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An Essay Concerning Judicial Resignation and Non-Cooperation in the Presence of Evil

Bruce Ledewitz*

I. INTRODUCTION

In the 1840's Wendell Phillips and his fellow Garrisonians1 challenged the conscience of the legal profession by their call upon anti-slavery judges to resign their offices. Only a very few ever did so. Surprisingly, the failure of the anti-slavery judges to resign has not embarrassed legal commentators and theorists. There have been no symposia examining their response to the abolitionists; there have been no impassioned exchanges in the pages of the law reviews. The one project of evaluation by a law professor, that of the late Robert Cover,2 ended as a mild criticism of the failure of these judges to ameliorate the worst aspects of the Fugitive Slave Act of 1850.3 Professor Cover never analyzed the refusal to resign.

Injustice also today should challenge the conscience of the legal profession. Law today is engaged in two practices of taking human life—abortion and the death penalty. Many, no doubt most, judges find these practices morally acceptable; but some judges do not. What is striking about these judges is that they find it comfortable to sign death warrants and order abortions when in their hearts

* Professor of Law, Duquesne University School of Law. The author serves as Secretary of the National Coalition to Abolish the Death Penalty. In this essay I use the male pronoun to refer to judges. This is not mere convention. Most judges are male; and in an essay in part about abortion, that fact should be noted.

1. Speaking roughly, the followers of William Lloyd Garrison and the abolitionist theory contained in the pages of the Liberator.

2. R. Cover, Justice Accused: Antislavery and the Judicial Process (1975) [hereinafter Cover]. This article relies heavily upon Professor Cover's scholarship.

3. 9 Stat. 462 (1850).
they know these acts to be murder. Their complicity does not arise as an issue for them.

These judges have assumed that the matter of cooperation with injustice by judges has somehow been resolved as legitimate. They believe, without thinking about it, that they are making the choice vindicated by history.

This assumption is aided by two glaring failures. The first is tactical. The partisans—death penalty abolitionists and pro-life attorneys—have failed to raise the issue of judicial complicity in court, in journal, or in the public realm. In fact, the jurisprudential thought of both movements has been impoverished. As one such partisan, this assessment of blame is personal as well as general.

The second failure belongs to the entire profession, but particularly to the law professors. Why have we not addressed the refusal of Justice Joseph Story⁴ and others to resign? If a defense can be made, why have we not made it? The silence of the profession has sent a message to generations of the best, most sensitive law students: the highest duty of a judge is to remain a judge and enforce any law that is constitutional.

This message has been persuasive. It explains an otherwise curious legal history. In the course of the late nineteenth and early twentieth centuries, two long-enfolding patterns of racial oppression were accepted easily by the legal profession: racial apartheid and the wholesale arrest of citizens and non-citizens of Japanese ancestry. Both practices were upheld as constitutional by the United States Supreme Court.⁵ Both were opposed by some members of the bar. But in neither case did the profession raise the issue of judicial resignation. Yet, in both instances, judges were called upon to cooperate in practices of brutality and injustice. Not one influential judge refused to cooperate. Not one influential law professor called for resignation.

That story of judicial complicity takes my topic beyond even the central questions of abortion and the death penalty. If the failure of the profession to evaluate Wendell Phillips' call for resignation has rendered the entire legal profession an unthinking machine of law enforcement, even proponents of the death penalty and abor-

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⁴. Of all the jurists who struggled with the conflict between morality and the constitution in the period before the Civil War, Justice Story was the most learned and noted. See generally, Eisgruber, Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism, 55 U. Chi. L. Rev. 273 (1988).

⁵. See, respectively, Plessy v. Ferguson, 163 U.S. 537 (1896) and Korematsu v. United States, 323 U.S. 214 (1944).
tion should seek to end the silence about resignation. Even if abortion and the death penalty are not the moral issues I think they are, we can be certain that in the future there will be occasions for judges to oppose immoral law.

My purpose in this essay is first to begin to reexamine resignation, in the context of the argument of the abolitionists. My second purpose is to propose that the community formally accept non-cooperation by judges. The community should not command judges with moral qualms to order abortions or sign death sentences. If these judges obey, they have to that extent diminished their humanity. If they resign, the wider community has lost the service and talent of some of its best judges. Far better, then, to adopt a "conscience clause" allowing judges to opt out of death penalty and abortion cases.

This essay does not purport to do more than begin the program of examination of resignation. There is here no exhaustive consideration of the plight of the anti-slavery judges or that of the judges of today. I do wish, however, to sketch for the reader the sorts of issues with which the legal profession should be dealing and should have been dealing all along.

II. WAS WENDELL PHILLIPS RIGHT?

In what follows, I use the term "anti-slavery judges." By that term I mean not only the four examples identified by Robert Cover in his book,6 but all the unknown judges whose consciences harbored doubts about slavery. In considering the justifications for remaining on the bench, I will look at what these judges said, what they might have said, and what the profession today might say about them.

At the risk of considerable oversimplification, I will boil down Phillips' position to the point where it seems, if not unassailable, at least very persuasive. Although such a shrunken position would have been of little interest to the slavery abolitionists, I wish to show that some judges should have resigned. If that position were accepted, the debate within the legal profession would be over when, not whether, an honorable judge resigns rather than enforce an unjust law.

There were many judges in the antebellum world called upon to

6. Joseph Story, Justice of the U.S. Supreme Court; John McLean, Justice of the U.S. Supreme Court; Lemuel Shaw, Chief Justice of the Massachusetts Supreme Court; Joseph Swan, Chief Justice of the Ohio Supreme Court. See Cover, supra note 2, at 238-56.
uphold slavery in one form or another. One might say in fact that every judge was an accomplice in slavery. Certainly every judge in the slave holding states appeared ready to enforce general property rights and to allow slave holders to dispose legally of the proceeds of slavery. In the non-slave holding states as well, economic exchange with slavery was accepted. Of course, without such intercourse, slavery would not have existed. Nevertheless, the connection of some judicial officers with slavery was far closer. In the slave states, the connection was direct. The judge who sentenced a slave who had defended himself against his owner, or who acquitted the owner of assaulting the slave, was supplying the essence of legal slavery.

In non-slave states, direct contacts with slavery were generally limited to the dramatic seizure and return of the runaway slave. Most judges were never involved in this rather rare event. The closest most northern judges came to slavery was a trial of an aider and abettor of a fugitive slave’s escape or the request by partisans of the fugitive for a state writ of habeas corpus.

Neither of these situations represents a pure issue of cooperation with injustice. In the case of the aider and abettor, it has been often argued that it is appropriate to punish violators of an unjust law even though the law should be disobeyed. Most practitioners of civil disobedience take this position, and not just as a public relations stance. Whether this view is persuasive is another matter. Certainly willingness to preside at such trials is not the clearest case of cooperation with evil.

In the case of refusing to issue a state writ of habeas corpus, the judge’s involvement was even more attenuated. The writ itself is an order in the name of the law. Thus, issuing the writ when one knows that the law does not allow it, is not only civil disobedience but is a lie—a misrepresentation—about what the law is. Again, most practitioners of civil disobedience prize their candor in law violation. They do not champion lying.

In contrast to these equivocal situations, the judicial order to return or hold a fugitive slave did represent clear complicity in legal slavery. The judges who performed these acts directly upheld the unjust institution of slavery.

In the crucial decade of the 1850’s, primarily a special group of judges actually ordered slaves to be returned to the South—the federal commissioners appointed pursuant to the Act of 1850. These men represented an early form of administrative law judge. It was usually these judges who signed orders to return slaves.
A second group of judges involved in returning fugitive slaves were regular judges who ordered an alleged fugitive to be held while evidence on the issue of fugitive status was gathered. Records are not available on how often this occurred or who the judges were, but it is known that Joseph Story did this at least once.  

Should these judges have resigned? Very few federal commissioners would have been concerned about resignation since many were appointed with the express understanding that the job of commissioner entailed enforcing the Act of 1850. These judges presumably felt slavery was justified on racist or other grounds. For these men, there was no issue of resignation.

But there must have been more than a few judges who believed slavery to be wrong. Some notable nineteenth century judges are known to have opposed slavery. Presumably, there were other less well-known judges who felt the same way. Nineteenth century judges were certainly aware that the greatest sources of natural law scholarship considered slavery to be a violation of natural rights. Furthermore, there was awareness that a terrible injustice was being perpetrated on the escaped slave in particular. The slave had a right to be free. It was this right the judge was about to take away. Why were there so few resignations and why was resignation not a pressing issue for the judiciary?

The anti-slavery judge might have relied upon the presumptive morality of democratic rule to justify returning fugitive slaves. Most Americans believe that the product of majoritarian lawmaking is presumptively justified. But in the case of slavery, such justification would have been incoherent. The slaves had neither the right to vote nor any other means of influencing the decision to retain slavery. Furthermore, the majority by and large did not even pretend to be legislating for the common good. The slaves were simply sacrificed for the convenience and economic advantage of the white majority.

Nor could the judge have justified continuing in office by reference to commonly accepted limits on the obligation of a judge. There is no role prohibition against judicial resignation. A judge who feels that a law to be enforced is unjust and resigns rather than enforce it is as faithful to a judiciary's self-image as those who

7. This occurred in the celebrated case of George Latimer. See Cover, supra note 2, at 169.

8. For an account of the intellectual context of slavery for lawyers in the antebellum period, see Cover, supra note 2, at 8-30.
enforce the law.

Of course, the judge could claim that his status as judge allowed him to do a great deal of good, so much good that it outweighed the evil of sending some slaves back to slavery. I do not think that any judge actually made this claim. They seemed to think of their cooperation as in and of itself good, rather than as evil outweighed by good.9

A judge might claim two kinds of good that outweighed enforcing the Act of 1850: good in regard to reforming or eliminating slavery or good in regard to other matters. In regard to slavery, the claim theoretically could be true. It might be justified for a judge to send a few slaves back to slavery if, by continuing as a judge, he might free more slaves, directly or indirectly.

This claim, however, would certainly have been empirically false, both in particular cases and in general anti-slavery propaganda. Given the procedural restrictions of the Act of 1850, a judge could rarely free anyone.10 A judge could have tried to interpret statutory provisions narrowly, or to give broad reign to competing state provisions, but few judges ever seriously undertook such tasks. Thus, in terms of the outcome of the slave cases, it did not usually matter whether the judge was anti-slavery.

Nor were the anti-slavery judges striking any other blows against slavery; the pulpit of the court was not useful, or at least not obvi-

9. Thus, Chief Justice Shaw wrote as follows in Thomas Sim's Case, 61 Mass. (7 Cush.) 285 (1851), in refusing to issue a writ of habeas corpus for one imprisoned under the Act of 1850 by order of a Federal Commissioner:

The framers of the constitution could not abrogate slavery, or the qualified rights claimed under it; they took it as they found it, and regulated it to a limited extent. The constitution, therefore, is not responsible for the origin or continuance of slavery. The provision it contains [The Fugitive Slave Clause, art. IV, § 2, cl. 3] was the best adjustment which could be made of conflicting rights and claims, and was absolutely necessary to effect what may now be considered as the general pacification, by which harmony and peace should take the place of violence and war.

Id. at 318.

10. This is somewhat overstated. State trial judges could order the release of alleged fugitive slaves in proceedings, of questionable constitutional validity after Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), parallel to those of the Act of 1850. This did occasionally occur. In the most celebrated instance of such judicial activity, Justice A.D. Smith of the Wisconsin Supreme Court ordered the discharge of Sherman Booth, an alleged aider and abettor in a successful escape of a fugitive slave. In re Booth, 3 Wis. 13 (1854). This and related actions by the full state Supreme Court were reversed in Ablemen v. Booth, 62 U.S. (21 How.) 506 (1859).

State courts could have more sustained effect. In one case discussed by Robert Cover, that of Rosetta Armstead in Ohio in 1855, the action of a state probate judge apparently convinced the Federal Commission to refuse to issue the certificate of removal. See Cover, supra note 2, at 183-84.
ously so, to the long-term abolition movement. Judges did not turn their prestige systematically against slavery. The only criticisms they uttered were in the context of their refusals to act against slavery. But even here the statements against slavery were curt, compared to the emphasis on the inability of the judge to act.\textsuperscript{11}

If the judges could not claim to be accomplishing good in the abolition battle, what of other good? Joseph Story, Lemuel Shaw, and the others were influential voices in legal development generally. No doubt they made many important contributions that would have been lost had they left the bench.

This line of argument is reminiscent of Professor Derrick Bell's analysis of the anti-slavery judges: they would not resign over slaves any more than judges would resign today to avoid killing whales.\textsuperscript{12} It would be a callous scale that weighed the lives of slaves against impressive advances in legal doctrine. Just how many slaves returned to slavery would it take to outweigh Story's Commentaries on the Constitution?\textsuperscript{13}

In fact, the wrong done to the fugitive could be worse than the wrong of slavery itself. To be returned to slavery after escape meant even harsher and more brutal treatment than for the average slave.\textsuperscript{14} The returned slave might be moved south, further from potential escape routes. The warrant for return could easily be considered a death warrant. Even a utilitarian scale measuring the contribution of a judge, a scale that had no a priori regard for the nature of a wrong but only for its consequences, would be hard pressed to balance any good consequences against the suffering caused by enforcement of the Act of 1850.

In fairness to the anti-slavery judges, they would never have argued thus. I am replying to a possible modern justification for stay-

\textsuperscript{11} See, e.g., Giltner v. Gorham, 10 F. Cas. 424 (C.C.D. Mich. 1848),(No. 5,453), in which Justice McLean charged a jury as follows: "With the policy of the local laws of the states, we have nothing to do. However unjust and impolitic slavery may be, yet the people of Kentucky, in their sovereign capacity, have adopted it." \textit{Id.} at 432. Compare the comment of Chief Justice Marshall in the Antelope, 6 U.S. (10 Wheat) 268, 280 (1825): "this Court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law." \textit{Id.}

\textsuperscript{12} Bell, Book Review, 76 \textit{COLUM. L. REV.} 350, 357-58 (1976). Professor Bell's images are of declaring war over whaling or extending full equality to whales.

\textsuperscript{13} J. \textit{STORY, COMMENTARIES ON THE CONSTITUTION} (1833), certainly the most prestigious legal work on the Constitution ever written.

\textsuperscript{14} After the well known Thomas Sim's Case, 61 Mass. (7 Cush.) 285 (1851), in which Chief Justice Shaw refused to issue a writ of habeas corpus for a fugitive slave, \textit{see supra note 9}, Sims was returned to the south and publicly whipped 39 times. \textit{See T. MORRIS, FREE MEN ALL 153} (1974) [hereinafter MORRIS].
ing on the bench. In their own eyes, not only did the anti-slavery judges not stay on the bench by doing wrong, they were willing to be removed from the bench as the price of doing right. One well-known example is Judge Joseph Swan of the Ohio Supreme Court, who was not renominated to the court in large part because of his enforcement of the Act of 1850.\textsuperscript{15} No doubt, Story and Shaw were willing to endure a similar fate. The decision to stay on the bench rested on a different sort of justification.

It is not easy to do justice to the anti-slavery judges’ decisions not to resign. By and large their formal responses were justifications for why judges should follow the law, which is not germane if the question is resignation. There was, however, one theme in the opinions of these judges that can be applied to resignation—that of disunion. By the 1850’s, several references had been made in legal opinions to the danger of civil disruption and violence.\textsuperscript{16} It was not idle to fancy that the South considered enforcement of the Act of 1850 to be the token paid for union and peace.\textsuperscript{17} Failure to enforce the Act might have meant civil war.

The point of potential disunion should be distinguished from the theme of anarchy.\textsuperscript{18} It has often been argued, and the anti-slavery judges emphasized as well, that violating the law might lead to anarchy. It is difficult to apply the theme of anarchy to the act of resignation, however, which of itself is entirely legal.

But how would resignation threaten the Union? While there were many judges willing to enforce the Act, a few influential resignations would no doubt have brought a substantial number of resignations from the ranks of lesser known judges. These resignations, while not literally depleting the stock of judges, might have encouraged disobedience to the Act and demoralized law enforcement. Certainly, it would have appeared so in the South. Good faith enforcement was what the South demanded.

\textsuperscript{15} Cover, \textit{supra} note 2, at 253-56.
\textsuperscript{16} See, e.g., \textit{Ex Parte Bushnell}, 9 Ohio St. 77, 198-99 (1859) (refusing to issue a writ of habeas corpus to aiders and abettors in a successful rescue).
\textsuperscript{17} See \textit{Morris}, \textit{supra} note 14, at 147.
\textsuperscript{18} See, e.g., Jones v. Vanzandt, 13 F. Cas. 1047 (C.C.D. Ohio 1843) (No. 7,502) (McLean, J):

\begin{quote}
If convictions, honest convictions they may be, of what is right or wrong, are to be substituted as a rule of action in disregard of the law, we shall soon be without law and without protection... What one man, or association of men, may assume as the basis of action, may be assumed by all others. And in this way society may be resolved into its original elements, and then the governing principle must be in force.

Every approximation to this state is at war with the social compact.
\end{quote}

\textit{Id.} at 1048-49.
Even if a few resignations by themselves would not have precipitated civil war, there was another reason not to resign: an unwillingness that others should perform unpleasant tasks assigned to the judge. To a judge who believed that enforcement of the Act represented a necessary evil—in other words that some judges had to enforce the Act—resignation would put that heavy burden on the shoulders of someone else. That hardly would have been a responsible or fair course. It is no answer to say that there were others willing to do the work because they did not see the evil of slavery. From the perspective of the anti-slavery judges, those other judges should not have been more willing to enforce the Act.

The question then becomes: was the enforcement of the Act a necessary evil? Was complicity in slavery justified by threatened disunion? Fortunately, this paper need not resolve that issue in order to argue that the profession should consider such questions.

Nevertheless, I will make a preliminary comment on the choice the judges made to stay on the bench. On the one hand, the decision to cooperate with slavery comes close to saying that it is better that blacks be slaves than that whites die in civil war. But it was not clear in the 1850's that disunion would necessarily lead to war and abolition. It might have led to a permanent, slave-holding Confederacy. Slavery might then have lasted forever. This possibility had to be weighed in the balance as well.

Was Phillips then right or not? At worst, if he was wrong, it was only in the context of the most dangerous political/moral division in the history of the United States. With any lower stakes, he was surely right.

III. SHOULD JUDGES RESIGN TODAY?

Today the stakes in resignation are lower. Judges today are able to resign without threatening civil war. So, for the judge who sees abortion and execution as murder, there is no persuasive excuse for cooperation. It remains only to inquire at what point cooperation becomes intolerable.

But I have jumped the first step. If it was wrong to enforce slavery laws, which it was, but for the possibility of civil war, it was wrong for every judge. It was not the case that it was worse for judges who opposed slavery to enforce the Act of 1850 than for other judges. In the case of abortion and the death penalty, however, that is just the point of controversy. Overwhelmingly, judges, and indeed society as a whole, view abortion and the death penalty as right acts.
This response—that abortion and the death penalty are widely accepted—is a variation of the currently widespread attack on all substantive moral claims. It is said that the truth of moral propositions cannot be shown. Chief Justice Rehnquist, for example, has cited the unavailability of demonstration as the major objection to any theory of constitutional interpretation that is based on defending fundamental human rights.\textsuperscript{19} The further assumption in this attack is that, in the absence of demonstration of the truth of moral claims, judges using the language of morality will simply be exercising arbitrary will.\textsuperscript{20}

Whatever the strength of this position, it has no application to the issue of resignation. Taking Rehnquist again as a popular spokesman for this value skepticism, he does not deny or disparage acting on the basis of conscience. Rehnquist's objection is to a judge's judging on the basis of conscience. Private parties are to try to persuade society of the soundness of their moral positions. When the majority becomes convinced and enacts a moral vision into law, then and only then is the judge to judge on the basis of this vision.\textsuperscript{21} Thus, Rehnquist sharply distinguishes between the conscience of the private party and the conscience of the judge.

Obviously, for the skeptic, the individual attempting persuasion, whether for example pro-life or abolitionist, is just as likely to be arbitrary as would be the judge. In the realm of persuasion, there is still no demonstration of moral truth possible. Rehnquist would say, however, that there is no danger, or perhaps an unavoidable danger, from private, arbitrarily held moral positions. No doubt Rehnquist believes the marketplace of ideas will protect us. If ideas are false, they will not be accepted.

The difference between the judge, who is not to act on conscience, and the private citizen who is, is in Rehnquist's view, that of power. The judge holds power while the private citizen does not. The objection is that the judge in judging would be forcing the rest of us to live by the judge's subjective and arbitrary moral vision.

Resignation is precisely consonant with the Rehnquist view. By refusing to cooperate in evil, the judge exercises no power over the

\textsuperscript{19} See Rehnquist, \textit{The Notion of a Living Constitution}, 54 Tex. L. Rev. 693 (1976) [hereinafter Rehnquist]: “There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgment of your consciences . . . .” Id. at 704.


\textsuperscript{21} See Rehnquist, supra note 19.
rest of us, at least as Rehnquist understands power. The act of
resignation not only removes the individual judge from furthering
evil, but also serves as a symbolic protest designed to persuade the
majority to change its view. Resignation is close to the sort of
propaganda effort Rehnquist supports. The current, pervasive
value skepticism is no barrier to resignation based on conscience.

Before examining the actual contexts of abortion and the death
penalty, one additional objection must be met. I am addressing the
call for resignation to judges who already accept the proposition
that abortion and/or the death penalty are wrong. Does that mean
that morality can be reduced to the proposition, "To thine own self
be true?"

It is not the case that the anti-slavery judges had more of an
obligation to resign than did any other judge. I address the call for
resignation to a certain group of judges not because some judges
should resign, but because only some judges can see that they
should resign. There is a two-step process: first, to see the underly-
ing evil, second, to decide to stop cooperating with it. The judges
who hear the call for resignation already have traveled part of the
way.

The actual decision to resign, however, will depend upon further
and more specific inquiry into the nature of the evil and the extent
of the cooperation by the judge. At this point, therefore, the two
issues—abortion and the death penalty—must be considered sepa-
rately, and the nature of the judge's opposition must be examined.

A. Abortion

What precisely is wrong with abortion? Many different positions
about abortion have been argued, but the only one that could jus-
tify all abortion is that the fetus is not truly a human being. The
Court's position in Roe v. Wade\(^{22}\) was that since the humanity of
the fetus was not demonstrable—here reversing the impact of
value skepticism—the established right of personal autonomy must
control. That is, the State must have a reason beyond simple de-
sire for interfering with a fundamental right, including deciding
whether to have a medical procedure performed. The humanity of
the fetus would represent such a reason, but that humanity is itself
a matter of opinion.

The Court's decision leaves the humanity of the fetus to choices

\(^{22}\) 410 U.S. 113 (1973) (recognizing a constitutional right of a woman to procure an
abortion within certain parameters).
by individuals because it is considered debatable. But these individuals do not and could not similarly leave the matter open. A mother deciding to have an abortion has by this act decided whether the fetus is a person or not.

Is the judge, like the Supreme Court, free to leave the matter open? Let us say, contrary to the actual situation, that a judge must sign an order before an adult woman may obtain an abortion.\(^{23}\) Furthermore, let us assume that the only question legally relevant is whether the woman wants the abortion. Is the judge obligated to decide about the humanity of the fetus before deciding to sign the order?

The contrary position—that the judge may suspend judgment—would suggest that, if the humanity of the fetus is unclear, it is permissible to leave the decision to the mother. But this position makes no sense for the judge deciding whether to sign the order. The humanity of the fetus is subject to dispute, but it is not ultimately a matter of opinion. The fetus is either in relevant respects human or not human. The mother's view of the matter does not decide it, for she may be wrong.

It is true of course that the mother will live with the consequences of the abortion decision and the judge will not. And it is also true that the judge is likely to be a man who, like most men, has placed responsibility for rearing his own children entirely on the back of a woman. The judge, the lawyer and the law professor are all likely to be callous and insensitive to the mother's situation. Feminists summarize the insensitivity of men by saying that if men could get pregnant, abortion would not even be an issue.

This is a harsh but fair judgment for women to make. It is true that our society, which is dominated by men, has shown little regard for human life outside the realm of abortion. We stockpile and appear ready to use weapons of war that might kill all human beings on the planet. We are content to let or encourage men to seduce young women and then do little to force these men to take responsibility for the child. We abandon the children of the poor to the market to determine much of their life's potential. To call this male-dominated society pro-life would be a mockery.

The recognition of this context of injustice, however, is no help to the judge who is asked to sign an abortion order. The judge may agree with all his heart that women are treated with brutal unfair-

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\(^{23}\) Pursuant to Roe, an adult woman, prior to fetal viability, is free to decide whether to have an abortion. No order of a court is needed.
ness in this society, with regard to sexual responsibilities in particular. But killing this fetus, this child not yet born, will not lessen the structure of oppression. Killing the child instead adds one more violent wrong to all that is already wrong in society. At the point of signing the abortion order, the social reality of oppression does not justify abortion’s act of oppression. When victims in turn victimize, those who have never been victims had better reign their self-righteousness. But having acknowledged that, the status of victim does not make the victim’s acts of oppression right, nor certainly, does it entitle the victim to cooperation by others.

But my hypothetical situation, the adult woman seeking an abortion, is not what actually occurs in cases. Abortion for middle-class adult women, and for poor women able to procure medical services, does not require a judicial order. Should the pro-life judge make particular judgments about the actual situations he in fact faces? Or should he resign in any abortion case regardless of context?

Here it is apparent that the appellation “pro-life” for the judge, and that of “abolitionist” as well, does not capture the diversity of views that exist in society and presumably on the bench about abortion and the death penalty. There are very few persons who believe that all abortions should be prohibited by law. The continuum of those who say that killing a fetus is killing a human being is extremely varied. Some of these persons hold the view that, though abortion is murder, it, unlike every other murder, should not be a crime. Others who say abortion is murder hold that such killing may be justified nevertheless in circumstances that would not otherwise justify killing, such as when the health or psychological well-being of the mother is at stake. Finally, some hold that abortion is justified only to save the life of another person—the mother.

The point of this listing is that the pro-life judge is not likely to confront what he considers to be the “worst” case—an abortion by an adult woman who is using abortion as a form of birth control.


25. I hesitate to use the term “pro-life judge” because the term covers a spectrum of views. In this essay I make several assumptions about the views of a hypothetical pro-life judge that some, perhaps many, in the pro-life movement would dispute. I use the term “pro-life” because to consider seriously resignation because of abortion is already a sign of significant commitment to the unborn.
Instead, the judge may confront situations that for him raise genuine moral issues—a fifteen-year old victim of incest,26 for example—or that raise issues tangential to abortion—such as whether fathers should receive notice.27

What should the pro-life judge do, then, in the cases he does face? If he is called upon by a fair reading of precedent to declare a paternal notice bill unconstitutional and he considers the right of the father to be irrelevant to the real moral stakes—the life of the unborn child—should he invalidate the statute or should he resign? If he believes an abortion might be justified in the case of the fifteen-year old victim of incest, should he resign?

Such questions can be answered only by separate examination of each situation. Notice to fathers is generally of no moral significance. In fact, since most of these fathers are the real reasons for abortion in the first place, mandatory notice to fathers is usually absurd. But notice is also one more obstacle to an abortion. As an obstacle, such notice might save the lives of a few unborn children. Therefore, although in and of itself a notice requirement is arbitrary, the pro-life judge may not strike down such a law. He must resign.

The young girl who is the victim of incest presents an agonizing dilemma over which many even in the pro-life movement waiver. Before concluding that the pro-life judge should therefore sign an abortion order, however, the nature of that waiving must be examined. The judge does not think it right to kill the unborn child. He simply feels the pregnant girl has suffered enough. Truly, only a genuine heroine would be willing to bear that child. Having the baby is the right thing to do, but it is not what most of us would be willing to do. The judge is unwilling to try to force such a standard of moral heroism on someone else.

This view is good public policy. That is, the law should always give the victims of rape and incest the right to refuse to bear the child. It is not right that this be done, but law often permits to be done what should not be done. But how does the recognition of the proper limit of law justify the judge's signing the abortion order? The unborn child has not harmed this girl. The unborn child is

26. See Bellotti v. Baird, 443 U.S. 622 (1979) (broad alternative procedure, which can be a judicial proceeding, must be available if parental consent is required for an abortion for a minor).

innocent. Even if every one of us would demand an abortion in the same circumstances, which is true for most of us, the judge still has no right to help kill the child. Obviously, then, still less justification is there for a judge to preside routinely over juvenile abortions—a situation common under existing abortion law.\textsuperscript{28}

But the obligation of the pro-life judge to resign extends even beyond the morally questionable to the morally certain. Even in a case where the mother's life is threatened, when the law must certainly allow abortion, and where even strict justice would permit abortion, the judge should not sign the order.

The reason for this extreme position is the special role in this society of any pro-life person. This society does not recognize unborn children as human. Nor, for that matter, does this society recognize life—human or otherwise—as a gift. In that kind of society, those with a different consciousness, those who wish to cherish and protect the natural world, must view critically all of their actions. It is easy in such a society to further the forces of indifference and killing. Those who would protect life must then always act as a reminder; they must view themselves as a special case.

Thus it is that, though the woman has a right not to risk her life, even if that means killing her child, and even though law should not impose any different demand on her, the pro-life judge must not step forward blithely, as if this were obvious. Instead he should publicly, but quietly, resign his office. He does not condemn the woman. He would no doubt choose abortion himself and recognizes her right to do so. But he does not consent.

The judge's resignation will not stop the abortion. Nor should it. His goal is not to threaten the woman's life. His goal is to be a reminder that one life has been saved only at the cost of another life. That recognition, however, means that all judges are placed under a radical obligation; and not just judges. Abortion could not exist unless law protected its functioning. Abortion clinics have numerous enforceable legal rights, such as the right to have promises to pay enforced. It is the common expectation of people who perform abortions that general, enforceable legal rules apply to them.

But just as the matter arose under slavery,\textsuperscript{29} one may well ques-

\textsuperscript{28} One study of judicial orders for abortions for minors after Bellotti v. Baird, 443 U.S. 622 (1979), finds the order to be a rubber stamp administrative operation "in which not one of 1300 applications was refused." \textsc{Mnookin, In the Interest of Children}, 262-63 (1985). As Professor Mnookin puts it, other than opposition to abortion, what reason could exist to deny a first trimester abortion for a minor?

\textsuperscript{29} See, e.g., Greenwood v. Curtis, 6 Mass. 358 (1810) (cause of action upheld for dam-
tion the judge’s extension of protection to the clinic. The judge may feel, for example, that in matters unrelated to abortion, there is no issue of cooperation. Thus, perhaps the judge may participate in a suit by the clinic against a painter for nonperformance of a promise to paint the clinic. On the other hand, a suit by the clinic for payment of cancellation charges when a woman decides at the last moment not to have the abortion may strike the judge as directly encouraging women to have abortions. Here the judge may decide he cannot participate and resign instead.

The distinction between direct and indirect aid to abortion, however, is not meaningful. A clinic performing abortions needs all kinds of resources, from paint, to knives, to patients. Furnishing any of these resources helps abortions to be performed. The pro-life judge should resign rather than extend any legal aid to the clinic.

But that line of argument pushes the participation issue back much further. The very fact that abortion is legal offers tremendous legitimation to abortion. A cadre of judges appear ready to enforce the clinic’s rights and that by itself makes the clinic’s operation possible. Thus, it may not be possible to remain a judge at all in a society that allows, and encourages, abortion.

This observation also does not go far enough. By treating the legal slaughter of millions of unknown children as a matter of discussion, rather than as a matter of radical critique, the legal profession as a whole helps keep abortion in place. The law professor who teaches abortion’s pro’s and con’s, who teaches the reasoning of Roe v. Wade, is equally guilty of lending support to abortion. Imagine, in contrast, a law school course entitled, The Law of Extermination in the Death Camps. Obviously, any such course would adopt a critical pose vis-a-vis its subject. Abortion does not allow neutrality.

These comments are meant to remind the reader that the judge is by no means solely or even especially to be condemned for cooperation with evil law. All lawyers, to greater and lesser extents, cooperate with existing law. The judge may have a special obligation to resign rather than enforce evil law, but the obligation to confront evil law is not the judge’s alone.

B. Death Penalty

The circumstances under which judges resign over the death
penalty will depend upon the basis of their opposition. For some judges, the death penalty is always wrong. For others, some persons may be executed legitimately, whereas some defendants—the mentally ill for example—may not be. For other judges, moral issues arise only if innocent persons are mistakenly executed.

Because judges are closely involved in every execution, there is no question in capital punishment of how much cooperation is needed before the issue of resignation arises. The judge presides over the capital trial. Judges hear the resulting appeals. In most states the judge pronounces the actual sentence—a symbolic but necessary step. In some states, the judge even decides on the sentence after an advisory jury makes a recommendation. A judge troubled over an execution cannot doubt the significance of his own involvement. It is with this involvement in mind that Wendell Phillips himself considered the case of the anti-death penalty judge about to sign a death warrant and advised, “quit the bench rather than violate your own conscience.”

The degree of judicial involvement is important because of its implication for judges not generally opposed to the death penalty. These judges too will confront executions they consider to be wrong. First, however, the simpler case of the abolitionist judge will be examined. Because of the nature of the death penalty and the argument against it, there is no sort of death penalty case in which the abolitionist judge may participate. To see this, it is necessary to consider briefly the abolitionist position.

1. The Abolitionist Judge

Proponents of the death penalty claim, and this society concurs overwhelmingly, that the murderer deserves to die despite, or even because of, his humanity. The other claims justifying the death penalty, those of deterrence or future danger, are secondary to this deserving because it is only one who deserves to die who may be sacrificed for such utilitarian purposes. The claim that the murderer deserves to die is not new. This view has been upheld historically both by society’s secular and religious traditions of moral teaching. Society believes that for some killings and killers, death is the appropriate penalty.

In the face of this widespread consensus about the propriety of the death penalty, the abolition movement has not developed a

single, so to speak official, argument to show why the death penalty is wrong. Instead, a number of arguments have been put forward. But these arguments generally share two elements: a distinction between what the murderer might be said to deserve and what society has a right to do and a related denial that the guilt of a murderer is relevant to the propriety of the death penalty.

The first position, the distinction between the murderer's deserving and society's killing, concedes that the murderer has forfeited certain claims on his own life. Because the murderer has killed, he cannot consistently claim that human life is unique. Thus, he cannot protest what seems to be a fitting punishment for his crime: that he should forfeit what he has taken from another. In this sense the murderer may be said to deserve to die.

But the inconsistency of the murderer's protest does not justify the death penalty. The abolitionist contests the authority of the State over human life. As far as we know, human life is a gift unique in all the cosmos. The destruction of this gift is for the creator, not for society, to undertake. Only necessity, the prevention of further killing, justifies killing. These words have their origin in religious tradition. Nevertheless, the same can and is held now on general humanist grounds as well. Human life is a unique good and must be treated as such.

The abolitionist need not deny the guilt of the murderer, nor engage in inaccurate claims about the likelihood of rehabilitation. It may be admitted that killing the killer is in a sense a fitting punishment for murder and that the execution can be done in a non-brutal fashion. None of these points touch on the main issue. The abolitionist need only respond to the claim that the murderer no longer deserves to live. We do this by maintaining that human beings need not earn the right to live.

At one time, the death penalty did occupy a life-affirming role in society. In religious society, the death penalty is a part of an ongoing narrative of life that does not end with the death of the murderer. The presence of the death penalty in the Bible should not be understood as a judgement that the murderer's life was worthless because of his sin.31 Instead, the death penalty was understood

31. The Bible contains a number of capital crimes, including: adultery, (Leviticus 20:10), (Deuteronomy 22:22 ff.); idolatry, (Exodus 20:3-5, Deuteronomy 13:1-10, 17:2-7); false prophecy in the name of God, (Deuteronomy 18:20-22); laboring on the sabbath, (Exodus 31:14-15, 35:2); striking or cursing or rebelling against a parent, (Exodus 20:12 ff, 21:17, Leviticus 19:3, 20:9, Deuteronomy 21:18 ff.); prostitution, or harlotry, under certain circumstances, (Leviticus 21:9, Deuteronomy 22:20-21); sorcery, (Exodus 22:18, Leviticus 20:27);
as expiation for a sin that would otherwise cut the murderer off from God and, perhaps, from eternal life.\textsuperscript{32} Thus, the death penalty represented an acknowledgement that the murderer continued to be of crucial and unique value.

In a secular culture like ours—a society without serious commitment to an afterlife—the death penalty has no life-affirming role. Instead, the death penalty is garbage disposal. Certainly it is not meant to redeem the defendant; it is meant to rid us of the defendant. His humanity, his being, is no longer of special concern. In that lies the unalterable immorality of the death penalty.

It should be clear why the abolitionist judge cannot make distinctions about which capital cases "really" require resignation and which are only relative outrages. No doubt the judge will be tempted to resist resignation over some of the particularly awful cases that arise. It will no doubt seem foolish to give up a career because of a defendant who has killed before or who has tortured his victim. These distinctions, however, must be rejected.

One distinction in particular that is irrelevant is the desire of the survivors in the victim's family to see the death of the murderer. It is sometimes thought that such family members have a superior moral claim—a right—to have the killer executed. It is certainly the case that, particularly, parents of murdered children live with a special pain every day of their lives. That is part of the wrong the murderer has committed.

But despite the historical acceptance of vendetta killings, the status of survivor alters nothing. The family member stands in no special relation to human life. In fact, it is ironic commentary on the general indifference to human life in this society that we think family members have been hurt by the loss of this precious life, but that the rest of us have not been. In a life-centered society, all of us would bear the shock and pain of each killing. This is why


When he is about ten cubits away from the place of execution, he is told to make confession, for it is incumbent on all who are condemned to death to make confession. Everyone who does so has a portion in the world to come. If he knows not how to confess, he is instructed: "Say, 'May my death be an expiation for all my sins.'" Even if he knows that the evidence on which he is convicted is false, he uses this form of confession.

\textit{Id.}
the Bible does not speak of victims and their families. All crimes are considered equally terrible affronts to the order of the universe. The pain of surviving family members does not entitle the judge to take life.

One justification for the death penalty the abolitionist judge must consider, however, is deterrence. Many abolitionists justify killing in self-defense because the killing prevents other killings from taking place. Deterrence theorists claim that executing murderers deters potential killers from killing. Thus, deterrence might be said to satisfy the test of necessity.

If deterrence were empirically verified, would it lessen the moral wrong of the death penalty? Abolitionists like to say that deterrence is irrelevant because a pure deterrence rationale would justify executing the murderer's child if that would deter other murder. But the murderer has first been chosen because by his actions he has denied the right of life. In some sense he deserves to die, whether the State should kill him or not.

I would not say that an act wrong in itself, like killing a murderer, could never be justified by its potentially good consequences. Who would not, if he could, go into the past and strangle the infant Hitler in his crib? It is fair to say, though, that justifying an act wrong in itself by its good consequences is fraught with potential error. In the Hitler hypothesis, the stakes of human suffering are so great and the known information so great that normal moral judgments simply must be suspended. In the case of the deterrence claim, however, normal morality still applies. Killing the murderer is itself still wrong. In fact it is wrong for much the same reason that killing anyone else is wrong. Furthermore, the potential saved life is not entirely equivalent to the life taken. The judge and society are, after all, responsible for their own killing in a way that they are not responsible for the acts of another killer. Still, if we could be certain that the death penalty saved particular lives, the deterrence rationale would not be morally frivolous. That sort of certainty is not possible, however. Statistical correlations, even if they existed, certainly could never be sufficient to justify the wrong. Thus, deterrence theory as we know it must be rejected as a justification for the death penalty.

From what has been said to this point, it follows that the abolitionist judge cannot impose the death penalty in any case or cooperate with it in any important way. The non-abolitionist judge, however—one who does not accept the absolute sanctity of human life—still considers certain executions to be wrong. The execution
of an innocent defendant, for example, represents a special and uniquely troubling issue. A fair number of judges have recently participated in the execution of men widely believed to have been innocent.\textsuperscript{33} How does that recognition relate to the question of judicial resignation?

2. The Non-abolitionist Judge and the Innocent Defendant

The possible, indeed inevitable, execution of innocent persons is itself a powerful argument against the death penalty as a matter of social policy. But for the judge at the moment of the sentence or the judgment, the policy issue is closed. What then is the obligation of a judge who is sentencing a man to death or refusing to overturn a sentence of death on appeal or in collateral proceedings, if the judge suspects that the defendant is in fact innocent? Particularly, what is the obligation of a judge who believes that a guilty murderer may properly be killed, but that this defendant did not commit the murder?

The reader should not be surprised that an issue of innocence could both arise after the due process available at trial and represent a troubling incapacity for the judge. Plausible claims of innocence are not unusual in death penalty cases, even after years of review.\textsuperscript{34} Nor are they, however, necessarily grounds of judicial, as opposed to executive, relief for a condemned man.\textsuperscript{35}

\textsuperscript{33} The recent study by Professor Hugo Bedau and Professor Michael Radelet, documents the cases of twenty-three defendants executed during this century, whom the authors believe to have been wrongly convicted. \textit{Mischarriages of Justice in Potentially Capital Cases}, 40 \textsc{St. L. Rev.} 21 (1987). One of these is James Adams, executed in 1984. \textit{Id.} at 91. Recently, the National Coalition to Abolish the Death Penalty released a packet of materials on the occasion of the 100th person executed since 1976. This packet listed, in addition to Adams, Timothy Baldwin, Edward Earl Johnson and Willie Jasper Darden, all executed within the past four years, all with significant claims of innocence. [Packet on file with the National Coalition Against the Death Penalty.] Given the number of appeals and petitions for relief filed in these cases, literally hundreds of judges participated at one point or another in these four cases alone. Obviously, I do not mean to suggest that there are not other cases with significant claims of innocence. Four out of one hundred is itself quite a significant percentage.

\textsuperscript{34} Bedau and Radelet list thirty-one cases of defendants wrongly convicted in potentially capital cases since 1976. \textit{See id.} at 178-79. The list is not considered by the authors to be exhaustive. They mention in a footnote that, in the first six months of 1987 alone, eight prisoners on death row in five states were released because of evidence raising doubts about their guilt. \textit{Id.} at 29-30, n.40.

\textsuperscript{35} The role of evidence of innocence in obtaining judicial relief from state sentences of death varies from state to state and between the states and federal habeas corpus. In all states the evidence may be utilized in order to attempt to obtain Executive Clemency. There are generally limits on its use in court. In Pennsylvania, for example, after discovered evidence will serve as the basis for a new trial only if four conditions are met:
The judge facing such a situation would no doubt first respond that the legal system is constructed in such a way that claims of innocence are to be directed to the Governor, unless the claim concerns legal error. While this position may represent a rational way to design a legal system, it hardly confines the judge’s moral responsibility. The judge who sentences or affirms a sentence of death for a man the judge believes to be innocent, in the hope or even expectation of executive clemency, stands personally condemned for helping to kill an innocent man if that execution takes place. How can responsibility for the foreseeable result of his actions be placed elsewhere?

But the responsibility of the non-abolitionist judge does not end with the obligation to resign in the case of the innocent defendant. For the judge, as one responsible for his own actions, must assure himself that the defendant is not innocent before he may act to further the penalty. If a judge chooses, by remaining a judge, to participate in the killing of a man, he must be certain that the man is not innocent. He may not rely on the efforts of defense counsel unless those efforts are reasonably believed to have been adequate, which often is not the case. Under the law, a killer must take his victim as the victim is found. The killer may not later claim that he did not know of a victim’s fragile medical condition. With respect to a defendant’s possible innocence, the moral obligation of a

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[the evidence] (1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely for impeaching credibility of a witness; and (4) is of such a nature and character that a different verdict will likely result if a new trial is granted. Commonwealth v. Colson, 507 Pa. 440, 469, 490 A.2d 811, 826 (1985) (quoting Commonwealth v. Valderrama, 479 Pa. 500, 505, 388 A.2d 1042, 1045 (1978)). For an analysis of and a proposal concerning aspects of the role of innocence in federal habeas corpus in death penalty cases, see Ledewitz, Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence, 24 Crim. L. Bull. 379 (1988).

The effect of limitations on judicial considerations of innocence can be seen vividly in Commonwealth v. Goldblum, 498 Pa. 455, 447 A.2d 234 (1982). Goldblum was convicted of murder and sentenced to life imprisonment without parole. His codefendant, Clarence Miller, was the Commonwealth’s chief witness against him. Prior to his trial, Goldblum requested a psychiatric examination of Miller. The request was denied. At Miller’s own, subsequent trial, Miller introduced psychiatric evidence of organic brain damage resulting in unreliability. Neither the prosecution nor the defense had access to this information during Goldblum’s trial. The Pennsylvania Supreme Court held that evidence of Miller’s untrustworthiness involved credibility only rather than competence. Accordingly, the after-discovered evidence from Miller’s trial could not form the basis for a new trial for Goldblum. Incredibly, no one ever disputed that because of uncontradicted, objective psychiatric evidence Goldblum might well not have been convicted had the jury known about Miller’s condition and Goldblum may be innocent; yet he sits in prison to this day. Id.
The obvious rejoinder to this position is that such heavy moral responsibility would bring the administration of justice to a halt. For myself, the horror of executing an innocent man is so great that it outweighs any other consideration. Even if the judge is not moved by the simple fact of life in the balance, however, there is still the matter of the inadequacy of safeguards designed to protect the innocent. The unfortunate situation is that a poor defendant is not likely to command the resources necessary to prepare adequately a capital case; including the preparation for contesting his guilt. This assertion raises a matter subject to empirical verification. I would be pleased if judges tried to find out how reliable the current system of representation actually is.36

The foregoing analysis of resignation and investigation applies not just with regard to the defendant who did not commit the murder or who has a legally adequate justification, as in self-defense. The judge's obligation not to participate in an unjustified killing extends to the case of the defendant who committed the crime but who, for reasons compelling to a non-abolitionist, does not deserve to die. For example, the defendant may have been extremely young at the time of the crime, or mentally ill, or retarded, or under the influence of drugs. Typically, judges say that if the mitigating evidence was fairly considered by the sentencer, the sentence of death must stand. But while this may adequately describe the judge's legal obligation, it does not excuse him from never participating in an unjustified killing. In the case of this sort of excessive sentence of death, the judge must either find grounds to overturn the sentence, or he must resign. The fact that the jury was convinced to kill may give him pause, but the jury could be wrong.

This way of putting the matter itself raises many questions. Does the law ever really require the judge to sentence a defendant to death or to deny relief from such a sentence? Is there not always discretion to avoid such a result? If so, the judge could avoid ever confronting a situation that requires a choice between resignation or resistance to law.

3. Discretion to Avoid the Death Penalty

Judges do have enormous discretion in death penalty cases. In some states, judges actually decide on the sentence. In some states appellate judges are free to peruse the entire record, raising and deciding issues the defendant never thought of. Even in the context of a federal writ of habeas corpus, the judge may find a miscarriage of justice in a case.

But most judges believe that the law sometimes requires particular results. For example, the *per se* unconstitutionality of the death penalty has been foreclosed at both the federal and, in most states, at the state level. But since judges generally accept the notion of hierarchical judicial authority, this means there is no generally available ground for lower court judges to find for life automatically in every case.

Of course one could argue for a bolder vision of judicial interpretation. Ronald Dworkin has argued that the anti-slavery judges should have been more creative in arguing that slavery in general and the Fugitive Slave Act of 1850 in particular were unconstitutional. But even if bold legal interpretations against the death penalty were presented, lower court judges at least would still be faced with the problem of precedent. The broadest grounds of decision are, typically, those in which general values may be used to oppose society’s desires. But it is in the context of just such broad grounds that prior decisions may most easily be seen to settle a question. Most judges, then, do not consider themselves free to interpret the death penalty away in one stroke.

In deciding cases one at a time, as opposed to utilizing broader grounds, a result for life theoretically might still be rendered in every case without violating the law. Rose Bird, formerly Chief Justice of the California State Supreme Court, did precisely that while not making appeal to any but the least arguable, existing legal precedents.

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39. Chief Justice Bird’s loss in a judicial retention election in 1986, along with Associate Justices Joseph Grodin and Cruz Reynoso is commonly attributed in large part to her votes to overturn death penalties in all sixty-one cases she considered during her tenure. The Court reversed fifty-eight of the sixty-one cases. See Ledewitz, *California Delivers a*
For most judges, though, if they faithfully follow the law, death is sometimes the outcome of the most persuasive interpretation, either of the sentencing process if the judge sentences, or of the law generally, if the judge simply reviews. That is, except for the judge’s view that the death penalty is wrong, he would find aggravation outweighs mitigation and he would sentence to death; or except for his view, he would find no error and affirm. Most judges, in such a case, feel they must affirm death. Thus, though discretion allows certain life sentences and certain reversals, it is not for most judges a thorough response to the immorality of the death penalty. Almost all judges who oppose the death penalty are going to confront a situation in which they feel they cannot both follow the law and achieve a life sentence. At such a point, the judge must resign.

One dissent to this view comes from the judge’s allies. The lawyers in the abolition movement do not want anti-death penalty judges to leave the bench. They would prefer sympathetic interpretation of law even at the cost of occasional votes for executions. No doubt many in the pro-life movement, though this has not to my knowledge been discussed, would also prefer that pro-life judges stay on the bench. I will now turn to this objection. I will discuss this issue in the context of the death penalty because I have more experience with the views of judges in that area. Obviously, the same sort of analysis may apply to pro-life judges.

IV. COUNTER-RESIGNATION

The lawyers who litigate death penalty cases can be expected to criticize any call for judicial resignation. After all, a lawyer in a death penalty case wants rulings from the judge that will enhance the chances for a verdict other than death. Lawyers assume that judges deeply opposed to the death penalty are more likely to render helpful rulings in death penalty cases. Therefore, lawyers want these judges to hear their cases.

I concede that the impact of a favorable judge, particularly at the trial level, can be great. In a state in which the judge makes the sentencing decision, an abolitionist judge might find that death is not appropriate when most persons would find death quite appropriate. Legal rulings too, at the trial level, can help insure a life sentence. Judges have enormous discretion, almost unreviewable discretion, in the granting of continuances, funds for expert wit-

nesses and the appointment of zealous attorneys to represent indigent capital defendants. Trial judges can also render favorable rulings on legal matters of judgment, such as when photographs are too inflammatory to be used, or when a potential juror is too opposed to the death penalty to sit on a jury, or when a prior conviction may be used for purposes of impeachment. All of these instances are reviewable, but pro-defense rulings tend not to be challenged, nor overturned.

On the larger legal issues, such as, for example, whether the jury should be told of a co-defendant's life sentence, or whether prosecutors should be allowed to invoke deterrence in closing arguments at sentencing, a preliminary ruling by the trial judge is not that significant. Eventually, the State or United States Supreme Court decide such issues. In this context, death penalty litigators want to make sure that death penalty opponents stay on the State appellate bench or the federal bench for purposes of habeas corpus. In habeas corpus, the federal trial judge is particularly significant in deciding such questions as whether there is "cause" to excuse a procedural default or whether an evidentiary hearing should be held pursuant to a particular issue. There is no question, then, that judges at all levels who rule in favor of capital defendants can save lives.

Certainly, given this potential effect, an abolitionist judge might in theory stay on the bench. If a judge were determined to rule in favor of a capital defendant in all matters and to vote to overturn every death penalty sentence, that judge should not resign. In no sense is such a judge responsible for any execution.

The reason Wendell Phillips did not acknowledge this exception in his call for resignation is that he believed judicial opposition to slavery would have represented judicial nullification. Phillips rejected the position of Lysander Spooner, and others, that slavery was unconstitutional. Phillips argued that faithfulness to the rule of law, to which he was committed, prevented general judicial opposition to slavery.⁴⁰

In death penalty practice, as opposed to theory, only three jurists in recent history could justify staying on the bench by pointing to a history of always opposing sentences of death. Not surprisingly, all of them have invoked accepted legal principles, rather than nullification, in doing so. Former Chief Justice Bird of the

⁴⁰ For an account of the dispute between the Garrisonians and the "constitutional utopians," see Cover, supra note 2, at 150-58.
California Supreme Court voted to overturn all sentences of death upon which she passed. In every case, however, Justice Bird either wrote or joined opinions to overturn the sentence based on clearly binding precedent. It was argued during her retention election that these readings of precedent were result-driven and thus not fair readings, but no careful analysis has ever been done to substantiate this claim.

The remarkable campaign of opposition to the death penalty by U.S. Supreme Court Justices Brennan and Marshall raises more challenging issues, but also fits ultimately into a normal recourse to law. Justices Brennan and Marshall disagree with the Court's interpretation of the eighth amendment. They continue to argue that the death penalty is per se cruel and unusual punishment. One may ask why they are not bound by the majority's contrary position. But a careful reading reveals that their minority interpretation never conflicts directly with settled precedent. In dissents from denial of a writ of certiorari in death penalty cases, Justices Marshall and Brennan are in effect inviting the Court to change its interpretation of the eighth amendment. To my knowledge, these Justices have never voted in a case on the merits on the basis of their interpretation of the eighth amendment alone, but have always set forth narrower legal grounds to overturn a particular sentence of death.

Thus, no judge currently fights against the death penalty as a matter of resistance and almost no judges vote against all death sentences on any ground. Overwhelmingly, judges sentence some

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41. See supra note 39.

42. In a speech delivered at Hastings College of Law at the University of California in 1985, Justice Brennan defended his practice, and by implication the identical practice of Justice Marshall, of dissenting from the denial of relief in any death penalty case.

I must add a word about a special kind of dissent: the repeated dissent in which a justice refuses to yield to the views of the majority although persistently rebuffed.

In my judgment, the unique interpretive role of the Supreme Court with respect to the Constitution demands some flexibility with respect to the call of stare decisis. Because we are the last word on the meaning of the Constitution, our views must be subject to revision over time, or the Constitution falls captive, again, to the anachronistic views of long-gone generations.

This kind of dissent, in which a judge persists in articulating a minority view of the law in case after case presenting the same issue, seeks to do more than simply offer an alternative analysis—that, of course, could be done in a single dissent and does not require repetition. Rather, this type of dissent constitutes a statement by a judge as an individual: "here I draw the line."

The Pennsylvania Gazette, 22-23 (Feb. 1986).
defendants to death or affirm some sentences of death though they represent generally favorable votes in capital cases. Justices Blackmun and Stevens, for example, are judges who often vote against death sentences, but not always. Resignation must be addressed, then, with regard to this type of judge.

By "this type of judge" I mean an ideal type. I cannot say that any such judges actually exist. I certainly do not mean that Stevens and Blackmun are such. The characteristics of this ideal type of judge are as follows. He is a generally anti-death penalty vote, substantively and procedurally. He also believes that judges must follow the law and endeavors to do this. Finally, he believes—he might add "personally"—that the death penalty is wrong. This is the judge death penalty litigators desperately want to keep on the bench. These are the judges who would both send some defendants to the electric chair and save others, all the while remaining opponents of the death penalty.

How could these opponents of the death penalty vote against the death penalty most of the time but claim plausibly that they are following the law? Presumably, they often vote against sentences of death because of a generally liberal outlook and also because the importance of the stakes involved in a death penalty case legitimately permits them to hold the government to a strict standard of procedural regularity.

There was an ameliorist legal position possible under slavery. It involved extending procedural protections to alleged fugitive slaves. For Phillips, apparently, judicial amelioration, including procedural protection, were not important enough to weigh against resignation. Slavery was the sort of system that either existed or it did not. A procedurally sound fugitive slave system would save a few slaves but would doubtless have sent many more back to slavery. If Phillips was right that slavery was constitutional, there really was no way for a judge both to ameliorate the evil of slavery significantly and to follow the law faithfully.

In the case of the death penalty, in contrast, substantial amelioration is obviously possible. For example, Lockett v. Ohio,43 which guarantees the capital defendant the opportunity to introduce any mitigating evidence, has saved many, many lives. Therefore, anti-death penalty judges, unlike anti-slavery judges, can make a big

43. Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (plurality opinion) (defendant may present as a mitigating factor any aspect of his character, record or the circumstances of the offense).
difference even while remaining within the confines of law. Resignation thus does present a moral question for my ideal type of judge.

Nevertheless, I think such a judge—one who usually but not always votes against sentences of death, who believes he is following the law and who also believes that the death penalty is wrong—must resign, despite the lives he could save. To see this, imagine a case in which the judge thinks the defendant is innocent but innocence is not per se a proper ground of reversal. Perhaps, for example, the judge simply disagrees with the jury's conclusions about credibility. Is this one innocent man to be killed so that some number of defendants in other death penalty cases can be saved?

If the death penalty is murder, every case is like that. Recently, in Franklin v. Lynaugh, Justice Blackmun voted to affirm the judgment of the fifth circuit that denied a petition for habeas corpus relief on behalf of Donald Franklin. There was a great deal of good law in the concurrence by Justice O'Connor that Justice Blackmun joined. The principles in that concurrence ultimately may help overturn every death penalty in Texas. Nevertheless, if in the interim Donald Franklin is executed, Justice Blackmun has helped to kill him.

The idea that judges should stay on the bench to save some persons, though they help execute others, is sort of a reverse deterrence argument. Proponents of the death penalty ask the rest of us to accept the execution of one person, though we think that killing wrong, in order that others will be saved. Opponents of resignation ask the judge to stay on the bench despite his participation in wrongful killing in order to save other defendants. As with deterrence, it is possible that so many lives would be saved that this trade-off would be worth it. But it is unlikely that a strict account-

44. 108 S. Ct. 2320 (1988) (on the facts of this case, Texas death penalty sentencing scheme does not unconstitutionally limit jury's discretion in sentencing; thus, no corrective sentencing instructions are necessary).

45. Id. at 2332-2335 (O'Connor, J., joined by Blackmun, J., concurring in the judgment).

46. In Franklin, the Court split 4-2-3. Justice Stevens, joined by Justices Brennan and Marshall, was ready to condemn the Texas capital sentencing scheme because the jury answers narrow questions concerning the deliberations of the crime and the likelihood of future violence instead of considering mitigating evidence independently. Id. at 2335-2341. Justices O'Connor and Blackmun, who represent the swing votes in any future attack on the Texas scheme, seemed inclined to agree that this might be true in theory, but argued that Franklin himself suffered no prejudice from any limitations on the jury given the mitigating evidence he presented.
ing of the lives saved could be done. Without such an accounting, it is certainly wrong to oppose resignation. I would not vote to kill some people in order possibly to save some others, and neither would any other death penalty litigators. None of us would consent to be the doctor meeting the train at Auschwitz. How then can we ask the judge to stay?

What we should ask is that abolitionist judges vote for life in all cases. That course would remove the impetus to resign. That course would save the most lives. But the judges of whom I write will not follow that course. Sometimes they will vote for death. Better resignation than that.

In addition to the moral imperative of resignation, I also doubt the empirical premise that resignation would worsen judicial rulings in death penalty cases. It is not obvious to me that the judges who find the death penalty or abortion morally repugnant will necessarily be the reformers. Justices Stevens and Blackmun may not be the ones who feel the pull to resign. I think it just as likely that judges who generally vote in favor of the death penalty because they think they are following the law, may be those who become convinced to resign. After all, Chief Justice Burger, in addition to Justice Blackmun, voiced doubts about the death penalty in *Furman.*

One reason for my hunch that those judges who ameliorate the death penalty may not be its greatest opponents is Robert Cover's argument. Professor Cover suggested in his book that when law and morality conflict, the judge will attempt to reduce cognitive dissonance either by drawing law and morality together or by accepting a radical cleavage between the two. That is, the judge will say, "I must follow the law and the law is good"—the utopian position—or "I must follow the law despite its evil"—the position that anti-slavery judges ultimately did take.

It seemed to Cover that the most difficult position to hold when faced with an acknowledged, serious evil is a mild sort of reformist

47. *Furman v. Georgia,* 408 U.S. 238 (1972), was the case in which the Court, badly divided, invalidated all existing death penalty statutes. This result was later reversed by *Gregg v. Georgia,* 428 U.S. 13 (1976). In *Furman,* Chief Justice Burger, who is not regarded as having been an opponent of the death penalty on the Court, wrote of the death penalty: "If we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall [eliminating the death penalty] or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes." 408 U.S. at 375. Justice Blackmun wrote, "I yield to no one in the depth of my distaste, antipathy and, indeed, abhorrence, for the death penalty. . . . " *Id.* at 405.

48. Cover, supra note 2, at 226-229.
position.49 That would have been the position of requiring proce-

dural protections under the Act of 1850 or allowing state habeas 
corpus to apply to those seized under the Act. If this model is ac-
curate, the reformers on the bench now may not be personally 
troubled by the death penalty. Resignation, then, may alter the 
current balance of judges on the bench very little, or it may even 

improve it. The gain of resignation, on the other hand, to the 
judges themselves, to the abolition movement and to society, will 
certainly be great.

Yet, there is still a great cost to society attendant to judicial res-

ignation. By this act, some very good judges would be lost to the 
bench. There is a way, however, for judges both to avoid coopera-
tion with evil and at the same time retain their office.

V. NON-COOPERATION

When lawyers observe law tending toward evil, they must decide 
how to react. Obviously, one type of response is resistance. Resis-
tance can be pursued by cases in court challenging the practice in 
question or by political organization of the bar. Non-cooperation is 
a second type of response. The lawyer can refuse to have anything 
to do with that aspect of law felt to be unjust. Non-cooperation is a 
practical option, however, only if law itself is basically not evil and 
the particular practice is seen as an aberration.

In the 1840's and 1850's, lawyers could easily view slavery as just 
such an aberration. They could view American society as funda-
mentally committed to equality, with the exception of racial slav-
ery. No doubt most lawyers who opposed slavery felt that way and 
decided to have no dealings with it.

In the case of the death penalty and abortion, lawyers who op-
pose them can and do take the same view: that these practices are 
aberrations. At a certain point, however, law's alliance with other 
life-denying processes may become manifest and abortion and the 
death penalty may seem to represent law's norm. At such a point, 
resistance is the only course open to the lawyer who remains a law-
yer. Because the evil would then seem pervasive, non-cooperation 
would be an option only through leaving legal practice altogether.

For judges, the options are different and more limited. By far 
the common judicial response to evil is to accept the law and to

49. Indeed, it was in part the failure of the anti-slavery judges to utilize "ameliorist 
manipulation of formalisms," id. at 233, that Cover was seeking to illuminate in the disso-
nance hypothesis.
enforce it. Most judges consider their moral views about the law to be more or less irrelevant to the job of judging. Insofar as morality is relevant at all, it is said to be the traditions of our people that are examined rather than the view of the judge. Within this tradition, the only resistance to evil that is possible is to view law as itself resisting the evil (thus, this course is not resistance to law at all). This is the approach of Justices Brennan and Marshall. The alternative form of resistance for the judge would be to accept law as it is, but to refuse to follow it in his rulings. This step judges overwhelmingly do not take and never have taken. Resistance then is not an option.

Non-cooperation with evil is very difficult, though not impossible, for judges to achieve. Lawyers need only to avoid cases in which law protects or enhances evil practices. In states that divide the courts, as does Pennsylvania, a judge might seek such avoidance by administrative assignment to a division—let us say, family court—in which a practice like the death penalty did not seem likely to come up. Or the judge might seek appointment or election to a specialized court, again in Pennsylvania to Commonwealth Court. This is not a foolproof method, however, since one can never be certain where legal challenges will arise. And avoidance of the death penalty might well put the judge in the middle of abortion cases. But specialized functions are some protection. They are a form of non-cooperation with evil.

The reason that a specialized court would be viewed as a desirable form of non-cooperation is that by tradition judges must take any case to which they happen to be assigned. The Code of Judicial Conduct requires the judge to "respect and comply with the law" and to "be faithful to the law." Presumably this includes an obligation to enforce all law. No provision is made for recusal in the case of particular laws regarded by the judge as immoral. Judges either are not supposed to have such feelings or are sup-

50. Perhaps the classic expression of this position was given by Justice Harlan: Due process has not been reduced to any formula. . . . [T]hrough the course of this Court's decisions it has represented the balance which our Nation . . . has struck. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.

51. Code of Judicial Conduct, Canon 2A and Canon 3A(1). The Code was adopted by the House of Delegates of the American Bar Association on August 16, 1972 and has been widely influential.

52. Cf. id, at Canon 3C ("Disqualification").
posed to put them to one side and decide the case.

That obligation, to put one's feelings aside, explains why recusal, which is not actually forbidden by the Code, has but rarely been invoked by judges. If a judge were to recuse himself when the law is seen as too evil to enforce, his course would be considered by the community of judges to be a failure by that judge to do his job. While there is nothing shameful in finding the law to be immoral and in feeling that a good person should not enforce it, most judges would feel that one either is a judge or not and that a judge simply must enforce whatever the law is. It seems then that resignation is the only form of non-cooperation open to a sitting judge.

It is here, however, that the norms of society and in particular the worship of law as an exacting mistress may be changing. The fact that a judge had a distaste for the law of slavery was regarded by some of the anti-slavery judges as a professional failing. But today society more easily acknowledges that conscience is an acceptable ground of action, particularly where fundamental issues are in conflict. Society today accepts, and has for a long time, non-cooperation in war in the form of conscientious objection. More to the point, and more recently, society has allowed doctors and other health professionals to refuse to participate in executions. In the case of abortion, federal and state laws specifically protect health care providers from liability or employment discrimination over refusals to perform abortions. This is a healthy and mature re-

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53. Canon 3C does not purport to be exhaustive ("including but not limited. . . "). Id.
54. See, e.g., Justice McLean's instruction to the jury in United States v. Cole, 25 F. Cas. 493, 527 (C.C.D. Ohio 1853) (No. 14,832): "Even those sympathies so honorable to our natures, are not to govern us here. Nothing but the facts and the law, should govern you." Id.
56. For example, 42 U.S.C. § 300a-7 (1975) provides that recipients of federal assistance under the Public Health Services Act, the Community Mental Health Centers Act, and the Developmental Disabilities Services and Facilities Construction Act are not required to provide abortions if the recipients have a moral or religious objection to doing so, and also prohibits discrimination against health personnel because of performing, or refusal to perform, an abortion. The Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(b), 102 Stat. 29 (1972) (codified as amended at 20 U.S.C.S. § 1688 (Law Co-op. Supp. June, 1988), carefully provides neutrality with regard to abortion: "Nothing in this title shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion." Id.
(a) No hospital or other health care facility shall be required to, or held liable for refusal to, perform or permit the performance of abortion or sterilization contrary to
sponse to disagreement over fundamental values.

There is no reason that such tolerance for a different view of moral questions should not extend as well to judges. Presumably, there are judges today who feel the death penalty and/or abortion are fundamental evils. Why should these judges be forced to choose between the alternatives of resignation or a violation of conscience? Surely if they act in disregard of conscience they will no longer be the judges they once were. And if they resign, society will lose some of its most sensitive judges—just those perhaps it would most like to have serve.

If the option of non-cooperation were honed in this way, society would be admitting the possibility that its practices of the death penalty and abortion might be wrong, and, further, that these practices are thought wrong now by some persons of judgment. But the very existence of the First Amendment shows that society is not harmed by admitting the possibility of error.

If permitted, such non-cooperation should be open. In a democratic society, everyone ought to be able to know which officials are not willing to serve majoritarian policies. Therefore, this new form of non-cooperation should be formal, public and reasoned. It should not be ad hoc, but considered and accomplished before particular cases arise. In this way society would have the benefit of the wisdom of these judges. In this way, society also would be reassured that the judges who do hear abortion and death penalty cases are committed to its policies.

It is my hope that if an exemption for conscience were available, significant numbers of judges would choose non-cooperation with abortion and the death penalty. Certainly, if substantial numbers did so, the effect would be great. Judges have always been regarded as teachers and society could not help but be moved by the example of judges refusing to kill. The legal system would also gain. Judges would be making a great contribution to the law—cleansing it of some of its stain of blood.

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its stated ethical policy. No physician, nurse, staff member or employee of a hospital or other health care facility, who shall state in writing to such hospital or health care facility an objection to performing, participating in, or cooperating in, abortion or sterilization on moral, religious or professional grounds, shall be required to, or held liable for refusal to, perform, participate in, or cooperate in such abortion or sterilization.

*Id.*