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RELIGIOUS SYMBOLS AND RELIGIOUS GARB IN THE COURTROOM: PERSONAL VALUES AND PUBLIC JUDGMENTS

*Samuel J. Levine**

INTRODUCTION

AS a nation that values and guarantees religious freedom, the United States is often faced with questions regarding the public display of religious symbols. Such questions have arisen in a number of Supreme Court cases, involving both Establishment Clause and Free Exercise Clause issues. Since 1984, the Court has considered the constitutionality of the display of religious symbols such as a creche,[1] a menorah,[2] and a cross[3] in public areas. The Court has also considered the constitutionality of Air Force regulations that prohibited a clinical psychologist from wearing a yarmulke.[4]

Parallel to the Supreme Court cases, a number of federal and state courts have been faced with cases involving the display of religious symbols in the courtroom. These cases also include Establishment Clause issues, relating to a court's display of symbols such as the Ten Commandments, as well as Free Exercise Clause issues, involving the rights of parties, witnesses, and attorneys to dress in religious garb in the courtroom. At the same time, these courts have often considered the potential for juror prejudice that may result from the display of religious symbols in the courtroom.

This Article surveys and analyzes the decisions courts have reached in addressing these issues. Part I of the Article discusses the rights of parties to wear religious garb in the courtroom. Despite some notable exceptions, most courts have protected this right, finding that it would not unduly interfere with courtroom decorum or improperly prejudice a jury. Part II observes that, in contrast, courts have not been as willing to protect the rights of witnesses and attorneys to dress in religious

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1. Lynch v. Donnelly, 465 U.S. 668 (1984).

2. County of Allegheny v. ACLU, 492 U.S. 573 (1989).

3. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995). For a discussion of political and social implications of public displays of religious symbols, see Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 Harv. C.R.-C.L. L. Rev. 503 (1992).

4. *See* Goldman v. Weinberger, 475 U.S. 503 (1986).

garb in the courtroom. Part III discusses the display of religious symbols in courtrooms, and the different approaches courts have employed in considering this issue, in light of Establishment Clause questions as well as potential juror prejudice. This Article concludes with the hope that courts will have the wisdom to issue judgments that carefully balance the competing interests in a way that protects both the value of religious freedom and the values of fairness and equality.

I. THE RIGHTS OF PARTIES TO WEAR RELIGIOUS GARB IN THE COURTROOM

The diverse nature of the population of the United States manifests itself in a variety of settings. As the forum for those seeking to obtain justice, the courtroom attracts individuals from nearly every segment of the population, including adherents to numerous systems of religious beliefs. Because many religions mandate religious garb, courts have been faced with the issue of whether to allow parties to wear such garb in the courtroom. In balancing adherents' religious rights against the interests of courtroom security and decorum, courts have often, though not always, ruled in favor of religious liberties.

It should be noted that these courts have usually relied on the Supreme Court's decisions in *Sherbert v. Verner*[5] and *Wisconsin v. Yoder*,[6] which set a compelling state interest standard for restrictions on religious practice. There are presently questions regarding the continued authority of this standard, in light of subsequent Supreme Court decisions in *Employment Division, Dep't of Human Resources v. Smith*[7] and *City of Boerne v. Flores*.[8] Thus, it remains to be seen to

5. 374 U.S. 398 (1963).

6. 406 U.S. 205 (1972).

7. 494 U.S. 872 (1990).

8. 117 S. Ct. 2157 (1997). *Boerne* found unconstitutional the Religious Freedom Restoration Act ("RFRA").

There has developed a vast literature of scholarly discussions of *Smith*, RFRA, *Boerne*, and their effects on Free Exercise Clause adjudication. *See, e.g.*, Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539 (1995) (arguing that RFRA is unconstitutional because it violates the principles of Federalism and separation of powers); Robert F. Drinan, *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 Geo. L.J. 101 (1997) (warning that the decision to strike down RFRA may be just the beginning of a struggle between the Supreme Court, Congress, and the American people); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. Rev. 437 (1994) (arguing that RFRA is unconstitutional because it violates principles of religious freedom, exceeds legitimate federal authority, and impermissibly binds the Judiciary); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 Sup. Ct. Rev. 323, 333-59 (reviewing *Smith* and the subsequent passage and constitutionality of RFRA); Eugene Gressman & Angela C. Carmella, *RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65 (1996) (arguing that RFRA is unconstitutional, a bad precedent for future Congresses that aim to undo Supreme Court decisions, and an unfortunate response to *Smith*); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Four-*

what extent parties will continue to enjoy the right to wear religious garb in the courtroom.

In 1970, in *McMillan v. State*,[9] the Maryland Court of Appeals considered the issue of a party's right to wear a religious head covering in the courtroom. During his arraignment, the defendant, also known as Olugbala, was asked to remove his filaas, a religious head covering.[10] Olugbala, a member of a religious sect known as Ujamma, refused, explaining that his religion required that he wear the filaas in the courtroom.[11] Despite the protestations of Olugbala and his attorney, the trial court ruled that Olugbala was required to remove the filaas, and, in response to the attorney's question, added that a Jewish individual would likewise be required to remove a yarmulke.[12] When Olugbala nevertheless continued to wear his filaas, in adherence to his professed religious belief, the trial court found him in contempt.[13] The Court of Appeals reversed.

The appeals court cited the landmark Supreme Court case of *Sherbert v. Verner*,[14] which applied the compelling state interest standard for governmental restrictions on religious practice.[15] Despite acknowledging that "respect for the courts is something in which the State has a compelling interest," the court found that "it would appear that the wearing of the filaas by the defendant was not disruptive of the decorum and respect to which a court is entitled."[16] In contrast, the court observed that the Supreme Court permitted restrictions on religious practices when such practices or beliefs "imposed some substantial threat to public safety."[17]

The court also criticized the trial court for failing to examine the basis for Olugbala's professed religious belief. It noted that courts do not have the discretion to judge whether a particular religious belief is

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teenth Amendment, 16 Cardozo L. Rev. 357 (1994) (asserting that RFRA is unconstitutional, and arguing that the solution to the problems raised by *Smith* may be found through a more thoughtful and vigorous Supreme Court); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209 (1994) (analyzing the legislative history of RFRA); Michael M. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153 (1997) (arguing that RFRA is a valid exercise of congressional power under Section 5 of the Fourteenth Amendment); William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 Duke L.J. 291 (1996) (arguing that RFRA oversteps the bounds of congressional power under Section 5 of the Fourteenth Amendment); *Symposium: The Religious Freedom Restoration Act*, 56 Mont. L. Rev. 5 (1995) (a collection of articles on RFRA).

9. 265 A.2d 453 (Md. 1970).
10. *Id.* at 454.
11. *Id.* at 454, 457.
12. *Id.* at 455.
13. *Id.*
14. 374 U.S. 398 (1963).
15. *Id.* at 406.
16. *McMillan*, 265 A.2d at 456.
17. *Id.* at 456 (quoting *Sherbert*, 374 U.S. at 403).

correct, though they do have the authority to inquire as to the sincerity of a professed religious belief.[18] Applying these principles to Olugbala, the court found that the trial court had erred in refusing to consider the nature of Olugbala's religious claim. The court referred to the transcript of a habeas corpus proceeding conducted two days after the trial court's contempt order, at which Olugbala described the basis of his religious beliefs. He stated that he had been a member of the Ujamma faith for two years, and that his religion required him to wear his filaas in front of his oppressors, whom he believed to include the United States courts.[19] Restating the courts' role of weighing only the sincerity of religious beliefs and not their theological merit, the Maryland Court of Appeals held that the trial court erred in finding Olugbala in contempt without considering whether he was sincere in his stated belief that he was required to keep his head covered in court.[20]

Eight years later, relying in part on *McMillan*, the Rhode Island Supreme Court held that a Superior Court decision violated a party's free exercise rights by requiring him to remove his religious head covering or leave the courtroom. In *In re Palmer*,[21] Palmer, an orthodox Sunni Muslim, appealed to the Superior Court a decision of the Providence Probate Court denying his petition to change his name for religious reasons.[22] As Palmer waited for his case to be called, the trial judge noticed that he was wearing a takia, a white knitted skullcap that serves as a prayer cap for Sunni Muslims indicating that its wearer is in constant prayer.[23] When the trial judge stated that he did not allow men to wear head covers in the courtroom, Palmer responded that his religious belief prevented him from removing the takia, and he left the courtroom.[24] At a conference in chambers, the trial judge suggested that Palmer's deposition be offered into evidence in place of in-court testimony.[25] However, when the case was called for a hearing, Palmer's attorney requested that Palmer be permitted to testify in court while wearing his takia, and the court passed the case.[26]

On appeal, the Rhode Island Supreme Court held that the Superior Court's failure to ascertain the substance and sincerity of Palmer's religious beliefs denied Palmer his free exercise rights. Applying both

18. *Id.* at 456-57; *see also* United States v. Ballard, 322 U.S. 78, 86-88 (1944) (holding that courts may not inquire into the validity of a particular religious belief).

19. *McMillan*, 265 A.2d at 457.

20. *Id.*

21. 386 A.2d 1112 (R.I. 1978).

22. *Id.* at 1113-14.

23. *Id.* at 1113.

24. *Id.*

25. *Id.*

26. *Id.* at 1114

Sherbert and the more recently decided case of *Wisconsin v. Yoder*,[27] the court explained that the trial court first should have allowed Palmer to establish the sincerity of his religious beliefs, and then should have balanced his First Amendment right against the court's interest in regulating dress in the courtroom.[28] Referring to the standard enumerated in *Sherbert*, the court concluded that "wearing a prayer cap in court" does not threaten "public safety, peace, or order."[29] Therefore, similar to the decision in *McMillan*, the court held that, "assuming that the petitioner's beliefs are sincere, the state would bear a heavy burden of establishing how such actions threaten any compelling interest that the state may have in maintaining decorum in the courtroom."[30]

Less than two months after *Palmer*, a New York state court held that a trial court had violated a civil defendant's religious rights by ordering that he remove his religious head covering before the jury entered the courtroom. In *Close-It Enterprises, Inc. v. Weinberger*,[31] the trial court's justification for requiring the defendant to remove his yarmulke appeared to be a concern that the jury might be prejudiced by the connection of a religious symbol with one of the parties. The defendant, "a devout adherent of the Jewish faith," believed that his religion required him to wear his yarmulke, and therefore, faced with what the appellate court termed "an unenviable choice," chose to leave the courtroom.[32] The trial—"really an inquest," according to the appellate court—was conducted in the defendant's absence and, within minutes of the trial's conclusion, the jury found in favor of the plaintiff.[33]

The Appellate Division reversed, stating that the defendant should not have been required to choose between his legal interests and his religious beliefs. The court found no reason to believe that any of the parties would have been denied a fair trial had the defendant worn a yarmulke. In addition, the court noted that neither the plaintiff nor his attorney had objected, and that the defendant had already worn his yarmulke in front of the potential jurors during jury selection.[34] Finally, the court suggested that any potential prejudice could have been alleviated through the *voir dire* and the court's instructions to the jury.[35]

In a more recent case, a Florida state court endorsed the use of jury instructions to prevent any prejudice that may result from a party's

27. 406 U.S. 205 (1972).
28. *Palmer*, 386 A.2d at 1115.
29. *Id.* at 1116.
30. *Id.*
31. 407 N.Y.S.2d 587 (App. Div. 1978).
32. *Id.* at 588.
33. *Id.*
34. *Id.*
35. *Id.*

wearing religious garb in a courtroom. In the 1994 case of *Joseph v. State*,[36] the petitioner professed to being a member of "an 'omni' type of religion incorporating many different religious denominations, and based on the deity's word being superior to the laws of man."[37] He claimed that his religion required him to wear a sweatshirt and jeans with certain religious pictures and names.[38] The trial court, despite acknowledging that the petitioner's beliefs were sincerely religious, prohibited him from wearing these clothes at trial.[39]

The Florida Court of Appeal, citing extensively to *Palmer*, engaged in an analysis similar to that of the Rhode Island Supreme Court and applied the rule from *Sherbert*.[40] The court first found that the defendant's choice of clothes was sincerely based on his religious beliefs, and that, although these beliefs were "not mainstream," case law required "a subjective definition of religion . . . in constitutional analysis which examines the individual's inward religious attitudes."[41] After the petitioner met the first prong of the *Sherbert* test by asserting a sincerely held religious belief, the court found that the trial court failed to offer "any evidence or basis to support" its decision to prohibit his religious garb in the courtroom.[42] Responding to arguments of potential juror prejudice, the court echoed *Weinberger*, calling for jury instructions that would tell jurors to disregard the petitioner's garb and would explain to them his religious rights.[43]

While these cases illustrate a general willingness among appellate courts to protect the rights of parties to wear religious garb in the courtroom, courts have placed limitations on these rights. For example, in *Spanks-El v. Finley*,[44] the plaintiff was an adherent to Islam who claimed that he was required by his religion to wear a fez on his head at all times.[45] When the plaintiff refused to remove his fez for

36. 642 So. 2d 613 (Fla. Dist. Ct. App. 1994).
37. *Id.* at 615.
38. *Id.* at 614-15.
39. *Id.* at 613-15.
40. Sherbert v. Verner, 374 U.S. 398 (1963).
41. *Joseph*, 642 So. 2d at 615 (citing International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2d Cir. 1981)); *see also* United States v. Lee, 455 U.S. 252, 257 (1982) (stating that "[c]ourts are not arbiters of scriptural interpretation" and that it was beyond "the judicial function and judicial competence" to determine whether Lee or the government had correctly interpreted the Amish faith, and "therefore accept[ing] appellee's contention that both payment and receipt of social security benefits is [sic] forbidden by the Amish faith" (quoting Thomas v. Review Bd., 450 U.S. 707, 716 (1981))); *Thomas*, 450 U.S. at 716 (accepting Thomas's claim that his religion required him to quit his job, because "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith," and because "it is clear that Thomas terminated his employment for religious reasons").
42. *Joseph*, 642 So. 2d at 615.
43. *Id.*
44. No. 85-C9259, 1987 U.S. Dist. LEXIS 3374 (N.D. Ill. Apr. 23, 1987), *aff'd*, 845 F.2d 1023 (7th Cir. 1988).
45. *Id.* at *1-*2.

the purposes of a security search, he was denied access to the courtroom. The plaintiff claimed that his free exercise rights were violated, and alleged that, because he was unable to enter the courtroom to testify, a judge ruled against him in a will contest.[46]

Despite the existence of "some dispute as to whether plaintiff must 'always' wear the fez as part of his religious practice," the United States District Court for the Northern District of Illinois assumed that the plaintiff "sincerely and deeply believes that he must keep the fez atop his head at all times, including when entering a courtroom, in order to properly practice his religion."[47] Therefore, the court applied the compelling state interest test in deciding whether the state was justified in requiring the plaintiff to remove his fez for a security search.

The *Spanks-El* court balanced the plaintiff's free exercise interests against the state's interest in courtroom security. Though accepting the plaintiff's contention that his religion required him to wear the fez at all times, the court emphasized the limited nature of the burden that would be placed on the plaintiff through a "temporary removal of his hat at a security checkpoint for purposes of visually detecting whether the hat contained a security risk."[48] The court found that "so long as courts have a compelling interest in maintaining, as far as is possible, security from danger, the state is entitled to ask that persons seeking courthouse access submit to a brief inspection of those personal articles that reasonably pose a security risk. That includes plaintiff's fez."[49] Thus, the District Court rejected the plaintiff's claim that the state court had violated his free exercise rights.

In *State v. Hodges*,[50] the Tennessee Supreme Court appeared to allow for a greater limitation on a party's right to wear religious garb in the courtroom, but only under extraordinary circumstances. The trial court's order prohibited a criminal defendant from entering the courtroom dressed—as described by the trial court—"like a chicken."[51]

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46. *Id.* at *2.

47. *Id.* at *2-*3. The court's acceptance of the plaintiff's interpretation of his religious requirements is apparently consistent with United States Supreme Court opinions in *Thomas v. Review Board*, 450 U.S. 707 (1981) and *United States v. Lee*, 455 U.S. 252 (1982). *See supra* note 41. For an analysis of the Court's consideration of whether an individual is actually "required" by religious belief to wear a particular religious garb, see discussion *infra* note 98.

48. *Spanks-El*, 1987 U.S. Dist. LEXIS 3374, at *3.

49. *Id.* at *9.

50. 695 S.W.2d 171 (Tenn. 1985).

51. *Id.* In the order adjudicating the defendant in contempt, the trial judge described the defendant as

> dressed in a grossly shocking and bizarre attire, consisting of brown and white fur tied around his body at his ankles, loins and head, with a like vest made out of fur, and complete with eye goggles over his eyes. He had colored his face and chest with a very pale green paint or coloring. He had what appeared to be a human skull dangling from his waist and in his hand he carried a stuffed snake.

When the trial court ordered the defendant to wear "proper clothes" for the trial, the defendant asserted that "[t]his is a spiritual attire and it is my religious belief."[52] The trial court found the defendant in contempt.[53] On appeal, the Court of Criminal Appeals reversed the contempt order, finding that the trial court should have inquired into the "nature and sincerity of appellant's beliefs, the denomination of his religion, its origin, organization, and the length of time which the appellant had espoused it."[54]

In remanding the case to the trial court, the Tennessee Supreme Court appeared to anticipate that the trial court would likely reach the same decision as in its original order. The court relied heavily on *Palmer*, which required a balancing of a party's First Amendment rights against the interest of maintaining decorum in the courtroom.[55] Based on *Palmer*, the court identified the threshold issue as whether the defendant's asserted belief was entitled to First Amendment protection.[56] To address this issue, the court first observed that *Sherbert*, *Yoder*, and

> most of the free exercise cases decided by the United States Supreme Court have involved the religious beliefs and practices of well established religions, well documented beliefs and practices long adhered to, so that the Court has not been called upon to explicitly articulate what constitutes a religious belief that is entitled to First Amendment protection.[57]

The court found instructive the Court's analysis in *Yoder*, which explained that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in

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Id. at 171 n.1.

The Supreme Court of Tennessee further observed, based on photographs of the defendant at the trial, that the

> so-called vest consisted of two pieces of fur that covered each arm but did not meet in front or in back, leaving defendant's chest and back naked to his waist. His legs were also naked from mid-way between his knee and waist to his ankles. He appeared to be carrying a military gas mask and other unidentifiable ornaments.

Id.

52. *Id.* at 172.

53. *Id.*

54. *Id.*

55. *Id.* at 172-73.

56. *Id.* at 173.

57. *Id.* A number of scholars, noting that the United States Supreme Court has not defined religion under the First Amendment, have attempted to offer potential working definitions. *See, e.g.*, Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. Ill. L. Rev. 579; Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 Cal. L. Rev. 753 (1984); Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. Sch. L. Rev. 719, 748-49 nn.138-41 (1996) (citing these and other attempts to develop a definition of religion, as well as critiques of such efforts).

which society as a whole has important interest."[58] Therefore, in remanding the case to the trial court, the Tennessee Supreme Court emphasized the importance of determining whether the defendant was "the sole adherent to his asserted religious belief and practice."[59]

In addition to *Yoder*, the court relied on the United States Supreme Court decision in *Thomas v. Review Board*.[60] *Thomas* is often cited for the proposition that "the resolution of [what is a religious belief or practice] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[61] However, the court also quoted a qualifying statement in *Thomas*, that "[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection of the Free Exercise Clause."[62] The court strongly suggested the possibility that the case before it presented such a bizarre claim, stating that the record of the case clearly indicates that the defendant's claim may not be entitled to free exercise protections.[63]

II. The Rights of Attorneys and Witnesses to Wear Religious Garb in the Courtroom

Thus, with the exception of cases involving brief security checks or apparently bizarre religious claims, courts have consistently held that parties to cases are protected by a constitutional right to wear religious garb in the courtroom. The rights of attorneys or witnesses to dress in religious clothing pose more difficult questions. Courts have often addressed these issues in the context of the rights of priests to appear in clerical collars in the courtroom.

Well before the development of modern Religion Clause jurisprudence, the Pennsylvania Supreme Court addressed the question of whether a witness should be allowed to testify while clothed in religious garb. In the 1924 case of *Commonwealth v. Trinkle*,[64] a material witness in a criminal trial was permitted to testify at a hearing conducted at her home, after a doctor concluded that moving her to the courtroom would likely prove fatal.[65] The hearing was conducted with all the formalities of an actual courtroom proceeding, as the wit-

58. *Hodges*, 695 S.W.2d at 173 (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).
59. *Id.* at 173.
60. 450 U.S. 707 (1981).
61. *Hodges*, 695 S.W.2d at 173 (quoting *Thomas*, 450 U.S. at 714).
62. *Id.* (quoting *Thomas*, 450 U.S. at 715).
63. *Id.*
64. 124 A. 191 (Penn. 1924).
65. *Id.* at 191.

ness was sworn, questioned, and cross-examined, and the defendant was ultimately convicted.[66]

On appeal, the defendant claimed that he was unfairly prejudiced by the circumstances surrounding the witness's testimony. Among other contentions, the defendant claimed that the court should not have allowed the witness to testify "surrounded by images, pictures and fixtures indicating her faith to be Roman Catholic," as well as holding a crucifix and beads.[67] The defendant argued that, given these circumstances, the Roman Catholic members of the jury were more likely to accept as credible the witness's testimony than had she testified in the courtroom.[68] The court rejected this argument, on the grounds that "[t]hese are circumstances of a trial which cannot be obviated."[69] Moreover, the court was apparently disturbed by the implication that a jury would be improperly influenced by the sight of a witness surrounded by religious symbols, stating that "[t]o establish rules to govern such cases would be a serious reflection on our jury system."[70]

In rejecting the defendant's contention, the court also reasoned that his argument "could be used if an aged nun or priest testified in court, or any other person belonging to any particular sect or order wearing a particular dress to indicate his or her faith."[71] Thus, although the case did not involve a priest, it is clear from the court's analysis that it would have allowed a priest to testify while wearing a clerical collar, and that it would have trusted the jury's ability to judge the witness's credibility despite his religious garb.

In a case decided more than 40 years later, a New York State Appellate Term opinion suggests an unwillingness to allow a priest to testify in clerical garb. In reversing the trial court decision in *People v. DeMore*,[72] the court noted a number of errors that occurred at trial. Among these was "an improvident exercise of discretion to permit a member of the clergy to sit alongside the complaining witness while the jury was being impaneled. . . . [i]t gave an air of credence and respectability to anything the complainant might thereafter say and was prejudicial to the defendants."[73] In *DeMore*, the priest merely sat next to the complaining witness, did not testify, and apparently was present only while the jury was impaneled, not during the actual trial testimony.[74] Nevertheless, the court found the priest's appearance im-

66. *Id.* at 191-92.
67. *Id.* at 193.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. 258 N.Y.S.2d 10 (App. Term 1965).
73. *Id.* at 12.
74. *Id.*

properly prejudicial.[75] Presumably, the court would be even less likely to allow a priest to testify in clerical garb.

It is arguable, however, that the court's reasoning was based on the fact that the priest was not indispensable to the proceedings, and therefore appeared to function primarily as a means for enhancing the credibility of the witness. Such reasoning would not preclude a priest from functioning as a material witness in a case. Additionally, the court could have distinguished between the function of an attorney and that of a witness.[76]

A more recent and extensive illustration of the way courts have dealt with the rights of priests to wear clerical collars in front of juries is found in the saga of Vincent LaRocca, a Roman Catholic priest and a lawyer in New York. In 1974, the New York State Supreme Court, Criminal Term, reversed a lower court decision that had prohibited LaRocca from wearing his clerical collar during jury selection and trial.[77] Although LaRocca claimed that the lower court decision violated his free exercise rights, the Supreme Court prefaced its review of the lower court decision by stating that "[t]he lower court's order presents no complex issue of prevention of free exercise of religion, or of favoring a religion."[78] Focusing instead on jury bias, the court characterized the issue as follows:

> [T]he authority of a presiding Judge to determine, as a matter of law, that the outerwear of an attorney, be it a clerical collar, skull cap, crucifix, star of David, or other religious or societal emblem or medallion, distinctive of his faith, or belief will so prejudice the state of mind of a jury panel as is likely to preclude it from rendering an impartial verdict.[79]

Expressing confidence in the effectiveness of *voir dire*, the court concluded:

> If the outward clerical collar or other symbol denoting religious faith and integrity be barred, then what test other than *voir dire* may be applied to a trial counsel in a local community who, despite the

75. *Id.* at 12-13.

76. In the later case of Vincent LaRocca, *see infra* notes 83-87 and accompanying text, the Appellate Division upheld a trial court's authority to preclude a priest from wearing a clerical collar when serving as an attorney. Noting that the trial court did not prohibit priests from wearing the collar as a spectator, a witness, or a party, the Appellate Division referred to the special "relationship between the court and an attorney [as a] more intimate and more subject to regulation than . . . the status of a spectator, witness, or party." LaRocca v. Lane, 366 N.Y.S.2d 456, 460 (App. Div.), *aff'd*, 338 N.E.2d 606 (N.Y. 1975); *see also* LaRocca v. Gold, 662 F.2d 144, 149 (2d Cir. 1981) ("[T]here are often factors present which justify the balance being struck in favor of permitting parties and witnesses to exhibit clerical or religious affiliations while prohibiting lawyers, who are officers of the court, from doing so.").

77. LaRocca v. Lane, 353 N.Y.S.2d 867 (Sup. Ct. 1974), *rev'd*, 366 N.Y.S.2d 456 (App. Div.), *aff'd*, 338 N.E.2d 606 (N.Y. 1975).

78. *Id.* at 868.

79. *Id.*

> normal streetwear, is better known to the residents of the community for his much publicized meritorious work as a church leader and as a man of honesty and integrity? If *voir dire* is employed in one instance, it should be employed, with equal force, in the other. *Voir dire* is the very cornerstone of jury selection.[80]

The court continued, relying on a strong faith in the jury as well as a practical view of the effect of religious symbols in modern society. The court insisted:

> The presence of a clerical collar or a skull cap in our social milieu, in our political and governmental functions, is no unusual phenomenon. The prejudices of the past have been tempered by the involvement of our clergymen in the now open citadels of public life. We cannot nor may we build bars on an evanescent presumption to bias, presumably triggered by the sight of religious trappings.[81]

The court concluded: "To adopt the view that every jury panel will be biased as a matter of law is to condemn our entire society to bigotry and to deny *voir dire* its function that has been hallowed by precedent and statute."[82]

Through a more nuanced discussion of the constitutional issues involved in the case, the Appellate Division, in a three-to-one 1975 decision, reversed the decision of the Supreme Court.[83] The court balanced LaRocca's right to exercise his religious practice against the court's interest in conducting a fair and impartial trial. The court found that LaRocca's right to the free exercise of his religious beliefs was "subject to reasonable regulation when he appears as an attorney in court to try a case before a jury."[84]

Turning to the issue of securing a fair trial, the court first rejected the presumption that a careful *voir dire* would eliminate any potential juror prejudice.[85] In any event, the court continued, a fair trial "includes the atmosphere and the appearance of a fair trial."[86] Relying in part on *DeMore*, the court concluded that LaRocca's attire "would

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80. *Id.* at 870.

81. *Id.* at 871-72. The court's analysis thus relied in large part on the familiarity of a clerical collar or a yarmulke. A similar approach was applied by Justice Brennan, who argued in *Goldman v. Weinberger*, 475 U.S. 503, 518 (1986) (Brennan, J., dissenting), that "[i]t cannot be seriously contended that a serviceman in a yarmulke presents so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed."

It is not clear whether this approach would protect those who wish to wear less familiar religious garb, which might have a more pronounced effect on a jury or on military personnel. Indeed, Justice Brennan allowed for the possibility that the Air Force could prohibit turbans, saffron robes, and dreadlocks, if a court found a "*reasoned* basis" for such prohibitions. *Id.* at 519 (Brennan, J., dissenting).

82. *LaRocca*, 353 N.Y.S.2d at 872.

83. LaRocca v. Lane, 366 N.Y.S.2d 456 (App. Div.), *aff'd*, 338 N.E.2d 606 (N.Y. 1975).

84. *Id.* at 461.

85. *Id.* at 463-64.

86. *Id.* at 464.

undoubtedly affect the witnesses and the spectators. Witnesses for the prosecution, especially the complaining witnesses, might question whether the scales of justice had not been tipped by [LaRocca's] presence."[87]

In a dissenting opinion, Justice Shapiro criticized the majority's balancing test as a departure from the compelling state interest test established in *Sherbert v. Verner*,[88] thus resulting in insufficient protection of LaRocca's free exercise rights.[89] Additionally, Justice Shapiro was disturbed by the majority's "presumption" of juror prejudice and the "implicit . . . rejection of the entire process of *voir dire*."[90]

Later that year, the New York State Court of Appeals affirmed the Appellate Division decision.[91] Referring to cases such as *Sherbert* as "not particularly helpful," the court balanced the state's "paramount duty to insure a fair and impartial trial" against LaRocca's free exercise rights.[92] In discussing the potential danger to a fair trial, the court offered two alternate scenarios of juror prejudice that could result from a priest's wearing a clerical collar when serving as a lawyer. First, due to the respect accorded members of the clergy by much of society, the court found it "understandable . . . that a juror might view differently statements made by a member of the clergy . . . and might ascribe a greater measure of veracity and personal commitment to the rightness of his client's cause."[93] At the same time, the court recognized the existence of religious prejudices in society, which "might spill over from a lawyer-cleric of whatever faith to the client."[94] Thus, the court found that the lower court decision, ordering LaRocca not to wear his collar in court, protected the rights of both the defendant and the People to a fair trial.

In considering the "incidental limitation" on LaRocca's free exercise rights, the court observed that the requirement that LaRocca wear his collar "is not unconditional or beyond dispensation."[95] Despite noting that LaRocca claimed to have been "designated" by his bishop to wear the collar in court, the Court of Appeals was not persuaded that such a direction was absolute, or that it should, in any event, outweigh the court's duty in assuring a fair trial.[96] In his Appellate Division dissenting opinion, Justice Shapiro had criticized the majority opinion for referring to the "minimal effect" of the restriction on LaRocca because he was prevented from wearing his collar only

87. *Id.*
88. 374 U.S. 398 (1963).
89. *LaRocca*, 366 N.Y.S.2d at 466-71 (Shapiro, J., dissenting).
90. *Id.* at 471 (Shapiro, J., dissenting).
91. LaRocca v. Lane, 338 N.E.2d 606 (N.Y. 1975).
92. *Id.* at 612-13.
93. *Id.* at 613
94. *Id.*
95. *Id.*
96. *Id.*

when he tried cases before a jury. According to Justice Shapiro, this approach violated the rule that the state may not determine "what is a cardinal principle and what is a subordinate principle of the petitioner's religious faith."[97] Under Justice Shapiro's logic, which was endorsed generally in a one-line dissenting Court of Appeals opinion by Judge Gabrielli, the Court of Appeals' questioning of LaRocca's obligation to wear his collar was similarly improper.[98]

Despite holding against LaRocca, however, the Court of Appeals did allow for possible limitations on the scope of its ruling. Because the court's reasoning focused on a jury's reaction to the unique clerical status of a priest, the court stated that its decision could be different in cases of "head coverings, nonclerical religious garb, [or] common religious symbols worn by devotees of a faith."[99]

In December 1978, a new chapter was opened in the saga of Vincent LaRocca, who informed the District Attorney that he intended to wear his clerical collar while representing Anna Rodriguez, a witness in grand jury proceedings. The trial court ordered LaRocca not to wear his collar before the grand jury, stating in an oral bench opinion:

> [T]he very presence in the Grand Jury of Reverend LaRocca attired in priestly garb, and . . . his being referred to as the witness' counsel-

97. LaRocca v. Lane, 366 N.Y.S.2d 456, 470 (App. Div.), *aff'd*, 338 N.E.2d 606 (N.Y. 1975) (Shapiro, J., dissenting).

98. Justice Shapiro based his criticism of the majority on Justice Jackson's majority opinion in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), which stated that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. Justice Shapiro's reasoning, that a judge therefore "certainly" may not rule on what is a cardinal principle of a person's faith, is less than convincing. Justice Jackson's words prohibit a judge from prescribing to an individual a particular belief; they do not necessarily preclude a judge from analyzing the structure of an individual's professed religious system.

A Supreme Court case that might better support Justice Shapiro's view was decided a number of years later. In *Thomas v. Review Bd.*, 450 U.S. 707 (1981), the Court accepted the petitioner's depiction of his religion because "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." *Id.* at 716; *see also supra* notes 41, 47.

More recently, the Supreme Court also refused to judge the "centrality" of a religious practice within a religious system, because such an inquiry

> offers us the prospect of this Court's holding that some sincerely held religious beliefs and practices are not "central" to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words . . . to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.

Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. 439, 457-58 (1988).

For a critique of the Court's approach in these and other cases, see Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 Ford. Urb. L.J. 85 (1998).

99. LaRocca v. Lane, 338 N.E.2d 606, 613 (N.Y. 1975).

> lor [sic], plus the witness' act of conferring with, being advised by, and consulting a Roman Catholic priest projects him prominently and unmistakably in the eyes of the Grand Jurors as not merely the witness' attorney, but as a Roman Catholic priest espousing and defending her testimony.[100]

The trial court's decision appears to be consistent with the decision in *People v. DeMore*,[101] which precluded a priest from sitting next to a complaining witness because of improper enhancement of the witness's credibility.[102] In affirming the trial court's order, the Appellate Division relied instead on the Court of Appeals' holding regarding LaRocca himself, in *LaRocca v. Lane*,[103] and found no meaningful distinction between LaRocca's representation of a party to a case and his representation of a grand jury witness.[104]

When Rodriguez was subsequently indicted, LaRocca continued to serve as her attorney, and again sought to wear his collar at trial. The Supreme Court ruled in favor of LaRocca's right to wear his clerical collar while representing a criminal defendant in front of a jury.[105] The court, departing from the ruling of the Court of Appeals, based its decision on a number of factors, ranging from a careful examination of LaRocca's religious beliefs to the changing perception of members of the clergy in society.

The court first acknowledged that LaRocca based his religious practice on the direction of his superiors.[106] Under the Canon Law of the Roman Catholic Church, he was required to wear his collar in a public forum.[107] In addition, LaRocca cited a pronouncement by Pope John Paul II that further supported his claim.[108] Having thus established the religious basis for LaRocca's claim, the court turned to the question of whether LaRocca's wearing clerical garb would prevent a fair trial.

Emphasizing the "function of the judicial process to view each case with a clear eye and an open mind," the court refused to accept the Court of Appeals decision as stare decisis, stating that since the decision, "the world has turned over many, many times."[109] Specifically, the court found outdated the Court of Appeals' depiction of the measure of respect and trust accorded to members of the clergy by society. The court pointed to "the plethora of social, political, and even criminal situations occurring since 1975 . . . in which men and women of the

100. *See* LaRocca v. Gold, 662 F.2d 144, 146 (2d Cir. 1981).
101. 258 N.Y.S.2d 10 (App. Term 1965).
102. *See supra* notes 68-69 and accompanying text.
103. 338 N.E.2d 606 (N.Y. 1975).
104. *See LaRocca*, 662 F.2d at 146.
105. People v. Rodriguez, 424 N.Y.S.2d 600 (Sup. Ct. 1979).
106. *Id.* at 602.
107. *Id.*
108. *Id.*
109. *Id.*

cloth have been primary figures."[110] Such situations included "almost daily" news reports of "an ever-increasing number of [clergy] members falling into venality, unseemly behavior, and outright criminality."[111] Indeed, the court asserted, discussion of such behavior, "which in times past was spoken of in hushed and secretive tones, is a topic of open conversation today."[112]

As a result of these events, the court concluded, citizens view members of the clergy as "men and women first, equipped with all the characteristics of human beings and the added factor of their singular vocations."[113] The court insisted that denying such an erosion of respect for the clergy, which the court analogized to the erosion of public respect for the legal profession, "is to deny a reality."[114] Thus, despite acknowledging the "unfortunate and depressing" nature of these events, the court felt compelled to reject the factual basis for the Court of Appeals' decision.[115]

The court found further support for its conclusions in the Appellate Division decision in *Close-It Enterprises, Inc. v. Weinberger*.[116] In *Weinberger*, the Appellate Division reversed a trial court order that a party to the case remove his yarmulke in court.[117] The Appellate Division found that any potential prejudice resulting from the party's religious garb could be cured through *voir dire* and jury instructions.[118] The court in *Rodriguez* reasoned that if such a procedure would prevent bias regarding one of the parties to a case, it would certainly be effective with regard to an attorney, who is "a step removed from his client" and "whose activities are not in issue."[119]

Finally, the court balanced the interests in the case. Applying *Sherbert v. Verner*,[120] the court first focused on LaRocca's religious beliefs. Citing again the directives of LaRocca's church superiors, as well as LaRocca's own "intense desire to display his religious calling," the court found that his belief "pervades his daily life," "has been a part

110. *Id.* at 604.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. 407 N.Y.S.2d 587 (App. Div. 1978); *see also supra* notes 31-35 and accompanying text.
117. 407 N.Y.S. 2d at 588.
118. *Id.*
119. *Rodriguez*, 424 N.Y.S.2d at 605. In employing this logic, the court expressly disputed part of the Appellate Division's analysis in *Weinberger*. *Id.* The Appellate Division had accepted as binding the Court of Appeals decision in *LaRocca*, but had distinguished its case from *LaRocca* on the grounds that the prejudice resulting from an attorney in religious garb would be greater than that from a party's wearing a religious symbol. *Id.* The court in *Rodriguez*, which rejected *LaRocca*, disagreed with this reasoning, and, in fact, found the converse to be a more realistic description of juror responses. *Id.*
120. 374 U.S. 398 (1963).

of his existence for a substantial period of years," and "is tied to the principles and literature of his church."[121] The court therefore criticized the conclusion that requiring LaRocca to remove his collar would be merely an "incidental burden" on his religious beliefs. Such a finding, the court stated, "would . . . minimize a shared belief with literally thousands and thousands of his co-religionists."[122]

Having found a substantial burden on LaRocca's beliefs, the court balanced LaRocca's religious interests against the state's interest in a fair trial, noting that the state's interest must be compelling in order to override LaRocca's free exercise claim. The court remained unconvinced that a fair trial could not be obtained, concluding that "an in-depth and searching *voir dire* . . . is the traditional and proper vehicle to seek out and eliminate potential bias or prejudice."[123]

In further proceedings, however, a Justice of the Appellate Division granted a stay of the trial court's order, and the Appellate Division later prohibited the enforcement of the court's order. In doing so, the Appellate Division found that the trial court improperly disregarded the holding of the Court of Appeals in *LaRocca*, which "continues to be dispositive of this issue."[124] After the stay of the trial court's order, LaRocca commenced an action in the United States District Court for the Eastern District of New York. The court dismissed the action, holding that the state's interest in regulating LaRocca's garb pursuant to assuring a fair and impartial trial outweighed LaRocca's free exercise right to wear his clerical collar.[125]

LaRocca then appealed to the United States Court of Appeals for the Second Circuit. Bringing to an end the saga of Vincent LaRocca's attempt to wear his clerical collar while appearing as an attorney in front of a jury, the Second Circuit denied LaRocca's free exercise claim on the grounds of collateral estoppel. The court found that LaRocca had already a "full and fair opportunit[y]" to litigate the issue in several state courts, which had resolved the matter in favor of his opponents.[126]

LaRocca's ultimate lack of success, however, may not prevent priests from wearing clerical collars when testifying before juries. For example, in *People v. Drucker*,[127] a criminal defendant sought an order precluding the complaining witness, an Episcopalian priest, from testifying before the jury in his clerical garb. The Criminal Court first distinguished its case from *LaRocca*, noting that in *LaRocca*, the Appellate Division had emphasized that a court's authority to regulate

121. *Rodriguez*, 424 N.Y.S.2d at 606.
122. *Id.*
123. *Id.* at 608.
124. Gold v. McShane, 426 N.Y.S.2d 504, 505 (App. Div. 1980).
125. *See* LaRocca v. Gold, 662 F.2d 144, 147 (2d Cir. 1981).
126. *Id.* at 149.
127. 418 N.Y.S.2d 744 (Crim. Ct. 1979).

the outward appearance of attorneys may not extend to witnesses.[128] Instead, the court drew an analogy to *Weinberger*, in which a party to a case was allowed to wear his yarmulke in front of the jury.[129] Drawing a further analogy to a police officer who testifies in uniform, the court endorsed the use of careful *voir dire* and jury instructions to overcome any potential prejudice.[130]

The court concluded its opinion with an impassioned defense of *voir dire* and the jury system as a whole. Relying heavily on the trial court opinion in *LaRocca* and on Justice Shapiro's Appellate Division dissenting opinion, the court asserted that "[w]e must not allow every speculative prejudice to cripple our jury system" and that "[w]e are satisfied that the resort to an extensive *voir dire* and a strong charge will most clearly set the tone and leave no substantial abridgment of this defendant's rights."[131] Finally, the court charged:

> One apparently does not trust the American jury system if he believes that after an agonizing *voir dire* and a strong charge that the jury will be prepared to discount all the evidence, and the myriad factors gleaned from days of testimony, only to decide the case upon the fact that one witness wore a clerical collar.[132]

It should be noted, though, that due to the court's reliance on an opinion that was ultimately reversed and on a minority opinion, the Second Circuit suggested in 1981 that "it is questionable whether *Drucker* . . . represents the law of the state."[133]

Nevertheless, in 1982, almost one year to the date after questioning the authority of *Drucker*, the Second Circuit, without mentioning that case, endorsed the reasoning set forth in *Drucker*. In *O'Reilly v. New York Times Co.*,[134] Reverend John O'Reilly appealed from an order of the United States District Court for the Southern District of New York denying his motion to appear *pro se*. The Second Circuit found the District Court's conclusion, that "it would be disruptive to the process of the trial to have Father O'Reilly represent himself," an insufficient basis for denying him the right to proceed *pro se*.[135]

In a footnote, the Second Circuit addressed the District Court's concern that Father O'Reilly would appear in a Roman collar when presenting his summation to the jury. Similar to the state court in *Drucker*, the Second Circuit relied on *Weinberger* to support its conclusion that "[t]here is little question that were [Reverend O'Reilly] to

128. *Id.* at 745 (citing LaRocca v. Lane, 366 N.Y.S.2d 456, 460 (App. Div.), *aff'd* 338 N.E.2d 606 (N.Y. 1975)); *see also supra* note 76.
129. 418 N.Y.S.2d at 745-46.
130. *Id.* at 746.
131. *Id.* at 747.
132. *Id.*
133. *See* LaRocca v. Gold, 662 F.2d 144, 150 (2d Cir. 1981).
134. 692 F.2d 863 (2d Cir. 1982).
135. *Id.* at 869.

appear at trial only as a party and a witness in his own behalf he would not be expected to remove his collar."[136]

The Second Circuit, in fact, appeared to take the reasoning in *Drucker* and *Weinberger* a step further, allowing Reverend O'Reilly to appear as an attorney in front of the jury while wearing a clerical collar. The court distinguished its case from *LaRocca*, because Reverend O'Reilly was "not a lawyer who happens also to be a priest," but "a priest who happens also to be a *pro se* plaintiff in a civil action."[137] "We can see no reason," the court continued, "why his assumption of the further role of advocate in his own behalf should be conditioned on his doffing his everyday clerical garb."[138]

Still, the court limited its ruling to the "unusual circumstances" of the case, in which one of the issues was whether Reverend O'Reilly was, indeed, a "full-fledged ordained priest in good standing."[139] The court found that requiring him to remove his collar would affect not only his First Amendment rights, but also the very credibility of his claim, in a way that could not be cured by *voir dire* or jury instructions. Yet, the court again echoed *Drucker* in finding that Reverend O'Reilly's wearing his collar would not improperly prejudice the jury, because "[i]t should be enough to explain that Rev. O'Reilly is simply being permitted to wear his everyday dress and that no inference as to his religious standing is to be inferred therefrom."[140]

Finally, in a more recent case, the New Jersey Superior Court, Appellate Division, relied on *Drucker* and *O'Reilly* in reversing a trial court order prohibiting a party to the case from wearing his clerical garb. In *Ryslik v. Krass*,[141] the court first distinguished its case from *LaRocca* by pointing out that the priest in *Ryslik* did not appear as an attorney.[142] Unlike the courts in *Drucker* and *O'Reilly*, however, the New Jersey Court further distinguished its case from *Weinberger*, as well from *Palmer*[143] and *Joseph*,[144] on the grounds that in those cases, "the original orders impinged on what the parties considered to be a religious obligation, not merely a choice of clothes."[145] In contrast,

136. *Id.* at 869 n.8.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. 652 A.2d 767 (N.J. Super. Ct. App. Div. 1995).
142. *Id.* at 770.
143. *In re Palmer*, 386 A.2d 1112 (R.I. 1978); *see supra* notes 21-30 and accompanying text.
144. *Joseph v. State*, 642 So. 2d 613 (Fla. Dist. Ct. App. 1994); *see supra* notes 36-43 and accompanying text.
145. *Ryslik*, 652 A.2d at 771.

the court asserted, "[a] priest, unless required by church law, may wear ordinary garb."[146]

Nevertheless, the court cited *O'Reilly* and *Drucker* and, finding no reason to depart from those decisions, reversed the trial court's order. In addition, following the reasoning in those cases, and relying on what it termed a "non-constitutional basis" for its determination of the case, the court added that "[a]ny potential bias that could be caused by defendant's religious garb can be and here actually was addressed during the jury selection process."[147]

Thus, as in cases involving the rights of parties to wear religious garb in the courtroom, courts have balanced the free exercise rights of attorneys and witnesses to dress in religious clothing against countervailing interests. In particular, courts have expressed a concern for the potential prejudice that might result if an attorney or witness is allowed to dress in religious garb. Indeed, courts have, at times, found that such a concern outweighed the religious rights of the attorneys or witnesses.

III. Displays of Religious Symbols by the Court

A similar concern for potential prejudice has arisen in cases involving the display of religious symbols by the court. Yet, more significantly, such cases introduce an additional area of complexity that must be addressed—Establishment Clause considerations.

The issue of religious symbols displayed by courts has recently received much attention in both legal and popular settings, due to the

146. *Id.* The court's unequivocal statement, without elaboration, support, or further investigation, that the priest was not required to wear his clerical collar during court proceedings, is somewhat problematic. *See supra* notes 41, 47, 98.

147. *Ryslik*, 652 A.2d at 772, 772 n.3. Under unique circumstances, courts have prohibited courtroom spectators from wearing religious garb. In *United States v. Yahweh*, 779 F. Supp. 1342 (S.D. Fla. 1992), the United States District Court for the Southern District of Florida presided over a racketeering conspiracy case against nineteen members of a religious organization, the Nation of Yahweh, for numerous acts of violence. *Id.* at 1343. At an early status hearing, the court observed more than sixty courtroom spectators wearing the traditional garb of the religious group, a white turban and a long white robe. *Id.* Concerned about the possible intimidating effects on a jury, the court suggested that spectators be prohibited from dressing in the religious garb. *Id.* In the interest of guaranteeing a fair trial for the public and the government, as well as for the defendants, the court ruled that there should be no "uniforms" in the courtroom. *Id.* Thus, the court ordered that neither witnesses, including Metro-Dade Department of Public Safety witnesses, nor spectators, would be permitted to wear their "uniforms" in the courtroom. *Id.* at 1344. The court did make an exception for the defendants, permitting them to dress in their religious garb because their only other clothes would identify them to the jury as prison inmates. *Id.* at 1344-45.

This issue arose again in the trial of Oklahoma City bombing suspects Timothy McVeigh and Terry Nichols. United States District Court Judge Richard Matsch prohibited courtroom observers from wearing any religious symbols. Stephen Gascoyne, *Nichols Lawyer: Rights Were Violated*, U.P.I., June 29, 1996, *available in* LEXIS, News Library, UPI File.

controversy over Judge Roy Moore's refusal to remove a display of the Ten Commandments from his Alabama courtroom. The recent events, however, represent only the latest stage of a larger controversy involving the relationship of the Establishment Clause to the presence of religious symbols in courtrooms as well as other public areas throughout the United States.

In 1973, the Kentucky Court of Appeals considered the appeal of a convicted murderer, who argued that the trial court had erred in refusing to remove a framed copy of the Ten Commandments from the courtroom.[148] In particular, the defendant claimed that he was prejudiced because "his entire life had been in opposition to the Ten Commandments."[149] Without engaging in an Establishment Clause analysis, the court called the defendant's claim "near frivolous."[150] The court found that "[t]here was no pervasive religious atmosphere" at trial, and that the defendant had not produced any evidence to show that the jurors could read or even noticed the copy of the Ten Commandments.[151] Moreover, the court asserted that, regardless of the presence of the Ten Commandments in the courtroom, American jurors would most likely "have some knowledge of the provisions of the Ten Commandments."[152] Thus, the court likened the display of the Ten Commandments to the sword of justice hanging on the wall behind the judge in London's Old Bailey, with an inscription calling for the punishment of wrongdoers.[153] The court found that in both instances, the displays did not prejudice the jurors, but instead merely reminded them of basic principles of justice that they presumably already knew.

In 1980, in *Stone v. Graham*,[154] a case that involved classrooms rather than courtrooms, the United States Supreme Court reversed Kentucky State Court decisions which had upheld a statute requiring the posting of a copy of the Ten Commandments in public school classrooms. In considering the constitutionality of the statute, the Court applied the three-part test established in the Court's landmark case of *Lemon v. Kurtzman*.[155] *Lemon* required that: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . .; finally the statute must not foster 'an excessive government entanglement with religion.'"[156]

148. Scott v. Commonwealth, 497 S.W.2d 561, 563 (Ky. 1973).
149. *Id.* (citing defendant's brief).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. 449 U.S. 39 (1980) (per curiam).
155. 403 U.S. 602 (1971).
156. *Id.* at 612-13 (citations omitted).

Addressing the first prong of the *Lemon* test, the *Stone* court found that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths."[157] Therefore, the court rejected the State's reliance on the small print at the bottom of the displays stating, "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."[158] The court insisted that "no legislative recitation of a supposed secular purpose can blind us" to the religious nature of the Ten Commandments, which include not only secular matters but religious duties as well.[159] Thus, the Court concluded that the display of the Ten Commandments failed the first prong of the *Lemon* test, thereby violating the Establishment Clause.

In a dissenting opinion, Justice Rehnquist expressed a number of concerns over the majority's approach, stating that "[t]he Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence."[160] Moreover, in response to the majority's reference to the undeniably religious significance of the Ten Commandments, Justice Rehnquist argued that "[i]t is equally undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World."[161] In a footnote, Justice Rehnquist further rejected the majority's emphasis on the strictly religious portions of the Ten Commandments, focusing instead on the "significant secular impact" of the "document as a whole," including its "directly traceable secular effects."[162]

In *Harvey v. Cobb County*,[163] the plaintiffs challenged the constitutionality of the display of a framed panel of the Ten Commandments and the "Great Commandment" in the Cobb County State Court Building.[164] Relying on the *Stone* majority's perception of the nature

157. *Stone*, 449 U.S. at 41.
158. *Id.* (quoting Ky. Rev. Stat. Ann. § 158.178 (Michie 1996)).
159. *Id.* at 41.
160. *Id.* at 43 (Rehnquist, J., dissenting).
161. *Id.* at 45 (Rehnquist, J., dissenting).
162. *Id.* at 45 n.2 (Rehnquist, J., dissenting).
163. Harvey v. Cobb County, 811 F. Supp. 669 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994).
164. *Id.* at 671. The court used the term "Great Commandment" for the following statements that followed the text of the Ten Commandments in the display: "Jesus said: 1. Thou shalt love the LORD thy GOD with all thy heart, and with all thy soul, and with all thy mind. 2. Thou shalt love thy neighbor as thy self. On these two commandments hang all the law and the prophets." *Id.* at 672.

The court cited the trial testimony of a rabbi, who noted that these statements, excluding the reference to Jesus, are found in Jewish sources that preceded Christianity. *Id.* The first commandment is "one of the fundamental Jewish creeds found in Deuteronomy." *Id.; see also Deuteronomy* 6:5, 11:13. The second commandment is taken from Leviticus. *Leviticus* 19:18. Finally, the third part of the quotation "is actu-

of the Ten Commandments, the United States District Court for the Northern District of Georgia held that the display of the Ten Commandments in a courtroom violated the Establishment Clause.[165]

The *Harvey* court's Establishment Clause analysis, based on the *Lemon* test, incorporated other Supreme Court decisions, subsequent to *Stone*, regarding the display of religious symbols in public areas.[166] The court observed that in such cases, the Supreme Court's analysis had emphasized the second prong of *Lemon*, "that the principal or primary effect of the government action must not be either to advance or inhibit religion."[167] Using as a model Justice Blackmun's opinion in *County of Allegheny v. ACLU*,[168] the court identified the Supreme Court's focus on the "content and context" of the display.[169]

In *Allegheny*, the Court considered the constitutionality of the government's permitting the display of a creche in the county courthouse, and the display of a menorah in the City-County Building. In his majority opinion regarding the creche, Justice Blackmun first looked at the content of the display, in which the angel in the creche said "Glory to God in the Highest!"[170] Justice Blackmun interpreted this to mean "Glory to God because of the birth of Jesus," and concluded that "[t]his praise to God in Christian terms is indisputably religious—indeed sectarian—just as it is when said in the Gospel or in a church service."[171] Turning then to the context of the creche, Justice Blackmun noted that the creche "stands alone [as] the single element of the display on the Grand Staircase . . . the 'main' and 'most beautiful part' of the building that is the seat of county government."[172] Based on these two factors, Justice Blackmun concluded that "nothing in the context of the display detracts from the creche's religious message" and that "[n]o viewer could reasonably think that [the creche] occupies this location without the support and approval of the government."[173] Therefore, he concluded, the display of the creche violated the Establishment Clause, because, through it, Allegheny County cel-

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ally a paraphrase borrowed from Rabbinic literature by Rabbi Hillel, which precedes even the birth of Jesus." *Harvey*, 811 F. Supp. at 672; *see also Talmud Bavli*, Sabbath 31a; Rashi, Commentaries on the Pentateuch 126 (1970) (discussing *Leviticus* 19:18 and citing Rabbi Akiva's statement that the biblical verse "love your neighbor as yourself" is "a fundamental principle of the Torah").

165. *Id.* at 677-78.

166. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

167. *Harvey*, 811 F. Supp. at 676. For an analysis of the Court's current application of the *Lemon* test to Establishment Clause issues such as the display of religious symbols in public areas, see Greenawalt, *supra* note 8, at 359-79.

168. 492 U.S. 573 (1989).

169. *Harvey*, 811 F. Supp. at 676-77.

170. *Allegheny*, 492 U.S. at 598.

171. *Id.*

172. *Id.* at 598-99.

173. *Id.* at 598-600.

ebrated Christmas "in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ."[174]

Though there was no Opinion of the Court with regard to the display of the menorah, the *Allegheny* court "was unified in its approach" that this issue also depended on a consideration of both content and context.[175] In his plurality opinion, Justice Blackmun argued that, in contrast to the creche, the menorah had both religious and secular components. He found that although it "is a religious symbol . . . the menorah's message is not exclusively religious,"[176] because, as he noted in his majority opinion, "Chanukah . . . is a cultural event as well as a religious holiday," celebrated by some American Jews as "an expression of ethnic identity."[177] Therefore, to determine the message of the menorah display, Justice Blackmun looked to its context, which included not only the 18-foot menorah, but also the city's 45-foot Christmas tree and a sign entitled "Salute to Liberty."[178] Because the Christmas tree, "clearly the predominant element in the city's display," is "not itself a religious symbol," Justice Blackmun concluded that "the combination of the tree and menorah communicates . . . a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition."[179]

Based on *Allegheny*, the District Court in *Harvey* likewise analyzed the courtroom display of the Ten Commandments in terms of its content and context.[180] The court referred to the "undeniably religious" nature of the panel, due to its inclusion of not only the Ten Commandments, "an integral part of the Jewish and Christian traditions," but also the Great Commandment, which "emphasize[d] the religious nature of the panel and its association with the Christian tradition."[181]

174. *Id.* at 601.

175. Harvey v. Cobb County, 811 F. Supp. 669, 676-77 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994).

176. *Allegheny*, 492 U.S. at 613 (opinion of Blackmun, J.).

177. *Id.* at 585.

178. *Id.* at 582, 587.

179. *Id.* at 616-18 (opinion of Blackmun, J.).

180. *Harvey*, 811 F. Supp. at 677-78.

181. *Id.* at 677. The court further stated that "the panel's association with the Christian tradition is accentuated by the language of the Sixth Commandment prohibiting killing," i.e., "Thou shalt not kill." *Id.* at 672, 677. According to the trial testimony of a rabbi, this statement represents a "mistranslation of the original Hebrew, which prohibits murder, and frequently appears in Christian versions of the Ten Commandments." *Id.* at 677. It is not clear why the court emphasized the specifically Christian character of the Ten Commandments display. In *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), the Supreme Court had declared unconstitutional the display of the Ten Commandments in public schools, because it found that the Ten Commandments "are undeniably a sacred text in the Jewish and Christian faiths." *Id.* at 41.

In any event, the rabbi apparently did not testify about other discrepancies between the courtroom display and Jewish tradition regarding the passages in Exodus where the Ten Commandments are found. *Exodus* 20:1-17; *cf. Deuteronomy* 5:6-21. For example, the display listed as the First Commandment "Thou shalt have no other gods before me." *Harvey*, 811 F. Supp. at 671. This commandment is found in *Exodus* in

Therefore, citing the Supreme Court's opinion in *Stone v. Graham*,[182] the court in *Harvey* rejected the argument that the content of the display was not religious. The court concluded that "these Biblical texts, the Ten Commandments and the Great Commandment, are undeniably religious and to deny this is to deny their essence."[183]

Following the next step of the *Allegheny* analysis, the District Court then considered the context of the display, to determine whether "its overall effect endorses religion."[184] The court found that, similar to the creche in *Allegheny*, the display stood alone in the alcove and did not contain "countervailing secular passages or symbols."[185] In addition, the court noted the setting of the display, "a seat of judicial authority in the county," which, as in *Allegheny*, would lead a reasonable viewer to believe that the government approved of the display.[186] Thus, the court concluded that the display had "the effect of endorsing religion in general and Christianity in particular," thereby violating the Establishment Clause.[187]

Despite holding that the display of the Ten Commandments violated the Establishment Clause, in concluding its opinion, the court allowed for the possibility that the plaque could be maintained if other objects were displayed along with it. Emphasizing again the importance of the context of a display, the court cited Justice Stevens's con-

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the third verse of Chapter 20. According to most Jewish biblical commentaries, the first commandment in the chapter is actually found in the preceding verse which states, "I am the Lord, your God, Who took you out of slavery in Egypt." *Exodus* 20:2; *see, e.g.*, Maimonides, Book of Commandments. Moreover, the display translated the Eighth Commandment as "Thou shalt not steal." *Harvey*, 811 F. Supp. at 672. According to Jewish tradition, however, a more precise translation would be a prohibition against kidnapping, which is a capital crime, consistent with the preceding prohibitions against murder and adultery, also capital crimes. The prohibition against stealing is found elsewhere, in *Leviticus* 19:11. *See* Rashi, *supra* note 164, at 93 (discussing *Exodus* 20:13).

The very title of the display, "The Ten Commandments," is not fully consistent with Jewish biblical interpretation, which identifies more than ten commandments in this segment of the Torah. The biblical phrase used for this segment of the Torah is, in fact, *Aseret Ha-devarim*, *Deuteronomy* 4:13, which means roughly "the ten words" or "the ten statements." Indeed, this phrase is apparently the source of the term "Decalogue," also meaning "ten words," and used by Christians as well to refer to this segment of the Torah. According to Jewish tradition, although these verses can be divided into ten statements, some of the statements consist of more than one commandment. Thus, these verses as a whole actually contain more than ten commandments. *See* Walter Harrelson, The Ten Commandments and Human Rights 47 (1980); Maimonides, *supra*.

182. 449 U.S. 39 (1980) (per curiam); *see supra* notes 156-59 and accompanying text.

183. *Harvey*, 811 F. Supp. at 678.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

curring opinion from *Allegheny*.[188] Justice Stevens explained why, although he held that both the display of the creche and that of the menorah in *Allegheny* violated the Establishment Clause, a carving of Moses holding the Ten Commandment on the walls of the United States Supreme Court courtroom did not present such a violation.[189] He reasoned that, on its own, the carving could "convey[ ] an equivocal message, perhaps of respect for Judaism, for religion in general, or for law."[190] However, Justice Stevens observed, the carving of Moses was placed together with not only other religious leaders, such as Confucius and Mohammed, but also with such secular figures as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall, "signal[ling] respect not for great proselytizers but for great lawgivers."[191]

The court in *Harvey* similarly reasoned that the inclusion of the Ten Commandments in a larger educational display, including such materials as the Code of Hammurabi, the Code of Justinian, and passages from early English cases, would not violate the Constitution.[192] One year later, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision, without opinion.[193]

Another episode involving objections to a courtroom display of the Ten Commandments is currently being played out in North Carolina. In 1995, Judge Lacy Thornburg of the United States District Court for the Western District of North Carolina considered the case of *Suhre v. Board of Commissioners*.[194] Richard Suhre, an avowed atheist, objected to a display in a courtroom inside the Haywood County Courthouse.[195] The display consisted of abridged versions of the Ten Commandments, placed behind the bench of the presiding judge, on each side of a bas-relief of "Lady Justice."[196] The figure of Lady Justice was approximately twice as large as the plaques of the Ten Commandments, and flags of the United States and the State of North Carolina were placed on the sides of the display.[197]

Suhre stated that he was offended by the presence of the Ten Commandments in the courtroom, and claimed that he was personally prejudiced by the display.[198] While testifying as a criminal defendant

188. *Id.* at 678-79 (quoting County of Allegheny v. ACLU, 492 U.S. 573, 652-53 (1989) (Stevens, J., concurring in part and dissenting in part)).
189. *Allegheny*, 492 U.S. at 652 (Stevens, J., concurring in part and dissenting in part).
190. *Id.* (Stevens, J., concurring in part and dissenting in part).
191. *Id.* at 652-63 (Stevens, J., concurring in part and dissenting in part).
192. *Harvey*, 811 F. Supp. at 678.
193. Harvey v. Cobb County, 15 F.3d 1097 (11th Cir. 1994).
194. 894 F. Supp. 927 (W.D.N.C. 1995).
195. *Id.* at 929.
196. *Id.*
197. Suhre v. Haywood County, No. 94-CV-179, 1997 U.S. Dist. LEXIS 5013, at *4 (W.D.N.C. Mar. 17, 1997), *rev'd and remanded*, 131 F.3d 1083 (4th Cir. 1997).
198. *Suhre*, 894 F. Supp. at 929-30.

in the courtroom, Suhre had refused to swear on the Bible.[199] He alleged that the jury, conscious of the display behind the judge, found him guilty of violating the First Commandment, depicted in the courtroom as "Thou shalt have no other god before me."[200] As the District Court put it, he claimed that he was convicted "not because of his guilt but because of his atheism."[201]

The District Court opinion further recounted the events leading up to its consideration of the case, including Suhre's request, at a Public Session on September 8, 1994, that the Board of County Commissioners remove the display, and the Board's unanimous rejection of his request.[202] Less than two weeks later, Suhre initiated the lawsuit. On September 22, 1994, at another Public Session, several Haywood County citizens expressed their support for the Board's action, and presented petitions, containing more than 1500 signatures, supporting the continued display of the Ten Commandments in the courtroom.[203] According to the District Court, the Board referred to the display—which had been in the courtroom since the building opened in 1931—as "an historical part of the courthouse," and stated that "this country was founded on the principles of the Ten Commandments and that they would remain in the courtroom until their removal is forced by a court of law."[204]

The defendants, the Board of Commissioners and the manager of Haywood County, claimed that their decision was entitled to legislative immunity.[205] The District Court agreed, finding that the Board's decision to maintain the display until ordered by a court to remove it "constituted a policy making decision on behalf of the citizens of Haywood County."[206] Moreover, the court found that, because the commissioners acted in their legislative capacity, they were immune not only from liability, but also from defending themselves, which would require testifying about their legislative conduct and their motives.[207] The court engaged in similar reasoning to conclude that the county itself, as well as the county manager, was likewise immune from the suit.[208]

The court's decision did not end the controversy, however. The case was remanded to the District Court as a result of a subsequent Fourth Circuit decision on the law of immunity.[209] When the case

199. *Id.* at 930.
200. *Id.* at 930 & n.2.
201. *Id.* at 930.
202. *Id.*
203. *Id.*
204. *Id.* at 931.
205. *Id.* at 930.
206. *Id.* at 932.
207. *Id.*
208. *Id.*
209. *See* Berkeley v. Common Council of Charleston, 63 F.3d 295 (4th Cir. 1995).

came before Judge Thornburg in 1997, he again ruled against Suhre, this time holding that Suhre did not have standing to challenge the display.[210] Suhre stated that, as an atheist, he felt that religion has no place in a courtroom, and "he feels distinctly unwelcome in that courtroom."[211] Thus, he claimed that he had citizen standing due to an "'injury in fact' to [his] [ ] individuated right to a government that 'shall make no law respecting the establishment of religion.'"[212] Suhre further cited *Harvey v. Cobb County*[213] to support the proposition that, although he could not establish standing through spiritual or psychological harm resulting from offensive contact, his "'unwelcome' contact with the offensive object is enough to establish injury for purposes of standing."[214]

The court rejected Suhre's reliance on *Harvey* as inconsistent with the Supreme Court's holding that required a "personal injury suffered by [him] *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. . . . [S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy."[215] Thus, the court stated that it did not find "that the presence of an abbreviated version of the Ten Commandments on either side of Lady Justice constitutes an unwelcome religious exercise or the assumption of a special burden sufficient to establish standing."[216] Moreover, the court distinguished its case from *Harvey* on the grounds that the display in the Cobb County courtroom included no secular components, such as Lady Justice, and cited "a precept singularly associated with the Christian faith, includ[ing] the name of 'Jesus.'"[217] As Judge Thornburg noted, this distinction, grounded in the Supreme Court's reasoning in *Allegheny*,[218] was in fact articulated by the court in *Harvey* itself, which prescribed the addition of secular components to the display as a means of curing the violation of the Establishment Clause.[219]

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210. Suhre v. Haywood County, No. 94-CV-179, 1997 U.S. Dist. LEXIS 5013 (W.D.N.C. Mar. 17, 1997), *rev'd and remanded*, 131 F.3d 1083 (4th Cir. 1997).

211. *Id.* at *16.

212. *Id.* at *17 (quoting Valley Forge, Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 470 (1982)) (alteration in original).

213. 811 F. Supp. 669 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994).

214. *Suhre*, 1997 U.S. Dist. LEXIS 5013, at *18 (quoting *Harvey*, 811 F. Supp. at 672).

215. *Id.* at *17 (quoting *Valley Forge*, 454 U.S. at 485-86) (emphasis added).

216. *Id.* at *19.

217. *Id.* at *20 n.9. While Judge Thornburg accurately observed that the display in *Harvey* made reference to Jesus, it is less than clear that the precept cited was "singularly associated" with Christianity. As the court in *Harvey* noted, based on the testimony of a rabbi, the substance of the "Great Commandment," with the exclusion of the reference to Jesus, is found in Jewish sources that preceded Christianity. *See Harvey*, 811 F. Supp. at 672; *supra* note 181.

218. 492 U.S. 573 (1989); *see supra* notes 177-78 and accompanying text.

219. *Suhre*, 1997 U.S. Dist. LEXIS 5013, at *20 n.9.

The court also rejected Suhre's claim that he had been injured as a result of the display because it caused him to be convicted of being an atheist.[220] First, the court noted that the record did not contain any reference to Suhre's being an atheist. Rather, before Suhre's testimony, the judge instructed that he be affirmed as a witness. When the clerk mistakenly included the words "so help you God," Suhre responded "Not—without the God, Ma'am," and he instead took an affirmation, at the court's direction.[221] Second, the court found that Suhre's conviction was consistent with the substantial evidence at trial, including his own admissions, and was not a result of his atheistic beliefs or any bias on the part of the jury due to the presence of the Ten Commandments in the courtroom.[222] After rejecting Suhre's remaining arguments, the District Court dismissed his claim on the grounds that he lacked standing to bring the suit.[223]

This still did not end the controversy, however. On appeal, the Fourth Circuit Court of Appeals rejected Judge Thornburg's standing analysis, and remanded the case to the District Court without ruling on the merits.[224]

The most recent and highly publicized episode of legal proceedings over the presence of religious symbols placed in a courtroom involves the current display of the Ten Commandments in the Etowah County courtroom of Judge Roy Moore. As the Alabama Supreme Court later observed, "[f]rom its inception, this litigation . . . attracted the attention of the national news media, as well as that of the local media" and "has ignited a public controversy."[225]

In the 1995 case of *Alabama Freethought Association v. Moore*,[226] the Association and a number of individuals alleged that Judge Moore violated the Establishment Clause of the First Amendment by hanging in his courtroom a plaque depicting the Ten Commandments and opening jury sessions with prayers.[227] In a lengthy opinion, the

220. *Id.* at *8.
221. *Id.* at *23-*24.
222. *Id.* at *24-*25.
223. *See id.* at *25-*33.
224. Suhre v. Haywood County, 131 F.3d 1083, 1085 (4th Cir. 1997).
225. State *ex rel.* James, No. 1951975, 1998 Ala. LEXIS 19, at *20 (Ala. Jan. 23, 1998).
226. 893 F. Supp. 1522 (N.D. Ala. 1995); *see also Ex rel. James*, 1998 Ala. LEXIS 19, at *3-*4, *7.
227. In 1990, federal courts considered the constitutionality of courtroom prayer in the case of North Carolina Judge H. William Constangy. After the bailiff's opening cry, Judge Constangy regularly stated "Let us pause for a moment of prayer," and then recited a prayer that he had composed. North Carolina Civil Liberties Union v. Constangy, 751 F. Supp. 552, 552-53 (W.D.N.C. 1990), *aff'd*, 947 F.2d 1145 (4th Cir. 1991). The United States District Court for the Western District of North Carolina held that the prayer failed all three prongs of the *Lemon* test. *Id.* at 554.

The United States Court of Appeals for the Fourth Circuit affirmed the District Court opinion, also holding that the prayer failed all three prongs of the *Lemon* test. 947 F.2d at 1151-52. Among other concerns, the court found that "prayer in the

United States District Court for the Northern District of Alabama declined to consider the merits of the case, finding that all of the plaintiffs lacked standing to bring the action.[228]

After the federal court decision, the case continued to be played out, as much in public and political arenas as in Alabama state courts. At the initiative of Alabama Governor Fob James, the state attorney general filed a suit against both the ACLU and Judge Moore in order to have a state judge issue a ruling on the constitutionality of the judge's actions. Both the ACLU and Judge Moore filed claims against each other and against the State, and the case was assigned to Montgomery County Circuit Court Judge Charles Price.[229]

The case prompted rallies in support of Judge Moore. For example, when the case came before Judge Price on September 11, 1996, between 350 and 400 people from across the state held a rally in front of the Montgomery County Courthouse supporting Judge Moore.[230] Judge Price decided the case on November 22, 1996, finding that "the practice or policy of permitting Alabama's circuit judges, and/or of circuit judges' undertaking on their own to conduct or arrange for prayer, including the prayer of a particular faith, in public courts . . . violates . . . the United States Constitution and . . . the Constitution of Alabama."[231] Thus, he ordered that prayer in the courtroom "immediately cease and desist."[232] Judge Price also ruled, however, that "the display of the Ten Commandments in the courtroom intermingled with the historical and/or educational items" did not violate the Constitution.[233] In response, a spokesman for Judge Moore stated that "[h]e does not plan to stop anything he's practiced so far. He will defy the order."[234] Alabama Attorney General Bill Pryor, representing the State in the case, expressed disappointment over the order, while Alabama Governor Fob James pledged state money to assist Judge Moore with his legal expenses.[235]

In December of 1996, the battle over the case continued as the ACLU requested that Judge Price actually view Judge Moore's courtroom and reconsider his decision about the Ten Commandments,

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courtroom by a judge is a religious act by a government official with little historical support," which serves to "inject religion into the judicial process and destroy the appearance of neutrality." *Id.*

228. *Moore*, 893 F. Supp. at 1542-43; *see also Ex rel. James*, 1998 Ala. LEXIS 19, at *14.

229. *Ten Commandments, Courtroom Prayer Timeline*, Montgomery Advertiser, Apr. 12, 1997, at 5A; *Ex rel. James*, 1998 Ala. LEXIS 19, at *4-*17.

230. Sandee Richardson, *Hundreds Rally in Support of Judge in Prayer Case*, Montgomery Advertiser, Sept. 12, 1996, at 1A.

231. *Ex rel. James*, 1998 Ala. LEXIS 19, at *18.

232. *Id.* at *18-*19.

233. *Id.* at *18.

234. Sandee Richardson, *Judge Plans to Defy Order Not to Pray*, Montgomery Advertiser, Nov. 23, 1996, at 1A.

235. *Id.*

rather than relying on the photographs that had been presented at the hearing.[236] On February 5, 1997, two days before Judge Price's scheduled visit to inspect the courtroom, Governor James warned at the State's annual Alabama Baptist-sponsored legislative prayer luncheon that "[t]he only way that the Ten Commandments and prayer will be stripped from Alabama's courts will be a force of arms. Make no mistake about it."[237]

The following week, Judge Price reversed his earlier ruling on the display of the Ten Commandments, stating that "[b]ased on the fact that the plaques are handing in the courtroom on the wall alone for the obvious and stated purpose of promoting religion, the court finds that their presence as displayed" violates the Establishment Clause.[238] Relying on *Harvey v. Cobb County*,[239] Judge Price ruled that the display could remain only if placed within "a larger display of nonreligious and/or historical items."[240] In his weekly radio address, Governor James stated that he would use all legal means, including state troopers and the Alabama National Guard, to prevent the removal of the display.[241] These events, particularly Governor James's remarks, placed the case in the national spotlight. For example, the *New York Times* began to report on the case, quoting Governor James as comparing his refusal to accept Judge Price's ruling to Abraham Lincoln's refusal to adhere to laws of slavery.[242]

On February 18, 1997, Judge Price denied the attorney general's request that he issue a stay of his ruling on the Ten Commandments, sending the case to the Alabama Supreme Court. The next day, the Alabama Supreme Court granted the stay, in a 5-0 ruling with four justices not voting.[243] The Sunday after the high court's ruling, thousands of people rallied at Gadsden State Community College in support of Judge Moore.[244]

The publicity engendered by the Alabama high court's rulings led to even greater public debate and political action. On March 5, 1997, the United States House of Representatives voted 295 to 125 to approve a

236. Sandee Richardson, *ACLU Continues Battle with Judge*, Montgomery Advertiser, Dec. 10, 1996, at 1B.

237. Sandee Richardson, *James Denounces Courtroom Prayer Ruling*, Montgomery Advertiser, Feb. 6, 1997, at 2B.

238. *Ex rel. James*, 1998 Ala. LEXIS 19, at *19; Sandee Richardson, *Commandments Display Judged Unconstitutional*, Montgomery Advertiser, Feb. 11, 1997, at 1A.

239. 811 F. Supp. 669 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994); *see supra* note 192 and accompanying text.

240. *Ex rel. James*, 1998 Ala. LEXIS 19, at *19.

241. Richardson, *supra* note 230, at 1A.

242. Rick Bragg, *Judge Allows God's Law to Mix with Alabama's*, N.Y. Times, Feb. 13, 1997, at A14.

243. Sandee Richardson, *High Court Ruling Delays Ten Commandments Case*, Montgomery Advertiser, Feb. 20, 1997, at 1A.

244. Sandee Richardson, *Prayer in the Courtroom Support for Praying Judge Split*, Montgomery Advertiser, Feb. 25, 1997, at 1A.

resolution praising Judge Moore's display of the Ten Commandments because they are "a declaration of fundamental principles that are cornerstones of a fair and just society."[245] On the same day, the Alabama Senate Judiciary Committee unanimously approved legislation to allow state courtrooms to display the Ten Commandments.[246] Later that month, Judge Moore was honored in Washington, D.C., by activists and politicians, including United States Senators Richard Shelby and Jeff Sessions, who had co-sponsored a Senate resolution in support of the judge.[247] Supporters of Judge Moore and Governor James grew more vocal, presenting a petition of more than 200,000 signatures and organizing a rally in support of Judge Moore's Ten Commandments display and prayers in the courtroom.[248] The rally was endorsed and publicized by numerous organizations, including the Christian Coalition, and politicians, including three United States Congressmen who filed an amicus brief with the Alabama Supreme Court backing Judge Moore.[249] The rally, held on April 12 at the steps of the Alabama State Capitol, attracted a crowd estimated between 10,000 and 25,000 people. Speakers included, among others, Judge Moore, Governor James, then Christian Coalition executive director Ralph Reed, and former Republican presidential candidate Alan Keyes.[250] Later that month the Alabama State Senate voted 32-0 in favor of a bill allowing judges to display the Ten Commandments in the courtroom. The bill's sponsor said that the bill was designed to send a message to the Alabama Supreme Court.[251]

While the appeal was pending, as the Alabama Supreme Court later observed, "an impressive number of amici curiae filed briefs" with the court.[252] In addition, the court received what it later called "a considerable amount of correspondence from private persons expressing support for one side or the other."[253] In January 1998, the court decided in a lengthy opinion that "the controversy was nonjusticiable" and that the trial court therefore "lacked subject matter jurisdiction to

245. *House Backs Ten Commandment Display*, N.Y. Times, March 6, 1997, at B10.

246. Sandee Richardson, *Bills Would Let Officials Hang Ten*, Montgomery Advertiser, March 6, 1997, at 1A.

247. Anne Sclater, *Commandments Judge Hailed; Judge Takes Case to Nation's Capital*, Montgomery Advertiser, March 21, 1997, at 1A.

248. Sandee Richardson, *Supporters of Gadsden Judge Collect Nearly 215,000 Petitions*, Montgomery Advertiser, Apr. 4, 1997, at 1B.

249. Sandee Richardson, *Before the Rally Thousands to Gather in Support of Judge*, Montgomery Advertiser, Apr. 12, 1997, at 1A.

250. Sandee Richardson, *Rally Draws Thousands; Judge Defends Right of Religion*, Montgomery Advertiser, Apr. 13, 1997, at 1A.

251. *Digest*, Montgomery Advertiser, Apr. 25, 1997, at 7A.

252. State *ex rel.* James, No. 1951975, 1998 Ala. LEXIS 19, at *20 (Ala. Jan. 23, 1998); *see also id.* at *66-*70 (Maddox, J., concurring in the result) (listing the amici and outlining their arguments).

253. *Id.* at *20.

enter its judgments."[254] As a result, the court vacated the judgments and dismissed the appeal.[255]

In light of the controversy over the mere presence of a copy of the Ten Commandments in the courtroom, it is notable that the Second Circuit has upheld a conviction in a trial that actually took place in a church hall. In *People v. Knapp II*,[256] the defendant's initial conviction was vacated on the grounds of a violation of his right to counsel.[257] Due to renovations being conducted at the Ostego County Courthouse, the retrial was held in the church hall of a Roman Catholic church, and the defendant was again convicted.[258] On appeal, Knapp claimed that he was denied a fair trial because the church hall contained "holy pictures" and other religious artifacts, including a crucifix along the path from the room in which the trial was conducted to the jury room.[259]

The Appellate Division found "troublesome" the trial court's decision to hold the trial in the church hall, over the objections of both the defendant and the prosecution.[260] The court cited a County Court opinion which had stated, in dicta, that "selection as a courthouse or courtroom of a building or room dedicated to religion or permeated with religious symbols is inconsistent with the spirit and intent of the constitutional prohibitions of and fortifications against establishment of religion."[261] Therefore, the court concluded, the church hall was not the "ideal place" to conduct the trial.[262]

Nevertheless, the court decided that holding the trial in the church hall was not so prejudicial as to deny the defendant a fair trial. The court asserted that it was not clear that a religious environment and the presence of religious artifacts would prejudice the defendant, finding it as likely that the jurors' reaction would be "to render a just and honest verdict."[263] In addition, the court noted that "[e]ven traditional courtrooms are not devoid of religious symbols and artifacts and both jurors and witnesses are traditionally sworn with the phrase 'so help you God.'"[264] Accordingly, the court found, "the legal conceptions of truth and justice are often related to the religious conceptions of these terms."[265] Finally, the court pointed out that the trial

254. *Id.* at *38.
255. *Id.*
256. 441 N.E.2d 1057 (N.Y. 1982).
257. *Id.* at 1060-61.
258. People v. Knapp III, 495 N.Y.S.2d 985, 989 (App. Div. 1985).
259. *Id.*
260. *Id.*
261. *Id.* (quoting People v. Rose, 368 N.Y.S.2d 387, 391 (Rockland County Ct. 1975)).
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* Thus, the court appeared to embrace a form of what the Supreme Court later called "ceremonial deism." In his plurality opinion in *County of Allegheny v.*

was not held in the church itself, but in a separate building. Therefore, the court decided that the record did not indicate a "religious environment [ ] so pervasive as to deny defendant a fair trial."[266]

In 1995, the case came before the Second Circuit, on appeal from the denial, by the United States District Court for the Northern District of New York, of the defendant's petition for a writ of habeas corpus.[267] In his habeas petition, Knapp again claimed that he was denied his right to a fair trial because the trial had been conducted in a church hall.[268] The Second Circuit first cited the Appellate Division's finding that the church hall "was used for a number of secular purposes."[269] Then, despite acknowledging that it was "undoubtedly imprudent" to hold the trial in the church hall, the court relied on the Appellate Division's further findings to conclude that there was no showing of constitutional error and prejudice to the defendant.[270] Thus, the Second Circuit rejected this claim as a basis for habeas relief.

In a lengthy and impassioned dissent, Judge Oakes criticized as "glaring" the "weakness of the rationalization on direct appeal for upholding the constitutionality of trial in [the church hall]—followed without amplification by the panel majority in our habeas review."[271] Judge Oakes found it significant that the defendant was convicted of "that most emotionally charged offense—murder," which, he added, involved a violation of the Sixth Commandment, "Thou shalt not kill."[272]

Judge Oakes continued with a rejection of the Third Department's finding, accepted by the Second Circuit majority opinion, acknowledging the presence of religious symbols in traditional courtrooms. In fact, Judge Oakes stated that he could not "recall a courtroom that I

ACLU, Justice Blackmun referred to legislative prayer and the Court's invocation as examples of "ceremonial deism," "a form of acknowledgment of religion that 'serve[s], in the only wa[y] reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.'" 492 U.S. 573, 596 n.46 (1988) (quoting Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)).

One commentator has argued, in an article offering an extensive discussion and critique of ceremonial deism, that the courtroom oath itself violates the Establishment Clause. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2146 (1996).

266. *Knapp III*, 495 N.Y.S.2d at 989.

267. *Knapp v. Leonardo*, 46 F.3d 170 (2d Cir. 1995).

268. *Id.* at 177.

269. *Id.* (quoting *Knapp III*, 495 N.Y.S.2d at 989). The Appellate Division actually presented this finding to counter the defendant's claim that he had been denied the right to a public trial, not in response to his claim that the religious setting of the trial violated his right to a fair trial. *See Knapp III*, 495 N.Y.S.2d at 989.

270. *Knapp*, 46 F.3d at 177.

271. *Id.* at 181 (Oakes, J., dissenting).

272. *Id.* (Oakes, J., dissenting).

have been in which contains religious symbols, pictures, or artifacts, or a courthouse the hallways of which are thus furnished."[273] The only courtroom symbol he was able to even identify with religion, one "which is rarely, if ever, seen in a courtroom," was the reverse side of the Great Seal of the United States, which reads "*Annuit Coeptis*" [He has favored our undertakings].[274] However, Judge Oakes minimized any religious effect that this motto may have on individuals, noting that it is in Latin, "unfamiliar Latin at that," and "does not even contain the word 'God.'"[275] Thus, he concluded that "[t]his abstruse phrase, carried on the reverse of the familiar Seal, can hardly be said to have the immediacy of impact—it is not instinct with the threat of religious imprecations—that religious artifacts so readily envoke."[276] In sum, Judge Oakes called for separation of "church and courtroom," finding this principle consistent with the Founding Fathers' insistence on the separation of church and state.[277]

As for the Appellate Division and Second Circuit's citation to the wording of courtroom oaths, Judge Oakes responded that New York does not require a reference to a deity in the oath administered to jurors or witnesses, and that "theological belief has long been ruled out as a measure of a person's capacity or competency to act as a juror or witness."[278] By contrast, he referred to

> the days when a judge could address a witness by saying, "I charge thee, therefore, as thou will answer it to the Great God, the judge of all the earth, that thou do not dare to waver one tittle from the truth, upon any account or pretense whatsoever; . . . for that God of Heaven may justly strike thee into eternal flames and make thee drop into the bottomless lake of fire and brimstone, if thou offer to deviate the least from the truth and nothing but the truth."[279]

Finally, Judge Oakes concluded his dissent by agreeing "emphatically" with the County Court judge whom the majority had quoted regarding the impropriety of conducting a trial in a room containing religious symbols.[280] Although the majority had agreed with the judge's senti-

273. *Id.* at 182 (Oakes, J., dissenting).

274. *Id.* (Oakes, J., dissenting) (emphasis added).

275. It is notable that Judge Oakes did not acknowledge the phrase, "In God We Trust," which contains the word "God" in English, and is present on the wall of many courtrooms throughout the United States.

276. *Id.* (Oakes, J., dissenting).

277. *Id.* (Oakes, J., dissenting).

278. *Id.* (Oakes, J., dissenting). In *Society of Separationists v. Herman*, 939 F.2d 1207 (5th Cir. 1991), *aff'd en banc*, 959 F.2d 1145 (5th Cir. 1992), the United States Court of Appeals for the Fifth Circuit held that a Texas state judge violated a potential juror's free exercise rights when he jailed her for refusing, pursuant to her atheistic beliefs, to take a pre-*voir dire* oath. *Id.* at 1209.

279. *Knapp*, 46 F.3d at 182 (Oakes, J., dissenting) (quoting Jefferies, C.J., in *Lady Lisle's Trial*, 11 How. St. Tr. 298, 325 (1685) (*quoted in* 6 Wigmore on Evidence s. 1816, at 383 (Chadbourn Rev. 1976))).

280. *Id.*

ments but nevertheless held that the presence of religious symbols did not violate the defendant's right to a fair trial, Judge Oakes concluded that the defendant was entitled to a new trial.[281]

Thus, the issue of the display of religious symbols in the courtroom, so widely publicized in the case of Judge Moore, has in fact been addressed by courts for many years in a variety of contexts. The extent of the controversies these cases have engendered, in both legal and popular settings, suggests the need for courts not only to employ careful legal reasoning, but to display judicious wisdom in deciding such matters.

CONCLUSION

In discussing the Establishment Clause, but in a statement that may apply to the current uncertainties in Religion Clause jurisprudence as a whole,[282] Professor Kenneth Karst wrote:

> [T]he main source of doctrinal incoherence is the First Amendment itself, which seems to command a neutrality that lies beyond anyone's power to achieve. No bright-line rule will do all the work that needs to be done in protecting both the value of religious freedom and the value of inclusion.[283]

Thus, he called on judges "to moderate the most corrosive harms of a politics of religious division, to maintain a polity that embraces all Americans as full members."[284] In making this plea, Karst was recognizing the divisive potential latent in decisions on matters of Religion Clause jurisprudence, in a society as religiously diverse as ours.

Questions over the public display of religious symbols amplify the politics of religious division. Courts deciding these questions must often make difficult judgments in trying to balance the value of religious freedom and the value of equality. It can only be hoped that, at least with regard to religious symbols within the courtroom itself, judges will have the wisdom and ability necessary to make decisions that produce doctrinal coherence and at the same time embrace all Americans as full members.

281. *Id.*
282. *See generally*, Greenawalt, *supra* note 8.
283. Karst, *supra* note 3, at 529.
284. *Id.* at 530.