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DON'T TAKE HIS EYE, DON'T TAKE HIS TOOTH, AND DON'T CAST THE FIRST STONE: LIMITING RELIGIOUS ARGUMENTS IN CAPITAL CASES

John H. Blume and Sheri Lynn Johnson*

Professors John H. Blume and Sheri Lynn Johnson explore the occurrences of religious imagery and argument invoked by both prosecutors and defense attorneys in capital cases. Such invocation of religious imagery and argument by attorneys is not surprising, considering that the jurors who hear such arguments are making life and death decisions, and advocates, absent regulation, will resort to such emotionally compelling arguments. Also surveying judicial responses to such arguments in courts, Professors Blume and Johnson gauge the level of tolerance for such arguments in specific jurisdictions. Presenting proposed rules for prosecutors and defense counsel who wish to employ religious quotes, images, authority, and the like, Professors Blume and Johnson propose that religious comments by prosecutors should be sharply limited, while defense counsel should be given wider latitude (though not unfettered freedom) to address religious subject matter. The proposed rules are arrived at by considering the constraints placed upon prosecutors (but not defense attorneys), and the rights conferred upon capital defendants (but not the state) by the Eighth Amendment's cruel and unusual punishment clause.

* * *

INTRODUCTION

Both opponents and proponents of capital punishment employ religious imagery and authority in support of their respective positions;¹ in this respect, capital punishment is no different from other hotly disputed social issues of the present and past, such as abortion, gay rights, euthanasia, divorce, welfare, segregation, or war. What is somewhat unusual is the regularity with which religious argument is publicly invoked in the course of decision-making concerning the application of the death penalty to *particular* cases. Thus, for example, it would be unusual to have a public discussion that cited religious principles in determining whether Jane Roe's

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¹ See, e.g., H. WAYNE HOUSE & JOHN YODER, *THE DEATH PENALTY DEBATE* (Word Publications, 1991).

abortion, *in particular*, was constitutionally protected,² or, to go back to a now-dead controversy, whether Ruby Bridges, *in particular*, should have been allowed to attend an otherwise all-white school.³

In contrast, religious arguments in the course of particular capital sentencing proceedings are very common. This may be in part because capital punishment jurisprudence, unlike the jurisprudence of reproductive rights or segregation, has itself mandated individualized decision-making.⁴ Public discussion of whether religious principles or authority compel (or preclude) the imposition of the death penalty for all police killings (or, more broadly, all killings) has been largely mooted by the Supreme Court's determination that mandatory death penalty statutes violate the Eighth Amendment.⁵ Perhaps what might otherwise be broader arguments about the *categories* of cases in which capital punishment is morally and religiously legitimate are imported into individual cases by this jurisprudence. Or perhaps, religious emotions and authority are simply so compelling to jurors who make life and death decisions that advocates, absent regulation, will naturally resort to them.

The title of this Article refers to the two most common religious appeals. Prosecutors in capital cases who wish to employ religious argument or imagery overwhelmingly favor "an eye for an eye, and a tooth for a tooth,"⁶ or some other invocation of Mosaic law requiring capital punishment. Reported cases may be a less reliable sample of what defense attorneys argue, as we will discuss later, but both the cases and our informal discussions with defense attorneys suggest that defense attorneys looking for a religious theme tend to read or retell the New Testament story of the woman caught in adultery, whose would-be executioners are told "[h]e that is without sin among you, let him first cast a stone."⁷ Of course, if these were the only statements advocates made, it would be much easier to determine whether or not religious argument should be permitted, but as Part I will survey, the popularity of these two arguments should not obscure the wide range of religiously-based comments that have been made in various death penalty trials.

Part II will describe the judicial responses to these arguments. Despite the number of constitutional constraints involved, or perhaps because of them, different courts have made conflicting judgments about the propriety of the same arguments. Moreover, few jurisdictions have enunciated a rule that, even within that jurisdiction, can be applied with confidence to the next species of religious

² See *Roe v. Wade*, 410 U.S. 959 (1973).

³ See *Bush v. Orleans Parish Sch. Bd.*, 138 F. Supp. 336 (E.D. La. 1956).

⁴ See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

⁵ U.S. CONST. amend. VIII.

⁶ *Matthew* 5:38 (King James).

⁷ *John* 8:7 (King James).

argument. Finally, with the exception of Pennsylvania,⁸ even where comments are disapproved, reversal is rare; indeed, as this Article was about to go to press, the Ninth Circuit reversed a religious argument case for the first time.⁹ Consequently, the last section of Part II reviews several doctrines used to affirm cases where the court has determined the argument to be improper.

Parts III and IV present our proposed rules for prosecutors and defense counsel who wish to employ religious quotes, images, authority, or the like. Prior commentary on this subject is sparse; we found only two student notes¹⁰ and the forthcoming publication of a jointly-authored paper of our colleagues Stephen Garvey and Gary Simson.¹¹ Those three pieces take quite different views: one student note looks to the prevalence of religious allusions in our language and culture and concludes that “[a]ppeals to moral foundations, including biblical moral foundations, should not be improper so long as the introduction of religion does not encourage jurors to overlook the law and reach a verdict on an improper basis.”¹² Our colleagues, in contrast, examining the question from an Establishment Clause perspective,¹³ conclude that virtually all uses of religion in closing arguments, by either prosecutors or defense lawyers, should be forbidden. We think neither of these “sauce for the goose is sauce for the gander” approaches is correct. The second student note is limited to consideration of prosecutors’ comments and proposes a narrow automatic reversal rule. We condemn more prosecutorial arguments, address defense arguments, and present a more nuanced view of the appropriate remedies for misconduct, in large part because we conclude that the Note’s proposed automatic reversal of cases *on habeas corpus* is not sustainable under current law.

The two of us came to this topic from different directions: one from previously researching an analogous subject, the uses of racial imagery in criminal trials, and one from post-conviction and capital trial practice in a state where religious argument is very common. These two perspectives, however, find a common voice in our proposal, which sharply limits the use of religious comments by prosecutors, while giving defense counsel wider latitude (though not completely unfettered

⁸ See *Commonwealth v. Chambers*, 599 A.2d 630 (Pa. 1991).

⁹ *Sandoval v. Calderon*, Nos. 99-99010, 99-99013, 2000 WL 1657783 (9th Cir. Nov. 3, 2000).

¹⁰ Elizabeth A. Brooks, Note, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Argument*, 33 GA. L. REV. 1113 (1999); Brian C. Duffy, Note, *Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors’ Use of Religious Arguments in the Sentencing Phase of Capital Cases*, 50 VAND. L. REV. 1335 (1997).

¹¹ Stephen P. Garvey & Gary J. Simson, *Knockin’ on Heaven’s Door: Rethinking the Role of Religion in Death Penalty Cases*, ___ CORNELL L. REV. (forthcoming ___).

¹² Brooks, *supra* note 10, at 1174.

¹³ U.S. CONST. amend. I.

freedom) to address religious subject matter. As we will explain, these non-reciprocal rules are compelled by consideration of the constraints the speech and establishment clauses of the First Amendment place upon prosecutors (but not defense attorneys), and by the rights conferred upon capital defendants (but not the state) by the Eighth Amendment's cruel and unusual punishment clause.¹⁴

I. WHAT LAWYERS SAY GOD SAYS

As the reader may guess, what prosecutors and defense lawyers think God has said about capital punishment is so different that it is hard to see how they can be talking about the same God. It is, however, clear that they all think they are talking about the same God, a Judeo-Christian deity. None of the reported cases involves reliance on religious authority from outside of the dominant tradition. Because there are so many more cases involving prosecutors, and because we will ultimately conclude that prosecutorial invocations of religious authority present more of a threat to First and Fourteenth Amendment values, we begin with them.

A. *Religious Appeals for Death Sentences*

At least to those unacquainted with capital trial practice, both the frequency and variety of religious quotations or allusions by prosecutors are surprising. In the last fifteen years, *nearly one hundred* reported capital cases involved challenges to a prosecutor's religiously oriented remarks, and the numbers are not decreasing. Moreover, in most jurisdictions, given the virtually uniform lack of success of these challenges,¹⁵ there must be many more cases in which prosecutors make such remarks without challenge because the defense attorneys know that a challenge is futile.

1. An Eye For an Eye and Other Retributive Commands

Most popular are quotations from Mosaic law that, at least upon facial interpretation,¹⁶ appear to require the imposition of the death penalty. In eight reported instances, the prosecutor chose the classic retributive mantra "an eye for an eye."¹⁷ In another nine cases, the prosecutor quoted from Exodus 21:12, "[h]e

¹⁴ U.S. CONST. amend. VIII.

¹⁵ The various reasons for the affirmances in these cases are catalogued *infra*, in Part II.

¹⁶ *But see* Daniel A. Rudolph, *The Misguided Reliance in American Jurisprudence on Jewish Law to Support the Moral Legitimacy of Capital Punishment*, 33 AM. CRIM. L. REV. 437 (1996) (concluding that "an extreme reluctance to impose the death penalty, combined with the array of barriers, rendered capital punishment virtually nonexistent in practice under Jewish law").

¹⁷ *Thompson v. State*, 581 So. 2d 1216, 1243 (Ala. Crim. App. 1991); *People v. Hill*, 952

that smiteth a man, so that he die, shall be surely put to death”¹⁸ and, in eight more cases, quoted Genesis 9:6 for the rule that “[w]hoso sheddeth the man’s blood, by man shall his blood be shed.”¹⁹ Similarly, six cases report a quotation from Numbers 35:16:²⁰ “the murderer shall [surely] be put to death.”²¹

Discussions of the Fifth Commandment, “Thou shalt not kill,”²² are a bit more complicated because the text is obviously open to more than one interpretation. In three cases, the prosecutor simply cited the commandment as reason to condemn the defendant,²³ but in eight more, he took pains to explain why this commandment did not preclude the use of capital punishment by the state.²⁴ In the most personal of these arguments, the prosecutor declared, “[s]ome of us went to Viet Nam and had to kill for this country, and I will be damned if anybody is going to tell me that what we did in Viet Nam or in any other war was a violation of the Fifth Commandment

P.2d 673, 692 (Cal. 1998); *People v. Wash*, 861 P.2d 1107, 1147 (Cal. 1993); *People v. Montiel*, 855 P.2d 1277, 1309 (Cal. 1993); *Hammond v. State*, 452 S.E.2d 745, 753 (Ga. 1995); *State v. Shurn*, 866 S.W.2d 447, 464 (Mo. 1993); see *State v. Rouse*, 451 S.E.2d 543, 562 (N.C. 1994) (paraphrasing); see also *Waldrop v. Thigpen*, 857 F. Supp. 872 (N.D. Ala. 1994).

¹⁸ *State v. Williams*, 510 S.E.2d 626, 642 (N.C. 1999); *State v. Bond*, 478 S.E.2d 163, 182 (N.C. 1996); *State v. Hunt*, 373 S.E.2d 400, 413 (N.C. 1988); see *Ruiz v. Norris*, 868 F. Supp. 1471, 1514 (E.D. Ark. 1994) (paraphrasing); *People v. Arias*, 913 P.2d 980, 1036 (Cal. 1996) (paraphrasing); *People v. Williams*, 756 P.2d 221, 255 (Cal. 1988) (paraphrasing); *People v. Mahaffey*, 651 N.E.2d 1055, 1068 (Ill. 1995) (paraphrasing); see also *Waldrop*, 857 F. Supp. at 931; *Wash*, 861 P.2d at 1148.

¹⁹ *Cape v. Francis*, 741 F.2d 1287, 1301 (11th Cir. 1984); *Ruiz*, 868 F. Supp. at 1514; *Carruthers v. State*, 528 S.E.2d 217, 221 (Ga. 2000); *Hammond*, 452 S.E.2d at 753 (paraphrasing); *Todd v. State*, 410 S.E.2d 725, 733 (Ga. 1992); *Doss v. State*, 709 So. 2d 369, 399 (Miss. 1996) (paraphrasing); *State v. Laws*, 381 S.E.2d 609, 632 (N.C. 1989); *State v. Middlebrooks*, No. 01C01-9606-CR-00230, 1998 WL 13819 (Tenn. Crim. App. Jan. 15, 1998).

²⁰ Several other verses in this chapter repeat this language or language that is very similar.

²¹ See *Ruiz*, 868 F. Supp. at 1514 (paraphrasing); *State v. Gell*, 524 S.E.2d 332, 346 (N.C. 2000) (same); *State v. Fullwood*, 373 S.E.2d 518, 535 (N.C. 1988) (same); *Hunt*, 373 S.E.2d at 413 (same); *State v. Brown*, 358 S.E.2d 1, 19 (N.C. 1987) (same); *Commonwealth v. Chambers*, 599 A.2d 630, 643 (Pa. 1991) (same).

²² *Exodus* 20:13 (King James).

²³ *Wash*, 861 P.2d at 1144; *Lucas v. Commonwealth*, 840 S.W.2d 212, 214 (Ky. 1992); *Laws*, 381 S.E.2d at 632.

²⁴ See *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996); *Bracy v. Gramley*, 81 F.3d 684, 695 (7th Cir. 1996); *Ruiz*, 868 F. Supp. at 1514; *Daniels v. State*, 650 So. 2d 544, 561 (Ala. Crim. App. 1994); *People v. Bradford*, 929 P.2d 544, 580 (Cal. 1997); *People v. Freeman*, 882 P.2d 249, 269 (Cal. 1994); *State v. Holden*, 488 S.E.2d 514, 529 (N.C. 1997); *State v. Bond*, 478 S.E.2d 163, 182 (N.C. 1996); see also *People v. Hill*, 952 P.2d 673, 692 (Cal. 1998) (explaining why “[v]engeance is mine sayeth the Lord” does not preclude capital punishment).

of the Bible.”²⁵

This exhausts the commonly cited Old Testament retribution verses, but there are some interesting idiosyncratic choices. One slightly more creative prosecutor quoted the language from Deuteronomy 27:24, “[c]ursed be he that smiteth his neighbour secretly. And all the people shall say amen,” and then added his own commentary, “[i]t’s time to sentence this man, a murderer, to die and let the people of Bertie County say amen.”²⁶ Another cited Deuteronomy 13 as authority for the proposition that false prophets must be put to death, calling the defendant a false prophet and comparing him to Jim and Tammy Bakker.²⁷ In two cases, the prosecutor cited verses whose relevance, if any, is not made clear by the reporting opinion: one quoted the Sixth Commandment, which forbids adultery,²⁸ and one quoted John, “[i]f one taketh another captive, then to captivity he must be taken.”²⁹ Another obviously took Marc Antony’s oratory as a model when he announced, “I could talk to you about Scripture and verse from the Old Testament that supports capital punishment. But I’m not.”³⁰

Although many prosecutorial arguments from Mosaic law were limited to a single quotation,³¹ in others³² the prosecutor recited numerous quotations or recounted at length the history of capital punishment in the Old Testament. In one case, according to the court, the prosecutor interspersed copious biblical quotations with the reading of a statute in such a way that a listener could not tell which was which.³³

2. Claiming Divine Authority

In a lesser number of cases, the prosecutor’s religious comments address the question of who has the authority to impose a death sentence. The coerciveness of these claims varies greatly between cases. Occasionally, the claim is limited to an assertion that sentencing the defendant to death is not a usurpation of God’s

²⁵ *Bracy*, 81 F.3d at 695.

²⁶ *Gell*, 524 S.E.2d at 346.

²⁷ *See State v. Lundgren*, 653 N.E.2d 304, 319 (Ohio 1995).

²⁸ *See State v. Gibbs*, 436 S.E.2d 321, 360 (N.C. 1993).

²⁹ *State v. Spivey*, No. 89 C.A. 172, 1997 WL 16196 (Ohio App. Dist. Jan. 13, 1997).

³⁰ *People v. Wrest*, 839 P.2d 1020, 1028 (Cal. 1992).

³¹ In addition to the quotations discussed above, some prosecutors gave their own summation of the import of Old Testament law. *See, e.g., State v. Tichnell*, 509 A.2d 1179, 1197 (Md. 1986) (noting that the prosecutor said that the Bible is the authority for the imposition of the death penalty).

³² *See e.g., Waldrop v. Thigpen*, 857 F. Supp. 872, 931 (N.D. Ala. 1994); *People v. Wash*, 861 P.2d 1107, 1148 (Cal. 1993) (three and one-half transcript pages); *People v. Bradford*, 929 P.2d 544, 580 (Cal. 1997); *State v. Artis*, 384 S.E.2d 470, 500 (N.C. 1989); *Gibson v. State*, 501 P.2d 891, 900 (Okla. Crim. App. 1972).

³³ *See Artis*, 384 S.E.2d at 500.

authority, and in such cases the prosecutor tends to proclaim: "Render unto Caesar what is Caesar's."³⁴ Somewhat more aggressive are the cases in which the prosecutor claims that either he or the jury are acting under the authority of the Almighty. When claiming God's authority for themselves, prosecutors have, for example,³⁵ stated that after the flood, God gave the "sword of justice" to Noah, who represents the government, thereby giving the government the power to decide who dies,³⁶ or that he, the prosecutor, "is the servant of God to execute his wrath on the wrongdoer."³⁷ Similarly, others have described the authority of the jury in religious terms,³⁸ for example by referring to the jury as "the tool of the Lord,"³⁹ or by stating that the jurors were "bound by their duty to God" to return the proper sentence.⁴⁰ In some instances, however, prosecutors have been extremely aggressive in their claim for divine authority. Thus, in three cases, the prosecutor cited the Bible in arguing that because police and prosecutors are ordained by God as His representatives, to disobey them is to resist God Himself, and that "he who resists authority has opposed the ordinance of God . . . and will receive condemnations."⁴¹

3. Comparisons to Biblical Characters

Both of the first two types of argument are quite generic; either the prosecutor is claiming that God desires the death penalty or that He desires compliance with the state. In the next three categories, the prosecutor attempts to focus on the

³⁴ *People v. Jackson*, 920 P.2d 1254, 1299 (Cal. 1996); *State v. Laws*, 381 S.E.2d 609, 632 (N.C. 1989); see *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996) (paraphrasing); *Wash*, 861 P.2d at 1148 (Cal. 1993) (paraphrasing); see also *People v. Davenport*, 906 P.2d 1068, 1099 (Cal. 1996) (noting that the prosecutor argued it is not God's province to decide about sentencing because He gave us free will and power to choose); *State v. Rogers*, 341 S.E.2d 713, 731 (N.C. 1986) (noting that the prosecutor made references [not specified in the opinion] to biblical passages that encourage Christians to obey the law).

³⁵ See *Berry v. State* 703 So. 2d 269, 281 (Miss. 1997) (noting that the prosecutor stated that he had chosen to prosecute because he was commanded to do so by law and scripture); *State v. Ingle*, 445 S.E.2d 880, 896 (N.C. 1994) (noting that the prosecutor stated he will go back to his house and say his prayers because he will have a good conscience about what he is doing and asks jury to act in such a way that it can do the same).

³⁶ See *Bennett*, 92 F.3d at 1346.

³⁷ *Buttrum v. Black*, 721 F. Supp. 1268, 1316 (N.D. Ga. 1989).

³⁸ See *McNair v. State* 653 So. 2d 320, 339 (Ala. Crim. App. 1992) ("And don't be afraid. I submit when your time comes, Jesus, God, whoever you believe in, will tell you you did the right thing.").

³⁹ *State v. Middlebrooks*, 995 S.W.2d 550, 559 (Tenn. 1999).

⁴⁰ See *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998).

⁴¹ *People v. Sandoval*, 841 P.2d 862, 883 (Cal. 1992) (paraphrasing Romans 13:1-7); see also *State v. Daniels*, 446 S.E.2d 298, 320 (N.C. 1994) (referring to same passage); *State v. Moose*, 313 S.E.2d 507, 519 (S.C. 1984) (same).

particular facts of the case and derive some guidance from the Bible about those facts. One way to do so is to compare the defendant to some despicable biblical character. Thus, in three cases, the prosecutor analogized the defendant to Judas Iscariot.⁴² Three prosecutors made a more extreme comparison, likening the defendant to the devil himself.⁴³ In three more cases, the prosecutor told the story of Cain and Abel,⁴⁴ and in one, the story of David and Goliath.⁴⁵

A final case in this category denies that comparisons to biblical figures are valid. After attempting to distinguish Cain, Moses, David, and Saul, none of whom received the death penalty for their crimes, and Jesus, who did but should not have, one prosecutor made the remarkable claim that the only killings he knew of in the Bible were either acts of war or self-defense.⁴⁶

4. Millstones for Child Murderers

In five child murder cases, the prosecutor cited a verse that appears in Luke 17:2, Mark 9:42, and Matthew 18:6: "Whosoever shall offend one of these little ones that believe in me, it is better for him that a millstone were hanged about his neck, and he were cast into the sea."⁴⁷ Although one could certainly interpret these New Testament passages as simply warning of the terrible moral gravity of doing harm to children, this is not the interpretation the prosecutors take. Instead, they use the admonition much as the Old Testament retributive verses are used: as a command.

5. Specific Religious Experiences of the Defendant or Victims

This category of comments sometimes refers to evidence about the parties and sometimes contains rank speculation. With respect to the defendant, several prosecutors have deprecated the sincerity of the defendant's purported religious

⁴² See *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991); *State v. Phillips*, 940 S.W.2d 512, 519 (Mo. 1997); *State v. Geddie*, 478 S.E.2d 146, 160 (N.C. 1996).

⁴³ See *Commonwealth v. Henry*, 569 A.2d 929, 939 (Pa. 1990); *Commonwealth v. Whitney*, 512 A.2d 1152, 1168 (Pa. 1986); *State v. Cauthern*, No. 02C01-9506-CC-00164, 1996 WL 688356 (Tenn. Dec. 2, 1996).

⁴⁴ See *People v. Jackson*, 920 P.2d 1254, 1299 (Cal. 1996) (arguing that putting the mark of Cain on the defendant in the past had been insufficient punishment to deter future crimes); *Shell v. State*, 554 So. 2d 887, 899 (Miss. 1989) ("And we still hear ringing in our voices the question of God, '[w]here is your brother?'); *State v. Alston*, 461 S.E.2d 687, 710 (N.C. 1995) ("The voice of thy brother's blood crieth unto me from the ground.").

⁴⁵ See *Washington v. Gentry*, 888 P.2d 1105, 1146 (Wash. 1995).

⁴⁶ See *Nixon v. State*, 533 So. 2d 1078, 1101 (Miss. 1987).

⁴⁷ *State v. Sidden*, 491 S.E.2d 225, 230 (N.C. 1997); *State v. Holden*, 488 S.E.2d 514, 529 (N.C. 1997); *State v. Walls*, 463 S.E.2d 738, 771 (N.C. 1995); *Long v. State*, 883 P.2d 167, 177 (Okla. Crim. App. 1994); *Commonwealth v. Brown*, 711 A.2d 444, 493 (Pa. 1998).

beliefs,⁴⁸ and at least two have, like Torquemada,⁴⁹ hypothesized that execution might provide the only opportunity for the defendant's salvation.⁵⁰ We found no factual comments about the victim's religious beliefs but found several statements that the defendant had deprived the victim of his opportunity to "get right with the Lord"⁵¹ or to become all that God had planned for him.⁵² We also found three remarks that would seem to have no probative value at all. In the first case, the prosecutor "wonder[ed], as Garnett and Betty [the victims] were in their room, if they were praying;"⁵³ in the second, he referred to the victim's home as his "crucifixion block;"⁵⁴ and in the third, stated "Karen [the victim] is going up the ladder now. I'm sure she's looking upward with great tears."⁵⁵

6. Miscellaneous Remarks

A wide variety of remarks fall into no obvious category.⁵⁶ In two cases, the

⁴⁸ See *United States ex rel. Abubake v. Redman*, 521 F. Supp. 963, 971 (D. Del. 1981) (arguing that the Bible does not mean anything to the defendant); *Hooks v. State*, 416 A.2d 189, 204 (Del. 1980) (same, but in response to religious testimony); *Commonwealth v. Cook*, 676 A.2d 639, 649 (Pa. 1996) (arguing that the one part of the Bible the defendant did not read is "[t]hou shalt not kill"); see also *People v. Payton*, 839 P.2d 1035, 1049 (Cal. 1992) (arguing that defendant's "newborn Christianity" is not a statutory mitigator).

⁴⁹ See *EDWARD PETERS, INQUISITION 306* (1988).

⁵⁰ See *People v. Sandoval*, 841 P.2d 862, 883 (Cal. 1992) ("This might be the only opportunity to wake him up. God will destroy the body to save the soul. . . . Let him have the opportunity to get his soul right."); *People v. Wrest*, 839 P.2d 1020, 1028 (Cal. 1992) ("I'm not going to talk about the fact of whether the death penalty could provide someone with the opportunity to repent at the time of death or whether a long stay in prison will allow somebody to find God or find rehabilitation.").

⁵¹ *State v. Brown*, 358 S.E.2d 1, 9 (N.C. 1987).

⁵² See *Williams v. State*, CR-98-1074, 2000 WL 127219, at *21 (Ala. Crim. App. Feb. 4, 2000); *Eldred v. Commonwealth*, 906 S.W.2d 694, 707 (Ky. 1994) (same); *State v. Barrett*, 469 S.E.2d 888, 898 (N.C. 1996) (paraphrasing Ecclesiastes, stating that there is a time to live and a time to die, but defendant took God's place when he killed victim).

⁵³ *State v. Ramsey*, 864 S.W.2d 320, 332 (Mo. 1993).

⁵⁴ *Lawson v. Dixon*, 3 F.3d 743, 755 (4th Cir. 1993).

⁵⁵ *Cape v. Francis*, 71 F.2d 1287, 1301 (11th Cir. 1984). Perhaps this is a comment about the victim's religious beliefs, but its relevance is not obvious.

⁵⁶ See e.g., *Bradford v. People*, 929 P.2d 544, 580 (Cal. 1997) (offering a long history of the Bible and including the New Testament story of Ananias and his wife, who were put to death for lying, though not by the state); *People v. Hill*, 839 P.2d 984, 1018 (Cal. 1992) (citing unspecified biblical passages to support death penalty); *Lawrence v. State*, 691 So. 2d 1068, 1074 (Fla. 1997) (telling biblical story equating sentencing task to "God's judgment of the wicked"); *Crowe v. State*, 458 S.E.2d 799, 811 (Ga. 1995) ("Was it [referring to finding a palm print] luck or was it divine intervention?"); *State v. Calhoun*, 511 A.2d 461, 487 (Md. 1986) ("It says in the Bible: '[d]eath cometh final, certain.'"); *Berry v. State*, 703 So. 2d 269, 281 (Miss. 1997) (psychological problems like defendant's have been

prosecutor commented on consciousness of guilt by citing Proverbs 28:1: "The wicked will flee when no man pursueth, but the righteous stand bold as a lion."⁵⁷ Perhaps the most interesting of these is the argument that "Christians are a bunch of wimps that will not enforce the laws,"⁵⁸ which was combined with the curious and unsupported factual representation that both the prosecutor and the defense attorney are Baptists.⁵⁹ To the authors, perhaps because of their own religious beliefs, one other remark was particularly striking: "The [B]ible supports mercy only for the merciful."⁶⁰ Finally, in at least *fifteen* cases, the reviewing court refers to religious arguments by the prosecutor without stating what they were.⁶¹

B. *Religious Appeals Against Death Sentences*

Because the Double Jeopardy Clause of the Fifth Amendment bars retrial after an acquittal,⁶² most religious remarks by defense attorneys are unassailable on appeal. The reported cases are comprised of the two instances in which a defense attorney was precluded from making a religious argument: the slightly more

around since biblical times); *State v. Phillips*, 940 S.W.2d 512, 519 (Mo. 1997) (calling dismemberment a "despicable, unchristian act"); *State v. Clemons*, 946 S.W.2d 206, 230 (Mo. 1997) ("I trust you will pray about [your decision]" and life is created by God, has value, and God will take it away.); *State v. Zuniga*, 357 S.E.2d 898, 911 (N.C. 1987) (referring to victim as "a little child of God"); *Commonwealth v. Smith*, 675 A.2d 1221, 1232 (Pa. 1995) ("The presumption of innocence is gone. It is removed. That is as final in God as Ryan Leahy's life is. That man stands today a convicted murderer."); *State v. Tillman*, 750 P.2d 546, 560 (Utah 1988) (stating that a fifteen year prison sentence is not adequate alternative to death penalty because Israelites had to wander forty years in the wilderness).

⁵⁷ *Bussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994) (paraphrasing); *State v. Richardson*, 995 S.W.2d 119, 126 (Tenn. Crim. App. 1998) (citing *Proverbs* 28:1).

⁵⁸ *Todd v. State*, 410 S.E.2d 725, 734 (Ga. 1991).

⁵⁹ *See id.* In this case, the reader must consult the dissent to learn the content of the remarks made by the prosecutor.

⁶⁰ *Cape v. Francis*, 741 F.2d 1287, 1301 (11th Cir. 1984); *see also State v. Crago*, 639 N.E.2d 801, 817 (Ohio App. 1994) (describing prosecutor as misquoting the Bible to make a Golden Rule); *State v. Cribbs*, 967 S.W.2d 773, 783 (Tenn. 1998) (citing "[w]hatever you sow" as a justification for retribution).

⁶¹ *See Boyd v. French* 147 F.3d 319 (4th Cir. 1998); *Brecheen v. Reynolds*, 41 F.3d 1343 (10th Cir. 1994); *Ruiz v. Norris*, 868 F. Supp. 1471 (W.D. Ark. 1994); *High v. Turpin*, 14 F. Supp. 2d 1358 (S.D. Ga. 1998); *Roberts v. State*, 735 So. 2d 1244 (Ala. Crim. App. 1997); *Ivery v. State*, 686 So. 2d 495 (Ala. Crim. App. 1996); *Bonifay v. State*, 680 So. 2d 413 (Fla. 1996); *Street v. State*, 636 So. 2d 1297 (Fla. 1994); *Greene v. State* 469 S.E.2d 129 (Ga. 1996); *Hill v. State*, 427 S.E.2d 770 (Ga. 1993); *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1988); *Carr v. State*, 655 So. 2d 824 (Miss. 1995); *Debler v. State*, 856 S.W.2d 641 (Mo. 1993); *State v. Rose*, 451 S.E.2d 211 (N.C. 1994); *State v. Keen*, 926 S.W.2d 727 (Tenn. 1996).

⁶² *See Ball v. United States*, 163 U.S. 662 (1896).

numerous cases in which the remarks of defense attorneys make their way into a reported case because they are used as a justification for the prosecutor's religious arguments, and cases in which either the execution or the omission of religious arguments were the subject of an ineffective assistance of counsel claim. From these sources, plus anecdotal accounts, we have tried to discern the range of religious arguments made by defense counsel.

1. Biblical Instances of Mercy

Most common, we think, are invocations of the story of the "woman caught in the act of adultery," brought before Jesus.⁶³ As the scribes and Pharisees reminded Jesus, Mosaic law commanded that she be stoned, and they asked him "What do you say about her?"⁶⁴

So when they continued asking him, he lifted up himself, and said unto them, "[h]e that is without sin among you, let him cast the first stone." . . . But when they heard it, they went away, one by one, beginning with the eldest, and Jesus was left alone with the woman standing before him. Jesus looked up and said to her, "Woman, where are they? Has no one condemned you?" She said, "No one Lord." And Jesus said, "Neither do I condemn you; go and do not sin again."⁶⁵

We have also found two reported instances of retelling the story of Cain and Abel, with emphasis on the fact that after murdering his brother, Cain was punished not by death, but by "banishing him from the soil,"⁶⁶ and "putting a mark on him."⁶⁷ Similarly, two attorneys cited Jesus' forgiveness of those who killed him,⁶⁸ one of whom colorfully stated:

[H]e didn't say, "Send these people to the electric chair, consign them

⁶³ See *State v. Shafer*, 531 S.E.2d 524 (S.C. 2000); *State v. Patterson*, 482 S.E.2d 760 (S.C. 1996); Rick Bragg, *Carolina Jury Rejects Execution for Woman Who Drowned Sons*, N.Y. TIMES, July 29, 1995, at A1 (recounting use of this story by defense attorney David Bruck in the penalty phase of Susan Smith's capital trial). In addition to these two reported instances, word of mouth in the capital defense community is that this argument is extremely common; one of us has used this argument as well.

⁶⁴ *John* 8:5 (Revised Standard Version).

⁶⁵ *John* 8:7-11 (King James).

⁶⁶ *State v. Bradford*, 929 P.2d 544, 580 (Cal. 1997) (paraphrasing *Genesis* 4:14-16).

⁶⁷ *Id.*; *Commonwealth v. Daniels*, 644 A.2d 1175 (Pa. 1994) (same, arguing that we have not created life and therefore do not have authority to end it).

⁶⁸ *Bennett v. Angelone*, 92 F.3d 1336 (4th Cir. 1996); *State v. Messiah*, 538 So. 2d 175 (La. 1988).

to hell.” He lifted his eyes up and he said, “Father forgive them, for they know not what they do.”⁶⁹

Another defense attorney recounted a greater number of instances of mercy, discussing Cain, Moses, King David, and Paul.⁷⁰ More generally, counsel in one case argued that the New Testament teaches mercy,⁷¹ and in another that retribution and revenge are not part of the Bible or the law,⁷² and in a third that the jury would have an opportunity to “condemn the sin but not condemn the sinner.”⁷³

2. Biblical Prohibitions Against Execution

In three instances defense counsel quoted the Fifth Commandment: “Thou shalt not kill.”⁷⁴ Another two argued that the Sermon on the Mount replaced “an eye for eye.”⁷⁵ More indirectly, defense counsel in another case quoted: “Love your neighbor as yourself.”⁷⁶ Defense counsel made the related argument that life and death decisions belong to God in an additional two cases. In one, he paraphrased: “Vengeance is mine, thus sayeth the Lord.”⁷⁷ In a second, he referred to the Sermon on the Mount, quoting: “Judge not that ye be not judged.”⁷⁸ Rather more coercively, yet another attorney argued, during the *guilt* phase of a capital prosecution, that the death penalty is un-Christian, and that if the jurors impose it, they will suffer after death.⁷⁹

Two defense attorneys recognized that the application of biblical passages is less than certain and cited additional authority supporting an anti-death penalty interpretation. In one case, defense counsel argued that “[t]he death penalty today is condemned by most religious beliefs,”⁸⁰ and went on to note that Popes John Paul II and Paul IV, as well as other religious authorities, including the National Council of Churches, oppose it.⁸¹ In the other, an attorney argued that the jury should not

⁶⁹ *Messiah*, 538 So. 2d at 188.

⁷⁰ *See Nixon v. State*, 533 So. 2d 1078, 1100 (Miss. 1988).

⁷¹ *See State v. Oliver*, 307 S.E.2d 304, 326 (N.C. 1983).

⁷² *See State v. Ramsey*, 864 S.W.2d 320, 332 (Mo. 1993).

⁷³ *Street v. State*, 636 So. 2d 1297, 1303 (Fla. 1994).

⁷⁴ *Bracy v. Gramley*, 81 F.3d 684, 695 (7th Cir. 1996); *Daniels v. State*, 650 So. 2d 544, 561 (Ala. Crim. App. 1994); *People v. Davis*, 794 P.2d 159, 200 (Colo. 1990).

⁷⁵ *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996); *see also State v. Messiah*, 538 So. 2d 175, 188 (La. 1988) (“An eye for an eye, a tooth for a tooth or turn the other cheek, walk the additional mile. Which standard, which criterion shall you use?”).

⁷⁶ *State v. Daniels*, 446 S.E.2d 298, 321 (N.C. 1994).

⁷⁷ *State v. Middlebrooks*, 995 S.W.2d 550 (Tenn. 1999).

⁷⁸ *People v. Freeman*, 882 P.2d 249, 287 (Cal. 1994).

⁷⁹ *See McNair v. State*, 653 So. 2d 320 (Ala. 1992).

⁸⁰ *People v. Wash*, 861 P.2d 1107, 1135 n.19 (Cal. 1993).

⁸¹ *See id.* at 1135.

apply “an eye for an eye,” literally because this approach leaves “the whole world . . . blind,” citing Ghandi.⁸²

3. Comments on the Defendant’s Religious Beliefs

In two cases, defense counsel’s religious arguments were limited to discussing evidence of the quite different beliefs of the two defendants. In the more prosaic, he discussed the defendant’s religious conversion,⁸³ and in the other, discussed the defendant’s delusion that he was a “ninja of God,” acting according to divine orders.⁸⁴ We found no religiously oriented comments about the victims.

4. Miscellaneous Remarks

In nine more cases, the reviewing court discusses whether religious argument of defense counsel invited the religious argument of the prosecutor, but without specifying what defense counsel said.⁸⁵

This is a total of twenty-nine cases, less than one-third of the reported cases involving prosecutors’ religious arguments. As we discussed earlier, however, reporting of defense uses of religious arguments is limited to the cases where prosecutors use defense remarks to justify their own references to religion and the few cases in which religious argument has been prohibited. Moreover, we note one other indicator of the frequency with which defense counsel use such arguments. In *Stokes v. Armontrout*,⁸⁶ the defendant claimed that his trial counsel was ineffective for failing to offer testimony that the death penalty flouts the Bible. Given the first prong of the ineffective assistance of counsel standard, such a claim could not be made without the assertion that similar proffers and argument are so frequently employed by defense counsel that to omit them is outside the range of reasonable competence.⁸⁷

Thus, the evidence of the reported cases, taking into account how few of the arguments made by defense counsel land in published opinions, combined with our

⁸² *People v. Sandoval*, 841 P.2d 862, 882 (Cal. 1992).

⁸³ *See Commonwealth v. Cook*, 676 A.2d 639 (Pa. 1996).

⁸⁴ *Ivery v. State*, 686 So. 2d 495, 500 (Ala. Crim. App. 1996).

⁸⁵ *See Thompson v. State*, 581 So. 2d 1216 (Ala. Crim. App. 1991); *People v. Hill*, 839 P.2d 984 (Cal. 1992); *People v. Mahaffey*, 651 N.E.2d 1055 (Ill. 1995); *Doss v. State*, 709 So. 2d 369 (Miss. 1996); *Shell v. State*, 554 So. 2d 887 (Miss. 1989); *Debler v. State*, 856 S.W.2d 641 (Mo. 1993) (en banc); *State v. Rogers*, 341 S.E.2d 713 (N.C. 1986); *Gibson v. State*, 501 P.2d 891 (Okla. Crim. App. 1972); *State v. Gentry*, 888 P.2d 1105 (Wash. 1995).

⁸⁶ 851 F.2d 1085, 1086 (8th Cir. 1988).

⁸⁷ *See State v. Watson*, 449 So. 2d 1321, 1324-25 (La. 1984) (holding that it is not reversible error to exclude testimony of Catholic priest that the death penalty is an impermissible punishment).

own conversations with other defense lawyers, lead us to conclude that defense counsel frequently make religious arguments against the death penalty, at least in the South, where we practice. We are less sure, however, that we have adequately surveyed the range of defense counsels' arguments than we are with respect to those made by prosecutors.

II. WHAT COURTS SAY LAWYERS SAY ABOUT WHAT GOD SAYS

Only *four* of the one hundred capital cases in which prosecutors made religious arguments were reversed solely⁸⁸ upon that ground.⁸⁹ Both of the cases in which defense counsel's religious arguments were precluded were affirmed.⁹⁰ These bottom lines, however, conceal a substantial disagreement concerning the propriety of various specific arguments and the standard by which such arguments should be judged; they also reflect agreement about a conger of doctrines that permit affirmance even in the face of improper argument.

A. *The Propriety of Particular Religious Arguments by Prosecutors*

In each of the five categories of prosecution arguments described above, some courts have condemned the very argument that others have deemed acceptable. Thus, to start with our first category, "*an eye for an eye*" and *other retributive commands*, three courts have found "an eye for an eye" proper,⁹¹ while four have found it improper,⁹² and they are similarly divided about other Mosaic law quotations.⁹³

⁸⁸ See *Cunningham v. Zant*, 928 F.2d 1006, 1019-20 (11th Cir. 1991) (noting that the court did not need to determine whether religious remarks were sufficiently prejudicial to warrant a new sentencing hearing because improper jury instructions required vacating the death sentence).

⁸⁹ See *Sandoval v. Calderon*, Nos. 99-99010, 99-99013, 2000 WL 1657783 (9th Cir. Nov. 3, 2000); *Carruthers v. State*, 528 S.E.2d 217 (Ga. 2000); *State v. Brown*, 358 S.E.2d 1 (N.C. 1987); *Commonwealth v. Chambers*, 599 A.2d 630 (Pa. 1991).

⁹⁰ See *Daniels v. State*, 650 So. 2d 544 (Ala. Crim. App. 1994); *State v. Patterson*, 482 S.E.2d 760 (S.C. 1997).

⁹¹ See *Thompson v. State*, 581 So. 2d 1216 (Ala. Crim. App. 1991); *State v. Shurn*, 866 S.W.2d 447 (Mo. 1993) (en banc) (not deciding whether there was error, but determining it was not plain error); *State v. Rouse*, 451 S.E.2d 543 (N.C. 1994).

⁹² See *Waldrop v. Thigpen*, 857 F. Supp. 872 (N.D. Ala. 1994); *People v. Montiel*, 855 P.2d 1277 (Cal. 1993); *People v. Hill*, 839 P.2d 984 (Cal. 1992); *Hammond v. State*, 452 S.E.2d 745 (Ga. 1995).

⁹³ Compare, e.g., *State v. Williams*, 510 S.E.2d 626, 642 (N.C. 1999) ("He that smiteth a man, so that he die" is improper), with *People v. Mahaffey*, 651 N.E.2d 1055, 1068-69 (Ill. 1995) (not deciding if same quote is proper but determining that it is not plain error); compare also *State v. Holden*, 488 S.E.2d 514, 529-30 (N.C. 1997) ("[t]hou shall not kill"

In our second category, *claims of divine authority*, there is equally great disagreement. The mildest variation, “[r]ender unto Caesar that which is Caesar’s” has been deemed both acceptable and unacceptable argument,⁹⁴ and there is similar disagreement about the most coercive cases, in which the prosecutor argued that to disobey police and prosecutors is to resist God himself.⁹⁵

Comparison to biblical characters arguments in our third category, also get a mixed reception; we discern no pattern. In all three of the cases where the prosecutor compared the defendant to Cain, the reviewing courts found the comparison acceptable.⁹⁶ Courts disagreed about the propriety of comparing the defendant to Judas,⁹⁷ and disagreed about a comparison of the defendant to the Devil.⁹⁸

The propriety of the *millstones for child murderers* argument is also in dispute. In the three North Carolina cases, the courts found the millstone quote within the prosecutor’s authority, but in Oklahoma and Pennsylvania, it has been disapproved as outside the bounds of proper argument.⁹⁹

Views on the appropriateness of arguments about the victim’s and defendant’s particular religious experiences are just as much of a hodgepodge. With respect to the propriety of comments about the sincerity or significance of the defendant’s religious beliefs, reviewing courts are evenly split.¹⁰⁰ Not surprisingly, neither

is improper), *with* *People v. Arias*, 913 P.2d 980, 1036 (Cal. 1996) (“you shall not kill” is proper).

⁹⁴ See *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996) (not acceptable); *People v. Jackson*, 920 P.2d 1254 (Cal. 1996) (same); *State v. Laws*, 381 S.E.2d 609, 632 (N.C. 1989) (acceptable).

⁹⁵ See *People v. Sandoval*, 841 P.2d 862 (Cal. 1992) (paraphrasing *Romans* 13:1-7 and disapproving); *State v. Daniels*, 446 S.E.2d 298 (N.C. 1994) (referring to same passage, but approving its use); *State v. Moose*, 313 S.E.2d 507 (S.C. 1984) (same but disapproving use).

⁹⁶ See *People v. Jackson*, 920 P.2d 1254 (Cal. 1996); *Shell v. State*, 554 So. 2d 887 (Miss. 1989); *State v. Alston*, 461 S.E.2d 687 (N.C. 1995).

⁹⁷ See *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991) (unacceptable); *State v. Phillips*, 940 S.W.2d 512 (Mo. 1997) (en banc) (acceptable); *State v. Geddie*, 478 S.E.2d 146 (N.C. 1996) (acceptable).

⁹⁸ See *Commonwealth v. Henry*, 569 A.2d 929 (Pa. 1990) (approving); *Commonwealth v. Whitney*, 512 A.2d 1152 (Pa. 1986) (approving); *State v. Cauthern*, No. 02C01-9506-CC-00164, 1996 WL 937660 (Tenn. Crim. App. Dec. 2, 1996) (disapproving).

⁹⁹ See *State v. Sidden*, 491 S.E.2d 225 (N.C. 1997) (approving); *State v. Holden*, 488 S.E.2d 514 (N.C. 1997) (approving); *State v. Walls*, 463 S.E.2d 738 (N.C. 1995) (approving); *Long v. State*, 883 P.2d 167 (Okla. Crim. App. 1994) (disapproving); *Commonwealth v. Brown*, 771 A.2d 444 (Pa. 1998) (disapproving).

¹⁰⁰ See *United States ex. rel. Abubake v. Redman*, 521 F. Supp. 963 (D. Del. 1981) (disapproving argument in response to religious testimony that the Bible does not mean anything to the defendant); *Hooks v. State*, 687 So. 2d 233 (Ala. Crim. App. 1996) (approving same); *People v. Payton*, 839 P.2d 1035, 1048 (Cal. 1992) (disapproving argument that defendant’s “new born Christianity” is not a statutory mitigator);

reviewing court found the argument that execution would give the defendant an opportunity to be saved to be appropriate.¹⁰¹ On the other hand, reviewing courts failed to condemn statements that the defendant had deprived the victim of his opportunity to “get right with the Lord”¹⁰² or to become all that God had planned for him.¹⁰³

B. *Criteria for Judging the Appropriateness of Religious Arguments by Prosecutors*

We have just compared the content of what is approved and disapproved across jurisdictions. Another way to compare these cases is to ask by what rule courts determine the propriety or impropriety of arguments. Here, too, there is no consensus.

1. Zero Tolerance (Almost?)

The most restrictive approach, the apparent disapproval of virtually all religious argument, is followed by only two state courts, Pennsylvania and Tennessee, and two federal circuits.

a. *Pennsylvania*

In 1991, in the case of *Commonwealth v. Chambers*,¹⁰⁴ the Pennsylvania Supreme Court adopted a new rule, holding that “reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.”¹⁰⁵ Since then the court has both affirmed this holding¹⁰⁶ and extended it to religious

Commonwealth v. Cook, 676 A.2d 639, 649 (Pa. 1996) (approving the argument that the one part of the Bible the defendant did not read is “[t]hou shalt not kill”).

¹⁰¹ See *People v. Sandoval*, 841 P.2d 862, 883 (Cal. 1992) (“This might be the only opportunity to wake him up. God will destroy the body to save the soul. . . . Let him have the opportunity to get his soul right.”); *People v. Wrest*, 839 P.2d 1020, 1028 (Cal. 1992) (“I’m not going to talk about the fact of whether the death penalty could provide someone with the opportunity to repent at the time of death or whether a long stay in prison will allow somebody to find God or find rehabilitation.”).

¹⁰² *State v. Brown*, 358 S.E.2d 1, 19 (N.C. 1987).

¹⁰³ *Williams v. State*, CR-98-1074, 2000 WL 127219, at *19 (Ala. Crim. App. Feb. 4, 2000); *Eldred v. Commonwealth*, 906 S.W.2d 694, 707 (Ky. 1994) (paraphrasing Ecclesiastes, stating that there is a time to live and a time to die, but defendant took God’s place when he killed victim); *State v. Barrett*, 469 S.E.2d 888, 899 (N.C. 1996) (same).

¹⁰⁴ 599 A.2d 630 (Pa. 1991).

¹⁰⁵ *Id.* at 643-44.

¹⁰⁶ See *Commonwealth v. Brown*, 711 A.2d 444 (Pa. 1998).

remarks made by defense counsel,¹⁰⁷ as discussed in greater detail in Part II D.

This rule would seem to cover most, if not all, of the remarks we have catalogued above, but two subsequent cases have demonstrated that even this purportedly “bright-line”¹⁰⁸ rule has some limits. In *Commonwealth v. Cook*,¹⁰⁹ the prosecutor responded to mitigation testimony regarding the defendant’s longstanding religious beliefs by arguing that the one part of the Bible the defendant did not read was “[t]hou shalt not kill,” and the court determined that these remarks were not improper, reasoning that biblical references were not being used to support imposition of the death penalty.¹¹⁰ A second intuitive, but less easily articulated, distinction was made in *Commonwealth v. Smith*,¹¹¹ where the prosecutor said: “The presumption of innocence is gone. It is removed. That is as final in God as Ryan Leahy’s life is. That man stands today a convicted murderer.”¹¹² About this peculiar remark, the Pennsylvania court said only that “[a]ppellant has failed to demonstrate how the prosecutor’s tangential reference to God constitutes an interjection of religious law for the jury’s consideration.”¹¹³

b. *Tennessee*

Although Tennessee courts trace their broad prohibitions against religious arguments back much further than do Pennsylvania courts,¹¹⁴ and they have condemned more arguments than have Pennsylvania courts,¹¹⁵ we discuss Tennessee second because, to date, it is those prohibitions which are all bark and no bite, having never led to a reversal. In Tennessee, all “references to biblical passages or religious law during the course of a criminal trial are inappropriate.”¹¹⁶ This rule appears to encompass not only quotations, but paraphrases of such quotations, and as the Tennessee Court of Criminal Appeals has held, comparisons to biblical figures as well.¹¹⁷ No cases have yet been decided that carve out an exception to this rule.

¹⁰⁷ See *Commonwealth v. Daniels*, 644 A.2d 1175 (Pa. 1994).

¹⁰⁸ *Brown*, 711 A.2d at 458.

¹⁰⁹ 676 A.2d 639, 649 (Pa. 1996).

¹¹⁰ *Id.*

¹¹¹ 675 A.2d 1221, 1232 (Pa. 1996).

¹¹² *Id.* at 1232.

¹¹³ *Id.*

¹¹⁴ See *State v. Cribbs*, 967 S.W.2d 773, 784 (Tenn. 1998); *State v. Cauthern*, No. 02C01-9506-CC-00164, 1996 WL 937660, at *16 (Tenn. Crim. App. Dec. 2, 1996) (citing *Kirkendoll v. State*, 281 S.W.2d 243 (Tenn. 1955)).

¹¹⁵ See *State v. Middlebrooks*, 995 S.W.2d 550 (Tenn. 1999); *State v. Richardson*, 995 S.W.2d 119 (Tenn. Crim. App. 1998); *Cribbs*, 967 S.W.2d 773; *Cauthern*, 1996 WL 937660.

¹¹⁶ *Cribbs*, 967 S.W.2d at 784.

¹¹⁷ See *Cauthern*, 1996 WL 937660, at *16.

c. *The Fourth Circuit*

Astonishing as it may seem, the Fourth Circuit, the most conservative federal court of appeals, appears to endorse a similarly broad proscription. In *Boyd v. French*,¹¹⁸ it stated that “biblical quotations and references” are “undoubtedly . . . improper.”¹¹⁹ In *Bennett v. Angelone*,¹²⁰ it stated that “federal and state courts have universally condemned such religiously charged arguments as confusing, unnecessary, and inflammatory.”¹²¹ Moreover, in *Bennett*, the court stated that the state’s argument that biblical law justifies the morality of the death penalty has “no place in our non-ecclesiastical courts and may not be tolerated there.”¹²²

d. *The Ninth Circuit*

This year, the Ninth Circuit quoted the Fourth Circuit’s broad-proscriptive language with approval,¹²³ after noting briefly three reasons for such a proscription. *Sandoval v. Calderon* holds that invocations of “higher law” both violate the Eighth Amendment’s requirement of channeled discretion and impermissibly undercut the jury’s sense of responsibility for imposing the death penalty.¹²⁴ *Sandoval* also notes that “the Establishment Clause of the First Amendment also requires [special vigilance] in guarding against religious argument,”¹²⁵ without deciding whether such arguments actually violate the Establishment Clause.

2. Religious Law May not Supplant State Law or Command the Death Penalty

More jurisdictions have disapproved arguments that they view as urging that religious law supplant state law. Thus, for example, the Georgia Supreme Court deems “direct references that urge the teachings of a particular religion command the imposition of a death penalty”¹²⁶ improper, but carefully qualifies that prohibition with the observation that “we have long declined to disapprove of passing, oratorical references to religious texts”¹²⁷ The exact contours of such

¹¹⁸ 147 F.3d 319 (4th Cir. 1998), *cert. denied*, 525 U.S. 1150 (1999).

¹¹⁹ *Id.* at 328-29.

¹²⁰ 92 F.3d 1336 (4th Cir. 1996).

¹²¹ *Id.* at 1346.

¹²² *Id.*

¹²³ See *Sandoval v. Calderon*, Nos. 99-99010, 99-99013, 2000 WL 1657783 (9th Cir. Nov. 3, 2000).

¹²⁴ See *id.* at *7.

¹²⁵ *Id.* at *7-8.

¹²⁶ *Carruthers v. State*, 528 S.E.2d 217, 221 (Ga. 2000).

¹²⁷ *Id.* at 221-22.

rules, as well as their applications, vary.

California provides an excellent example because of the relatively large number of religious argument cases its courts have considered. A prosecutor "may not . . . invoke higher or other law as a consideration in the jury's sentencing determination,"¹²⁸ and references to biblical support for capital punishment are therefore improper.¹²⁹ On the other hand, some of the applications of this rule seem psychologically naive. Thus, in *People v. Arias*,¹³⁰ the prosecutor quoted several Old Testament retributive verses, but the court deemed his remarks proper because he also said that the Bible can be used on both sides, which the court declared was really an exhortation to jurors not to resort to religion in deciding the case!¹³¹ Similarly, the court found no error in *People v. Davenport*,¹³² where the prosecutor stated: "God allowed men to carry out his word. *God gave us Bibles . . . to follow and we as [a] society have decided that through God that what we are doing is not wrong in a very aggravated circumstance.*"¹³³

According to the court, these remarks neither cloaked the prosecutor in a mantle of divine authority nor instructed jurors to look to a higher authority, in part because the prosecutor also stated that the "imposition of the death penalty was not usurping God's authority but legitimately carrying out California law."¹³⁴ Thus, it appears that in California, a prosecutor may quote scripture or talk about God's plans for mankind so long as he tells the jury that they must ultimately rely upon state law.¹³⁵

A few other jurisdictions seem to have a similar rule, though less well-articulated. In Ohio, the state supreme court has held that quoting Deuteronomy for the proposition that false prophets should be put to death is improper,¹³⁶ as is misquoting the Bible to create a retributive "Golden Rule."¹³⁷ Similarly, in Oklahoma, the state supreme court has stated that for the prosecutor to quote the

¹²⁸ *People v. Sandoval*, 841 P.2d 862, 883 (Cal. 1992).

¹²⁹ See *People v. Wash*, 861 P.2d 1107, 1135 (Cal. 1993); *People v. Wrest*, 839 P.2d 1020, 1028 (Cal. 1992).

¹³⁰ 913 P.2d 980 (Cal. 1996).

¹³¹ See *id.*; see also *People v. Jackson*, 920 P.2d 1254, 1299 (Cal. 1996) ("Render unto Caesar" is not an "argument for using Biblical or religious criteria of justice, but rather quite the opposite.").

¹³² 906 P.2d 1068 (Cal. 1996).

¹³³ *Id.* at 1099.

¹³⁴ *Id.*

¹³⁵ But see *People v. Wrest*, 839 P.2d 1020, 1028 (Cal. 1992), an earlier California case where the court stated that the negative form of the prosecutor's remarks would not alone insulate them from a finding of impropriety, apparently an insight now forgotten. "Although the prosecutor's comments here were strategically phrased in terms of what he was not arguing, they embody the use of a rhetorical device—parlepsis—suggesting exactly the opposite." *Id.*

¹³⁶ See *State v. Lundgren*, 653 N.E.2d 304 (Ohio 1995).

¹³⁷ *State v. Crago*, 639 N.E.2d 801, 817 (Ohio Ct. App. 1994).

millstone-for-those-who-harm-children verse to make the sentencing task easier “by implying God is on the side of a death sentence is an intolerable self-serving perversion of Christian faith as well as the criminal law.”¹³⁸ Though it is unclear what is encompassed by this prohibition, an earlier case in which the same court condemned recitations of Mosaic law¹³⁹ makes it evident that this ruling is not merely a reflection of the judges’ view of the correct interpretation of this statement by Jesus. The Eighth Circuit has suggested a roughly equivalent rule: only if the prosecutor invokes the wrath of God against the defendant or suggests that the jury apply divine law rather than state law, is his comment improper.¹⁴⁰

Recently the North Carolina Supreme Court, whose present rule is described in the next section, suggested that it may be moving toward the condemnation of retributive religious quotations. In *State v. Williams*,¹⁴¹ where the prosecutor had cited retributive passages from Exodus and Numbers, the court stated that while such arguments are not so grossly improper as to require *ex mero motu* intervention by the trial court, they “discourage such arguments” and “caution all counsel that they should base their jury arguments solely upon the secular law and the facts,” and then go on to warn that such arguments “unnecessarily risk reversal of otherwise error-free trials.”¹⁴²

3. Claims of Divine Authorization are Prohibited

In two jurisdictions where retributive quotes are currently permissible, courts have drawn the line at prosecutorial claims of divine inspiration or authorization.¹⁴³ Thus, in North Carolina, it is still permissible to quote, for example, “[i]f he smite him,” but improper to argue that law officers are “‘ordained’ by God.”¹⁴⁴ In a case where the prosecutor called the North Carolina statute an Old Testament “statute of judgment,” the court refrained from condemning the argument, but commented that it “sw[u]ng inappropriately close to . . . saying the law of this state codifies divine law.”¹⁴⁵

Although Kentucky law is less well-developed,¹⁴⁶ the Kentucky Supreme Court

¹³⁸ *Long v. State*, 883 P.2d 167, 177 (Okla. Crim. App. 1994).

¹³⁹ *See Gibson v. State*, 501 P.2d 891 (Okla. Crim. App. 1972).

¹⁴⁰ *See Bussard v. Lockhart*, 32 F.3d 322 (8th Cir. 1994).

¹⁴¹ 510 S.E.2d 626 (N.C. 1999).

¹⁴² *Id.* at 643.

¹⁴³ *See State v. Gibbs*, 436 S.E.2d 321 (N.C. 1993).

¹⁴⁴ *State v. Artis*, 384 S.E.2d 470, 500 (N.C. 1989).

¹⁴⁵ *Id.*

¹⁴⁶ *See Lucas v. Commonwealth*, 840 S.W.2d 212, 214-15 (Ky. 1992) (explaining only that “[t]hou shalt not kill” did not “exceed reasonable latitude”).

has stated in dicta that it is impermissible for a prosecutor to argue that the Bible or God requires a particular outcome.¹⁴⁷

4. Variations on “Wide Latitude”

Most jurisdictions have either avoided stating any rule at all for judging religious arguments by prosecutors or else have embraced a vague generosity. Thus, in Mississippi,¹⁴⁸ the courts have repeatedly stated that drawing on religious material is permissible, applying this principle to quotations from Mosaic law,¹⁴⁹ comparisons to biblical figures,¹⁵⁰ and derogations of the defendant’s mitigation evidence.¹⁵¹ In Missouri, attorneys are simply instructed to avoid “excessive biblical . . . [and historical] references.”¹⁵² In Alabama, it is acceptable to allude, “by way of illustration, to historical facts and public characters, or to principles of divine law or biblical teachings,”¹⁵³ with the only apparent limitation being that the prosecutor may not “minimize the *legal* significance of the jury’s role” in sentencing.¹⁵⁴ In most of the remaining jurisdictions,¹⁵⁵ courts have simply avoided describing any rule for deciding these cases, occasionally by deeming the remark improper without explaining the basis for doing so,¹⁵⁶ but more often by finding some reason for affirmation without reaching the question of the merits of the claimed impropriety.¹⁵⁷

¹⁴⁷ See *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1994).

¹⁴⁸ See *Berry v. State*, 703 So. 2d 269 (Miss. 1997); *Doss v. State*, 709 So. 2d 369 (Miss. 1996); *Carr v. State*, 655 So. 2d 824 (Miss. 1995); *Shell v. State*, 554 So. 2d 887 (Miss. 1989).

¹⁴⁹ See *Doss*, 709 So. 2d 369.

¹⁵⁰ See *Shell*, 554 So. 2d at 887 (finding it permissible to discuss Cain and Abel).

¹⁵¹ See *Berry*, 703 So. 2d at 269.

¹⁵² *State v. Clemons*, 946 S.W.2d 206, 230 (Mo. 1997) (quoting *State v. Debler*, 856 S.W.2d 641, 656 (Mo. 1993)); *State v. Phillips*, 940 S.W.2d 512, 519 (Mo. 1997); *State v. Debler*, 856 S.W.2d 641, 656 (Mo. 1993) (en banc); see also *State v. Storey*, 901 S.W.2d 886 (Mo. 1995); *State v. Ramsey*, 864 S.W.2d 320, 332 (Mo. 1993).

¹⁵³ *Ivery v. State*, 686 So. 2d 495, 511 (Ala. Crim. App. 1996).

¹⁵⁴ *McNair v. State*, 653 So. 2d 320, 339-40 (Ala. Crim. App. 1992) (telling the jurors, interestingly enough, that when they died, Jesus would tell them they had done the right thing was not deemed a violation of this rule; apparently the court was looking at “legal significance” in a fairly literal way).

¹⁵⁵ But see *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991) (stating without elaboration that it is improper to refer to religious symbols and beliefs, and employing that rule to condemn a comparison to Judas Iscariot).

¹⁵⁶ See, e.g., *United States ex rel. Abubake v. Redman*, 521 F. Supp. 963 (D. Del. 1981); *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1988).

¹⁵⁷ See *infra* Section C.

C. *Reasons for Affirmance Despite Improper Arguments by Prosecutors*

As one of us observed with respect to uses of racial imagery, “[t]here is a passel of reasons for these affirmances.”¹⁵⁸ In a large number of cases, the courts rely upon defense counsel’s failure to object to the prosecutor’s remarks to sustain the death sentence. In the absence of objection, most appellate courts either deem a claim procedurally barred¹⁵⁹ or require a demonstration of plain error before entertaining a misconduct claim; where no objection has been made to a prosecutor’s religious argument, courts often skip over the question of whether any error occurred and declare that certainly the comments did not rise to the higher standard of plain error.¹⁶⁰

In another large group of cases, the court excuses the prosecutor’s conduct by reference to the doctrine of invited error. Courts virtually always apply this doctrine without consideration of whether different standards apply to prosecution and defense arguments.¹⁶¹ Perhaps this sauce-for-the-goose reflex is not surprising, but other aspects of the application of this doctrine cannot be so easily rationalized. Surely, it is odd that in three cases courts have applied this doctrine when defense counsel *never in fact referred to the Bible*, but the court thinks that the prosecutor “reasonably anticipated” that he would!¹⁶²

Almost as surprising are the two cases in which defense counsel’s *subsequent* responses to the state’s religious arguments are deemed adequate to justify the state’s foray into religious material.¹⁶³ Finally, in two of the cases where the

¹⁵⁸ Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TULANE L. REV. 1739, 1782 (1993).

¹⁵⁹ See, e.g., *People v. Hill*, 952 P.2d 673 (Cal. 1998); *State v. Tichnell*, 509 A.2d 1179 (Md. 1986); *Berry v. State*, 703 So. 2d 269 (Miss. 1997); *Doss v. State*, 709 So. 2d 369 (Miss. 1996); *Carr v. State*, 655 So. 2d 824 (Miss. 1995); *Watts v. State*, 487 P.2d 981 (Okla. Crim. App. 1971).

¹⁶⁰ See, e.g., *Ivery v. State*, 686 So. 2d 495 (Ala. Crim. App. 1996); *Bonifay v. State*, 680 So. 2d 413 (Fla. 1996); *Street v. State*, 636 So. 2d 1297 (Fla. 1994); *People v. Mahaffey*, 651 N.E.2d 1055 (Ill. 1995); *State v. Shurn*, 866 S.W.2d 447, 464 (Mo. 1993); *State v. Laws*, 381 S.E.2d 609 (N.C. 1989); *State v. Fullwood*, 373 S.E.2d 518 (N.C. 1988); *State v. Hunt*, 373 S.E.2d 400 (N.C. 1988); *State v. Brown*, 358 S.E.2d 1 (N.C. 1987); *State v. Zuniga*, 357 S.E.2d 898 (N.C. 1987); *State v. Oliver*, 307 S.E.2d 304 (N.C. 1983); see also *Todd v. State*, 410 S.E.2d 725 (Ga. 1991); *State v. Keen*, 926 S.W.2d 727, 736 (Tenn. 1994) (holding that defendant waived the issue by not objecting, but because the case was capital, the court considered the issue, albeit under the higher standard of whether the remark “clearly would have had some effect on the verdict”).

¹⁶¹ See *Daniels v. State*, 650 So. 2d 544 (Ala. Crim. App. 1994); *McNair v. State*, 653 So. 2d 320 (Ala. Crim. App. 1992); *People v. Bradford*, 929 P.2d 544 (Cal. 1997).

¹⁶² See *State v. Holden*, 488 S.E.2d 514, 530 (N.C. 1997); *State v. Bond*, 478 S.E.2d 163, 182 (N.C. 1996); *State v. Barrett*, 469 S.E.2d 888, 899 (N.C. 1996).

¹⁶³ See *Shell v. State*, 554 So. 2d 887 (Miss. 1989); *State v. Daniels*, 446 S.E.2d 298 (N.C. 1994).

purported invitation did precede the complained of conduct, the connection between the two was quite tenuous: in one case the court deemed the prosecutor's comment, "[t]he Bible says if you kill somebody you must be put to death,"¹⁶⁴ a legitimate effort to counter defense testimony about the defendant's religious activities;¹⁶⁵ and in the other, the reviewing court determined that the prosecutor's comment, "wondering" whether the victims were praying before being murdered, was responsive to defense counsel's statement that retribution and revenge are not part of the Bible.¹⁶⁶

In another large subset of cases, the reviewing court affirmed because it concluded that the error was harmless. Most frequently, these determinations cited in conclusory fashion the overwhelming evidence of guilt and the heinousness of the crime, in finding no prejudice.¹⁶⁷ Although it is standard doctrine to consider whether an instruction cured an alleged error, in two cases the courts relied in part upon a judge's instruction to defuse religious comments despite the fact that the relevant instruction was only the general statement that arguments by counsel are not evidence.¹⁶⁸ In one case, the reviewing court relied upon *its own* power to independently assess the sentence as a purported cure for any possible effect on the *jury's* sentencing decision.¹⁶⁹ In three cases, the reviewing courts relied in part on the brevity of the remarks in finding no prejudice,¹⁷⁰ and in six cases, the courts gave no real reason for their conclusion that the remarks were not prejudicial.¹⁷¹

Thus, although about a third of prosecutors' religious remarks have been disapproved, only four have compelled reversal.¹⁷² Two of these reversals have

¹⁶⁴ Crowe v. State, 458 S.E.2d 799, 811 (Ga. 1995).

¹⁶⁵ See *id.*

¹⁶⁶ See State v. Ramsey, 864 S.W.2d 320 (Mo. 1993).

¹⁶⁷ See Boyd v. French, 147 F.3d 319 (4th Cir. 1998); Bennett v. Angelone, 92 F.3d 1336 (4th Cir. 1996); Brecheen v. Reynolds, 41 F.3d 1343 (10th Cir. 1994); United States *ex rel.* Abubake v. Redman, 521 F. Supp. 963 (D. Del. 1981); People v. Wrest, 839 P.2d 1020 (Cal. 1992); Long v. State, 883 P.2d 167 (Okla. Crim. App. 1993); Gibson v. State, 501 P.2d 891 (Okla. Crim. App. 1972); State v. Richardson, 995 S.W.2d 119 (Tenn. Crim. App. 1998).

¹⁶⁸ See People v. Mahaffey, 651 N.E.2d 1055 (Ill. 1995); *Boyd*, 147 F.3d 319.

¹⁶⁹ See State v. Lundgren, 653 N.E.2d 304 (Ohio 1995).

¹⁷⁰ See Waldrop v. Thigpen, 857 F. Supp. 872 (N.D. Ala. 1994); United States *ex rel.* Abubake v. Redman, 521 F. Supp. 963 (D. Del. 1981); People v. Wash, 861 P.2d 1107 (Cal. 1993).

¹⁷¹ See Bracy v. Gramley, 81 F.3d 684 (7th Cir. 1996); Hammond v. State, 452 S.E.2d 745 (Ga. 1995); State v. Laws, 381 S.E.2d 609 (N.C. 1989); State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998); State v. Keen, 926 S.W.2d 727 (Tenn. 1994); State v. Gentry, 888 P.2d 1105 (Wash. 1995).

¹⁷² See Sandoval v. Calderon, Nos. 99-99010, 99-99013, 2000 WL 1657783 (9th Cir. Nov. 3, 2000); Carruthers v. State, 528 S.E.2d 217 (Ga. 2000); State v. Brown, 358 S.E.2d 1 (N.C. 1987); Commonwealth v. Chambers, 599 A.2d 630 (Pa. 1991).

occurred in Pennsylvania, where the court has imposed an automatic reversal rule.¹⁷³ In the third, the Georgia Supreme Court declared without elaboration that it could not conclude beyond a reasonable doubt that the biblical quotations were harmless.¹⁷⁴ Most recently, the Ninth Circuit granted habeas relief based upon its assessment that the defendant was prejudiced by the prosecutor's religious argument; in finding prejudice, that court relied upon the extent and coerciveness of the comments, the absence of overwhelming evidence, and the length of jury deliberations.¹⁷⁵

Two jurisdictions may be considering more stringent enforcement. In Tennessee, the Court of Criminal Appeals has recently stated that "[a]t some point, the need to preserve the integrity of the judicial process will require that the continued practice not be subject to the harmless error rule."¹⁷⁶ In Oklahoma, the Court of Criminal Appeals has expressed its displeasure with religious arguments in strong terms, stating with respect to the "millstone for child murderers" quotation that "[t]his statement is rank misconduct which we expect not to be repeated."¹⁷⁷

D. *The Limited Judicial Response to Defense Counsel's Religious Arguments*

In large part, courts have said nothing about what arguments defense counsel may make; only four cases confront this issue directly. As mentioned earlier, Pennsylvania has held that the ban on religious argument extends to defense counsel. In *Commonwealth v. Daniels*,¹⁷⁸ the state supreme court held that "commenting on religion is . . . improper when it goes beyond the bounds of consideration of the character and the record of the accused."¹⁷⁹ The court deemed religious arguments outside this limited sphere as improper for the same reason that it is improper for prosecutors: it distracts jurors from consideration of the evidence concerning the appropriateness of the death penalty in the circumstances of that case. In addition, the court stated that because the legislature has authorized the death penalty, it would not permit an attack on the legislative enactment of the death penalty. Given that "the law, under certain circumstances, mandates death,"¹⁸⁰ defense counsel should be precluded from arguing that the death penalty is morally wrong.

In dicta, the Supreme Court of California has taken a slightly more moderate

¹⁷³ See *Chambers*, 599 A.2d at 630.

¹⁷⁴ See *Carruthers*, 528 S.E.2d 217.

¹⁷⁵ See *Calderon*, 2000 WL 1657783, at *12.

¹⁷⁶ *State v. Richardson*, 995 S.W.2d 119, 128 (Tenn. Crim. App. 1998).

¹⁷⁷ *Long v. State*, 883 P.2d 167 (Okla. Crim. App. 1994).

¹⁷⁸ 644 A.2d 1175 (Pa. 1992).

¹⁷⁹ *Id.* at 1183.

¹⁸⁰ *Id.*

position, as it has with respect to the arguments of prosecutors.¹⁸¹ In *People v. Sandoval*,¹⁸² the case in which the Ninth Circuit eventually granted habeas relief, the California Supreme Court concluded that “[r]eference by either party to religious doctrine, commandments or biblical passages”¹⁸³ is improper. Although it acknowledged that the defendant must be allowed latitude in the presentation of mitigating evidence, it denied that such latitude extends to “exhortation of religious canons as a factor weighing against the death penalty.”¹⁸⁴ It departed from the Pennsylvania court’s approach, however, by stating that they “[did] not mean to rule out all reference to religion or religious figures so long as the reference does not purport to be a religious law or commandment.”¹⁸⁵

The only other jurisdiction that has directly addressed religious arguments by the defense is South Carolina. In South Carolina, the South Carolina Supreme Court ruled that the trial judge did not err in prohibiting the defense attorney from telling the story of the woman caught in adultery during his closing argument.¹⁸⁶ The court gave no reason for this conclusion but somewhat cryptically added: “Furthermore, appellant’s argument in this case resulted in no fundamental unfairness since the trial judge permitted neither the solicitor nor appellant to argue about religion or God.”¹⁸⁷ Recently, the South Carolina Supreme Court reaffirmed this rule in *State v. Shafer*.¹⁸⁸ We would guess that this implies a “sauce-for-the-geese” rule *for each case*; trial judges may allow or disallow religious argument as they please, so long as they do so evenhandedly.

III. WHAT COURTS SHOULD SAY

Given the hodge-podge of outcomes and rationales that courts have employed when confronted with prosecutors’ religious arguments, and the dearth of cases ruling on defense counsels’ religious arguments, it is impossible to describe any test as commanding even majority support. We think that part of the reason for the scattered case law regarding prosecutorial argument is that no court has systematically considered *all* of the constitutional and statutory limits on such arguments.¹⁸⁹ Instead courts have tended to grab the first one that comes to mind,

¹⁸¹ See *People v. Wash*, 861 P.2d 1107 (Cal. 1993); *People v. Sandoval*, 841 P.2d 862 (Cal. 1992).

¹⁸² 841 P.2d 862 (Cal. 1992).

¹⁸³ *Id.* at 883.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 884.

¹⁸⁶ See *State v. Patterson*, 482 S.E.2d 760 (S.C. 1997).

¹⁸⁷ *Id.* at 766.

¹⁸⁸ 531 S.E.2d 524, 532 (S.C. 2000).

¹⁸⁹ The notable exception to this generalization is Justice Mosk’s dissent in *People v. Sandoval*, 841 P.2d 862 (Cal. 1992). Justice Mosk wrote (without amplification) that

or perhaps the only one that the litigants briefed. We also think that the “sauce-for-the-goose” approach that the three courts addressing defense arguments seemed to agree upon is wrong; we believe it is the result of a related failure: the failure to consider systematically whether the various constraints that apply to prosecutors also apply to defense attorneys, and how these constraints interact with rights unique to the defendant. We hope to remedy these failures in the following section.

A. *Constitutional and Statutory Limitations on Prosecutors’ Religious Arguments*

Although the Fourth Circuit’s characterization of “religiously-based arguments” as “universally condemned”¹⁹⁰ certainly overstates the relevant positive law, we think it is close to the mark, normatively speaking. Most religious arguments made by prosecutors are improper and should be precluded because they infringe upon one or more constitutional rights. The Establishment Clause of the First Amendment, the Cruel and Unusual Punishment Clause of the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, and the Free Speech Clause of the First Amendment each forbid at least some of the arguments discussed above. It is not our intention to discuss exhaustively the reach of each of these clauses, but only to sketch them in sufficient detail to convince the reader that together they prohibit all religious arguments, except those that directly address testimony concerning the defendant’s or victim’s religious beliefs or activities, assuming, of course, that such testimony was properly received as relevant to aggravation or mitigation.

1. Establishment Clause Limitations

Because the Establishment Clause sweeps so broadly, we begin with it. A prosecutor is a “quintessential state actor,”¹⁹¹ so there can be no doubt that the actions of the prosecutor are subject to the Establishment Clause. The proper standard for judging Establishment Clause violations is less than clear. The classic three-prong purpose-effect-entanglement test of *Lemon v. Kurtzman*¹⁹² has never been formally abandoned, but it has been frequently criticized by various members

religious arguments violated the Establishment, Due Process, and Cruel and Unusual Punishment Clauses of both the United States and California constitutions. *See id.* We expand upon those arguments here, and also consider Free Speech Clause limitations.

¹⁹⁰ *Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998) (citing *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996)).

¹⁹¹ *Georgia v. McCollum*, 505 U.S. 42, 50 (1992); *McCleskey v. Kemp*, 481 U.S. 279, 350 (1987).

¹⁹² 403 U.S. 602 (1971).

of the Court¹⁹³ and frequently sidestepped.¹⁹⁴ Nevertheless, a majority of the Court remains committed to the central tenet of *Lemon*: government may not take action either for the purpose, or with the primary effect, of endorsing religion.¹⁹⁵ Although religious arguments pass the purpose test, they fail the primary effect test.

Even the most zealous advocate of *Lemon* would not contend that religious arguments in capital cases fail the purpose prong;¹⁹⁶ whatever his secondary motives, the overriding purpose behind the prosecutor's reference to religion in his sentencing phase closing argument is the desire to secure a death sentence.¹⁹⁷ The effect prong of the test, however, focuses not on the subjective intent of the governmental actor, but upon the likely effects on a reasonable observer. The question, therefore, becomes whether the juror or courtroom spectator is likely to view the reference to religion as sending a message of state approval (or disapproval, which occurs less frequently in this context) of religion.¹⁹⁸

A state may not place its power or prestige behind religion, whether it be a particular form of religion, or religion in general. When it attempts to do so, it effectively endorses religion.¹⁹⁹ When a prosecutor refers to religion in closing argument, he obviously places the power and prestige of his office behind his remarks. Indeed, prosecutors frequently refer to their submissions as those of the state; the prosecutor does not claim in his or her request to be seeking death as "William Smith" or "Susan Jones," but as "we, the people of the state of South Carolina." The only question, therefore, is which kinds of references to religion, in fact, lend religion power or prestige.

As the Ninth Circuit has suggested—but not decided—the answer would seem

¹⁹³ See *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) (reviewing opinions criticizing the *Lemon* test).

¹⁹⁴ See, e.g., *Mitchell v. Helms*, ___ U.S. ___, 120 S. Ct. 2530 (2000) (finding federally aided assistance to parochial schools does not violate the Establishment Clause); *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that a program allowing public school teachers to teach remedial education to disadvantaged children did not violate the Establishment Clause); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (establishing that a city did not violate the Establishment Clause by using a nativity scene in its Christmas display).

¹⁹⁵ See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (holding that the state did not violate the Establishment Clause by permitting private party to display a cross on grounds of state capitol). Four members of the Court, however, would find no Establishment Clause violation absent the presence of coercion. See, e.g., *id.* at 763-69 (plurality opinion of Scalia, J., Rehnquist, C.J., Kennedy, J., and Thomas, J.).

¹⁹⁶ See *Garvey & Simson*, *supra* note 11.

¹⁹⁷ Only when the "pre-eminent purpose" of a state action is "plainly religious in nature" is the purpose prong satisfied. *Stone v. Graham*, 449 U.S. 39, 41 (1980).

¹⁹⁸ See *County of Allegheny v. ACLU*, 492 U.S. 573, 599-600 (1989); see also *Wallace v. Jaffree*, 472 U.S. 38, 76 (O'Connor, J., concurring) (discussing the interpretation of state endorsement of prayer in schools).

¹⁹⁹ See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989).

to be that virtually all of them do. Looking at our initial categories, it is obvious that quoting “an for an eye” or any other retributive command lends power and prestige to religion because it urges the jury to rely upon religion in determining sentence; quoting “millstones for those who harm children” functions in the same way.

Claims of divine authority for the prosecutor or police at first glance may not seem to fit the endorsement criteria because it appears that the prosecutor is borrowing God’s prestige and power, rather than loaning some to God. Nonetheless, if we consider the ultimate effect on the audience, it is to enhance and endorse religion; why else should the prosecutor want God’s authority unless he or she is acknowledging the ultimate authority of God? Certainly, the identification of the state with God in the stronger versions of this claim (i.e., to resist the state is to resist God) constitutes such an identification of God with the state that endorsement is inevitable; even the weakest versions of claims of divine authority (e.g., “Render unto Caesar that which is Caesar’s”)²⁰⁰ suggest that the state bows to God, and that it is only because God has given the state this power that it may exercise it. This too is endorsement.

Comparisons to biblical characters vary greatly, and vary as well in the degree to which their primary effect upon an observer is to advance religion. It is hard to imagine an observer hearing a comparison to Judas without inferring endorsement of Christian beliefs. Similarly, one would expect that a retelling of the story of Cain and Abel ending in the quotation “[t]he voice of thy brother’s blood crieth unto me from the ground”²⁰¹ suggests to the listener that the Bible provides guidance on how to deal with the defendant. The only marginal case in this category is that of the prosecutor who tried to distinguish Cain, Moses, David, and Saul, none of whom received the death penalty for their actions; even the process of contrast, however, suggests that were a biblical comparison valid, it would provide guidance for the present situation.

On the other hand, comments about the specific religious experiences of the defendant or victim might, but would not always, constitute endorsement. It seems to us that comments without evidentiary support virtually always would have the effect of advancing religion; *hypothesizing* that the victim was praying prior to his death or that execution might provide the defendant with an opportunity for salvation implies endorsement of religious practices and beliefs, because there would be no reason for a prosecutor to fabricate such things unless he or she believed them and, more importantly, believed the jury should consider them in assessing the appropriate sentence. On the other hand, were there *evidence* that the victim was praying at the time he was killed, this would legitimately bear on whether he posed any threat to the defendant, which is relevant to the moral

²⁰⁰ See cases cited *supra* note 34.

²⁰¹ State v. Alston, 461 S.E.2d 687, 710 (N.C. 1995).

turpitude of the offense. Similarly, if the defendant presented *evidence* of good character that included religiosity, a prosecutor could question the credibility of that evidence in the same way that he would challenge the credibility of other evidence of good character, and not thereby either endorse or disparage the belief itself.

With respect to our miscellaneous category, generalizations are obviously difficult. Undeterred, we venture two. First, the mere use of the word “God” is unlikely to constitute an endorsement of religion; thus to call a victim “this little child of God” or to say “my God!” is probably insufficiently specific to have a substantial effect of advancing or endorsing religion. On the other hand, virtually all identifiable quotations from the Bible do have an endorsing effect, for they suggest the authority of that book compared to others. Thus, even if “[t]he wicked will flee when no man pursueth”²⁰² does not suggest a rule or analogy by which to decide an entire case, it suggests that the Bible is the source to turn to in resolving difficult questions. It is not accidental that some other equally “poetic” source such as Eldridge Cleaver is not quoted, for it is the identification with and endorsement of the religious authority that is both desired and anticipated.

2. Cruel and Unusual Punishment Clause Limitations

“Death is a different kind of punishment from any other which may be imposed in this country. . . . both [in] its severity and its finality.”²⁰³ As a consequence, the Eighth Amendment’s Cruel and Unusual Punishment Clause requires a “greater degree of scrutiny of the capital sentencing determination,”²⁰⁴ which has a number of ramifications,²⁰⁵ two of which are relevant here.

a. *The “Truly Awesome Responsibility of Capital Jurors”*

In *Caldwell v. Mississippi*,²⁰⁶ the Supreme Court held that it is “constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness

²⁰² See cases cited *supra* note 57.

²⁰³ *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (quoting *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977)).

²⁰⁴ *Turner v. Murray*, 476 U.S. 28, 35-36 (1986) (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)).

²⁰⁵ See, e.g., *id.* (finding the special nature of capital sentencing proceeding requires voir dire on racial prejudice not required for non-capital cases); *Beck*, 447 U.S. at 625 (holding that a capital defendant’s jury must be permitted to consider verdict of guilt of lesser included non-capital offense supported by the evidence although due process does not require that a non-capital defendant is not entitled to lesser included offense instruction).

²⁰⁶ 472 U.S. 320 (1985).

of the defendant's death rests elsewhere."²⁰⁷ Prosecutorial references to religion during closing argument diminish the jury's sense of responsibility when they suggest that the decision is dictated by the Bible or God. A number of courts, including the Ninth Circuit,²⁰⁸ have found a prosecutor's references to religion in closing argument to violate the *Caldwell* rule, though they disagree on what sort of remarks *Caldwell* covers.²⁰⁹

Certainly, remarks that state or imply that capital punishment has been sanctioned by the Bible or by God (including all of the retributive quotes and the "millstones for those who harm children" verses) would fall within this rule, as would assertions that God has ordained the prosecutor (who, of course, is seeking a death sentence). On the other hand, in most cases,²¹⁰ neither comparisons to biblical characters nor comments about the defendant's or victim's religious experiences would diminish the jurors' sense of responsibility.

b. "*Consideration of the Character and Record of the Individual Offender*"

The other "death is different" requirement that has implications for prosecutors' religious arguments is the "rejection of the common-law practice of inexorably

²⁰⁷ *Id.* at 328-29 (citing *California v. Ramos*, 463 U.S. 992, 998-99 (1983)).

²⁰⁸ *See Sandoval v. Calderon*, Nos. 99-99010, 99-99013, 2000 WL 1657783 (9th Cir. Nov. 3, 2000).

²⁰⁹ *See, e.g., Buttrum v. Black*, 721 F.Supp. 1268 (N.D. Ga. 1989) (reversing because, among other instances of misconduct, the prosecutor made improper biblical reference, stating "[h]e is the servant of God to execute his wrath on the wrongdoer"); *People v. Hill*, 952 P.2d 673 (Cal. 1998) (reversing because, among other instances of misconduct, the prosecutor made improper reference to "an eye for an eye, a tooth for a tooth" during closing argument); *People v. Wash*, 861 P.2d 1107 (Cal. 1993) (holding improper the prosecutor's numerous references to religion, including "[r]ender unto Ceasar [sic] the things that are Ceasar's [sic]," his citation to the commandment "thou shalt not kill," and his suggestion that the commandments were delivered because "God recognized there'd be people like Mr. Wash"); *Carruthers v. State*, 528 S.E.2d 217, 221 (Ga. 2000) (reversing because of prosecutor's improper biblical references during closing argument arguing that the Bible supports capital punishment as deterrence, including "[w]ho sheddeth man's blood by man shall his blood be shed for in the image of God made [he] man," "[a]ll they who take the sword shall die by the sword," and a claim that Paul's Letter to the Romans says that every person is subject to the governing authority). *But see McNair v. State*, 653 So. 2d 320 (Ala. Crim. App. 1992) (holding that telling the jurors that when they died, Jesus would tell them they had done the right thing was deemed not a violation of this rule). Apparently the court was looking at "legal significance" in a fairly literal way.

²¹⁰ One exception in the biblical characters category would be comparisons to Cain and Abel when coupled with quotations that imply retribution is required, such as the prosecutor made in *State v. Alston*, 461 S.E.2d 687, 710 (N.C. 1995): "The voice of thy brother's blood crieth unto me from the ground."

imposing a death sentence upon every person convicted of a specified offense.”²¹¹ In *Woodson v. North Carolina*, the Supreme Court struck down North Carolina’s broad mandatory scheme for its failure to allow for “particularized consideration . . . of the character and record of each convicted defendant before the imposition upon him of a sentence of death.”²¹² Moreover, the Court deemed even Louisiana’s narrow mandatory statute impermissible because evolving standards of decency reject “the belief that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.”²¹³ Thus, all state capital sentencing laws require individualized consideration of the offender and his offense because the Eighth Amendment forbids any other kind of capital sentencing scheme. But, as the Ninth Circuit succinctly noted, “The Biblical concepts of vengeance . . . do not recognize such a refined approach.”²¹⁴

Were jurors to rely upon any of the retributive verses from Mosaic law, all of which are nondiscretionary in nature, they would be violating their duty under (constitutionally-mandated) state law. As the Georgia Supreme Court correctly observed, for a prosecutor to quote Mosaic law is to suggest that “another, higher law should be applied in capital cases, displacing the law in the court’s instructions.”²¹⁵ Summaries of Old Testament law are similarly infirm, as is the use made of the “millstones for those who harm children” quote. Other forms of religious argument or imagery, however, do not violate the *Woodson* individualized sentencing principle.

3. Due Process Clause Limitations

An additional danger posed by many religious and biblical references during closing argument are their prejudicial and inflammatory effect on the jury.²¹⁶ The Due Process Clause of the Fourteenth Amendment compels reversal of a conviction

²¹¹ *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976).

²¹² *Id.* at 303.

²¹³ *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (internal quotations omitted); *see also* *Summer v. Shuman*, 483 U.S. 66 (1987).

²¹⁴ *Sandoval v. Calderon*, Nos. 99-99010, 99-99013, 2000 WL 1657783, at *9 (9th Cir. Nov. 3, 2000).

²¹⁵ *Carruthers v. State*, 528 S.E.2d 217, 221 (Ga. 2000); *see also* *State v. Artis*, 384 S.E.2d 470, 501 (N.C. 1989) (expressing disapproval of prosecutor’s amalgam of Mosaic Law and statutory references, on the basis that “[s]uch remarks are not only misguided, they are misleading”).

²¹⁶ *See* *Hammond v. State*, 452 S.E.2d 745, 753 (Ga. 1995) (holding the following remarks inflammatory and improper: “He violated the law of God. Thou shalt not kill. Whoever sheds the blood of man by man shall his blood be shed, for God created man in his own image. An eye for an eye; a tooth for a tooth. A life for a life.”); *see also* *United States v. Giry*, 818 F.2d 120, 133 (1st Cir. 1987) (holding a reference to Peter’s denial of Christ improper and inflammatory).

when the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."²¹⁷ This is a high standard, and unlike those previously considered, takes into account whether the objectionable comment was invited by defense counsel, at least to the extent that the defense counsel's comments limited the damage done by the prosecutor's remarks.²¹⁸ Interestingly enough, although there is overlap between this category and the Establishment Clause violation category, most cases that meet this standard do not violate Eighth Amendment restrictions. Thus, for example, the Eleventh Circuit found that a comparison of the defendant to Judas Iscariot violated due process because of its inflammatory nature,²¹⁹ though such a comparison would not seem either to diminish juror responsibility or preclude individualized decision-making.²²⁰

It should be noted that some religious arguments that do not violate due process nonetheless violate complementary statutory²²¹ or supervisory²²² rules concerning the conduct of trials, or ethical duties placed upon prosecutors.²²³ Moreover, in some respects, biblical arguments risk another harm related to unfairness caused by passion; they may cause the jury to digress from its individualized judgment mission into questions concerning the proper interpretation of biblical texts. As even the permissive North Carolina Supreme Court noted, closing arguments based on religion "inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law."²²⁴

²¹⁷ *Darden v. Wainwright*, 477 U.S. 168, 169 (1986).

²¹⁸ *See id.* at 179.

²¹⁹ *See Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991).

²²⁰ Upon reflection, we think this is because prosecutors tend to use religion in capital sentencing in proceedings in one of two ways: either to tell the jury what to do, or to make them mad. While both of these uses violate the Establishment Clause, the first violates Eighth Amendment requirements and the second violates due process requirements.

²²¹ For an unusually specific example, see LA. CODE CRIM. PROC. ANN. art. 770 (West 1981) (requiring a mistrial on motion of the defendant when a state official has referred directly or indirectly to race, religion, or national origin, and the comment was not material and might prejudice the jury against the defendant).

²²² *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (distinguishing habeas review of summations from "the broad exercise of supervisory power").

²²³ *See AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION* § 3-5.8(c) (1971) ("The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.").

²²⁴ *State v. Williams*, 510 S.E.2d 626, 642-43 (N.C. 1999) (expressing disapproval of prosecutor's references to religion in closing argument, including "[h]e that smiteth a man, so that he die, shall be surely put to death." and comparing the statute under which the state was urging the death penalty with the Bible, the "statute of judgment").

4. Freedom of Speech Clause Limitations

We consider Free Speech Clause limitations last because they affect the smallest number of cases. In a capital sentencing proceeding, a state may neither “authorize a jury to draw adverse inferences from conduct that is constitutionally protected,”²²⁵ nor treat as aggravating “factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race, religion or political affiliation of the defendant.”²²⁶ In *Dawson v. Delaware*,²²⁷ the Supreme Court held that evidence concerning the defendant’s beliefs may be properly admitted in only three situations: (1) the evidence is tied to the murder of the victim; (2) the evidence is used to show that a defendant represents a future danger to society; or (3) the evidence may be relevant to rebut any mitigating evidence offered by the defendant.²²⁸ Presumably, arguments concerning the defendant’s beliefs or associations violate the First Amendment just as does admission of evidence, absent one of these three circumstances.

Thus, if a prosecutor wished to comment upon the defendant’s religious beliefs, he ordinarily could not do so unless the defendant had opened the door with the evidence he offered in mitigation. Given, however, the relative paucity of comments about the defendants’ religious beliefs, this barrier is either scrupulously honored or irrelevant to the arguments most commonly made. It does have a few important applications where the defendant may belong to an unpopular religious group such as the Black Muslims.

B. *An Amalgam Rule and Its Enforcement*

Surprisingly, taking all of these constitutional constraints together simplifies, rather than complicates, the question of defining and regulating religious argument by prosecutors.

²²⁵ *Zant v. Stephens*, 462 U.S. 862 (1983).

²²⁶ *Id.* at 885. Although the Constitution does not erect a per se barrier to the admission of a defendant’s political beliefs or racial attitudes during sentencing, see *Dawson v. Delaware*, 503 U.S. 159, 165 (1991), the government may not admit such beliefs indiscriminately. In *Barclay v. Florida*, 463 U.S. 939 (1983), the Supreme Court held that a sentencing judge in a capital case properly considered the defendant’s membership in the Black Liberation Army and his consequent desire to start a racial war, where racial hatred motivated the killing and the defendant’s “desire to start a race war [was] relevant to several statutory aggravating factors.” *Id.* at 949. In contrast, the Supreme Court found evidence of the defendant’s membership in a racist prison gang, the Aryan Brotherhood, inadmissible where, on the facts of the case, that affiliation had “no relevance to the issues being decided in the proceeding.” *Dawson*, 503 U.S. at 160.

²²⁷ 503 U.S. 159 (1991).

²²⁸ *See id.*

1. Defining Religious Argument

The careful reader will have noticed that we have not yet defined religious argument, and this delay has been deliberate. If we superimpose the constitutional constraints on the categories of prosecutorial arguments that we created by attempting to sort the cases (ignoring the miscellaneous category for the moment), it turns out that the First, Eighth, and Fourteenth Amendments, taken together, proscribe quotation of or reference to retributive Mosaic law, claims of divine authority and quotations of the millstone verse (all of which are forbidden by Establishment Clause and the Cruel and Unusual Punishment Clause), comparisons to biblical characters and speculative comments on the victim's or defendant's religious experiences (both of which are forbidden by the Establishment Clause and often the Due Process Clause as well), and derogatory references to the content of the defendant's religious beliefs except where they provided a motivation for the crime (which the Freedom of Speech Clause forbids). This leaves only one significant category that we initially reviewed: comments about the sincerity or significance of a defendant's or victim's *actual* religious experiences. This category forms the only exception to our tentative definition: religious argument is any recognizable quotation from, paraphrase of, or allusion to the Bible or biblical characters, including God, or to any other religious text, characters, or deity, *except* in those instances where (1) the allusion is limited to the discussion of evidence presented at trial concerning the specific religious beliefs or activities of the defendant(s) or victim(s), and (2) such beliefs or activities are relevant to mitigation or aggravation.

2. Enforcing the Prohibition Against Religious Argument by Prosecutors in Capital Cases

Here is the real rub. Even the conservative Fourth Circuit might nod at our definition of what is prohibited; after all, in *Boyd v. French*,²²⁹ that court stated that "biblical quotations and references" are "undoubtedly . . . improper,"²³⁰ and in *Bennett v. Angelone*,²³¹ that "federal and state courts have universally condemned such religiously charged arguments as confusing, unnecessary, and inflammatory."²³² The Fourth Circuit, however, did not reverse either *Boyd* or *Bennett*, and in fact is notorious for its refusal to grant habeas relief in capital cases

²²⁹ 147 F.3d 319 (4th Cir. 1998).

²³⁰ *Id.* at 328-29.

²³¹ 92 F.3d 1336 (4th Cir. 1996).

²³² *Id.* at 1346.

of any stripe.²³³ Without a mechanism for enforcement, however, even a clear rule is worth very little.

a. *Direct Review*

Courts should adopt 95% of the Pennsylvania automatic reversal rule for prosecutorial religious arguments in capital cases. There is a practical reason to do so: the practice will stop. The Tennessee State Supreme Courts has expressed frustration with the inadequacy of continued reprimands and warnings to counsel, but in the face of this toothless disapproval, prosecutors have continued to quote the Bible and urge its teachings, and trial courts have continued to permit the arguments.²³⁴ Motivated by the same frustration, the Supreme Court of Pennsylvania adopted a rule that “reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.”²³⁵ Since establishing that rule, Pennsylvania has had to reverse only one criminal conviction because a prosecutor made improper religious references during closing argument.²³⁶

What is the 5% (or perhaps 2%) exception? Single, in passing, references to “God” should not require reversal, in part because they probably cannot be deterred. This is true whether the prosecutor says “my God!,” refers to the victim as “a child of God,”²³⁷ or says something incomprehensible that includes the word God, as he did in one case, declaring the defendant’s conviction was “as final in God as Ryan Leahy [the victim]’s life is.”²³⁸ The Pennsylvania court somewhat cryptically—but we think more or less correctly—captured the second reason to exempt such remarks from the automatic reversal rule: “Appellant has failed to demonstrate how the prosecutor’s tangential reference to God constitutes an interjection of religious

²³³ See John H. Blume and Sheri Lynn Johnson, *The Fourth Circuit’s “Double-Edged Sword:” Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 MD. L. REV. 1480 (1999).

²³⁴ See *State v. Middlebrooks*, 995 S.W.2d 550, 559 (Tenn. 1999). The court stated: We have condemned Biblical and scriptural references in a prosecutor’s closing argument so frequently that it is difficult not to conclude that the remarks in this case were made either with blatant disregard for our decisions or a level of astonishing ignorance of the state of the law in this regard.

Id.

²³⁵ *Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1991).

²³⁶ See *Commonwealth v. Brown*, 711 A.2d 444, 457 (Pa. 1998) (reversing because of prosecutor’s reference to the biblical passage, “[w]hosoever shall offend one of these little ones that believe in me, it is better for him that a millstone were hanged about his neck, and he were cast into the sea”).

²³⁷ *State v. Zuniga*, 357 S.E.2d 898, 911 (N.C. 1987).

²³⁸ *Commonwealth v. Smith*, 675 A.2d 1221, 1232 (Pa. 1996).

law for the jury's consideration."²³⁹ That is to say, the likelihood of prejudice (or endorsement of religion, for that matter) from such a scattered reference to God is small.

The likelihood of prejudice inherent in *most* religious arguments, however, provides a compelling doctrinal rationale for the 95% automatic reversal rule. Under the harmless error doctrine, a defendant attacking a conviction based upon constitutionally improper behavior by a prosecutor should have his conviction reversed unless the state can prove beyond a reasonable doubt that the constitutional violation did not affect the outcome.²⁴⁰ But effects on the outcome of the sentencing phase of a trial are far more difficult to assess than are effects on the outcome of the guilt phase. There is no undeniably right answer to the sentencing question, at least not in most cases in most jurisdictions. The jury has vastly more discretion in the sentencing phase than they do in the guilt phase, and how they exercise it not only depends upon the particular evidence in front of them, but also how they as individuals view that evidence and how they view the death penalty; if this were not the case, capital cases would not require such elaborate and lengthy jury selection procedures. An argument that tells jurors to look to religious law, precepts, lessons, or the like, therefore carries with it an unquantifiable and highly variable risk that any given juror's vote will be altered by his or her perceptions of the commands of religious law. Moreover, whether the religious argument on its face referred directly to a governing retributive rule or merely "resorted to Proverbs for a more poetic version of a common-sense connection . . . [between flight and consciousness of guilt],"²⁴¹ the fact that the representative of the "People of the State of California" has made this argument implies that religious considerations are appropriate in capital sentencing, thereby implicitly sanctioning the juror to think for herself of an "eye for eye,"²⁴² even when the prosecutor has not said it.

Thus when the defendant objects and asks for a mistrial, reversal should be automatic in all cases except those that contain only a random reference to God. Moreover, as this rule becomes established, courts should be quick to find religious argument by prosecutors to be plain error. In part, this is because the rule is clear

²³⁹ *Id.*

²⁴⁰ *Chapman v. California*, 386 U.S. 18 (1968). This is true for Establishment Clause violations, Cruel and Unusual Punishment Clause violations, and Freedom of Speech violations. With respect to due process violations, the definition of the constitutional violation itself requires the defendant to show that the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Because all of the remarks that we would prohibit on due process grounds also violate the Establishment Clause, the burden of proof of harmlessness falls on the state for all prosecutorial religious arguments, as we have defined them.

²⁴¹ *Bussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994).

²⁴² *Exodus* 21:24 (King James).

and easy for a prosecutor to avoid transgressing. There is an additional reason to move such arguments to the plain error list: it is extremely difficult for defense lawyers to object to such arguments without risking the impression that they, and their clients, are opposed to the Bible, or even to God. To require a lawyer to choose between asserting his client's rights and seeming to side with the Devil, or at least with heretics, is another wrong of constitutional magnitude.

b. *Collateral Review*

The issue is different, however, on habeas corpus. Here we must part company with the student author, who urges that the automatic reversal rule of the Pennsylvania courts be applied to collateral as well as direct review. Whatever we might wish the scope of habeas review to be, an automatic reversal rule is not consistent with its present contours; section 2254(d) of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA) precludes application of such a rule in post-AEDPA cases. In relevant part, AEDPA provides that an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings *unless* the adjudication of the claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.²⁴³

Thus, if a state court determines that a prosecutor's religious argument was proper, a federal court must ask whether, at the time the state court ruled, clearly established federal law, as determined by the United States Supreme Court, held that such arguments violated a constitutional right.

We do not think it fairly can be said that the Supreme Court has clearly established that all religious argument by prosecutors is prohibited. Both the *Caldwell* rule, which prohibits comments that minimize the jury's responsibility for the sentencing decision,²⁴⁴ and the *Woodson* rule, which requires individualized sentencing determinations,²⁴⁵ are, however, very clearly established, and with the rare exception of a handful of very old cases, were clearly established at the time the state court made its decision. Thus, arguments that violate *Caldwell* or *Woodson*—those arguments that either supply a biblical rule of decision-making or

²⁴³ 28 U.S.C. § 2254(d) (Supp. III 1997).

²⁴⁴ *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

²⁴⁵ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

claim divine authorization for the state—are unconstitutional and a state court that did not find them so was acting contrary to established Supreme Court authority.²⁴⁶

There may, however, be some additional cases in which habeas relief is warranted. These are the cases in which the state court *correctly* determined that a prosecutor's comment violated the Establishment Clause or the Due Process Clause, but then incorrectly held that the error was harmless.²⁴⁷

C. *Crafting More Modest Limits for Defense Attorneys*

Our final section of this Article is, by necessity, about one part substance and three parts imagination. True, there are few reported cases that involve precluded religious arguments by defense lawyers. But for two reasons we think we need to address the subject despite the lack of a live controversy at the moment. First, the only court that has adopted a bright line automatic reversal rule for prosecutorial religious arguments similar to the one we propose has held that the rule extends to defense counsel;²⁴⁸ if more courts adopt a rule similar to the one we propose, we anticipate pressure to extend the rule to defense counsel. The second reason is the superficial attractiveness of an analogy to the reciprocal peremptory challenge rules of *Batson v. Kentucky*²⁴⁹ and *Georgia v. McCollum*,²⁵⁰ an analogy we think is flawed and would like to distinguish.

1. Constitutional Constraints that Limit Prosecutors' Religious Arguments Are Inapplicable to Defense Counsel

Establishment Clause, Due Process Clause, and Freedom of Speech Clause commands only apply to governmental actors. Prosecutors are indisputably governmental actors whenever they act as prosecutors, but defense counsel, at least during closing arguments, are not. In *Georgia v. McCollum*, the Supreme Court extended the holding of *Batson v. Kentucky* to defense counsel, holding that the Equal Protection Clause "prohibits a criminal defendant from engaging in

²⁴⁶ As the Court recently has made clear, the test is not whether a renegade court in fact ignored established authority, but whether the authority was clear. *Williams v. Taylor*, 529 U.S. 362 (2000).

²⁴⁷ On habeas corpus review, where the state court has found an error harmless, the appropriate standard is whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 508 U.S. 619, 637 (1993) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1945)).

²⁴⁸ See *Commonwealth v. Daniels*, 644 A.2d 1175 (Pa. 1992); see also *People v. Sandoval*, 841 P.2d 862, 883 (Cal. 1992) (stating in dicta that constraints on defense counsel are similar to those on prosecutors).

²⁴⁹ 476 U.S. 79 (1986).

²⁵⁰ 505 U.S. 42 (1992).

purposeful discrimination on the ground of race in the exercise of peremptory challenges.”²⁵¹ Whether *McCullum* is rightly decided,²⁵² it does not control here.

Prior to *McCullum*, the Supreme Court held in *Polk County v. Dodson*,²⁵³ that public defenders are not vested with state authority “when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.”²⁵⁴ *McCullum* does not purport to overrule *Dodson* but distinguishes it.²⁵⁵ The question therefore, is not whether defense counsel is always or never a governmental actor, but whether he takes on the mantle of the state in the exercise of a specific function.

The Court’s analysis of why defense exercise of the peremptory challenge is state action relies upon two factors that are not present when defense counsel presents a closing argument. First, unlike when defense counsel is presenting a closing argument, when he exercises a peremptory challenge, he “is performing a traditional governmental function,”²⁵⁶ because the selection of a jury in a criminal case “fulfills a unique and constitutionally compelled governmental function.”²⁵⁷ Second, when defense counsel argues against the State in closing penalty phase argument, it is clear to all observers that his actions are not those of the State, but diametrically opposed to those of the State, in contrast to the appearance of state involvement in jury selection, where “[r]egardless of who precipitated the jurors’ removal, the perception and the reality in a criminal trial will be that the court has excused the jurors based on race, an outcome that will be attributed to the State.”²⁵⁸ Thus, when defense counsel attempts to sway jurors away from imposing the death sentence that is being sought by the State, he is not a governmental actor, and as such, is not subject to First or Fourteenth Amendment constraints.²⁵⁹

Eighth Amendment prohibitions are likewise inapplicable to defense counsel. It is the defendant, not the State, who has a right against the imposition of cruel and unusual punishment and therefore has the concomitant rights to heightened

²⁵¹ *Id.* at 46.

²⁵² *See id.* at 62-69 (O’Connor, J., dissenting) (arguing that the adversarial relationship between the accused and the government precludes finding the accused a state actor); *see also* Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993) (arguing generally that *McCullum* is wrongly decided because it exacerbates rather than ameliorates the effects of white racism).

²⁵³ 454 U.S. 312 (1981).

²⁵⁴ *Id.* at 325.

²⁵⁵ *McCullum*, 112 U.S. at 42.

²⁵⁶ *Id.* at 51.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 53.

²⁵⁹ An additional reason supports the conclusion that there is no state action here: *McCullum* and its precursor, *Powers v. Ohio*, 513 U.S. 951 (1994), which extended *Batson* to civil cases, are themselves outliers on the state action doctrine continuum. *See* Burt Newborne, *Of Sausage Factories and Syllogism Machines*, 67 N.Y.U. L. Rev. 419, 433 (1992).

reliability and fairness in capital sentencing proceedings. Consequently, even if defense counsels' religious remarks did diminish the jurors' sense of responsibility for the imposition of a *life* sentence, or lead to less than individualized determinations that a *life* sentence was appropriate, no constitutional violation would have occurred.

2. Most Defense Religious Arguments Do Not Supplant State Law

When prosecutors argue “[h]e that smiteth a man . . . shall . . . be put to death,”²⁶⁰ they contradict state law that requires individualized sentencing, thereby violating the Eighth Amendment that requires individualized sentencing. As discussed above, defense counsel's statements cannot analogously violate the Eighth Amendment, but for non-constitutional reasons, a state court might want to preclude counsel on either side from misstating the law. It is therefore worth noting that defense religious arguments, unlike those most commonly made by prosecutors, rarely offer an alternative rule of decision.

To take the most widely used example, the import of the story of the woman caught in adultery is not either to forbid or prescribe a rule for capital punishment, but to ask the sentencer to look at his or her own failings before making an ultimate judgment. Similarly, the point of comparisons to David or Paul is not to supplant state law, but to point out to jurors that even deeply flawed human beings, including those who have committed murders can change and subsequently lead worthwhile lives. Thus, we think the Pennsylvania Supreme Court was wrong to deem any defense comment on religion (except those limited to “consideration of the character and record of the accused”) an attack on the legislative enactment of the death penalty.²⁶¹ Such a sweeping condemnation sounds a little paranoid.

This is not to say that defense arguments *never* offer a substitute rule of decision. If defense counsel says “The Bible says ‘Thou shalt not kill,’ and there’s no exception for killings by the State of Arizona,” counsel has argued for supplanting state law with religious law. If defense counsel says “Pope John Paul II has said that the death penalty is wrong and no good Catholic can vote for the death penalty,” counsel has again argued for replacing state law with religious authority. Notice, however, that chopping off the second half of each of those sentences makes them more ambiguous; if the lawyer only says “The Bible says ‘Thou shalt not kill,’” or “Pope John Paul II and other religious leaders have concluded that the death penalty is wrong,” it is less clear whether this is an argument to supplant state law or a moral argument for extreme caution in imposing the death penalty. Given the ambiguity, courts should consider the affirmative

²⁶⁰ *Exodus* 21:12 (King James).

²⁶¹ *Commonwealth v. Daniels*, 644 A.2d 1175, 1183 (Pa. 1992).

reasons for permitting such an argument, discussed in Part III C (4) below, before deciding to preclude it.

3. Most Defense Religious Arguments Are Not Inflammatory

Just as defense argument supplanting state law may be a legitimate judicial concern even though it has no constitutional dimension, inflammatory defense arguments are a source of legitimate concern even when they come from defense counsel and therefore do not violate the Due Process Clause. The overwhelming majority of defense religious arguments, however, have no inflammatory potential. The only exception we have found in the reported cases is the defense attorney who argued that the death penalty is un-Christian and that if the jurors impose it, they will suffer after death.²⁶² This is more than inflammatory; it is threatening, and should not be permitted.

4. Affirmative Reasons to Allow Defense Religious Arguments Should Be Considered

A final justification for imposing only modest limitations on defense counsel's use of religious arguments lies in the affirmative benefits of such arguments. Briefly, we think there are three reasons for viewing defense resort to religious arguments with a generous eye, all three of which relate to the ways in which "death is a different kind of punishment from any other,"²⁶³ and consequently, requires a "greater degree of scrutiny of the capital sentencing determination."²⁶⁴

a. *Encouragement of Individual Jurors' Responsibility for Sentencing*

As discussed above, in *Caldwell v. Mississippi*,²⁶⁵ the Supreme Court held that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."²⁶⁶ While many, if not most, prosecutorial references to religion during closing argument tend to diminish the jury's sense of responsibility (because they suggest that the decision is dictated by the Bible or God), most defense arguments emphasize and encourage individual responsibility for the life or death decision. In part, this is the flip side

²⁶² See *McNair v. State*, 653 So. 2d 320 (Ala. Crim. App. 1992).

²⁶³ *Beck v. Alabama*, 447 U.S. 625 (1980) (quoting *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977)).

²⁶⁴ *California v. Ramos*, 463 U.S. 992, 999 (1983).

²⁶⁵ 472 U.S. 320 (1985).

²⁶⁶ *Id.* at 328-29.

of not advocating a retributive rule for decision-making, but instead encouraging personal reflection.

b. *Facilitating the Consideration of All Relevant Mitigating Circumstances*

Even more significantly, allowing a fairly free rein for defense penalty phase summations comports with the “rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense,”²⁶⁷ and the required “particularized consideration of . . . the character and record of each convicted defendant before the imposition upon him of a sentence of death.”²⁶⁸ This need for truly individualized decision-making has led to very broad admissibility rules for the mitigation evidence in capital sentencing proceedings.²⁶⁹ Mitigating evidence is evidence which “in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.”²⁷⁰

As the Supreme Court’s mitigation decisions have unfolded, they have stressed that the sentencing body’s possession of the fullest information possible concerning the defendant’s life and characteristics is highly relevant, if not essential, to the selection of the appropriate sentence. The sentencer, in all but that rarest kind of capital case, must be allowed to consider, “as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”²⁷¹ The Court has employed this requirement of individualized sentencing to strike down death sentences where the jury was precluded from considering the defendant’s age or relatively minor role in the offense,²⁷² evidence of “a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance,”²⁷³ evidence that as a child the defendant had habitually inhaled gasoline, that after on one occasion passing out from the fumes, his mind tended to wander, that he had been one of seven children in a poor family forced to pick cotton, that his father had died of cancer, and that he had been a loving uncle,²⁷⁴ and evidence of mental retardation.²⁷⁵ Moreover, even mitigation evidence that does *not* relate to culpability for the charged crime must be admitted under the Lockett principle so long as it may serve

²⁶⁷ Woodson v. North Carolina, 428 U.S. 280, 301 (1976).

²⁶⁸ *Id.* at 303.

²⁶⁹ See Green v. Georgia, 520 U.S. 1125 (1997) (state hearsay rules must yield to right to present mitigation evidence).

²⁷⁰ BLACK’S LAW DICTIONARY 903 (5th ed. 1979).

²⁷¹ Lockett v. Ohio, 438 U.S. 586, 604 (1978).

²⁷² See *id.* at 608.

²⁷³ Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

²⁷⁴ Hitchcock v. Dugger, 481 U.S. 393 (1987).

²⁷⁵ Penry v. Lynaugh, 492 U.S. 302 (1989).

as a “basis for a sentence less than death.”²⁷⁶

Though the Court has been adamant that it is essential that the sentencer consider those “compassionate or mitigating factors stemming from the diverse frailties of humankind,”²⁷⁷ and has defined those factors broadly, the defendant’s right to have relevant mitigating evidence *actually considered* by the jury depends both upon what evidence the state must allow the defendant to present, and upon what, and how persuasively, defense counsel may marshal that evidence. Allowing defense counsel to employ religious references may enhance his or her ability to show jurors the significance of the “compassionate or mitigating factors stemming from the diverse frailties of humankind.”²⁷⁸

c. *Counteracting Prevalent Cultural “Eye for Eye” Religious Orientations*

A final reason to allow defense counsel wide latitude in the use of religious arguments is the cultural prevalence of “an eye for an eye” religious orientations. Although jurors who would automatically impose the death penalty in every case *should* be eliminated by voir dire, data from the Capital Jury Project shows that many such jurors survive the death qualification process.²⁷⁹ Particularly when some of the jurors come into the jury with a mandatory death penalty predisposition that was created by prior exposure to retributive religious doctrines, the best way to combat that (unconstitutional) predisposition is likely to be through reference to countervailing religious principles and stories. At the very least, in order to create any receptivity to mitigating evidence, defense lawyers may need to first defuse beliefs that God commands every murderer be put to death.

5. Balancing Legitimate Judicial Concerns with the Defendant’s Interest in Effective Advocacy

Because the constitutional constraints that curtail prosecutors’ religious arguments in capital cases do not speak to defense religious summation, because garden-variety defense arguments differ in kind from common prosecutorial

²⁷⁶ In *Skipper v. South Carolina*, 476 U.S. 1 (1986), the Court held that exclusion from the sentencing hearing of proffered testimony regarding the defendant’s good behavior during pretrial incarceration violated the Eighth and Fourteenth Amendments; in *Simmons v. South Carolina*, 512 U.S. 154 (1994), it went one step further and held that the defendant’s statutory ineligibility for parole, at least in a case where future dangerousness was an issue, might serve as a basis for a sentence less than death and therefore must be presented to the jury upon the defendant’s request.

²⁷⁷ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

²⁷⁸ *See id.*

²⁷⁹ *See, e.g., William J. Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1087-90 (1995).

religious arguments, and because there are significant constitutional values furthered by allowing defense counsel substantial leeway in their employment of religious imagery and allusions, the rules forbidding religious argument should not be applied to defense attorneys. Instead, defense attorneys' arguments should be precluded only when they clearly infringe upon another judicial value.

Courts therefore may legitimately restrain religious arguments by defense counsel when those arguments: (1) directly advocate replacing state law with religious law or bowing to religious authority; (2) threaten the jury with divine wrath or are in some other way inflammatory; (3) denigrate the significance of killing the victim based upon the victim's religious beliefs; or (4) opt for generic recitation of religious platitudes when such recitations reveal a lack of diligent investigation and advocacy of mitigation evidence in violation of the duty to provide effective assistance of counsel. Otherwise, religious argument by defense counsel should not be restrained.

CONCLUSION

These are our "closing remarks" and we are both defense counsel, so we should not be precluded from resorting to religious argument. What is sauce for the goose is not always sauce for the gander:

And behold, there was a man with a withered hand. And they asked him, "Is it lawful to heal on the sabbath?" so that they might accuse him. He said to them, "What man of you, if he has one sheep and it falls into a pit on the sabbath, will not lay hold of it and lift it out? Of how much more value is a man than a sheep! *So it is lawful to do good on the sabbath.* The he said to the man, "Stretch out your hand." And the man stretched it out, and it was restored, whole like the other.²⁸⁰

The Sabbath should be honored, and the law should be honored, but it is lawful to do good on the Sabbath. The Establishment Clause, the Cruel and Unusual Punishment Clause, the Due Process Clause, and the Freedom of Speech Clause all must be honored, but defense religious appeals *for life* do not dishonor any of these principles.

To quote a secular authority, for a prosecutor to make the sentencing task easier "by implying that God is on the side of a death sentence is an intolerable self-serving perversion of Christian faith as well as the criminal law. . . ."²⁸¹ To imply that God is on the side of a life sentence is another matter; whether correct or not, such an argument dishonors neither the law nor the Sabbath.

²⁸⁰ *Matthew* 12:10-13 (Revised Standard Version) (emphasis added).

²⁸¹ *Long v. State*, 883 P.2d 167, 177 (Okla. 1994).