

Chief Justice Frank F. Drowota, III
Tennessee Supreme Court
Supreme Court Building
401 Seventh Avenue North, Suite 318
Nashville, Tennessee 37219-1407

August 12, 2005

Dear Chief Justice Drowota,

We are a group of scholars of legal and judicial ethics who write to request you to address the propriety of judges disqualifying themselves in advance from hearing all requests by minors for a judicial bypass of a parental consent requirement for abortions on the ground that they cannot in good conscience participate in authorizing an abortion.

The Tennessee press has reported that several judges of the Memphis Circuit Court have adopted a practice of regularly recusing themselves in cases in which pregnant minors who desire an abortion are seeking a judicial bypass of a parental consent requirement, a procedure provided for by T.C.A. §§ 37-10-303, 37-10-304 and Supreme Court Rule 24. Apparently these cases are reaching the Circuit Court because the Juvenile Court judge is on medical leave. The recusing judges base their recusal on a personal moral conviction that abortion is the killing of innocent life and thus never justified. One of them has made a public statement (copy attached) stating that approving waiver of parental consent "would put me into the process of assisting in the abortion. . . . I could not in good conscience be a part of that process."

We have deep respect for anyone who is morally opposed to abortion, but that is not the issue. Indeed, abortion is not the issue. Our view of the propriety of this conduct would be the same if the systematic recusals were based on a deeply held moral objection to any law, such as the death penalty, the prohibition of the use of marijuana to ease the pain of cancer patients, no-fault divorce, the First Amendment's protection for protest expressed through burning the American flag or the First Amendment's prohibition against state establishment of religion.

Judges, in our view, are as entitled as any other American to have deeply held moral convictions. Indeed, if our judiciary were populated by persons without strong moral convictions, it would be poorer and much less reflective of the communities that judges serve. But that general proposition does not answer the question of what judicial conduct is ethically proper when a case involving a law to which a judge has strong moral objection comes before that judge.

On the one hand, judicial recusal is ethically appropriate and perhaps required when a judge is convinced that his or her moral views render the judge unable to decide facts and law

impartially *in a particular case*. Such instances occur rarely. However, the blanket use of recusal to avoid a particular category of unpopular cases is inappropriate, especially when coupled with a public statement or signaling of the reason for recusal by a judge acting individually or in apparent collective action with other judges. Such action is inconsistent with the judicial duty to decide cases assigned to the judge, undermines confidence in the judiciary's commitment to uphold state law, stamps other judges unfairly with the charge that they approve of all laws that they implement, and puts pressure on other judges to follow suit in order to win reelection to the bench or to gain elevation to a higher court. As the Code of Judicial Conduct states (S. Ct. R. 10, Canon 3(B)(1)): "A judge *shall* hear and decide matters assigned to the judge except those in which disqualification is *required*" (emphasis added).

The Judge whose statement is attached does not seem to take the position that he would be unable to decide what the law requires in a judicial bypass procedure. He explains that, if the abortion had already occurred but were brought into question in a medical malpractice suit, he would be able to instruct the jury what Tennessee law applies and then review their verdict. Rather, his position is that, having decided what the law requires, he could not in good conscience act on that decision if the result were to authorize an abortion. Unwillingness to follow the law is not a legitimate ground for recusal. If it were, many judges would be obliged to recuse themselves in cases under laws with which they conscientiously disagreed.

Even if, as is typically the case, the judge provides no explanation of the reason for recusal, a policy of recusing oneself in all cases involving a particular law is troubling. It is true that a private undetected act cannot, by definition, undermine public confidence in the judiciary. On the other hand, regular recusal on moral grounds in all cases involving a particular law, even without signaling the reasons for the recusal, remains questionable because that practice may delay the administration of justice by clogging the dockets of other judges with all cases of a certain "unpopular" type, and by shifting the political burden of handling these controversial cases to these other judges. Across the board recusal also contravenes a judge's duty to exercise his or her discretion in the circumstances of each case in deciding whether recusal is required. Indeed, announcements by a judge who will be up for reelection that he will not sit in a whole category of cases presumably constitute "statements that commit or appear to commit the candidate with respect to cases . . . that are likely to come before the court" which are forbidden by S. Ct. R. 10, Canon 5(A)(3)(d)(ii).

What then is a judge to do when he or she has deep moral convictions that conflict with a valid law that the judge is called upon to apply or enforce? There are two ethical and appropriate responses. The first ethical response flows from the oath taken by all judges: to faithfully uphold the laws of the state and nation by putting aside one's personal feelings on the matter and ruling according to the law. This is the standard advocated by most candidates for judicial office in the states and at the federal level. Judges, we are constantly told, are not to "make law" but to "enforce it." There is great uncertainty about where that line is, but one thing should be clear. When judges pick and choose the laws they will enforce they have crossed the line. The line between the legislature and the courts would be effectively eliminated if judges were free to nullify state laws by deciding which laws to enforce.

The second clearly ethical response is to resign from the bench if one's moral convictions prevent one from impartially applying the state's law or federal law, as interpreted by the state

and federal courts. Conscientious disobedience to law is an important part of our history. But its morality depends upon a willingness to submit to the costs or penalties of non-compliance.

That brings us to the situation in at least one county in Tennessee. One judge has announced that he will not rule on abortion “bypass” cases because it involves the killing of innocent beings and another has expressed general support for that stance and has indicated a similar recusal-in-all-such-cases policy. These responses put pressure on every other judge in Tennessee to follow suit or risk facing uninformed charges that the judge somehow personally favors abortion or at least is less morally repulsed by it than the recusing judges. Blanket recusal in this situation is not ethical or appropriate judicial conduct.

Why have a group of scholars from around the country decided to write to you on this matter? Because what starts in Tennessee may spread to other courts in other states and to the federal bench, for that matter. Because what begins with abortion may be extended to death penalty cases, to medical marijuana, separation of church and state, divorce, domestic abuse, or any other area on which a judge may hold deep moral convictions. The Supreme Court has plenary power under T.C.A. §§ 16-3-501, 16-3-504 to exercise supervisory control over lower courts. It is highly unlikely that any minor will appeal on this issue, or indeed would have standing to object to having her case decided by one duly authorized judge after another judge had withdrawn. To avoid the consequences we have described and to preserve the integrity of the courts of the great state of Tennessee, we respectfully urge you to address this matter immediately, to condemn the practice of recusal based on a judge’s acceptance or rejection of a particular law, and to take appropriate steps to stop this practice.

Respectfully,

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Institutions provided for affiliation purposes only and not to indicate institutional endorsement of views.

cc:

Judge John R. McCarroll, Jr

Judge James F. Russell

Judge Karen R. Williams

Judge Rita L. Stotts

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Judge Jerry Stokes

Judge Donna Fields

Judge D'Army Bailey

Judge Robert L. Childers

Chancellor Steven J. Stafford

The Honorable Joe Riley

This letter was sent to each member of the Tennessee Supreme Court and to Judges Glenn, Ash and Clark.