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Against the Law: The Nixon Court and Criminal Justice. By Leonard Levy.

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BOOK REVIEWS

AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE. By LEONARD W. LEVY.* New York: Harper and Row. 1974. Pp. xvi, 506.

*Reviewed by Edward R. Korman***

> I do not like judicial activism, but forced to choose between liberal activism and conservative activism, I much prefer the former. I believe that the intellectual integrity and professional expertise of the court, the validity of the route that it takes to reach a result, rank in importance with the result itself.[1]

With this preface, Professor Levy undertakes an exhaustive analysis of the quality and impact of the decisions of the Supreme Court from 1970 to 1973 in the criminal justice area—the one area which Mr. Nixon expressly desired to influence by his appointments.[2]

Levy finds the work of the Supreme Court noticeably lacking in intellectual integrity and judicial expertise:[3]

> It does not confront complicated constitutional questions with appropriate disinterestedness. Its opinions do not provide intellectually convincing explanations for its results. Far too often the majority simply issues edicts. Its fiat cannot command respect when the majority abuses or ignores precedents or refuses to consider fairly and seriously the arguments advanced by dissenting opinions. The majority faces away from, instead of facing, opposing views. There is too little debate in majority opinions. They fail to weigh criticisms. In brief, they do not develop carefully reasoned judgments.

One may be inclined to dispute this assessment of the quality of the work of the Supreme Court, but if this were all Professor Levy had to say it would be possible to conclude from reading his book that the transition from the Warren Court to the "Nixon

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1. P. xiii.
2. P. 421.
3. P. 438.

Court" marked, at most, a change in degree. As Professor Levy observes, "the Warren Court did not offer adequately reasoned justifications or intellectually coherent explanations for their results."[4] Although the author argues that "[t]he Nixon Court has done a lot worse in its criminal-justice opinions"[5] than the Warren Court, he acknowledges that an evaluation "of the Nixon Court's craftsmanship is as subjective as the art of judging, and experts will doubtless disagree, as they have about the Warren Court's craftsmanship."[6]

While Levy is very concerned with the quality of the work of the Supreme Court, his primary focus is on the results reached by the Court in the criminal justice area. Indeed, by the end of the book, Professor Levy abandons his previously expressed distaste for judicial activism. He asserts, instead, that "the Bill of Rights requires an ardently sympathetic if not a liberal activist court."[7]

Professor Levy, of course, concludes that the four appointees of Mr. Nixon had a noticeable impact on criminal justice. This impact was inevitable given the closely divided votes that characterized the holdings of the Warren Court in this area. In assessing the impact of the decisions of the "Nixon Court," the author brings to his effort an extraordinary degree of intellectual integrity and professional expertise. His conclusions and his analysis, however, demonstrate that there can never be total objectivity. One of the principal areas discussed by Professor Levy—search and seizure—best demonstrates this point.

The construction of the fourth amendment and the application of the exclusionary rule are perhaps the most controversial of all criminal justice holdings. Professor Levy begins his analysis with a thoughtful discussion of the rule and its many faults. He concludes, quite correctly, that for all its defects, there is no practical alternative to the exclusion of illegally obtained evidence. Levy even appears to approve of an exception to the application of the exclusionary rule where law enforcement officers have, in good faith, obtained a warrant from a magistrate. As he quite aptly observed: "The sanction of the law strikes the wrong party when the police have obtained a warrant."[8] In the

4. Pp. xiii-xiv.
5. P. 438.
6. *Id.*
7. P. 440.
8. P. 81.

end, however, he is harsh in his criticism of the holdings of the "Nixon Court" in the search and seizure area. Professor Levy states:[9]

> Excepting its decision restraining warrantless electronic surveillance on authority of the President in domestic-security cases, the Nixon Court has steadily moved away from the disposition of the Warren Court to stress the need for particular warrants issued on probable cause by an independent magistrate. The recent decisions vividly show a propensity to extend exceptions to the warrant requirement in cases dealing with stop and frisk, automobiles, exigent circumstances, searches incident to arrest, and constructive consent. The Court has moved like a sidewinder, wriggling steadily in the direction of removing Fourth Amendment constraints on the police.

This criticism is unfair and unduly harsh. The "exception" to which Professor Levy alludes, the holding rejecting the power of the President to order warrantless electronic surveillance in domestic security cases,[10] is perhaps the most significant of all the fourth amendment holdings of the "Nixon Court." None of the cases decided during the period covered by Professor Levy's analysis involved the kind of danger to personal privacy and other constitutional values, including those protected by the first amendment, as did President Nixon's assertion of authority to order warrantless electronic surveillance in "domestic-security" cases. Furthermore, his assertion regarding the degree to which the other holdings have marked a departure from the Warren Court is overstated.

Professor Levy's conclusion that, in cases "where the police have acted with warrants, the Court, after some vacillation, relaxed warrant requirements by finding probable cause based on informers' tips that definitely lacked the credibility and proof demanded by the Warren Court"[11] ignores the fact that the Warren Court had never conclusively resolved this issue. In *Spinelli v. United States*,[12] a five to three decision, the Supreme Court held that an application for a warrant based upon an informant's tip must show why the informant is reliable and set forth the basis to credit his information. Mr. Justice White cast the decid-

9. P. 137.

10. United States v. United States Dist. Court for the E. Dist. of Mich., 407 U.S. 297 (1972).

11. P. 137.

12. 393 U.S. 410 (1969).

ing vote despite serious misgivings. He expressed the belief that the law in this area was in need of reconsideration, but he voted with the majority principally because "a vote to affirm would produce an equally divided court."[13] The dissenters were Justices Fortas, Black and Stewart. In language reflected in the opinion of the "Nixon Court" in *United States v. Harris*,[14] to which Professor Levy directs his criticism, Justice Fortas commented in *Spinelli* that:[15]

> A policeman's affidavit should not be judged as an entry in an essay contest. It is not "abracadabra." . . . [A] policeman's affidavit is entitled to common-sense evaluation.

It is clear that in the holding in *Harris*, sustaining a warrant which may not have passed muster in *Spinelli*, the "Nixon Court" was not departing from any direction which had been clearly set by the "liberal activists" on the Warren Court. It was, instead, in the words of one of those "liberal activists," Justice Fortas, grappling "with the difficult problem of the nature of the showing that must be made before the magistrate to justify his issuance of a search warrant."[16]

This is not the only respect in which Professor Levy's criticism is unjustified. Particularly unfair is his suggestion that the decisions show "a propensity to extend exceptions to the warrant requirement in cases dealing with stop and frisk, automobiles, exigent circumstances, searches incident to arrest, and constructive consent."[17]

A. *The Stop and Frisk Case*

In *Terry v. Ohio*,[18] the Warren Court held that a law enforcement officer may stop an individual based on reasonable suspicion and conduct a limited self-protective search for weapons (a frisk). Such an intrusion, involving considerably less in the way of interference with the liberty and privacy of an individual than an arrest and search, was held to require only a showing of reasonable suspicion. In *Terry*, this requirement was satisfied by the law enforcement officer's own observations. In *Adams v. Williams*,[19]

13. *Id.* at 429.
14. 403 U.S. 573 (1971).
15. Spinelli v. United States, 393 U.S. 410, 438-39 (1969) (Fortas, J., dissenting).
16. *Id.* at 436-37.
17. P. 137.
18. 392 U.S. 1 (1968).
19. 407 U.S. 143 (1972).

the "Nixon Court" held that where a person who is known to the law enforcement officer advises the officer that an individual is committing a crime, a similar limited stop and frisk of the suspect may be conducted. Whatever disagreement there may be as to the result reached on the facts in *Adams*, the "extension" is hardly extreme. Law enforcement officers often act on information of which they have no personal knowledge. A complaint from a citizen who alleges that he was the victim of a crime, or information supplied by someone who claims to have witnessed a crime, often provides the basis for an arrest and search. In *Adams*, the informant was a person known to the law enforcement officer. He does not appear to have been a paid informant and the information he supplied regarding the defendant's possession of narcotics and a weapon could hardly have been ignored.

If the limited response which the police officer took constituted an "extension" of an "exception to the warrant requirement," as Professor Levy suggests, that extension was taken by the Warren Court in *Terry* when it held that street encounters of the kind present in *Terry* and *Adams* did not come within the ambit of the warrant clause of the fourth amendment.

B. *Automobile Searches*

It is somewhat ironic that Professor Levy should attribute to the "Nixon Court" an extension of the exception to the warrant requirement in the area of automobile searches. The principal holding in this area, which Professor Levy is most critical of, is *Chambers v. Maroney*.[20] It was held, in *Chambers*, that law enforcement officers who stopped a vehicle in flight from the scene of a crime could search the car immediately (given probable cause) without a warrant. The Supreme Court held that a similar search could be made hours later at the station house, also without a warrant, even though there may no longer be a valid reason for failing to obtain a magistrate's approval.[21] This holding can hardly be attributed to the Nixon appointees as only two of them (the Chief Justice and Justice Blackmun) were then on the Supreme Court. More significantly, the majority opinion was joined by Justices Brennan, Marshall, and Douglas. There would still have been a majority if the Chief Justice and Justice Blackmun had dissented.

20. 399 U.S. 42 (1970).
21. *Id.* at 52

C. *Searches Incident to Arrest*

In *United States v. Robinson*,[22] the Supreme Court held that the long acknowledged right of a police officer to search a suspect for weapons or evidence incident to an arrest, did not require a showing in each case that evidence would be found or that the law enforcement officer was, in fact, concerned for his safety. As a practical matter, the holding is significant due to the context in which the case arose, *i.e.*, an arrest for a traffic offense, for in most arrests for ordinary crimes, there is clearly a basis for a thorough search of an individual for weapons or evidence. Even in *Robinson*, Justice Marshall was not prepared to say that such a search was inappropriate. His dissent was based, instead, on the fact that the interest in insuring that all weapons had been taken from the defendant was satisified when the police officer removed a crumpled cigarette pack from the defendant's pocket. There was no reason to look inside the package.[23] Accordingly, Marshall would have suppressed the drugs found therein.

When viewed in perspective this decision and the holding in the related case of *Gustafson v. Florida*[24] do not mark an extraordinary departure from prior holdings. Justice Stewart[25] and Justice Powell,[26] who cast the decisive votes in both cases, indicated that neither defendant raised the critical issue of whether the fourth amendment permitted a custodial arrest for a mere traffic violation, nor did the defendants raise any question regarding the validity of an arrest which is simply a pretext to search for evidence of other crimes.

Accordingly, it is not fair to say, as Professor Levy does, that "[a]s a result of *Robinson*, an officer may arrest a person for a traffic violation as an excuse to search him for evidence of other crime."[27] Indeed, in light of the concurring opinions in *Robinson* and *Gustafson*, it is not even settled that a custodial arrest may be made in such circumstances.

D. *Consent Searches*

In *Schneckloth v. Bustamonte*,[28] the Supreme Court held

22. 414 U.S. 218 (1973).
23. *Id.* at 255-56.
24. 414 U.S. 260 (1973).
25. *Id.* at 266-67 (Stewart, J., concurring).
26. United States v. Robinson, 414 U.S. 218, 238 n.2 (1973) (Powell, J., concurring).
27. P. 109.
28. 412 U.S. 218 (1973).

that a person may give a valid consent to a search even though he is not advised that he may refuse to consent to the search. The failure to give such advice is merely one factor to be considered in determining the voluntariness of the consent to search. Although Professor Levy analyzes this issue, as did the Supreme Court, in terms of waiver of fourth amendment rights, this analysis does not properly state the issue. The fourth amendment guarantees the right to be free from "unreasonable searches and seizures." One does not waive such a right. Rather, the issue presented in a case such as *Schneckloth* is whether a search is unreasonable simply because a person is not told that he may withhold his consent, even though other circumstances in the case indicate an absence of substantial coercion. Indeed, in *Coolidge v. New Hampshire*,[29] a decision praised by Professor Levy, the Supreme Court looked at this issue in terms of reasonableness and *unanimously* sustained a seizure of evidence which had been turned over to the police by the defendant's wife (a third party consent) without any warnings. There Justice Stewart observed:[30]

> In a situation like the one before us there no doubt always exist forces pushing the spouse to cooperate with the police. Among these are the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse. But there is nothing constitutionally suspect in the existence, without more, of these incentives to full disclosure or active cooperation with the police.

But assuming that reasonable men may differ over the result reached in *Schneckloth*, neither that holding nor the others discussed above warrants the conclusion that the Supreme Court, spurred by the four appointees of Mr. Nixon, "has moved like a sidewinder, wriggling steadily in the direction of removing Fourth Amendment constraints on the police."[31] Indeed, only last term, albeit after publication of Professor Levy's book, the Supreme Court, in another significant opinion following the lead of the Warren Court, held that the taint which attaches to a confession obtained after an illegal arrest is not removed by the fact that *Miranda* warnings are given.[32] A contrary result would have seri-

29. 403 U.S. 443 (1971).
30. *Id.* at 487-88.
31. P. 137.
32. Brown v. Illinois, 95 S. Ct. 2254 (1975).

ously undermined the effect of the exclusionary rule in deterring illegal arrests. This case, and others like it,[33] show that the near hysterical response in certain quarters that accompanies every opinion of the "Nixon Court" affirming the conviction of a murderer, rapist, or robber, is often unjustified. Rather than departing significantly from precedent, the "Nixon Court" strikes the difficult balance that must be made in these cases somewhat differently from the Warren Court.

33. *See, e.g.*, United States v. Hale, 95 S. Ct. 2133 (1975).

RESIGNATION IN PROTEST: POLITICAL AND ETHICAL CHOICES BETWEEN LOYALTY TO TEAM AND LOYALTY TO CONSCIENCE IN AMERICAN PUBLIC LIFE. By EDWARD WEISBAND* and THOMAS FRANCK.** New York: Grossman Publishers. 1975. Pp. xv, 326. $10.00.

*Reviewed by Mark P. Denbeaux****

In *Resignation in Protest*, Professors Weisband and Franck claim that of the senior federal officials who have resigned from their positions over matters of principle, too few have publicly disclosed the reasons for their actions. According to the authors' investigation, since the turn of the century 34 of the 389 people who have resigned in protest have openly articulated the factors which compelled their voluntary departure from the highest seats of power.

There can be no doubt that an analysis of the style and reasons for these resignations could prove to be valuable and informative. Unfortunately, the evidence indicates that only an insignificant number of people have disclosed their reasons for leaving public office. Although the book is brief, it suffers from a lack of focus because the topic raises two necessarily sequential questions and the authors examine only the second. Before one can consider the style of a resignation over a matter of principle, one must deal with the substantive question of the moral obligation of whether to resign at all. The formal structure, as well as the pretentious title of the book, is addressed solely to the style of the resignation of these individuals. Questions surrounding the problem of whether to resign keep arising in an unstructured manner throughout the text and interfere with the development of the authors' theme.

The application of political and ethical choices to the conflict between conscience and team play does not lend itself to intensive analytical consideration. The 34 individuals who expressed their reasons for leaving office are a very disparate group. They ranged from William Jennings Bryan—a victim of World War I,[1]

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1. In 1915, William Jennings Bryan resigned as Secretary of State because he opposed the bellicose position of the Woodrow Wilson Administration. After his departure from office, Bryan publicly spoke out against war and military preparedness. Pp. 8, 65.

to Elliot Richardson and William Ruckelshaus—victims of the "Saturday night massacre."[2] The authors, nevertheless, assiduously try to discover meaningful patterns within a group which they recognize as too small to be significant.

The consideration of the few people who publicly expressed the violations of their principles which led them to voluntarily relinquish their seats of power evokes a bittersweet poignancy which bears witness to the fundamental accuracy of the authors' premises. When one scans this select list of those who have not only resigned, but have also publicly disclosed their reasons for so doing, it becomes apparent that our society has degraded their courageous actions by ignoring or forgetting them. Many of the names are of people who are unknown while the remainder evoke memories of individuals who were recognized for acts other than their resignations. Except in the most recent cases, the abdications are difficult to recall and the reasons for them impossible. Thus, the list includes: Wayne Chatfield Taylor, Harold Ickes, James A. Farley, Webster Davis, William Jennings Bryan, Henry A. Wallace, Lewis W. Douglas, Lindley Garrison, John L. Sullivan, Kenneth N. Davis, Jr., Henry Breckinridge, Benedict Crowell, T. Jefferson Collidge, Edward J. Noble, John Wesley Hanes, Harry Woodring, Robert Lansing and Raymond Moley. The relative anonymity of these "profiles in courage" corroborates the authors' claim that our society does not reward acts of moral principle. Society is disdainful of disloyalty even when it stems from a moral obligation.

Professors Weisband and Franck attempt to compare American and British reactions to acts of protest, presumably to indicate that the British tolerance of public dissent is more apt to encourage public disclosure of the reasons for resignation from a high level government position. The analogy is weak. As the authors admit, the parliamentary system, with all senior governmental officials serving simultaneously as Ministers and Members of Parliament, encourages independence and serves as a substantial buffer against political ostracism. There are also many other political and constitutional differences which prohibit any controlled comparison. Furthermore, as the recent litigation over

2. The Saturday Night Massacre of October 20, 1973, consisted of the removal of Archibald Cox as the Watergate Special Prosecutor and the subsequent resignations with public protest of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus. P. 14.

the Crossman Diaries indicates, the Official Secrets Act of 1911[3] serves as a major impediment to the dissemination of public information; a problem which does not exist in America. Richard Crossman, a Minister in the Labor Government from 1964 until 1970, kept diaries of government business, meetings, and personalities, probably for the purpose of some future publication. Crossman has since died, but efforts have been made to publish his diaries. The current labor government is attempting to enjoin their publication in the interest of preserving the necessary sense of confidentiality in government.[4] It is submitted that the reaction of the British government to the publication of these diaries would preclude the publication of "leaked" information in all circumstances and is inconsistent with the authors' claim that the British system encourages unfettered public disclosure of the causes of a resignation over a matter of principle.

One of the many individuals who resigned but then failed to protest sufficiently to meet the authors' standards was Dean Acheson. Acheson had claimed to be a member of the most exclusive club in America: "The club . . . of men in public life who have resigned in a cause of conscience."[5] The authors refuse to accept Acheson's claim even though it was clearly accurate. They observe that:[6]

> [I]n fact, Acheson's commendation could not have been very sincerely meant. His own resignation in opposition to Roosevelt's 1933 devaluation was a model of public discretion and tact, leaving him . . . eminently eligible for future calls to public service.

Acheson's claim was unassailably correct. He, in fact, resigned over a matter of principle; the authors do not deny this.

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3. Official Secrets Act of 1911, 1 & 2 Geo. 5, c. 28, 2.

4. N.Y. Times, Aug. 3, 1975, § 4 (The Week in Review), at 16, col. 1.

5. The authors relate that after the resignation with public protest of John L. Sullivan, Acheson encountered Sullivan at a Washington cocktail party:

> [Sullivan] was greeted near the door by Dean Acheson, who took his hand, patted him on the back, and said, "Welcome to the most exclusive club in America."
>
> "What club is that?" Sullivan asked.
>
> "The club," Acheson said benignly, "of men in public life who have resigned in a cause of conscience."
>
> "Who are the other members of the club?" Sullivan wanted to know.
>
> Acheson answered, "Just you and me and Lew Douglas."

P. 63.

6. *Id.*

They dispute, however, the sincerity of his claim and find him guilty of discretely resigning without risking any injury to his future political career—something Acheson never denied. Such petty criticism is harmful because it reflects an effort on the part of the authors to arbitrarily impose their order and standards on all resignations.

Many other individuals, especially in recent years, have earned admission to the authors' list of those who, after resigning over matters of conscience, failed to publicly articulate the reasons for their principled relinquishment of power. Although inclusion in the authors' list should not warrant being consigned to the inner circle of hell, it should not give great comfort to those whom the authors have identified: Robert S. McNamara, Willard Wirtz, George Ball, Bill Moyers, Richard Goodwin, Charles Frankel, McGeorge Bundy, Nicholas deB. Katzenbach and John W. Gardner.

Throughout the book there is a sense that the authors have overstated the importance of the style of communicating a resignation and have understated the moral significance of the act of resigning. The authors claim that a silent departure from public office, in opposition to an administration's activities,[7]

> raises a question central to democracy. If a course of action is perceived to be so wrong, so unethical or ill-advised, as to warrant a person separating himself from those embarked upon it, is it not wrong—and undermining of faith in the whole system—to leave in such a way as to give the public the impression that all is well?

Once again, the legitimacy of such a question is undeniable, although the answer may not be as obvious as the question would seem to indicate. It would be of considerable interest to know what response, for example, John W. Gardner, Founder and Director of Common Cause, would make to this question. The authors convincingly establish that John Gardner belongs on the list of those who have resigned over matters of principle. He did so, however, not only without protest, but with praise for the administration. Only several years later did Gardner timidly protest the issue which presumably provoked his resignation—the Vietnam War and its impact on his domestic programs.

It is certainly interesting that only a tiny percentage of the people whose moral fiber has already been tested and proven by

7. P. 12.

resignation have chosen to speak out. No good explanation seems to exist. Some sort of cost-benefit ratio cannot be considered a good explanation for such inaction on the part of these otherwise morally active people. Resignation, alone, is a major price for no benefit.

A substantial part of the book is allocated to an attempt to analyze the members of the authors' most elite list and to create significant patterns among them, despite the admitted numerical insignificance of the sample. For example, Davis, Bryan, and Wallace are grouped together as representatives of:[8]

> [A] gutsy, scrappy Middle Western political style which differs from . . . the more staid Eastern Establishmentarians. . . . Each displayed qualities of the successful lay preacher . . . . [E]ach had about him something of the soil, the Bible, and the town meeting. Above all, each had a faith in the ability of the common people to change the course of the republic once they heard the truth. To all three, God and the people were their only jury.

The 34 individuals who disclosed the reasons for their resignations are also compared on the basis of the issues which provoked their outbursts. One-half resigned over foreign policy and national defense issues, matters which are often viewed as requiring that partisanship stop and cooperation begin "at the water's edge." More than one-quarter spoke out in response to trade and monetary policy issues. The remainder resigned over internal or interdepartmental disputes, issues surrounding Senator Joe McCarthy, farm subsidies, the Taft-Hartley Act, enforcement of prohibition, and Roosevelt's decision to seek a third term.[9] Clearly these last are eclectic issues which reflect certain eccentricities on the part of the individuals involved.

An even more distressing example of the authors' efforts to overemphasize the significance of their limited findings occurs when they seek to ascertain a trend. It is forcefully stated that "[t]he reluctance to speak out is getting worse. This lamentable fact emerges from a further examination of the 389 'prime' resigners. Among this group, the rate of going public has declined sharply during the past thirty years."[10] The documentation to support this claim is that from 1910 until 1919, 16.2 percent of

8. P. 38-39.
9. P. 61.
10. P. 72.

all resignations over matters of principle were publicly articulated; during the 1920's, 10.5 percent; during the 1930's, 21.7 percent; during the 1940's, 19.7 percent; during the 1950's, 5.1 percent; and during the 1960's, 6.3 percent.

Even if these figures did support a claim of an alarming decrease in the rate of going public, the determination of the rate itself is not very significant. The number of resignations in protest which represented the figure of 16.2 percent for the period from 1910 until 1919 was only 4 people. During the 1920's, when the rate dropped to 10.5 percent, there were exactly the same number—4 resignations in protest. During the 1930's when the rate of resignations in protest doubled, the number of people who so resigned was 5. In the 1940's, when the 30 year decline in the rate of resignations in protest supposedly began, the rate was 10.7 percent and represented only 7 people. In the decade of the 1950's, the proportion of those who resigned in protest dropped to 5.1 percent but once again, that figure represented only 5 people. The 1960's showed a percentage of 6.3 percent and the actual number of these who protested publicly was 7.[11] The authors' attempt to establish a claim of a serious trend upon such a meager diet severely undermines their credibility, especially because that claim is so central to their thesis.

Thirty-four resignations over a 60 year period, representing all regions of the country, both political parties, many different issues and, above all involving many disparate personalities can only be useful as anecdotes and not as the subject matter for serious analysis. Certainly these anecdotes, which are the bulk of the book, give examples of special problems that raise not only entertaining but important questions. For example, the question of a lawyer's responsibility to resign in protest over a question of moral principle may be obscured by other conflicting professional obligations. Often it is not clear in which capacity someone who is a lawyer and also a government official should be judged. Perhaps this difficulty arises because it is not clear whether an attorney-client relationship exists. No one can contend that it is normally appropriate for an attorney to resign (withdraw) and publicly protest his reasons. If a lawyer holds a governmental position which involves the performance of legal work and feels compelled as a matter of moral principle to resign, is he any less obligated to speak out than a businessman in the same position?

11. P. 201, Appendix B, figure 1.

Unfortunately, Professors Weisband and Franck did not pursue this problem, even though 35 percent of their subjects were lawyers.

Resignation in Protest clearly proves its point; Americans do not resign in protest. This project, however, represents a self-liquidating act of scholarship. Having successfully established the accuracy of their negative proposition, the authors were equally successful in proving the proposition that this book did not warrant publication. This is not to say that the fact that Americans do not resign in protest is not important, nor that many of the anecdotes are uninteresting. The most useful aspect of the book, however, arises from the impact the anecdotes have upon the question that was not considered: When, and under what circumstances, does one resign at all?

The determination of whether moral principle mandates resignation cannot be the responsibility of any one field of expertise. When one attempts to measure the moral failure of a principled but silent resignation, the moral value of the resignation itself cannot be ignored. Edmund Wilson, in *Patriotic Gore*,[12] raises the timeless issue which painfully illustrates the moral choices which arose for so many people in contemporary times because of the Vietnam War. Ulysses S. Grant had participated in the Mexican War—a war which he opposed. Years later, after leaving the Presidency, he recalled his choice and his decision:[13]

> I do not think . . . there was ever a more wicked war than that waged by the United States on Mexico. I thought so at the time, when I was a youngster, only I had not moral courage enough to resign. I had taken an oath to serve eight years, unless sooner discharged, and I consider my superior duty was to my flag. I had a horror of the Mexican War and I have always believed that it was on our part most unjust.

While recognizing that it is simple to rationalize one's principles in order not to resign, it is also too easy to ignore the possibility that there may be valid reasons for not resigning despite policies which violate one's morality.

The rhetoric that "if you are not part of the solution, you are part of the problem" might mandate an explosive resignation, but it is not necessarily morally superior to that of one who has

12. E. WILSON, PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR (1962).

13. *Id.* at 133-34.

chosen to remain in office and work from within. The weakness of the latter course is the danger of corruption and rationalization. Yet, either standard demonstrates a style of conduct which, if properly honored, would equally contribute to an improved society.

Having recognized that resignation may not be the inexorable result of a moral person's confrontation with a policy which violates his ethical standards, it still must be acknowledged that those individuals who resign have performed a courageous and expensive act. Professors Weisband and Franck might more constructively have considered the 389 people they have identified who resigned over matters of principle rather than considering only the 34 who publicly protested. The moral issues requiring that the resignation be publicly declared are unlikely to be more compelling than those which mandate the resignation itself. The cost to a person whose ethical standards require resignation is high—the loss of office, of power, and the trappings of power. This enormous price for principle does not significantly increase if one elects to publicly protest as one resigns rather than quietly depart. In each case, the person has abandoned power and now stands alone. To the extent that the authors rely on the distinction between quiet resignation and resignation with public protest as the test of ethical standards in government, their thesis is unconvincing.