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THE PROTESTER: A SENTENCING DILEMMA

Judge Stephen J. McEwen, Jr.*

We have witnessed through recent decades an enhanced awareness — and for some, perhaps, a deep chagrin — concerning those individuals who employ public protest as a method to present the dialectic and as a device to effect change. Activists have, in recent decades, protested racial discrimination, the Vietnam war, nuclear power, and abortion. Their efforts, as they decry a perceived bigotry, unjust war, a polluted environment, and murder of the unborn, have presented fundamental constitutional issues.

Once the protest activity is halted by arrest and the protesters must confront the criminal justice system, the protesters generally pursue two distinct and divergent paths through that system. Most protesters, in the present time, seek to present the defense of justification. The other course, more widely followed in the recent past, is that pursued by the civil disobedience protester.

The largest portion of the citizenry not only blurs all activists and protesters as one group, but, in particular, overlooks a basic characteristic which distinguishes those who practice civil disobedience from other protesters and, in particular, from those protesters who would assert the defense of justification. A synopsis of the distinction seems purposeful.

The protester who asserts the defense of justification presents a denial of responsibility for criminal activity based upon the fact that he or she believed the conduct necessary for the purpose of avoiding a greater evil or harm. The concept of justification as a defense to the criminal charge arising from

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1. The focus of this article is the protester who engages in non-violent protest activity. Thus the author precludes by definition such protest activity as involves injury or destruction.

2. The defense of justification is also frequently described by the process of its application, such as “choice of evils,” “competing harms,” “compulsion,” “balancing of harms,” “balancing of evils,” and “balancing of competing values.” McEwen, The Defense of Justification and Its Use by the Protestor, 91 DICK. L. REV. 1, 4 (1986).
the protester's choice posits that every law has such stature as
to compel compliance, only where compliance will not produce
a greater evil than the failure to comply. The protester who
pleads justification does not seek excuse for harmful behavior,
but instead asserts that the transgression is not only non-crimi-
nal but is, as well, proper. Thus, the defense, in essence, urges
that the criminal conduct was not forgivably wrong but was
right.

Civil disobedience, on the other hand, is a method of pro-
test which posits that while the obligation of conscience tran-
scends all duty to the state, the criminal activity performed
pursuant to that duty to conscience is not immune from pun-
ishment. Our country was recent witness to what many view as
the brightest chapter of civil disobedience, certainly in this
country, the historic revolution led by Dr. Martin Luther King,
Jr. Dr. King enthusiastically preached and fervently practiced
the principle that one who breaks an unjust law must do so openly,
lovingly, and with a willingness to accept the penalty. Dr. King urged
the notion that an individual who breaks a law that conscience
tells him is unjust, and who willingly accepts the penalty of
imprisonment in order to arouse the consciousness of the com-

Although the citizenry and even some protesters have
failed to realize the considerable distinction between the pro-
tester who practices civil disobedience and the protester who
enters upon the defense of justification, the judiciary has exhib-
ited such a clear and certain grasp of the distinction that the
courts have established conditions precedent to the use of the
defense of justification by activists and protesters.

3. Mohandas Karamchand Gandhi, as the court on March 23, 1922, was
poised to sentence him for sedition, declared:
I want to avoid violence. Non-violence is the first article of my faith.
It is also the last article of my creed . . . . Non-violence implies voluntary submission to the penalty for non-cooperation with evil. I am here, therefore, to invite and submit cheerfully to the highest penalty that can be inflicted upon me for what in law is a deliberate crime and what appears to me to be the highest duty of a citizen. Gandhi: A Plea for the Severest Penalty upon Conviction for Sedition, reprinted in The Law as Literature 461-65 (1982).

4. M.L. King, Why We Can't Wait 86 (1964). References to the principles, programs, and conclusions of Dr. King are derived from this work.

5. The defense of justification is only available when: (1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger; (3) there is no legal alternative which will be effective in abating the danger; and (4) the
It is, then, at the proceeding for the imposition of sentence upon the protester the judge confronts a particular dilemma: Should an individual convicted of criminal behavior (disorderly conduct, trespass, or similar offenses) as a result of protest activities, which do not cause or threaten personal injury or damage to property, be viewed more favorably than an individual convicted of similar offenses while not engaged in protest activities?

If so, should the perspective of the sentencing judge be further affected by the fact that the offender has not sought to avoid conviction by pursuing the defense of justification, but instead acknowledges the offense and submits to the punishment of the court?

The traditional purposes of punishment have been: restraint, deterrence, retribution, and rehabilitation. Revisionists have been generally successful in this century in urging the view that the sentencing judge must provide concerned focus upon the accused as an individual. The result has been a shift in emphasis from retribution to rehabilitation. The fact that the accused as an individual may in the recent age have been

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6. A number of states have enacted sentencing codes which in major measure echo the Model Penal Code for formulation of the statement of purposes.

Section 1.02. Purposes; Principles of Construction

(2) The general purpose of the provisions governing the sentencing and treatment of offenders are:
(a) to prevent the commission of offenses;
(b) to promote the correction and rehabilitation of offenders;
(c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
(d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;
(e) to differentiate among offenders with a view to a just individualization in their treatment;
(f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;
(g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders.
the apparent\textsuperscript{7} beneficiary of enhanced attention from the courts, or been the subject of model codes, is not, however, of particular relevance to our discussion.

First, the character and motivation of the accused as perceived by the Court has always been an essential factor during the sentence deliberation and determination of the courts — albeit, in earlier times, only to the disadvantage of the guilty. Second, the protester is not within the class of criminal for whom traditional concepts of punishment were devised or modern codes drafted.

Thus, even with all of the edicts of concerned legislators and all of the proposals of enlightened legal philosophers, two questions persist:

Should the sentencing judge weigh as a factor favorable to the offender that the commission of the offense was an expression of protest?\textsuperscript{8}

\textit{Section 7.01 Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation}

(1) The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:

(a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) a lesser sentence will depreciate the seriousness of the defendant’s crime.


7. It remains for another time to discuss the assertion of some that, however profound the effort, such codes are essentially cosmetic, since retribution and deterrence have merely been disguised and remain dominant purposes of punishment.

Though there may be rays of light in the landscape of the current system of criminal justice, we have found few. If we ignore or discount the latest treatment fad, it is because we have found that new programs always turn out to be reincarnations of the same old ideas. They are usually negligible in their human impact — a new carrot with a sticks-and-carrots arsenal of managerial control. Often they are a step backward, a covert method for increased surveillance and control.


8. This question posits a certain social significance to the protest.
Should the sentencing judge weigh as a further factor favorable to the offender that the offender did not employ the defense of justification, but pleaded guilty and submitted himself to the court for imposition of sentence?9

Both propositions trigger disagreement and intense debate, even though the former position addresses a question of essential difference and the latter an issue of but shades of distinction.

Be that as it may, I submit in response:

That the offender who acts in an unlawful manner in the expression of protest should be viewed in a more favorable light in the sentencing context than the offender who does not act in protest.

That one may not fault the sentencing judge who views more favorably the protestor who pleads guilty and submits to the punishment of the court, than he does the protestor who employs the defense of justification but is found guilty.

Those to whom it is self-evident that the offender who broke the law in protest may be perceived more favorably than would otherwise be the case, view certain factors as situationally dominant, including:

The character of the offender is a fundamental factor in determining an appropriate sentence.

If the sincerity of the protestor — to be distinguished from any perceived worthiness of the cause which the protestor has embraced — is sound and intact, then the evaluation of the character of the protestor must be favorable.

United States Supreme Court Justice John Paul Stevens would, perhaps, view the situation differently. When a member of the United States Circuit Court for the Seventh Circuit, Justice Stevens declared:

One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that

9. It is to be left to philosophers in the present age and historians in the future to debate which response to the charge of violation of the law is the more efficacious method of accomplishing change; that is, those who plead not guilty and seek to employ the defense of justification, or those who practice civil disobedience by pleading guilty and accepting the punishment. The accomplishments of Dr. King and his followers are, of course, eloquent evidence of the efficacy of the latter method of protest.
his own ability to determine policy is superior to democratic decision-making. Appellant's professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate.10

While this pronouncement might arguably have been directed to the protester as a class, it may be reasonable to assert that the intensity of the expression was triggered by the particular circumstances of the offense (the offender had engaged in the burglary of a Selective Service office and removed and burned office records) and of the theory of the defense (a religious compulsion negated the requisite criminal intent). The protest activity which so repulsed Justice Stevens, however, is beyond the ken of this article, since the protester there had engaged in burglary and destruction of property, prompting us to reiterate that civil disobedience, as here defined, precludes the commission of offenses which involve personal danger and destruction of property.

The issues under consideration is not whether to refrain from punishment of the protester. Such individuals, however well-intentioned, may never, under any circumstance, be viewed as above the law. The initial proposition assumes, of course, offenders of comparatively similar contact, or lack of it, with the law, so that the comparison is between first offenders, or frequent offenders, or repeated offenders. The second proposition would distinguish between protesters by reason of an essential distinction between the civil disobedient and the protester who would plead justification, a distinction which flows from the divergent manner of their response to the accusation of offense.

The law is composed of two parts, namely, the mandate, and the penalty. The civil disobedient acknowledges the majesty of the law, for, while he does not comply with the mandate provisions, he does submit to its sanction. The protester who would plead justification, on the other hand, refuses to accept the efficacy of either the mandate provision or the penalty provision. Thus, there is apparent validity to the suggestion that a certain serenity is reflected by those who engage in civil disobedience, while the protester who would assert justification11 mir-

10. United States v. Cullen, 454 F.2d 386, 392 (7th Cir. 1971).
11. Since the offender is rarely permitted, by reason of the conditions precedent, to enter upon the defense of justification, the subject of this discussion is the protester who would, if permitted by the trial court, undertake the presentation of the defense of justification.
rors a certain defiance. Although such thoughts may be the subject of sharp disagreement, there is considerably less question about the observation that civil disobedience inspires, however begrudgingly, a certain respect for a willingness to accept the sanction of the law. The protester who would assert justification, on the other hand, might to some seem misguided, since the imposition of sanctions seems assured by reason of a futile reliance upon an unavailable defense.

I submit that the offender who has violated the law in protest may be viewed more favorably by the sentencing authority than would otherwise be the case. Further, I believe that the protester who, pursuant to the tenets of civil disobedience, pleads guilty and submits to the sentence of the court may be viewed more favorably than the offender who proceeds to trial in futile reliance upon the defense of justification.

It is my hope, of course, that this article will inspire reaction. From those readers for whom the conclusions are a source of distress, I now beat a rapid retreat. For those readers who concur with the conclusions, I pose a departing dilemma. A number of jurisdictions have enacted sentencing codes which provide sentencing guidelines. Enactment of the federal guidelines is so recent that one only proceeds at peril to report conclusions, although the trend of the application of the guidelines by the federal courts appears to be more rigid than relaxed. Surely, in any event, the existence of such guidelines inhibits the sentencing judge from imposing the sentence that would otherwise be appropriate were the exercise of discretion allowable. The protester, however, is not within the class of criminal to whom traditional or modern concepts of punishment are directed. Thus, the newest dilemma: Do the guidelines preclude, particularly in the case of the habitual protester, implementation of the foregoing recommendations? The legislature certainly intended to restrict, if not extinguish, the discretion of the sentencing judge. But can it validly be argued that the legislature so purposed with regard to protesters? Thus our topic: The Protester: A Sentencing Dilemma.