioned, maybe, on the type of selectivity the registrant is exercising. I find after *Sicurella* only three cases claiming to refuse exemptions because the registrant did not object to all wars.⁷⁸ Two of them do not suggest any ground for limiting *Sicurella*. One is *United States v.*

*Kurki*⁷⁹ where the registrant was trying to get around his failure to exhaust administrative remedies by saying *Seeger* had been the first intimation his kind of objection could get an exemption. In rejecting this the court said *Seeger* had not changed the registrant's position, since he was still ineligible because of the all-wars requirement. The force of this is somewhat blunted by the affirmance by the Court of Appeals for the Seventh Circuit with no mention of the all-wars problem.⁸⁰ The other case is *United States v. Shermeister*⁸¹ where *Shermeister* had attached statements to his two Forms 150 insisting his objection was limited to Vietnam. He was held guilty for his failure to submit to induction, but there were many other factors. He did not claim a conscientious objection till he had been refused a hardship deferment; he did not sign the statement of objection on the Form 150 till the day he was to report. The court does not say what attempt *Shermeister* made to show he was religious; it seems from his insistence on the specificity of his objection he might have made no attempt at all.

So these two cases do not suggest any rule against any particular school of selective objection. But the third case, *United States v. Spiro*⁸² suggests that, in the Justice Department Conscientious Objector Section at least, Catholic just war objectors are not entitled to the exemption, *Sicurella* notwithstanding.

⁷⁸ See also *United States v. Valentine*, 288 F. Supp. 957 (D.P.R. 1968) (dicta).

⁷⁹ 255 F. Supp. 16 (E.D. Wis. 1966).

⁸⁰ 384 F.2d 905 (7th Cir. 1967), cert. denied, 390 U.S. 926 (1968).

⁸¹ 286 F. Supp. 1 (E.D. Wis. 1968).

⁸² 384 F.2d 159 (3d Cir. 1967), cert. denied, 390 U.S. 956 (1968).

Spiro was a Catholic who objected to going into the army because he was sure no future war would be a just war. The hearing officer conceded his sincerity, but it is not clear just what beliefs this concession extended to. The hearing officer understood Spiro to object only to wars in which noncombatants are killed. He noted Spiro had said he would not object to an army which used only bullets and shot only at other soldiers.⁸³ But Spiro took a different view in the letter he sent to the appeal board in rebuttal to the Justice Department recommendation. There he reduced the just war to a mere conceptual possibility:

The very fact of the existence of a nuclear potential rules out the possibility of assurance of a just war. The same thing was said of the invention of gunpowder, and in fact I agree with that as well. I can find no example of war since the invention of gunpowder of which I can say it began, was conducted, and ended justly. For that matter, nor can I find an example of war before the invention of gunpowder which met all the criteria of the teachings of my church. . . .

I maintain that this "just" war is, in the real world, not capable of occurring; that as a result of the Sin of Adam and the consequent Corruption of the Human Will, it is inconceivable that a just war will ever happen—since there never has been one, as far as I can tell, and I hardly expect that Men will suddenly change.⁸⁴

If this is accepted as Spiro's position, there is only one ground on which he can

be distinguished from Sicurella: Spiro spelled out the characteristics of his just war, whereas the Jehovah's Witnesses speak of their theocratic war only in mythic terms. As the government said in its brief in *Spiro*: "The hearing officer concluded that petitioner's minor premise—that the United States was inevitably committed to indiscriminate mass bombing of civilians and use of nuclear weapons—was not a religious belief based on fact but was essentially a historical prediction of a political nature"⁸⁵ That is, the registrant may object to wars selectively so long as his basis of selectivity is inarticulated, based on inspiration rather than reason, or does not involve the kind of fact weighing characteristic of a Congressional decision.

This is quite different from the original rationale implied in *Kauten* and *Phillips*, because Spiro's fervor is not lessened by his just war, at least not in any way Sicurella's was not lessened by his theocratic war. Spiro seems to disagree with the government in terms the government claims to recognize, not in terms it is committed to ignore, like Sicurella's vision. Potter, though he is in favor of recognizing selective objection, says that a selective objector is in theory a revolutionary:

The subject matter he treats is not the nature of his own calling but rather the nature of the true state He is, in relation to the incumbent powers, essentially subversive, a subversive made more dangerous by the nobility of the norms he invokes.⁸⁶

⁸³ Petitioner's Brief for Certiorari at 29A, *Spiro v. United States*, 384 F.2d 159 (3d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

⁸⁴ *Id.* at 32A-33A.

⁸⁵ Respondent's Brief in Opposition at 6, *United States v. Spiro*, 384 F.2d 159 (3d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

⁸⁶ See Potter, *supra* note 21.

Thus the rule in Spiro's case might be: be as selective as you like, but only Congress may reason, and if we catch you reasoning you can't be exempted from the draft. If this were the rule it would rest not on the words "war in any form" in the statute, but on a reading of the word "religious."⁸⁷ This would be more than a rule against selective objection, an all-wars rule, but it would exclude just war objectors and many other selective objectors.

But this cannot be the rule, because the program has never been administered this way. This reading would shout out any pacifist, no matter how absolute or universal, if he were found to say anything outside the mythic styles of speech. And we know that many traditional conscientious objectors, and many pacifists, and many members of the traditional peace churches, and the three defendants in the *Seeger* case,⁸⁸ do reason, and do speak to the norms the state claims to serve.

The basic error behind a rule against factual selectivity is the attempt to explain the conscientious objector exemption as a case where the strictures against impeaching government decisions do not logically apply. This is not the true case. The government is logically impeached, in one way or another, by any objector, whether he is a Quaker who says the government has failed to grasp the full meaning of justice and peace, a Jehovah's Witness who says it is irrelevant to everything that ought to concern a man (is that statement not anti-social?), or a Catholic who says it has

failed to keep its sense of proportionality. The only impeachment of governmental decisions that carries no threat at all is that of a madman. Indeed, some of the popular toleration of the conscientious objector law may rest on a belief that they are a little mad,⁸⁹ but clearly Seeger, or the average Quaker, is not. On the contrary, they address themselves very squarely to things the government is supposed to serve, like justice, the public safety, etc. If we excuse conscientious objectors it has to be for some such reason as I have suggested: because we have decided with military service to proceed without true coercion, without the usual governmental prerogative of having the final say on both major and minor premises in each particular case, and if we have done that it is because we were acting in a rare moment of national concord when we were sure most people would decide the government's way.

The rule against factual selectivity was not endorsed by the only published opinion in Spiro's case, that of the Court of Appeals for the Third Circuit,⁹⁰ which says on the merits only that there was some basis for holding Spiro draftable. This could have been anything, including the suddenness of his discovery that his church was against war.⁹¹ So Spiro's case is not legal authority for a rule against factual selectivity, but it shows that such a rule will often appear and deny the exemption to men such as Catholic just war objectors.

⁸⁷ 50 U.S.C. APP. § 456(j) (1964).

⁸⁸ *United States v. Seeger*, 380 U.S. 163 (1964).

⁸⁹ Sen. Morse has said as much. 94 CONG. REC. 7278, 7304 (1948).

⁹⁰ 384 F.2d 159 (3d Cir. 1967).

⁹¹ And, as noted above, there were no opinions written when the Supreme Court denied certiorari. 390 U.S. 956 (1968).

III. Why Does the All-Wars Requirement Survive in the Face of the Legal Authority Against It?

Thus we have shown that the statute does not require that an objector oppose all wars; that such a requirement can find little judicial authority but two ill-explained cases in the second circuit; and that the Supreme Court had expressly ruled that an objector need not oppose all wars. Other commentators have ably argued that any such all-wars requirement would raise serious Constitutional questions by discriminating between religions for no compelling reason. Yet local boards go on asking questions like the one set out above about repelling an invasion, and go on refusing exemptions to registrants who hesitate to say they would never fight in any conceivable war.

The strongest force keeping the all-wars requirement alive is the notion that religion should speak only in verbal formulas that are thought to represent moral unchangeables—that questions of fact are less holy than questions of true theory, and must be left to Caesar. The Justice Department's comments in Spiro's appeal suggest this notion of religion⁹² it is implied in the *Kauten*⁹³ and *Phillips*⁹⁴ opinions, and General Hershey's response⁹⁵ to the Bishop's statement seemed to rest on this belief. This is indeed a central thesis of some religions.

⁹² Respondent's Brief in Opposition, at 6, *Spiro v. United States*, 384 F.2d 159 (3d Cir. 1967), cert. denied, 390 U.S. 956 (1968).

⁹³ *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943).

⁹⁴ 135 F.2d 521 (2d Cir. 1943).

⁹⁵ N.Y. Times, Nov. 17, 1968, at 34, col. 1.

There are, of course, good religious arguments for enunciated universal rules. First, there is the feeling that such rules are a firmer guide to conduct, that persons admitting no change in rules are less likely to do the wrong thing out of confusion or weakness; some feel the "existential ethics" of modern theologians is less demanding than rule-forming ethics.⁹⁶ Then there are faiths where the attachment to verbal universals comes naturally from a belief in a revealed holy text. And among Catholics the habit of rule-forming has been a deeply ingrained point of style since the days of the Schoolmen.

These are good religious reasons for the use of universal formulas, but they are religious reasons. Asking a citizen to take a stand on them is as much a test oath as asking him to abjure transubstantiation. Macgill has spelled out the Constitutional reasons against this,⁹⁷ but it would still be a bad idea even if not unconstitutional. Most of us feel a system of universal verbal formulas is inevitably a fairly unsophisticated system of ethics, since we believe no one can go very far in the study of ethics, or law, or history, without learning about the universal defeasibility of English sentences.⁹⁸

⁹⁶ For a sounder survey see *Existential Ethics*, 5 NEW CATHOLIC ENCYCLOPEDIA 724 (1967); *Situational Ethics*, 13 NEW CATHOLIC ENCYCLOPEDIA 268 (1967).

⁹⁷ See Macgill, *supra* note 19.

⁹⁸ See Friedman, *supra* note 27, at 17; Carl Cohen, THE NATION, July 8, 1968, at 12. Friedman makes this a central part of his faith: he holds with Martin Buber, that the Commandments are invitations to respond correctly to the situations in the world, not prohibitions inhibiting such response.

Surely the strongest reason for the nullifying of *Sicurella* is an actual disagreement with the policy of exempting objectors, a disagreement hardly surprising in light of the vision of a consensual society the policy springs from, and the actual state of our society after four years of Vietnam. The Marshall Commission found many board members will admit this disagreement.⁹⁹ We do not know whether this reflects general public sentiment, or whether the system of unpaid volunteers has produced boards as unrepresentative of community thinking as they are of the general distribution of race and class.¹⁰⁰ I myself think that if the question were coming up for the first time there would be much opposition to any form of conscientious objection now. Vietnam has been peculiar among American wars in the narrowness of its impact; there has been no rationing, no excess profits tax, no rhetoric about civilians doing their part; the burden has fallen on a few men, who are supposed to bear it with stoicism, not enthusiasm. A nation willing to draft its young men under these circumstances may have already made the decision to treat them as objects of national policy, not as participants in a national pur-

pose, and might see no reason to exempt those whose full participation is inhibited.

But others¹⁰¹ have examined these arguments at length, and have found in *Seeger* and in other first amendment cases ample argument that a statute cannot give the privilege to universal pacifists and deny it to all selective objectors. I have only tried to show that the statute did not in fact make that dubious distinction, and the Supreme Court has held as much. *Spiro* is not clear enough to stand as authority contra.

If the draft keeps up it will raise much more serious problems than the outlines of the conscientious objection exemption. There is no proper solution to our present problems but to stop drafting ignorant boys as well as learned ones, profane as well as sincere. But if the draft is stopped, we still have to think about the record we leave behind: it should show the wide dissatisfaction with the draft, but it should not add imaginary evils to the precedent. To this end commentators should stop assuming that the "present laws of this country, however, provide only for those whose reasons of conscience are grounded in a total rejection of the use of military force."¹⁰²

⁹⁹ MARSHALL REPORT at 108-09.

¹⁰⁰ See Comment, *supra* note 5 at 2163. MARSHALL REPORT, at 73-81.

¹⁰¹ See, e.g., Macgill, *supra* note 19; Mansfield, *supra* note 20; Potter, *supra* note 21.

¹⁰² *Human Life in Our Day*, CATHOLIC STANDARD (Supp.), Nov. 21, 1968, at 8, col. 3.