Notre Dame Law School
NDLScholarship

Scholarly Works | Faculty Scholarship

1998

Catholic Judges in Capital Cases

Amy Coney Barrett
Notre Dame Law School, abarrett@nd.edu

John H. Garvey

Follow this and additional works at: http://scholarship.law.nd.edu/law_faculty_scholarship

Part of the Ethics and Professional Responsibility Commons, and the Judges Commons

Recommended Citation
Barrett, Amy Coney and Garvey, John H., "Catholic Judges in Capital Cases" (1998). *Scholarly Works.* Paper 527.
http://scholarship.law.nd.edu/law_faculty_scholarship/527

This Article is brought to you for free and open access by the Faculty Scholarship at NDLScholarship. It has been accepted for inclusion in Scholarly Works by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

CATHOLIC JUDGES IN CAPITAL CASES

JOHN H. GARVEY*

AMY V. CONEY**

Here is an interesting cultural collision. The death penalty is back in fashion in our legal system. Congress has created more than sixty new capital crimes. The Attorney General has used the new laws to prosecute Timothy McVeigh and Theodore Kaczynski. The federal courts have lost some of their authority to review state executions. The Catholic Church, with no sense of timing (or a fine sense of urgency), has picked this moment to launch a campaign against capital punishment. This puts Catholic judges in a bind. They are obliged by oath, professional commitment, and the demands of citizenship to enforce the death penalty. They are also obliged to adhere to their church's teaching on moral matters.

The legal system has a solution for this dilemma—it allows (indeed it requires) the recusal of judges whose convictions keep them from doing their job. This is a good solution. But it is harder than you think to determine when a judge must recuse himself and when he may stay on the job. Catholic judges will not want to shirk their judicial obligations. They will want to sit whenever they can without acting immorally. So they need to know what the church teaches, and its effect on them. On the other hand litigants and the general public are entitled to impartial justice, and that may be something that a judge who is heedful of ecclesiastical pronouncements cannot dispense. We need to know whether judges are sometimes legally disqualified from hearing cases that their consciences would let them decide.

We talk specifically about Catholic judges, but they are not alone in facing this difficulty. Quakers have opposed capital punishment in this country since its founding. The Church of the Brethren has long espoused the same pacifist ideal. The Union of American Hebrew Con-

---

* Professor, Notre Dame Law School.

** Law Clerk to Judge Laurence H. Silberman, U.S. Court of Appeals for the D.C. Circuit. We would like to thank a number of people for their advice on this paper. They include Michael Baxter, C.S.C., John Cavadini, John Finnis, Cathy Kaveny, William Kelley, Edward A. Malloy, C.S.C., John Noonan, John Robinson, Patrick Schiltz, Tom Shaffer, Phillip M. Thompson, Mark Tushnet, Robert Tuttle, and Todd Whitmore.

gregations, in common with a large number of liberal Protestant groups, has spoken out against the death penalty during much of this century. Unitarians and Universalists did so both before and after their merger in 1961.[1] And of course there may be any number of judges who believe in no God at all who would nevertheless have insurmountable conscientious problems with enforcing the death penalty. We focus on Catholic judges not because their church has set a better example, but because it is the one we belong to. So do a large number of judges. It is hard to get an exact figure, but it appears that as many as one-fourth of all federal judges may be Catholic.[2] Moreover, although there has been some variation in Catholic teaching about the death penalty over the years, the pope and the American bishops have recently offered clear and forceful denunciations that have drawn considerable public attention.

To simplify our exposition we also focus on federal judges, and this requires a little explanation. Historically the states have been more enthusiastic about capital punishment than the federal government. Of the 4,116 people executed (outside the military) since 1930, only thirty-three have been federal prisoners—none since 1963.[3] But federal inclinations are changing fast. In 1988 Congress passed the "drug kingpin" statute (the Anti-Drug Abuse Act).[4] Through May 1995 the government had asked for death sentences under that law in forty-six cases—six or seven a year.[5] In 1994 Congress passed the Violent Crime Control

1. A useful collection of statements by these and other bodies can be found in THE CHURCHES SPEAK ON: CAPITAL PUNISHMENT (J. Gordon Melton, ed., 1989).

2. A National Law Journal survey of 348 state and 57 federal judges done in 1987 reports that 29% identified themselves as Catholic. Ellen L. Rosen, *The Nation's Judges: No Unanimous Opinion*, NAT'L L.J., Aug. 10, 1987, at S18. Lucy Payne, associate librarian in the Notre Dame Law Library, has searched individual biographies of federal judges and concluded that the figure is about 25%. Ms. Payne reviewed entries in the Marquis Database on Westlaw, American Bench 1995-96, and the Almanac of the Federal Judiciary. She also consulted faculty members about the religious affiliation of judges they knew personally. Using the 1151 entries in the Almanac as her base number, she confirmed that 180 are Catholic, and at least 109 others may be—a proportion that comes to 25.1%.

3. *Capital Punishment 1994*, BUREAU OF JUST. STAT. BULL. 10 (Feb. 1996). George Kannar, *Federalizing Death*, 44 BUFF. L. REV. 325, 329 (1996). Harry Blackmun was the last judge to pass on that prisoner's execution. Feguer v. U.S., 302 F.2d 214 (8th Cir. 1962).

4. 21 U.S.C. § 848 (1997). In the years following *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), Congress allowed death penalty statutes to languish on the books rather than revise them to comply with new constitutional requirements. The Anti-Drug Abuse Act thus in effect "reinstated" the federal death penalty.

5. Kannar, *supra* note 3, at 327. *See, e.g.*, United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996); United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), *cert denied*, 117 S. Ct. 87 (1996); Chandler v. United States, 996 F.2d 1073 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2724 (1994); United States v. Tidwell, 1995 U.S. Dist. LEXIS 19153 (E.D. Pa. Dec. 22, 1995);

and Law Enforcement Act, which added about sixty new federal capital crimes.[6] Of course federal judges encounter the death penalty most often in habeas review of state cases, and here Congress has recently *reduced* their role—so that state prisoners cannot delay execution by filing repeated petitions. The Antiterrorism and Effective Death Penalty Act of 1996[7] will prevent a certain amount of this, but it is less radical than some suppose. Federal judges will still see a fair number of state capital cases.

So federal judges do less capital sentencing than state judges. But they are getting more active. And the "drug kingpin" law contains a recent, detailed set of procedures for death cases that will help us explain the various roles judges may play. Finally, the federal recusal statute, substantially amended in 1974, is as good a law as anything the states have to offer for addressing this problem. Our conclusions would not be different if we were to focus on state judges—indeed, we hope to have most influence on that level. We have chosen to state our case in federal terms in order to make it as accessible as possible.

To anticipate our conclusions just briefly, we believe that Catholic judges (if they are faithful to the teaching of their church) are morally precluded from enforcing the death penalty. This means that they can neither themselves sentence criminals to death nor enforce jury recommendations of death. Whether they may affirm lower court orders of either kind is a question we have the most difficulty in resolving. There are parts of capital cases in which we think orthodox[8] Catholic judges

---

United States v. Perry, 1994 U.S. Dist. LEXIS 20462 (D.C. Jan. 11, 1994).

6. Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Charles Kenneth Eldred, Note, *The New Federal Death Penalties*, 22 AM. J. CRIM. L. 293 (1994).

7. The Antiterrorism and Effective Death Penalty Act of 1986, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

8. We have had some difficulty in choosing an adjective that means nothing more nor less than "faithful to the teaching of the church on the subject of capital punishment." The word "observant" has something to recommend it, though in ordinary Catholic circles it is likely to signify someone who regularly receives the sacraments and observes the rituals of the church. "Orthodox" has several misleading connotations. One is that it is also used to designate particular sects, like those eastern churches (Russian Orthodox, Greek Orthodox) not in communion with Rome. Though there is a division of opinion among the members of the Roman Catholic Church on the subject of capital punishment, we do not wish to imply that it has led to the formation of camps, branches, or sects within the church. "Orthodox" has also been used in a sociological sense by writers like James Davison Hunter to signify a kind of religious conservatism (its antonym is "progressive"). JAMES DAVISON HUNTER, CULTURE WARS 43-46 (1991). Opposition to capital punishment is not a trait characteristic of this group. Above all we do not wish to imply that one's orthodoxy (or heterodoxy) with regard to this point of doctrine entails anything about the soundness of one's judgment or

may participate—these include trial on the issue of guilt and collateral review of capital convictions. The moral impossibility of enforcing capital punishment in the first two or three cases (sentencing, enforcing jury recommendations, affirming) is a sufficient reason for recusal under federal law. But mere identification of a judge as Catholic is not a sufficient reason. Indeed, it is constitutionally insufficient.

I. CATHOLIC TEACHING ABOUT CAPITAL PUNISHMENT

In the last twelve years there has been an explosion of thought about the role of religion in our law and politics.[9] On the whole this work has been very beneficial. It has led to a deep and sympathetic understanding of a very serious issue. One shortcoming of this body of writing is that the treatment of religion has been fairly abstract and general. It will not suffice to discuss our problem on that plane. Catholic teaching about capital punishment is fairly complicated. Furthermore, it is not possible to say, as some might suppose, that members of the Catholic Church are simply bound by their faith to follow the Church's teaching on this issue. And even if they were, the prohibition against capital punishment has different implications for people acting in different roles. Though one might say that it was simply and unqualifiedly wrong to flip the switch or pull the trigger that kills a human being, this is not what judges do. Judges cooperate in many ways more or less direct with that evil act, and their participation in some of these ways is permissible, even commendable. In the first half of our paper, we will examine some of these complications.

A. Teaching About Capital Punishment

In modern Catholic teaching, capital punishment is often condemned along with other practices whose point is the taking of life—abortion, euthanasia, nuclear war, and murder itself. It is sometimes said that consistency requires no less—that respect for life in all these cases is a seamless garment.[10] Human beings are created in the image and likeness of God, and "[h]uman life is thus given a sacred and invio-

---

religious behavior in other areas. By "orthodox Catholic" in the context of our subject we mean simply one who holds as correct the teaching of the church's magisterium about capital punishment.

9. It started with Kent Greenawalt's Cooley Lectures at the University of Michigan Law School, published as *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985).

10. The metaphor is Cardinal Joseph Bernardin's. JOSEPH BERNADIN, CARDINAL BERNADIN'S CALL FOR A CONSISTENT ETHIC ON LIFE (1983), *reprinted in* 13 ORIGINS 491 (1983).

lable character, which reflects the inviolability of the Creator himself."[11] That seems to make things pretty simple. It is a good rule of thumb to say, "No killing. Period." But a more precise statement of the church's teaching requires a few qualifications. The prohibitions against abortion and euthanasia (properly defined) are absolute; those against war and capital punishment are not.

There are two evident differences between the cases. First, abortion and euthanasia take away innocent life. This is not always so with war and punishment. Second, in cases of aggression it may be impossible to avoid the taking of life. Sometimes the only way to save the victim is to do what will in fact kill the aggressor. Let us consider how these differences affect the church's position on capital punishment.

1. Guilt and Retribution

We might distinguish between executing criminals and killing the aged and the unborn in this way: criminals deserve punishment for their crimes; aged and unborn victims are innocent. The church certainly teaches that criminals deserve punishment. In his recent encyclical, *Evangelium Vitae*, Pope John Paul II says that the

> primary purpose of the punishment which society inflicts is "to redress the disorder caused by the offense." Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime, as a condition for the offender to regain the exercise of his or her freedom.[12]

When X commits a crime the government should "redress the disorder" ("redress the violation") by punishing him. But is death a proper redress?

That depends on what balance or disorder we are trying to redress. In Catholic teaching the desire to get even—to take revenge, to appease one's anger—is not a permissible reason for acting. If it were it might justify execution, because the proper measure would be the feelings of those concerned about the victim, and they might be satisfied with no less. But the gospel teaches that it is wrong to act out of hatred, to answer evil with evil. When the pope speaks of the need for redress, he has in mind a requirement of justice. We who live in society accept con-

---

11. John Paul II, EVANGELIUM VITAE § 53 (1995). *Cf. Genesis* 1:26-28.

12. EVANGELIUM VITAE § 56, quoting CATECHISM OF THE CATHOLIC CHURCH ¶ 2266 (1994). This section of the Catechism was revised in 1997 to conform more closely with *Evangelium Vitae*. We explain the changes *infra* at notes 33-35.

straints on our own actions out of consideration for other people and for the good of society. It might serve my purposes to knock you down and take your car, but I subscribe to a set of laws that forbid me to do that. The criminal who engages in car-jacking, however, cheats on rules that the rest of us obey, and seizes "more than [his] fair share of the liberty to do as one pleases. This overreaching requires steps to restore a just balance between criminals and law-abiding people."[13] This is why fines and imprisonment are appropriate means of punishment: a fine diminishes the criminal's assets and so his opportunities for choice, and prison directly restrains his liberty.

But what about taking his life, as he has taken the life of his victim? This misstates the relevant comparison. As John Finnis points out,

> the "law of talion" (life for life, eye for eye, etc.) misses the point, for it concentrates on the material content or consequences of criminal acts rather than on their formal wrongfulness (unfairness) which consists in a will to prefer unrestrained self-interest to common good, or at least in an unwillingness to make the effort to remain within the common way.[14]

The measure of guilt is not the harm done to the victim (though that should certainly be repaired, if it can) but the selfish will of the criminal. There should doubtless be some proportion between the criminal's bad will and the severity of his punishment, but the theory of retribution does not permit us to be more specific. It does not justify capital punishment. Neither does it rule it out.

For the Christian, though, there are reasons to limit the measure of retribution. First, there is the belief that each person is made in the image and likeness of God. This is no less true of those who have broken the law than of those who have kept it. Recognizing this dignity "should make us unwilling to treat the lives of even those who have taken human life as expendable."[15] Second, though the case of criminals is different from the unborn, the aged, and the infirm, rejecting the death penalty "removes a certain ambiguity which might otherwise affect the witness that we wish to give to the sanctity of human life in all its stages."[16] It makes a more convincing case against abortion and euthanasia if we can say in an unqualified way that God alone is the Lord of

13. GERMAIN GRISEZ, 2 THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE 891 (1993); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 262-263 (1980).

14. FINNIS, *supra* note 13, at 264.

15. U.S. CATHOLIC CONFERENCE, U.S. BISHOPS' STATEMENT ON CAPITAL PUNISHMENT ¶ 11 (Nov. 1980).

16. *Id.* at ¶ 12.

life. Third, and most important, rejection of the death penalty is most consistent with the example of Jesus, who taught and practiced that we should love our enemies.[17]

2. Incapacitation and Deterrence

Let us turn now to the second difference that we observed between capital punishment and abortion or euthanasia. A thoroughly consistent respect for human life can create real dilemmas. It may happen, for example, that the only way to stop an aggressor from taking one's own life is to take his instead. The church teaches that if one acts with the intention of stopping such an attack, and uses only such force as is necessary for doing so, one shows a proper respect for life.[18] The same principle applies to the defense of others entrusted to one's care—a parent protecting his or her children, for example.[19] And in traditional Catholic teaching the principle has sometimes been extended to the death penalty. Consider what the 1994 edition of the Catechism of the Catholic Church had to say:

> Preserving the common good of society requires rendering the aggressor unable to inflict harm. For this reason the traditional teaching of the Church has acknowledged as well-founded the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty. . . .
>
> If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.[20]

There is some ambiguity here about just what it is that the death penalty defends us against. There is a clear suggestion that it may sometimes be necessary to incapacitate the criminal ("defend human lives against an aggressor"), as the police may be obliged to use lethal force against attacking felons. The phrase "protect public order and the

17. *Id.* at ¶ 13; *Matthew* 5:44.

18. THOMAS AQUINAS, 3 THE SUMMA THEOLOGIAE IIaIIae, Q. 64, a.7 (Fathers of the English Dominican Province trans., 1981).

19. CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2265, 2309 (1994).

20. *Id.* at ¶¶ 2266-2267. *Cf. supra* note 18, at Q. 25, a.6; Q. 64, a. 2.

safety of persons" is more uncertain. Some say we must execute murderers to deter others from acting likewise. Standing alone, this is not an argument that Catholics can accept. The appeal to general deterrence is a claim that we should do evil for the good that may come of it, and that is an impermissible suggestion.[21] Perhaps if there is some other justification for punishing the criminal in this way (retribution, for example), the likelihood of deterrence would be an additional reason for going to that extreme.

The modern Catholic opposition to the death penalty has been driven by the conviction that neither of these arguments about the defense of society—the need for incapacitation and deterrence—is persuasive in developed countries. The Pontifical Commission for Justice and Peace, which studied the question at the request of the American Catholic bishops, concluded in 1976 that "There is no convincing evidence to support the contention that [the death penalty] is exemplary or, in modern terms, a deterrent. [Therefore] it can be concluded that capital punishment is outside the realm of practicable just punishments."[22] Four years later the National Conference of Catholic Bishops issued a Statement on Capital Punishment which concluded "that in the conditions of contemporary American society, the legitimate purposes of punishment do not justify the imposition of the death penalty."[23] Like the Pontifical Commission, the bishops stressed the lack of evidence to prove that occasional executions have any general deterrent effect. They did not gainsay the importance of protecting society from violence. But, they said, the legal process that must precede an execution is long and complex, so it is not a very effective means of preserving order in times of civil disturbance. All in all, given "its nature as legal penalty and . . . its practical consequences, capital punishment is different from the taking of life in legitimate self-defense or in defense of society."[24] The bishops were less dogmatic in their pronouncement than they sometimes are. The Statement was adopted by a vote of 145 to 31, with 41 abstentions. It closed with a recognition that many citizens sincerely believe in capital punishment: "nor is this position incompatible with

---

21. M.B. Crowe, *II Theology and Capital Punishment*, 31 IRISH THEO. Q. 99, 112 (1964); Germain G. Grisez, *Toward a Consistent Natural-law Ethics of Killing*, 15 AM. J. JURIS. 64, 70-71 (1970).

22. *The Church and the Death Penalty* (1976) (emphases omitted), *reprinted in* 6 ORIGINS 389, 391 (1976).

23. UNITED STATES CATHOLIC CONFERENCE, *supra* note 15, at ¶¶ 8-9.

24. *Id.* at ¶ 8.

Catholic tradition."[25]

When Pope John Paul II addressed the subject in his 1995 encyclical *Evangelium Vitae*, he was not so hesitant. He said:

> [T]here is a growing tendency, both in the Church and in civil society, to demand that [the death penalty] be applied in a very limited way or even that it be abolished completely. . . . [T]he nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.[26]

The pope did not clarify exactly what *would* count as a case where the death penalty was justified. The first example that comes to mind is a society where murderers cannot be kept securely in custody for the duration of their terms. That is not the United States, where people rarely escape from federal prison.[27] And even if it were true in (say) New Mexico because its state prisons were (let us suppose) obsolete and poorly guarded, one might justifiably argue that New Mexico could not avoid its moral obligations by under-funding its penal system. It might be different if the New Mexico economy were so primitive that it could not afford to build and maintain a modern prison system, but that is not the case. This argument—the failure of incapacitation—is one that will work only in parts of the world far less developed than the United States.

A second example that comes to mind is one in which imprisonment is not an effective specific deterrent—such as murder by a prisoner already serving a life sentence.[28] The pope's encyclical speaks of the impossibility of "defend[ing] society." Murderous prisoners, because they are in prison, do not pose a threat to society as such. Their victims are guards and other prisoners. The pope probably did not mean to suggest

---

25. *Id.* at ¶ 22.

26. EVANGELIUM VITAE *supra* note 11, at §56 (emphasis omitted).

27. The Federal Bureau of Prisons reports that in fiscal 1994 only one prisoner escaped from a federal correctional facility; in 1995 the number was six. (The Bureau distinguishes escapes from "walk-aways" and "AWOLs"—the loss of control over prisoners in looser forms of custody.) BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995, Table 6.56 (1996) (visited Mar. 1, 1998) <http://www.albany.edu /sourcebook/1995/tos'_6.html#6_S>.

28. EDWARD A. MALLOY, C.S.C., THE ETHICS OF LAW ENFORCEMENT AND CRIMINAL PUNISHMENT 88 (1982).

that capital punishment could be imposed if it would save many lives ("society"), but not if it would save only a few (guards and prisoners). If the Church rejects the death penalty for murderers already serving life sentences, the more likely explanation would be that it does not work or that there are alternatives (better security before the fact, increased punishments like solitary confinement after the fact) that do.[29]

The third sort of exception to the presumptive rule against capital punishment—the most obvious meaning of "defend[ing] society"—may be the case where crime threatens the stability of the political order. Karl Barth, though in principle opposed to capital punishment, argued that it was called for in cases of high treason in wartime.[30] John Langan, S.J., has suggested that when the pope spoke of defending society he may have been thinking of countries like Colombia where the democratic process is seriously threatened by crime on a large scale.[31] Perhaps the implication is that the state can be made secure only by reducing the number of gang lords and their soldiers rather than incarcerating them. A sufficiently large and well organized criminal element could infiltrate, intimidate, and overpower courts, police, prosecution, and prisons. Better, therefore, to kill those who commit murder.

This example, like the first one, does not fit the United States very well. The United States is unusually violent for a developed nation. Its large cities have gangs that engage in drug trafficking, mayhem, and murder. These criminal organizations, for the most part unconnected with one another, do not threaten the stability of the federal or state governments. They do make life in urban neighborhoods hazardous and unpleasant. But it is seldom suggested that the murderers among them be executed in order to reduce the criminal element to manageable size. Some say the death penalty should be imposed because gang members

---

29. The 1976 statement by the Pontifical Commission for Justice and Peace hints at the first point. In the course of its argument that executions do not deter, the Commission cited a study purporting to show that this was true even for those who murdered policemen. *The Church and the Death Penalty, supra* note 22, at 391. Edward Malloy argues that it is psychologically improbable, given the barbarous conditions of prison life, that the threat of death at the hands of the state looms large in prisoners' deliberations. MALLOY, *supra* note 28, at 88. One can even imagine a life prisoner committing murder in order to end a sentence that he was finding unendurable.

30. III KARL BARTH, CHURCH DOGMATICS 448 (Part 3, 1960). Barth's reason is that the traitor, by endangering his country, has "forfeited his right to live in this community and therefore to be rightly subject to death[.]" *Id.* Such arguments about desert do not fit very comfortably with the Catholic approach to capital punishment.

31. John Langan, S.J., *Situating the Teaching of John Paul II on Capital Punishment: Reflections on* Evangelium Vitae *in* CHOOSING LIFE 210, 221 (Kevin W. Wildes, S.J. & Alan C. Mitchell eds., 1997).

who murder deserve it. That argument is foreclosed by Catholic teaching on the subject. Some say we should impose it because that is the only way to deter urban crime. But there is no reason to think that urban criminals are peculiarly susceptible to deterrence. The argument probably works no better here than it does elsewhere.

The almost unqualified condemnation of capital punishment announced by the pope in *Evangelium Vitae* led this year to a change in the language of the Catechism that we quoted above.[32] It now reads this way:

> Assuming that the guilty party's identity and responsibility have been fully determined, the traditional teaching of the church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor.
>
> If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person.
>
> Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitively taking away from him the possibility of redeeming himself—the cases in which the execution of the offender is an absolute necessity are very rare, if not practically nonexistent.[33]

This version consciously stresses that the only acceptable justification for executing a criminal is the need to keep him from killing again ("the only possible way of effectively defending human lives against the unjust aggressor"; "defend and protect people's safety from the aggressor"; "rendering one who has committed an offense incapable of doing harm"). The 1994 version spoke conjunctively about the need "to defend human lives against an aggressor and to protect public order and the safety of persons."[34] The 1997 version deletes the suggestion that "protecting public order" is a sufficient reason for the death penalty.[35]

---

32. See *supra* page 309.

33. *Vatican List of Catechism Changes*, 27 ORIGINS 257, 261 ¶ 2267 (1997).

34. CATECHISM OF THE CATHOLIC CHURCH *supra* note 19, at ¶ 2267 (1994).

35. The amended version of ¶ 2266 observes that punishment serves three purposes: "defending public order," "protecting people's safety," and "a medicinal purpose"

B. The Binding Effect of Church Teaching

We have been talking about the Catholic Church's teaching on the subject of capital punishment. Let us look now at how it might be binding on Catholic judges. This subject—the authoritative force of Catholic teaching on church members—is fairly complex. It is not the case that individual Catholics must, on pain of infidelity, follow all directives of the pope and the bishops. The authoritativeness of church teaching varies in several ways. First, it matters who the speaker is. Statements by individual bishops or offices in the Vatican bureaucracy may have less weight than statements by episcopal conferences (like the National Conference of Catholic Bishops) or by the pope. Second, it adds something to the authority of the speaker if there is vertical as well as horizontal support for it—*i.e.*, if the teaching is not only currently widespread, but has a long history behind it. Third, authority is also a function of the speaker's intention. The pope and the bishops have (rather rarely) made statements which are treated as infallible teachings, but when they do so, they indicate as much. This is not unlike a clear statement rule in statutory interpretation: if the teaching is not accompanied by an express claim to that kind of authority, it warrants less deference.[36] Fourth, the authoritativeness of the Church's teaching varies with the subject matter. Its decrees about astronomy have not been notably successful.[37] The Church's jurisdiction, if we may express it that way, is limited to matters of "faith or morals,"[38] and within that domain it speaks with more assurance on some matters (*e.g.*, that Jesus is God) than on others (*e.g.*, that the use of contraceptives is immoral).[39]

Recent teachings about the death penalty have certainly come from

(contributing "to the correction of the guilty party"). *Vatican List of Catechism Changes, supra* note 33, at 261. Only the second of these is carried over to the next paragraph, which takes up the death penalty.

36. The "Dogmatic Constitution on the Church (Lumen Gentium)" issued by Vatican II states that the pope teaches infallibly only when "he proclaims *by a definitive act* some doctrine of faith or morals." *The Dogmatic Constitution on the Church (Lumen Gentium), in* THE DOCUMENTS OF VATICAN II 14 (Walter M. Abbot, S.J. ed. & Very Rev. Msgr. Joseph Gallagher trans. ed., 1966). The bishops do so only when they enunciate such a doctrine in a council approved by the pope, or when—scattered throughout the world—"they concur in a single viewpoint *as the one which must be held conclusively.*" *Id.* at § 25.

37. Addressing the Pontifical Academy of Sciences in October 1992, Pope John Paul II acknowledged that the judges of the Holy Office were wrong to condemn Galileo. *Lessons of the Galileo Case*, 22 ORIGINS 370 (1992).

38. *Lumen Gentium supra* note 36, at § 25.

39. For a fuller treatment of these themes see John H. Garvey, *The Pope's Submarine*, 30 SAN DIEGO L. REV. 849 (1993).

the sources that American Catholics should find most authoritative—the pope, the American bishops, and the Catechism of the Catholic Church.[40] There are, however, several reasons for saying that none of these teachings should be treated as infallibly true. There was, to begin with, some dissent from the bishops' 1980 statement, which closed with a recognition that a belief in capital punishment was not "incompatible with Catholic tradition." It is also true that the pope's encyclical does not display the kind of clear intention that accompanies infallible pronouncements.

Moreover, it cannot fairly be said that the current teaching has been the unanimous and long-standing belief of the church. The early Fathers were not of one mind about capital punishment. Clement of Alexandria (c. 150-211) supported the idea for the irreformable evildoer—for his own sake, to prevent him from doing further wrong, and for the defense of society, which he might infect.[41] Origen (c. 185-254) took the state's power over life and death for granted, as did St. John Chrysostom (c. 344-407).[42] Augustine mentions, as an exception to the commandment against killing, the action of those who represent "the public justice . . . and in this capacity . . . put to death wicked men."[43] Thomas Aquinas in the high middle ages argued that "if any man is dangerous to the community and is subverting it by some sin, the treatment to be commended is his execution in order to preserve the common good[.]"[44] In the same period the church required certain heretics returning to the faith to profess (among other things) the belief that public officials could impose capital punishment without committing any grave sin.[45]

It might therefore be said that the Church has wandered a bit before coming to its current conclusion. Its teaching is nevertheless entitled to

---

40. The Catechism was begun at the request of the Synod of Bishops convened in 1985 for the twentieth anniversary of the close of the Second Vatican Council. "The project was the object of extensive consultation among all Catholic Bishops, their Episcopal Conferences or Synods, and of theological and catechetical institutes. As a whole, it received a broadly favorable acceptance on the part of the Episcopate." CATECHISM OF THE CATHOLIC CHURCH *supra* note 12, at 4. At the time of its publication the pope declared it to be "a sure norm for teaching the faith." *Id.* at 5.

41. *The Stromata, or Miscellanies* Book I, ch. xxvii, *in* II THE ANTE-NICENE FATHERS 339 (Alexander Roberts & James Donaldson eds., 1956).

42. M.B. CROWE, I THEOLOGY AND CAPITAL PUNISHMENT 24, 32-35 (1964).

43. I SAINT AUGUSTINE, CITY OF GOD, ch. 21., at 27 (Marcus Dods trans., Random House, 1950).

44. AQUINAS, *supra* note 18, at 2a 2ae Q. 64, a.2. *See also* JAMES J. MEGIVERN, THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY (1997) (providing a fairly extensive review of the history of Catholic thought on the death penalty).

45. GRISEZ, *supra* note 13, at 893 & n.108.

serious respect from church members. Vatican II's Constitution on the Church said the following about such non-infallible moral teachings:

> Bishops, teaching in communion with the Roman Pontiff, are to be respected by all as witnesses to divine and Catholic truth. In matters of faith and morals, the bishops speak in the name of Christ and *the faithful are to accept their teaching and adhere to it with a religious assent of soul.* This *religious submission of will and of mind* must be shown in a special way to the authentic teaching authority of the Roman Pontiff, even when he is not speaking ex cathedra [*i.e.* infallibly].[46]

That is fairly strong language, and it seems to cover a case like this where the bishops are "teaching in communion with the [pope]." Notice, though, that it is limited to "matters of faith and morals," and that even with respect to such matters, the duty to comply cannot be any clearer than the teaching itself. That clouds the issue slightly.

The proclamations at issue here are not flat prohibitions like the ban on abortion, which (properly defined) is always immoral. Capital punishment, the pope declares, is permissible "in cases of absolute necessity[,] when it would not be possible otherwise to defend society."[47] It is difficult to think of examples, as we have indicated. The pope himself has observed that "such cases are very rare, if not practically non-existent."[48] Still, one could conceivably accept the Church's teaching but consider that it does not apply to cases that we have not yet (because of a lack of imagination) been able to hypothesize.

One might also reject the current teaching, or rather the assumptions underlying it, on the theory that they are not concerned with "matters of faith and morals." Both the pope and the United States bishops make a more or less strictly moral claim that only reasons analogous to self-defense can justify capital punishment. This is not the sort of claim that will be more persuasive in some times and places than in others. However, the statements about what *will* justify executions are of a different sort. The Catechism, the bishops, and the pope all say that capital punishment is only permitted when it is necessary to protect public safety and order. The pope adds the observation that "[t]oday . . . , as a result of steady improvement in the organization of the penal system, such

46. *Lumen Gentium supra* note 36, at § 25 (emphasis added). Canon 752 of the Code of Canon Law uses almost the same language. THE CODE OF CANNON LAW, §752 (James A. Cordien et al. eds., 1983).

47. *Evangelium Vitae supra* note 11, at § 56.

48. *Id.*

cases are very rare, if not practically non-existent."[49] One might say that the pope and the bishops, while entitled to the utmost respect for their moral judgments, are no better than any other interested observer when it comes to describing the level of violence in twentieth century America or the deterrent effect that capital punishment has on the average American gangster. Indeed it is conceivable that the pope's statement, directed as it is to the Catholic Church throughout the world, is not even intended to describe American society in particular.[50]

One could say all this, but it has an air of evasion about it. We have found it difficult to imagine cases where the death penalty would be necessary in the requisite sense. The United States bishops' judgment about deterrence matches the prevailing opinion among informed observers.[51] The pope's insistence on a showing of "absolute necessity" suggests that even if his empirical judgment is only approximately true, we should draw the same moral conclusion.

C. Cooperation with Evil

Thus far, we have discussed what the Catholic Church teaches about capital punishment and what binding effect that teaching might have on Church members. But there is still another facet to the problem for Catholic judges: not everyone who plays a role in the system of capital punishment bears the same degree of guilt. Some do not act wrongly at all. In the old Code of Canon Law there was a rule that a person who had served as a public executioner could not be ordained as a priest. His immediate assistants were also disqualified, but only if they had actually taken part in an execution. The judge who imposed the death sentence was also disqualified, but jurors who only made a decision about guilt or innocence were not. Nor were lawyers, witnesses, or even those who built scaffolds.[52] These distinctions might seem too refined, but they are not out of line with our own intuitions. The most adamant opponent of capital punishment today would probably impute no blame to the manufacturer whose needles are used for a lethal injection; nor to

---

49. *Id.*

50. Langan, *supra* note 31, at 11.

51. CHALLENGING CAPITAL PUNISHMENT (Kenneth C. Haas and James A. Inciardi eds., 1988); NATIONAL RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978); Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177 (1981).

52. T. LINCOLN BOUSCAREN, S.J., & ADAM C. ELLIS, S.J., CANON LAW: A TEXT AND COMMENTARY c. 984, 6°-7° (1946).

the bus driver who brings the executioner to work. If we are going to make these kinds of distinctions, we will also (though for rather different reasons) have a difficult time with judges, who play a wide variety of roles. At one extreme is the sentencing judge who imposes a sentence of death. This is still a step removed from the actual execution, which the judge will not even see, but it is a role where the judge bears a primary responsibility for what happens to the criminal. At the other end is the Supreme Court justice who votes to deny certiorari to a state prisoner, condemned to death, whose last hope is to convince someone that the trial court improperly denied his suppression motion. Our instinct is to say that the Church's teaching on capital punishment has little bearing on this last case. But how exactly is it different?

In Catholic moral theology, there is an extensive literature on this subject, usually collected under the heading of cooperation with evil. Stated abstractly, these are cases where one person ("the cooperator") gives physical or moral assistance to another person ("the wrongdoer") who is doing some immoral action. In judging the morality of the cooperator's action, the most important distinction the Church draws is between what it calls formal and material cooperation. Here is a simile to help lawyers think about the distinction. In first amendment law there are two "tracks" for judging government actions that sin against the freedom of speech. Track one is for cases where the government acts with a bad intention—where it restricts speech because it does not like what is being said. (Imagine a law forbidding people to make jokes about the Vice President.) This kind of action is almost always unconstitutional. Track two is for cases where the government restricts speech unintentionally, in the course of doing something else. (Imagine a law against littering applied to a politician distributing handbills.) This kind of action is sometimes unconstitutional and sometimes not. The courts will balance the law's good effects against its impact on speech.[53]

Formal and material cooperation are a little like tracks one and two. A person formally cooperates with another person's immoral act when he shares in the immoral intention of the other. Imagine a tenant who, coveting the apartment of his Jewish neighbor, gives his name to the Nazis. Formal cooperation is always immoral.[54] Material cooperation involves an act that has the effect of helping a wrongdoer, where the co-

53. For a summary of the law and an explanation of the role of intentions see JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 207-218 (1996).

54. BERNARD HÄRING, II THE LAW OF CHRIST 496 (1963); C. HENRY PESCHKE, I CHRISTIAN ETHICS 251-252 (1981).

operator does not share in the wrongdoer's immoral intention. Imagine a grocer who sells food to a glutton, or a letter carrier who delivers an extortionate threat. Material cooperation is only sometimes immoral. We judge this by a kind of moral balancing test—weighing the importance of doing the act against the gravity of the evil, its proximity, the certainty that one's act will contribute to it, and the danger of scandal to others.[55]

Rather than say much more about these rules in the abstract, let us see how they might apply to judges. We will examine a few of the roles a federal judge can be asked to play in a capital case arising under the Anti-Drug Abuse Act of 1988 (the "drug kingpin" statute).[56] This Act authorizes capital punishment where a defendant engaged in a "continuing criminal enterprise" intentionally kills someone or causes such a killing. The United States Attorney must serve notice of the government's intention to seek the death penalty early on,[57] but the sentencing hearing is held after trial on the issue of guilt, generally before the judge and jury who handled the trial.[58] At the hearing the government must prove that there are certain factors present that make the crime an aggravated case, deserving of death.[59] The defendant tries to prove factors that might mitigate against death—his youth, record, state of mind, and so on. The jury can recommend death if it finds the requisite aggravating factors and concludes that they outweigh any mitigating factors. But no matter what its findings, it is not required to impose death.[60] Neither is the judge who sits without a jury. When the hearing

55. HÄRING *supra* note 54, at 496-500; GERMAIN GRISEZ, 3 THE WAY OF THE LORD JESUS: DIFFICULT MORAL QUESTIONS, App. 2, 876-884 (1997).

56. 21 U.S.C. § 848 (1997).

57. *Id.* § 848(h). A protocol in the U.S. Attorneys' Manual requires the U.S. Attorney to notify the head of the Criminal Division of the Department of Justice of his desire to seek capital punishment. The request is then reviewed by the Department. The Attorney General makes the final decision.

58. The defendant can choose, with the government's approval, to have a hearing before the judge alone. *Id.* § 848(i).

59. The statute includes aggravating factors. It requires proof of one from § 848(n)(1) and another from § 848(n)(2)-(12). Subsection (n)(1) requires that the defendant must have (A) intentionally killed the victim, or (B) intentionally inflicted serious bodily injury which resulted in death, or something like that. Subsections (n)(2)-(12) cover a variety aggravating factors ranging from prior killings (2), to picking on an especially vulnerable victim (old, young, infirm) (9), to employing torture or serious physical abuse in the commission of the offense (12).

60. *Id.* § 848(k). It has been suggested that this provision, because it gives the judge and the jury "discretion to dispense mercy," violates the eighth amendment. Brian Serr, *Of Crime and Punishment, Kingpins and Footsoldiers, Life and Death: The Drug War and the Federal Death Penalty Provision—Problems of Interpretation and Constitutionality*, 25 ARIZ.

is held before a jury and the jury recommends the death penalty, however, the Act provides that "the court shall sentence the defendant to death."[61]

1. Sentencing With a Jury

Let us begin by considering the action of the judge who sentences a defendant to death upon the jury's recommendation. Here is an example of such a sentence imposed in *United States v. Chandler*:

> SENTENCE
>
> Based upon the Special Findings and Recommendations of the jury on April 3, 1991, under Count 3, the court hereby imposes upon the defendant a sentence of death. The defendant will be

---

ST. L. J. 895, 922 (1993). The Court in *Furman v. Georgia*, 408 U.S. 238 (1972), held that Georgia's death penalty was cruel and unusual punishment because it gave the jury unrestricted discretion to choose between death and life imprisonment for murder. The cure for that deficiency, which the Court approved in *Gregg v. Georgia*, 428 U.S. 153 (1976), was to separate the determination of guilt from the sentence (so that all relevant information could be laid before the jury at the sentencing phase) and to guide the jury's discretion by requiring it to weigh statutorily defined aggravating factors against mitigating factors. Serr suggests that § 848(k) returns us to the unconstitutional discretion of the pre-*Furman* era. But this is a mistake. The difference between *Furman* and § 848(k) is that *Furman* gave the jury discretion that was open at both ends—it could be either uncommonly merciful or uncommonly harsh. Section 848, by contrast, is open only at one end. The requirement that the government prove two of the statutory aggravating factors, and convince the judge or jury that these (and other aggravations) outweigh any mitigating factors, closes off the possibility of discretionary harshness. It is true that § 848(k) leaves open the possibility of mercy in any case. And this can lead to a kind of unfairness: some really bad actors may be spared when people like them are executed.

But this was true in *Gregg*. The jury could not recommend death without finding a statutory aggravating circumstance. But it could make a recommendation of mercy binding on the trial court without finding any mitigating circumstance. *Gregg*, 428 U.S. at 197 (opinion of Stewart, Powell, and Stevens, JJ.). In fact, the plurality said, "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Id.* at 199. This was the basis for the Court's later decision in *McCleskey v. Kemp*, 481 U.S. 279, 306-307 (1987), rejecting a petitioner's claim of disproportionality: "absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty." As another commentator later observed,

> At one time, it appeared that the Court was trying to achieve rationality in the process of selecting those to be spared as well as those to be executed—*Furman* seemed to demand as much. The Court, however, has essentially abandoned the former effort, holding that the eighth amendment is little concerned with consistency in sparing a life.

Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1109 (1990)

61. 21 U.S.C. § 848(l).

> remanded to the custody of the Bureau of Prisons with directions to cause such death sentence to be implemented.[62]

This is a straightforward case of formal cooperation, one in which the judge sets the wheels of injustice in motion. Once the judge enters the order, the government is authorized—indeed unless there is a pardon, *bound*—to put the defendant to death. And the judge intends that this should happen. That the judge may feel reluctance or regret does not change his intent. One who pulls a trigger reluctantly still intends to fire a gun. One who gives an order cannot protest that he did not intend it to be carried out.

There are two points that might cause some hesitation. Perhaps the judge's act, though it is followed by momentous consequences, is really just a formality, and should not entail the burden of guilt we impute to it. Consider the docket clerk who enters the order. It would be a bit much to accuse the clerk of formal cooperation in the execution. Both acts seem to be routine, ministerial—the cranking of tiny wheels in a machine that runs by itself. Section 848(l) tells the judge that, "Upon the [jury's] recommendation that the sentence of death be imposed, the court shall sentence the defendant to death."[63]

But the judge's and the clerk's acts are not the same. The content of the order does not matter to the clerk. He files death sentences and discovery orders indifferently, as the post office franks love letters, pornography, blackmail, and letter bombs without a thought to their contents. Content matters to the judge, who composes the order. More importantly, he commands that the execution take place. This is an exercise of authority that in our system of government only a judge can have. It is true that the statute obliges him to give the order, but the reason it obliges *him* (rather than the docket clerk or the court reporter) is that we want the approval of a responsible figure who has seen the proceedings and polled the jurors, and who can assure us that there is no legal reason against the sentence being imposed.[64]

The other point that might cause hesitation concerns the judge's intent. Consider this case. In *Zobrest v. Catalina Foothills School Dis-*

62. CR 90-H-266-E (N.D. Ala., May 14, 1991), *vacated in part and aff'd in part*, 996 F.2d 1073 (11th Cir. 1993), *cert. denied*, 512 U.S. 1227 (1994).

63. 21 U.S.C. § 848(i).

64. The statute allows, under certain circumstances, for a change of judge between trial and sentencing hearing. 21 U.S.C. § 848(i). But the judge who sentences the defendant must be the judge who has sat through the sentencing proceeding. *Cf.* Morgan v. United States, 298 U.S. 468 (1936).

trict,[65] the Supreme Court approved public payment of a sign-language interpreter for a parochial school student. Strict separationists complained that the interpreter would accompany the student even to mass, and that having a state employee deliver religious messages would violate the establishment clause. The Court replied that there was a difference between a teacher and an interpreter: The interpreter is obliged to "transmit everything that is said in exactly the same way it was intended." In passing it on he does not signify his own (or his employer's) approval.[66] Might we say that the judge stands like an interpreter between the jury and the Bureau of Prisons? If the judge hands the message on without endorsing it, might he lack the intent required for formal cooperation?

This comparison leaves out an essential component of what the judge does. He does not merely repeat what the jury has said; he orders it to be done. Under the statute the jury only makes a "recommendation"; the judge "imposes" the sentence.[67] The judge's order says, "the court hereby imposes upon the defendant a sentence of death." It is a performative utterance.

2. Sentencing By the Judge

Under the drug kingpin law a defendant can opt, with the government's agreement, to dispense with a jury and have his sentence determined by the judge alone. A judge who imposes the death penalty in such a case is plainly engaged in formal cooperation. Here there can be no suggestion that the judge is acting like a docket clerk or an interpreter. He bears responsibility for the entire decision, and could make it either way. Section 848(k) states that "the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence."[68]

But suppose that the judge in the end decides *not* to order death. The judge might in fact make up his mind at the beginning of the hearing that, no matter what the evidence showed, he would not (because he morally could not) impose the death penalty. We argue in Part II that if the judge entertained this resolve he would be obliged to recuse himself. But the judge might go through the sentencing hearing with an open mind, and only after all the evidence was in decide on life rather than

65. 509 U.S. 1 (1993).

66. *Id.* at 13.

67. 21 U.S.C. § 848(l).

68. *Id.* § 848(k).

death. If that is what happens can we say, at the end of the day, that he has done nothing wrong? In order to actually conduct the hearing with an open mind, the judge who accepts that capital punishment is wrong must suspend his moral judgment during deliberation. It is the willingness to do this that we want to focus on.

Conscience is not a uniquely Christian idea[69]—many people subscribe to the notion of an interior faculty that guides our moral judgments.[70] Christians generally maintain, however, that judgments of conscience are more than natural insights. They are judgments illumined by faith (or darkened by error and vice).[71] The Catholic Church teaches its members that they are bound to obey the certain judgment of their consciences.[72] A judge who suspends his moral judgment during sentencing sets his conscience aside. The effect of the decision, though internal, is real—the judge rejects his obligation to obey conscience and consents, at least provisionally, to act contrary to right judgment. He cuts himself loose from his moral moorings.[73] Because the act lacks any observable effect (the defendant gets life in the end) it is easy to overlook this point. But the Catholic Church, unlike the criminal law, maintains that we can sin in thought as well as action. This is not a moral stance peculiar to Catholics. You may recall the attention Jimmy Carter received when he told an interviewer from Playboy magazine that he had sinned by lusting in his heart.[74] He was referring to the injunction in Matthew's gospel: "What I say to you is: anyone who looks lustfully at a woman

---

69. HÄRING *supra* note 54, at 136; PESCHKE *supra* note 54, at 152. Peschke describes an ancient Egyptian inscription in which the word "heart" replaces the word conscience: "The heart is an excellent witness . . . he must stand in fear of departing from its guidance." *Id.* at 152. Häring calls conscience, as an ethical guide, a "point of contact with those who are not religious-minded at all." HÄRING *supra* note 54, at 146.

70. PESCHKE *supra* note 54, at 147.

71. *Id.* at 152; HÄRING *supra* note 54, at 136.

72. 1 *Timothy* 1:19: ("hold fast to faith and a good conscience. Some men, by rejecting the guidance of their conscience, have made shipwreck of their faith"); 1 *Timothy* 2:9 ("They must hold fast to the divinely revealed faith with a clear conscience."); *Romans* 14:22 ("Use the faith you have as your rule of life in the sight of God. Happy the man whose conscience does not condemn what he has chosen to do! But if a man eats when his conscience has misgivings about eating, he is already condemned, because he is not acting in accordance with what he believes. Whatever does not accord with one's belief is sinful."); CATECHISM OF THE CATHOLIC CHURCH *supra* note 12, at 1790, 1800 ("A human being must always obey the certain judgment of his conscience.").

73. In cautioning against obscuring conscience, Häring points to *Matthew* 6:22-24: "The eye is the body's lamp . . . and if your light is darkness, how deep will the darkness be!"

74. Robert Scheer, *Interview with Jimmy Carter*, *in* THE PLAYBOY INTERVIEW 456-488 (G. Barry Golson ed., 1981).

has already committed adultery with his in this thoughts."[75] The moral problem with suspending judgment in a capital sentencing hearing is like this. It would be wrong for a judge to place himself at the service of evil by getting in a position to go where events may take him.

3. The Guilt Phase

Suppose the district judge knows in advance of trial that the United States Attorney will seek the death penalty, and resolves to take no part in sentencing. May the judge nevertheless handle the case up until that point? May he sit in the trial on the issue of guilt or innocence and then withdraw? The statute might allow this.[76] We will explore in Part II whether this solution is *legally* proper. Let us assume for the moment that it is, and ask whether there might be a *moral* problem with making such a contribution. The judge who guides the jury to a guilty verdict lays the groundwork for the defendant's execution. Is it wrong for one opposed to the death penalty to do this?

There are several important differences between this case and the first two. There is nothing intrinsically wrong with trying the defendant. Indeed it is a *good* thing to try and convict criminals who murder innocent people. It is doing justice. This is not like sentencing the defendant to death—a punishment that is wrong despite the defendant's guilt. Moreover, the judge who conducts the trial need not intend to bring about the defendant's death. Think of *Washington v. Davis.*[77] The government gave a verbal ability test to candidates for the police force. There is nothing intrinsically wrong with this. It is a good idea to have cops who can communicate. The test also disqualified more black than white candidates. But the government did not intend this effect; indeed it regretted it. So too here. The judge's unintended contribution to capital punishment is an example of material cooperation.[78]

Unlike formal cooperation, material cooperation is not always im-

75. *Matthew* 5:28. See also *Exodus* 20:17; *Deuteronomy* 5:21; *Matthew* 15:17-20; *Mark* 7:18-23.

76. 21 U.S.C. § 848(i)(1) reads as follows: "When . . . the defendant is found guilty . . . the judge who presided at the trial . . . , or any other judge if the judge who presided at the trial . . . is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed."

77. 426 U.S. 229 (1976).

78. "Merely material cooperation is concerned with a good or at least with an indifferent act. The act, neither in itself (*i.e.*, by its own inner purposiveness) nor by the intent of the agent, contributes to the sin of another, but is misused or misappropriated by the latter and is thus placed in the service of his sinful activity." HÄRING *supra* note 54, at 496.

moral. But neither is there a very neat rule for deciding when it is. The rules are, as we suggested earlier, like the balancing test we use on track two in speech cases or like the tort rules of proximate cause, which define an actor's responsibility for far-reaching effects. In judging the propriety of material cooperation an actor must weigh his reasons for participating against such things as the gravity of the evil, the proximity of his cooperation, the certainty that his work will be misused, the probability that his refusal to cooperate would prevent the evil, and the danger of scandal to others.[79]

Consider what this might mean for a Catholic judge sitting at trial on the issue of guilt. The judge has a strong reason to participate in that phase: society needs judges to enforce the criminal law. Those who do so help maintain a peaceful and just society. It is this social good that we must weigh against the harm of material cooperation. The evil of capital punishment is certainly grave—the taking of human life. But the judge does not actually participate in the sentencing. Indeed he does not know for certain whether he is contributing to a death sentence because he does not know what sentence will be imposed at the later hearing. Recusing himself would not prevent the evil, because another judge would replace him at trial. For these reasons we think that the district judge's material cooperation in capital punishment can be morally justified.[80]

---

79. HÄRING *supra* note 54, at 499. The balancing test we give in the text follows St. Alphonsus Liguori, whose *Theologia Moralis* (L. Gaudé ed. 1905-1912) states the standard way of thinking about material cooperation. Germain Grisez offers a different sort of balancing test. GRISEZ, *supra* note 55. He suggests that we compare the good reasons for cooperating in the immoral act to the good reasons for not cooperating, "rather than to the gravity of the wrongdoing and how closely the act will involve one in it. . . ." *Id.* at 877. Grisez suggests that this is a clearer way of thinking about the issue for a number of reasons. One is that material cooperation can have a number of bad side effects, some of them quite distinct from the wrongdoing that St. Alphonsus considers in his balancing process.

> Third parties can be scandalized by someone's material cooperation. This can happen in various ways. Sometimes the fact that "good people" are involved makes wrongdoing seem not so wrong and provides material for rationalization and self-deception by people tempted to undertake the same sort of wrong.

Id. at 881. Another is that describing this judgment (about material cooperation) as a weighing of goods and bads oversells a metaphor. What we describe as "goods and bads are benefits and detriments to the true fulfillment of the persons involved . . .— not a set of concrete entities whose values and disvalues can be measured and commensurated." *Id.* at 885.

80. One of the virtues of Grisez's more nuanced account of material cooperation is that it directs our attention to some features we might otherwise overlook. A district judge deciding whether to try the issue of guilt or innocence should consider whether, even if his participation does the defendant no injustice, he may appear to condone capital punishment, or make it seem "not so wrong," by taking part in the larger process. Material cooperation can

4. Appeal

The appellate judge, like the district judge, plays a variety of roles, and some of them present more difficult moral questions than others. If the defendant is convicted and sentenced to death under the drug kingpin law, he may appeal both the conviction and the sentence. The judge's role in reviewing a conviction is not very different from his role in conducting a trial on the issue of guilt. Consider some of the claims in *United States v. Chandler.*[81] Chandler was convicted of murder in furtherance of a continuing criminal enterprise in violation of 21 U.S.C. § 848(e).[82] He argued on appeal that the indictment failed to allege and the jury instructions failed to require a connection between the murder and the enterprise. The Eleventh Circuit concluded that the language of both was sufficiently clear on the point.[83] Chandler also charged that the government had called a witness (a police officer who identified a piece of paper seized in Chandler's home) who was not on the witness list that the law requires the government to supply.[84] The court agreed that this was an error, but it did not require reversal because Chandler had made no contemporaneous objection, and it had no effect on the outcome of

---

cause scandal even if it doesn't contribute to the sin of *this* execution. Consider the wonderful account of the scribe Eleazar during the persecution of Antiochus. (This is not a case of material cooperation, but it nicely illustrates the evil of scandal.)

> Eleazar, . . . a man now advanced in age and of noble presence, was being forced to open his mouth to eat swine's flesh. . . .
>
> Those who were in charge of that unlawful sacrifice took the man aside, because of their long acquaintance with him, and privately urged him to bring meat of his own providing, proper for him to use, and pretend that he was eating the flesh of the sacrificial meal which had been commanded by the king, so that by doing this he might be saved from death, and be treated kindly on account of his old friendship with them. . . .
>
> "Such pretense is not worthy of our time in life," he said, "lest many of the young should suppose that Eleazar in his ninetieth year has gone over to an alien religion, and through my pretense, for the sake of living a brief moment longer, they should be led astray because of me, while I defile and disgrace my old age."

2 *Maccabees* 6:18-25. We do not think that the danger of scandal in the case we are concerned with is great enough to warrant stepping aside. The judge who sits at trial and leaves at sentencing proclaims by a public act that he finds the conclusion of the procedure objectionable. (Eleazar, had he done as he was asked, would have deceived his young followers.) And there are, as we say in the text, good reasons for taking part up to that point. (It is a good thing to try, convict, and punish violent criminals. It is only wrong to kill them.)

81. 996 F.2d 1073 (11th Cir. 1993).

82. *Id.* at 1096.

83. *Id.* at 1098.

84. *Id.*

the trial.[85]

Affirming Chandler's conviction has the effect of sending him to death. And the appellate judge knows this, because he does his job after sentencing (not before, like the trial judge). But his cooperation is also material rather than formal. In reviewing the sufficiency of the indictment, the jury instructions, and the trial procedure he takes no position on the issue of capital punishment. He would reach the same conclusion if the defendant were sentenced to life in prison. Apart from its unintended consequences, his act (reviewing the fairness of the trial) is a good and just thing to do. If he did not sit on the case someone else would, with the same result. On balance, this seems like the kind of material cooperation that is morally acceptable.

The appellate court's review of Chandler's sentence is a closer question. This seems to complete the district court's order, as the district court completes the jury's recommendation. Is there any real difference between the two cases? The statute provides that

> [t]he court shall affirm the sentence if it determines that
> (A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and
> (B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors . . . .
> In all other cases the court shall remand the case for reconsideration under this section.[86]

In one way this assignment seems to make the appellate judge more culpable than the trial judge. If the jury recommends death, the trial judge has no choice about imposing that sentence. He might therefore say that his action is just a formality, like the docket clerk's entry of the judgment. We found that this excuse does not work, given the nature of the judge's order. But the excuse is not even available to the appellate judge. The statute directs him to review the evidence and the behavior of the judge and jury, and gives him two options: affirm or remand. He (more accurately, the panel) thus has some room to affect the defendant's fate.

Strictly speaking, though, the panel neither condemns nor saves the defendant. The sentencing judge's order in *Chandler* said, "the court hereby imposes upon the defendant a sentence of death." The Eleventh

85. *Id.* at 1099.
86. 21 U.S.C. § 848(q)(3).

Circuit's order said:

> UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the Judgment . . . of the said District Court in this cause be and the same is hereby VACATED IN PART and AFFIRMED IN PART.[87]

To affirm the sentence is not to approve it, but to say that the trial court did its job. What the court of appeals really decides is that the responsibility for life and death lies somewhere else. When the court of appeals finds an error it does not sentence the defendant itself. It "remand[s] the case for reconsideration."[88]

The appellate judge can thus say, we think rightly, that he does not intentionally direct or promote the defendant's execution. Consider a slightly easier case of the same sort. The defendant, convicted in Alabama state court, seeks direct review in the United States Supreme Court. He claims that the death penalty violates the Eighth Amendment.[89] The Supreme Court would probably reject this claim. It might point out that the text of the Fifth Amendment contemplates executions.[90] But affirming the sentence is not the same thing as authorizing capital punishment. It only means that in our federal system, the federal courts are not empowered to hold up executions if Alabama chooses to carry them out. The responsibility for doing that lies with the voters, legislators, and judges of Alabama. An affirmance under the drug kingpin law makes a more modest, but comparable, point: that the statute entrusts the decision to the trial judge and jury.

Appellate review of a death sentence is not, then, a case of formal cooperation. This does not mean that it is all right. Whatever might be the legal significance of an affirmance, it probably looks to most people like an endorsement of the sentence. This can cause scandal, leading others into sin:

---

87. U.S. v. Chandler, Nos. 91-7466 and 91-7577. The part of the judgment that was vacated had to do with Chandler's conviction for conspiracy. His convictions and sentences on the other counts, including his death sentence, were affirmed. *Chandler*, 996 F.2d 1073 (11th Cir. 1993).

88. 21 U.S.C. § 848(q)(3).

89. The Eighth Amendment provides, in part, that "Cruel and unusual punishment [shall not be] inflicted." U.S. CONST. amend VIII.

90. The Fifth Amendment speaks of "capital" crimes and deprivations of life:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[;] nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V.

> Sometimes the fact that "good" people are involved makes wrongdoing seem not so wrong and provides material for rationalization and self-deception by people tempted to undertake the same sort of wrong.... [O]ften the material cooperation of "good" people in wrongdoing leads others to cooperate in it formally...."[91]

Considerations like this make it exceedingly difficult to pass moral judgment on the appellate review of sentencing. The morality of the acts which fall under that description will, it seems to us, vary from one set of circumstances to another.

5. Habeas Corpus

This is a bit of a misnomer if we confine our attention to federal convictions. Section 2255 of the federal code,[92] though it gives federal prisoners relief commensurate with what state prisoners get in habeas corpus proceedings, is a slightly different procedure. A § 2255 motion is a further step in the criminal case, not a separate civil action. This means that it is filed with the judge who tried the case and handled the sentence (or if they are different, with the judge who supervised the proceeding being attacked).[93] And that in turn means that orthodox Catholic judges who recuse themselves from capital sentencing proceedings will not ordinarily be assigned § 2255 motions attacking the sentence itself. It may nevertheless occasionally happen when the appropriate judge is unavailable to consider the motion.[94] And of course judges who preside over the guilt phase will be assigned motions attacking that proceeding. Is there a moral objection to deciding either of these questions?

Let us first consider an attack on the underlying conviction. Suppose the prisoner claims that he had ineffective assistance of counsel, or that

91. GRISEZ, *supra* note 55, at 881.

92. 28 U.S.C. § 2255 provides, in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. ... If the court finds [for the prisoner] the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate....

93. Rules Governing Section 2255 Proceedings, Rule 4(a).

94. *Id.* And Catholic judges will face similar issues in federal habeas review of state convictions, which can go to any judge.

the court violated the confrontation clause by letting the prosecution use a videotaped deposition of its key witness. We have already explained why we think it would be permissible for a pro-life judge to sit in the guilt phase of a capital trial, where questions like these might arise in the first instance. We see even less reason to worry about deciding them on collateral review. When the movant invokes the right to counsel or the confrontation clause, the judge's job is to interpret the Sixth Amendment. We need judges to do this to maintain the balance between individual rights and government authority. Though the judge must know that the movant's life is at stake, he can act without intending to cause the movant's death. This is a case of material, not formal, cooperation. And as material cooperation goes, one can make a pretty good case for it. It would be unwise from the point of view of death row inmates to leave the interpretation of the constitution to death-qualified judges.[95]

An attack on the sentence itself is a harder question, just as it is on appeal. Suppose the movant charges that the aggravating circumstances relied on by the prosecution are expressed in the statute in unconstitutionally vague terms, or were not proven beyond a reasonable doubt.[96] Would it be wrong for a judge who conscientiously opposes the death penalty to decide claims like these where the movant's life is at stake?

The problem seems rather like the one we identified in appellate review. The movant who makes a vagueness claim asks the judge to invalidate a capital sentencing scheme created by Congress because it does not narrow the sentencer's discretion enough. But a judge cannot just casually strike down laws enacted by democratically elected officials. The power of judicial review created in *Marbury v. Madison*[97] lets the judge intervene only when a law is inconsistent with the constitution. Saying that the Eighth Amendment does not authorize intervention is not equivalent to enforcing or approving what Congress has done. Here is what the court says:

> [I]t is ORDERED, ADJUDGED, and DECREED that all . . . claims asserted in Chandler's . . . motion to vacate and for a new trial . . . are DENIED, and a final judgment in favor of the United States is hereby ENTERED with respect to Chandler's motion to vacate

95. We borrow the phrase "death qualified" from the jury context. *See infra* page 336; Buchanan v. Kentucky, 483 U.S. 402, 407 n.6 (1987).

96. *Cf.* Arave v. Creech, 507 U.S. 463 (1993) (§ 2254); Richmond v. Lewis, 506 U.S. 40 (1992) (§ 2254).

97. 5 U.S. (1 Cranch) 137 (1803).

> and for a new trial.[98]

In essence the judge declines to get involved. Of course we all know that judicial review is not a mechanical process, that there is a lot of room to maneuver, and that a determined judge *can* get involved, often without running a serious risk of reversal. But the conscientious judge is not under a moral obligation to save all the prisoners he can. The real responsibility for Chandler's death sentence lies with the Congress that wrote the law, the President who signed it, the prosecutor who invoked it, and the judge and jury who imposed the sentence. The § 2255 judge who declines to undo their work has a good reason for standing by if he is respecting a lawful and otherwise useful and morally acceptable division of authority.

II. RECUSAL

Let us now consider whether the moral difficulties we perceive with recommending, imposing, and reviewing the death penalty should as a legal matter prevent Catholic judges from sitting in capital cases. There are two recusal[99] statutes in the federal judicial code. We will focus on 28 U.S.C. § 455, which has two provisions that bear on this problem:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.[100]

Subsection (b)(1), the older of the two provisions, requires proof of ac-

98. This is an order disposing of a § 2255 motion in *U. S. v. Chandler*, 957 F. Supp. 1505 (N.D. Ala. 1997).

99. We will generally speak of recusal but this is slightly inaccurate. Strictly speaking "recusal" refers to a judge's voluntarily stepping down. The proper term for mandatory stepping down under a statute is "disqualification." John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROB. 43, 45 (1970).

100. The other statute, 28 U.S.C. § 144, does the same work as § 455(b)(1). It provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

This provision is limited to district judges, and comes into play only when a party makes a motion supported by an affidavit. Section 455 requires a judge to disqualify himself.

tual bias or prejudice—proof that the judge is actually unfaithful to his oath to discharge his duties impartially.[101] Subsection (a) is concerned less with the litigants' right to a neutral judge than with the appearance of justice and the legitimacy of the judicial system. For that reason it asks how people might perceive the judge—it may require recusal even if there is no bias in fact.

We will begin with subsection (b)(1), the issue of actual bias or prejudice. We said in Part I that observant Catholic judges may have real moral problems with sentencing. Here we ask whether these moral difficulties count as disqualifying prejudices under the recusal statute. We also said in Part I that such judges might be able to try capital cases, and maybe decide capital appeals, notwithstanding their opposition to the death penalty. But a judge's pro-life convictions might affect his behavior outside the sentencing proceeding. The judge might, for example, be more reluctant to convict (or more willing to reverse) if a finding of guilt would inevitably lead to the defendant's execution. Should this sort of collateral influence also count as a disqualifying prejudice?

We will then look at subsection (a), the issue of apparent partiality. What happens when a Catholic judge who does not agree with the Church's teaching sits on a phase of the case (let us say sentencing) where he should have problems but professes not to? Does the simple fact of membership in the Catholic Church disqualify him because it creates a "reasonable question" about his impartiality?

A. *"Personal Bias or Prejudice"*

The phrase "personal bias or prejudice" in subsection (b)(1) can mean that the judge has some illegitimate reason for wanting to rule against this particular party. For example, the defendant may have mistreated the judge's daughter in an unhappy love affair. But the requisite bias need not be personal in the sense that the judge has prior first-hand knowledge of the parties.

> Bias and prejudice [are] not divided into the "personal" kind, which is offensive, and the official kind, which is perfectly all right.... It is common to speak of "personal bias" or "personal prejudice" without meaning the adjective to do anything except emphasize the idiosyncratic nature of bias and prejudice.... In

101. Actually subsections (a) and (b)(1) were both added in 1974, when § 455 was substantially amended. But subsection (b)(1) copied the "personal bias or prejudice" language of § 144, which has been around since 1911. The appearance-of-impartiality rule of subsection (a) was new. *See* Liteky v. United States, 510 U.S. 540 (1994); Randall J. Littenecker, Note, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236 (1978).

> a similar vein, one speaks of an individual's "personal preference," without implying that he could also have a "nonpersonal preference."[102]

So "personal" does not just mean that the judge has it in for *this* defendant. Nor does "bias or prejudice" mean animosity[103] toward a particular class of people (say, Germans).[104] That may be, but it is not necessarily so. Subsection (b)(1) also covers a bias or prejudice about a particular issue, which may "concern a party" in the sense that it spoils his hope for success. We speak this way about jurors who are unalterably opposed to the death penalty. The government is allowed to exclude them in capital cases. When the question first arose in 1892, the Supreme Court said, "A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror."[105] When the Court revisited the issue in 1968 Justice Black observed, "As I see the issue in this case, it is a question of plain bias."[106] This does not mean that a judge with an unalterable moral objection to the death penalty is in all cases automatically disqualified. Judges play many different roles in capital cases. And the legal impediments to sitting, no less than the moral ones, may vary with the role.

1. Sentencing With a Jury

The easiest case is the one we discussed at pages 320-22. Suppose a drug kingpin is tried before a jury and the jury recommends death. The statute says that "Upon the [jury's] recommendation that the sentence of death be imposed, the court shall sentence the defendant to death."[107] This directs the judge to formally cooperate in bringing about the defendant's execution—something the observant Catholic judge should not do. Of course judges often have to set aside their personal convictions in order to do justice, but this is easier in some cases than in others. We can set aside convictions about facts if there is some reason to trust

102. *Liteky*, 510 U.S. at 549.

103. Or partiality. We will stress the negative aspect just to simplify the exposition.

104. *See, e.g.*, Berger v. United States, 255 U.S. 22 (1921).

105. Logan v. United States, 144 U.S. 263, 298 (1892).

106. Witherspoon v. Illinois, 391 U.S. 510, 535 (1968) (Black, J., dissenting). *Witherspoon* held that the state could not exclude all jurors who had conscientious scruples against capital punishment—only those who would be "irrevocably committed" to vote against the death penalty in all cases. *Id.* at 522.

107. 21 U.S.C. § 848(l).

another person's perceptions more than our own. (I may know that you have better eyesight than I.) We can also set aside our legal convictions in deference to a superior authority in the legal system. Here is an example of Justice Brandeis doing this:

> Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus [I act on the assumption that the right of free speech is] protected by the federal Constitution from invasion by the states.[108]

But the principle at stake in capital sentencing is a moral one, not a factual or simply legal one. And the judge is asked to violate it—not to reason from different legal premises to morally unobjectionable conclusions (like Justice Brandeis did in *Whitney*). There is no way the judge can do his job and obey his conscience. The judge's conscience tells him to impose a life sentence; federal law directs him to impose death. Because the judge is unable to give the government the judgment to which it is entitled under the law, § 455(b)(1) directs him to disqualify himself.

This is not a difficult case. But it has two procedural complications. First, the judge who sentences the defendant must be the one who has conducted the sentencing hearing. This might seem unnecessary, since the judge only enforces the jury's recommendation, and anybody can do that. But the sentencing provision includes one last escape clause: it concludes by saying that a death sentence cannot be carried out on a person who is retarded or mentally disabled.[109] The sentencing judge must ensure that the last proviso does not prevent him from enforcing the jury's recommendation, and he can only do so if he has attended the hearing and heard the information bearing on this point. This means that the Catholic judge must recuse himself before the hearing, not after it.

The second wrinkle is this. The law says that in the ordinary course "the judge who presided at the trial . . . shall conduct a separate sentencing hearing[.]"[110] This is obviously the efficient way of doing things since much of the evidence presented at trial will assist in the proof of aggravating and mitigating factors. A new judge would have to rely on

---

108. Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

109. 21 U.S.C. § 848(l).

110. 21 U.S.C. § 848(i)(1) provides that when "the defendant is found guilty . . . the judge who presided at the trial . . . or any other judge if the judge who presided at the trial . . . is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed."

the trial transcript and exhibits rather than his observation of the real thing.[111] Does this mean, then, that our scrupulous judge should back out even earlier in the process so that his substitute will be well prepared when he gets to the sentencing hearing? The appropriate time would probably be when the government files notice of its intent to seek the death penalty.

That is a sensible solution, but we do not think it is required by the statute, and all things considered, it may not even be the best approach. Although the law presumes that the trial judge will ordinarily conduct the sentencing hearing, it provides that "any other judge" can do so if the trial judge "is unavailable."[112] The last phrase is not defined in the Act, and the legislative history is unilluminating.[113] The phrase describes a judge who is disqualified just as well as it does one who is sick or absent. Though it might be more efficient to require recusal earlier in the proceedings, there is no textual reason for insisting on it. From the point of view of the federal judiciary as a whole, there is something to be said for not doing so. There is some inter-judge unfairness in shifting the entire capital caseload from Catholic judges—and others with unalterable scruples—to those who lack their moral qualms. As for the parties, it is not clear that late-stage recusal favors one side or the other. A judge's opposition to the death penalty might affect his discretionary rulings at trial. If so, a defendant should favor late over early recusal. On the other hand when the same judge handles both phases, it may happen that residual doubts about guilt will temper the severity of punishment.[114] In that case the defendant should favor early recusal so he can have the same judge throughout.

It seems to us, then, that the proper approach to this kind of case—morally and legally—is for the observant Catholic judge to recuse himself after trial and before the sentencing hearing. It would probably be appropriate to give the parties prior notice that he intends to do so if the trial ends in conviction.

2. Sentencing By the Judge

If the defendant requests and the government agrees, the sentencing

111. *Id.* § 848(j).

112. *See supra* note 110.

113. The provision about the judge being "unavailable" was in the bill from the beginning (it appeared in the original Senate version, S. 7556-01, 100th Cong. § 1(i)(1)(1988)) but was not debated at any point along the way.

114. Lockhart v. McCree, 476 U.S. 162, 181 (1986).

hearing may be conducted before the judge alone. The breadth of the judge's responsibility in this case makes the recusal question (like the moral question) a tricky one. In the last case the judge's conscience obliged him to act contrary to law, and the only legal solution (short of resignation) was recusal. When the judge sits alone he can decline to impose the death penalty without exceeding the scope of his discretion. This is explicit in the law: "the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence[.]"[115] And it is implicit in the judge's authority to find any factors he might chance upon "in the defendant's background or character [that] mitigate against imposition of the death sentence."[116] Here there is no impossible conflict of duties. And yet there is a difference between what this judge would do at a sentencing hearing and what his neighbor in the next courtroom would do. The religiously scrupulous judge, though he might never exceed the scope of his discretion, would always come down in exactly the same place. Would this be an abuse of discretion?

There is a parallel to this problem in the rules about selecting "death-qualified" juries. States that impose capital punishment generally have rules designed to keep convinced death penalty opponents from serving on juries. In 1960 Illinois had a statute that allowed a juror to be challenged for cause if he had "conscientious scruples against capital punishment."[117] The Court held in *Witherspoon v. Illinois*[118] that this was actually too broad a disqualification—a jury cleared of all people who harbored doubts about the wisdom of capital punishment would not be impartial in the constitutional sense.[119] Such a jury would be death-prone.

The Court pointed out that many of these people could perform the sentencing function perfectly well. In Illinois at that time[120] the jury had complete discretion to decide whether or not death was the proper penalty. As the Court saw it, someone "who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a ju-

---

115. 21 U.S.C. § 848(k).

116. *Id.* § 848(m)(10).

117. ILL. REV. STAT. c. 38 § 743 (1959).

118. 391 U.S. 510 (1968).

119. *Id.* at 519-20.

120. The Court decided *Witherspoon* before *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, the Court held that systems like Illinois's that give juries unrestricted discretion violate the Eighth Amendment.

ror."[121] But even in a regime that allowed that degree of discretion, the Court noted, it would be proper for the state to exclude a juror who "would automatically vote against" death, or whose attitude toward the death penalty would prevent him from making an impartial decision about guilt.[122] The Court enforced this suggestion in *Wainwright v. Witt.*[123] The defendant, sentenced to death, complained that several people had been kept off the jury for their opposition to capital punishment. The Court upheld their exclusion—indeed, it announced a rule that made exclusion easier than *Witherspoon* had done: "[T]he State may exclude from capital sentencing juries that 'class' of veniremen whose views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths."[124]

It is hard to say exactly what duty the conscientious juror fails to perform. Under current death penalty jurisprudence the state cannot require a jury to impose death in any particular case. Jurors must always be allowed to consider (and act on) mitigating factors in the defendant's character and record.[125] This means that a life sentence is always, in any particular case, a legally permissible choice. The juror cannot violate his duty by choosing it. Another possible explanation of the Court's remark might be that, because death sentences usually have to be unanimous, one conscientious objector could avert capital punishment in each case, and the cumulative effect of such behavior would be to render executions impossible. This would, the Court suggested, "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes."[126] In this account we need not attribute a violation of duty to any individual juror. It is rather their collective behavior that prevents the judicial system from carrying out the will of the legislature. But the only way to cure the problem is to exclude the members of the class as they appear in individual cases.

The weakness of this explanation is that it does not fit very well with the test the Court announced for deciding who is excludable—jurors "whose views would prevent . . . the performance of their duties in accordance with their instructions or their oaths."[127] *Morgan v. Illinois*[128]

121. *Witherspoon*, 391 U.S. at 519.

122. *Id.* at 522 n.21.

123. 469 U.S. 412 (1985).

124. *Id.* at 426 n.5.

125. Sumner v. Shuman, 483 U.S. 66 (1987); Lockett v. Ohio, 38 U.S. 586, 597 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

126. *Wainwright*, 469 U.S. at 423.

127. *Id.* at 424.

offers a more persuasive idea. *Morgan* is the flip side of *Witherspoon*. It affirms the defendant's right to exclude a juror who, having found guilt, would automatically vote to impose the death penalty. The problem with such a juror is not that he reaches a forbidden conclusion. It is that he refuses to go through the process required to get there.

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror.[129]

More prosaically we might say that he fails to keep an open mind until all the evidence is in. This is the literal meaning of prejudice. As the Court said in *Morgan*, if it were a judge rather than a juror who was "refusing in advance to follow the statutory direction to consider that evidence[, he] should disqualify himself[.]"[130]

One might object that a requirement to "consider," unsupported by any obligation to "decide," is just wasted motion. But if it is, it is a popular exercise. The National Environmental Policy Act[131] amounts to nothing more. Its best known and most frequently contested provision is the requirement that a federal agency must prepare an environmental impact statement before it undertakes a major federal action with significant environmental effects.[132] The point of the exercise is to control "*how* agencies go about their decision-making not *what* they actually decide to do."[133] The Public Utility Regulatory Policies Act,[134] a conservation measure enacted during the Carter administration, included a similar provision for naked consideration. Title I of the Act required state public utility authorities to consider six different approaches to structuring rates.[135] But the Act specifically provided that state authorities were free, having considered them, to accept or reject these propos-

---

128. 504 U.S. 719 (1992).

129. *Id.* at 729.

130. Id. at 739.

131. 42 U.S.C. §§ 4331-4347.

132. *Id.* § 4332(2)(C).

133. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 810 (2d ed. 1994).

134. Public Utility Regulatory Policies Act of 1978, PUB. L. NO. 95-612, 92 STAT. 3117 (codified as amended in scattered sections of 16, 42, & 43 U.S.C.).

135. 16 U.S.C. § 2621(d). The approaches included time-of-day rates, seasonal rates, and interruptible rates.

als.[136]

On a slightly more exalted level, we have turned to "consideration" requirements to solve a variety of constitutional problems. Here it is the very lack of any obligation to decide that renders them acceptable. *Regents of the University of California v. Bakke*[137] is the most celebrated example. Justice Powell held that the California-Davis Medical School could not decide in advance of reading its admissions folders that it would reserve sixteen seats for certain racial minorities.[138] If it wanted to employ affirmative action, Justice Powell said, the proper approach was to consider race as a factor that played a sort of mitigating role in the total mix of applicant characteristics.[139] The current approach to using race in voter reapportionment is similar. A state cannot decide in advance how many "white" and "black" districts it will create. If a state wants to take account of race the only permissible approach is to consider it as one among many factors, and see how the deliberations play out.[140]

Our legal assessment of sentencing by the judge thus matches fairly closely our moral assessment. We said it would be morally improper for a judge who conscientiously opposed capital punishment to suspend judgment and consider, with an open mind, the possibility of imposing it. The proper moral course seems to be to avoid putting oneself in this predicament. The recusal law reaches the same result for its own reasons: if a judge cannot honestly consider death as a possibility, he is "prejudiced" within the meaning of § 455(b)(1) and should recuse himself.

3. The Guilt Phase

Suppose a judge is religiously opposed to the death penalty but willing to preside over a trial on the issue of guilt or innocence. The United States Attorney might worry that the judge's pro-life convictions will carry over to collateral matters at trial, making it more difficult to secure a conviction. Consider two examples from *United States v. Chandler*.[141] The government charged Chandler with running a con-

136. *Id.*. § 2621(a).
137. 438 U.S. 265 (1975).
138. *Id.*
139. *Id.* at 317-18.
140. Bush v. Vera, 116 S. Ct. 1941 (1996); Shaw v. Reno, 509 U.S. 630 (1993); T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 MICH. L. REV. 588, 650 (1993).
141. 996 F.2d 1073 (11th Cir. 1993).

tinuing criminal enterprise (a large marijuana operation) and murdering a man named Martin Shuler in connection with it.[142] One of Chandler's arguments was that the indictment did not allege with sufficient clarity that he had murdered Shuler in furtherance of the criminal enterprise.[143] A judge averse to capital punishment might read the indictment Chandler's way, or impose a clear statement rule, in order to reduce the charge to something less than capital murder. The government also offered evidence that Chandler had threatened two other men for stealing his marijuana, and that they had then disappeared.[144] Chandler argued[145] that this evidence violated Federal Rule of Evidence Rule 403 (unfair prejudice) and Rule 404 (propensity evidence). A pro-life judge might be tempted to rule for Chandler on issues like these, to improve the odds of acquittal. Is an aversion to death a disqualifying bias or prejudice in these circumstances?

This is not an unusual problem. A judge will often entertain an ideological bias that makes him lean one way or the other. In fact we might safely say that *every* judge has such an inclination. As Chief Justice Rehnquist once observed when rejecting a motion to disqualify himself,

> [s]ince most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another.... Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* would be evidence of lack of qualification, not lack of bias.[146]

Implicit in the Chief Justice's observation are two reasons why we should not automatically disqualify judges for holding such views or convictions. One is that everyone has them. If we applied this criterion faithfully we would disqualify the entire judiciary. The rule of necessity that allows judges to sit on cases about judicial compensation applies here too: better a flawed judge than no judge at all.[147] The second is that the possession of convictions is not only inevitable, it is to some ex-

142. *Id.* at 1080.

143. *Id.* at 1096-97.

144. *Id.* at 1100-01.

145. Chandler actually made these arguments for the first time on appeal. At trial he objected only on hearsay grounds. *Id.* at 1101.

146. Laird v. Tatum, 409 U.S. 824, 835 (1972) (memorandum of Rehnquist, J.).

147. United States v. Will, 449 U.S. 200, 211-17 (1980).

tent desirable. Judges in civil law countries are nonpolitical civil servants; they look on their job as a fairly mechanical one.[148] Federal judges are nominated and confirmed by politicians. Justice Marshall was chosen by Lyndon Johnson precisely because he was a hero in the fight for racial equality. It would be odd if those principles kept him from sitting in school desegregation cases, even if they made his judgments fairly predictable.[149]

This is not to say that we expect or want judges to let personal convictions determine their judgment on all collateral questions. There are easy cases. We expect judges to recognize them and follow the law even if it runs against their inclination. Justice Douglas routinely voted against the Internal Revenue Service in tax cases no matter what the issue was.[150] This is unacceptable judicial behavior.

When we discussed sentencing with a jury,[151] we pointed out that a judge cannot set aside moral convictions as easily as he can convictions about matters of fact or (sometimes) law. There is, though, an important difference between that case and this one. When an observant Catholic judge sits on the guilt phase of a capital case his cooperation with the evil of capital punishment is material rather than formal. He does not intentionally promote the defendant's execution by sustaining the indictment or admitting evidence. His objective is to deal justly with the defendant—to find out if he has murdered someone to protect his marijuana business. If the judge lets his opposition to capital punishment control his decision of collateral issues, he runs the risk of acting unjustly in two different ways. First, he could bring about the acquittal of a guilty person. Second, he could sabotage a system of procedural and evidentiary rules that we employ to good effect in other cases. There is no good reason to suppose that judges who oppose capital punishment are so committed to their objective that they are willing to cause these sorts of injustice in order to achieve it.

4. Appeal

Recusal problems on appeal are like those at the guilt phase, though they are not identical. From a moral point of view deciding an appeal is an act of material cooperation, not formal, and one where it is difficult to say what outcome is morally preferable. The issue is especially diffi-

148. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 34-38 (2d ed. 1985).
149. See Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975).
150. BERNARD WOLFMAN, ET AL., DISSENT WITHOUT OPINION (1975).
151 *See supra*, pages 333-34.

cult in cases where the judge is asked to review the death sentence itself. Unless he intervenes the defendant will die. And his act of affirming, whatever its legal significance might be, looks a lot like approval of the sentence. Conscientious Catholic judges might have more trouble with cases like these than they would at trial.

Suppose, though, that such a judge is willing to sit. Are there any legal impediments to his doing so? The government's concern, similar to its concern at trial, is that the judge's opposition to capital punishment might warp his judgment on other legal questions. And one of the questions on appeal is the propriety of the sentence itself. How could the conscientious judge ever escape the influence of his convictions in deciding that issue?

The difficulty is compounded by the nature of the question itself. The choice of a sentence is a very flexible undertaking. The law requires the government to prove a capital offense and two different kinds of aggravating factors,[152] but once it has done that the sentencing authority is on its own. It can always refuse death.[153] And it can probably also always impose death. The law offers no guidance about how to balance aggravating and mitigating factors. It requires only that the person doing it keep an open mind until the information is all in.

On appeal the issue is not quite so formless. The court of appeals is directed to check for only a few defects. It must affirm the sentence unless it was "imposed under the influence of passion, prejudice, or any other arbitrary factor," or the evidence and other information (from the sentencing hearing) does not support the findings about aggravating and mitigating factors.[154] These are fairly standard directions for review of fact-finding—ones that judges know how to follow. The job is made easier by two rules of deference. The court of appeals looks at the information in the light most favorable to the prosecution (which won below). And the court defers to the sentencing body, especially a jury, about the credibility of witnesses (who appeared live below).[155] When the job is this limited, constrained, and familiar, there will be easy cases, as there are in the guilt phase.

No doubt an appellate judge can, if he wants, find reasons to reverse even in easy cases. Consider the statutory charge to review the informa-

152. 21 U.S.C. § 848(n). *See supra* note 59.

153. 21 U.S.C. § 848(k).

154. *Id.* § 848(q)(3).

155. Jackson v. Virginia, 443 U.S. 307 (1979); United States v. McCullah, 76 F.3d 1087, 1112 (10th Cir. 1996), *cert denied*, 117 S. Ct. 1699 (1997).

tion supporting mitigating factors.[156] A defendant is entitled at the sentencing hearing to introduce any information about his "background or character [that might] mitigate against imposition of the death sentence."[157] If a defendant made any effort at all along these lines, it is hard to imagine an appellate judge bent on reversing who would be unable to find some incident or feature that tempered his guilt or made his life worth saving. Robert Cover once argued that the judge has a moral obligation to engage in just this sort of nit-picking to save as many lives as he can.[158] This is a suggestion that we reject. There is a real moral cost to undermining the legal system, even in small ways. If the system were completely corrupt (as, say, the regime in Nazi Germany was) we could ignore this consideration. But it is hardly possible to make that claim about our own legal system. It has flaws—the death penalty is one. On the whole, though, it is a decent and just institution that judges should take care to preserve. If one cannot in conscience affirm a death sentence the proper response is to recuse oneself.[159] If the judge does no moral wrong in affirming, he should enforce the law in easy cases, even if he could save a life by cheating.

B. *The Appearance of "Impartiality"*

Section 455(a) requires disqualification "in any proceeding in which [the judge's] impartiality might reasonably be questioned."[160] This is an easier route than § 455(b)(1) because it does not require proof of actual bias or prejudice.[161] It is not a question about the judge's state of mind

---

156. 21 U.S.C. § 848(q)(3)(B).

157. *Id.* § 848(m)(10).

158. Cover made this proposal about judges called on to enforce the draft laws during the Viet Nam War. Robert M. Cover, Book Review, 68 COLUM. L. REV. 1003 (1968). He made a much more moderate version of the same argument à propos judges called on to enforce the law of slavery. ROBERT M. COVER, JUSTICE ACCUSED (1975).

159. Michael Paulsen makes an argument much like this in connection with abortion. He concludes that "where there is no honest, legitimate alternative for deciding the case but to follow positive law supporting the right to commit an abortion," the judge should recuse himself. Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J. L. & REL. 33, 79 (1990). The abortion case is a bit easier, we think. Both the state and the unborn child's mother are (at least typically) acting with gross unfairness to the unborn child, whereas the moral objection to capital punishment is not that it is unfair to the offender.

160. 28 U.S.C. § 455(a).

161. There are several reported cases where litigants have claimed that the judge's religious belief has caused actual bias sufficient to disqualify him under § 455(b)(1) or under § 144. All such claims have failed for lack of proof. United States v. Merkt, 794 F.2d 950 (5th Cir. 1986); Singer v. Waldman, 745 F.2d 606 (10th Cir. 1984); Kennedy v. Meacham, 540 F.2d

at all. The issue is whether a reasonable person might doubt his impartiality. In *Liljeberg v. Health Services Acquisition Corp.*[162] the Court found a violation of § 455(a) where the judge, as a trustee of Loyola University, had a financial interest in the outcome of a case before him but was unaware of the conflict. The point of subsection (a) is to promote public confidence in the integrity of the judiciary, not to guarantee the parties actual fairness. That being so, the Court held, "a violation of § 455(a) is established when a reasonable person, knowing the relevant facts, would expect that a [judge] knew of circumstances creating an appearance of partiality, notwithstanding a finding that the judge was not actually conscious of those circumstances."[163]

Suppose we transpose this principle to the case where a Catholic judge who is unaware of or disagrees with the Church's teaching conducts a death sentence hearing under § 848(i)—not an improbable event given the number of Catholic judges and the increasing number of federal capital cases. The government might move for disqualification on the following theory:

(1) The Catholic Church forbids its members to participate in capital punishment.
(2) Judge X is a member of the Catholic Church.
(3) Judge X may not know of the Church's teaching, or may disagree with it, but a reasonable observer would expect him to follow it.
(4) Therefore Judge X's impartiality might reasonably be questioned, and he is disqualified under § 455(a).

Is there merit to this motion?

We think not, for two reasons. The first is that membership in the Catholic Church is too imperfect a proxy for flat opposition to the death penalty to make the observer's assumption in (3) reasonable. The second is that using mere membership in any church to disqualify a federal judge would violate the Religious Test Clause.

Let us begin with the first point. We have argued that Catholics who take seriously the Church's teaching on moral questions should find it difficult to imagine cases where the government would be justified in imposing capital punishment. But even among Catholics of this descrip-

1057 (10th Cir. 1976); Annur-Ibn-Hashim Bey v. Philadelphia Passport Agency, 1986 WL 14733 (E.D. Pa. 1986); United States v. Ibrahim El-Gabrowny, 844 F. Supp. 955 (S.D.N.Y. 1994); Menora v. Illinois High School Ass'n, 527 F. Supp. 632 (N.D. Ill. 1981).

162. 486 U.S. 847 (1988).

163. *Id.* at 850.

tion there may be some differences of opinion. Some might say that the death penalty is a necessary deterrent against murder by prisoners serving life sentences.[164] Some might reject the assumptions underlying the Church's teaching, believing that the pope and the bishops (though entitled to the utmost deference for their moral judgment) had misunderstood certain facts about American society.

There may be some, but not much, room for difference on those points. There is more on the next. In Part IC we explained that the judge's moral duty varies with the nature of the judicial task. Catholic judges are not forbidden to have *anything* to do with the death penalty. We think that they may sit on the guilt phase of capital cases—provided they withdraw before sentencing. They may handle appeals challenging convictions and (perhaps) even sentences. They may also engage in collateral review of cases where the defendant was sentenced to death. Recusal motions directed at these activities should necessarily fail. But the judge's cooperation with evil passes acceptable limits when he conducts a sentencing hearing—the issue with which we are now concerned.

Thus far we have been talking about the behavior of orthodox Catholics in capital cases. But when people make sociological claims about who is a Catholic, or what Catholics think and do, they do not confine their attention to the orthodox. One often reads in the popular press about how many Catholics dissent from the Church's teaching about contraception, abortion, divorce, homosexuality, or the ordination of women.[165] Some Catholics draw a more general conclusion from these particulars—that the Church's teaching is advisory rather than authoritative. Members are well-advised to consider it, but in the end they are free to accept or reject it. This attitude about teaching is linked to another about membership—that it is a matter of voluntary association. An individual is a Catholic in good standing if he says so. These attitudes about teaching and membership conflict with the Church's traditional understanding of itself, but they fit well with the American way of thinking about religion as a free and democratic kind of enterprise. Envisioning Catholicism in this way severs the link between Church membership and belief about the death penalty. If the reasonable ob-

---

164. We rejected this assertion earlier in the text. *See supra* notes 20-35 and accompanying text. But we left open the possibility of showing that the death penalty is an effective deterrent in these cases, and that there are no equally effective alternatives.

165. Kenneth Woodward, *Mixed Blessings*, NEWSWEEK, Aug. 16, 1993, at 38; Andrew M. Greeley, *The Abortion Debate and the Catholic Subculture*, 167 AMERICA 13 (July 4-11, 1992). On the death penalty in particular, *see* Robert F. Drinan, *Catholics and the Death Penalty*, 170 AMERICA 13 (June 18-25, 1994).

server of § 455(a) holds this picture of the Catholic judge, it is hard to say why he should think that being Catholic affects his impartiality.

The case is then rather like *Menora v. Illinois High School Association*,[166] a suit on behalf of Orthodox Jewish boys who were forbidden to wear yarmulkes while playing high school basketball. The principal defendant moved to disqualify judge Milton Shadur because he was Jewish, and because before his appointment he had been an active member of the American Jewish Congress. This, the defendant charged, raised a reasonable question about his impartiality. Judge Shadur replied:

> I am Jewish, but I am not an Orthodox Jew. I do not share the beliefs of plaintiffs, nor do I practice them. But of course I respect them as I respect the beliefs and practices of every religion or, for that matter, every atheist and every agnostic. As for American Jewish Congress, like most Jewish organizations it does not have a particular religious affiliation of its own, either Orthodox, Conservative or Reform. Its members are drawn from every shade of Jewish belief or, in many cases, from every shade of lack of Jewish belief.[167]

If one assumes that the judge, though nominally a member of the same religion as the plaintiffs, is free to give allegiance to that version of doctrine he finds most convincing, this is a persuasive reason for denying recusal.

Our final observation about the first point is that many judges—even some who would regard themselves as orthodox Catholics—when faced with a conflict between moral and legal duties, see themselves as bound to enforce the law. Part of the explanation for this is that the moral-legal distinction is not as clear as we might wish. As Robert Cover put it, "the moral-[legal] decision [is actually] a moral-moral decision—a decision between the substantive moral propositions relating to [life and the death penalty] and the moral ends served by the [legal] structure as a whole, by fidelity to it."[168] There is a significant moral dimension to the legal structure created by our constitution. That system empowers Congress to define our corporate objectives, directs judges to enforce them, and sets limits on the power of judges to change our course. It would betray a public trust and undermine this system if judges who flatly opposed capital punishment were to cheat—to take charge of sentencing hearings and manipulate the law and evidence in order to save

166. 527 F. Supp. 632 (N.D. Ill. 1981).

167. *Id.* at 633.

168. COVER, *supra* note 158, at 199.

lives. Some judges see a positive as well as a negative side to this role responsibility—a duty to do one's job, not just to refrain from undercutting it. This is the position Governor Mario Cuomo took in defending his decision to allow abortion in the state of New York.

> [T]he Catholic who holds political office in a pluralistic democracy... bears special responsibility. He or she undertakes to help create conditions under which all can live with a maximum of dignity and with a reasonable degree of freedom; where everyone who chooses may hold beliefs different from specifically Catholic ones, sometimes contradictory to them[.]
>
> In fact, Catholic public officials take an oath to preserve the Constitution that guarantees this freedom.... [T]o assure our freedom we must allow others the same freedom, even if occasionally it produces conduct... which we would hold to be sinful.[169]

Justice Brennan took a similar position during his confirmation hearings in 1957, when he was asked whether he could abide by his oath in cases where "matters of faith and morals" got mixed with "matters of law and justice." He said:

> Senator, [I took my] oath just as unreservedly as I know you did... And... there isn't any obligation of our faith superior to that. [In my service on the Court] what shall control me is the oath that I took to support the Constitution and laws of the United States and [I shall] so act upon the cases that come before me for decision that it is that oath and that alone which governs.[170]

We do not defend this position as the proper response for a Catholic judge to take with respect to abortion or the death penalty. We mention it here for a different reason. The question in a disqualification motion under § 455(a) is whether a reasonable observer would expect a Catholic judge, simply by virtue of membership in the Catholic Church, to be unalterably opposed to capital punishment. It is a sociological observation, not a moral conclusion. And as a sociological observation about judges who are Catholics it is, for the reasons we have noted, unfortunately inaccurate.

---

169. Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 16 (1984).

170. *Nomination of William Joseph Brennan, Jr.: Hearings Before the Committee on the Judiciary, United States Senate*, 85th Cong., 1st Sess. 34 (1957). The interchange is discussed in Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1062-63 (1990).

Let us turn now to the second reason why such a motion should be denied. The original constitution made no mention of religious liberty as such. That guarantee came four years later in the first amendment. But article VI of the constitution did include this provision at the end of the oath clause: "no religious Test shall ever be required as a Qualification to any office or public Trust under the United States."[171] The idea probably has as much in common with our later establishment clause as with the free exercise clause. That is to say, it is as much concerned with the composition of the government (and perhaps the participant's interest in sharing those duties) as it is with the practice of faith. At the time of the convention the laws of Georgia, New Hampshire, New Jersey, North Carolina, and Vermont required high executive and legislative officers to declare their belief in the Protestant religion. Maryland and Massachusetts limited office-holding to Christians. Delaware, Pennsylvania, and Vermont insisted on an acknowledgment of the divine inspiration of the old and the new testaments.[172] By dropping limitations like these, article VI made a federal establishment of religion less likely because it prevented homogeneity among the lawmakers. It also assured an equal role in government to (most prominently) Catholics and Jews.

It seems plainly inconsistent with the clause to suggest that Catholics, simply by virtue of being Catholics, are disqualified from serving as judges.[173] There are, however, two features of this case which make it more difficult. One is that a disqualification motion prevents a Catholic judge from serving only in a particular kind of case, not from appointment, confirmation, and service in general. This fact tempers the scope of the violation, but it does not justify it. It is a point that can easily be extended to a wide range of cases, with unpalatable results. As Judge Noonan has observed, it might be raised in abortion cases as well as death penalty cases. It might be asserted against Orthodox Jews and Mormons, who also oppose abortion.[174] It might be asserted against legislators no less than judges. Suppose the Senate adopted a rule for its own proceedings that Catholics could not vote on measures dealing with

---

171. U.S. CONST. art. VI, cl. 3.

172. CARL ZOLLMAN, AMERICAN CHURCH LAW 5 (1933). The fullest account of the colonial situation and the history of the clause is Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1987).

173. It is a different matter to say that a particular Catholic judge, because he holds firmly to a proposition which his church teaches, is disqualified under § 455(b)(1) from activities which require him to hold the contrary.

174. Feminist Women's Health Center v. Codispoti, 69 F.3d 399 (9th Cir. 1995).

abortion or aid to parochial schools. Our natural reaction to a proposal like this is to think that it violates the freedoms of religion and speech. It probably does.[175] But the religious test clause provides the most precise explanation of its deficiency. We cannot limit representation along religious lines, and this goes for voting rights as well as the right to serve.[176]

The other feature which makes this case difficult is that it involves judges. The religious test clause says that religion cannot be a qualification for any "office or public Trust under the United States."[177] Does this phrase include judges? We said a moment ago that one purpose of the clause was to head off an establishment by preventing homogeneity among the lawmakers. It need not apply to judges to serve that end.[178] But the oath clause in which the religious test clause appears speaks of "executive and *judicial Officers*"—language which pretty clearly signifies that the framers thought of a judgeship as an "office."[179] The evident meaning of the religious test clause is that those whom the first part of the sentence requires to take an oath shall not have to swear to any religious propositions. Judges are required to take an oath by the first part of the sentence. And we should guard against understanding the religious test clause too narrowly. People supported it for more than one reason, and some did so for reasons that would look to us more like arguments for the free exercise of religion. James Iredell defended it this way: "This article is calculated to secure universal religious liberty,

175. The Court held in *McDaniel v. Paty*, 435 U.S. 618 (1978), that a state law disqualifying clergy from legislative service violated the free exercise clause. The decision invalidating a religious oath in *Torcaso v. Watkins*, 367 U.S. 488 (1961), also relies in part on the free exercise clause.

176. It is no answer to say that legislators, because they make the laws, can follow the teachings of their religion without *violating* the laws—as the reasonable observer will suspect Catholic judges of wanting to do. Legislators are bound by the supreme law (the constitution), and can break their oaths and violate it by passing laws against abortion and other constitutionally protected acts that they view as sinful.

177. U.S. CONST. art. VI, cl. 3.

178. The judge's faith is not irrelevant. Unconstitutional laws, if they could get passed, would get a more receptive hearing from courts whose members all belonged to the majority religion.

179. The full text is:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. CONST. art. VI, cl. 3.

by putting all sects on a level—the only way to prevent persecution."[180] Isaac Backus defended the clause because he believed that "nothing is more evident, both in reason and the Holy Scriptures, than that religion is ever a matter between God and individuals."[181] It is certainly inconsistent with ideas like these to disqualify judges because of their affiliation with certain religious groups.[182]

III. CONCLUSION

Catholic judges must answer some complex moral and legal questions in deciding whether to sit in death penalty cases. Sometimes (as with direct appeals of death sentences) the right answers are not obvious. But in a system that effectively leaves the decision up to the judge, these are questions that responsible Catholics must consider seriously. Judges cannot—nor should they try to—align our legal system with the Church's moral teaching whenever the two diverge. They should, however, conform their own behavior to the Church's standard. Perhaps their good example will have some effect.

---

180. IV ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 196 (1901).

181. LEO PFEFFER, CHURCH STATE AND FREEDOM 124 (1967).

182. Even if the public knows that a judge's religious belief is (like Judge Noonan's well known opposition to abortion) more than nominal, we think that the free exercise and religious test clauses prevent disqualification under § 455(a). Although a litigant could make a stronger case here for the "appearance of partiality" than where the judge has made no public statements about the depth of his belief, we think the constitutional guarantees trump the public relations concerns of § 455(a). As a practical matter this leaves most recusals for religious reasons in the hands of judges themselves, for problems of proof make § 455(b) motions hard to win. Only the judge himself really knows when his religious belief will cause actual bias.