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# Vietnam Amnesty – Problems of Justice and Line-Drawing

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# VIETNAM AMNESTY — PROBLEMS OF JUSTICE AND LINE-DRAWING

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## I. INTRODUCTION

The troublesome issue of pardon for crimes connected with the Vietnam War raises some of the most complex and difficult questions in the philosophy of law. What are the purposes of criminal punishment? Under what conditions is violation of obligations imposed by law morally justified? When, and on what conditions, is it proper to excuse those who have violated the law for conscientious reasons? How much should decisions whether to pardon turn on what offenders "deserve" and how much should they turn on what will be socially acceptable and promote future social harmony? How far should the desirability of dispositions carefully tailored to individual circumstances give way to the desirability of lines of exclusion and inclusion that are clear and easily administrable?

Any program on amnesty must explicitly or implicitly reflect concrete answers to those questions. This essay is an attempt to work out sensible answers to specific problems about amnesty in light of what seem to me to be sensible answers to these broader questions. The essay is an exercise in applied jurisprudence rather than speculative jurisprudence; it does not defend positions on these broader questions against possible attack; rather it starts with views I take to be fairly widely shared and develops their implications for different classes of offenders for whom pardons have been urged. In developing these implications, I assert a number of propositions about complicated facts and resolutions of conflicts in value. Thoughtful readers, even those who accept my positions on broader theoretical

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issues, may well disagree with some of my judgments on these narrower matters, and that may affect their conclusions about the proper scope of amnesty. I doubt, in fact, if any reader will endorse all of my judgments; but I hope by highlighting what considerations are important both to promote a more general understanding of the extraordinary complexity of relevant issues and to contribute to a resolution of outstanding practical questions about amnesty.

Because amnesty is a subject that quickly engages people's emotions and because much of the discussion about it has come from fierce advocates, one-sided and oversimplified views are common. A wider perception of genuinely competing considerations should enhance public acceptance of a sensible policy and reduce the bitterness and resentment that will unavoidably follow any decision to grant or withhold amnesty. It is partly for this reason that it is still useful to analyze the appropriateness of amnesty for the offenders who will clearly receive it under President Carter's administration—those who failed to perform obligations under the selective service laws. Such an analysis is also useful as a basis for comparison with those groups as to whom President Carter plans a "case-by-case" approach—"deserters"—and those groups his campaign proposals apparently did not include.

The body of the essay begins with a summary of a position on the "basic" questions posed at the outset. It then analyzes in turn four broad classes of offenders: those who violated the draft laws, those who absented themselves from military duty, those who committed other crimes while in military service, and those whose acts of resistance to the Vietnam War violated state or federal laws. Major attention is given to the first two categories. Preliminarily I discuss the proper societal attitude toward various kinds of offenders and then try to answer the practical questions that must be resolved: (1) Should any amnesty be given? (2) What crimes should an amnesty cover? (3) What consequences of criminal behavior should an amnesty eliminate? (4) What conditions should attach to amnesty? (5) What agencies of government should grant amnesty? These questions are interwoven. Whether or not amnesty should be given directly to individuals by presidential order or administered by some board on a case-by-case basis will depend, for example, on the scope of the amnesty.

The analysis of these practical questions yields the conclusion that the approach to amnesty that the President plans to take is fundamentally sound, and it provides guidelines for the handling of

those offenders not to be covered by the initial pardon to draft violators.

A preliminary caution about terminology may be wise. The word "amnesty" has a somewhat indefinite scope. Sometimes it is used to cover only pardons to classes of offenders rather than particular individuals; sometimes it is used to refer only to pardons granted before conviction rather than after conviction; sometimes it is thought to imply obliteration of all consequences of past offenses rather than more limited forgiveness;[1] and sometimes it is thought to imply approval rather than merely forgiveness of the acts covered. Those who think resisters to the Vietnam War did wrong but should now be forgiven may prefer to talk of "pardon" or "clemency," while those who insist that resistance was right prefer the word "amnesty." Various terms do have subtly different moral and political connotations, but for the sake of simplicity I use the word amnesty here to cover any general program of forgiveness. The President's power to act in respect to federal crimes derives from his power to grant pardons,[2] whether forgiveness precedes or follows conviction, is total or partial, is conditional or unconditional, implies approval or does not imply approval. Therefore, the source and scope of executive power does not depend on whether forgiveness is better characterized as amnesty or something else. Nor does whatever power Congress and state legislatures have to authorize forgiveness to classes of offenders depend on that possible distinction. There are, of course, significant practical differences between various programs of forgiveness. For example, pardons may or may not be conditioned on the performance of some alternative duty; pardons for military deserters may or may not include an upgraded discharge. I shall pay attention directly to these practical differences, without trying to decide what label should best be attached to each of the alternatives.

## II. Some Basic Premises

### A. *Justifications For Punishment*

The justifications for criminal punishment are various, and their

[1] President Ford's 1974-1975 program, which involved conditional pardon in many instances and did not, for many offenses, restore all the rights and benefits that had been lost, was called a "clemency" program. *See* Presidential Clemency Board, Report to the President 14-15 (1975).

[2] U.S. Const. art. II, § 2.

respective strength differs among offenses.[3] Punishment may discourage the actor from repeating his act or committing other crimes (individual deterrence) and it may also discourage others from performing the same or similar acts (general deterrence). Both because it symbolizes the seriousness with which society regards legal norms, and because it alleviates the sense of unfairness that exists if criminals escape burdens that fall on other members of society, punishment may reinforce the feeling of law-abiding citizens that legal norms are important and have a substantial moral claim on their obedience (norm reinforcement). Punishment may satisfy widespread desires that those who have broken the law be punished (vengeance), desires likely to be particularly acute among those who have been victimized. If punishment takes the form of imprisonment, it makes it temporarily impossible for the criminal to commit further crimes (isolation). Either imprisonment or some lesser form of supervision, and perhaps even the ritual of condemnation, may help "rehabilitate" the criminal, so he is less tempted to commit crimes in the future (reform). Some theorists assert that even independent of these justifications, those who have committed wrongs "deserve" to be punished. Although this form of retributive justification appears to me unwarranted,[4] I shall discuss it briefly in connection with arguments about amnesty.

### B. *Justified Disobedience of Law*

Whether our duty to obey the law as citizens in a democracy is a quasi-contractual one, as suggested by social contract theories, or rests on our responsibility to further the welfare of society,[5] the duty is a substantial one. But it can be outweighed by powerful enough countervailing reasons. If the immorality of a law or government policy is great, and disobedience is the course most likely to mitigate the evil, then disobedience may be morally, though not legally, warranted.[6]

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[3] My views on theories of punishment are developed in more detail in Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of* Powell v. Texas, 69 COLUM. L. REV. 927, 935-45 (1969).

[4] *See id.* at 938-40.

[5] I take this approach in Greenawalt, *A Contextual Approach to Disobedience*, 70 COLUM. L. REV. 48 (1970).

[6] *See id.*

C. *Justified Excusal of Conscientious Objectors*

Some purposes of punishment may be served even when it is rightly believed by those who prosecute that a disobedient act was morally justified;[7] punishment may discourage other acts of disobedience that would not be justified and reassure the community of the final authority of legal processes. Other purposes of punishment, such as reform of character, may not be served when the actor has had a conscientious reason for disobedience,[8] though his reason is misconceived and is not widely accepted. Thus, the question of whether an actor should be punished is not quite the same as the question of whether his violation of law was morally justified; some actors who do what is morally justified should be punished, and some actors who mistakenly believe they were morally justified should not be punished. Part of the reason for the exemption from military service given to pacifists was that, despite society's nonacceptance of the pacifist position, it did not wish to treat those conscientiously opposed to service as ordinary law breakers.[9] The exemption reflected the view that the imposition of alternatives to criminal punishment satisfied the relevant purposes of punishment without its undesirable features. Those who have conscientious reasons for refusing to accept general obligations are less to blame, and therefore less deserving of formal condemnation, than those moved by selfish advantage. Moreover, punishing persons for doing what they feel morally compelled to do, though sometimes necessary, will often produce or increase a sense of alienation. Of course the arguments for punishment are stronger if no legal exemption exists and the law has already been violated; but the question of conscientious motivation is still highly relevant to decisions about prosecution, sentence, and pardon.[10]

D. *The Basis For Decisions to Pardon*

Pardon decisions are properly both forward-looking and backward-looking. Occasionally it is appropriate on the basis that the public welfare will be served to grant pardons even to persons who have no claim to deserve pardon. President Ford was advancing

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[7] *See id.* at 69-71, 78-80.

[8] I explore the meaning of "conscientious objection" in Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31, 57-63.

[9] *See id.*

[10] *See* Greenawalt, *supra* note 5, at 78-80.

such a justification for pardoning President Nixon when he urged that the prosecution would divert the country's attention from more important tasks. It is also appropriate to pardon those whose convictions were demonstrably wrong, quite apart from any predictable future benefits of the pardon. Although the person who has conscientiously disobeyed the law has not been wrongly convicted, he is somewhat less deserving of blame and punishment than the ordinary offender, and his motivations constitute a reason for leniency independent of the likely consequences of leniency.

Commonly, considerations of future benefit and "desert" are mixed. It could be said, for example, about amnesty for Confederate soldiers both that amnesty would promote harmony in a reunited country and that men who had lived in the South and fought in the Confederate Army should not be blamed as ordinary traitors. In one respect the two kinds of considerations conjoin, for an important aspect of public welfare is that people perceive the legal system to be reasonably fair; and it is a substantial social cost when pardons are widely given to those whom most members of society think deserve punishment or are withheld from those not thought to deserve punishment.

The development of a program on amnesty requires not only sensitivity to issues of justice but also a sound political grasp, since a successful program must be acceptable both to those for whom amnesty is intended and to most of the general public. Though not pretending to political expertness, I do touch briefly on the acceptability of various programs in this essay, though my main concern is with considerations of justice and the administrability of distinctions they suggest.

### E. *Clear Rules and Individuation*

Broad, clear rules reduce administrative expense and inconvenience and minimize actual and perceived arbitrariness in application, but usually at the price of treating as identical situations that are really quite different. A flexible case-by-case approach can more carefully adjust dispositions to individual circumstances, but at the price of possible arbitrariness in application and considerable administrative expense. When a choice of approach is required, a "legislator" must decide how the interests are balanced in that particular instance and whether they are best served by following one approach or the other or some compromise between the two. Whatever he does, he can be sure he will sacrifice some values to attain others.

## III. Crimes of Avoidance of Obligations Under the Draft Law

The arguments about amnesty are most straightforward in respect to selective service violators, and they are covered by President Carter's plan to issue a blanket pardon. For those reasons, it is well to begin analysis with this group, but it is crucial to recognize that as of late 1976 amnesty for draft resisters is of less overall practical importance than amnesty for those who committed crimes while in the military. President Ford's Clemency Board in 1974 and 1975 commuted the sentences of those still in prison after convictions for refusal to report for induction and other crimes of draft evasion.[11] At that time, the Justice Department prepared a final list of 4,522 persons indicted for these crimes whom it intended to prosecute, and it announced that no other persons would be prosecuted.[12] Some 700 of these subsequently received pardons under the part of President Ford's Clemency Program administered by the Justice Department. Given the low prosecutorial batting average in selective service cases in recent years,[13] we can guess that the percentage of the rest of the remaining 3,800 successfully prosecuted to conviction would have been relatively small and that few of those convicted would actually have been sent to jail.[14] Of course, pardon can be important in eliminating fear of prosecution, which may persist despite awareness that conviction is unlikely; nonetheless pardons

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[11] Clemency Board Report, *supra* note 1, at 11, 49.

[12] *Id.* at 14. The "finality" of this list apparently does not apply to the offenses of failing to register and deceiving selective service boards. If such violations now come to light and prosecution is not barred by the five-year statute of limitations, United States Attorneys may still seek new indictments. Many of the high estimates of persons who would be affected by a general amnesty (as many as two million), *see* N.Y. Times, Jan. 7, 1976, at 17, col. 1, rest on the assumption that a great many men of draft age (as many as one million) failed to register between 1964 and 1973 and would be reached by an amnesty. According to a Supreme Court interpretation of the statute of limitations applicable until September 28, 1971, Toussie v. United States, 397 U.S. 112 (1970), and a court of appeals interpretation of the revised statute, United States v. Richardson, 512 F.2d 105 (3d Cir. 1975), only men who reached eighteen after September 28, 1971, are now subject to prosecution for failing to register. Thus, only a small percentage of nonregistrants are even theoretically liable to criminal action at this point.

[13] In 1973 and 1974, the conviction rate was 28% and 33%, respectively. *See Hearings on the Presidential Clemency Program, Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 149, 203 (1975). The government has suggested that many of those against whom there were stronger cases submitted to induction in lieu of prosecution, *id.* at 91, but this seems an inadequate explanation for the low conviction rate.

[14] In 1973, slightly more than 25% of those convicted, 7% of those prosecuted, were sent to jail. *See Hearings on Amnesty, Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 607 (1974).

for draft violators will not greatly affect the numbers of men actually suffering criminal punishment.

For those already convicted and not pardoned under President Ford's Clemency Program, an amnesty would eliminate the continuing disadvantages in job opportunities and disabilities for civil rights, such as voting and running for office,[15] that a felony conviction typically entails. Although a conviction for a selective service violation sometimes damages an applicant's chance of getting a job, most draft resisters are well educated and articulate and their convictions are ordinarily not major barriers to a satisfactory way of life.[16] Although to minimize the practical significance of amnesty for some draft resisters would be a mistake, for many resisters amnesty would be important largely symbolically as a formal expression of an altered societal attitude toward their behavior. Much of the heat generated over the issue of amnesty arises precisely because of disagreement about the appropriateness of that attitudinal change.

### A. *The Appropriate Societal Attitude Toward Draft Resisters and Draft Evaders*

The great majority of those convicted of violations of draft laws during the Vietnam War and of those still under indictment are young men who had some conscientous reason for refusing military service.[17] Some were pacifists but did not believe themselves sufficiently religious to qualify for the statutory exemption;[18] some actually qualified for the exemption but were conscientously opposed to performing alternative service administered by the selective service administration;[19] others were opposed to participating in the United States war effort in Vietnam. It is this last group that is the

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[15] It may be questionable if a presidential pardon compels a state to eliminate whatever disabilities it places upon those who have committed serious federal crimes, *see* CLEMENCY BOARD REPORT, *supra* note 1, at 12, but there is no reason to suppose states would resist the implications of pardons in these circumstances.

[16] *See id.* at 51.

[17] *See id.* at 43-44. It does not follow that most draft law violators were conscientious. Those who violated the law for selfish reasons were much more likely to have acted surreptitiously and therefore were much less likely to have been caught than conscientious violators, who usually acted openly.

[18] Given the Supreme Court's willingness to stretch the meaning of the exemption in United States v. Seeger, 380 U.S. 163 (1965), and Welsh v. United States, 398 U.S. 333 (1970), these pacifists would actually have qualified if they had applied and persisted, but most competent lawyers, let alone uncounseled laymen, would not have foreseen the result in *Welsh*.

[19] Jehovah's Witnesses make up a high percentage of this group. *See* CLEMENCY BOARD REPORT, *supra* note 1, at 41.

subject of the most controversy. Opponents of amnesty claim that those who refused to serve failed to meet an important obligation of citizens, one borne by millions of other young men during the same period. Many advocates of amnesty assert not only that men who refused to serve did what was morally right, but that the country's present views about the Vietnam War confirm the rightness of their stand.

1. *"Morally Appropriate" Distinguished From "Morally Justified."*—To evaluate these contrasting views, we need to distinguish two senses in which one can say that a person was morally right to act in a certain way. One sense is that we think a morally courageous person who correctly evaluated all conflicting moral demands would have acted in that way. A second sense is that we think the actor behaved properly in acting on his own evaluation of moral demands, an evaluation which we regard sympathetically but with which we do not agree. It is in this second sense that many nonpacifists might say that a pacifist was morally right to refuse to fight; they think that the pacifist inaccurately assessed the morality of killing in certain circumstances, but they are sympathetic with the reasons that led him to do so, and they believe he did right to follow his deeply held moral convictions.[20] Even this more limited sense of moral approval requires some sympathy with the actor's moral deliberations; we do not think Adolf Eichmann did what was morally right even if he followed his own conscience. I know of no verbal distinction that nicely captures the distinction between these two different senses in which we say a person did what was morally right. In this essay I shall use the term "morally justified" to mean an act that we think would have been performed by a morally courageous person correctly evaluating all conflicting demands, and the term "morally appropriate" to mean an act that we think was based on moral convictions which we regard sympathetically but with which we disagree.

2. *Present Attitudes Toward the Vietnam War.*—One cannot easily summarize the country's present attitude toward our involvement in the Vietnam War, and evaluation of what that attitude should be is too complex a task to be undertaken in this essay. Almost no one regards the war as having been, on balance, desirable

[20] Although moral judgments are usually thought to be "universalizable," some people believe that the correct moral choice about participation in military service depends on the character and personality of the actor. A nonpacifist of this view might actually believe that a pacifist has correctly assessed the morality of killing for the pacifist himself.

for either the Vietnamese people or ourselves. While some persist in the view that the country's only mistake was not fighting harder, a substantial consensus exists that extensive American involvement in the Vietnam conflict was, at the least, a serious political error. Many people also believe our involvement was unconstitutional (because war was not declared), or was in violation of international law (because we were aggressors or interfered in Vietnam's internal affairs or systematically committed "garden-variety" war crimes),[21] or was a direct expression of attitudes of racial superiority and imperialism. Some people believe all of these things. A more widely shared and moderate view is that our involvement, while not clearly illegal or blatantly racist or imperalist, did reflect a sort of moral failure on the part of our government, an arrogance about our own power, a distressing insensitivity to the needs of a people far away geographically and different racially and culturally, a disturbing willingness to accept excessive brutality in methods of warfare, and an almost insouciant expenditure of American lives and resources in the pursuit of dubious ends.

Those who think the war blatantly illegal and immoral will probably believe that refusal to serve was morally justified. But not everyone who believes that United States involvement was unwise and even, to a degree, immoral need conclude that those who refused military service made the right moral choice. One may think that citizens should ordinarily undertake obligations democratically determined and express their opposition in ways other than failing to carry out those obligations. However inept the national government may be at times, it is better equipped to decide matters of foreign policy than the ordinary citizen and, apart from competence, it has a much better claim to do so under democratic theory. If the immorality of the war is partial, the duty to accept shared obligations of citizenship may outweigh the duty to avoid contributing to social evils, and if the immorality is arguable, perhaps those who believe the war is wrong should give some weight to the judgment of the representatives of the majority of the population. Such a position has strong historical roots; many writers about "just wars" have asserted that in cases of doubt citizens should comply with the judgments of their rulers. And that position may be stronger if the "rulers" are democratically chosen and military service is a generally shared responsibility.

[21] *See, e.g.*, T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970).

3. *Educative Effect of Acts of Refusal.*—Present approval of the acts of draft violators follows no more directly from the premise that those who refused to serve helped enlighten the rest of us about the evils of war than from the premise that the war was wrong. It is probably true that alternative forms of opposition by draft resisters would not have heightened awareness of the moral questions about the war nor contributed to the strength of its opposition as quickly as the spectre of young men going to jail and leaving the country rather than serving in the army. However, though a timely riot may alert people to very serious evils, and the good done by amelioration of those evils may even outweigh the harm of the riot, that does not necessarily mean we retrospectively approve the act of riot. The likely educative effect of an act, viewed at the time the act was undertaken, is certainly relevant to its moral justifiability, but there are many other relevant factors.

4. *Moral Appropriateness of Refusal to Serve.*—Although a substantial argument can be made that those who were conscientiously opposed to participation in the Vietnam War were "morally justified" in refusing to serve, it is an argument that need not be, and would not be, accepted by many persons (including myself) who now think the Vietnam War reflected moral shortcomings as well as political misjudgments. The argument that those who refused to serve at least acted in a "morally appropriate" way is much more compelling. Certainly there were strong reasons, now accepted by most of American society, for persons subject to the draft to have had grave doubts about the propriety of the Vietnam War. The prospect of personally contributing to that war through military service, possibly requiring one's own infliction of injury and death on others, created a serious moral dilemma for sensitive young men who thought the war wrong and were subject to the draft. The conclusions of those who decided that their own military service would be morally unacceptable is one that we should view with sympathy, even if our own moral conclusion is different.

One who grants that refusal to serve was morally appropriate might still think that an objector to the war should have at least recognized his obligation to his fellow citizens to the extent of submitting to punishment, particularly since that form of behavior would demonstrate most conclusively his moral abhorrence of the war. Submission to punishment may be the morally better and more

courageous action,[22] but it also takes moral courage for someone who acts from opposition to the war, rather than fear for his life, to leave the country, unable to return without being prosecuted; and some resisters may have thought self-imposed exile would allow more effective opposition to the war. An individual's choice to take that course rather than spending years in jail is one that calls for sympathetic understanding, especially since the war made some young men so disenchanted with American society they doubted if they wanted to live in it. The person who deceived his draft board in some significant way has much less claim to our moral approval; even if we could be sure that his objection to participation in the war was genuine, we should refuse to consider morally appropriate a course of action involving deception of officials, designed to conceal the true ground of the objector's avoidance of his obligations and to shield him from any adverse consequence.

5. *Nonconscientious Avoidance of Service.*—How should we now view the young man who avoided his obligation of military service for reasons other than objection to the war? If the character of the war had no influence at all upon his behavior, our moral evaluation of him would not be affected by our judgment of the war. However, then-perceived evils of the Vietnam War probably did affect many nonconscientious avoiders. Some may have had qualms about the war that reduced any sense of obligation to submit to military service; more may have been subtly affected by public opinion, feeling no strong pressure to fight in a war condemned so vehemently by so many fellow citizens. Some young men may also have been influenced by what they thought were inequities in the draft and in military assignments. None of these factors were sufficient to make their actions morally appropriate; we do not believe that someone should avoid one of the basic obligations of citizenship because of vague disquiet about the use of the armed forces, or his sense of public opinion, or his belief that the selective service system or military could operate more fairly.[23] But these factors should affect the degree of our moral disapproval; a selfish avoidance of the draft

[22] For an explanation of why submission to punishment is important under a utilitarian approach see Greenawalt, *supra* note 5, at 69-71. Social contract theorists suggest that the man who submits has not breached his quasi-contractual obligations as much as one who avoids punishment.

[23] If very large inequities were the result of intentional discrimination without any defensible justification, then it could plausibly be argued that the moral obligation to serve evaporates for the class against whom the discrimination is directed. I do not believe such inequities have been shown.

during the Vietnam era seems somewhat less reprehensible than a selfish avoidance of the draft during a war of national survival.[24]

B. *The Appropriateness of Amnesty*

I have concluded that open refusal to submit to the draft during the Vietnam period because of opposition to military service was morally appropriate if not morally justified, but that substantial fraud and nonconscientious evasion of service were not morally appropriate. These conclusions are a helpful first step toward decisions about amnesty. If there is a substantial argument that people should be punished simply because they have broken the law and without regard to any positive effects of punishment (the retributive position), the argument is certainly weakened by the fact that persons have acted from strong moral convictions that arouse widespread sympathy.[25] Nor do other general arguments for punishment provide solid reasons for withholding pardon from conscientious draft resisters.

Since a draft resister will not again be put the question if he is willing to fight in a war he disapproves, causing him pain will not lead him to choose differently the next time; so there is no plausible aim of deterring him from repeating that crime. And the connection between conscientious draft resistance and other crimes is too remote to suggest a strong need to deter the resister from other crimes, isolate him, or reform his character. That leaves the possibilities that punishment is necessary to deter others from similar acts in the future and to reinforce the sense of society generally that laws are to be taken seriously. The argument for general deterrence now has little applicability to persons already punished for draft violations; their pardon after they have paid a substantial penalty will not be likely to have much effect on many persons subject to a draft in future years. Even as to those not yet punished, the argument from general deterrence is weak. The country no longer has a draft. It is not inconceivable, however, that young men (and probably women)

[24] Draft avoiders often had personal reasons that were not purely selfish, such as the need to stay and care for members of their families.

[25] It might be argued by some "rule-utilitarians" that punishment generally must be supported by utilitarian justifications but that individual punishments should be imposed whenever the law has been broken whether or not any utilitarian purpose is served in that instance. But, so long as the rule-utilitarian recognizes some proper role for decisions to decline prosecution and to pardon, presumably he would acknowledge that such decisions are appropriate for the classes of cases in which the purposes of punishment are not served. This would lead him to weigh the considerations next discussed in the text.

will be subject to a draft during an unpopular, but needed, war in the future.[26] Nevertheless, though failure to punish Vietnam draft resisters might hypothetically encourage harmful resistance to a hypothethical future draft during a hypothetical future war, this eventuality is too remote to weigh heavily in present decisions about amnesty.

A more troublesome point is the integrity of the law generally, and particularly the possible feeling of those who submitted to the draft, and of their families, that others who avoided the burden they accepted have gotten off "scot free." Excusing those who committed a narrow kind of crime in exceptional circumstances is not a major breach of the general principle that laws must be taken seriously. Moreover, the granting of a kind of retroactive excuse from service to those who objected to a particular war would not represent a tremendous alteration in a law[27] which had already excused religious and nonreligious pacifists from military service.

Those who served and suffered in Vietnam may understandably be unhappy that the burdens of the war were not more widely or equitably shared; continuing the criminal stigma for those already convicted and retaining the threat of prosecution for others may give them some satisfaction, but it should not give them very much. The selective service laws contained a multitude of exemptions and opportunities for delay, and the procedures prescribed for local and appeal boards were often not followed to the letter. A well-counseled registrant had a very high chance of being excused or, if that failed, of avoiding a valid conviction on some technical ground. Indeed, one gets the impression from experienced defense lawyers that, at least near the end of the war, any well-advised registrant unwilling to serve could be virtually certain of escaping criminal punishment by legal means. And, of course, throughout the war considerable numbers of men subject to the draft escaped by some outright fraud upon their local boards. As opposition to the war increased, a smaller percentage of those liable to prosecution were convicted. The finality of the Justice Department's list of those to be prose-

[26] We should not rest comfortably with the suggestion sometimes made that draft resistance to any war as to which opinion is sharply divided is acceptable because the country has no business fighting such wars. That argument leads to the conclusions that the Revolutionary War and northern resistance to secession were unwarranted and that the extensive resistance to the draft in the North during the Civil War was justified. It is possible that, although some historical wars on which popular sentiment was divided were justified, no future war would be; but the analysis to render this position persuasive has yet to be provided.

[27] *See generally* Greenawalt, *supra* note 8.

cuted means that many men whose cases were under investigation then and who were thought to have violated the law are now free from the threat of prosecution. Even among those still subject to prosecution, few would probably be convicted. Those who have been and would be convicted are thus a small percentage of all those who could reasonably be said to have declined or evaded their obligations under the draft laws, and pardoning them will not greatly affect the overall distribution of the burdens of the war.

Strong reasons exist for granting an amnesty to conscientious draft resisters. Most of them believe they acted in a morally justifiable way and to many of them the country's withdrawal from Vietnam appears to be societal confirmation of that judgment. Their status as convicted criminals or persons subject to prosecution is a continuing source of resentment and helps keep the domestic wounds of the Vietnam conflict unhealed. The anomalies of the draft laws and the unevenness with which criminal punishment has fallen are a subsidiary reason for amnesty. Even if most of society believes only that the acts of conscientious objectors were morally appropriate rather than morally justified, these are not men who "deserve" punishment for wrongdoing, and the practical purposes of punishment no longer stand to be significantly served.

### C. *The Crimes Amnesty Should Cover*

Nonreligious pacifists and "selective" conscientious objectors are the group of men who should most obviously receive amnesty. So also should men who, having received conscientious objector status, were convicted of refusing to perform alternative service administered by the selective service system. The hard question is whether an amnesty should be cast in terms of classes of crimes or classes of criminals. The latter approach not only demands some case-by-case evaluation, but involves the difficulty of reconstructing events or beliefs from the not recent past and requires some degree of participation by those who would receive amnesty. To pardon all those convicted of certain crimes is much simpler. Since both the Vietnam War and the draft have ended, since most persons who failed to report for induction or openly refused to perform other selective service obligations had conscientious reasons,[28] and since many of those without conscientious reasons were undoubtedly influenced

[28] *See* CLEMENCY BOARD REPORT, *supra* note 1, at 33, estimating that 75% of their applicants were strongly opposed to the war.

by their awareness that the country had no firm commitment to the war, President Carter's plan to grant an across-the-board pardon to those who committed these offenses makes sense even though some persons who were not conscientious will benefit from the pardon. The matter is more debatable in respect to those who never registered with their selective service boards. Probably a lower percentage of those were conscientious and their attempt to evade any contact at all with the draft system may seem a more serious offense. Since relatively few convictions were for this offense[29] and since President Ford has already granted pardons to some of those who failed to register, failure to register should also be included in the list of offenses for which pardon is granted. Whether those convicted for positively deceiving selective service officials should be pardoned is yet more questionable. Convictions for furnishing false information to draft officials were not covered by President Ford's Clemency Program and they should not be included in a blanket amnesty. Deception of government officials to avoid substantial obligations of citizenship is a serious crime and is more likely to evidence a willingness to cut corners with other obligations than open refusal to perform a particular obligation. Perhaps an amnesty board, which would be created mainly to deal with other offenses, could consider such cases upon application of persons convicted and recommend pardons in particularly appealing cases, if any.

D. *The Consequences of Criminal Behavior An Amnesty Should Eliminate*

For those not yet convicted, an amnesty will, as did the pardon of former President Nixon, remove the possibility of prosecution. For those already convicted, it will automatically remove continuing disabilities under federal law, and presumably will be accorded similar effect in the states. Congress, if not the President, would have the power to compensate convicted persons for hardships suffered, but so long as most people in the country think that registrants should have submitted to the draft, that step would be clearly inappropriate; and it has not been urged even by vigorous proponents of universal, unconditional amnesty. A step that would go somewhat beyond simple pardon would be to seal or expunge records of conviction, formally putting persons in the position of those

[29] Three percent of the applicants to the Clemency Board had as their offense failure to register for the draft. *See id.* at 43.

who had never been convicted. But concealment of the identity of persons who acted openly for conscientious reasons and now believe themselves wholly or largely vindicated would be somewhat anomalous. Therefore, even though, arguably, those pardoned may possibly suffer if narrow-minded prospective employers learn of their records, openness is preferable; the record should show what has taken place.[30] However, the federal government should make clear that it itself, in its hiring capacity, will not decline to employ pardoned conscientious draft resisters in the absence of such job-related considerations as might be encountered in specialized agencies like the C.I.A.

A troublesome problem not dealt with by President Ford's Clemency Program is the future status of men who left the United States to avoid the draft, renounced American citizenship, and became citizens of other countries. Certainly as a part of a general amnesty these persons should be put in a position as favorable as the other citizens of the country to which they have fled; no special impediments should remain to their entry into the United States.[31] The hard issue is whether their American citizenship should be restored. I do not see how citizenship can be restored without a request by the man involved, since the United States cannot know whether any particular person wishes to become a citizen again. However, if a conscientious resister does seek to restore his citizenship, that should be done expeditiously. Citizenship should not be routinely restored to those who denounced it to avoid the draft for nonconscientious reasons. Since the authorities will have to examine all requests for restored citizenship in at least some detail, it would be appropriate for them to inquire about motivation and to restore citizenship quickly only for those with conscientious motives.

### E. *The Conditions for Amnesty*

Should amnesty for draft violators be conditioned on the performance of alternative service or the taking of an oath? In theory, an alternative service requirement would seem just for those who have

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[30] It may be, however, that in the interests of privacy and rehabilitation of offenders, criminal records should generally be sealed or expunged after a period of time. *See* K. GREENAWALT, LEGAL PROTECTIONS OF PRIVACY, FINAL REPORT TO OFFICE OF TELECOMMUNICATIONS POLICY 71-76 (1976).

[31] *See* 8 U.S.C. § 1182(a)(22) (1970) (excluding from admission into the United States persons who have departed or remained outside the country to avoid training or service in the armed forces); *Hearings on the Presidential Clemency Program*, *supra* note 13, at 144, 150.

not yet suffered any hardship, but, primarily for practical reasons, the imposition of such service would be unwise. The failure to serve of selective objectors and nonreligious pacificists has no greater claim on our sympathies than the failure to serve of religious pacifists who have traditionally been granted an exemption. The latter have been required to perform alternative civilian service, and those who could not conscientiously do so have been put in jail. Few of those who have urged throughout the years a broadening of eligibility for conscientious objector status have also urged elimination of the alternative service requirement. It would have seemed unfair and likely to engender resentment to require many men to spend two years in military service and perhaps risk their lives while others who objected to serving were excused altogether. The alternative service requirement has also been an impediment to fraudulent assertions of conscientious objection. If the alternative service requirement has made sense for religious pacifists, it may seem an appropriate condition for amnesty.

Nonetheless, the arguments against alternative service for draft resisters are stronger than the arguments for it. Persons who have already suffered lengthy imprisonment should not be required to serve further, and even less serious criminal penalties should probably be sufficient to relieve one of alternative service obligations. In fact, although President Ford's Clemency Program was often called one of "earned reentry," his Clemency Board recommended outright pardons with no alternative service requirement for more than eighty percent of the applicants convicted of draft violations.[32] The main purpose for alternative service would be to impose a burden on those not yet convicted. The Department of Justice, which administered President Ford's program for unconvicted draft violators, required alternative service for all of its 688 applicants.[33] Some opponents of alternative service say unconvicted draft violators have already suffered enough. Although suffering caused by fear of prosecution and evasion from prosecution cannot be equated with suffering exacted by the state in satisfaction of its obligations, still the impact of natural suffering should be of some relevance when the proper quantum of state imposed suffering is considered. A more telling argument against alternative service for draft violators is that the necessity for it is much diminished now that both the war

[32] *See* CLEMENCY BOARD REPORT, *supra* note 1, at 134-36, 146.

[33] *See id.* at 146.

and the draft have ended. But the most powerful arguments are more practical ones. Alternative service requirements necessitate case-by-case evaluations and dispositions; the wider the ambit of alternative service, the more the advantages of a simple sweeping amnesty are sacrificed. Although the Clemency Board apparently did a remarkable job of maintaining consistent dispositions,[34] individual decisions about alternative service raise problems of fairness and perceived fairness. Finding alternative service assignments is often difficult; men willing to perform alternative service often cannot be placed in appropriate positions and it is difficult to monitor their performance once they are initially placed. Placement sometimes may mean the loss of a job opportunity for an unemployed person who desperately needs the position. Most important of all, those not yet convicted know they have an excellent chance of avoiding conviction and an even better chance of avoiding a jail sentence. Why should they submit to a lengthy term of alternative service in order to be pardoned? Many would prefer to take their chances.[35] Here must lie much of the explanation why less than 700 of the more than 4,500 men on the Justice Department's "final list" applied for amnesty. The truth is that an amnesty for draft resisters conditioned on alternative service would not be successful because it would not attract the applications of most of those eligible for amnesty.

Any oath procedure that demanded an effective admission of wrongdoing would be inappropriate.[36] Ordinarily, admission that one has done wrong may be a proper condition for forgiveness, but those who avoided military duty for conscientious reasons still believe that what they did was morally right, and most of the rest of society at least respects their moral position. A bland oath of allegiance to the country would not be subject to the same objection, but it would be pointless, mildly humiliating, and inconvenient. Therefore, no oath should be a precondition for amnesty.

### F. *The Agencies to Grant Amnesty*

As far as draft resisters are concerned, amnesty should be largely accomplished by simple presidential order. Congressional action

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[34] *See id.* at 123-47.

[35] Some of these will also be opposed in principle to alternative service, believing that they have done the country a service by resisting the draft and should not be put under any further obligation.

[36] *See Hearings on the Presidential Clemency Program, supra* note 13, at 74-75.

would be needed to authorize speedy restoration of citizenship to conscientious resisters who renounced allegiance to the country but wish to become citizens again. Some sort of administrative board would be needed to deal with applicants for citizenship and with applicants for pardon who furnished false information to the government. It would be preferable to have all problems of amnesty not settled by an initial proclamation dealt with by a single board, rather than to have responsibilities divided among different agencies.

## IV. Crimes of Absence From Duty Committed by Soldiers

The considerations relevant to amnesty for soldiers who went AWOL or deserted are even more complex than those concerning draft violators. Despite its advantages, an across-the-board amnesty is not desirable; despite its defects, a case-by-case approach is needed.

First, a word about terminology. Absence from duty can lead to conviction for one of three offenses: missing movement, AWOL, or desertion. Desertion, the most serious offense, requires that a soldier shirk an important duty or depart with the intent to avoid hazardous duty or to remain away permanently.[37] Although those absent for more than thirty days are classified administratively as deserters, it is typically difficult to prove an intent to remain away permanently, and court-martial convictions are usually for AWOL.[38] In this essay I shall use the term "soldiers absent from duty" to cover all three offenses.

### A. *The Appropriate Societal Attitude Toward Soldiers Absent From Duty*

We shall first consider the soldier who left his duties because his experience in military service led him to decide that he could not conscientiously participate in the Vietnam War or in any war at all. Soldiers, unlike civilians, have become part of a military organization and have taken an oath to serve their country. The avoidance of their military duties may seem a more serious offense than a passive refusal to submit to the draft. On the other hand, those who become conscientious objectors in military service have at least initially given their country the benefit of the doubt and have awaited

[37] *See* Clemency Board Report, *supra* note 1, at 65.

[38] Of applicants to the Clemency Board, 90% were punished for AWOL.

hard experience before concluding that they cannot in conscience fight. Moreover, those entering the military at a younger age and after a slighter exposure to social ideas may not have had the opportunity typical for college students of debating the morality of military service; and it is somewhat unfair to say they should have formulated their opposition in advance.[39] Although subtle distinctions can be drawn between conscientious objectors who refused to be drafted and did not immediately submit to prosecution and conscientious objectors who left military duties, these distinctions are not great enough to warrant any basic difference in moral attitude. Therefore, if we decide that the acts of conscientious draft resisters who left the country were morally appropriate, though not morally justified, we should also decide that conscientious deserters acted in a morally appropriate way, so long as their absence did not leave comrades in serious danger.

The great majority of those who absented themselves from military duty were probably not conscientious objectors. The Clemency Board reports that among its military objectors only five to seventeen percent could be classified as conscientiously opposed to military service or the Vietnam War.[40] Even if one quarrels over its methods of classification or doubts that its applicants are fairly representative of the much larger class of men who did not apply for amnesty, still one reaches the conclusion that conscientious objectors were a minority of those who left military service.

The other reasons for absence were extraordinarily diverse, for example, special psychological problems (often post-combat), family problems, discontent with occupational assignments, resentment of superior officers.[41] Most case histories evoke sympathetic responses, but typically it is the sort of sympathy one feels for persons who because of personality or circumstance seem helpless to control their own destinies, not the sort of sympathy one feels for morally courageous actions. With the possible exception of soldiers who left because of extreme family needs to which military authorities were unwilling to accommodate, their behavior was not morally appropriate.

As with respect to draft violators, the unpopularity of the war may

[39] It should not make much difference for this purpose whether they were drafted, enlisted in the expectation of being drafted, or enlisted because of a positive desire to be in the military.

[40] *See* CLEMENCY BOARD REPORT, *supra* note 1, at 66.

[41] *See id.* at 55-69.

have made soldiers more willing to absent themselves, since they may have faced neither the sharp claims of conscience nor the prospect of severe disapproval among acquaintances that might be present during a war of national survival. Thus, our moral disapproval of nonconscientious absence from duty may be substantially lessened by the nature of the Vietnam War, but that does not mean it should be eliminated.

B. *The Appropriateness of Amnesty*

President Ford's Clemency Board estimated that roughly 13,000 draft violators and 100,000 persons who absented themselves from military duty were eligible for the Clemency Program.[42] However debatable these figures may be, they suggest that the number of persons who have been punished or received unfavorable discharges or both for absence from duty or who are now subject to military prosecution for absence offenses is substantially greater than the number of persons who have been punished or are subject to prosecution for draft violations. In terms of sheer numbers, therefore, a decision about amnesty for military absenters is more important than a decision about amnesty for draft violators.

Arguments against amnesty for military personnel absent from duty are much more powerful than the arguments against amnesty for draft violators. The country is no longer fighting in Vietnam and it no longer has a draft, but it still has a very substantial peacetime army, and its continuing commitments indicate a clear policy to fight abroad in certain circumstances. If the Clemency Board applicants are a fair guide, fewer than ten percent of those who absented themselves from military duty did so while in Vietnam or upon being assigned to Vietnam.[43] A greater number left after returning from a tour of duty in Vietnam;[44] while some of these were particularly influenced by the special character of the Vietnam conflict, others suffered the sort of physical and psychological consequences that might occur after extensive combat in any war. Most of those

[42] *See* CLEMENCY BOARD REPORT, *supra* note 1, at 8. The 100,000 figure includes those who were discharged because of an absence from duty offense, but it does not include those who after a court-martial conviction returned to their units and subsequently were discharged honorably. Nor does it include those who may have been absent but who received an unfavorable discharge because of some other offense. For these reasons, the total number of those absent from duty is much greater than the number of those who were eligible for the Clemency Program. *See Hearings on the Presidential Clemency Program*, *supra* note 13, at 132.

[43] *See* CLEMENCY BOARD REPORT, *supra* note 1, at 60-61.

[44] *See id.* at 63.

who left military service did so for reasons that arise in peacetime as well as war, and many of these left their duties in the United States and Europe without having had any combat experience. A surprising eighty-four percent of military applicants to the Clemency Board had enlisted.[45] No doubt some did so because of draft pressures, but many sought vocational and educational opportunities in the army. Thus, the end of the draft does not mean the country now has a military force for which the temptations to leave duties are no longer very significant.

As I have indicated, most of the case histories of those who absented themselves arouse sympathy, but the justification for punishing absences from duty is, even more than with respect to most crimes, one of general deterrence. Once the country has determined that it needs an effective military force, it must accept standards for governing military personnel that are in many respects more rigorous than those applicable to civilians. Because so much can be at stake, disobeying superiors and walking off the job are treated as crimes, not just as possible bases for terminating employment. Military life is often demanding and harsh; the temptations to "take off" are strong, and serious penalties may be necessary to discourage men from leaving their units. It is impossible to distinguish the position of many of those who left their units during the period of the Vietnam War from those who did so before or after the war, and it would seem somewhat unfair to single out for pardon those nonconscientious soldiers who happened to absent themselves during the war while neglecting those who did the same thing at some other time. More important, any blanket amnesty for absenters during the war might well weaken the threat of punishment for those tempted to leave their units during some future war and even during peacetime. Finally, most of those who served during the Vietnam War must have been much more directly aware of men who left their military duties than of men who resisted submission to the draft; their resentment might be greater if their comrades who escaped duty were pardoned than if draft resisters were pardoned.

It is sometimes argued that to treat draft resisters more favorably than "deserters" is a sort of class discrimination because "deserters" come mainly from poorer and less well-educated groups that were less likely to have developed articulate conscientious opposition to the war. That argument is very strong as it applies to men

[45] *See id.* at 53.

who did develop a conscientious opposition to service while in the military, and rather strong as it applies to men who suffered serious disquiet about the Vietnam War or the morality of military combat. But the argument has little force as it applies to quite different reasons for absence. Consider a man who goes home because he thinks he must support his family better. His economic status may bear on how gravely his absence should be viewed, and his case may remind us of the economic causes of many kinds of crimes, but whether or not persons conscientiously opposed to being drafted are excused has little bearing on how he should be treated.

Despite the more substantial arguments for punishment based on the offender's assumption of special duties, the nature of military service, and the need for general deterrence, most conscientious absenters should be treated like conscientious draft resisters.[46] However, the argument for amnesty for most nonconscientious absenters is not strong.

### C. *The Crimes Amnesty Should Cover*

Since the number of nonconscientious absenters is so great in comparison with those who acted from conscientious motives, no blanket amnesty should be given by categories of crime. Except for those, if any, who left comrades in serious danger, all who for conscientious reasons left military service should be pardoned for convictions or relieved from the threat of prosecution for the crimes of AWOL, desertion, and missing movement. A Vietnam War amnesty should also include pardons for those whose absence from duty was caused primarily by a severe reaction to the war, whether that reaction took the form of emotional revulsion at continued service in Vietnam or psychological or physical problems caused by extended combat in Vietnam. Others who absented themselves for reasons that elicit considerable sympathy should also be pardoned, as was done for applicants under President Ford's Clemency Program. Contrary to the practice of the Clemency Board, a "bad record" after discharge from the service should not have a bearing on

[46] Since the law provided for discharge of those who during military service become conscientious objectors to participation in any war, some conscientious absenters, like some conscientious draft resisters, were actually entitled to exemption from military service. Many men were either unaware of the possibility of discharge or did not trust military authorities to grant it. For the number of applications and discharges during the Vietnam period see *Hearings on Amnesty, supra* note 14, at 545. Many nonreligious pacifists did not foresee the Supreme Court's expansion of the statutory exemption which would have brought them within its ambit.

whether pardon is granted;[47] the pardon should be viewed as related to the military offense, not as a mark of approval of subsequent behavior.

D. *The Consequences of Criminal Behavior an Amnesty Should Eliminate*

The thorniest and practically most significant problem in respect to military offenders is what to do about unfavorable discharges.[48] While many of those court-martialed and convicted for AWOL were returned to their units, others were given punitive discharges—Bad Conduct Discharges or Dishonorable Discharges.[49] Many offenders were not court-martialed at all; in return for their acceptance of Undesirable Discharges, typically for "unfitness," military authorities waived their trials.[50] The great majority of those guilty of absence from duty have now been discharged from the military; for them the formal status of their court-martial conviction, if they had one, matters much less now than the character of their discharge. An Undesirable Discharge, like a punitive discharge, bars men from virtually all veterans' benefits,[51] such as health care, educational assistance, and vocational rehabilitation, and it precludes them from civil service preferences given to veterans. It also can disadvantage them greatly in the search for jobs with private employers and government agencies. A major element of President Ford's amnesty program was the upgrading of Undesirable Discharges to Clemency Discharges. In a few instances of apparent military injustice or extensive and creditable military service the Clemency Board recommended that men receive Honorable Discharges.[52]

The newly created Clemency Discharge drew the fire of groups favoring universal amnesty who urged that nothing less than an Honorable Discharge should be granted and even suggested that a Clemency Discharge was no better than an Undesirable Discharge. The Clemency Discharge did not confer veterans' benefits and has

[47] *See* CLEMENCY BOARD REPORT, *supra* note 1, at 120.

[48] For an excellent summary of the regulations applicable to discharges, the kinds of discharges, and the conditions under which they are typically granted, see D. ADDLESTONE & S. HEWMAN, ACLU PRACTICE MANUAL ON MILITARY DISCHARGE UPGRADING 99-235 (1975).

[49] *See* CLEMENCY BOARD REPORT, *supra* note 1, at 71, 77.

[50] *See id.* at 71-74, 77. Some of those who received Undesirable Discharges mistakenly believed they would receive General Discharges.

[51] A complete Title of the United States Code, Title 38, is devoted to the multiplicity of veterans' benefits.

[52] *See* CLEMENCY BOARD REPORT, *supra* note 1, at 14.

not made its recipients eligible for civil service preferences. A study commissioned by the Board indicated that some private employers would discriminate against job applicants with Clemency Discharges but not nearly as many as would discriminate against applicants with Undesirable Discharges.[53] In the study the Clemency Discharge fared about as well as the General Discharge, a discharge less desirable than an Honorable Discharge but one given under "honorable conditions" which entitles otherwise eligible recipients to veterans' benefits.

A typical ground for a General Discharge would be unsuitability for military service due to psychological problems or mental incapacity.[54] That discharge indicates that for reasons other than physical incapacity a soldier is unable to perform his military duties satisfactorily but that he is not to be blamed for his inability. Those nonconscientious absenters whose cases are sympathetic ones generally warrant no more favorable treatment than persons who have received a General Discharge. A man whose psychological problems drove him to leave his unit should not be better treated than a man whose psychological problems led authorities to grant a General Discharge.

Although here there is more room for argument, it would also not be appropriate to give the typical conscientious absenter an Honorable Discharge. The Honorable Discharge does not signal specially meritious service; it is indeed the ordinary form of discharge. But it does signify satisfactory performance of military duties up to the time of discharge. The man who has left has made a choice not to perform his military duties; even if that choice is now believed to be a morally appropriate one, society should not treat the conscientious objector as if he had satisfactorily performed his military duties. Perhaps those deserters who could have obtained an Honorable Discharge on the basis of their pacifist views should now receive the same Honorable Discharge given to those who actually qualified under the statute.[55] Other conscientious absenters and those nonconscientious ones with appealing cases should be given a discharge equivalent to a General Discharge, on the theory that for a variety of reasons for which they were not to blame these men were unsuited for military service. This discharge would be considerably more generous than Presient Ford's Clemency Discharge because it would

[53] *See id.* at 403-09.

[54] *See id.* at 72.

make men with sufficient length of service eligible for veterans' benefits. Honorable Discharges should be given only in cases of miscarriages of justice or extraordinarily sympathetic cases, such as instances of men with lengthy service in Vietnam, eligible for Honorable Discharges, who subsequently reenlisted and became beset by overwhelming personal problems that led them to go AWOL.

The demand for Honorable Discharges across the board may be viewed not so much as a logical corollary of objections to the Vietnam War as an attack on the whole system of allowing post-service benefits and opportunities to turn so heavily on possibly arbitrary decisions about the form of discharge and, more generally, on the quality of military justice. The validity of such an attack is beyond the scope of this essay, but those proposing Honorable Discharges for all absenters should at least explicitly make out their argument in those terms.[56]

### E. *The Conditions for Amnesty*

It has already been suggested that the principle of alternative service is just and is in accord with statutory exemptions that existed both for civilian and military conscientious objectors. Calculating on the basis of length of service and taking into account mitigating and aggravating factors, the Clemency Board set terms of alternative service for military applicants in a fair manner.[57] For most men the period was less than six months. The problems of finding alternative service positions and of disrupting existing employment were particularly acute in respect to short periods of service. Although the possibilities for alternative service sensibly included part-time jobs,[58] jobs were often not available and the program was complicated to administer. No doubt some of those who were eligible for the program and did not apply refused to do so because the benefits to be gained did not appear worth the prospect of alternative service. General alternative service requirements appear to be a bar to any broadly successful amnesty program. For these reasons, any new amnesty program should either dispense with alternative service altogether or reserve it for special cases in which the claim for full pardon simply appears too weak without

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[55] *See* Welsh v. United States, 398 U.S. 333 (1970).

[56] *See, e.g., Hearings on Amnesty, supra* note 14, at 248-49; *Hearings on the Presidential Clemency Program, supra* note 13, at 176.

[57] *See* CLEMENCY BOARD REPORT, *supra* note 1, at 123-47.

[58] *See id.* at 18.

some commitment of time to useful national service.

Part of the problem with President Ford's Clemency Program was that it depended on application by individual offenders, a condition for pardon that was unavoidable given the requirement that most applicants had to be willing to undertake alternative service commitments. Less heavy reliance on alternative service would relieve the need for many of those eligible to come forward. It can, of course, be argued that a condition of individual application is positively desirable, requiring an offender at least to demonstrate his willingness to petition public authorities. But according to Clemency Board estimates, only about 13,000 of 90,000 eligible discharged military offenders took advantage of its program.[59] Slightly more than half of 10,000 eligible persons took advantage of the Department of Defense program,[60] which covered those against whom military charges were still outstanding. The vast majority of all eligible military offenders, therefore, did not apply, whether because of ignorance, discontent over the terms of pardon, or mistrust of government bodies. Since the government should extend the hand of reconciliation to those who are now uninformed or are mistrustful, selfrighteous, and resentful, as well as to those who are themselves willing to take conciliatory steps and aware of how to take them, an amnesty program should go as far as it can without individual applications.

Apparently in every instance when offenders applied to the Department of Defense under President Ford's Clemency Program, pending charges were dropped and the offenders received Undesirable Discharges.[61] These discharges could be upgraded upon performance of alternative service. In theory failure to perform alternative service after a promise to do so might have led to charges based on a lack of intent to perform that service, but in practice failure meant only that the discharge would not be upgraded.[62] Its procedures and its uniform grants of clemency indicate that the Department of Defense now has little interest in prosecuting soldiers who absented themselves during the Vietnam era. It would appear feasible for it to go through its own files and see if there are any exceptional cases for which it thinks prosecution is really crucial. With respect to all

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[59] *See id.* at 146.

[60] *See id.* Another 765 men returned to military service but decided not to participate in the program. *See Hearings on the Presidential Clemency Program, supra* note 13, at 61.

[61] *See id.* at 14.

[62] *See id.* at 74.

other cases, it could simply issue an Undesirable Discharge, clearly ending the possibility of court-martial but leaving open application for an upgraded discharge from those who acted conscientiously or had cases that were otherwise appealing. This simple step could at least finally put to rest the spectre of possible future criminal prosecutions for refusals to serve during the Vietnam War.

Similarly, without application an administrative body could directly review the files of those discharged for being absent and grant pardons and somewhat upgraded discharges for those who would clearly qualify. Those persons who did not receive any form of pardon or who believed they should receive further upgraded discharges could then apply to the board. At this point, perhaps a form of alternative service might be employed to tip borderline cases in favor of more generous treatment.

Under this approach, thousands of cases could be disposed of without lengthy investigations and without application. Only those cases for which some participation of the offender was crucial would depend on his initiative. For the same reasons applicable to draft resisters, no oath should be required of military offenders who receive pardon, and cases in which deserters have acquired foreign citizenship should be treated like similar cases involving draft resisters.

### F. *The Agencies to Grant Amnesty*

The broad outlines of an amnesty program for soldiers who absented themselves from duty could be laid out by executive order or statute, but the program would have to be administered by some agency, preferably a special board devoted to these problems. The board would begin by recommending clemency as broadly as it could on the basis of summary examination of existing records. It would then turn to more detailed examination of difficult cases. There seems little point in following the example of President Ford's program and setting a narrow time limit on applications; so long as a substantial flow exists, the board should stay in business.

## V. Other Crimes Committed By Soldiers

Many soldiers during the Vietnam era were convicted and given Undesirable Discharges for crimes other than absence from duty. Few persons have proposed blanket amnesty for violent crimes[63] or

[63] *But see Hearings on Amnesty, supra* note 14, at 249.

thefts, but pardons have been suggested for nonviolent offenses like disobedience of orders, drug use, and consenting homosexual acts.

At least one sort of disobedience should clearly be included in an amnesty. Suppose a soldier informed superior officers that he could not conscientiously perform further military duty, refused to obey the next orders given him, and submitted to punishment.[64] Just as the draft resister who submitted to punishment acted less in opposition to legal rules than the resister who left the country, so also the soldier who submitted to punishment breached his military obligations less than the soldier who deserted. Since most refusals to obey orders did not involve matters of conscience, those who had demonstrable conscientious reasons should apply for relief. It is frequently asserted that military authorities found independent grounds for punishing soldiers known to oppose the war. Unless all offenses are to be pardoned, such cases can be handled only by individual application. Since it will ordinarily now be difficult to go beneath the surface reasons for punishment, applicants would have to make a strong showing that authorities were really concerned about antiwar sentiment.

A generalized amnesty for all victimless offenses would not make sense. Arguably drug use should not be criminal, although the reasons for soldiers to refrain from heavy use of drugs are even stronger than those that apply to civilians. But if drug use is now the basis for criminal charges or discharge, there is little basis for pardoning all those who happened to use drugs during the Vietnam era. It would make more sense, however, to treat with leniency those whose use of drugs is directly traceable to difficult experiences in the Vietnam conflict. An amnesty board should consider such cases as it considers cases of nonconscientious absences, granting pardon and an upgraded discharge when circumstances are especially appealing. The same approach should be taken for other "victimless" crimes.

## VI. Crimes Committed By Civilians In Opposition to the War

A citizen has a moral obligation to obey the law, but he may also have a moral obligation to do what he can to prevent the country from perpetrating serious injustices. Most people would acknowledge that in sufficiently extreme circumstances disobedience of the law is morally justified;[65] they would praise those who helped fugi-

[64] *See* Clemency Board Report, *supra* note 1, at 8.

[65] *See generally* Greenawalt, *supra* note 5.

tive slaves escape or who hid Jews from persecutors. Even more than in respect to conscientious refusal to serve, our present moral evaluation of the Vietnam War will affect our moral evaluation of acts of opposition to the war. If we tried to develop a rough scale of acceptability for acts that interfered with legally protected interests, we might put first lawful demonstrations and other lawful political acts, then acts that were technically illegal (because, say, involving trespass or breach of the peace) but not seriously disturbing to property or persons, acts contributing to the avoidance of obligations of others (such as illegal encouragement or assistance to draft evaders), acts seriously disturbing normal activities (such as blocking traffic), acts involving substantial interference with property rights (such as the "occupation" of a building), acts involving a potential but not actual use of force against others (such as the occupation of a college building with threats to others to stay out), acts involving force against other persons but not the infliction of injury (as when others are forcibly removed from a building but not harmed), acts involving the actual or attempted theft or destruction of property, acts involving a threat of serious personal violence towards others (such as detention at the point of a knife), and finally, acts actually involving serious personal violence or carrying a high risk of such violence (as the explosion of a bomb in a public building). This scale is imprecise not only because it is hard to classify many borderline cases but also because there may be debate about the general ordering (is destruction of property usually worse than threatened force against persons?) and because the ordering of any particular case obviously depends more on the special facts than on placement in any general category (barricading a Dow Chemical recruiter in a room is more serious than destroying his collection of pamphlets about the company).

Many persons who thought relatively early that the Vietnam War was immoral still believed that departure from lawful channels of dissent was unjustified. The history of growing opposition to the war does not make clear what the contribution of illegal acts other than refusals of military service was. The decisive force in our eventual withdrawal was widespread lawful opposition in the country and in Congress, but at an early stage acts of unlawful opposition received considerable publicity and influenced people's thinking. What is uncertain is whether those acts actually led private citizens or public officials any more quickly to oppose the war or, on balance, strengthened support of the war by casting doubt on the responsibility of its opponents. Those whose judgment is that the war was

illegal and obviously immoral, and who believe illegal acts of opposition were necessary to stop the war, will be likely to think that many illegal acts were morally justified or morally appropriate. Those who think the war was probably not illegal and was less obviously immoral and who were dubious about the utility of illegal acts in stopping it will be less likely to think those acts were justified or appropriate.

If those who conscientiously refused to serve acted in a morally appropriate way, though they were not morally justified, those who openly encouraged and assisted others to refuse also acted in a morally appropriate way. Acts that were technically illegal but did not involve major disturbance, threat of personal injury, or serious interference with property rights may also have been morally appropriate. At the borderline, perhaps, between moral appropriateness and moral inappropriateness are acts involving a substantial interference with property rights (breaking into a draft board office) but no actual harm to property or other serious harmful consequence, and acts involving an implied threat of physical force in circumstances in which that threat did not seriously interfere with the activities of others and the use of actual physical force seemed very unlikely (occupation of an office during a short period in which others were warned to stay out). Lines will be drawn somewhat differently by everyone, of course, and the extraordinary complexity of trying to draw lines in this area is of major importance.

One further problem is worth mentioning here. Many demonstrations at universities, and perhaps elsewhere, were only partly concerned with the war. The Columbia University crisis of 1968, for example, involved objections to community-related university policies (the gym in the park), treatment of minority students, and some "war-related" practices (R.O.T.C., acceptance of grants for "war" research). Our moral evaluation of any particular demonstrator would depend not only on our sense of morally appropriate tactics for opposing the Vietnam War but also on our sense of how closely the "war-related" issues were actually connected to the war, on our sense of morally appropriate tactics for opposition to the other challenged policies, and on our belief about the centrality of various issues in the demonstrator's mind.

Apart from persons who rendered simple forms of assistance to others who committed acts of refusal or absence from duty themselves the subject of amnesty, or who encouraged resistance by purely symbolic acts, such as draft card burning, that did not invade personal or property rights, an amnesty should not reach

crimes committed by civilians in opposition to the war.[66] The most obvious candidates for amnesty among such crimes would be nonviolent demonstrations involving technical trespasses and, perhaps, some disturbance of the activities of others or limited threats of force. Most of those who participated in such demonstrations were well-educated, reasonably well-to-do persons. The great majority have not been prosecuted. Most others have suffered very minor criminal penalties that have not seriously interfered with their lives. The significance of amnesty for these offenses would be almost entirely symbolic.

I do not believe society is ready to acknowledge the moral appropriateness of physical force against persons or substantial interferences with property, and it would be a serious problem to draw the line in particular instances between demonstrations that would receive amnesty and those that would not. Not only would a determination have to be made, for example, whether physical force was used or threatened; the thorny question of the significance of a "war connection" would have to be worked out. The drafting and administrative problems would be almost insurmountable and not worth the meager "payoff." Moreover, since the power of Congress to grant amnesty for state crimes is highly doubtful,[67] it would be difficult or impossible to have a uniform national policy.

More fundamentally, though drafts for unpopular wars may not be frequent, public issues of great emotional significance are. If society wants to discourage easy employment of illegal forms of redress, as I think it should, legal vindication of those who employed these forms of redress is not the way. In this context arguments about specific and general deterrence and the integrity of law have greater plausibility and help lead to the conclusion that amnesty should not, with narrow exceptions, reach civilian acts of opposition to war policy.

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[66] Anyone actually convicted of verbal or written encouragement to draft resisters should also be pardoned. But there may have been no such successful prosecutions. *See* Spock v. United States, 416 F.2d 165 (1st Cir. 1969).

[67] *See* Lusky, *Congressional Amnesty for War Resisters: Policy Considerations and Constitutional Problems*, 25 VAND. L. REV. 525, 540-43 (1972).