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RELIGION AND RECUSAL

RICHARD B. SAPHIRE*

The question of the proper relationship between religion and the judicial process has important theoretical and practical dimensions. Recent scholarship has explored the question from the perspective of political morality, asking whether and when, in the context of democratic political theory, it is appropriate for public officials to rely upon their personal religious convictions when they consider, debate, formulate, adopt, and apply public policy. Scholars have adopted a wide range of positions on this question, but most agree that the question is particularly important as it pertains to the exercise of the judicial function, and it is generally believed that making and justifying decisions on the basis of religious beliefs is most problematic when engaged in by judges.¹

There are many reasons for this view. Judges, of course, wield political power, and from a theoretical point of view, they should be subject to whatever restraints are thought necessary for official power to be exercised in accordance with widely held principles of (democratic) political legitimacy. But judges exercise a special kind of power. Generally speaking, the judicial function is not one of law making, but of law application. It is the judge's task to determine what the law is and to apply it in the cases before him or her. The norms of fairness and justice embedded in our political and constitutional tradition require that the judge apply the law with optimum impartiality. It is generally assumed that these norms require the judge to put aside, to the extent humanly possible, values that are personal to him or her, including values that are drawn from the set of religious

* Professor of Law, University of Dayton School of Law. This paper was prepared for delivery on April 4, 1997 at the Marquette University Law School's Conference on *Religion and The Judicial Process: Legal, Ethical, and Empirical Dimensions*. It was prepared as a response to an earlier version of John Garvey's and Amy Coney's paper, entitled *Catholic Judges in Capital Cases*. As I suspect will be apparent, there is much in the published version of the Garvey and Coney paper with which I agree. I wish to express my appreciation to Fr. James Heft, S.M., Chancellor and University Professor of Faith and Culture at the University of Dayton, Michael Perry, and Jan Konya for helpful discussions concerning the relevant issues, and to Ms. Konya for valuable research assistance.

1. See JOHN RAWLS, *POLITICAL LIBERALISM* 216 (1993).

beliefs which that judge holds.²

Thus, when Federal District Judge John Sprizzo recently dismissed contempt proceedings against two Catholic clerics who had been accused of violating the court's orders restricting their protests at an abortion clinic, some critics wondered whether his leniency was attributable to his personal agreement with the religious values which animated the protesters' conduct.³ Similarly, when Washington Supreme Court Justice Richard B. Sanders went from his swearing-in ceremony to an anti-abortion March for Life rally held on the state capitol steps, he was charged with violating professional norms governing the integrity, impartiality and independence of the judiciary. Some suggested that his conduct, when viewed in light of its self-avowed religious motivation, casted doubt on his ability to "rule fairly in a case concerning abortion."⁴ Finally, and perhaps somewhat more famously, Supreme Court Justice Scalia's recent religiously-informed remarks at a law school prayer breakfast raised, at least in some quarters, concerns about his ability to objectively and impartially decide (at least) church-state issues.⁵

How should we think about this sort of conduct on the part of religious judges? And what, if anything, should we do about it? These questions are fraught with ethical, legal, and practical problems. From an ethical perspective, we should ask whether it is wrong for judges to rely upon their religious beliefs when they engage in the duties of their office or when they speak publicly in ways which might reasonably be understood to reflect on the performance of their official responsibilities. From a legal perspective, we should ask whether a judge's self-conscious resort to his or her religious convictions violates constraints on judicial behavior imposed by constitutional, professional,

2. See generally, KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASON* (1995).

3. *United States v. Lynch*, 952 F. Supp. 167 (S.D.N.Y. 1997). For discussion of Judge Sprizzo's ruling, see David E. Rovella, *Abortion Clinic Act Gutted by Unexpected Ruling*, NAT'L L. J., Feb. 3, 1997, at A6; *A Ruling Too Far*, NAT'L L. J., Feb. 3, 1997, at A18. For a critical and sympathetic analysis, see Michael W. McConnell, *Breaking the Law, Bending the Law*, FIRST THINGS, June/July 1997, at 13.

4. Carey Goldberg, *Judge's Speech at Abortion Rally Sets Off Dispute on Free Speech and Impartiality*, N. Y. TIMES, March 22, 1997, at A8 (reporting views of legal scholars on Judge Sanders's remarks. Goldberg also reported that "Justice Sanders said openly during his election campaign that he was a Roman Catholic and opposed abortion."). *Id.* See also Victoria Slind-Flor, *Vocal Pro-Life Judge*, NAT'L L. J., Dec. 23, 1996, at A4.

5. See Robert A. Sirico, *Scalia's Dissenting Opinion*, WALL ST. J., April 19, 1996, at A12. For a general and sympathetic analysis of Scalia's remarks, see Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863 (1997).

or statutory rules. Practically, we might ask whether we can develop and administer legal restraints on the religious behavior of judges in a way that responds sensibly to what is fair and reasonable to expect of them as people.

John Garvey and Amy Coney, in their essay *Catholic Judges in Capital Cases*,⁶ explore some of these questions by examining the problem of recusal of religious judges called upon to officiate in capital murder prosecutions. In particular, they are concerned about when judges with scruples about capital punishment should recuse themselves. They posit a devoutly Catholic judge⁷ who is called upon to preside in a capital case brought under the so-called federal "drug kingpin" statute.⁸ The statute provides for capital punishment upon conviction and places the judge in somewhat different positions depending upon whether the guilt and sentencing phases of the proceeding are tried to a jury or to the court. Garvey and Coney review the official position of the Catholic Church on the issue of capital punishment and conclude that the teaching of the Church establishes a presumptive rule against the death penalty, and that the presumption is not likely to be overcome given the realities that characterize the

6. John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998).

7. Garvey and Coney focus on the dilemma that they suppose an "orthodox" Catholic judge faces in capital cases. Garvey & Coney, *supra* note 6, at 305 and n.8. For reasons I will not belabor here, I take their use of the term "orthodox" to denote an idea quite similar, if not identical, to the notion of a "devout" religious believer, and so I will generally characterize our paradigmatic judge as "devout."

The decision to use a devout judge as a model has some obvious attractions. It is not uncommon to treat "devoutly" held religious beliefs (and believers) as inherently more homogeneous and unyielding than more "liberal" forms of religious believing. *But cf.* Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role Of Competing Religious Traditions in American Politics and Law*, 10 J. OF LAW & RELIG. 1, 14 (1994) (noting considerable diversity among "fundamentalist" religious beliefs). It is hard for me to know whether this is a valid way of thinking about "devout" Catholic thinking, although my experience suggests some basis for doubt. Within my own Jewish religious tradition, the notion that all "devout" or even "Orthodox" Jews think alike on such issues as capital punishment is quite controversial and subject to serious question, *cf.* *Menorah v. Illinois High School Ass'n*, 527 F. Supp. 632, 635 (N.D. Ill. 1981) (Jewish judge denied recusal motion in case challenging a rule applied to forbid observant Jewish athletes from wearing yarmulke; judge criticized the "myopia" of the movant's effort to "lump all Jews as fungible"). Although I recognize that Judaism is theologically and morally less centralized and hierarchical than Catholicism. It might well be the case that a Catholic who is not devout (or "orthodox" or "observant") in the sense contemplated by Garvey and Coney might have even graver and religiously motivated qualms about the death penalty than the "devout" believer, a point which highlights my concern about approaching the recusal issue from too general a perspective.

8. 21 U.S.C. § 848 (1994).

contemporary American criminal justice system.

The judge is faced with the question of whether, as a matter of the federal law governing recusal, he or she should be foreclosed from sitting in capital cases. The federal law which governs recusal contains more than one standard. First, 28 U.S.C. § 455(a) requires a judge to recuse himself or herself "in any proceeding in which his impartiality might reasonably be questioned."⁹ This provision has been construed as embodying an objective standard which asks whether a reasonable person, informed about the facts and the parties of a case and of a potential or alleged appearance of impropriety, would question the judge's impartiality.¹⁰ Second, 28 U.S.C. § 455(b)(1) requires disqualification where the judge "has a personal bias or prejudice concerning a party. . . ."¹¹ This provision has been construed to require a showing of bias in fact, not simply the appearance of bias.¹² As Garvey and Coney note, precisely what Section 455(b)(1)'s "bias or prejudice" standard entails has been the subject of some dispute. The standard most certainly entails some notion of personal animosity, but it probably includes more—for example, as Garvey and Coney put it, a feeling or attitude of the judge which spoils a party's "hope for success."¹³ Recently, Justice Scalia described the notion of "bias or prejudice" as connoting "a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess. . . or because it is excessive in degree. . . ."¹⁴ It encompasses the idea that the judge is partial toward one of the parties for reasons that are generally regarded to be inappropriate.¹⁵ Garvey

9. 28 U.S.C. § 455(a) (1994).

10. See, e.g., *United States v. El-Gabrowny*, 844 F. Supp. 955, 961-62 (S.D.N.Y. 1994); *Idaho v. Freeman*, 507 F. Supp. 706, 720-21 (D. Idaho 1981). This standard is similar to the one incorporated into Canon 3C1 of the American Bar Association's CODE OF JUDICIAL CONDUCT (1983) which requires judicial disqualification "in a proceeding in which [the judge's] impartiality might reasonably be questioned."

11. The disqualification standard contained in 28 U.S.C. § 144 has generally been construed, at least with respect to its substantive requirements, as "virtually identical" to 28 U.S.C. § 455. See, e.g., *United States v. York*, 888 F.2d 1050, 1053 (5th Cir. 1989). For general discussion, see RICHARD FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 742-43 (1996) (discussing similarities and differences between the two provisions).

12. *El-Gabrowny*, 844 F. Supp. at 959.

13. Garvey & Coney, *supra* note 6, at 333.

14. *Liteky v. United States*, 510 U.S. 540, 550 (1994).

15. But not all "partiality" is subject to condemnation (and recusal) under the statutory standard. See *id.* at 552-534 ("Partiality" does not refer to all favoritism, but only to such as

and Coney suggest, drawing from Supreme Court cases dealing with the issue of "death qualified" juries, that recusal is required where the judge's ability to determine the facts or apply the law is, in some fundamental way, skewed or distorted by the judge's moral or conscientious scruples. A judge with unalterable moral objections to the death penalty may be subject to disqualification if the judge's moral scruples or conscience require him or her to violate or disregard his or her duty to follow and apply the law. According to Garvey and Coney, the devout Catholic judge is in precisely this position because her religious scruples render her "unable to give the government the judgment it is entitled to under the law."¹⁶ Presumably, the problem would be the same if the judge's religious, or any other scruples, require her to sentence the convicted murderer to death in every case, regardless of facts and law which at least justify a different outcome.

Garvey's and Coney's thoughtful analysis raises a number of interesting and important questions, only some of which I can address here. It is certainly possible that a judge could be presented with the moral and professional dilemma which they describe. But how would the question of the judge's (dis)qualification be raised? When a party files a motion to recuse or to disqualify, the judge must consider whether his or her participation in the case will in fact be affected by "bias or prejudice" or whether it would be reasonable for the parties to question the judge's impartiality. Assume that Judge Smith is a devout Catholic who recently has been appointed to the bench and who has never before been assigned to a capital case. If Judge Smith had never publicly proclaimed his unalterable, religiously-premised opposition to capital punishment, how would the parties suspect that his religious beliefs would make him impartial in the way Garvey and Coney describe? As they note, it is clear that the mere fact that Judge Smith is Catholic, or that he belongs to a Catholic parish, would not suffice to provide the parties (in this case the government) a basis to obtain, and perhaps even to seek, recusal.¹⁷ After all, it is not the judge's status as a

is, for some reason, wrongful or inappropriate.").

16. Garvey & Coney, *supra* note 6, at 334.

17. *El-Gabrowny*, 844 F. Supp. 955, 962 ("[W]hether the presiding judge is an Orthodox Jew or a Zionist or some combination of the two, or neither, is utterly irrelevant to this case.") Cf. *In re Disqualification of Fuerst*, 674 N.E.2d 361 (1996) (fact that Catholic judge presiding over a case in which Catholic Diocese of Cleveland and Catholic priest were parties was, standing alone, insufficient to warrant disqualification under either actual bias or appearance of impropriety standards). Relatedly, Canon 4C of the ABA CODE OF JUDICIAL CONDUCT generally removes as a basis for disqualification a judge's service in several official capacities, and presumably membership, in religious organizations.

Catholic *per se* which is claimed to be disqualifying, but the fact that Catholic religious doctrine is (presumptively) opposed to capital punishment and that Judge Smith personally subscribes to that doctrine. One could imagine a religious group organized around opposition to capital punishment and whose (rigorously applied) membership standards required each member to personally endorse that principle and to act consistently with it in all aspects of their lives. The Catholic Church, to my knowledge, is not such an organization.

Assume, however, that Judge Smith's Catholicism is public knowledge,¹⁸ and that the prosecuting attorney suspects that the judge is devout and personally subscribes to the anti-death penalty theology that Garvey and Coney describe.¹⁹ When the recusal motion is filed (or when the judge considers his qualification to sit *sua sponte*²⁰), what should we expect of him? Presumably, the inquiry should not be confined to a determination of Church doctrine. Even if Garvey and Coney are correct about Catholic morality, the question of Judge Smith's actual bias should not depend on the nature of Church doctrine simpliciter, but on Judge Smith's attitude toward or concerning that doctrine. The judge's attitude may well raise a number of difficult questions. Among these questions are (1) the precise content of the relevant Catholic doctrine; (2) the Church's view about the authoritativeness of that doctrine in and for the lives of its members, which includes the way and the extent to which the doctrine is binding and the consequences the Church attaches to non-adherence; (3) the judge's attitude about the doctrine as well as his attitude about the institutional and personal costs of non-adherence;²¹ and (4) the extent to

18. Perhaps it was raised and discussed during the judge's confirmation process. See generally Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047 (1990).

19. Would the prosecutor have an ethical obligation to raise his suspicions concerning the judge's religiously-based bias? Would a defense attorney have such an obligation if there was some suspicion that the bias ran in favor of capital punishment?

20. It has been observed that 28 U.S.C. § 455(b) can be raised *sua sponte*. Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046, 1081 (1993).

With respect to the ABA CODE OF JUDICIAL CONDUCT, it has been said that "Canon 3C is intended to be used by a judge at the start of each case as a checklist to assist in deciding whether at that point he should disqualify himself from any participation in the proceedings." LESLIE W. ABRAMSON, *JUDICIAL DISQUALIFICATION UNDER CANON 3C OF THE CODE OF JUDICIAL CONDUCT* 11 (1992). It has also been suggested that, even prior to considering the ABA Code disqualification provisions, the judge "should first consult his own emotions and conscience, and pass an 'internal test of freedom' from disabling conflicts." *Id.*

21. Discerning the judge's attitude toward Church doctrine might be an extraordinarily

which Church doctrine accepts a role differentiation between the judge as Church-member-believer and the judge as public official (and whether Judge Smith believes the Church's view on this issue is, for him, authoritative).

Now, as I said, I think that these questions may be complex,²² and their complexity bears importantly on the question of whether Judge Smith should recuse himself. It may be the case that questions of recusal that are based on religious beliefs are particularly, if not uniquely, complicated. In many other circumstances where recusal is required or warranted, the law attaches a presumption that certain interests of the judge necessarily preclude him or her from deciding a case with the requisite degree of open-mindedness (for example, where the judge has some economic interest in the outcome of the case or where the judge or members of his or her family are related to the litigants). There is no such presumption attached to a judge's religious beliefs and there almost certainly, as a matter of both constitutional principle and political morality, should not be one. In part, this is probably because there is less agreement in our political culture on how religious beliefs, as opposed, for example, to beliefs about money or familial relationships, are held by people and the importance that those beliefs have in terms of how people act and think. What if every devout Catholic judge believed that a theological gun were pointed at her head and was set to go off and excommunicate her (and, perhaps, dispatch her to eternal damnation) if she followed the law and decided a case in a way which conflicted with Church doctrine? I suspect that most people would agree with Garvey and Coney that no devout Catholic judge should sit in a case under these circumstances.²³

difficult task. The party seeking recusal, and the judge himself, might be put in the rather delicate position of determining not only the objective content of the doctrine, but the degree to which the judge is committed to it. As Judge Noonan recently noted in the course of explaining his decision not to recuse himself from a case involving protests at a clinic where abortions were performed, any distinction between "firmly held" and "lukewarmly maintained" religious beliefs is likely to be, and for Noonan was, quite unworkable. *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399 (9th Cir. 1995).

22. Garvey and Coney acknowledge that "the authoritative force of Catholic teaching on church members [is a] fairly complex" subject. Garvey & Coney, *supra* note 6, at 314. For reasons I shall note, I think I find the subject even more complex than they do.

23. One might infer from Garvey's and Coney's analysis that they believe this is the position that most devout Catholic judges are in (or ought to view themselves as in) with respect to the death penalty. I should note that they do recognize that "even among Catholics of this [orthodox] description there may be some differences of opinion" about what the Church doctrine requires. Garvey & Coney, *supra* note 6, at 344. And there may well be evidence that would support such a belief. One example may be the position that

It is hard for me to assess the extent to which this situation fairly describes the position of the "average" devout Catholic judge called on to preside over prosecutions under the federal "drug kingpin" or similar statutes. However, I suspect that it does not describe the position of many such judges. As a threshold issue, I believe it is the case, as apparently do Garvey and Coney,²⁴ that the Church's anti-capital punishment doctrine is not infallible. As noninfallible teaching, its authoritative or binding status is not absolute in the sense that one could still be considered a "good Catholic" (i.e., at a minimum, not subject to excommunication) if one acted in contradiction to the Church's teachings.²⁵ Moreover, I suspect that many people in Judge Smith's position have a much more complicated and nuanced view of the proper relationship of their religious convictions to their official responsibilities.²⁶

some American Catholic Church leaders took in response to Catholic public officials who expressed their sense of obligation to enforce laws protecting a woman's abortion rights. See Ari L. Goldman, *O'Connor Warns Politicians Risk Excommunication Over Abortion*, N. Y. TIMES, June 15, 1990, at A1 (discussed in John Garvey, *The Pope's Submarine*, 30 SAN DIEGO L. REV. 849, 851 (1993)). Based on discussions I have had with Catholic colleagues and friends, however, my sense is that the Church's official position on the obligation of public officials to follow noninfallible Church teachings is a quite complicated issue as to which there is considerable debate and disagreement. Of course, even if the Church does not require it of her, any Catholic judge who accepts the Church's teaching as authoritative and binding upon her personal and official conduct and who feels obliged to ignore the law and enforce the Church's political morality probably ought to recuse herself, either under the recusal statutes or principles drawn from judicial ethics and due process.

24. Garvey and Coney seem to agree that Catholic teaching on capital punishment is not infallible. They note that infallible teachings must be formally identified as such and that "the Pope's encyclical does not display the kind of clear intention that accompanies infallible pronouncements." Garvey & Coney, *supra* note 6, at 315. Indeed, while passages from Pope John Paul II's treatment of the issue in *EVANGELIUM VITAE* certainly suggest the seriousness and importance of the teaching, see, e.g., *EVANGELIUM VITAE* § 57 (May 3, 1983), they do not seem to bear the characteristics required for infallibility. Nonetheless, Garvey and Coney argue that this teaching is "entitled to serious respect from church members." Garvey & Coney, *supra* note 6, at 316. It is hard to tell whether they believe that the Church's teaching on capital punishment should be regarded as if it were infallible.

25. It is my understanding that the noninfallible teachings of the Church are, as a matter of Church doctrine and tradition, to be taken seriously and respectfully and are entitled to considerable, and perhaps even presumptive, deference. But individual Catholics are morally entitled to dissent from non-infallible teachings, although there appears to be a lack of consensus on how this can be done responsibly. On the complexities of attributing moral or legal status to noninfallible Church teachings, see JOHN GALLAGHER, *THE BASIS FOR CHRISTIAN ETHICS* (1985); JAMES HEFT, *THE RESPONSE CATHOLICS OWE TO NONINFALLIBLE TEACHINGS*, in *RAISING THE TORCH OF GOOD NEWS* 105 (Bernard Prusak, ed. 1986).

26. Garvey and Coney note that some devout Catholic judges will have real difficulty sorting out their duties to Church and secular law where the two conflict. Garvey & Coney,

Indeed, I suspect that many judges would reach a conclusion similar to that reached by Federal District Judge Marion Callister who was asked to recuse himself in a case challenging the validity of Idaho's ratification of the Equal Rights Amendment. The motion for recusal was premised on the fact that Judge Callister was not only a member, but also a "Regional Representative" of the Church of Jesus Christ of Latter-day Saints (Mormon), whose leadership had publicly announced its opposition to the ERA.²⁷ In rejecting the recusal motion, Judge Callister emphasized the nation's tradition of viewing religion and government as operating in "separate spheres."²⁸ He also acknowledged that as a member of the Church, he had "undertaken the obligation to live the Christian doctrines as they are taught by the church, to assist the church in teaching these doctrines[,] and to help provide for the temporal and spiritual needs of those belonging to the church,"²⁹ He further noted that "religious societies have never claimed, nor have they been given, the right to interfere with the relationship between governments and their citizens."³⁰ Judge Callister had not publicly expressed any position, nor had he engaged in any

supra note 6, at 346-47.

What should a judge do if she has not fully worked out the nature of her religious beliefs and their relationship to the performance of her official function, but is uneasy about whether and the extent to which her strongly held religious convictions might effect her ability to follow the law? At one time, the recusal statutes were understood to incorporate a "duty to sit" on an assigned case, which was understood to militate against recusal where no valid legal reason for recusal could be established. *See, e.g., Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964). When 42 U.S.C. § 455(a) was enacted, it apparently was intended to do away with this rule, with the effect of advising judges to disqualify themselves in "close" cases, *Idaho v. Freeman*, 507 F. Supp. 706, 722 (D. Idaho 1981), although some courts continue to apply a "limited version" of it. *Flamm, supra* note 11, at 615-18. In my view, if the judge harbors substantial doubt, and perhaps where the judge concludes that the parties might reasonably believe that she harbors such doubt, the judge ought to recuse herself. This raises the question of whether a judge has a moral or ethical duty to advise the parties of her doubt. While it may be the case that mere uneasiness or squeamishness on the judge's part should normally not justify or require recusal, *see, e.g., McGough v. McGough*, 252 So. 2d 646 (Ala. Ct. App. 1970) (*cited in Flamm, supra* note 11, at 618), a judge should at least have reasonable confidence in her ability to follow the law.

27. Judge Callister denied the plaintiffs' original motion to recuse, brought pursuant to 28 U.S.C. § 455(a). *Idaho v. Freeman*, 478 F. Supp. 33 (D. Idaho 1979). He later denied a second motion to recuse, in which the plaintiffs alleged, *inter alia*, that "[t]he Church considers its position on the ERA to be of the utmost importance and those who back the ERA are subject to sanctions, including excommunication, as is evidenced by proceedings taken against the leader of the group 'Mormons for ERA.'" *Idaho v. Freeman*, 507 F. Supp. 706, 729-30 (D. Idaho 1981).

28. *Freeman*, 478 F. Supp. at 36.

29. *Id.*

30. *Id.*

demonstrations or political activity, concerning the ERA, and he noted that Mormon leaders had always taught that the principles and ideals which the Church endorsed and taught "can only be implemented when a majority of the people wish to implement them."³¹ Finally, Judge Callister observed that "the church has never taught either that it has any place influencing judges in the interpretation of the laws, or that a judge's religious beliefs take precedence over his sworn duty to uphold the Constitution and laws of the United States," and that "as a judge, I have no obligation to the church to interpret the law in any manner other than that which is required under the Constitution and the oath which I have taken."³²

Judge Callister's observations represent responses to several of the questions I identified earlier as bearing importantly on the issue of recusal. If we take his observations at face value,³³ they would seem clearly to justify his position against recusal. If our hypothetical Judge Smith were to reach similar conclusions in deciding whether to recuse himself from participation in a capital case, a similar result would be warranted.³⁴ This is not to say that every devout Catholic judge would or should necessarily reach the same conclusion.³⁵ The question of

31. *Id.* at 37.

32. 507 F. Supp. at 710-11.

33. Some of Judge Callister's observations were based upon facts that presumably would have been subject to verification. The principles and teachings of the Mormon Church might also be scrutinized, although such an inquiry could prove to be problematic on a number of grounds. The judge did not offer any comments on whether and to what extent he, as a Mormon or otherwise, agreed or disagreed with the ERA. Presumably he had concluded that his personal beliefs would not interfere with his ability to impartially adjudicate the case.

The *Freeman* case was the subject of considerable controversy, both inside and outside the government. A number of United States Senators wrote to the Department of Justice asking that it abandon the recusal attempt, and the government did not appeal Judge Callister's recusal decision. See, *Freeman*, 507 F. Supp. at 711-12 n.2 (setting out Solicitor General McCree's memorandum of decision explaining the basis for the government's decision not to appeal). See generally Senator Jake Garn & Lincoln Oliphant, *Disqualification of Federal Judges Under 28 U.S.C. § 455(a): Some Observations on and Objections to an Attempt by the United States Department of Justice to Disqualify a Judge on the Basis of His Religious and Church Position*, 4 HARV. J. L. & PUB. POL'Y 1 (1981).

34. Whether similar conclusions would be warranted, of course, would be difficult to determine. Questions that would need to be explored may include: whether the Catholic Church maintains the same "separate spheres" distinction between church and state that Judge Callister attributed to the Mormon Church (or whether the judge believes it does); whether the Catholic Church teaches that a judge's religious beliefs must be subordinated to the judge's official responsibility and, if not, whether the judge accepts the Church's position.

35. In their discussion of recusal under the "appearance of impartiality" standard embodied in 28 U.S.C. § 455(a), Garvey and Coney recognize that even some "orthodox" Catholic judges might disagree about whether, notwithstanding the Church's injunction

recusal should not be made to turn solely on a judge's membership in a faith community,³⁶ nor on the official teachings of the Church or on the attitude of any single judge toward those teachings.³⁷ Unless one assumes that every devout Catholic judge necessarily believes that, and will act as if, he or she is under the theological gun, any generalized claims about the duty to recuse in capital cases should be received with some skepticism.

By way of conclusion, I think it worth recalling an exchange that took place between Senator Strom Thurmond and Stephen Breyer during Breyer's confirmation hearings before the Senate Judiciary Committee. Responding to Thurmond's question regarding his views on the death penalty, Breyer stated:

Senator, if a judge has strong personal views on a matter as strong as the death penalty, views that he believes might affect his decision in such a case, he should perhaps, if they are very

against capital punishment, they are bound by a conception of role morality to impose the death penalty. They also properly warn against the risks associated with making easy "sociological claims about who is a Catholic, or what Catholics think and do." Garvey & Coney, *supra* note 6, at 345-46. The apparent diversity of thought and belief within at least the American Catholic Church might well suggest that even some "non-orthodox" Catholic judges might have even greater scruples against participating in the enforcement of the death penalty than their otherwise more orthodox colleagues.

36. As Judge Leon Higginbotham has so eloquently put it, "[i]t would be a tragic day for the nation and the judiciary if a myopic vision of the judge's role should prevail, a vision that required judges to refrain from participating in their churches, in their nonpolitical community affairs, in their universities." *Pennsylvania v. Local Union 542, Int'l Union of Operating Engineers*, 388 F. Supp. 155, 181 (E.D. Pa. 1974).

37. Garvey and Coney acknowledge the importance of this point with respect to recusal under 28 U.S.C. § 455(a), but apparently not to recusal under Section 455(b)(1), where I believe it is also relevant. (Imagine, for example, an appellate court deciding whether a devoutly Catholic judge committed error in refusing to recuse himself in a motion filed pursuant to Section 455(b)(1)).

In this regard, a determination of recusal under 28 U.S.C. § 455(a) could well be more complicated than a determination under Section 455(b)(1). As noted earlier, the former provision embodies an "appearance of impartiality" standard which is not dependent, as is the latter provision, on a finding of actual bias. Garvey and Coney conclude that a Section 455(a) motion to recuse should, as a general matter, be denied if based exclusively on the judge's membership in the Catholic Church. Garvey & Coney, *supra* note 6, at 344-46. Because of what I take to be the complexity of Catholic doctrine and the diversity of thought and belief among Catholics (as well as for the constitutional concerns they discuss), I am inclined to agree with them. However, a more difficult problem would be presented if a judge belonged to a religious community whose recognized, authoritative doctrine unalterably opposed capital punishment, and whose official doctrine required profound sanctions against even public officials who disregard that doctrine. In such a case, a judge might well properly conclude that, regardless of whether he or she has accepted and internalized the doctrine or is prepared to violate it, a reasonable person could believe that he or she could not be impartial.

strong . . . you might take yourself out of the case. I have no such personal view in respect of the death penalty."³⁸

Breyer elsewhere observed:

[T]he only time in which [subjective belief] enters is if you think the law is one way and you think your own subjective belief is the other way, and you feel that you cannot follow what you believe the law to be because of your subjective belief, then don't try, don't try. You can remove yourself from the case. . . .³⁹

One would, I think, certainly want to include (at least some, and perhaps especially devout) religious views in the category of "strong personal views." Whether they constitute "subjective beliefs," in the ordinary sense in which Justice Breyer probably intended, is a question that deserves a good deal of thought, as does the question of whether they operate on those who hold them differently than do other sorts of beliefs that are normally thought to implicate the issue of recusal.⁴⁰ And whether religious beliefs pose, as a general matter, special problems for theories of judging is itself an important issue that has been the subject of some dispute,⁴¹ as many of the other contributions to this symposium attest.

Professor Garvey and Ms. Coney have done an impressive job of focusing attention on the particular, and in some ways perhaps even unique, dilemmas which face judges whose religious convictions might interfere with their ability to determine the law and apply it "faithfully" and impartially to the parties that come before them. They conclude that the religious scruples that a devout Catholic judge will most

38. *Excerpts from Senate Hearings on Supreme Court Nominee*, N. Y. TIMES, July 13, 1994, at A16.

39. Federal News Service, July 13, 1994, Capitol Hill Hearing, Hearing of the Senate Judiciary Committee, Supreme Court Confirmation Hearing for Judge Stephen G. Breyer, cited in Ori Leve, *Personal Morality and Judicial Decision-Making in the Death Penalty Context*, 11 J. LAW & RELIG. 637, 640 (1994-95).

40. As I have suggested, where the authoritativeness and bindingness of a belief is importantly dependent on the consequences that one's faith community attaches to non-adherence, the "subjectiveness" of the belief can be an especially complex, which is not necessarily to say a unique, question. I note in passing that at least two treatises dealing with the problem of recusal do not treat a judge's religious convictions as a matter worth either distinct or extensive discussion. See Flamm, *supra* note 11; JEFFREY M. SHAMAN, ET AL., JUDICIAL CONDUCT AND ETHICS (1995).

41. See, e.g., Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989) (criticizing the notion that theories of judging should treat a judge's religious convictions differently from a judge's non-religiously based moral convictions); Scott Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433 (1993).

probably possess should almost always⁴² foreclose participation in legal proceedings which could result in a death sentence. Their analysis provides good reasons to be persuaded that a judge who holds the particular religious scruples they appear to hold should not sit in such cases. The extent to which their more general arguments about religion and recusal are as persuasive is, it seems to me, a bit more problematic.

42. The situations where Garvey and Coney believe that recusal is not indicated, at least in capital prosecutions under the statutes they discuss, include where a judge is called upon to preside over only the guilt-determination phase of the prosecution; where a judge collaterally reviews at least some challenges to a capital sentence; and where an appellate judge is called upon to review the conviction of guilt, but not the imposition of the death penalty. Garvey & Coney, *supra* note 6, at 324-25, 326-29, 329-31.

