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Special Comment

By Theodore Sager Meth*

SENTENCING THE RECIDIVIST—
AN ETHICAL DILEMMA

This article is a study of the sentencing function of the federal judiciary in a very limited class of cases—those where a draft registrant refuses to accept civilian work in lieu of military training.

Prior to February 4, 1949, the classification of registrant under the Selective Training and Service Act, the forerunner of the present Universal Military Training and Service Act,1 was not a matter of judicial review. On that date, however, the Supreme Court handed down the decision in Estep v. United States,2 making it clear that draft board action must meet the same standards of due process as other administrative action.

Therefore, Jehovah's Witnesses, who had constituted 7.4 percent of all conscientious objectors convicted from October 16, 1940 to June 30, 1945,3 came to be recognized as being entitled to the I-O classification accorded those who, "by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form."4 Having filed a special form,5 and having been determined by the local board or appeal boards to be entitled to a I-O, a registrant would "in lieu of induction be ordered by his local board to perform for a period equal to the period [fixed for active military training and service] such civilian work contributing to the maintenance of the national health, safety or interest as the local board [might] deem appropriate."6

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2 327 U.S. 114 (1946).
3 Elliot, Crime in Modern Society 193 (1952).
4 62 Stat. 604, 50 U.S.C. App. §456 (j) (1951); The willingness of Jehovah's Witnesses to fight in a theocratic war was held not to vitiate their objection to participation in human wars, Sicurella v. United States, 348 U.S. 385 (1955).
The civilian work ordinarily was and is employment at a state or county mental hospital. The regulations permit employment at non-public charitable institutions, but cases where this has been utilized are rare. The registrant is given an opportunity to submit types of work which he is willing to perform. If a Jehovah's Witness elects volunteer work for the Watchtower Bible and Tract Society, the parent organization of his religious association, it will not be acceptable to any local board. Deeming that accepting any other work would be inconsistent with his religious convictions, since it would be equivalent to employment by an "idolatrous nationalism," the Witness will invariably refuse to accept the form of work which the local board orders. This refusal constitutes a crime.

It is important to see how the criminal chain is linked together. The Act provides in relevant part as follows:

(a) Any person charged as hereinafter provided with the duty of carrying out the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or by a fine of not more than $10,000, or by both.

The failure or neglect to obey the order to perform civilian work is treated exactly like refusal to register, or refusal to report for or submit to induction. The same penalty applies to each.

The Jehovah's Witness now faces prosecution. He cannot attack his classification on the many procedural grounds that are

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8 S.S.S. 1660.20(a).
9 S.S.S. 1660.20(c).
12 Michener v. United States, 184 F.2d 712 (10th Cir. 1950).
13 United States v. Palmer, 223 F.2d 893 (3rd Cir. 1955). The Palmer case illustrates the repeatability of the crime. The court held, and the Supreme Court denied certiorar, that the fact that the defendant had been convicted for failure to register and had served a prison term did not prevent a subsequent conviction, after a registration, for refusing to report for induction. And see, United States v. Phillips, 143 F. Supp. 496 (N.D. W Va. 1956), where conviction for failure to report for civilian work followed an earlier conviction for failure to report for induction.
available to a registrant who is classified I-A.\textsuperscript{14} He claimed a I-O and received it. Although by his beliefs he is a minister, along with all other members of his congregation who have been dedicated, he is probably not entitled to a ministerial classification under the Act,\textsuperscript{15} because the quantum of secular work he performs so greatly outweighs that of his religious labors.\textsuperscript{16}

What kind of person is this young man now facing a prison term? From a sociologist's or criminologist's point of view he is likely to be a physically healthy, moral person who has never before been charged with any crime or juvenile offense. He comes from a stable home and community, and is of average intelligence. He has made his decision voluntarily, without involving associates. He is neither psychotic, neurorotic, nor socially maladjusted, although he does subscribe to some views which are different than those of the general community in regard to saluting the flag,\textsuperscript{17} the observance of Christmas, and blood transfusions.\textsuperscript{18} He supports his parents, or, if married, a young wife and child, by an employment calling for some substantial ability and character. Almost all his leisure time goes into religious work. Social prognosis is good.\textsuperscript{19}

Prognosis is good except for the fact that he will, almost inevitably, have to plead guilty and face a prison term averaging 18 to 24 months. After he has served this term, subject to parole privileges, he can and may be ordered to report for civilian work again,\textsuperscript{20} and then the cycle may be repeated until he is no longer eligible for military service.\textsuperscript{21} Since he will evaluate the prison regime from the perspective of the person who is not normally a prisoner, its special evils—contact with recidivist offenders, homosexual involvements, and stultifying physical discipline—

\textsuperscript{14} Gonzales v. United States, 364 U.S. 59 (1960); Chernekoff v. United States, 219 F. 2d 721 (9th Cir. 1955).
\textsuperscript{16} Dickinson v. United States, 346 U.S. 389 (1953); see United States v. Stepler, 258 F. 2d 310 (3rd Cir. 1958), where the bald contention of a local board that "a member of Jehovah's Witnesses does not qualify for a IV-D classification (ministerial) for the reason that he does not have the training and qualification of an ordained minister" was held erroneous. The test is purely a test of time. Wiggins v. United States, 262 F. 2d 113 (5th Cir. 1958); United States v. Hurt, 244 F. 2d 46 (3rd Cir. 1957).
\textsuperscript{17} State Board of Educ. v. Barnette, 319 U.S. 624 (1943).
\textsuperscript{19} Glueck, S. & E., 5000 Criminal Careers 281-82 (1936).
\textsuperscript{20} United States v. Palmer, 223 F. 2d 893 (3rd Cir. 1955).
\textsuperscript{21} Sibley & Wardlaw, Conscientious Objectors in Prison (1945).
probably will not destroy him. He may engage in evangelism among his fellow prisoners. But he does have a painful experience, and he, his family and the community suffer an extended hiatus in his useful life as a member of society.

We now have come to that point where we see the registrant as he is seen by the sentencing judge. The judge has a probation presentence report before him, he has the statute, the regulations and the jacket of the court proceedings. He knows the offense, the man, and the punishments. He has only to fit them together.

What practical alternatives are before him? We suggest that there are five:

1. Send the offender to a maximum security penitentiary for five years.\textsuperscript{22}

2. Send him to a penitentiary for exactly two years.\textsuperscript{23}

3. Send him to a penitentiary for a period of ten or more, but not in excess of eighteen, months.

4. Send him to a local federal detention center for a nominal term of weeks.

5. Suspend the operation of sentence and place him on probation for a term of months or years, or simply suspend sentence altogether.

Little need be said about the first alternative. Assuming that this is a first offense, no judge, however sincere a patriot, would consider imposing the maximum penalty.

The second alternative is the one most customarily invoked, and is defended as a "logical" course. In effect one says, "Young man, you must serve in the armed forces in a combatant or non-combatant capacity for two years, under present regulations, go to work at a mental hospital for the same period or go to jail for two years." Once the superficially geometrical symmetry of such a rule is exposed, however, its faults all appear. Prison is

\textsuperscript{22} This would be the maximum penalty also for the offense of recruiting soldiers to serve in an army hostile to the United States, (18 U.S.C. §2389), or of organizing a white slave ring (18 U.S.C. §2421). Such a term has been held not to constitute cruel and unusual punishment within the Constitutional inhibition. Kramer v. United States, 147 F.2d 756, cert. den. 324 U.S. 878 (1945). The usual rule, that excessive sentences are not reviewable by the Court of Appeals, has been applied in this field as well. Johnson v. United States, 126 F.2d 242 (8th Cir. 1942).

\textsuperscript{23} Statistics show little utilization in peace time of three or four years as an alternative.
neither a statutory nor a moral equivalent to service *pro patria.* Indeed, imprisonment will make the registrant unacceptable for future military service on a voluntary basis.\(^2\)

The sentencing function is unique. It is not in lieu of anything, not in lieu of military service or in lieu of civilian-work-in-lieu-of-military-service. The application of a two-year rule as a plausible parallel would turn our federal judges into vending machines which dispense a fixed punishment for a fixed crime regardless of all modern concepts of the function of sentencing as a warning to the offender and to society, and as a device for reform and rehabilitation. It would leave the judiciary, in one specialized class of cases, with the duty to vindicate the public interest without contemplating rationally what would effectively vindicate the public interest.\(^2\)

If, then, we reject the second alternative, if only in favor of any period other than a mechanical two years, whether it be 23 months or 25 months or what have you, we are faced with the ethical heart of the question as we examine the third alternative, i.e., a period of from 10 to 18 months imprisonment, subject to reduction by the grant of parole.

The defendant is a man likely to commit only one crime, the one for which he now stands convicted. Uniquely, he is ready, at the very moment he stands before the bar of justice, to commit the crime again and again! This situation is without parallel in criminology, except in cases where psychopathology is involved. In a word, his conscience makes him appear to be out of his senses in the view of ordinary society. The ordinary citizen and first offender who, unlike this defendant, will salute the flag, send Easter cards, (and keep his Bible safely in a drawer), may steal, assault or cheat, but may be very confident at the time of sentencing that he will "never do it again" if he is "given another chance", and, in light of the usual presentence report, the court will probably agree. But here, in the case of the Jehovah's Witness, the judge may as well discard the investigation report and all conventional presentencing practices: he is almost assured that a recidivist stands before him. At the same time as he

\(^{24}\) S.S.S. 1622 (44(a); and current armed forces admission regulations.

recognizes this fact, he also realizes that the concept of recidivism, so appropriate in regard to a crime like counterfeiting, is inapposite to the task before him.

What, then, is the defense of a sentence of imprisonment in excess of 10 months? The usual justification is that imprisonment for a substantial period publically and dramatically illustrates and underscores the conviction of the nation, for whose sake and with whose ultimate authority the judge acts, that each citizen has a duty to defend and protect the republic and that the duty is of a comparable ethical order to those duties imposed by the conscience of the individual.

In such a view, the purely criminal aspects disappear, or more properly are only utilized for the convenience of statutory classification. The issue becomes one of the relation between a member of a society and the rational order of society itself. The law cannot ignore defendant's civil disobedience; to do so would not only encourage others to be disobedient and so weaken the social structure and the will of the people to perpetuate their own defense, it would constitute an abrogation by society of its duty to those who voluntarily (using that term in its largest sense) make their legally required contribution to the defense of the community. One sentencing judge in a case of this sort said that any other action than some imprisonment would be the road to anarchy.

The consciousness of the philosophical character of the act of sentencing was apparent in the remarks attendant to the imposition of sentence in a recent unreported case, United States v. Korner. Here, one thoughtful judge, faced with the sentence of God. But when a group of men, either in the form of a family or a tribe, or a

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28 United States District Court, New Jersey, Crim. 241-61, Dec. 1, 1961; excerpted with permission of Hon. Reymer J. Wortendyke, Jr., who said, in part: "Counsel, I am debating in my mind whether or not I should disqualify myself in this case. I happen to be a veteran and I happen to be a native-born American citizen. I happen to have been called upon many times to administer to those who have not had the privilege of being born in this country the oath of allegiance, the language of which is before me. As you may recall, in that oath an opportunity is accorded to those who by reason of religious teachings are unwilling to engage in physical combat. The new citizen swears that "I will perform work of national importance under civilian direction when required by law." Far be it for me to pass upon my religious conviction or to sit in judgment upon the dictates of the human conscience. I suppose that man residing alone, not as a part of human society, not as a part of the group, would have a complete right to espouse and exemplify the principle which Mr. Korner has just stated, that man recognizes only the dictates of his conscience as interpretative of the law (Continued on next page)
SPEcIAL CommEvnt

ing dilemmas of this particular class of cases, chose to impose im-

prisonment, but for a moderate term.

The fourth alternative, which we have suggested, that of

sending the defendant to a detention center, as distinguished

from a federal penitentary, for a nominal term of weeks, up to

24 weeks, would equally follow from Judge Wortendyke’s reason-

ing. The difference in time and place of confinement would be

simply a difference in the weight given to the utility of a penal

term, in regard to the impact on the general community. One

(Footnote continued from preceding page)
larger subdivision, come together for their mutual well being, for their mutual

protection, for the advancement, if you will, of the Will of God, irrespective of

the embodiment of God as it may reside in the imagination or mind of any in-

dividual, enter into an agreement of which the Mayflower Compact, for example,

is an instance, it seems to me that the benefits which each individual is expected

to derive from the resultant social organization necessarily imposes upon the

individual the obligation to protect the group and keep alive the opportunity for

each individual, including the particular one, the opportunity—the privilege—
of exercising the dictates of his conscience under God.

“My difficulty is this: What am I going to do with a person who takes this

position? He is an American citizen. He says, in effect, I don’t recognize Ameri-

can laws except the law of God. When I said I should disqualify myself, I am

wondering whether my views are colored by being a veteran. I believe in God

and I believe in the human conscience. I believe that heaven is not something

that is going to come somewhere in the future, but it could exist right here on

this earth if everybody did to his neighbor as he would like to be done by. That

is my creed. If I weren’t too old, God willing I’d be in the service now again,

not because I believe the service does anybody any good, but I believe that an

American citizen owes a minimal recognition of his obligation to his country.

“When I received this presentence report, after I studied it thoroughly, I put

in my handwriting at the head of it: ‘How can I avoid imprisoning him?’ Then

after that, after I perused and studied his presentence report, I discussed it

with the probation officer, as I do in every case. I cannot understand, in

view of the teachings of the Jewish religion, in view of the teachings of the

Christian religion, in view of that thread of the obligation cast by Almighty God

through the human conscience on every individual to serve his fellow men, how

service in an institution such as that suggested by the [Local] Board in the case

of this defendant could be in conflict with Jehovah’s will. I don’t feel that

I have been shown, in view of the fact that defendant’s religious duties have not

in the past occupied all of his employment time, how his compliance with

the order of the Board would substantially obstruct his continuance in his religious

duties by the same time performing the civilian service which he was directed to

perform. I cannot imagine anything more exemplary of a truly humanitarian

Christian or Jewish or any other religious spirit than that of serving the sick in

their tribulation. Indeed, I believe that Christ healed the sick on many occasions.

“What am I going to do? I have no doubt that Mr. Komer’s conscience is a

healthy, normal conscience. I have no suspicion in my mind under any circum-

stances that he would do violence to a fellow man. What bothers me is this:

If a man can stand before a Court created under the laws and constitution of the

nation of which he is a citizen and say, ‘My conscience tells me that I should not

obey this law, then it seems to me that the very roots of the tree of law and

justice are destroyed.

“It is the sentence of this Court that you be committed to the custody of the

Attorney General of the United States for confinement to a jail type instit-
tution for a period of one year.”
can believe imprisonment is the right course and still believe it should be relatively mild.  

One sentencing alternative remains a suspended sentence with or without probation. Since the offender is dedicated, barring a radical change of conscience, to recidivism, probation could have no effect; no probation officer would be willing to tamper with conscience or with religious views, and so probation would be tantamount to a simple suspension of sentence. But if that is to be the result, why should the case be prosecuted in the first place? Not to obtain a conviction on paper, surely; in almost every instance it is an aforegone conclusion that the defendant will plead guilty. Within his social sphere a conviction probably carries little stigma, indeed, it may carry a degree of honor. Though imprisonment may make much less impression on the general public than is thought by its advocates, it surely does more to that end than the bare fact of a conviction.

The Government has another alternative, one which would not bring the judiciary into play at all. Upon investigation into the sincerity of a given registrant’s adherence to views forbidding him to accept civilian service in lieu of induction, it could decide not to prosecute at all. Not every offense against a nation must be prosecuted. Where insincerity or conscious draft-dodging is not involved, does it matter if a few persons escape service altogether? At least so long as the numbers involved are small, is prosecution as a matter of principle justified, when viewed in the light of the costs of judicial and penal administration and of the utility to the republic which is predictably involved?

The decision not to prosecute is, however, an ethical decision, no less so than the decision as to sentencing. The decision must in each case derive from a balancing of individual and social

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27 Shorter periods than six months give rise to administrative difficulties, and also, from the point of view of the defendant, they must be examined in light of prevailing parole regulations and practices.

28 Compare, Act No. 4729 of 27 July, 1957, Gaceta Official No. 8147, Prohibiting The Sect Known as Jehovah’s Witnesses, of the Dominican Republic which, in spite of Article 8, par. 5 of a Constitution which guarantees freedom of conscience and worship, criminal penalties are imposed on Witnesses on the ground that refusal to bear arms is a device for undermining the foundations of the State.

The official position of the United States, at least as it is expressed in the views of the administrative agency which is responsible for the Selective Service System, appears in “Let the Punishment Fit the Crime,” Vol. VII, No. 10, October 1957, Selective Service (Wash., D.C.), in an article by General Counsel, Col. Daniel O. Omer. The article advocates a uniform sentence of two years.
needs and, hopefully, from a procedure which gives genuine weight to the convictions of the individual as they are reflected in his behavior. It is not, we submit, enough to say that he exhibits anti-social behavior when he refuses to accept civilian work, unless one also says in what ways, in all other areas of his life, he exhibits socially approved and useful behavior.

Perhaps the ethical dilemma disappears precisely when we lift our sights above the bare act of sentencing for a given crime and consider sentencing as itself a necessarily ethical act. That act calls upon knowledge, judgment, a set of valuations and a spiritual quality usually denominated as charity. If a judge "knows" the defendant and the community to which he relates, is not afraid to make a decision in regard to the defendant's future, and has discovered and will apply a rational set of relationships among the values of the community, he is in a position to act ethically even if his act is not one which would be universally applauded. For that act to acquire a transcendental and therefore—in a sense—epic or national character, he need only add a general deep affection for all people which has as a part a deep affection for the defendant as one member of humanity. The unusual circumstance that the defendant will repeat his crime then ceases to be like a lost piece in a puzzle—something that brings the participants to a halt, and becomes simply part of the factual whole which is the subject matter for an ethical judgment.
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