

**RELIGIOUS REFERENCES IN DEATH SENTENCE PHASES OF
TRIALS: TWO PSYCHOLOGICAL THEORIES THAT SUGGEST
JUDICIAL RULINGS AND ASSUMPTIONS MAY AFFECT JURORS**

by
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The effect of religious references in the courtroom has garnered recent attention by researchers interested in the role of religion in the legal system. Researchers have set forth a typology suggesting various types of religious references used by prosecutors and defense attorneys, especially during sentencing phases of death penalty trials. Judges mention several assumptions when deciding whether attorneys should be allowed to make religious references in their opening or closing arguments. However, some of these assumptions seem erroneous in light of research on psychological concepts such as reactance theory and dual-processing theories. The objectives of the present study were to test this typology to determine whether it is under- or over-inclusive; to conduct a multiple state analysis to determine how often appellate judges permit religious references in trial courts, and discover the reasons why they are permitted or not permitted. The findings of the analysis have implications for defendants' constitutional rights during death penalty trials and the outcomes of their trials. Finally, recommendations for the legal system are discussed.

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I. INTRODUCTION

In recent years, the legal system as well as legal and social science journals and books have increased the amount of attention paid to the role of religion in the legal system.¹ One area that has garnered modest attention is the effect of religious references in the courtroom.² For decades, both prosecutors and defense attorneys have used widely known biblical quotes and other religious references to try to persuade the jury either to assign a defendant the death sentence or to spare his or her life.³ A typology set forth by legal psychology researchers, Miller and Bornstein, suggests various types of religious references, which will be

¹ BRIAN H. BORNSTEIN & MONICA K. MILLER, *GOD IN THE COURTROOM: RELIGION'S ROLE AT TRIAL* (2009); MONICA K. MILLER, *RELIGION IN CRIMINAL JUSTICE* (2006); Adam B. Cohen et al., *Religion and Unforgivable Offenses*, 74 J. PERSONALITY 85 (2006) (discussing generally how individuals of different religions deal with various social offenses, but not focusing specifically on criminal offenses); Kimberly J. Cook & Chris Powell, *Christianity and Punitive Mentalities: A Qualitative Study*, 39 CRIME, L. & SOC. CHANGE 69 (2003); Monica K. Miller & Brian H. Bornstein, *The Use of Religion in Death Penalty Sentencing Trials*, 30 LAW & HUM. BEHAV. 675 (2006) [hereinafter Miller & Bornstein, *Religion in Sentencing Trials*]; Monica K. Miller & R. David Hayward, *Religious Characteristics and the Death Penalty*, 32 LAW & HUM. BEHAV. 113 (2008).

² See generally Miller & Bornstein, *Religion in Sentencing Trials*, *supra* note 1.

³ See, e.g., *State v. Haselden*, 577 S.E.2d 594, 607–08 (N.C. 2003); *State v. Barden*, 572 S.E.2d 108, 134 (N.C. 2002); *State v. Bond*, 478 S.E.2d 163, 182 (N.C. 1996).

discussed below.⁴ For instance, attorneys may give a biblical quote, make a comparison between the defendant and a biblical character, or tell the jury that God has given the jurors the authority to sentence the defendant to death.⁵

Due to the widespread use of this practice, religious references have been the subject of numerous recent cases decided by various state courts,⁶ as well as a number of scholarly articles.⁷ Many defendants have challenged their death sentences, arguing that the religious references used by prosecutors during the death sentence phase violated their rights, such as their right to due process.⁸ Courts have responded to these challenges in a variety of ways.⁹ Some courts do not allow any references to God, the Bible, or biblical characters or metaphors under any circumstance;¹⁰ whereas other courts have decided that religious references are generally permissible.¹¹ Still other courts have determined that religious references are admissible on a case-by-case basis and limit certain types of religious references but not others.¹²

In making their decisions, judges may make some assumptions about the effects that religious references can have on jury decision-making. For instance, an appeals court may rule that a religious reference was a “harmless error” because the trial judge gave a curative instruction to the

⁴ Monica K. Miller & Brian H. Bornstein, *Religious Appeals in Closing Arguments: Impermissible Input or Benign Banter?*, 29 LAW & PSYCHOL. REV. 29 (2005) [hereinafter *Religious Appeals*] (note that sections of this article were reprinted in MILLER, *supra* note 1).

⁵ *Id.* at 33.

⁶ See, e.g., *Fahy v. Horn*, 516 F.3d 169, 201 (3rd Cir. 2008); *United States v. Mitchell*, 502 F.3d 931, 994–95 (9th Cir. 2007); *People v. Zambrano*, 163 P.3d 4, 65 (Cal. 2007); *People v. Lewis*, 140 P.3d 775, 842 (Cal. 2006).

⁷ See generally MILLER, *supra* note 1 (discussing the issue of attorneys using religious references in their closing arguments and the sentencing phase of death penalty trials and the effects they may have on jurors); Andrea D. Walker, Comment, “*The Murderer Shall Surely Be Put to Death*”: *The Impropriety of Biblical Arguments in the Penalty Phase of Capital Cases*, 43 WASHBURN L.J. 197 (2003); John H. Blume & Sheri Lynn Johnson, *Don’t Take His Eye, Don’t Take His Tooth, and Don’t Cast the First Stone: Limiting Religious Arguments in Capital Cases*, 9 WM. & MARY BILL RTS. J. 61 (2000); Lis Wiehl, *Judges and Lawyers Are Not Singing from the Same Hymnal When it Comes to Allowing the Bible in the Courtroom*, 24 AM. J. TRIAL ADVOC. 273 (2000); Marcus S. Henson, Case Note, *Carruthers v. State: Thou Shalt Not Make Direct Religious References in Closing Argument*, 52 MERCER L. REV. 731 (2001).

⁸ U.S. Const. amend. V; see, e.g., *Haselden*, 577 S.E.2d at 608; *Barden*, 572 S.E.2d at 134; *State v. Artis*, 384 S.E.2d 470, 504 (N.C. 1989).

⁹ See, e.g., MILLER, *supra* note 1, at 41–57.

¹⁰ See, e.g., *Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1991).

¹¹ See, e.g., *Haselden*, 577 S.E.2d at 608.

¹² See, e.g., *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991); *Greene v. State*, 469 S.E.2d 129, 140–41 (Ga. 1996); *Hill v. State*, 427 S.E.2d 770, 778 (Ga. 1993); *State v. Gibbs*, 436 S.E.2d 321, 361 (N.C. 1993); *Commonwealth v. Daniels*, 644 A.2d 1175, 1183 (Pa. 1994); *State v. Berry*, 141 S.W.3d 549, 587 (Tenn. 2004).

jury, ordering them to ignore the reference.¹³ Implicit in this instruction is the assumption that jurors are able to ignore references; however, research indicates that this may not be possible.¹⁴ If jurors are unable to ignore this religious reference, it may not be “harmless” and could influence a juror’s decision. Religious references may thus have serious implications for jurors’ decision-making processes and the outcome of a defendant’s trial. Therefore, it is important to determine what types of religious references are used most often, what rulings courts have made, and the possible assumptions and reasons behind these rulings. The purpose of this Article is threefold: first, to conduct an analysis which tests the typology of religious references set forth in previous research by Miller and Bornstein;¹⁵ second, to determine how often judges state psychological assumptions about whether religious references affect jurors’ decision-making and if so, how; third, to analyze the various assumptions that judges make about attorneys’ use of religious references and the effects these assumptions may have on juror decision-making and trial outcomes.

Part II of this Article will begin with a brief discussion of the common types of religious references used by prosecutors and defense attorneys, as set forth in the Miller and Bornstein typology.¹⁶ This is followed by a discussion of the various rulings that have been issued by appeals courts as well as a discussion of possible assumptions judges may make about the influence of religious references.¹⁷ Part III of this Article is a brief psychological analysis of the effects that judges’ assumptions about religious references may have on jurors’ decision-making and trial outcomes. Part IV of this Article is an overview of the current study that includes a description of the study’s purpose and pertinent research questions. Part V describes in detail the methodology that was used by describing how the cases were selected and which variables were coded. Part VI is a review of the results and a discussion of the study’s implications. Finally, Part VII offers recommendations for the legal system based on the findings of this study.

¹³ See, e.g., *United States v. Giry*, 818 F.2d 120, 134 (1st Cir. 1987); *Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998); *Bennett v. Angelone*, 92 F.3d 1336, 1346–47 (4th Cir. 1996).

¹⁴ See, e.g., Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67, 76 (1995); Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1050–53 (1997); Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUM. BEHAV. 407, 415 (1995).

¹⁵ Miller & Bornstein, *Religious Appeals*, *supra* note 4.

¹⁶ *Id.* at 33–39.

¹⁷ *Id.* at 39–49.

II. RELIGIOUS REFERENCES AND LEGAL RULINGS

Prosecutors and defense attorneys make several types of religious references.¹⁸ For example, attorneys will quote statements directly from the Bible,¹⁹ make comparisons between the defendant and biblical characters,²⁰ use religious metaphors to describe the defendant's crime,²¹ or make claims that God's authority is superior to state law.²² Miller and Bornstein found that religious references emerge in many forms depending on whether they are presented by the prosecution or the defense.²³

A. *Types of Common Prosecution References*

There are three categories of religious references commonly used by prosecutors. Miller and Bornstein refer to these as retributive commands, claims of divine authority, and comparisons to biblical characters or metaphors.²⁴

1. *Retributive Commands*

Retributive commands are typically quotes taken from the Bible that prosecutors might use to convince jurors that God or the Bible endorses capital punishment as a means of punishing murderers.²⁵ One popular quote used by many prosecutors is the "eye for an eye" argument, which implies that because the defendant killed, so he too should die.²⁶ Other similar quotes include: "[h]e that smiteth a man, so that he die, shall surely be put to death,"²⁷ and "[w]hoso sheddeth man's blood, by man shall his blood be shed."²⁸ Prosecutors use these commands to try to

¹⁸ *Id.* at 33–39.

¹⁹ *See, e.g.,* Call v. Polk, 454 F. Supp. 2d 475, 513 (W.D.N.C. 2006); People v. Zambrano, 163 P.3d 4, 65 (Cal. 2007); People v. Bradford, 929 P.2d 544, 580 (Cal. 1997); Dycus v. State, 875 So. 2d 140, 171 (Miss. 2004); State v. Gell, 524 S.E.2d 332, 346 (N.C. 2000); State v. Williams, 510 S.E.2d 626, 642–43 (N.C. 1999); State v. Zuniga, 357 S.E.2d 898, 920 (N.C. 1987).

²⁰ *See, e.g.,* Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991); United States v. Giry, 818 F.2d 120, 132 (1st Cir. 1987); *Zambrano*, 163 P.3d at 65; Wilcher v. State, 863 So. 2d 776, 822 (Miss. 2003); Nixon v. State, 533 So. 2d 1078, 1100–01 (Miss. 1987); Commonwealth v. Daniels, 644 A.2d 1175, 1183 (Pa. 1994); Commonwealth v. Henry, 569 A.2d 929, 939–40 (Pa. 1990).

²¹ *See, e.g.,* State v. Holden, 488 S.E.2d 514, 529–30 (N.C. 1997).

²² *See, e.g.,* Coe v. Bell, 161 F.3d 320, 351 (6th Cir. 1998).

²³ *See, e.g.,* Miller & Bornstein, *Religious Appeals*, *supra* note 4, at 33–39.

²⁴ *Id.* at 33–35.

²⁵ *Id.* at 33–34.

²⁶ *Deuteronomy* 19:21 (King James); *see, e.g.,* People v. Wash, 861 P.2d 1107, 1134 n.18 (Cal. 1993) (in bank); Hammond v. State, 452 S.E.2d 745, 753 (Ga. 1995).

²⁷ *Exodus* 21:12 (King James); *see, e.g.,* Wash, 861 P.2d at 1134 n.18; State v. Williams, 510 S.E.2d 626, 642 (N.C. 1999).

²⁸ *Genesis* 9:6 (King James); *see, e.g.,* Coe v. Bell, 161 F.3d 320, 351 (6th Cir. 1998); Carruthers v. State, 528 S.E.2d 217, 222 (Ga. 2000); State v. Middlebrooks, 995 S.W.2d 550, 559 (Tenn. 1999).

persuade a jury to assign a death sentence based on the belief that their choice would be supported by God or the Bible.

2. *Claims of Divine Authority*

Prosecutors sometimes make claims of divine authority by suggesting to jurors that God has provided the state or jury with the right or authority to put the defendant to death.²⁹ Examples of claims of divine authority include prosecutorial arguments that God's law surpasses the state's law.³⁰ One attorney stated the following: "Our governments are ordained by our creator, and a duly constituted body like this has the authority, as well it should; it has not just the authority; it has the duty to impose the proper and just punishment."³¹ These types of references are targeted toward jurors who have concerns about their authority to make the life and death decision in the trial.

3. *Comparison to Biblical Characters or Metaphors*

The third common type of religious reference typically used by the prosecution involves making comparisons to biblical characters or metaphors.³² Many prosecutors have compared the defendant or the crime to biblical characters or metaphors. For instance, prosecutors have compared defendants to biblical characters such as Paul³³ and Satan.³⁴ Prosecutors have also compared defendants and their crimes to the stories of Cain and Abel³⁵ and the Apostle Peter.³⁶

Prosecutors similarly use biblical metaphors to compare the defendant's crime to a story in the Bible in which the person who committed the crime was punished by capital punishment. For instance, in several cases in which the defendant was charged with murder of a child, attorneys told the story of what Jesus thought should happen to individuals who hurt children.³⁷ Comparisons of the defendants and their crimes to biblical characters and metaphors are used to suggest to the jury that the Bible or God encourages the death penalty for individuals like the defendant.³⁸

B. *Types of Common Defense References*

Just as prosecutors find biblical quotations and stories urging retribution, defense attorneys also use biblical quotations and stories, but

²⁹ Miller & Bornstein, *Religious Appeals*, *supra* note 4, at 34.

³⁰ See, e.g., *People v. Davenport*, 906 P.2d 1068, 1099 (Cal. 1995).

³¹ *Branch v. State*, 882 So. 2d 36, 77 (Miss. 2004).

³² Miller & Bornstein, *Religious Appeals*, *supra* note 4, at 35.

³³ See, e.g., *Farina v. State*, 937 So. 2d 612, 635 (Fla. 2006).

³⁴ See, e.g., *Fahy v. Horn*, 516 F.3d 169, 201 (3rd Cir. 2008).

³⁵ See, e.g., *People v. Jackson*, 920 P.2d 1254, 1299 (Cal. 1996); *Shell v. State*, 554 So. 2d 887, 899 (Miss. 1989).

³⁶ See, e.g., *United States v. Giry*, 818 F.2d 120, 132 (1st Cir. 1987).

³⁷ *Matthew* 18:6 (King James); see, e.g., *Ward v. Dretke*, 420 F.3d 479, 496 (5th Cir. 2005); *State v. Walters*, 588 S.E.2d 344, 367 (N.C. 2003).

³⁸ Miller & Bornstein, *Religious Appeals*, *supra* note 4, at 36.

instead to promote mercy, not retribution.³⁹ Miller and Bornstein suggest two categories of religious references used by the defense: biblical commandments against execution and biblical stories promoting mercy.⁴⁰

1. *Biblical Commandments Against Execution*

Defense attorneys often cite biblical passages that suggest that capital punishment or vengeance is forbidden by God or the Bible. For instance, a defense attorney might say, “do not take revenge, my friends, but leave room for God’s wrath, for it is written: ‘Vengeance is mine; I will repay, saith the Lord’”⁴¹ to suggest to the jury that it is not their role, but God’s to make life and death decisions.⁴²

Some defense attorneys have challenged the prosecution’s “eye for an eye” argument by making the “turn the other cheek” argument that is consistent with Jesus’s later teachings.⁴³ For instance, in one case, a defense attorney read from the Bible “You’ve heard that it was said an eye for an eye and a tooth for a tooth, but I say to you do not resist one as evil, but if anyone strikes you on the right cheek, turn to him the other also.”⁴⁴ In using these quotations that promote forgiveness and discourage retribution, defense attorneys try to convince jurors that the Bible condemns the death penalty, and therefore they should not sentence the defendant to death.

2. *Biblical Stories Promoting Mercy*

Some defense attorneys choose to appeal to jurors’ sense of compassion by presenting examples of biblical stories promoting mercy. Examples of this kind include the telling of the story of when Jesus saved the infamous adulteress from being stoned.⁴⁵ Jesus tells the people who seek to punish her that “[h]e that is without sin among you, let him first cast a stone at her.”⁴⁶ This story is told to persuade the jurors that they themselves are like the defendant in that they also have sinned in their lives and thus, according to Jesus, do not have the right to judge or sentence the defendant to death.

Defense attorneys have also presented stories from the Bible to demonstrate that God was merciful and forgiving. For example, in one case, the defense attorney made an argument that several prominent biblical characters who defied God’s laws (e.g., Adam and Eve, Cain, King

³⁹ See, e.g., *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996); *State v. Shafer*, 531 S.E.2d 524, 532 (S.C. 2000).

⁴⁰ See, e.g., Miller & Bornstein, *Religious Appeals*, *supra* note 4, at 36–37.

⁴¹ *Romans* 12:19 (King James).

⁴² See, e.g., *Bennett*, 92 F.3d at 1346 n.9 (referring to defense counsel’s use of *Romans* 12:19); *State v. Middlebrooks*, 995 S.W.2d 550, 559 (Tenn. 1999).

⁴³ See, e.g., *Dycus v. State*, 875 So. 2d 140, 171 (Miss. 2004); *Boyd v. Lee*, No. 1:00CV00647, 2003 WL 22757932, at *21 (M.D.N.C. Nov. 19, 2003).

⁴⁴ *Boyd*, 2003 WL 22757932, at *21 (quoting *Exodus* 21:24 (King James); *Matthew* 5:38–39 (King James)).

⁴⁵ See, e.g., *State v. Shafer*, 531 S.E.2d 524, 532 (S.C. 2000) (citing *John* 8:1–8:11 (King James)).

⁴⁶ *John* 8:7 (King James).

David, Moses, and Paul) were all punished by God, but not by death.⁴⁷ In other words, although many of these characters committed serious crimes, including murder, they were all spared the death penalty and punished in other ways, mostly banishment.⁴⁸

The above discussion shows the various tactics attorneys use when presenting religious references to the jury. Miller and Bornstein created a typology of prosecutor and defense references;⁴⁹ however, it was simply an anecdotal report as the authors did not do an exhaustive search of all appellate cases that involve religious references. Thus, their typology may be under-inclusive (i.e., may not include some religious references that are commonly used by attorneys) or over-inclusive (i.e., may include religious references that are not common enough among attorneys to be included in the typology). Thus, one purpose of this study is to test Miller and Bornstein's typology using more comprehensive methods. Understanding what types of religious references are used and how often they are used is important from a legal standpoint because such tactics may be considered litigation practices that violate a defendant's legal rights.

C. *Arguments and Challenges Against Religious References*

Opponents of religious references argue that prosecutorial use of religious references may violate a defendant's constitutional rights, including the right to due process.⁵⁰ The Fifth⁵¹ and Fourteenth⁵² Amendments of the Constitution guarantee individuals the right to due process. However, when prosecutors use religious references to try to persuade the jury to render a death sentence, these rights may be violated. Religious references used during the sentencing phase of death penalty trials may invoke emotional responses from jurors, especially given the high percentage of Americans who claim to believe in God.⁵³ These emotions could lead jurors to make unjust verdicts, thus denying the defendant an impartial trial. By appealing to a juror's emotions, prosecutors risk obscuring the facts of the case and thereby threaten the procedural due process to which a defendant is constitutionally entitled. Other convicted defendants have challenged their death sentence by arguing that the use of a religious reference inflamed the passions and

⁴⁷ See, e.g., *Wilcher v. State*, 863 So. 2d 776, 822 (Miss. 2003).

⁴⁸ *Id.*

⁴⁹ Miller & Bornstein, *Religious Appeals*, *supra* note 4, at 33–39.

⁵⁰ See, e.g., *Walker*, *supra* note 7, at 198; *Carruthers v. State*, 528 S.E.2d 217, 222–23 (Ga. 2000); *Todd v. State*, 410 S.E.2d 725, 734 (Ga. 1991).

⁵¹ U.S. CONST. amend. V.

⁵² U.S. CONST. amend. XIV.

⁵³ See PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>; Dana Blanton, *More Believe in God than Heaven*, FOX NEWS, June 18, 2004, <http://www.foxnews.com/story/0,2933,99945,00.html>.

prejudices of the jurors, thus leading jurors to make a decision based on emotions and not the law.⁵⁴

Convicted defendants have also raised Eighth Amendment⁵⁵ challenges, making one of two arguments: that religious references interfere with jurors' ability to use *channeled discretion* in determining whether a defendant should be given the death penalty⁵⁶ or that religious references reduce the responsibility jurors feel when making the sentencing decision.⁵⁷ The basis for the channeled discretion argument is that when jurors are persuaded with religious references, they are unable to weigh aggravating and mitigating factors as required by law—instead they rely on non-legal sources, such as content from the Bible.⁵⁸ The basis for the reduced responsibility argument is that religious references reduce jurors' responsibility for making the death penalty decision because they feel that God or biblical law requires a death sentence.⁵⁹ Thus, God ultimately bears the responsibility, not the jurors.

These arguments shine light on the possible effects that religious references may have on jurors and have implications for the legal outcomes of defendants who expect to receive fair capital trials. Because it has been suggested that religious references may affect the defendant's rights, judges, in the past decades, have established rules regarding the use of religious references by attorneys in their courts.⁶⁰

D. *Rulings Made on Religious References*

Currently, there is a great deal of disagreement among states and jurisdictions regarding the use of religious references during sentencing phases of trials.⁶¹ Appeals courts in some jurisdictions have generally allowed religious references,⁶² whereas appeals courts in other

⁵⁴ See, e.g., *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991); *United States v. Giry*, 818 F.2d 120, 134 (1st Cir. 1987).

⁵⁵ U.S. CONST. amend. VIII.

⁵⁶ See, e.g., *Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2001) (noting that "capital sentencing statutes must 'channel the sentencer's discretion'" (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980))); *Carruthers v. State*, 528 S.E.2d 217, 221–22 (Ga. 2000); *Hammond v. State*, 452 S.E.2d 745, 753 (Ga. 1995).

⁵⁷ See, e.g., *Sandoval*, 241 F.3d at 777; *People v. Wash*, 861 P.2d 1107, 1135–36 (Cal. 1993) (in bank).

⁵⁸ See, e.g., *Sandoval*, 241 F.3d at 776; *Carruthers*, 528 S.E.2d at 221–22.

⁵⁹ See, e.g., *Sandoval*, 241 F.3d at 776; *Wash*, 861 P.2d at 1136; *Carruthers*, 528 S.E.2d at 221.

⁶⁰ See, e.g., *Ward v. Dretke*, 420 F.3d 479, 497 (5th Cir. 2005); *People v. Woolley*, 793 N.E.2d 519, 525 (Ill. 2002); *State v. Shafer*, 531 S.E.2d 524, 532 (S.C. 2000).

⁶¹ See, e.g., *Lugo v. State*, 845 So. 2d 74, 110 (Fla. 2003); *Street v. State*, 636 So. 2d 1297, 1303 (Fla. 1994); *Dycus v. State*, 875 So. 2d 140, 172 (Miss. 2004); *Commonwealth v. Daniels*, 644 A.2d 1175, 1183 (Pa. 1994); *Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1991).

⁶² See, e.g., *People v. Wrest*, 839 P.2d 1020, 1028–29 (Cal. 1992) (in bank) (finding biblical references improper but allowable because it did not cause prejudice); *Farina v. State*, 937 So. 2d 612, 635 (Fla. 2006) (finding religious

jurisdictions have prohibited them.⁶³ Still, many courts make this determination on a case-by-case basis, depending on the type of reference and its relation to the defendant's crime.⁶⁴

1. *Religious References Permissible*

Courts in some states generally agree that all religious references are permissible in their jurisdictions. They have based their rulings on a number of reasons, including: the prosecutors' religious references are a fair response to religious references made by the defense;⁶⁵ the references were too brief or ambiguous to affect the jury;⁶⁶ the defendant did not object when the prosecutor made the religious references;⁶⁷ the religious references were within permissible boundaries established for closing arguments;⁶⁸ or the judge's curative instruction given to jurors to disregard the religious references were effective, and thus the references were not influential or unfair to the defendant.⁶⁹ Courts in other states and jurisdictions have also established that religious references are permissible based on similar reasons.⁷⁰

It is important to note that, in many cases, judges find that religious references are *improper*, but nevertheless find that a reference is *permissible*.⁷¹ For instance, the judge could determine that a religious reference by the prosecutor was improper; however, because the defendant also used his own religious reference, the two references

references "facially ambiguous" and therefore allowable); *Carr v. State*, 655 So. 2d 824, 853 (Miss. 1995); *State v. Taylor*, No. 65711, 1995 WL 663267, at *8-9 (Oh. Ct. App. Nov. 9, 1995).

⁶³ See, e.g., *Sandoval*, 241 F.3d at 776; *Woolley*, 793 N.E.2d at 525; *Commonwealth v. Brown*, 711 A.2d 444, 458 (Pa. 1998).

⁶⁴ See, e.g., *Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998); *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991); *Melson v. State*, 775 So. 2d 857, 893 (Ala. Crim. App. 1999); *McNair v. State*, 653 So. 2d 320, 340-41 (Ala. Crim. App. 1992); *People v. Freeman*, 882 P.2d 249, 287-88 (Cal. 1994) (in bank); *Wash*, 861 P.2d at 1136; *Greene v. State*, 469 S.E.2d 129, 140-41 (Ga. 1996); *Hill v. State*, 427 S.E.2d 770, 778 (Ga. 1993); *State v. Gibbs*, 436 S.E.2d 321, 361 (N.C. 1993); *Daniels*, 644 A.2d at 1183.

⁶⁵ See, e.g., *Boyd*, 147 F.3d at 329; *McNair*, 653 So. 2d at 340; *Street*, 636 So. 2d at 1303; *Hodges v. State*, 912 So. 2d 730, 753 (Miss. 2005); *Branch v. State*, 882 So. 2d 36, 77 (Miss. 2004); *Wilcher v. State*, 863 So. 2d 776, 824 (Miss. 2003); *Taylor*, 1995 WL 663267, at *8.

⁶⁶ See, e.g., *Farina*, 937 So. 2d at 635; *Lugo*, 845 So. 2d at 110.

⁶⁷ See, e.g., *Street*, 636 So. 2d at 1303; *Carr*, 655 So. 2d at 853.

⁶⁸ See, e.g., *Dycus v. State*, 875 So. 2d 140, 172 (Miss. 2004).

⁶⁹ See, e.g., *Bennett v. Angelone*, 92 F.3d 1336, 1346-47 (4th Cir. 1996); *United States v. Giry*, 818 F.2d 120, 134 (1st Cir. 1987); *Boyd v. Lee*, No. 1:00CV00647, 2003 WL 22757932, at *22 (M.D.N.C. Nov. 19, 2003).

⁷⁰ See, e.g., *State v. Williams*, 510 S.E.2d 626, 643 (N.C. 1999); *State v. Holden*, 488 S.E.2d 514, 530 (N.C. 1997); *State v. Daniels*, 446 S.E.2d 298, 320 (N.C. 1994); *State v. Artis*, 384 S.E.2d 470, 501 (N.C. 1989); *Commonwealth v. Henry*, 569 A.2d 929, 940 (Pa. 1990); *Commonwealth v. Whitney*, 512 A.2d 1152, 1160 (Pa. 1986).

⁷¹ *State v. Middlebrooks*, 995 S.W.2d 550, 559-60 (Tenn. 1999).

“balanced out” and ultimately no harm was done.⁷² In such a case, the judge determines that an improper reference is permissible because it is in “fair response” to the defendant’s reference.⁷³ In such cases, the defendant does not get a new trial because the judge decides that the references, although improper, did not influence the jury.⁷⁴

2. All or Some Religious References Prohibited

Not all state courts agree that all religious references should be permissible.⁷⁵ Some state courts prohibit any mention of a religious reference in court,⁷⁶ either because references to religion “inflame the passions or prejudices of the jury”⁷⁷ or divert responsibility from jurors the duty to apply state law;⁷⁸ or because previous courts have ruled religious references inadmissible.⁷⁹ Some judges have ruled that using a religious reference in court is reversible error per se and that violators are subject to disciplinary action.⁸⁰ Some have even gone as far as stating that a religious reference is grounds for an automatic reversal of the defendant’s sentence.⁸¹ Still other courts have determined that, although the religious reference was improper, it was not harmful, egregious, or unfair to the defendant, so thus it was permissible.⁸²

Some courts do not have a specific rule regarding religious references or they deal with the references on a case-by-case basis.⁸³ For example, courts that have previously found religious references to be impermissible have allowed some types of religious references because they are different or do not match the circumstances of previous rulings

⁷² *Crowe v. State*, 458 S.E.2d 799, 811 (Ga. 1995).

⁷³ *State v. Murphy*, 747 N.E.2d 765, 796 (Ohio 2001).

⁷⁴ *Crowe*, 458 S.E.2d at 811.

⁷⁵ *See, e.g.*, *Commonwealth v. Brown*, 711 A.2d 444, 458 (Pa. 1998); *Commonwealth v. Daniels*, 644 A.2d 1175, 1183 (Pa. 1994); *Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1991); *State v. Middlebrooks*, 995 S.W.2d 550, 559 (Tenn. 1999).

⁷⁶ *See, e.g.*, *Brown*, 711 A.2d at 458; *Chambers*, 599 A.2d at 644; *People v. Woolley*, 793 N.E.2d 519, 525 (Ill. 2002).

⁷⁷ *See, e.g.*, *Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2001); *Woolley*, 793 N.E.2d at 525; *Daniels*, 644 A.2d at 1183.

⁷⁸ *See, e.g.*, *Sandoval* 241 F.3d at 776; *Carruthers v. State*, 528 S.E.2d 217, 221 (Ga. 2000); *Daniels*, 644 A.2d at 1183.

⁷⁹ *See, e.g.*, *Brown*, 711 A.2d at 457; *State v. Shafer*, 531 S.E.2d 524, 532 (S.C. 2000).

⁸⁰ *See, e.g.*, *Chambers*, 599 A.2d at 644.

⁸¹ *Id.*

⁸² *See, e.g.*, *Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998); *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998); *Bennett v. Angelone*, 92 F.3d 1336, 1346–47 (4th Cir. 1996); *Hammond v. State*, 452 S.E.2d 745, 753 (Ga. 1995).

⁸³ *See, e.g.*, *Boyd*, 147 F.3d at 329; *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991); *Melson v. State*, 775 So. 2d 857, 893 (Ala. Crim. App. 1999); *McNair v. State*, 653 So. 2d 320, 340–41 (Ala. Crim. App. 1992); *People v. Freeman*, 882 P.2d 249, 287–88 (Cal. 1994); *People v. Wash*, 861 P.2d 1107, 1136 (Cal. 1993) (in bank); *Greene v. State*, 469 S.E.2d 129, 140–41 (Ga. 1996); *Hill v. State*, 427 S.E.2d 770, 778 (Ga. 1993); *State v. Gibbs*, 436 S.E.2d 321, 361 (N.C. 1993); *Daniels*, 644 A.2d at 1183.

in which they were found to be impermissible.⁸⁴ Some courts allow religious references as long as they do not go beyond the character or record of the accused,⁸⁵ do not inflame the passions or prejudices of the jurors,⁸⁶ or do not go beyond telling the history of the death penalty.⁸⁷ Many judges have allowed religious references, citing the wide latitude permitted to attorneys in their closing arguments.⁸⁸ The above examples illustrate that states differ greatly in their judicial rulings and reasons to allow or prohibit religious references. Given that some attorneys continue to rely on religious references during sentencing phases of criminal trials and many judges continue to allow religious references in their courtrooms, it is important to consider what possible effects religious references may have on jurors' decision-making.

III. PSYCHOLOGICAL ANALYSIS

This Part will present a brief psychological analysis of the effects of judges' assumptions about how religious references may or may not affect jurors' decision-making processes. Having been involved in many trials in the course of their careers, judges may make assumptions based on what they have experienced or seen, and rely on them in their line of work. Judges who oversee capital trials may develop assumptions about the effects (or lack of effects) religious references may have on jurors. Many of these assumptions can be erroneous, however, and may have serious consequences for jurors and the legal outcome of a trial. For example, judges may make several assumptions about the effect of religious references such as: 1) they do not influence jurors' decision-making when the lawyer who gave the religious reference also instructs the jurors to follow state law; 2) the jury is not affected by religious references in situations where the judge gives the jury a curative instruction to disregard the reference; 3) some references are too weak to have an influence on the jury when evidence against the defendant is strong; and 4) religious references have no effect on the jury when both the prosecutor and defense attorney give a religious reference because the effects of the references balance out.

Various psychological theories suggest that making these types of assumptions about the lack of effects that religious references may have on jurors can be erroneous, and can have the opposite effect on jurors. Thus, a defendant's rights may be violated because of the effect a

⁸⁴ *People v. Vieira*, 106 P.3d 990, 1010 (Cal. 2005); *People v. Arias*, 913 P.2d 980, 1036 (Cal. 1996); *Farina v. State*, 937 So. 2d 612, 635 (Fla. 2006).

⁸⁵ *Daniels*, 644 A.2d at 1183.

⁸⁶ *Cunningham*, 928 F.2d at 1020.

⁸⁷ *Freeman*, 882 P.2d at 287-88; *Hill*, 427 S.E.2d at 778.

⁸⁸ *State v. Barden*, 572 S.E.2d 108, 135 (N.C. 2002); *State v. Bond*, 478 S.E.2d 163, 182 (N.C. 1996); *State v. Barrett*, 469 S.E.2d 888, 899 (N.C. 1996); *State v. Artis*, 384 S.E.2d 470, 482, 500 (N.C. 1989); *State v. Berry*, 141 S.W.3d 549, 586 (Tenn. 2004).

religious reference may have on jurors' decisions. A psychological analysis is important to determine what effects these assumptions might have on jurors' decision-making processes. Psychological theories such as reactance theory and dual-processing theory can provide explanations for how religious references may affect juror decision-making. These theories also provide support for the notion that some assumptions judges may make are erroneous in light of psychological research.

A. *Reactance Theory*

One of the several assumptions judges make when considering whether to allow or prohibit religious references in their courts is that a curative instruction will undo any potential harm from such references.⁸⁹ Specifically, judges might assume that religious references, even if inappropriate, do not have an effect on jurors because the jury can be given a curative instruction by the judge.⁹⁰ An instruction to disregard the religious reference can similarly come from an attorney. In some cases, the judge has found the religious reference to be permissible when the attorney ultimately told the jurors to follow state law, not God's law.⁹¹ This type of instruction is similar to a judge's curative instruction because jurors are asked to disregard something they should not have heard. Judges might assume that jurors do what they are asked to do, that is, disregard the religious reference and follow the attorney's instructions to only consider state law in their decision-making. However, psychological research indicates that this might not be an accurate assumption.

Several research studies have indicated that curative instructions are often ineffective in making mock jurors disregard information or evidence that was ruled inadmissible by the judge.⁹² Researchers have cited reactance theory⁹³ as an explanation for the inability of jurors to disregard information after they are instructed to by judges.⁹⁴ According to reactance theory, when jurors are told that they should not consider information that they were not supposed to hear, they perceive the instructions as a means of restricting or threatening their freedom to

⁸⁹ See, e.g., *Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998); *Bennett v. Angelone*, 92 F.3d 1336, 1346–47 (4th Cir. 1996); *United States v. Giry*, 818 F.2d 120, 134 (1st Cir. 1987).

⁹⁰ Meaning, the judge tells the jury to strike the argument from the record or to forget that they heard the religious reference.

⁹¹ See, e.g., *People v. Davenport*, 906 P.2d 1068, 1099 (Cal. 1995); *Bond*, 478 S.E.2d at 182; *State v. Laws*, 381 S.E.2d 609, 633 (N.C. 1989).

⁹² See, e.g., *Greene & Dodge*, *supra* note 14, at 76; *Kassin & Sommers*, *supra* note 14, at 1046; *Pickel*, *supra* note 14, at 415.

⁹³ See, e.g., JACK W. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE 116–17 (1966); Rex A. Wright & Sharon S. Brehm, *Reactance as Impression Management: A Critical Review*, 42 J. PERSONALITY & SOC. PSYCHOL. 608, 608 (1982).

⁹⁴ See, e.g., Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOL. 205, 207 (1977).

consider all the evidence.⁹⁵ Thus, jurors are motivated to restore this freedom and have an increased tendency to do the opposite of the instructions by considering the inadmissible evidence.⁹⁶ When a judge instructs jurors to ignore a religious reference they just heard from an attorney, they may experience reactance, and thus be unable to successfully ignore or disregard the religious reference when they make their decision. Ironically, jurors may then rely *more* on the religious reference in their decision-making than they would have if the judge had not instructed them to ignore it.⁹⁷

This body of psychological research indicates that some judicial assumptions may be wrong because when judges restrict jurors from considering certain types of information in the trial, they may make jurors more likely to consider that restricted information than disregard it. The assumption that a religious reference may be ineffective because jurors are able to disregard information to which they have already been exposed is erroneous and could have a damaging effect on a defendant's trial or sentencing outcome.

B. *Dual-Processing*

Some judges have determined that a religious reference is not grounds for overturning a sentence because even in the absence of the reference, the evidence against the defendant was so strong that the religious reference did not influence the jury's final decision.⁹⁸ This means that judges might assume the jury would have decided on the death penalty sentence even if the religious reference had not been given.

Religious references are emotional in nature, and this emotion may change the way jurors make decisions. Further, references may be understood more literally by some jurors than others.⁹⁹ How jurors interpret the religious reference and apply it to the crime with which the defendant is charged has implications for how jurors make decisions. That is, whether jurors interpret religious references emotionally may lead to a different type of thought processing.

According to the Cognitive-Experiential Self-Theory (CEST),¹⁰⁰ jurors process information by one of two systems—the experiential and

⁹⁵ See, e.g., BREHM, *supra* note 93, at 70; Wright & Brehm, *supra* note 93, at 608.

⁹⁶ See, e.g., Wright & Brehm, *supra* note 93, at 608.

⁹⁷ See, e.g., Pickel, *supra* note 14, at 415.

⁹⁸ Crowe v. State, 458 S.E.2d 799, 811 (Ga. 1995); Hammond v. State, 452 S.E.2d 745, 753 (Ga. 1995); Hill v. State, 427 S.E.2d 770, 778 (Ga. 1993); State v. Middlebrooks, 995 S.W.2d 550, 560 (Tenn. 1999).

⁹⁹ See Miller & Hayward, *supra* note 1, at 118. This article measured "literal interpretism," the tendency to believe that the Bible is the word of God and should be interpreted word for word. Such individuals tended to be more punitive than those without such a belief. *Id.*

¹⁰⁰ Hedwig Teglasi & Seymour Epstein, *Temperament and Personality Theory: The Perspective of Cognitive-Experiential Self-Theory*, 27 SCH. PSYCHOL. REV. 534, 534 (1998).

the rational, and these systems operate by different rules. The experiential system is driven by emotion and draws upon personal experience and heuristics¹⁰¹ to speed decision-making. In contrast, the rational system is driven by analytical thinking and logical processing, often leading to more accurate decision-making.¹⁰²

Ideally, jurors should not make decisions based on emotions. Instead, they should make decisions very rationally by carefully examining the case facts, following the judge's instructions, and weighing aggravating and mitigating factors. Thus, they should be processing information using the "rational system," and not the "experiential system."

Jurors who are affected emotionally by religious references may rely heavily on the religious reference to make their decisions. Religious references can make jurors emotional in different ways. For instance, highly religious jurors may feel anger and resentment towards the defendant when an attorney reminds the jurors of how the defendant defied God and His morals, and thus, be more likely to convict the defendant or sentence him or her more punitively. Another way religious references can affect jurors emotionally is by angering atheists or jurors who do not consider themselves religious. These jurors may feel angry at the attorney who made the religious reference because he or she brought up religion or God in court and then asked jurors to consider what God would have done in their evaluation of the defendant. A religious reference given by an attorney to influence the jury to side with him or her might backfire on these jurors because they may try to prove to the attorney that they do not believe in God or care about what He would do and thus act more lenient or punitive towards the defendant, depending on which attorney gives the religious reference.

When jurors think at a lower level of processing, they are less likely to come to rational decisions, understand instructions, and instead base decisions on emotions and heuristics. Simply put, emotional jurors do not have the cognitive ability to make rational decisions as required by the legal process. A juror who makes decisions based on emotions and non-legal sources such as the Bible, is thus unable to use *channeled discretion* by weighing aggravating and mitigating factors as required by law.¹⁰³ For example, religious references such as "life shall go for life, eye for eye, tooth for tooth,"¹⁰⁴ can be used by jurors, especially those who strongly agree with the quote, as a heuristic in their decision-making, rather than carefully weighing the aggravating and mitigating factors.

¹⁰¹ Heuristics are considered "rules of thumb" socially learned by individuals and used when making quick decisions or judgments about people or situations when there is not enough information on which to base the decision. Relying on heuristics many times can lead to cognitive biases.

¹⁰² Teglassi & Epstein, *supra* note 100, at 534.

¹⁰³ See *supra* note 56 and accompanying text.

¹⁰⁴ *Deuteronomy* 19:21 (King James).

Despite judicial instructions that jurors base their verdict on the facts, once a juror is provided an emotional basis to make a decision that is consistent with a juror's general world view, the juror will be highly tempted to base his or her decision on that emotional basis or, at least, use that basis as a foundation against which to weigh the facts.¹⁰⁵ Jurors who consider themselves religious individuals or who interpret the Bible literally may be especially likely to be affected by religious references and to process them emotionally. Information that is emotional in nature can lead to lower-level processing¹⁰⁶ and can affect how jurors process information as well as the decisions they make.

This body of psychological research indicates that judicial assumptions (e.g., that some religious references are too weak to have an effect on the jury when the evidence against the defendant is strong) could be erroneous suppositions because different jurors are affected by religious references in different ways and some may be more affected than others. Some jurors are affected emotionally by religious references and then use their emotions as a basis in their decision-making and deliberations. Psychological research shows that relying on information that is emotional in nature often leads to lower-level processing,¹⁰⁷ such as relying on heuristics, and not carefully weighing aggravating and mitigating factors. Thus, while a judge may assume that the jury would have assigned the defendant a death sentence even if the religious reference had not been given, it may be possible that jurors were influenced by the religious references and decided on a death sentence based on their emotions that were elicited from the religious reference. However, if jurors were thinking rationally and had carefully weighed aggravating and mitigating factors, they may not have given the death penalty.

Judges might assume that religious references carry little determinative weight with jurors. Yet the research on reactance theory and dual-processing theories suggests ways that religious references may affect jurors' decision-making processes and ultimate verdict. Although this psychological research suggests that religious references do affect jurors' decisions, it also suggests that judges are unable to counter the effect of such references with curative instructions.¹⁰⁸

Therefore, one question remains: What is the frequency with which judges mention at least one of these psychological assumptions when determining whether a religious reference is permissible or

¹⁰⁵ Shelly Chaiken, *Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 J. PERSONALITY & SOC. PSYCHOL. 752, 753-54 (1980).

¹⁰⁶ Seymour Epstein, *Cognitive—Experiential Self-Theory*, in HANDBOOK OF PERSONALITY: THEORY & RESEARCH 165, 165-66, 167-70 (Lawrence A. Pervin ed., 1990).

¹⁰⁷ *Id.*

¹⁰⁸ See, e.g., Greene & Dodge, *supra* note 14, at 76; Kassin & Sommers, *supra* note 14, at 1046; Pickel, *supra* note 14, at 415.

impermissible? The answer to this question may reveal the level at which religious references are problematic and how concerned the legal system should be with attorneys' reliance on making religious references to try to persuade the jury to side with them.

IV. OVERVIEW OF THE STUDY

The first purpose of the study was to quantify the Miller and Bornstein typology (i.e., the types of religious references that exist)¹⁰⁹ to make sure it is not over or under-inclusive. Miller and Bornstein did not do a thorough analysis of all cases, and thus their typology may need to be improved. The second objective of this study was to quantify the judicial rulings and the reasons behind them. The goal was to determine how often appellate judges permit religious references and to discover the various reasons for their decisions. This analysis will be performed on a state-by-state basis, including only jurisdictions in which appellate cases that included a religious reference were found.¹¹⁰ The third objective was to determine how often the psychological assumptions exemplified before are mentioned by judges in appellate cases involving religious references. In trying to quantify judicial rulings, the analysis focused on the following research questions:

Research Question One: Do these data support Miller and Bornstein's typology or is the typology over- or under-inclusive?¹¹¹

Research Question Two: How many states have always found religious references to be proper, and thus, permissible; how many have found religious references to be improper, but nonetheless permissible under certain circumstances; how many have found religious references to be improper, and thus, impermissible?¹¹² Finally, how many states have mixed rulings or make these determinations on a case-by-case basis?¹¹³ Note that a court typically first determines whether the reference is proper (i.e., whether the attorney committed an error in using the reference). Even if the reference is found improper, a court can still find that the reference is permissible (e.g., if the trial judge had instructed the jury to ignore the improper reference).

Research Question Three: What are judges' most common reasons for finding the religious reference improper (i.e., it was improper for the attorney to use the reference) or proper (i.e., it was *not* improper for the attorney to use the reference)?¹¹⁴

¹⁰⁹ Miller & Bornstein, *Religious Appeals*, supra note 4.

¹¹⁰ Nine of the cases in this study are from federal district and appellate courts. These cases are still grouped with the case's state of origination for clarity and because the federal court's decision becomes binding on the state court if there are later proceedings.

¹¹¹ See *infra* Part VI.A.

¹¹² See *infra* Part VI.B.

¹¹³ *Id.*

¹¹⁴ See *infra* Part VI.C.

Research Question Four: How often do judges mention the previously discussed psychological assumptions when determining whether a religious reference is proper or improper? In how many cases do judges mention at least one psychological assumption when determining whether the religious reference was permissible or impermissible?¹¹⁵

V. METHOD

The study analyzed appellate cases that included religious references used by either the prosecutor or defense attorney (or both) during opening or closing arguments of death penalty sentencing trials.

A. *Selection Criteria*

Death penalty cases were chosen because the Bible provides many commandments that are explicitly about the death penalty, whereas other crimes or punishments are not as clearly discussed in the Bible. The authors of the study read law review articles discussing religious references and collected case citations relevant to the study from those articles. These cases were then located on the Lexis-Nexis and Westlaw databases. To find additional cases, the authors conducted a search on these two databases for cases that met the criteria mentioned above. Key terms used in the search were “religious appeal,” “biblical appeal,” “‘biblical argument’ or ‘religious argument,’” and “‘death penalty’ or ‘capital punishment.’” The authors also read these cases, noting cases that were cited and that were not yet included in the study. This method yielded a list of ninety-nine cases, which the authors believe is an exhaustive list of all appellate death penalty cases in which religious references were used by either the prosecutor or defense attorney (or both) during opening and or closing arguments.¹¹⁶ The sample is comprised of cases from the 1970’s to 2000’s.

B. *Codebook Construction*

It was necessary to create a codebook that would allow the authors to measure whether each case contained any variables related to the type of references or type of judicial rulings. To create a codebook, the authors read the law review articles, especially Miller and Bornstein’s article,¹¹⁷ which discussed the typology of types of religious references, and the reasons judges gave for their rulings. These types of references and reasons were listed in the codebook, along with categories for “other reference type” and “other reason.” The authors created operational

¹¹⁵ See *infra* Part VI.D.

¹¹⁶ See *infra* App. tbl.2.

¹¹⁷ See Miller & Bornstein, *Religious Appeals*, *supra* note 4.

definitions¹¹⁸ during the first phase of coding cases in order to measure variables of interest, such as types of religious references and psychological assumptions judges mentioned. Table 1 lists the variables that were included in the analysis and their operational definitions.¹¹⁹ For example, the variable “retributive command” was created in the codebook and measured whether or not the prosecutor in each case provided a religious reference by quoting or referencing the Bible to support the notion that someone who kills should die (e.g., eye for an eye).¹²⁰ If a case included a type of reference that was not in the codebook, the authors added it to the codebook under two open-ended variables: prosecutor miscellaneous references and defense miscellaneous references. Once the authors agreed that the codebook was “complete” (i.e., contained all the types of references and all the reasons that were used in cases), they began to code cases. Most variables were coded as *yes* or *no*, meaning that a particular case either did or did not contain each type of reference or reason.

C. *Coder Reliability*

To begin coding, the authors chose 21 articles to code to ensure that they were similarly coding each variable in the codebook. Inter-rater reliability¹²¹ was conducted for 21 cases, which was approximately 21% of the total sample. Holsti’s agreement coefficient¹²² between the two authors was 0.921. Only one variable, “biblical commands against the death penalty” was problematic; the agreement coefficient was 0.64, meaning that the authors did not agree at a high rate for this variable. The authors discussed the definition of this variable to ensure that they would be consistent in future coding, and this variable was re-coded after this discussion. Later analysis indicated that the authors were agreeing on this variable. Coefficients for other variables ranged from 0.83 to 1.00, indicating that overall consistency between the authors was quite high.

¹¹⁸ Operational definitions are created to define a concept synonymously with a corresponding set of operations so that other researchers are able to measure the variables in the same way.

¹¹⁹ See *infra* App. tbl.1.

¹²⁰ See, e.g., *People v. Wash*, 861 P.2d 1107, 1134 n.18 (Cal. 1993) (in bank); *Hammond v. State*, 452 S.E.2d 745, 753 (Ga. 1995).

¹²¹ Inter-rater reliability is the degree of agreement between two or more independent coders who are measuring the same variables. Having a high degree of inter-rater reliability is important because it demonstrates that there is high consensus between coders and that their coding schemes are reliable. DANIEL RIFFE ET AL., *ANALYZING MEDIA MESSAGES: USING QUANTITATIVE CONTENT ANALYSIS IN RESEARCH* 123 (1998).

¹²² This statistical term indicates the amount of agreement between the coders. A coefficient of 1.00 would indicate perfect agreement. Thus, a coefficient of 0.921 indicates that the coders agreed at a very high rate. For a discussion of inter-rater reliability, see DANIEL RIFFE ET AL., *supra* note 121, at 122–55.

Disagreements were resolved by discussion. Table 1 provides the reliability coefficients for each variable.¹²³

After the reliability check determined that the two authors were coding very similarly, the remaining cases were each coded by one author. One author coded 51 of the remaining 78 cases, and the other author coded the remaining 27 cases. The two authors' data were combined into a complete database that was used for analysis.

VI. RESULTS AND DISCUSSION

The sample included 99 cases in 15 states decided between 1978 and 2008.¹²⁴ Religious references were typically made by the prosecuting attorneys (96 of the 99 cases),¹²⁵ whereas the defense made religious references in only 38 of the 99 cases.¹²⁶ In 35 cases, both the prosecution and the defense made a religious reference. In most cases, religious references were made during closing arguments of the death-sentencing phase as opposed to during opening arguments. Specifically, the courts' opinions reflected that prosecutors made religious references 68 times during closing arguments and 2 times during opening arguments. The defense made 20 religious references during closing arguments and two during opening arguments. In some cases, the opinions did not clearly

¹²³ See *infra* App. tbl.1. Note that inter-rater reliability was not calculated for the prosecution and defense miscellaneous references because they were simply a "miscellaneous" category. While the authors needed to know that all the specific types of references were categorized correctly, it was not as essential to categorize any "other" reference as the miscellaneous category. Doing so would have artificially inflated the agreement because the category was so broad as to incorporate any "other" type of reference.

¹²⁴ See *infra* App. tbl.2.

¹²⁵ See *infra* App. tbl.3. There were also 11 additional cases not included on Table 3 in which the prosecution made a religious reference. These cases were omitted from the table because the court's opinion did not explain what type of religious reference was made, therefore, these cases could not be categorized. *Ivery v. State*, 686 So. 2d 495 (Ala. Crim. App. 1996); *People v. Riel*, 998 P.2d 969 (Cal. 2000); *People v. Hill*, 839 P.2d 984 (Cal. 1992); *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); *Carr v. State*, 655 So. 2d 824 (Miss. 1995); *State v. Walters*, 588 S.E.2d 344 (N.C. 2003); *State v. Gibbs*, 436 S.E.2d 321 (N.C. 1993); *State v. Fullwood*, 373 S.E.2d 518 (N.C. 1988).

¹²⁶ See *infra* App. tbl.4. There were also 9 additional cases not included on Table 4 in which the defense made a religious reference. These cases were omitted from the table because the court's opinion did not explain what type of religious reference was made, therefore, these cases could not be categorized. *Boyd v. French*, 147 F.3d 319 (4th Cir. 1998); *People v. Riel*, 998 P.2d 969 (Cal. 2000); *People v. Ervin*, 990 P.2d 506 (Cal. 2000); *Street v. State*, 636 So. 2d 1297 (Fla. 1994); *Carr v. State*, 655 So. 2d 824 (Miss. 1995); *Shell v. State*, 554 So. 2d 887 (Miss. 1989); *State v. Zuniga*, 357 S.E.2d 898 (N.C. 1987); *Commonwealth v. Cooper*, 941 A.2d 655 (Pa. 2007); *Commonwealth v. Cook*, 676 A.2d 639 (Pa. 1996).

reflect whether religious references were made during opening or closing arguments.

A. *Research Question One*

Research Question One was: Do these data support Miller and Bornstein's typology or is the typology over or under-inclusive?

1. *Prosecution References*

In their article, Miller and Bornstein discussed three common types of religious references used by prosecutors: retributive commands, reference to biblical characters and metaphors, and claims of authority.¹²⁷ These three common prosecutor references were identified in the analysis. Table 3 demonstrates which prosecution references were identified in each case that was used in the analysis. Retributive commands were the most common (used in 43 of the 96 cases that contained prosecutor religious references), followed by references to biblical characters, metaphors, or stories (31 cases), and claims of divine authority (25 cases).¹²⁸ Because each type of prosecutor-religious reference identified in the Miller and Bornstein typology was found in sufficient number, it was concluded that the typology is not over-inclusive.

During the coding process, the authors observed a fourth type of religious reference that was not included in the Miller and Bornstein typology but that was common in the cases that were included in the present analysis. It was determined that the variable deserved to be included in the typology. The new variable was labeled "God/Bible endorses the death penalty" and refers to references in which prosecutors specifically stated that God or the Bible supports the death penalty, without quoting the Bible specifically. These types of references were present in 23 of the 96 prosecutor references. Thus, it was determined that the Miller and Bornstein typology was under-inclusive for this type of prosecutor reference.

Any religious reference made by the prosecution that did not fit into the Miller and Bornstein typology, or the present authors' new variable "God/Bible endorses death penalty," was included in a "prosecutor miscellaneous reference" category. Examples of arguments that fit this category include one prosecutor's argument that murder is the worst type of crime in any religion.¹²⁹ Another prosecutor made the argument to the jurors that they should not feel bad in imposing the death penalty because God will not hold the jurors responsible, or that the prosecutor is the one who will be held responsible by God.¹³⁰ This was likely done to alleviate the jury from any guilt they may have had in imposing the death

¹²⁷ Miller & Bornstein, *Religious Appeals*, *supra* note 4, at 33–35.

¹²⁸ See *infra* App. tbl.3.

¹²⁹ Lugo v. State, 845 So. 2d 74, 110 (Fla. 2003).

¹³⁰ Daniels v. State, 650 So. 2d 544, 559 (Ala. Crim. App. 1994).

penalty based on any religious beliefs. One prosecutor argued to the jury that Christian teachings have no place in court.¹³¹ This occurred in a case in which the defendant had previously made a religious reference during closing arguments and then the prosecutor countered the religious reference with an argument of his or her own.¹³²

The most popular type of prosecutor reference was a retributive command. Attorneys quoted the Bible in these references. In several religious references, attorneys told jurors from which specific chapters and verses in the Bible they were quoting or to which they were referring. For example, one attorney told jurors: "To start with, God decreed capital punishment as the penalty for murder when he said in *Genesis* 9:6, 'Whosoever sheddeth man's blood, by man shall his blood be shed.'"¹³³ Attorneys may believe that jurors are more likely to believe their religious reference if they can provide the specific book or verse in the Bible with which the jurors may be familiar. Some examples of quotes commonly given by prosecutors were out of the *Books of Romans, Exodus, Genesis, Matthew, and Numbers*.

The second most frequent type of prosecution reference was a reference to a biblical story, character, or metaphor.¹³⁴ Examples of characters referred to in the Bible during religious references were Cain and Abel, Paul, Moses, and Judas Iscariot.¹³⁵ One story that was often referred to included the story of Jesus and the two thieves on the cross immediately before his death. Though Jesus forgave the two thieves for their sins, he did not end their suffering on their crosses. This story was often given by prosecutors as an example of how Jesus believed that those who sinned may be forgiven by Jesus, but they still deserve to pay for their sins, especially that of murder.¹³⁶ All in all, because each of the prosecutor religious references identified in the Miller and Bornstein typology was found in significant frequency, it was determined that the typology is not over-inclusive. However, it was under-inclusive because the present authors identified a type of reference, "God/Bible endorses death penalty," that Miller and Bornstein did not include in their typology.

2. Defense References

In their article, Miller and Bornstein discussed two common types of religious references used by defense attorneys: biblical commandments against the death penalty and biblical stories promoting mercy.¹³⁷ The present analysis also found these two common defense references. Table

¹³¹ Nixon v. State, 533 So. 2d 1078, 1101 (Miss. 1987).

¹³² *Id.* at 1100–01.

¹³³ Doss v. State, 709 So. 2d 369, 399 (Miss. 1996).

¹³⁴ See *supra* notes 32–38 and accompanying text.

¹³⁵ *Id.*

¹³⁶ See, e.g., Ward v. Dretke, 420 F.3d 479, 496 (5th Cir. 2005); People v. Woolley, 793 N.E.2d 519, 525 (Ill. 2002); State v. Haselden, 577 S.E.2d 594, 607 (N.C. 2003).

¹³⁷ Miller & Bornstein, *Religious Appeals*, *supra* note 4, at 36–37.

4 demonstrates which defense references were identified in each case that was used in the analysis. References to “biblical characters, metaphors, or stories” were the most common (used in 17 of the 38 cases that contained defense references), followed by “biblical, God, or religious commandments against the death penalty” (13 cases).¹³⁸ Because each of the defense reference types identified in the Miller and Bornstein typology was found in sufficient number, it was concluded that the typology is not over-inclusive.

As with the analysis of prosecution references, the authors created an additional type of religious reference that was not included in the Miller and Bornstein typology but was common in the cases that were included in the present analysis. The new variable was labeled “God/Bible does not endorse death penalty” and refers to references in which the defense attorney specifically said that God or the Bible opposes or does not endorse the death penalty. These types of references showed up in 8 of the 38 cases that contained defense references.¹³⁹ Thus, it was determined that the Miller and Bornstein typology was under-inclusive for this one type of defense reference.

Any arguments made by the defense that did not fit into the Miller and Bornstein typology or the current authors’ new variable “God/Bible does not endorse death penalty,” were included in the “defense miscellaneous reference” category. Examples of arguments that fit this category include one defense attorney’s argument that only God, not the jurors, can decide someone’s outcome of life or death.¹⁴⁰ Another attorney informed the jurors that they would have to live with their decision to sentence a defendant to death; this reference was apparently designed to instill fear or guilt in jurors and deter them from choosing a death sentence.¹⁴¹

The most common type of reference used by the defense is a biblical story, metaphor or character.¹⁴² The most common of these involved stories of Jesus demonstrating mercy. Some stories that were given include the one of Jesus saving the adulteress from being stoned by her neighbors,¹⁴³ and the story of how God banished Cain from his land after he killed his brother Abel, but He did not condemn him to death.¹⁴⁴

The second most popular defense reference was biblical commandments against the death penalty.¹⁴⁵ Defense attorneys provided jurors with the specific testament in the Bible they were quoting or to

¹³⁸ See *infra* App. tbl.4.

¹³⁹ *Id.*

¹⁴⁰ State v. Braxton, 531 S.E.2d 428, 463 (N.C. 2000).

¹⁴¹ Hodges v. State, 912 So. 2d 730, 753 (Miss. 2005).

¹⁴² See *infra* App. tbl.4.

¹⁴³ See, e.g., State v. Shafer, 531 S.E.2d 524, 532 (S.C. 2000).

¹⁴⁴ See, e.g., People v. Zambrano, 163 P.3d 4, 65 (Cal. 2007); Wilcher v. State, 863 So. 2d 776, 822 (Miss. 2003).

¹⁴⁵ See *infra* App. tbl.4.

which they were referring.¹⁴⁶ For example, one defense attorney told the jury that while “[t]he old testament was for the punishment . . . the new testament is forgiveness, to turn the other cheek.”¹⁴⁷ Some examples of quotes commonly given by defense attorneys came from *Genesis* 4, *Matthew* 5:39, and *Deuteronomy* 30:19.

In sum, Research Question One tested whether the present data (legal cases involving religious references) support Miller and Bornstein’s typology. Most of the religious references provided by the prosecution in the present study were categorized into the retributive commands, biblical characters, metaphors, or stories, and claims of divine authority. Most of the religious references offered by the defense were categorized into biblical commandments against the death penalty and biblical stories promoting mercy. Thus, the results of the analysis generally confirm the Miller and Bornstein typology. However, it was considered under-inclusive because two additional types of references (“God/Bible endorses/does not endorse death penalty”) were added in the present study. These new types of references, combined with the original reference types, create a complete typology of religious references.

B. Research Question Two

Research Question Two was: How many states or jurisdictions have always found religious references to be proper, and thus, permissible; how many have found religious references to be improper, but nonetheless permissible under certain circumstances; and how many have found religious references to be improper, and thus, impermissible? Finally, how many states or jurisdictions have mixed rulings or make these determinations on a case-by-case basis?

Table 5 is a state-by-state analysis of courts’ acceptance of religious references based on the 99 cases that were coded.¹⁴⁸ Four of the 16 states (including the territory of Puerto Rico) sampled found all religious references to be proper and permissible.¹⁴⁹ Four jurisdictions found religious references to be improper, but nonetheless permissible.¹⁵⁰ Finally, only 3 states were consistent in determining religious references were improper and impermissible.¹⁵¹ Five states had mixed rulings. Of the 6 appellate cases coded involving religious references in Alabama courts, 4 were found to be proper and permissible and 2 were found to be

¹⁴⁶ See, e.g., *Dycus v. State*, 875 So. 2d 140, 171 (Miss. 2004).

¹⁴⁷ *Id.*

¹⁴⁸ See *infra* App. tbl.5.

¹⁴⁹ *Id.* These states (and one territory) were Florida, Mississippi, Ohio, and Puerto Rico with five, nine, two, and one case, respectively.

¹⁵⁰ *Id.* These states were Illinois and Tennessee, with one and four cases each, respectively.

¹⁵¹ *Id.* These states were South Carolina, Texas, and Virginia, with one case each.

improper, but nonetheless permissible.¹⁵² Arizona had one case that was proper and permissible.¹⁵³ Of the 20 cases coded from California, 9 were found to be proper and permissible, 10 were found to be improper, but nonetheless permissible, and 1 was found to be improper and impermissible.¹⁵⁴ Florida courts were consistent with their rulings. Religious references in all 5 cases were found to be proper and permissible.¹⁵⁵ Georgia courts were mixed in their rulings of religious references in death sentencing phases, with 3 out of 7 cases finding religious references to be proper and permissible, 1 being found improper but permissible, and 3 being found improper and ultimately impermissible.¹⁵⁶ The largest amount of cases that were coded came from North Carolina (32 cases).¹⁵⁷ Out of 32 cases, the majority of cases (21) were found to be proper and permissible, 10 were found to be improper but permissible, and only 1 was found to be improper and ultimately impermissible. Finally, out of the 8 cases coded from Pennsylvania, 2 were found to be proper and permissible, and 2 were found to be improper but permissible, and 4 were found to be improper and ultimately impermissible.¹⁵⁸

Considering all 99 cases from all states, most courts (57) found the religious references to be *proper*, and were therefore *permissible*.¹⁵⁹ The second most common outcome was that the court found the religious reference to be *improper* for one or more reasons; this occurred in 30 cases.¹⁶⁰ However, in these cases the courts still allowed the reference to be *permissible* (i.e., did not reverse the defendant's death sentence because of the reference) for some reason (e.g., the religious reference was too weak to influence the jury).¹⁶¹ This was an interesting finding that many judges determined the attorney's use of the reference was *improper* but still refused to reverse the defendant's sentence or conviction, thus finding the reference ultimately permissible.

The third most common outcome was that the court found the use of the religious references to be *improper* and the references were therefore *impermissible*; this occurred in 12 of the cases.¹⁶² Only in these 12 cases did the court reverse the appellant's death sentence because of the religious reference.¹⁶³

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *See infra* App. tbl.2.

¹⁵⁹ *See infra* App. tbl.5.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

C. Research Question Three

The first part of Research Question Three sought to identify the most common reasons judges cited for finding a religious reference improper.¹⁶⁴ Table 6 lists these reasons. The reason most commonly cited by judges for finding the reference improper was that previous cases had already established religious references were not permissible. This reason was cited in 30 of the 99 cases.¹⁶⁵ The second most common reason for finding religious references improper was that the reference encourages jurors to follow God's laws and not state law.¹⁶⁶ Judges made rulings based on this reason in 20 of the cases.¹⁶⁷ Judges also reasoned that religious references were improper because they were prejudicial or inflammatory (13 cases), interfered with jurors' ability to use channeled discretion in determining whether a defendant should be given the death penalty (4 cases), relieved the jury of the responsibility of making the sentencing decision (5 cases), and finally, because they violated the defendant's due process rights (3 of the cases).¹⁶⁸ It should be noted that in most cases, judges gave more than one reason when determining whether the reference was proper.

The second part of Research Question Three sought to identify the most common reasons on which judges' rely when finding the religious reference proper. Table 7 lists these reasons.¹⁶⁹ Similar to what was found in the first part of Research Question Three, the most common reason for allowing the reference was because previous cases had already established that religious references were permissible.¹⁷⁰ This reason was cited in 44 of the 99 cases.¹⁷¹ Judges also reasoned that religious references were proper because the defense also made a religious reference or the prosecutor anticipated a religious reference from the defense and thus, the prosecutor's reference was not improper (37 cases); the references were within permissible bounds of an attorney's argument (34 cases); the reference was not too extreme or grossly improper (33 cases); the defense did not object at the time the prosecutor made the religious reference (28 cases); after making a religious reference, the lawyer instructed the jury to follow state law (21 cases); the evidence was assumed to be so strong against the defendant that the religious reference had no effect on the jury (21 cases); the reference did not affect the jury's decision because the judge gave them curative instructions to disregard the religious reference (4 cases); and finally because the attorney only gave a history of the death penalty and

¹⁶⁴ See *infra* App. tbl.6.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See *infra* App. tbl.7.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

did not specifically argue for or against it based on the Bible (4 cases).¹⁷² Again, it should be noted that in many cases, more than one of the above listed reasons was given as the judge's reason for determining whether the religious reference was proper. Also, there was some overlap of results in Tables 6 and 7 because the court may find the religious reference improper in some aspects and for reasons under Table 6, but proper and permissible under a reason listed on Table 7. The holding will then depend on which reason outweighs the countervailing reasons; and such holdings are not directly reflected in Tables 6 and 7.

D. Research Question Four

Research Question Four was concerned with how often judges mentioned the previously discussed psychological assumptions when determining whether a religious reference is permissible. There were 5 main assumptions that judges made when determining whether religious references were permissible or impermissible:

- that jurors did not use the reference in their sentencing decisions because the lawyer gave instructions to follow state law (21 cases);
- jurors did not use the reference in their sentencing decision because the judge gave jurors curative instructions to ignore the religious reference (4 cases);
- the religious reference was too weak to have an effect on the jury in light of the strong evidence against the defendant (21 cases);
- because both the prosecutor and defense attorney made religious references, the opposing references “balanced out” and had no effect (37 cases); and
- that the religious reference was not too extreme or grossly improper (33 cases).¹⁷³

The second part of Research Question Four sought to answer: in how many cases have judges made at least one psychological assumption when determining whether the religious reference was permissible or impermissible? According to the analysis, judges made at least one of the listed assumptions in 73 of the 99 cases.¹⁷⁴ The findings from Research Question Four reveal that judges relied somewhat heavily on at least 1 of the potentially erroneous psychological assumptions previously discussed in their reasons for ruling religious references as proper or improper.

¹⁷² *Id.*

¹⁷³ *Id.* Note that some cases cited more than one assumption.

¹⁷⁴ *Id.*

VII. IMPLICATIONS OF THE STUDY

The findings from Research Questions One through Four have implications for defendants' constitutional rights during death penalty trials and the outcomes of their trials. Based on this psychological analysis on the effects of judges' assumptions on how religious references affect jurors, there are several ways judges may ultimately affect a defendant's right to a fair and impartial jury by allowing attorneys to make religious references during a death penalty trial.

First, research on reactance theory suggests that jurors are not always successful in following judges' instructions to disregard information that they were not supposed to hear.¹⁷⁵ Nevertheless, based on the findings of the current study, many judges assume that jurors are unaffected by religious references when judges give them a curative instruction to ignore the reference, or when attorneys instruct jurors to follow state law and not "God's law." Judges may have ruled religious references permissible or impermissible based on these assumptions.¹⁷⁶ Judges were found to mention these types of assumptions in twenty-five percent of the cases coded for the study. Although it is unknown how many jurors were actually able to successfully disregard the reference and exclude it from their decision-making, psychological research suggests that not all jurors are able to do this.¹⁷⁷ The number of defendants who were sentenced to the death penalty because of jurors who were affected by and unable to disregard a religious reference also is unknown.

Second, research on dual-processing theories, such as CEST¹⁷⁸ suggests that jurors sometimes process information through a system that is driven by emotion and heuristics, rather than the rational system that most jurors are expected to use while serving on a jury. Nevertheless, some judges may allow religious references based on the assumption that the reference was too weak to influence the jury or that the evidence against the defendant was so strong that the jury would have chosen the death penalty regardless of hearing the reference. Judges mentioned this assumption in twenty-one percent of cases that were coded.¹⁷⁹ It is unknown how many jurors who served on the cases that were coded sentenced the defendant to death based on the evidence of the case alone, and how many were influenced by religious references made by the prosecuting attorney. However, based on psychological research on

¹⁷⁵ See, e.g., Greene & Dodge, *supra* note 14, at 76; Kassin & Sommers, *supra* note 14, at 1046; Pickel, *supra* note 14, at 415.

¹⁷⁶ See, e.g., Boyd v. French, 147 F.3d 319, 329 (4th Cir. 1998); Bennett v. Angelone, 92 F.3d 1336, 1346-47 (4th Cir. 1996); United States v. Giry, 818 F.2d 120, 134 (1st Cir. 1987).

¹⁷⁷ See, e.g., Greene & Dodge, *supra* note 14, at 76; Kassin & Sommers, *supra* note 14, at 1046; Pickel, *supra* note 14, at 415.

¹⁷⁸ Teglasi & Epstein, *supra* note 100, at 534.

¹⁷⁹ See *infra* App. tbl.7.

CEST,¹⁸⁰ it is not uncommon for jurors to base their decision-making on emotional stimuli and it is possible that some jurors, especially highly religious jurors, may have been influenced by religious references more than other jurors.

VIII. CONCLUSIONS AND RECOMMENDATIONS

As this analysis reveals, there are a variety of types of religious references used by both prosecuting and defense attorneys. The current analysis confirms and expands on the typology originally suggested by Miller and Bornstein.¹⁸¹ This updated typology suggested here is a complete list of types of religious references attorneys have used.

This analysis also revealed that jurisdictions are mixed on their rulings about the permissibility of these religious references. Four jurisdictions have consistently found the references are proper and permissible, three have consistently found references improper and impermissible, two have consistently found references improper but permissible and five have given mixed rulings (finding references permissible in some cases but impermissible in others). Thus, states are far from agreement about the permissibility of such references.

The third research question focused on the reasons courts gave for finding the references permissible or impermissible. There was a wide variety of reasons, with courts generally citing multiple reasons. While it is interesting enough to discover the wide range of reasons, it is even more interesting to discover how many of these reasons are based on psychological assumptions about the effects, or lack thereof, that religious references may have on juror decision-making. The last research question investigated how often judges mention such assumptions in which psychological research can cast doubt. For instance, judges might assume that jurors who are told to ignore a reference can do so. Psychological research indicates that these instructions may backfire.¹⁸² Jurors may experience a reactance effect, and allow the reference to affect their decision-making even more.

Allowing attorneys to make religious references during the sentencing phase of death penalty trials may have serious implications for the outcome of a defendant's trial. Defendants have argued that religious references violate their Eighth Amendment rights, because they interfere with jurors' ability to use channeled discretion in determining the proper sentence,¹⁸³ or because religious references reduce the perception of responsibility jurors experience in making a verdict.¹⁸⁴ Other defendants have claimed that religious references lead jurors to rely on their

¹⁸⁰ *Id.*

¹⁸¹ Miller & Bornstein, *Religious Appeals*, *supra* note 4, at 33–39.

¹⁸² Pickel, *supra* note 14; *see also*, Greene & Dodge, *supra* note 14; Kassin & Sommers, *supra* note 14.

¹⁸³ *See, e.g.*, Sandoval v. Calderon, 241 F.3d 765, 776 (9th Cir. 2001).

¹⁸⁴ *Id.* at 777; People v. Wash, 861 P.2d 1107, 1136 (Cal. 1993) (in bank).

emotions, passions and prejudices.¹⁸⁵ Judges have sometimes agreed, finding that religious references are improper.¹⁸⁶ Nevertheless, some judges who disapprove of religious references sometimes find that the attorney did no wrong because the reference was ultimately harmless. For instance, a judge could state that the religious reference was too weak to have influenced jurors. A judge in such an example might assume that “weak” religious references do not affect juror decision-making; however, psychology research casts doubt on such assumptions.¹⁸⁷

Given that judges may sometimes make assumptions that may not be accurate, at least when evaluated against previous psychological research, it is recommended that religious references be disallowed or at least be placed under harsher scrutiny because of their potential ability to affect jurors’ decisions and their decision-making process. Some courts have already barred all types of religious references, finding that they violate defendants’ rights.¹⁸⁸ These courts recognize the pitfalls of religious references. Other courts disagree with these courts and allow religious references. Future research is needed to specifically test the effects of religious references.¹⁸⁹ Such information will be valuable to courts that are deciding whether religious references are influencing jury decision-making in ways that violate the defendants’ rights. As such, psychologists can play a very important part in protecting the rights of defendants and the integrity of the legal system.

¹⁸⁵ See, e.g., *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991); *United States v. Giry*, 818 F.2d 120, 134 (1st Cir. 1987).

¹⁸⁶ See, e.g., *Ward v. Dretke*, 420 F.3d 479, 497 (5th Cir. 2005).

¹⁸⁷ See *supra* Part III.

¹⁸⁸ See, e.g., *Sandoval*, 241 F.3d at 776–77.

¹⁸⁹ Some research already exists. See, e.g., Miller & Bornstein, *Religion in Sentencing Trials*, *supra* note 1.

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APPENDIX

Table 1: Operational definitions and reliability coefficients for each variable

VARIABLE NAME	OPERATIONAL DEFINITION	HOW MEASURED	RELIABILITY COEFFICIENT
Retributive command	Whether the prosecutor made a quote or reference to Bible that supports notion that someone who kills should die (e.g., "eye for an eye")	0 = No 1 = Yes	0.94
Divine authority	Whether the prosecutor mentions that God gives jury, judge, prosecutor, state, or other legal actor power to give the death penalty	0 = No 1 = Yes	0.83
Biblical characters/ metaphors/stories	Whether the prosecutor made a reference to a biblical character, story, or metaphor (e.g., Cain and Abel)	0 = No 1 = Yes	0.94
Describe biblical characters/ metaphors/stories	The exact character, story, or metaphor the prosecutor alludes to (e.g., Paul)	Name of character or description of metaphor or story	
God/Bible endorses death penalty	Prosecutor specifically says that God or Bible supports the death penalty, but does not specifically quote the Bible	0 = No 1 = Yes	0.89
Prosecution miscellaneous reference	Any miscellaneous argument made by prosecution that does not fit into the listed categories	0 = No 1 = Yes	
Describe prosecution miscellaneous reference	A religious reference that does not fit any other prosecution category	Type in the reference	
Defense reference	Religious reference made by the defense	Type in the defense attorney's reference	
God/Bible commandments against death penalty	Whether the defense attorney made a quote or reference to the Bible that opposes the notion that someone who kills should die (e.g., turn the other cheek).	0 = No 1 = Yes	0.64
Biblical characters/ metaphors/stories	Whether the defense made a reference to a biblical character, story, or metaphor (e.g., Cain and Abel)	0 = No 1 = Yes	0.91
Describe biblical characters/ metaphors/stories	The exact character, story, or metaphor the defense alludes to (e.g., Paul)	Name of character or description of metaphor or story	
God/Bible does not endorse death penalty	Defense attorney specifically says that God or Bible does not support the death penalty	0 = No 1 = Yes	0.90
Defense miscellaneous reference	Any miscellaneous argument made by the defense that does not fit into the listed categories	0 = No 1 = Yes	
Describe defense miscellaneous reference	A religious reference that does not fit any other defense category	Type in the reference	

VARIABLE NAME	OPERATIONAL DEFINITION	HOW MEASURED	RELIABILITY COEFFICIENT
Reference proper?	Whether judge decided the religious reference was proper	0 = No 1 = Yes	1.00
Reference impermissible?	Whether judge decided the religious reference was impermissible	0 = No 1 = Yes	0.95
Not permissible because violates due process rights	Judge states reference is not permissible because it violates the defendant's due process rights	0 = No 1 = Yes	1.00
Not permissible because interferes with channeled discretion	Judge states reference is not permissible because it affects jurors' ability to weigh aggravating and mitigating factors and follow judge's instructions	0 = No 1 = Yes	0.95
Not permissible because makes jurors follow God's law, not state law	Judge states reference is not permissible because it makes jurors ignore state laws and instead encourages jurors to follow God or biblical law	0 = No 1 = Yes	0.90
Not permissible because relieves jury of responsibility of making the decision	Judge states reference is not permissible because it makes jurors feel less or no responsibility about imposing a death sentence	0 = No 1 = Yes	0.95
Not permissible because previous courts disapproved of similar references	Judge states reference is not permissible because previous courts have disapproved of similar references	0 = No 1 = Yes	0.90
Not permissible because prejudicial or inflammatory	Judge states reference is not permissible because it is prejudicial, inflammatory, or only said to bias jurors	0 = No 1 = Yes	0.95
Other reason not allowed	Judge states reference is not permissible for any reason not stated above	Type in reason	
Overtured because of biblical reference	The death sentence was overturned because of biblical reference	0 = No 1 = Yes	0.95
Permissible because lawyer instructs jurors to follow state law	Judge states reference is permissible because the attorney ultimately told the jurors that they must follow state law	0 = No 1 = Yes	0.95
Permissible because judge gave curative instruction	Judge states reference is permissible because he/she gave jurors curative instruction to ignore religious reference	0 = No 1 = Yes	0.95
Permissible because weight of evidence was so strong toward death	Judge states reference is permissible because the weight of the evidence was so strong against the defendant that the jury would have determined the same sentence without the reference; reference was too weak/ambiguous and did not have an affect on the jury	0 = No 1 = Yes	0.95

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VARIABLE NAME	OPERATIONAL DEFINITION	HOW MEASURED	RELIABILITY COEFFICIENT
Balanced out because both did it or prosecution anticipated defense argument	Judge states reference is permissible because both sides made a religious reference or prosecution only gave reference because she/he anticipated a reference from the defense	0 = No 1 = Yes	0.86
Permissible because not too extreme/grossly improper	Judge states reference is permissible because it is not too extreme or grossly improper	0 = No 1 = Yes	0.86
Permissible because defendant did not object at trial	Judge states reference is permissible because the defendant did not object at the time it was given during trial	0 = No 1 = Yes	0.86
Permissible because within permissible bounds of attorney argument	Judge states reference is permissible because attorneys have the freedom to use many different types of arguments	0 = No 1 = Yes	0.95
Permissible because previous courts approved of similar references	Judge states reference is permissible because previous courts have approved of similar references	0 = No 1 = Yes	0.90
Permissible because just a "history" of death penalty in Bible	Judge states reference is permissible because prosecutor only provided a history of the death penalty in his/her argument and did not encourage jurors to follow Bible	0 = No 1 = Yes	0.95
Other assumptions/reasons allowed	Judge states reference is permissible for any reason/assumption not stated above	Type in reason	

Table 2: All appellate death penalty cases containing religious references used in the analyses.

NUMBER	CASE	CITATION	STATE	YEAR
1	State v. Middlebrooks	995 S.W.2d 550	TN	1999
2	Hammond v. State	452 S.E.2d 745	GA	1995
3	Hill v. State	427 S.E.2d 770	GA	1993
4	Crowe v. State	458 S.E.2d 799	GA	1995
5	State v. Cribbs	967 S.W.2d 773	TN	1998
6	United States v. Giry	818 F.2d 120 (1st Cir.)	PR	1987
7	Bennett v. Angelone	92 F.3d 1336 (4th Cir.)	VA	1996
8	Ivery v. State	686 So. 2d 495	AL	1996
9	People v. Wrest	839 P.2d 1020	CA	1992
10	State v. Oliver	307 S.E.2d 304	NC	1983
11	State v. Moose	313 S.E.2d 507	NC	1984
12	People v. Davenport	906 P.2d 1068	CA	1995
13	People v. Arias	913 P.2d 980	CA	1996
14	People v. Roybal	966 P.2d 521	CA	1998
15	Street v. State	636 So. 2d 1297	FL	1994
16	Lawrence v. State	691 So. 2d 1068	FL	1997
17	Lugo v. State	845 So. 2d 74	FL	2003
18	People v. Freeman	882 P.2d 249	CA	1994
19	People v. Ervin	990 P.2d 506	CA	2000
20	State v. Brown	358 S.E.2d 1	NC	1987
21	State v. Fullwood	373 S.E.2d 518	NC	1988
22	State v. Hunt	373 S.E.2d 400	NC	1988
23	Doss v. State	709 So. 2d 369	MS	1996
24	Nixon v. State	533 So. 2d 1078	MS	1987
25	Miller v. North Carolina	583 F.2d 701	NC	1978
26	Bonifay v. State	680 So. 2d 413	FL	1996
27	State v. Zuniga	357 S.E.2d 898	NC	1987
28	State v. Braxton	531 S.E.2d 428	NC	2000
29	Boyd v. French	147 F.3d 319 (4th Cir.)	NC	1998
30	Commonwealth v. Henry	569 A.2d 929	PA	1990
31	State v. Geddie	478 S.E.2d 146	NC	1996
32	State v. Cummings	536 S.E.2d 36	NC	2000
33	Commonwealth v. Whitney	512 A.2d 1152	PA	1986
34	Farina v. State	937 So. 2d 612	FL	2006
35	People v. Zambrano	163 P.3d 4	CA	2007
36	State v. Gell	524 S.E.2d 332	NC	2000
37	People v. Wash	861 P.2d 1107	CA	1993
38	State v. Haselden	577 S.E.2d 594	NC	2003
39	State v. Holden	488 S.E.2d 514	NC	1997

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NUMBER	CASE	CITATION	STATE	YEAR
40	State v. Walls	463 S.E.2d 738	NC	1995
41	<i>Ex parte</i> Waldrop	459 So. 2d 959	AL	1984
42	Minor v. State	914 So. 2d 372	AL	2004
43	Melson v. State	775 So. 2d 857	AL	1999
44	Daniels v. State	650 So. 2d 544	AL	1994
45	People v. Bradford	929 P.2d 544	CA	1997
46	People v. Lewis	140 P.3d 775	CA	2006
47	People v. Hughes	39 P.3d 432	CA	2002
48	Carruthers v. State	528 S.E.2d 217	GA	2000
49	Branch v. State	882 So. 2d 36	MS	2004
50	Dycus v. State	875 So. 2d 140	MS	2004
51	Hodges v. State	912 So. 2d 730	MS	2005
52	Commonwealth v. Daniels	644 A.2d 1175	PA	1994
53	Shell v. State	554 So. 2d 887	MS	1989
54	Greene v. State	469 S.E.2d 129	GA	1996
55	Boyd v. Lee	No. 1:00CV00647, 2003 WL 22757932	NC	2003
56	Call v. Polk	454 F. Supp. 2d 475	NC	2006
57	Carr v. State	655 So. 2d 824	MS	1995
58	Coe v. Bell	161 F.3d 320 (6th Cir.)	TN	1998
59	Commonwealth v. Cook	676 A.2d 639	PA	1996
60	Commonwealth v. Brown	711 A.2d 444	PA	1998
61	Commonwealth v. Chambers	599 A.2d 630	PA	1991
62	Commonwealth v. Cooper	941 A.2d 655	PA	2007
63	Cunningham v. Zant	928 F.2d 1006 (11th Cir.)	GA	1991
64	Fahy v. Horn	516 F.3d 169 (3rd Cir.)	PA	2008
65	People v. Vieira	106 P.3d 990	CA	2005
66	People v. Welch	976 P.2d 754	CA	1999
67	People v. Samuels	113 P.3d 1125	CA	2005
68	People v. Roldan	110 P.3d 289	CA	2005
69	People v. Hill	839 P.2d 984	CA	1992
70	People v. Slaughter	47 P.3d 262	CA	2002
71	McNair v. State	653 So. 2d 320	AL	1992
72	Manning v. State	929 So. 2d 885	MS	2006
73	People v. Woolley	793 N.E.2d 519	IL	2002
74	People v. Jackson	920 P.2d 1254	CA	1996
75	Sandoval v. Calderon	241 F.3d 765 (9th Cir.)	CA	2001
76	State v. Artis	384 S.E.2d 470	NC	1989
77	State v. Barden	572 S.E.2d 108	NC	2002
78	State v. Barrett	469 S.E.2d 888	NC	1996
79	State v. Berry	141 S.W.3d 549	TN	2004
80	State v. Bond	478 S.E.2d 163	NC	1996

NUMBER	CASE	CITATION	STATE	YEAR
81	State v. Daniels	446 S.E.2d 298	NC	1994
82	State v. Davis	506 S.E.2d 455	NC	1998
83	State v. Davis	539 S.E.2d 243	NC	2000
84	State v. Gibbs	436 S.E.2d 321	NC	1993
85	State v. Ingle	445 S.E.2d 880	NC	1994
86	State v. Laws	381 S.E.2d 609	NC	1989
87	State v. Lloyd	552 S.E.2d 596	NC	2001
88	State v. Murphy	747 N.E.2d 765	OH	2001
89	State v. Roache	595 S.E.2d 381	NC	2004
90	State v. Rose	451 S.E.2d 211	NC	1994
91	State v. Taylor	No. 65711, 1995 WL 663267	OH	1995
92	State v. Walters	588 S.E.2d 344	NC	2003
93	State v. Williams	510 S.E.2d 626	NC	1999
94	Todd v. State	410 S.E.2d 725	GA	1991
95	United States v. Mitchell	502 F.3d 931 (9th Cir.)	AZ	2007
96	Ward v. Dretke	420 F.3d 479 (5th Cir.)	TX	2005
97	Wilcher v. State	863 So. 2d 776	MS	2003
98	People v. Riel	998 P.2d 969	CA	2000
99	State v. Shafer	531 S.E.2d 524	SC	2000

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Table 3: Prosecutor References (religious references used by the prosecution are indicated with an X).

NUMBER	CASE	CITATION	YEAR	1	2	3	4	5
1	State v. Middlebrooks	995 S.W.2d 550	1999	X		X		
2	Hammond v. State	452 S.E.2d 745	1995	X				
3	Crowe v. State	458 S.E.2d 799	1995	X			X	
4	State v. Cribbs	967 S.W.2d 773	1998	X				
5	United States v. Giry	818 F.2d 120	1987		X			
6	Bennett v. Angelone	92 F.3d 1336	1996	X	X	X		
7	People v. Wrest	839 P.2d 1020	1992				X	X
8	State v. Oliver	307 S.E.2d 304	1983				X	
9	State v. Moose	313 S.E.2d 507	1984			X		
10	People v. Davenport	906 P.2d 1068	1995			X	X	
11	People v. Arias	913 P.2d 980	1996	X			X	
12	People v. Roybal	966 P.2d 521	1998	X				
13	Lawrence v. State	691 So. 2d 1068	1997		X			
14	Lugo v. State	845 So. 2d 74	2003					X
15	People v. Freeman	882 P.2d 249	1994	X	X			
16	People v. Ervin	990 P.2d 506	2000	X	X			
17	State v. Brown	358 S.E.2d 1	1987	X			X	X
18	State v. Hunt	373 S.E.2d 400	1988	X				
19	Doss v. State	709 So. 2d 369	1996	X			X	
20	Nixon v. State	533 So. 2d 1078	1987		X			X
21	Miller v. North Carolina	583 F.2d 701	1978			X		
22	State v. Zuniga	357 S.E.2d 898	1987	X		X		
23	State v. Braxton	531 S.E.2d 428	2000	X			X	
24	Boyd v. French	147 F.3d 319	1998	X				
25	Commonwealth v. Henry	569 A.2d 929	1990		X			
26	State v. Geddie	478 S.E.2d 146	1996		X			
27	State v. Cummings	536 S.E.2d 36	2000	X	X			
28	Commonwealth v. Whitney	512 A.2d 1152	1986		X			
29	Farina v. State	937 So. 2d 612	2006	X	X			
30	People v. Zambrano	163 P.3d 4	2007	X		X		
31	State v. Gell	524 S.E.2d 332	2000	X				
32	People v. Wash	861 P.2d 1107	1993	X	X			
33	State v. Haselden	577 S.E.2d 594	2003	X	X	X	X	
34	State v. Holden	488 S.E.2d 514	1997	X	X		X	
35	State v. Walls	463 S.E.2d 738	1995			X		X
36	<i>Ex parte</i> Waldrop	459 So. 2d 959	1984			X	X	
37	Minor v. State	914 So. 2d 372	2004		X			
38	Melson v. State	775 So. 2d 857	1999	X	X	X		
39	Daniels v. State	650 So. 2d 544	1994				X	X

NUMBER	CASE	CITATION	YEAR	1	2	3	4	5
40	People v. Bradford	929 P.2d 544	1997		X		X	
41	People v. Lewis	140 P.3d 775	2006		X			
42	People v. Hughes	39 P.3d 432	2002	X				X
43	Carruthers v. State	528 S.E.2d 217	2000	X				
44	Branch v. State	882 So. 2d 36	2004			X		
45	Dycus v. State	875 So. 2d 140	2004	X				
46	Hodges v. State	912 So. 2d 730	2005		X			
47	Shell v. State	554 So. 2d 887	1989		X			
48	Boyd v. Lee	No. 1:00CV00647, 2003 WL 22757932	2003	X				
49	Call v. Polk	454 F. Supp. 2d 475	2006					X
50	Coe v. Bell	161 F.3d 320	1998	X			X	
51	Commonwealth v. Cook	676 A.2d 639	1996	X				
52	Commonwealth v. Brown	711 A.2d 444	1998	X				
53	Commonwealth v. Chambers	599 A.2d 630	1991	X				
54	Cunningham v. Zant	928 F.2d 1006	1991		X			
55	Fahy v. Horn	516 F.3d 169	2008		X			
56	People v. Vieira	106 P.3d 990	2005	X		X	X	
57	People v. Welch	976 P.2d 754	1999	X				
58	People v. Samuels	113 P.3d 1125	2005	X		X		
59	People v. Roldan	110 P.3d 289	2005				X	
60	People v. Slaughter	47 P.3d 262	2002	X			X	
61	McNair v. State	653 So. 2d 320	1992				X	
62	Manning v. State	929 So. 2d 885	2006				X	
63	People v. Woolley	793 N.E.2d 519	2002		X			
64	People v. Jackson	920 P.2d 1254	1996		X			
65	Sandoval v. Calderon	241 F.3d 765	2001			X		X
66	State v. Artis	384 S.E.2d 470	1989	X		X		X
67	State v. Barden	572 S.E.2d 108	2002		X	X		
68	State v. Barrett	469 S.E.2d 888	1996					X
69	State v. Berry	141 S.W.3d 549	2004					X
70	State v. Bond	478 S.E.2d 163	1996	X		X	X	
71	State v. Daniels	446 S.E.2d 298	1994	X		X	X	
72	State v. Davis	506 S.E.2d 455	1998		X			
73	State v. Davis	539 S.E.2d 243	2000		X	X		
74	State v. Ingle	445 S.E.2d 880	1994					X
75	State v. Laws	381 S.E.2d 609	1989	X	X	X		X
76	State v. Lloyd	552 S.E.2d 596	2001		X	X		
77	State v. Murphy	747 N.E.2d 765	2001					X
78	State v. Roache	595 S.E.2d 381	2004					X
79	State v. Rose	451 S.E.2d 211	1994	X			X	
80	State v. Taylor	No. 65711, 1995 WL 663267	1995		X			

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NUMBER	CASE	CITATION	YEAR	1	2	3	4	5
81	State v. Williams	510 S.E.2d 626	1999	X		X		
82	Todd v. State	410 S.E.2d 725	1991	X		X		
83	United States v. Mitchell	502 F.3d 931	2007					X
84	Ward v. Dretke	420 F.3d 479	2005		X			
85	Wilcher v. State	863 So. 2d 776	2003	X		X	X	
<ol style="list-style-type: none"> 1. Retributive commands 2. References to biblical characters, metaphors, or stories 3. Claims of divine authority 4. God/Bible endorses the death penalty 5. Prosecutor miscellaneous reference 								

Table 4: Defense References (religious references used by the defense are indicated with an X).

NUMBER	CASE	CITATION	YEAR	1	2	3	4
1	State v. Middlebrooks	995 S.W.2d 550	1999		X	X	
2	Bennett v. Angelone	92 F.3d 1336	1996	X	X		
3	State v. Oliver	307 S.E.2d 304	1983		X		
4	People v. Freeman	882 P.2d 249	1994	X	X	X	
5	Doss v. State	709 So. 2d 369	1996			X	
6	Nixon v. State	533 So. 2d 1078	1987	X			
7	State v. Braxton	531 S.E.2d 428	2000	X	X		X
8	People v. Zambrano	163 P.3d 4	2007	X	X		
9	People v. Wash	861 P.2d 1107	1993				X
10	Minor v. State	914 So. 2d 372	2004	X	X	X	
11	Melson v. State	775 So. 2d 857	1999	X		X	X
12	Daniels v. State	650 So. 2d 544	1994		X		
13	People v. Bradford	929 P.2d 544	1997	X			
14	Branch v. State	882 So. 2d 36	2004				X
15	Dycus v. State	875 So. 2d 140	2004	X	X		
16	Hodges v. State	912 So. 2d 730	2005	X			X
17	Commonwealth v. Daniels	644 A.2d 1175	1994	X		X	
18	Boyd v. Lee	2003 WL 22757932	2003	X	X		
19	Call v. Polk	454 F. Supp. 2d 475	2006		X		
20	McNair v. State	653 So. 2d 320	1992				X
21	Manning v. State	929 So. 2d 885	2006		X		
22	Sandoval v. Calderon	241 F.3d 765	2001				X
23	State v. Daniels	446 S.E.2d 298	1994		X	X	
24	State v. Murphy	747 N.E.2d 765	2001	X			
25	State v. Roache	595 S.E.2d 381	2004	X			
26	State v. Taylor	1995 WL 663267	1995	X			
27	United States v. Mitchell	502 F.3d 931	2007				X
28	Wilcher v. State	863 So. 2d 776	2003	X		X	
29	State v. Shafer	531 S.E.2d 524	2000	X			

1. References to biblical characters, metaphors, or stories
2. Biblical, God, or religious commandments against the death penalty
3. God/Bible does not endorse the death penalty
4. Defense miscellaneous reference

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*Table 5: State by state analysis of court rulings on the use of religious references.*¹⁹⁰

STATE	CASES BETWEEN 1978–2008 DEALING WITH RELIGIOUS REFERENCES	PROPER-PERMISSIBLE	IMPROPER-PERMISSIBLE	IMPROPER-IMPERMISSIBLE
Alabama	6	4 out of 6	2 out of 6	0 out of 6
Arizona	1	1 out of 1	0 out of 1	0 out of 1
California	20	9 out of 20	10 out of 20	1 of 20
Florida	5	5 out of 5	0 out of 5	0 out of 5
Georgia	7	3 out of 7	1 out of 7	3 out of 7
Illinois	1	0 out of 1	1 out of 1	0 out of 1
Mississippi	9	9 out of 9	0 out of 9	0 out of 9
North Carolina	32	21 out of 32	10 out of 32	1 out of 32
Ohio	2	2 out of 2	0 out of 2	0 out of 2
Pennsylvania	8	2 out of 8	2 out of 8	4 out of 8
Puerto Rico (territory)	1	1 out of 1	0 out of 1	0 out of 1
South Carolina	1	0 out of 1	0 out of 1	1 out of 1
Tennessee	4	0 out of 4	4 out of 4	0 out of 4
Texas	1	0 out of 1	0 out of 1	1 out of 1
Virginia	1	0 out of 1	0 out of 1	1 out of 1

¹⁹⁰ A court typically first determines whether the reference is proper, e.g., whether the attorney committed an error in using the reference. Even if the reference is found improper, a court can still find that the reference is permissible, e.g., if the trial judge had instructed the jury to ignore the improper reference.

Table 6: Most common reasons cited for finding religious references improper (reason(s) is indicated with an X).

NUMBER	CASE	CITATION	YEAR	1	2	3	4	5	6
1	State v. Middlebrooks	995 S.W.2d 550	1999	X	X	X			
2	Hammond v. State	452 S.E.2d 745	1995	X	X	X			
3	Hill v. State	427 S.E.2d 770	1993						
4	Crowe v. State	458 S.E.2d 799	1995						
5	United States v. Cribbs	967 S.W.2d 773	1998	X					
6	State v. Giry	818 F.2d 120	1987			X			
7	Bennett v. Angelone	92 F.3d 1336	1996	X		X			
8	Ivery v. State	686 So. 2d 495	1996						
9	People v. Wrest	839 P.2d 1020	1992	X	X			X	
10	State v. Oliver	307 S.E.2d 304	1983						
11	State v. Moose	313 S.E.2d 507	1984	X					
12	People v. Davenport	906 P.2d 1068	1995	X					
13	People v. Arias	913 P.2d 980	1996						
14	People v. Roybal	966 P.2d 521	1998	X	X				
15	Street v. State	636 So. 2d 1297	1994						
16	Lawrence v. State	691 So. 2d 1068	1997						
17	Lugo v. State	845 So. 2d 74	2003						
18	People v. Freeman	882 P.2d 249	1994	X					
19	People v. Ervin	990 P.2d 506	2000	X	X				
20	State v. Brown	358 S.E.2d 1	1987						
21	State v. Fullwood	373 S.E.2d 518	1988						
22	State v. Hunt	373 S.E.2d 400	1988						
23	Doss v. State	709 So. 2d 369	1996						
24	Nixon v. State	533 So. 2d 1078	1987						
25	Miller v. North Carolina	583 F.2d 701	1978						
26	Bonifay v. State	680 So. 2d 413	1996						
27	State v. Zuniga	357 S.E.2d 898	1987						
28	State v. Braxton	531 S.E.2d 428	2000						
29	Boyd v. French	147 F.3d 319	1998	X					
30	Commonwealth v. Henry	569 A.2d 929	1990						
31	State v. Geddie	478 S.E.2d 146	1996						
32	State v. Cummings	536 S.E.2d 36	2000						
33	Commonwealth v. Whitney	512 A.2d 1152	1986			X			
34	Farina v. State	937 So. 2d 612	2006						
35	People v. Zambrano	163 P.3d 4	2007	X					
36	State v. Gell	524 S.E.2d 332	2000		X		X		
37	People v. Wash	861 P. 2d 1107	1993	X	X			X	
38	State v. Haselden	577 S.E.2d 594	2003						
39	State v. Holden	488 S.E.2d 514	1997	X					

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JURORS AND RELIGIOUS REFERENCES

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NUMBER	CASE	CITATION	YEAR	1	2	3	4	5	6
40	State v. Walls	463 S.E.2d 738	1995	X					
41	<i>Ex parte</i> Waldrop	459 So. 2d 959	1984						
42	Minor v. State	914 So. 2d 372	2004						
43	Melson v. State	775 So. 2d 857	1999						
44	Daniels v. State	650 So. 2d 544	1994						
45	People v. Bradford	929 P.2d 544	1997	X					
46	People v. Lewis	140 P.3d 775	2006						
47	People v. Hughes	39 P.3d 432	2002						
48	Carruthers v. State	528 S.E.2d 217	2000	X	X	X	X	X	X
49	Branch v. State	882 So. 2d 36	2004						
50	Dycus v. State	875 So. 2d 140	2004						
51	Hodges v. State	912 So. 2d 730	2005						
52	Commonwealth v. Daniels	644 A.2d 1175	1994	X	X	X	X		
53	Shell v. State	554 So. 2d 887	1989						
54	Greene v. State	469 S.E.2d 129	1996						
55	Boyd v. Lee	No. 1:00CV00647, 2003 WL 22757932	2003						
56	Call v. Polk	454 F. Supp. 2d 475	2006						
57	Carr v. State	655 So. 2d 824	1995						
58	Coe v. Bell	161 F.3d 320	1998						
59	Commonwealth v. Cook	676 A.2d 639	1996						
60	Commonwealth v. Brown	711 A.2d 444	1998	X					
61	Commonwealth v. Chambers	599 A.2d 630	1991		X				
62	Commonwealth v. Cooper	941 A.2d 655	2007	X					
63	Cunningham v. Zant	928 F.2d 1006	1991			X			
64	Fahy v. Horn	516 F.3d 169	2008						
65	People v. Vieira	106 P.3d 990	2005						
66	People v. Welch	976 P.2d 754	1999	X					
67	People v. Samuels	113 P.3d 1125	2005	X					
68	People v. Roldan	110 P.3d 289	2005		X				
69	People v. Hill	839 P.2d 984	1992						
70	People v. Slaughter	47 P.3d 262	2002	X					
71	McNair v. State	653 So. 2d 320	1992						
72	Manning v. State	929 So. 2d 885	2006						
73	People v. Woolley	793 N.E.2d 519	2002			X			
74	People v. Jackson	920 P.2d 1254	1996						
75	Sandoval v. Calderon	241 F.3d 765	2001	X	X	X		X	X
76	State v. Artis	384 S.E.2d 470	1989	X		X		X	
77	State v. Barden	572 S.E.2d 108	2002		X		X		
78	State v. Barrett	469 S.E.2d 888	1996						
79	State v. Berry	141 S.W.3d 549	2004	X					
80	State v. Bond	478 S.E.2d 163	1996						

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NUMBER	CASE	CITATION	YEAR	1	2	3	4	5	6
81	State v. Daniels	446 S.E.2d 298	1994						
82	State v. Davis	506 S.E.2d 455	1998						
83	State v. Davis	539 S.E.2d 243	2000						
84	State v. Gibbs	436 S.E.2d 321	1993		X				
85	State v. Ingle	445 S.E.2d 880	1994		X				
86	State v. Laws	381 S.E.2d 609	1989						
87	State v. Lloyd	552 S.E.2d 596	2001		X				
88	State v. Murphy	747 N.E.2d 765	2001						
89	State v. Roache	595 S.E.2d 381	2004						
90	State v. Rose	451 S.E.2d 211	1994						
91	State v. Taylor	No. 65711, 1995 WL 663267	1995						
92	State v. Walters	588 S.E.2d 344	2003	X	X				
93	State v. Williams	510 S.E.2d 626	1999		X				
94	Todd v. State	410 S.E.2d 725	1991		X	X			X
95	United States v. Mitchell	502 F.3d 931	2007	X					
96	Ward v. Dretke	420 F.3d 479	2005	X	X	X			
97	Wilcher v. State	863 So. 2d 776	2003						
98	People v. Riel	998 P.2d 969	2000						
99	State v. Shafer	531 S.E.2d 524	2000	X					

1. Religious reference already established as not permissible by previous cases
2. Religious reference encourages jurors to follow God's law, not State law
3. Religious reference is prejudicial or inflammatory
4. Religious reference interferes with juror's ability to use channeled discretion
5. Religious reference relieves the jury of responsibility of sentencing
6. Religious reference violates the defendant's due process rights

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Table 7: Most common reasons judges cited for finding religious references proper (reason(s) is indicated with an X).

NUMBER	CASE	CITATION	YEAR	1	2	3	4	5	6	7	8	9
1	State v. Middlebrooks	995 S.W.2d 550	1999				X			X		
2	Hammond v. State	452 S.E.2d 745	1995							X		
3	Hill v. State	427 S.E.2d 770	1993				X			X		X
4	Crowe v. State	458 S.E.2d 799	1995		X	X	X	X		X		
5	State v. Cribbs	967 S.W.2d 773	1998				X			X		
6	United States v. Giry	818 F.2d 120	1987									X
7	Bennett v. Angelone	92 F.3d 1336	1996		X		X			X	X	
8	Ivery v. State	686 So. 2d 495	1996			X		X				
9	People v. Wrest	839 P.2d 1020	1992						X	X	X	
10	State v. Oliver	307 S.E.2d 304	1983		X			X				
11	State v. Moose	313 S.E.2d 507	1984									
12	People v. Davenport	906 P.2d 1068	1995						X			
13	People v. Arias	913 P.2d 980	1996	X				X	X			
14	People v. Roybal	966 P.2d 521	1998				X	X		X		
15	Street v. State	636 So. 2d 1297	1994		X		X	X				
16	Lawrence v. State	691 So. 2d 1068	1997	X								
17	Lugo v. State	845 So. 2d 74	2003	X			X					
18	People v. Freeman	882 P.2d 249	1994		X				X			X
19	People v. Ervin	990 P.2d 506	2000		X			X				
20	State v. Brown	358 S.E.2d 1	1987	X								
21	State v. Fullwood	373 S.E.2d 518	1988	X					X			
22	State v. Hunt	373 S.E.2d 400	1988	X								
23	Doss v. State	709 So. 2d 369	1996			X		X				
24	Nixon v. State	533 So. 2d 1078	1987									
25	Miller v. North Carolina	583 F.2d 701	1978					X		X		
26	Bonifay v. State	680 So.2d 413	1996			X		X				
27	State v. Zuniga	357 S.E.2d 898	1987		X							
28	State v. Braxton	531 S.E.2d 428	2000		X				X			
29	Boyd v. French	147 F.3d 319	1998		X							
30	Commonwealth v. Henry	569 A.2d 929	1990	X		X						
31	State v. Geddie	478 S.E.2d 146	1996	X						X		
32	State v. Cummings	536 S.E.2d 36	2000	X			X		X			
33	Commonwealth v. Whitney	512 A.2d 1152	1986									
34	Farina v. State	937 So. 2d 612	2006							X		
35	People v. Zambrano	163 P.3d 4	2007		X			X		X		
36	State v. Gell	524 S.E.2d 332	2000	X		X	X	X				
37	People v. Wash	861 P.2d 1107	1993	X	X		X		X	X		X
38	State v. Haselden	577 S.E.2d 594	2003	X	X		X		X			

NUMBER	CASE	CITATION	YEAR	1	2	3	4	5	6	7	8	9
39	State v. Holden	488 S.E.2d 514	1997	X	X	X						
40	State v. Walls	463 S.E.2d 738	1995	X		X	X		X			
41	<i>Ex parte</i> Waldrop	459 So. 2d 959	1994			X	X					
42	Minor v. State	914 So. 2d 372	2004	X	X	X						
43	Melson v. State	775 So. 2d 857	1999	X	X	X		X	X			X
44	Daniels v. State	650 So. 2d 544	1994	X	X		X					
45	People v. Bradford	929 P.2d 544	1997		X				X			
46	People v. Lewis	140 P.3d 775	2006			X	X	X		X		
47	People v. Hughes	39 P.3d 432	2002					X	X			
48	Carruthers v. State	528 S.E.2d 217	2000									
49	Branch v. State	882 So. 2d 36	2004	X	X	X						
50	Dycus v. State	875 So. 2d 140	2004	X	X	X	X	X				
51	Hodges v. State	912 So. 2d 730	2005	X	X	X		X				
52	Commonwealth v. Daniels	644 A.2d 1175	1994									
53	Shell v. State	554 So. 2d 887	1989	X	X	X						
54	Greene v. State	469 S.E.2d 129	1996	X		X	X	X		X		
55	Boyd v. Lee	No. 1:00CV00647, 2003 WL 22757932	2003		X					X	X	
56	Call v. Polk	454 F. Supp. 2d 475	2006	X	X							
57	Carr v. State	655 So. 2d 824	1995		X	X		X				
58	Coe v. Bell	161 F.3d 320	1998									
59	Commonwealth v. Cook	676 A.2d 639	1996	X	X	X						
60	Commonwealth v. Brown	711 A.2d 444	1998									
61	Commonwealth v. Chambers	599 A.2d 630	1991									
62	Commonwealth v. Cooper	941 A.2d 655	2007									
63	Cunningham v. Zant	928 F.2d 1006	1991									
64	Fahy v. Horn	516 F.3d 169	2008							X		
65	People v. Vieira	106 P.3d 990	2005	X				X		X		
66	People v. Welch	976 P.2d 754	1999									
67	People v. Samuels	113 P.3d 1125	2005						X	X		
68	People v. Roldan	110 P.3d 289	2005						X			
69	People v. Hill	839 P.2d 984	1992		X			X				
70	People v. Slaughter	47 P.3d 262	2002	X				X	X	X		
71	McNair v. State	653 So. 2d 320	1992	X	X							
72	Manning v. State	929 So. 2d 885	2006		X	X						
73	People v. Woolley	793 N.E.2d 519	2002									
74	People v. Jackson	920 P.2d 1254	1996	X			X					
75	Sandoval v. Calderon	241 F.3d 765	2001									
76	State v. Artis	384 S.E.2d 470	1989	X		X	X	X				
77	State v. Barden	572 S.E.2d 108	2002	X		X	X					

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NUMBER	CASE	CITATION	YEAR	1	2	3	4	5	6	7	8	9
78	State v. Barrett	469 S.E.2d 888	1996	X	X	X	X			X		
79	State v. Berry	141 S.W.3d 549	2004	X		X		X	X			
80	State v. Bond	478 S.E.2d 163	1996	X	X	X	X					
81	State v. Daniels	446 S.E.2d 298	1994	X	X	X	X					
82	State v. Davis	506 S.E.2d 455	1998	X		X	X		X			
83	State v. Davis	539 S.E.2d 243	2000	X		X	X	X	X			
84	State v. Gibbs	436 S.E.2d 321	1993	X		X	X					
85	State v. Ingle	445 S.E.2d 880	1994	X		X	X					
86	State v. Laws	381 S.E.2d 609	1989				X		X			
87	State v. Lloyd	552 S.E.2d 596	2001	X								
88	State v. Murphy	747 N.E.2d 765	2001		X							
89	State v. Roache	595 S.E.2d 381	2004	X	X	X	X	X				
90	State v. Rose	451 S.E.2d 211	1994	X		X	X					
91	State v. Taylor	No. 65711, 1995 WL 663267	1995		X							
92	State v. Walters	588 S.E.2d 344	2003	X			X	X				
93	State v. Williams	510 S.E.2d 626	1999	X			X		X			
94	Todd v. State	410 S.E.2d 725	1991									
95	United States v. Mitchell	502 F.3d 931	2007		X	X						
96	Ward v. Dretke	420 F.3d 479	2005									
97	Wilcher v. State	863 So. 2d 776	2003	X	X	X						
98	People v. Riel	998 P.2d 969	2000		X				X			
99	State v. Shafer	531 S.E.2d 524	2000									

1. Religious reference already established as permissible by previous cases
2. Religious reference was used by defense or prosecution anticipated it from defense
3. Religious reference is within permissible bounds of an attorney's arguments
4. Religious reference is not too extreme or grossly improper
5. Religious reference was not objected to by the defense
6. After Religious reference(s), lawyer instructed jury to follow state law
7. Religious reference had no effect on jury because the evidence was so strong against the defendant
8. Religious reference did not affect jury because judge gave curative instructions to disregard Religious references
9. Attorney gave only history of the death penalty