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Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors' Use of Religious Arguments in the Sentencing Phase of Capital Cases

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I. INTRODUCTION

> You are not playing God. You are doing what God says. This might be the only opportunity to wake [the defendant] up. God will destroy the body to save the soul. Make him get himself right.... Let him have the opportunity to get his soul right.[1]

Ninety-five percent of Americans profess belief in God,[2] and seventy percent are members of a church or synagogue.[3] Consequently, religious arguments, such as the prosecutor's invocation of Romans 13:1-7 from the Bible as excerpted above, will likely resonate with a jury consisting of "a fair cross-section" of a defendant's community[4] and have a substantial impact on the decision-making process of its members.[5] The impact of religious arguments is especially strong in the sentencing phase of capital cases when jurors must weigh a myriad of factors to determine whether a particular individual's life should end.[6]

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1. A state prosecutor invoked these powerful words during the closing argument of the sentencing phase in *People v. Sandoval*, 4 Cal. 4th 155, 841 P.2d 862, 883 (1992) (quoting *Romans* 13:1-7). The beginning of this religious argument appears in Part II.C.2.

2. Richard N. Ostling, *In So Many Gods We Trust*, Time 72, 72 (Jan. 30, 1995) (citing a Time/CNN poll).

3. Michael J. Perry, *Religious Arguments in Public Political Debate*, 29 Loyola L.A. L. Rev. 1421, 1421 (1996).

4. A criminal defendant is entitled to a jury that is chosen from "a fair cross-section" of the community as a part of the sixth amendment right to trial by an impartial jury. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). Though the Constitution does not mandate that a jury sentence defendants in capital cases, *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), most jurisdictions require it. Bennett L. Gershman, *Prosecutorial Misconduct* § 12.3(a) at 12-10 (Callaghan, release 11, 1996).

5. See generally *Jones v. Kemp*, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989) ("[Biblical] arguments come from a source which 'would likely carry weight with laymen and influence their decision,' [and] the effect may be highly prejudicial te the defendant, and the confidence in the reliability of the jury's decision which must guide the imposition of the death penalty may be nndermined.").

6. See *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (mandating that a death penalty statute "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death"). State statutes generally provide for a bifurcated proceeding in capital cases, separating the guilt/innocence stage from the sentencing/penalty phase. See Part III.B.1 (discussing the special safeguards for capital sentencing).

Notwithstanding the great risk, indeed likelihood, of a prejudicial effect from arguments based on religion rather than on secular law, courts consistently find that other factors sufficiently mitigate any danger of unfair prejudice. For example, in *People v. Sandoval*,[7] the Supreme Court of California identified a portion of the prosecutor's final argument in the sentencing phase, excerpted above, as a paraphrase of Romans 13:1-7, a biblical passage commonly understood as providing justification for the death penalty.[8] Although the court found that the argument was improper and constituted misconduct,[9] it held that the lengthy deliberations left no reasonable possibility that the jury would have reached a verdict more favorable than death on "only" one of the four counts.[10] Typical of most courts, the court in *Sandoval* offered no remedy or sanction beyond general disapproval of the improper argument that it deemed to be misconduct.

Whether on direct appeal or writ of habeas corpus, state and federal courts perform a contextual analysis in capital cases in which prosecutors invoke religious arguments, and the courts almost invariably find that the weight of the evidence, the length of the proceedings, or the trial judge's instructions overcome any prejudicial effect of the argument. This totality approach underestimates the prejudicial effect and discounts the constitutional nature of the misconduct. Moreover, the reasoning underlying such analysis is even less convincing when applied in the sentencing phase. Here, much more is at stake for the defendant—life. All that is at stake for the government is the method of punishment. Also, this separate proceeding is typically much shorter than the guilt phase and relies upon more personal judgments by the jury.[11]

Recognizing the danger of prejudice and the impotence of the court's practice of discouragement via reprimand, the Pennsylvania Supreme Court adopted a rule of automatic reversal of death sentences when a prosecutor relies upon a religious writing to support the penalty.[12] American jurisprudence places a high professional duty on prosecutors and demands vigilant protection against improper influ-

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7. 4 Cal. 4th 155, 841 P.2d 862 (1992).
8. *Sandoval*, 841 P.2d at 883.
9. Id. at 883-84.
10. Id. at 884.
11. See *California v. Ramos*, 463 U.S. 992, 1008-09 (1983) (describing fundamental differences between the jury's determinations in the guilt and sentencing phases).
12. *Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1991).

ences in capital cases: "[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones."[13] Concordantly, the Pennsylvania Supreme Court proscribes a prosecutor's invocation of religious law that goes beyond mere allegorical references and exerts an improper influence.[14]

This Note advocates the universal adoption of a per se reversible-error rule for capital sentences similar to the rule adopted in Pennsylvania.[15] The rule mandates reversal of a death sentence if the prosecutor invoked a religious argument in the sentencing phase.[16] This Note's argument draws on fundamental principles of jurisprudence and in no way disparages religion or capital punishment.[17] Indeed, an individual juror's personal consideration of religious principles in deciding a capital sentence is expected.[18] The prosecutor, however, must not play on these convictions in arguing for a sentence of death. As Judge Phillips of the Fourth Circuit Court of Appeals explained, "[s]uch statements, worthy of the profoundest respect in proper contexts, have no place in our non-ecclesiastical courts and may not be tolerated there."[19] Part II of this Note provides a detailed analysis of the current standards of review and their results. Part III presents the per se reversible-error rule as a new standard. This section defines the scope of the prohibition and advocates adoption of the rule. Part IV addresses potential questions and criticisms of the proposal. In conclusion, Part V considers the empirical need for the per se rule.

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13. *Berger v. United States*, 295 U.S. 78, 88 (1935). See Part III.B.1 (discussing the protections afforded capital defendants) and Part III.B.2 (discussing a prosecutor's special duty).

14. *Chambers*, 599 A.2d at 644.

15. The proposed rule is a bit more restrictive than the Pennsylvania rule, however. See note 198.

16. See Part III.A for further explanation on what the rule bars, that is, what constitutes a "religious argument" for the purposes of this rule.

17. This Author supports the death penalty and recognizes and appreciates the profound role religion plays in our lives.

18. See *Jones*, 706 F. Supp. at 1560 ("The court in no way means to suggest that jurors cannot rely on their personal faith and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen."). See also *State v. DeMille*, 756 P.2d 81, 84 (Utah 1988) ("Prayer is almost certainly a part of the personal decision-making process of many people, a process that is employed when serving on a jury.").

A related issue under debate is whether or not religion is an improper outside influence on jury deliberations generally in violation of Rule 606(b) of the Federal Rules of Evidence and its state counterparts. See generally Daniel S. Day, Note, *Utah Rule of Evidence 606(b): Is God an Improper Outside Influence?*, 969 Utah L. Rev. 972 (1989) (discussing whether religion is an improper outside influence).

19. *Bennett v. Angelone*, 1996 U.S. App. LEXIS 21003 *23 (4th Cir.). Not incidentally, Judge Phillips found that, in context, the misconduct in the case was not "sufficiently egregious" to warrant corrective action. Id. at *24.

II. THE CURRENT STANDARDS OF REVIEW FOR PROSECUTORIAL MISCONDUCT

A. Different Approaches

Challenges to death sentences based on prosecutorial misconduct are subject to different standards of review as defendants typically exhaust all available avenues of appeal. The harmless-error rule governs most appeals for prosecutorial misconduct.[20] Not surprisingly, however, after exhausting the avenues for direct review, many defendants in capital cases petition for a writ of habeas corpus which provides a narrower scope of review.[21]

1. Review on Appeal

All federal and state courts use a harmless-error rule to evaluate prosecutorial misconduct on appeal.[22] The United States Supreme Court pronounced it the duty of a reviewing court to consider the record and ignore errors that are harmless,[23] that is, errors which in light of the entire proceeding did not cause a miscarriage of justice.[24] The defendant generally must make a showing of prejudice to

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20. See generally Francis A. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 Iowa L. Rev. 311, 331-32 (1988) (noting the magnitude of the harmless error phenomenon and citing capital cases with improper prosecutorial arguments in the penalty phase as creating "unease").

21. See generally Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* § 28 (West 1985 & Supp. 1996) (discussing the writ); Barry Friedman, *A Tale of Two Habeas*, 73 Minn. L. Rev. 247 (1988). This Note's analysis of the standard focuses on federal habeas review.

22. Gershman, *Prosecutorial Misconduct* § 13.2(a) at 13-4 (cited in note 4); LaFave and Israel, *Criminal Procedure* § 26.6(a) at 995 (cited in note 21). Rule 52(a) of the Federal Rules of Criminal Procedure is typical and provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." F.R.Cr.P. § 52(a). The standard applies equally to arguments in the guilt phase and the penalty phase. *Adams v. Aiken*, 965 F.2d 1306, 1320 (4th Cir. 1992); *Potts v. Zant*, 734 F.2d 526, 535 (11th Cir. 1984).

23. *United States v. Hasting*, 461 U.S. 499, 508 (1983) (holding that the rule applies even to constitutional errors).

24. LaFave and Israel, *Criminal Procedure* § 26.6(a) at 996 (cited in note 21). States employ tssts purporting to use various standards of prohability that the error affected the outcome. Roger Traynor, *The Riddle of Harmless Error* 14 (Ohio State, 1970) (collecting cases). Pennsylvania, for example, requires, for constitutional and non-constitutional errors alike, that the court find beyond a reasonable doubt that the error had no reasonable possibility of affecting the decision. *Commonwealth v. Story*, 383 A.2d 155, 163-64 (Pa. 1978). The Pennsylvania Supreme Court reasoned that a lower standard would undermine the rules violatsd and the presumption of innocence. LaFave and Israel, *Criminal Procedure* § 26.6(b) at 998 (cited in note 21).

overcome the harmless-error presumption.[25] In setting forth this rule, the Court intended to provide an efficient means of extricating prejudicial error from the judicial process.[26]

Courts consider several factors when determining whether a prosecutor's misconduct amounts to prejudicial error.[27] These factors include the strength of the evidence, the probable impact on the jury, the deliberate nature of the conduct, and the importance of the issue to which the conduct related.[28] When determining the error's probable impact on the jury, courts consider whether the proceeding was lengthy, whether the trial judge offered a curative instruction, whether the errors were isolated, and whether the prosecutor was responding to the defense counsel's arguments.[29]

The above factors notwithstanding, most reviewing courts first examine the record to see if defense counsel raised a contemporaneous objection.[30] In fact, most courts require an appellant to have objected immediately for the court to consider whether the misconduct constituted prejudicial error.[31] The objection affords the trial judge the opportunity to offer a curative instruction in an attempt to prevent or eliminate any prejudicial impact on the jury.[32]

Nevertheless, courts have an escape hatch from rigid application of the contemporaneous-objection rule: the plain-error doctrine. Rule 52(b) of the Federal Rules of Criminal Procedure authorizes the courts of appeals to correct egregious errors that were not preserved

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25. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). When constitutional error jeopardizes the fundamental fairness of the proceeding, however, courts may presume prejudice. Id. at 256-57.

26. *Hasting*, 461 U.S. at 508.

27. See, for example, *Bennett*, 1996 U.S. App. LEXIS 21003 at *21 (listing "the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated"); *United States v. Young*, 470 U.S. 1, 11 (1985) (listing the probable effect on the jury, the defense counsel's conduct, and the nature of the prosecutor's response).

28. Gershman, *Prosecutorial Misconduct* § 13.2(a) at 13-7, 13-8 (cited in note 4).

29. See generally *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 242 (1939); *Young*, 470 U.S. at 12; *McGee v. State*, 1990 WL 254339 4 (Del. Supr.) (noting, in a contextual analysis, that the defense introduced the issue of religion). For a discussion of a prosecutor's responses and the rebuttal doctrine, see Part IV.B.

30. Gershman, *Prosecutorial Misconduct* § 13.2(b) at 13-8 (cited in note 4).

31. Id. See *People v. Hill*, 3 Cal. 4th 959, 839 P.2d 984, 1015 (1992) (ruling that the failure to object precludes review on direct appeal).

32. Gershman, *Prosecutorial Misconduct* § 13.2(b) at 13-9 (cited in note 4). Affording the trial court this opportunity may promote efficiency by preventing appeals. Id. See also *Hill*, 839 P.2d at 1015 (requiring that a request for a "curative jury admonition" accompany the objection).

Many courts, including the Supreme Court, however, recommend that the trial judge take the initiative to correct the error even without a contemporaneous objection. Gershman, *Prosecutorial Misconduct* § 13.2(b) at 13-10 (cited in noto 4) (citing *Viereck v. United States*, 318 U.S. 236, 248 (1943)).

by objection.[33] The rule states that courts should recognize plain error only when the errors "seriously affect the fairness, integrity or public reputation of judicial proceedings."[34] In *United States v. Giry*,[35] the First Circuit Court of Appeals posited a three-step inquiry for evaluating whether a prosecutor's misconduct constitutes plain error.[36] Under this inquiry, the court determines (1) whether the conduct was isolated and/or deliberate, (2) whether the trial judge's instructions were strong and explicit, and (3) whether it is likely that any prejudice survived the judge's instructions and could have affected the outcome.[37] Although the plain-error rule allows courts to overlook the failure to object, the analysis is narrow in scope and includes many of the same factors found in harmless-error analysis.

The Supreme Court has also recognized an exception to the harmless-error rule in cases involving constitutional error.[38] Lower courts had consistently followed a practice of automatic reversal for constitutional errors[39] before the Supreme Court narrowed this exception in *Chapman v. California*.[40] In *Chapman*, the Court held that constitutional errors are subject to harmless-error analysis. Nevertheless, the Court maintained a more exacting standard of review for constitutional errors, demanding that the reviewing court find the error harmless beyond a reasonable doubt before holding it harmless.[41] Furthermore, the Court placed the burden of proof on the government, as courts must presume that constitutional errors are prejudicial.[42] The *Chapman* Court appeared to bolster its strict

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33. *Young*, 470 U.S. at 15 (quoting *United States v. Frady*, 456 U.S. 152, 163 (1982)). The rule states: "Plain errors or defects may be noticed although they were not brought to the attention of the court." F.R.Cr.P. 52(b).

34. *Young*, 470 U.S. at 15 (quoting *United States v. Atkinson*, 297 U.S. at 160).

35. 818 F.2d 120 (1st Cir. 1987).

36. Id. at 133.

37. Id.

38. Defendants ordinarily challenge prosecutorial misconduct on due process grounds. See, for example, *People v. Wash*, 6 Cal. 4th 215, 861 P.2d 1107, 1135 (1993) (discussing defendant's contention that prosecutor's comments violated his right to due process). Some defendants, however, also bring first amendment separation of church and state claims, see, for example, id., and sixth amendment claims challenging the impartiality of the jury, see, for example, *People v. Arias*, 13 Cal. 4th 92, 179, 913 P.2d 980, 1036 (1996) (rejecting such claims). See notos 156 and 252 for more examples.

39. LaFave and Israel, *Criminal Procedure* § 26.6(c) at 1000 (cited in note 21).

40. 386 U.S. 18 (1967).

41. Id. at 24.

42. *Rose v. Clark*, 478 U.S. 570, 575-79 (1986). State courts vary as to which party bears the burden of proof. LaFave and Israel, *Criminal Procedure* § 26.6(b) at 998-99 (cited in note 21).

standard by begrudgingly conceding that courts could find some constitutional errors harmless.[43]

2. Review for a Writ of Habeas Corpus

A convicted defendant's petition for a writ of habeas corpus presents a collateral attack, usually on a federal constitutional claim and draws a review narrower in scope than an appeal.[44]

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43. The Court conceded that "there *may be some* constitutional errors which *in the setting of a particular case* are *so unimportant and insignificant* that they may . . . be deemed harmless, not requiring the automatic reversal of the conviction." *Chapman*, 386 U.S. at 22 (emphasis added).

Indeed, the constitutional-error exception to the harmless-error rule is a viable challenge to a prosecutor's religious arguments in capital sentencing proceedings. In his dissent, Justice Harlan expounded two categories of exceptions that "have always been respected by [the] Court and seem . . . essential to the fundamental fairness guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments." Id. at 52 n.7 (Harlan, J., dissenting). The first category concerns errors that undermine the public's respect for the integrity of the judicial process. Id. (Harlan, J., dissenting). Harlan cited the prosecutor's highly improper closing in *Berger* as an example. Id. (Harlan, J., dissenting). These religious arguments constitute the same type of "official misbehavior" for which "society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct." Id. (Harlan, J., dissenting). The second category includes errors that are "so devastating or inherently indeterminate" that courts cannot deem them harmless. Id. (Harlan, J., dissenting). Examples of religious arguments show that they can be both devastating and indeterminate. See Part II.C.2.

44. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974) (observing that the standard of review for the habeas corpus petition based on prosecutorial misconduct was "the narrow one of due process, and not the broad exercise of supervisory power that it would possess in regard to its own trial court"); LaFave and Israel, *Criminal Procedure* § 27.3(e) at 1035 (cited in note 21) (stating that virtually all habeas petitions present constitutional claims).

Petitioners can also bring claims based on federal statutes. See 28 U.S.C. § 2241(c)(3) (1997) (requiring that petitioner be in custody "in violation of the Constitution *or laws or treaties* of the United States") (emphasis added).

Congress recently passed the Antiterrorism and Effective Death Penalty Act of 1996 which includes habeas corpus reform. Pub. L. No. 104-132, 110 Stat. 1214 (1996). Congress intended to curb abuses of habeas review, notably the "unnecessary delay and abuse in capital cases." H.R. Rep. No. 104-518, 104th Cong., 2d Sess. 268 (1996). Most provisions, however, apply to all petitions. Tom C. Smith, *Crime Legislation Passes in Election Year*, 11 Crim. Just. J. 50, 50 (Summer 1996). The revisions mandate exhaustion of state remedies and deference to state court decisions. H.R. Rep. No. 104-518 at 268. See generally *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986) (citing 28 U.S.C. § 2254(b) for the rule that a defendant must exhaust all avenues for redress in the state courts before petitioning for a writ of habeas corpus). Furthermore, the Act sets a 180-day limitation period for filing a habeas petition and limits the time within which a federal court must act in a capital case. Pub. L. No. 107, 110 Stat. 1214. Discouraging successive petitions, the Act mandates a new approval procedure and requires newly discovered evidence or the recognition of new constitutional rights before a court may issue a certificate of appealability. Id.

The habeas reform has already passed a narrow constitutional challenge concerning the limitation on the Court's authority to review certain appellato court decisions via appeal or writ of certiorari. *Felker v. Turpin*, 135 L. Ed. 2d 827, 836-41, 116 S. Ct. 2333, 2337-39 (1996). The court held that congressional restriction of these avenues of review did not amount to an unconstitutional "suspension" of the writ given the Court's ability to entertain original habeas petitions. Id.

Notwithstanding the constitutional nature of the errors, collateral review of unconstitutional "trial errors" imposes a lesser burden on the State than does appellate review.[45] In *Brecht v. Abrahamson*,[46] the Supreme Court found trial errors amenable to harmless-error analysis because a court may assess the error's effect in light of the evidence the jury received.[47] Furthermore, the Court restricted *Chapman*'s strict, constitutional-error standard to direct review and, for habeas review, replaced it with the *Kotteakos* standard: "[W]hether the error had substantial and injurious effect or influence in determining the jury's verdict."[48] More recently, the Court clarified the new standard in *O'Neal v. McAninch*.[49] Citing the high stakes involved in habeas review, the Court held that when a federal judge cannot ascertain whether the error had a substantial and injurious effect, the error is not harmless, and, therefore, the judge must grant the writ.[50]

Exactly which constitutional claims courts will hear on habeas review is undefined.[51] When challenging prosecutorial misconduct, and specifically the use of religious arguments in the sentencing phase of capital cases, defendants usually bring a due process claim.[52] To

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45. *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993). The Court contrasted trial errors, which occur as attorneys present the case to the jury, with structural defects, which are defects in the trial mechanism. Structural defects, such as the deprivation of right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), require automatic reversal because the prejudice permeates the trial process. *Brecht*, 507 U.S. at 629-30.

The Court described the restricted nature of collatoral review and habeas relief, stating that "an error that may justify reversal on direct appeal will not necessarily support a collatoral attack on a final judgment." Id. at 634 (quoting *Frady*, 456 U.S. at 165). See also H.R. Rep. No. 104-518 at 268 (cited in noto 44) (noting the deference the new law demands for state court decisions).

46. 507 U.S. 619 (1993).

47. Id. at 629.

48. Id. at 637.

49. 513 U.S. 432 (1995).

50. Id. at 435. The Court avoided speaking in terms of a "burden of proof" because the reviewing judge's role is to apply a legal standard to a record, not to control the presentation of evidence. Id. at 436.

51. LaFave and Israel, *Criminal Procedure* § 27.3 at 1022-23 (cited in note 21). Justice Steveus has suggested that courts are likely to hear claims that present an issue of "fundamental fairness." Id. Professor Barry Friedman proposes an "appellate model" of federal courts' review of state court convictions. See Friedman, 73 Minn. L. Rev. 247 (cited in noto 21).

52. See, for example, *Bennett*, 1996 U.S. App. LEXIS 21003 at *20-*21. The Supreme Court has recognized due process claims for prosecutorial misconduct. See, for example, *Donnelly*, 416 U.S. at 637; *Darden v. Wainwright*, 477 U.S. 168, 180 (1986).

The Court has also reviewed habeas petitions for sixth amendment claims. LaFave and Israel, *Criminal Procedure* § 27.3(c) at 1030 (cited in noto 21). A capital defendant may have a cognizable sixth amendment claim alleging that the stato jeopardized the objectivity of the jury. See note 252. This Noto, however, considers the objectivity argument as a due process claim on an eighth amendment claim.

grant the writ, a federal court must find that the prosecutor's comments rendered the proceeding fundamentally unfair.[53] Under this standard, a court must consider the trial record as a whole and weigh the same factors it would in determining if the error were harmless.[54] This "fundamental fairness" standard requires courts to determine whether a reasonable probability exists that the prosecutorial misconduct changed the outcome, undermining the court's confidence in the jury's decision.[55]

B. Same Results

1. Misconduct Not Sufficiently Prejudicial

On the whole, the differences between the standards for direct review and habeas review become inconsequential as courts find prosecutors' religious arguments not "sufficiently egregious."[56] Generally, the arguments constitute error and misconduct;[57] however, at best, judges offer condemnation for the arguments[58] and

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53. *Darden*, 477 U.S. at 180 (citing *Donnelly*, 416 U.S. at 643); *Bennett*, 1996 U.S. App. LEXIS 21003 at *24; Gershman, *Prosecutorial Misconduct* § 10.1, n.15.1 at 10-6 (cited in note 4).

54. *Bennett*, 1996 U.S. App. LEXIS 21003 at *21 (stating that courts must consider "the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated"). Furthermore, a failure to object to prosecutorial misconduct at a state trial may bar federal habeas review. Thomas F. Urban II, *Prosecutorial Misconduct*, 78 Geo. L. J. 1163, 1176 n.2112 (1990).

55. *Wilson v. Kemp*, 777 F.2d 621, 623 (11th Cir. 1985).

If the petitioner's claim rests on a specific constitutional guarantee, a less exacting contextual approach governs. Gershman, *Prosecutorial Misconduct* § 10.1, n. 15.1 at 10-6 (cited in note 4) (citing *Mahoney v. Wallman*, 917 F.2d 469 (10th Cir. 1990)). In *Donnelly*, the Court set out the fundamental fairness approach and clarified that it demands greater protection for specific guarantees of the Bill of Righte. 416 U.S. at 642. The Court cited cases whero the constitutional violations required automatic reversal: *Argersinger v. Hamlin*, 407 U.S. 25 (1972), for the denial of the defendant's right to counsel and *Griffen v. California*, 380 U.S. 609 (1965), for the violation of the defendant's right against self-incrimination. Id. See also *Brecht*, 507 U.S. at 629-30 (distinguishing trial errors from structural errors).

56. *Bennett*, 1996 U.S. App. LEXIS 21003 at *23.

57. See, for example, id; *Sandoval*, 841 P.2d at 884 (holding that biblical invocation constitutes reversible error). Not all courts reach this conclusion, however. See, for example, *Hill*, 839 P.2d at 1017 (Mosk, J., concurring) ("The prosecutor here came perilously close to crossing the line into misconduct, but did not actually do so."); *People v. Bradford*, 14 Cal. 4th 1005, 1061-63, 929 P.2d 544, 579-81 (1997) (failing to find use of a religious argument to be misconduct).

58. See *Bennett*, 1996 U.S. App. LEXIS 21003 at *23 (stating that "[f]ederal and state courts have universally condemned such religiously charged arguments as confusing, unnecessary, and inflammatory" and collecting cases).

admonishment of the prosecutors.[59] Notwithstanding any rhetorical flair the judges wield, they almost invariably find that contextual factors overcome any prejudice that may justify a remedy under the applicable standard.

The Supreme Court of California provides several examples of the contextual approach in state courts.[60] The court in *Sandoval* held, over Justice Mosk's dissent,[61] that the prosecutor's use of the Romans paraphrase as biblical justification for the death penalty did not warrant reversal of the death penalty judgment.[62] Despite having classified the acknowledged invocation of higher law as an improper appeal and misconduct, the court deemed the error harmless.[63] The court found no reasonable possibility that any prejudice affected the lengthy and contentious deliberations which led to a verdict of death on "only" one of four counts.[64]

The California Supreme Court has found other arguments using religion to justify the imposition of the death penalty insufficiently prejudicial to overcome a defendant's failure to object. In *People v. Hill*,[65] the prosecutor referred to biblical verses which, he

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59. See Tracey L. Meares, *Rewards For Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 Fordham L. Rev. 851, 854 (1995) (noting that appellate reprimand is the most common sanction).

60. As in many states, death sentences warrant autematic appeal in California. See, for example, *Sandoval*, 841 P.2d at 866 (automatic appeal in California); *Bennett*, 1996 U.S. App. LEXIS 21003 at *16 (collecting cases and noting the requirements of different states' mandatory review statutes). Neither the impreper use of religious arguments nor the contextual analysis employed by the Court is peculiar to California. Each of this Note's examples of improper religious arguments in capital sentencing phases survived review in state court, whether or not it received collateral review. See note 44 (noting that habeas review requires a petitioner te have exhausted state avenues for relief). For example, in *Bennett* the defendant exhausted his direct state appeals and habeas appeals in the Virginia courts before petitioning the federal district and appellate courts. 1996 U.S. App. LEXIS 21003 at *2-3. See note 87 (quoting the prosecutor's improper argument in *Bennett*). For other examples of prosecuters' religious arguments at capital sentencing, see *Lawrence v. State*, 691 So. 2d 1068, 1074 (Fla. 1997) (Florida); *Greene v. State*, 266 Ga. 439, 459, 469 S.E.2d 129, 146 (1996); *Estes v. Commonwealth*, 744 S.W.2d 421, 426 (Ky. 1988); *State v. Holden*, 1997 WL 422230, 14 (NC.).

61. Justice Mosk found that the roligious argument violated California statutes and judicial decisions as well as the United States and California Constitutions' clauses concerning the establishment of religion, cruel and unusual punishments, and due process of law. *Sandoval*, 841 P.2d at 887 (Mosk, J., dissenting).

62. Id. at 884.

63. Id.

64. Id. The jurors indicated a six-to-six split after four days of deliberation. One day lator they returned verdicts of life without parole on three of the counts and death on one count. Id. In his dissent, Justice Mosk argued that a contrary assumption from the length of the deliberations seemed more reasonable. Id. at 891 (Mosk, J., dissenting).

65. 3 Cal. 4th 959, 839 P.2d 984 (1992).

asserted, "sanction [the] death penalty in cases like this."[66] Though one justice found that the prosecutor's summation "came perilously close"[67] to misconduct, the court held that the defendant's failure to object precluded review of the issue on direct appeal.[68] In his concurrence, Justice Mosk noted that the California Constitution would obligate reversal if there had been a "miscarriage of justice."[69]

Similarly, in *People v. Wrest*[70] the court found that with defense counsel's failure to object, the defendant waived any error that the trial judge could have "cured" by admonition.[71] In the State's penalty phase summation, the prosecutor made a clever, albeit brief, reference to the Old Testament's support for capital punishment.[72] The court saw straight through the use of the rhetorical device paralepsis but found the reference, along with other admittedly improper arguments, "undoubtedly harmless" in the context of the longer argument.[73]

Recently, in *People v. Jackson*,[74] Justice Mosk, who had been the most vigilant protector of defendants with these claims,[75] delivered the opinion of the court, finding that the prosecutor's argument did not amount to misconduct and caused no prejudice.[76] In *Jackson*, the prosecutor first commented on the defendant's prior escape from prison, stating that he had been "sent away" and had "the mark of Cain."[77] The prosecutor then admonished the jury to "render unto Caesar what is Caesar's and unto God what is God's."[78] The court overlooked, among other things,[79] the argument's biblical justification for jurors to impose the penalty the State was seeking—death. Instead, the court concluded that no misconduct or prejudice was

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66. 839 P.2d at 1018 (Mosk, J., concurring).

67. Id. Justice Mosk "strongly caution[ed] against such improper argument." Id. As in *Sandoval*, he stated that invoking religious law to support a death sentence violated case law, statutes, and constitutions. Id.

68. Id. at 1015.

69. Id. at 1018 (Mosk, J., concurring).

70. 3 Cal. 4th 1088, 839 P.2d 1020 (1993).

71. Id. at 1027.

72. Id. at 1028 ("I could talk to you about Scripture and verse from the Old Testament that supports capital punishment . . . [b]ut I'm not.").

73. Id. at 1028-29.

74. 13 Cal. 4th 1164, 920 P.2d 1254 (1996).

75. See notes 61 (discussing Mosk's dissent in *Sandoval*) and 67 (discussing Mosk's concurrence in *Hill*).

76. *Jackson*, 920 P.2d at 1300.

77. Id. at 1299.

78. Id.

79. For a more complete discussion of the legal interests violated by such arguments, see Part III.B.3.

present because the prosecutor did not suggest that the jury use religious criteria of justice.[80]

The exceptions to the harmless-error rule often prove worthless for defendants with claims of prosecutorial misconduct. The cases discussed above demonstrate that the plain-error doctrine usually fails to provide a remedy.[81] Moreover, the *Chapman* standard requiring the State to prove constitutional errors harmless beyond a reasonable doubt rarely, if ever, affords relief absent a violation of a specific guarantee of the Bill of Rights.[82] Instead, courts deem most constitutional violations harmless;[83] indeed, case law binds them to do so.[84]

Whether on direct appeal or habeas review, federal courts offer contextual analyses similar to that of state courts when analyzing claims of prosecutorial misconduct.[85] In *Bennett v. Angelone*[86] the prosecutor argued in the penalty phase that the Bible justifies and in fact grants the State's authority, and thereby obliges the individual juror to impose capital punishment.[87] The court, on habeas review,

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80. *Jackson*, 920 P.2d at 1299.

81. Arguably, the misconduct is sufficiently prejudicial to constitute plain error. *Wash*, 861 P.2d at 1146 (Mosk, J., dissenting).

82. See note 55.

83. Gershman, *Prosecutorial Misconduct* § 13.2(a) at 13-5 (cited in note 4) (collecting cases).

84. *Hasting*, 461 U.S. at 508. See note 43 for a discussion of the viability of the constitutional exception.

85. A federal appellate court must consider whether the error was harmful in the context of the entire trial record before reversing a conviction under its supervisory powers. Gershman, *Prosecutorial Misconduct* § 13.2(a) at 13-5 (cited in note 4).

86. 1996 U.S. App. LEXIS 21003 (4th Cir.).

87. Id. at *23. First using facts to demonstrate that the murder at issue was "vile," the prosecutor then used the Bible to jnstify the state's imposition of the death penalty generally and, perhaps not indirectly, that particular jury's imposition of the death penalty:

> Some will say that society shouldn't take a life becanse that's murder also. That's not true. Vengeance is mine saith the Lord, but later when he covered the Earth with water and left only Noah and his family and some animals to survive, when he saw the damage [that] had heen done te the Earth, God said "I'll never do that again" and handed that sword of justice te Noah. Noah is now the government. Noah will make the decision who dies. "Thou [shalt] not kill" is a proscription against an individual; it is not against Government. Because Government has a duty to protect its citizens.

Id. at *21-22. The prosecuter continued later in an apparent effort to justify the penalty in this particular "vile" case and to justify the affirmative decision of each juror:

> Our Gevernment has decided that the death penalty is legitimate and is morally right. The law says for a wantonly, outrageous, or vile murder, a person may be put to death. When Jesus was being tormented by the Roman soldiers before his death, they asked him jokingly, is it lawful to pay tribute unto Caesar? Jesus said give those things that are Caesar's unto Caesar, and those things that are God's to God. The moral being follow the law and leave the rest te heaven.

Id. at *22.

voiced its disapproval of the comments,[88] and, after noting the state and federal courts' universal condemnation of such arguments, stated that these arguments "have no place in our non-ecclesiastical courts and may not be tolerated there."[89] Nevertheless, in deciding whether the improper arguments rendered the sentencing proceeding fundamentally unfair, the court considered the entire context, including "the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated."[90] The court cited the strong evidence of guilt, the vile nature of the crime, and the judge's instruction before the sentencing arguments that the jurors, not the lawyers, determine the evidence.[91] Apparently giving considerable weight to the evidence of guilt,[92] the court concluded that the clearly improper arguments did not render the proceedings constitutionally unfair.[93]

Similarly, in *Bailey v. Snyder*[94] the District Court of Delaware denied the defendant's habeas petition. The defendant challenged the prosecutor's attempt to justify the imposition of the death penalty in the closing argument of the penalty phase.[95] The prosecutor argued: "There is no retribution. This is simply what is due the defendant. This is his day of atonement and his day of atonement will be today."[96] The defendant, having offered no objection to the arguments in court nor a challenge to them on direct appeal, faced a procedural hurdle.[97] Consequently, the defendant brought a claim of ineffective assistance

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88. Id. at *21-22 (classifying the argument as "highly improper" and stating that the argument deserved "strong condemnation").

89. Id. at *23.

90. Id. at *21.

91. Id. at *24. The instruction read as follows: "What the lawyers say is not evidence. You heard the evidence. You decide what the evidence is." Id.

92. A reasonable consideration of the factors would find four of the five listed factors weighing against excusing the arguments as not unfairly prejudicial. They are (1) the nature of the comments, see note 87, (2) the arguments of opposing counsel, which were shorter and in response to the prosecutor's initial argument, (3) the judge's charge, which was not specific to the misconduct, see note 91, and (4) the repeated nature of the improper argument. The nature and quantum of the evidence, which the court characterized as "particularly vile" and "powerful," was the only factor supporting the court's finding that the arguments were not too prejudicial. *Bennett*, 1996 U.S. App. LEXIS 21003 at *21-24.

93. Id.

94. 826 F. Supp. 804 (D. Del. 1993).

95. The defendant challenged the prosecutor's references to the State's opinion on capital punishment, religious comments on the issue, comments concerning the jury's duty to impose death, and deterrence argument in favor of imposing the penalty. Id. at 816.

96. Id.

97. Id. at 817.

of counsel.[98] Though the District Court disagreed with the Superior Court and found the challenge barred for failure to object or show cause, both courts found the arguments insufficiently prejudicial.[99] Upon hearing the motion for post-conviction relief, the Superior Court noted that the comments exceeded the "permissible range of advocacy" but held that defendant failed to meet the burden of demonstrating prejudice.[100] The District Court found the challenge barred but, nevertheless, opined that the argument was not improper and therefore could not have rendered the proceeding fundamentally unfair.[101]

2. Courts Condemn the Conduct But Offer No Remedy or Sanction

State and federal courts alike have universally condemned improper religious arguments,[102] generally finding that the arguments constitute misconduct.[103] As the cases above demonstrate, however, regardless of the standard of review, no remedy follows the rhetoric as courts find the errors insufficiently prejudicial.[104] Moreover, the courts offer nothing more than condemnation as a sanction.[105]

The "paucity" of discipline for forensic abuses is well-recognized,[106] and prosecutorial misconduct is no exception.[107] In fact, evidence suggests that misconduct occurs at a rate higher than reported cases indicate.[108] The most common sanctions are comments

98. The attorney testified to the court's satisfaction that the failure to object stemmed from strategic considerations. Id. at 815. Nevertheless, counsel must not have shared this strategy with the defendant. As the prosecutor urged the jury to send a deterring message of intolerance, the defendant offered his own objection of sorts, shouting "bring it on then motherfucker." Id. at 817.

99. Id. at 817.

100. Id.

101. Id. at 816-17.

102. *Bennett*, 1996 U.S. App. LEXIS 21003 at *23 (collecting cases).

103. See, for example, id. But see note 57.

104. Cases in Peunsylvania serve as the exception to the general rule of no remedy and no sanction. There, the argumente result in automatic roversal. *Chambers*, 599 A.2d at 644.

105. Meares, 64 Fordham L. Rev. at 854 (cited in note 59).

106. Charles W. Wolfram, *Modern Legal Ethics* § 12.1 at 620 (West, 1986).

107. See Meares, 64 Fordham L. Rev. at 854 (cited in note 59) (discnssing courts' failure to sanction prosecutors effectively).

108. Id. at 890 n.140.

and reprimands from appellate courts.[109] Not surprisingly, however, the reprimands prove ineffectual.[110]

The lack of disciplinary control contributes to the persistence of misconduct,[111] and the refusal to reverse sentences in spite of the misconduct invites the use of similar tactics by that lawyer and other lawyers.[112] Public pressure to secure death sentences, the desire to make reputational or political gains from the resulting media exposure, and the use of sentences as a mark of effectiveness and strength in future campaigns for public office provide incentives for prosecutors to act contrary to their objective, justice-seeking responsibility.[113] Therefore, the failure to reverse and the inefficacy of reprimands encourage prosecutors to push the envelope with religious arguments in efforts to attain death sentences.[114]

C. Further Problems With the Current Standards

1. The Totality Rationale of the Current Standards Is Inapplicable to Misconduct in the Sentencing Phase

The contextual analyses courts perform for review of forensic prosecutorial misconduct are inappropriate for improper arguments in the sentencing phase of capital cases. The Supreme Court mandates that the sentencing body in capital cases, almost invariably a jury,[115] consider the defendant's character and other factors particular to that

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109. Id. at 897.

110. Id. (collecting cases); Allen, 70 Iowa L. Rev. at 334 (cited in note 20). Even courts that issue such reprimands have lamented their ineffectiveness. Meares, 64 Fordham L. Rev. at 854 (cited in note 59). In *Robinson v. State*, a dissenting judge expressed his frustration:

> If the prosecuting personnel was warned and . . . that warning was ignored, how can we expect the warning set out . . . to be successful? As a practical proposition . . . many prosecuting personnel will not even read these opinions. We make this criticism with hat in hand and beg their forgiveness, but we cannot get around the facts of life.

Robinson, 434 So. 2d 206, 212 (Miss. 1983) (Bowling, J., dissenting).

111. Meares, 64 Fordham L. Rev. at 854 (cited in note 59).

112. Wolfram, *Modern Legal Ethics* § 12.1 at 620 (cited in note 106).

113. Gershman, *Prosecutorial Misconduct* § 12.1 at 12-4 (cited in note 4). See Part III.B.2 (describing the prosecutor's duty).

114. See Wolfram, *Modern Legal Ethics* § 12.1 at 620 (cited in note 106) (noting that the failure to reverse invites impropriety). Justice Stevens argued that "an automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case." *Rose*, 478 U.S. at 588-89 (Stevens, J., concurring).

115. See note 4.

individual.[116] Many of these factors require subjective determinations.[117] Consequently, the jury must make a personal decision in the sentencing phase unlike the strict application of law to facts in the guilt phase.[118] As the Court has noted, jurors are likely to have little experience and skill in dealing with the special sentencing considerations and thus need guidance in their deliberations.[119] At least one study suggests that jurors are confused by the legal instructions regarding their role in sentencing determinations.[120] This "unbridled juror discretion"[121] in the sentencing determination heightens the need for the decision to remain free of passion and prejudice.[122] Improper religious arguments are, therefore, more prejudicial in the sentencing phase of capital cases,[123] and a stricter standard of review should govern.[124]

Under the current totality approach, courts list several factors for consideration;[125] however, the strength of the evidence is clearly the most significant.[126] The approach allows the appellate court to act as fact-finder and disregard prosecutorial errors because of its own belief in the defendant's guilt and the propriety of the sentence.[127]

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116. *Woodson*, 428 U.S. at 303. See note 222 and accompanying text (noting that the jury must consider any factor that the defendant submits for mitigation).

117. James Luginbuhl and Julie Howe, *Symposium: The Capital Project: Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L. J. 1161, 1179 (1995). See note 222 for examples of aggravating circumstances and mitigating facters.

118. *Ramos*, 463 U.S. at 1008-09.

119. *Gregg v. Georgia*, 428 U.S. 153, 192 (1976).

120. Luginbuhl and Howe, 70 Ind. L. J. 1161 (cited in note 117). The study found that one fourth of jurors were confused and that the confusion made them more likely to vote for death. Id. at 1175-76.

121. Id. at 1161.

122. *Potts*, 734 F.2d at 535.

123. See Gershman, *Prosecutorial Misconduct* § 12.3(a) at 12-10 (cited in note 4) (stating that improper emotional appeals at sentencing are more prejudicial when the jury imposes the sentence).

124. See *Ramos*, 463 U.S. at 998-99 (noting the greater degree of scrutiny that capital sentencing determinations require). See also *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) ("With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion.").

125. See note 27 (citing cases that list factors).

126. See Gershman, *Prosecutorial Misconduct* § 13.2(a)(2) at 13-6 (cited in note 4). The reviewing court's "staunch belief" in the appellants' guilt "appears to transcend all variations of formula." Allen, 70 Iowa L. Rev. at 332 (cited in note 20). See, for example, the analysis of *Bennett* in note 92.

127. See Bennett L. Gershman, *Symposium: The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 425 (1992) (stating that the appellate court sits as a "super-jury" in harmless-error review, ignoring misconduct when it finds the defendant "clearly guilty"); Gershman, *Prosecutorial Misconduct* § 13.2(a)(1) at 13-6 (cited in note 4) (citing commentators and Justice Stevens expressing this belief).

While excusing the errors seems to deny "clearly guilty" defendants the right to a fair trial,[128] the discretionary, less evidence-driven nature of capital sentencing determinations exacerbates the problem of an appellate court usurping the jury's role. To ensure that death is the appropriate punishment, the Eighth Amendment requires that the jury make an individualized decision.[129] This determination is distinct from the weight of the evidence, as it is a more personal decision rather than a strictly logical one.[130] Therefore, when an appellate court makes a judgment based on the evidence, the analysis improperly becomes a "correct result" test as opposed to an "effect on the judgment" test.[131]

The effect of the misconduct on the jury is also a crucial factor in the totality approach.[132] Judges usually consider the length of the trial to determine the effect of improper arguments.[133] But because the sentencing phase is a separate proceeding for a different determination,[134] the length of the trial should be discounted. Furthermore, some courts consider the length of the penalty phase itself,[135] even though the improper arguments often come in the prosecutor's summation.[136] Because the sentencing phase is generally

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128. Gershman, *Prosecutorial Misconduct* § 13.2(a)(1) at 13-5, 13-6 (cited in note 4). See also *Darden*, 477 U.S. at 184 (Blackmun, J., dissenting) (stating that with the fundamental unfairness standard, the Court is "willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe").

129. *Caldwell v. Mississippi*, 472 U.S. 320, 333 (1985). The Eighth Amendment is applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666 (1962).

130. See *Ramos*, 463 U.S. at 1007-08 (describing the decisions as fundamentally different).

131. See LaFave and Israel, *Criminal Procedure* § 26.6(b) at 997 (cited in noto 21) (noting agreement on the proper approach and that appellate decisions focusing on evidentiary concerns jeopardize the approach). The Supreme Court stated in *Kotteakos v. United States*, 328 U.S. 750 (1946), that judges must analyze an error's effect on the judgment of laymen—"the impact of the thing done wrong in the minds of other men, not on one's own." Id. at 764.

132. See Gershman, *Prosecutorial Misconduct* § 13.2(a)(2) at 13-7 (cited in note 24). See note 27 (citing cases that list factors).

133. See, for example, *Donnelly*, 416 U.S. at 645 (applying the standard it set forth for evaluating prosecutorial misconduct, the Court examined the entire proceedings and noted that the improper remark was "but one moment in an extended trial"); *Socony-Vacuum Oil Co.*, 310 U.S. at 242 ("It is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial . . . .").

134. Luginbuhl and Howe, 70 Ind. L. J. at 1162 (cited in noto 117). See *Godfrey v. Georgia*, 446 U.S. 420, 426 (1980) (discussing the bifurcated proceeding). See also *Gregg*, 428 U.S. at 191-92 (suggesting that a bifurcated proceeding is necessary to comply with the commands of *Furman v. Georgia*, 408 U.S. 238 (1972), that states not impose the death penalty in an arbitrary or capricious manner).

135. See *Bailey*, 826 F. Supp. at 817 (considering the context of the presecutor's entire statement); *Wrest*, 839 P.2d at 1028-29 (finding other comments by the prosecuter to mitigate the prejudice).

136. See, for example, *Bailey*, 826 F. Supp. at 816; *Sandoval*, 841 P.2d at 882.

short,[137] and the jury often hears the improper argument just before deliberation, courts should not find the "duration" factor to mitigate the prejudicial effect. Furthermore, because the penalty phase is a separate and shorter proceeding than the guilt phase, by the Court's own reasoning,[138] the improper arguments will be more prejudicial.

In addition to the weight of the evidence and the length of the proceeding, reviewing courts often cite the trial judge's instructions on the law or "curative" instructions to disregard the improper argument as relieving any prejudicial effect.[139] Judges presume the trial court's instructions have more influence on the jury than the prosecutor's misconduct, or at least enough to displace the influence of religious references.[140] The legal instructions, however, offer only partial guidance and leave jurors with substantial discretion regarding how they should exercise their judgment.[141] Ordinarily, the instructions merely inform jurors that they decide the evidence, that the statements of the lawyers are not evidence, and, at best, that they should ignore particular improper statements by the lawyers.[142] Regardless of the fact that the instructions' curative effects are not apparent on their face, the finding of mitigation is problematic because the appellate courts are again stepping into the jury box, in this case to deem the instructions curative. Courts instead should judge the effect of the instructions on the "average juror."[143] Given the compelling nature of the prejudice,[144] the trial judge's instructions that the

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137. For example, the average penalty phase in Louisiana capital trials lasts 2.9 hours. Marcia Coyle, *Fatal Defense Close-up: Louisiana, A Triple Whammy Here Foils Justice*, Nat'l. L. J. 36, 36 (June 11, 1990).

138. See note 133 (considering duration as a mitigating effect).

139. See, for example, *Bennett*, 1996 U.S. App. LEXIS 21003 at *24 (including in the contextual analysis the judge's standard instruction on the evidence before the sentencing arguments and finding any prejudice sufficiently negated).

140. See *McGee*, 1990 WL 254349 at 4 ("The trial judge's cautionary instruction to the jury to ignore religious references cured any prejudicial effect."); *United States v. Giry*, 818 F.2d 120, 134 (1987) (finding the judge's instructions "sufficiently strong and explicit to have significantly reduced the prejudicial impact of the prosecuter's misstatements").

Consistent with this assumption, courts find reversible error when prosecutors use language from judicial decisions to justify the death penalty. See Part III.B.3.

141. *Caldwell*, 472 U.S. at 333.

142. See, for example, *Bennett*, 1996 U.S. App. LEXIS 21003 at *24; *Donnelly*, 416 U.S. at 644 (stating that "the trial court took *special pains* to correct any impression that the jury could consider the prosecuter's statements as evidence in the case [and] admonished the jury to ignore [the improper remark]" (emphasis added)).

143. For a discussion of the average juror standard, see note 171 (quoting Chief Justice Taft in *Tumey v. Ohio*, 273 U.S. 510 (1927)).

144. See note 172 and Part II.C.2 (discussing the unique appeal and power of improper religious arguments).

statements are not evidence or even that they should be ignored do not abate the prejudicial effect of an improper religious argument.[145]

"Curative" or "limiting" instructions are more problematic because the instructions not only fail to cure prejudice, they generally emphasize the objectionable argument.[146] After discussing at length the impotence of such instructions,[147] the Supreme Court stated in *Bruton v. United States*[148] that a substantial risk exists that the jury will not, or cannot, follow the court's instructions and that the risk may be intolerable when the consequences are so vital to the defendant.[149] In addition, commentators contend that the instructions compound the prejudice.[150] Given the contemporaneous-objection rule, this increased emphasis on the objectionable arguments leaves the defense attorney in a catch-22 situation: Should the attorney object, thus emphasizing the argument and perhaps creating the impression of being opposed to religion simply to preserve the claim for appeal; or, should counsel refuse to object and risk being procedurally barred from review.

The contemporaneous-objection rule bars review of trial errors if counsel raised no objection, unless the reviewing court finds plain error.[151] The court will not excuse the failure to object without good cause,[152] reasoning that an objection gives the trial judge a chance to

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145. See *Chambers*, 599 A.2d at 644 (characterizing improper religious arguments as "deliberate attempt[s] to destroy the objectivity and impartiality of the jury which cannot be cured . . . ."). See also *Giry*, 818 F.2d at 134 (noting, after claiming that the strong and explicit instructions on the evidence significantly reduced any prejudicial impact, that "[i]t is possible that the instructions did not entirely neutralize the prejudice"); *Donnelly*, 416 U.S. at 644 (stating that even particularly strong curative instructions may be insufficient to mitigate the effect of some clearly prejudicial forensics).

146. In fact, "curative" instructions may do more harm than good. In most cases, they emphasize the improper arguments and may increase the prejudicial effect. Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure—Federal Rules of Evidence* § 5756 (West, 1992).

147. "[T]he effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors." *Bruton v. United States*, 391 U.S. 123, 129 (1968). "The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." Id. (quoting Justice Jackson in *Krulewitch v. United States*, 366 U.S. 440, 453 (1949) (Jackson, J., concurring)). "Judge Hand referred to the instruction as a 'placebo,' [and] Judge Jerome Frank suggested that its legal equivalent 'is a kind of judicial lie.'" Id. at 134.

148. 391 U.S. 123 (1968).

149. Id. at 126, 135.

150. See note 145. See also *Bank of Nova Scotia*, 391 U.S. at 129 n.4 ("It has been suggested that the limiting instruction actually compounds the jury's difficulty in disregarding the inadmissible hearsay.").

151. See Part II.A.1 (discussing standards of review).

152. "The [plain-error doctrine] authorizes the Courts of Appeals to correct only 'particularly egregious errors,' those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Young*, 470 U.S. 1, 15 (1985).

offer a curative instruction.[153] Although the judge could,[154] and arguably should,[155] act independently, courts refuse review if defense counsel failed to contest a prosecutor's religious comments at trial.[156] The nature of the prejudice resulting from challenging the use of a biblical reference,[157] for example, and the questionable efficacy of a judge's admonition render a procedural bar inappropriate.[158]

Furthermore, as the list of factors indicates, the totality approach amounts to a balancing test.[159] One of the underlying principles of the test is that the judiciary should not waste valuable resources to conduct a new trial if the error was not so prejudicial as to render the trial fundamentally unfair.[160] Indeed, the Supreme Court has agreed that conserving judicial resources was the primary purpose behind the harmless-error rule.[161] Another principle of the test is the idea that it would be unfair to the State for a court to force a new trial and risk the conviction the prosecutor had attained, especially if the defendant was "obviously guilty."[162]

The primary concerns of the totality approach, wasting resources and upsetting convictions, are of less magnitude with regard to misconduct in the sentencing phase. First, the penalty phase is a

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153. See Part II.A.1.

154. See *Young*, 470 U.S. at 10 (describing the judge's authority and duty as "governor" of the trial).

155. See note 32 (noting the Supreme Court's recommendation). However, the judge should bear in mind that the instruction may have an effect opposite the intended curative one. See note 145.

156. See, for example, *Bailey*, 826 F. Supp. at 817 (finding habeas review barred for want of objection and challenge on direct appeal); *Jackson*, 920 P.2d at 1300 n.20 (finding claims under the Fifth, Sixth, Eighth, and Fourteenth Amendments without substance for want of objections); *Hill*, 839 P.2d at 1012 (finding waiver to bar consideration of the prosecutor's repeatod reliance on biblical passages as support for the death penalty); *Bonifay v. Florida*, 680 So.2d 413, 418 n.9 (Fla. 1996) (barring claim regarding biblical references during closing in the absence of fundamental error).

157. See Part II.C.2 (discussing the prejudicial effect of religious arguments).

158. See *Giry*, 818 F.2d at 132 (reviewing an inflammatory appeal to religion under the plain-error doctrine).

159. See Part II.B.1.

160. See Wolfram, *Modern Legal Ethics* § 12.1 at 620 (cited in uote 106) (noting that appellate courts must balanco the improper argument and the effects of no sanction against the "expenditure of additional judicial, party, and witness resources").

161. *Hasting*, 461 U.S. at 508.

162. Judge Learned Hand argued that reversal was an inefficient response to improper arguments:

> That was plainly an improper remark, and if a reversal would do no more than show our disapproval, we might reverse. Unhappily, it would accomplish little towards punishing the offender, and would upset the conviction of a plainly guilty man .... [I]t seems to us that reversal would be an immoderate penalty.

United States v. Lotsch, 102 F.2d 35, 37 (2d Cir. 1939).

distinct proceeding requiring far less time, money, and effort than a trial.[163] Furthermore, the reversal of a sentence does not jeopardize the conviction.[164] Thus, the State has less at stake, solely the method of punishment. A defendant, however, has more at stake—the specific determination of life or death. Moreover, in capital cases, the Supreme Court demands the utmost protection to ensure fair sentencing.[165]

2. The Contextual Analyses Underestimate the Prejudicial Effect of Religious Arguments

As the current approaches fail to recognize the increased likelihood that improper arguments will result in unfair prejudice because of the structure and nature of the sentencing phase, the consistent failure to realize the prejudicial effect of religious arguments is even more problematic.[166] In setting forth the harmless constitutional-error rule in *Chapman*, the Supreme Court was careful to note that harmless-error rules can engender unfair results when a jury hears highly persuasive but legally forbidden arguments.[167] Nevertheless, judges often assume that such misconduct will not influence jurors.[168]

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163. See notes 134, 137.

164. See *Texas v. Mead*, 465 U.S. 1041, 1043 n.1 (1984) (Rehnquist, J., dissenting from denial of cert.) (stating that the appropriate remedy for *Witherspoon* violations of improper juror exclusion is to reverse *only* the death sentence, not the underlying conviction). See, for example, *Chambers*, 599 A.2d at 644 (reversing sentence only) and cases cited in note 166.

165. *Ramos*, 463 U.S. at 998-99.

166. If courts realized the highly prejudicial nature of improper religious arguments, they might provide remedies and sanctions within the current standards, despite the standards' other failures. See, for example, *Potts*, 734 F.2d at 536 (reversing death sentence for using excerpts from judicial decisions to justify the sentence); *Davis v. Georgia*, 429 U.S. 122, 123 (1976) (imposing automatic reversal of the death sentence for a *Witherspoon* violation of improper juror exclusion); *Vasquez*, 474 U.S. at 264 (adhering to the longstanding rule of mandatory reversal for discrimination in grand jury selection).

167. *Chapman*, 386 U.S. at 22.

168. For example, dissenting from the majority's pronouncement of a reversible-error rule for arguments relying on religious writings to support the death penalty, Jnstice McDermott in *Chambers* commented caustically: "The majority opinion is an unmerited censure of citizens called to such vast responsibility. To believe them swayed from their solemn, sworn duty by a single reference to a legal irrelevance is a presciosity that undermines the very essence of trial by jury." *Chambers*, 599 A.2d at 644. See also *Socony-Vacuum Oil Co.*, 310 U.S. at 242 ("It is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately.").

Note the irony and fallacy in Justice McDermott's strong assertions that the jurors will not be improperly influenced by the prosecutor's religious argument. He bases his argument on the jurors' "solemn, sworn duty." Disregarding the religious overtones in the word "solemn," in all likelihood the sworn duty was an oath taken on the Bible, the same "legal irrelevance" from which the prosecutor improperly drew language to support the imposition of the death penalty.

Religious arguments, however, are particularly powerful and are likely to resonate with most jurors.[169] Prosecutors often draw support from the Bible for imposing the death penalty.[170] The average juror,[171] and even the legal system, holds the Bible sacrosanct and accords it great weight in influencing behavior.[172] Yet because they cannot ascertain the arguments' actual influence on jurors,[173] judges

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See *State v. Smith*, 94-GS-44-906, 907 at 5081 (S.C. Gen. Sess. 1995) (transcript of record) ("This Bible has sat on that desk for the whole trial . . . [a]nd each one of you put your hand on it before voire dire . . . .").

Justice McDermott's confidence notwithstanding, the Supreme Court in *Marshall v. United States*, 360 U.S. 310 (1959), refused to consider dispositive each juror's statement that he would remain free from the influence of the many news accounts regarding the case. Id. at 312.

169. Ninety-five percent of Americans profess belief in God, and 70% are members of a church or synagogue. Perry, 29 Loy. L.A. L. Rev. at 1421 (cited in note 3). American leaders realize the enormous influence of religion and its persuasive character. Every inaugural address, with the exception of Washington's second, has contained a reference to God. Time, *Hail to the Heavenly Chief* 16 (Jan. 20, 1997). See also notes 5, 172 (noting religion's powerful effect).

170. See, for example, *Bennett*, 1996 U.S. App. LEXIS 21003 at *21-22; *Sandoval*, 841 P.2d at 883.

171. In *Jones* the district court noted the great potential of religious arguments to influence "the average juror" and "laymen." 706 F. Supp. at 1559-60. It is an important distinction as it exposes another problem with the current standards of review which often "places the appellate court in the jury box." Gershman, *Prosecutorial Misconduct* § 13.2(a)(1) at 13-6 (cited in note 4) (quoting Singer, *Forensic Misconduct By Federal Prosecutor—and How It Grew*, 20 Ala. L. Rev. 227, 232 (1968)). Judges maintain a focus on the law, while the judge's instructions on the law leave jurors with substantial discretion and are not likely to prevent or cure any prejudice. See Part II.C.1. Chief Justice Taft expressed the difference:

> The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man . . . which might lead him not to hold the balance nice, clear, and true between the state and the [defendant] denies the latter due process of law.

Estes v. Texas, 381 U.S. 532, 543 (1965) (quoting Chief Justice Taft in *Tumey v. Ohio*, 273 U.S. 510 (1927)).

172. See *Jones*, 706 F. Supp. at 1559-60 ("To the average juror . . . the Bible is an authoritative religious document [and] a specific, extra-judicial code of conduct . . . which would likely carry great weight with laymen and influence their decision."); *Sandoval*, 841 P.2d at 888 (Mosk, J., dissenting) (stating same and citing *Jones*).

The judicial system relies upon the oaths of witnesses and jurors taken on the Bible to influence them to properly perform their respective duties. Federal Rule of Evidence 603 provides: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and awaken the witness' mind with the duty to do so." Fed. R. Evid. 603. See *Smith*, 94-GS-44-906, 907 at 5081 (noting that each juror and witness had taken an oath on the Bible).

173. See *Jones*, 706 F. Supp. at 1559 (stating that the court cannot ascertain the effect of the Bible that the court expressly allowed in the jury room). See also *Vasquez*, 474 U.S. at 263 (comparing the improper selection of the petit jury and a jury exposed to prejudicial publicity with racial discrimination in the selection of the grand jury and stating that "[w]hen constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court [cannot] . . . evaluate the resulting harm"). For a discussion of the constitutional nature of improper religious arguments, see Part III.B.3.

often justify excusing biblical references by characterizing the references as innocuous.[174]

What these judges fail to recognize when excusing improper religious remarks is that the prejudice from improper religious arguments is unique[175] and far more difficult to overcome than prejudice from other improper influences.[176] Religions generally, and Christianity and Judaism in particular,[177] provide moral principles to guide their adherents' actions, and the jurors in a capital sentencing face "the ultimate moral decision."[178] Furthermore, the propriety of death as a form of punishment engenders a debate fraught with religious arguments,[179] with many principles and beliefs coming from authoritative religious texts.[180] Incorporating these principles into a jury argument jeopardizes the proper decision-making process of jurors,[181] for they may feel morally and spiritually compelled to vote a particular way.[182] For example, the prosecutor in *Sandoval* argued:

> Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause

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174. In *Chambers* the prosecutor argued in the penalty phase closing that the defendant had taken a life and "[a]s the Bible says, 'and the murderer shall be put to death.'" 599 A.2d at 643. Justice McDermott, dissenting, argued that "[t]his was not emotional oratory calling for divinely motivated retribution; rather it was a reference to one of the texts from which our social system has evolved." Id. at 644 (McDermott, J., dissenting).

The Eighth Circuit's characterization of the presecutor's closing argument in the guilt phase of a capital felony murder is also exemplary: "The prosecutor did not use the Bible to suggest that the jury apply divine law as an alternative to the law of Arkansas. Instead, the prosecutor simply resorted to Proverbs for a more poetic version . . . ." *Bussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994). See also *People v. Williams*, 45 Cal.3d 1268, 756 P.2d 221, 255 (1989) ("In context the prosecutor's words were part of a short and fairly neutral 'history' of capital punishment . . . .").

175. See *Jones*, 706 F. Supp. at 1558 (comparing references to the Bible with those to other texts).

176. See *Chambers*, 599 A.2d at 644 (stating that the prejudicial effect of improper religious arguments "cannot be cured").

177. See, for example, Exodus 20:1-17 (the Ten Commandments).

178. Luginbuhl and Howe, 70 Ind. L. J. at 1161 (cited in note 117).

179. See *Furman*, 408 U.S. at 296 (describing the "longstanding and heated controversy" as an "essentially moral conflict").

180. For example, the Bible calls for capital punishment for many crimes and contains many passages expressly disparaging mercy, the most important element of the jury's discretion which favors a capital defendant. *Jones*, 706 F. Supp. at 1559-60.

181. See Part III.A (noting the Eighth Amendment's requirement of guidance in capital sentencing).

182. See *Chambers*, 599 A.2d at 644 (stating that the invocation of religious arguments destroys the objectivity and impartiality of the jury).

Courts and attorneys may exclude for cause prospective jurors who feel compelled to vote a certain way at the outset. *Lockhart v. McCree*, 476 U.S. 162, 173 (1986).

> of fear for good behavior, but for evil. Do you want to have no fear or authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an Avenger who brings wrath upon one who practices evil.[183]

Jurors may also feel that they are somehow less responsible for the sentence, that religious authority mandates a decision, and that the decision is, therefore, out of their hands.[184] For example, in *Chambers* the prosecutor argued in closing at the penalty phase that the defendant had taken a life and "[a]s the Bible says, 'and the murderer shall be put to death.' "[185]

It is well-settled that religion should play no part in sentencing.[186] Because the force of these improper religious arguments is so powerful, courts excusing these arguments based on their context is particularly scurrilous.[187] Given the power of these arguments, courts should entertain the opposite presumption from their inability to ascertain the arguments effect and refuse to excuse the improper religious arguments.[188] This presumption should hold true whether the argument at issue, if a "religious argument,"[189] is a lengthy one as in *Sandoval* or a sentence or two as in *Chambers*. When a defendant's life is at stake, it is not too much to require that the jury determine the penalty free of prejudice from a prosecutor's improper religious arguments.[190]

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183. *Sandoval*, 841 P.2d at 883.

184. *Wrest*, 839 P.2d at 1028 ("[P]rosecutor's reference to Old Testament support for capital punishment . . . tends to diminish the jury's sense of responsibility for its verdict.").

185. *Chambers*, 599 A.2d at 644.

186. *Jones*, 706 F. Supp. at 1559.

187. See id. at 1560 (stating that the effect of the Bible in the jury room may be highly prejudicial to the capital defendant and undermine the confidence in the reliability of the jury's decision); *Sandoval*, 841 P.2d at 891 (Mosk, J., dissenting) (stating that the improper religious argument raises a reasonable possibility of unfair prejudice in the outcome and, therefore, cannot be harmless beyond a reasonable doubt).

188. See notes 168, 174 and accompanying text for the current presumption of no unfair prejudice and Part III.B.3 for further support of a presumption of prejudice.

189. See Part III.A.

190. See noto 124.

III. ANALYSIS OF THE PER SE REVERSIBLE-ERROR RULE: WHAT IT BARS AND WHY

A. What the Rule Bars

Courts should enforce a per se reversible-error rule when prosecutors use religious arguments in the penalty phase of capital cases to justify, support, or mandate the imposition of the death penalty. "Religious argument" includes the use of religious allegorical references, allusions, or doctrine relating to the death penalty in the abstract or in a particular case.[191] The rule mandates reversal of the sentence only and provides a remand for a new penalty hearing.[192] It

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191. Though the arguments differ in degree, they do not differ in kind; each appeals to the jurors' religious principles to justify, support, or mandate a death sentence. See Part II.C.2 (discussing the naturo of the prejudice). See also note 213 (giving examples of improper arguments that the rule does not bar).

Some examples of what the rule bars follow: (1) "I could talk te you about Scripture and verse from the Old Testament that supports capital punishment. But I'm not." *Wrest*, 839 P.2d at 1028; (2) stating that the defendant had been "sent away" and had "the mark of Cain," and exhorting the jury to "render unto Caesar what is Caesar's and unto God what is God's," *Jackson*, 920 P.2d at 1299; (3) "Thero is no retribution. This is simply what is due the defendant. This is his day of atonement and his day of atonement will be today." *Bailey*, 826 F. Supp. at 816; (4) "[Defendant] has taken a life. As the Bible says, 'and the murderer shall be put to death." *Chambers*, 599 A.2d at 643; (5) "He who sheddeth the blood of man, by man shall his blood be shed." *Todd v. State*, 261 Ga. 766, 775, 410 S.E.2d 725, 734 (1991); (6) "Let's get down te what this trial and what the laws are all about and this is retribution. An eye for an eye. A tooth for a tooth. Right there in the Bible .... As you hear that word mercy thero is one phrase from the Sermon on the Mount that I want you te hear at the same time .... And you drank his whole and entire being and see if you can find a grain of mercy extended to anybody." *Greene*, 469 S.E.2d at 146-47; (7) quoting from the Old Testament, the Book of Numbers, to the effect that "when a man kills out of hatred, '[t]he avenger of blood may execute the murderer on sight ... you [the jurors] have to act as the avenger of blood on behalf of the [victim's] family ... [and] they ars entitled to an avenger of blood acting for them." *Estes*, 744 S.W.2d at 426; (8) for extended and particularly egregious examples, see note 87 (quoting *Bennett*, 1996 U.S. App. LEXIS 21003 at *21-22); *Wash*, 861 P.2d at 1135 n.18. See also Part II.B (providing greater discussion of some examples).

192. See note 164. Courts may reverse a sentence and remand without upsetting the underlying conviction. For example, in *Chambers* the court reversed the death sentence and remanded. *Chambers*, 599 A.2d at 644. Upon rehearing, a new jury returned another death sentence. *Commonwealth v. Chambers*, 546 Pa. 370, 378, 685 A.2d 96, 100 (1996). Note that due process forbids the State from introducing the defendant's original sentence into the new proceeding. See *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969) (forbidding mention in the sentencing proceeding of the defendant's successful attack on the first conviction).

If the error survives in the trial court, but the defendant receives a life sentence, an appellate court should not invoke the rule if the defendant seeks a lesser punishment than the one given. The prejudice with which the rule is concerned did not harm the defendant, and thero would be little deterring effect. Furthermore, the defendant is "acquitted" from the death penalty because the Double Jeopardy Clause of the Fifth Amendment prohibits the State from subjecting a defendant who received a life sentence in a proceeding that was reversed due to the possibility of a death sentence in the new proceeding. *Burlington v. Mississippi*, 451 U.S. 430, 446 (1981).

should apply to all courts, and on direct and habeas review, for all courts suffer the shortcomings of the current standards.[193] This per se reversible-error rule has related goals. First, it aims to maintain the secular law, embodied in the trial judge's instructions, as the principle guide of sentencing discretion.[194] Second, the rule seeks to prevent appeals to religion from lessening the jurors' sense of public responsibility for the sentencing determination.

The Eighth Amendment of the United States Constitution requires that the secular law of the jurisdiction narrowly channel and circumscribe a capital jury's sentencing discretion.[195] The jury should base the sentence on the court's instructions, not on any extraneous authority.[196] Accordingly, the Supreme Court of Pennsylvania established that it is reversible error when prosecutors rely upon a religious writing to support a death sentence.[197] Though the Pennsylvania prohibition is a bit narrower than the proposed rule,[198] the court's description of the type of argument the rule proscribes is instructive:

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193. See Parts II.B and II.C (analyzing the current standards). The rule focuses on reversals and therefore on appellate courts; however, the rule applies just as forcefully to trial courts. The rule encourages trial courts to take precautions prior to the proceeding and to declare a mistrial for sentencing procedures tainted by improper religious arguments in order to avoid reversal and the waste of resources. See Part III.B.4 (discussing the duties and powers of trial courts). When a trial court discharges a capital sentencing jury without a verdict, principles of double jeopardy do not bar resentencing if the mistrial was granted for legal necessity or with the consent of the defendant. *Wash*, 861 P.2d at 1126.

Federal courts and the judicial conduct organizations of each state should take the lead in adopting the rule. See note 322 (discussing the insulation of the federal bench from public pressures); Gershman, 53 U. Pitt. L. Rev. at 454 (cited in note 127) (encouraging judicial conduct organizations to take the lead in setting standards by which the judiciary can effectively handle prosecutorial misconduct).

194. This aim adheres to the eighth amendment requirement of legal guidance. See text accompanying notes 195 and 201.

195. *Jones*, 706 F. Supp. at 1559. See generally *Godfrey*, 446 U.S. at 428.

196. *Sandoval*, 841 P.2d at 883-84 (referring to the Bible).

197. *Chambers*, 599 A.2d at 644.

198. The rule advanced here is not limited by the court's language in *Chambers*. First, the bar should not apply solely to reliance upon religious writings. Though the *Chambers* court broadened its holding with "in any manner," the tie to writings could lead to confusion and may not prohibit some of the targeted prejudicial arguments. Id. Further, the "religious argument" need not necessarily be a "*deliberate*[ ] *attempt*[ ] to destroy the objectivity or impartiality of the finder of fact." Id. at 643 (emphasis added). Nor does the argument have to cause or tend to cause the verdict to be "a product of emotion rather than reflective judgment." Id. Indeed, using religion to justify imposing the death penalty can be a product of reflective judgment rather than emotion. In fact, jurors certainly may rely upon religious principles in ultimately reaching a decision; however, the prosecuter may not interject religion as a consideration consistent with the Eighth Amendment. See generally *Jones*, 706 F. Supp. at 1560. Furthermoro, the rule does not excuse all allegorical roferences, as the Pennsylvania court's language implies that its rule does. *Chambers*, 599 A.2d at 644.

"[T]his [religious] argument by the prosecutor advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment."[199] Though the California Supreme Court did not reverse the penalty judgment in *Sandoval*, it stated the applicable principle: "[The prosecutor] may not invoke . . . higher or other law *as a consideration* in the jury's sentencing determination."[200]

In addition, eighth amendment jurisprudence assumes that jurors in capital sentencing determinations proceed with recognition of the gravity of their task; anything that upsets this assumption renders the proceeding insufficiently reliable under the Eighth Amendment.[201] Accordingly, the Supreme Court forbids prosecutors from making arguments that tend to lessen a juror's sense of responsibility.[202] As the above excerpts from *Sandoval* and *Chambers* demonstrate, interjecting religious arguments into the sentencing process tends to lessen the jurors' senses of responsibility, upsetting this constitutional requirement.[203]

At the risk of blurring the definition of "religious argument" but careful not to overreach, the proposed rule does not demand reversal for all improper appeals to religion.[204] Again, it prohibits using

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199. *Chambers*, 599 A.2d at 644.

200. *Sandoval*, 841 P.2d at 883 (emphasis added). Though much of the courts' rhetoric from analyzing the prosecutorial misconduct under the other standards would apply to the per se reversible-error rule, the per se rule's prohibition is more encompassing because it bars using religion as, among other things, a justification for a death sentence and not just as a different higher law. As the court in *Sandoval* stated, the rule bars the interjection of religion *as a consideration*. Id. Other courts' language illustrates the distinction, forbidding arguments that "suggest that the jury apply divine law *as an alternative* to the law [in the instructions]." *Bussard*, 32 F.3d at 324 (emphasis added). See also *Wrest*, 839 P.2d at 1028 (finding the argument improper because it "impl[ies] that another, higher law *should be applied* in capital cases, displacing the law in the court's instructions") (emphasis added).

201. *Caldwell*, 472 U.S. at 330.

202. See generally id.

203. See Part II.C.2. See also *Sandoval*, 841 P.2d at 887-88 (Mosk, J., dissenting) (listing constitutional violations and citing *Wrest* for the proposition that the challenged argument "tends to diminish the jury's sense of responsibility").

204. Distinguishing between impermissible religious arguments and permissible references is a difficult task. See *Sandoval*, 841 P.2d at 889 (Mosk, J., dissenting) (chastising the majority for its attempt to distinguish between permissible references to 'religion' and impermissible references to 'religious law'). See also Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 San Diego L. Rev. 677, 679-86 (1993) (noting the difficulty and attempting to define "religious argument"). However, as the Court stated in *Donnelly*, "constitutional line drawing [for prosecutorial misconduct] is necessarily imprecise." 416 U.S. at 645. The per se reversible-error rule diminishes the imprecision in one respect, concerning how prejudicial the error is, and, in another respect, the nature of the rule will likely force prosecutors to "err" on the side of caution, which should prevent many close calls. See generally Part II.B.2 (noting that the failure to sanction invites similar tactics and contributes to the incidence of misconduct).

religion to justify, support, or mandate capital punishment.[205] Comments concerning a particular defendant's religious beliefs, practices, or lack thereof, do not necessarily qualify. Though it is improper and may constitute misconduct,[206] prosecutors may use allegorical references or personal attacks that are relevant to the death penalty solely because the penalty is a sentencing consideration. Two examples[207] of such allegorical references are (1) a prosecutor arguing that "the victim's house was not his castle but his 'crucifixion block,' "[208] and (2) a prosecutor claiming that "[t]here must be a special place in hell for anyone who can [perform the acts that defendant has]."[209] An example of a personal attack is a prosecutor's characterization of the defendants as " 'despicable' people to whom the Bible 'doesn't mean anything.' "[210] The comments in no way invoke biblical authority for capital punishment. At worst, they are inflammatory statements targeting passion or prejudice,[211] not reason, rationality, or a sense of control and responsibility.[212] They are not "religious arguments."[213]

B. Arguments in Favor of the Rule

Not only are the current standards of review inappropriate for religious arguments in capital sentencing procedures,[214] fundamental

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205. For examples, see note 191.

206. Gershman, *Prosecutorial Misconduct* § 10.2 at 10-6 (cited in note 4). "A prosecutor must not use arguments calculated te inflame the passions or projudices of the jury." Id.

207. The examples are for the sake of illustration. The first argument occurred in the closing of the guilt phase of a capital case, and the second occurred in a trial for mail fraud.

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

209. *United States v. Brewer*, 807 F.2d 895, 898 (11th Cir. 1987).

210. *Hooks v. State*, 416 A.2d 189, 204 (Del. 1980).

211. Compare with Gershman, *Prosecutorial Misconduct* § 10.2(e) at 10-17, 10-18 (cited in note 4) (collecting cases).

212. See Part II.C.2 (describing the powerful effect of religious arguments).

213. The examples should elucidate not only what the rule does not har hut also the nature of the prejudice the rule seeks to eradicate, which, in turn, should help clarify what misconduct the rule bars. See also Part II.C.2 (discnssing the nature of the prejudice). For more examples of inflammatery appeals that the rule does not address, but may have the fortuiteus effect of significantly discouraging, see *McGee*, 1990 WL 254349 at 5 n.6 ("[Defendant] had time . . . to stand . . . and pray to the good Lord to give him strength not to pull the trigger, and he did not."); *Giry*, 818 F.2d at 132 (arguing that defendant's denial of intent "[s]ounds like Peter who for the third time denied Christ"); *State v. Marks*, 201 N.J. Super. 514, 534, 493 A.2d 596, 606 (1985) (comparing with Judas the Jewish defendant on trial for the assault and robbery of his employer).

214. See Part II.C.

principles of American jurisprudence suggest that courts should take a different approach.

1. A Capital Defendant Is a Unique Individual Before the Law

Death is a unique punishment in the United States[215] and the death penalty demands "a degree of care . . . that can be described only as unique."[216] The profound gravity of the sentence demands a high degree of scrutiny of the proceedings.[217] Current safeguards generally include a bifurcated sentencing proceeding to prevent concerns relevant at either the guilt or sentencing phase from infecting deliberations during the other.[218] Further, the imposition of death calls for the jury to base its decision on aspects of the particular defendant's character[219] and to "treat each defendant . . . with that degree of respect due the uniqueness of the individual."[220] In fact, the jury must find one or more aggravating circumstances[221] before

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215. *Furman*, 408 U.S. at 286-91 (Brennan, J., concurring), 305-06 (Stewart, J., concurring). "[T]he Court [has] acknowledged what cannot fairly be denied—that death is different from all other sanctions in kind rather than degree." *Woodson*, 428 U.S. at 303-04. In fact, no other punishment has incited public passion as the death penalty has. Id. at 296. Currently, 12 states and the District of Columbia reject capital punishment, leaving 38 states and the federal government with statutory provisions for the death penalty. David A. Kaplan, *Life and Death Decisions*, Newsweek 28, 28-29 (June 16, 1997).

An example of capital punishment's unique status in the law is the Double Jeopardy Clause's prohibition on imposing death upon resentencing of a defendant who received a less severe sentence in the first hearing. See note 192. In all other cases, a defendant is subject to a harsher penalty upon resentencing. *Chaffin v. Synthcombe*, 412 U.S. 17, 24 (1973).

216. *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987). Several Supreme Court Justices have expressed the opinion that courts should afford capital defendants greater safeguards and all benefits of the doubt. Justice Jackson, speaking for the Court, stated that "[w]hen the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law and order to give a doubtfully condemned man another chance." *Stein v. New York*, 346 U.S. 156, 196 (1953). In a majority opinion, Justice Reed stated in *Andres v. United States*, 333 U.S. 740 (1948), that "[i]n death cases doubts . . . should be resolved in favor of the accused." Id. at 752. Justice Harlan offered his view: "I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death." *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring).

217. "The qualitative difference of death from all other punishments requires greater scrutiny of the capital sentencing determination." *Ramos*, 463 U.S. at 998-99. See also Allen, 70 Iowa L. Rev. at 320 (cited in note 20) (describing the "extraordinary efforts of the Supreme Court and many state and federal courts to minimize the influence of caprice, poverty, and bias in awarding the death penalty . . . [as] herculean").

218. *McCleskey*, 481 U.S. at 313 (describing the safeguards); *Sumner v. Shuman*, 483 U.S. 66, 85 n.13 (1987) (describing the purposes of the bifurcated proceedings).

219. *Woodson*, 428 U.S. at 303.

220. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

221. *McCleskey*, 481 U.S. at 313. Typical aggravating factors include (1) the defendant's record, (2) the murder being committed to avoid capture, (3) the murder being committed for pecuniary gain, and (4) actions which pose a threat to many people. Luginbuhl and Howe, 70

recommending a death sentence and must consider as a mitigating factor anything the defendant believes warrants a sentence less severe than death.[222] Mandatory state supreme court review is also common.[223] Above all, sentencing procedures must not subject any capital defendant to a risk that the jury will decide in an arbitrary and capricious manner.[224] Consequently, adequate procedural safeguards must exist to ensure the reliability of the determination that death is the appropriate punishment for a particular individual.[225]

To ensure reliability, a state must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' "[226] Religious law does not conform to these procedural requirements. At best, it justifies the penalty in the abstract, without consideration of the particular defendant's character.[227] Moreover, a court cannot know a religious argument's effect

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Ind. L. J. at 1179 (cited in note 117). For other examples of aggravating circumstances, see the list of eight that the Model Penal Code proposes, enumerated in *Gregg*. 428 U.S. at 193 n.44.

222. *Lockett*, 483 U.S. at 604.

> [A] statute that prevents the sentencer . . . from giving independent mitigating weight to aspects of the defendant's character and record and te the circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the . . . Eighth and Fourteenth Amendments.

Id. at 605. This requirement does not preclude the judge from excluding proffered factors as irrelevant if they do not bear on the defendant's character, prior record, or the circumstances of the offense. Id. at 605 n.12.

Jurors typically consider in mitigation (1) the defendant's age, (2) whether the defendant's mental state did not allow him to conform his behavior to the law, (3) whether the defendant's role in the murder was minor, and (4) whether there is a history of child abuse and neglect. Luginbuhl and Howe, 70 Ind. L. J. at 1179 (cited in note 117). For suggested mitigating considerations, see the list of eight that the Model Penal Code proposes, enumerated in *Gregg*, 428 U.S. at 193 n.44.

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Supreme Court reversed the sentence because the court refused consideration of the defendant's unhappy upbringing and emotional disturbance. Id.

223. *McCleskey*, 481 U.S. at 313.

224. *Godfrey*, 446 U.S. at 427 (citing *Furman*, 408 U.S. at 238).

225. *Woodson*, 428 U.S. at 305.

226. *Godfrey*, 446 U.S. at 428 (citations omitted).

227. For example, in *Estes v. Commonwealth*, the prosecutor quoted from the Old Testament, from the Book of Numbers, that "when a man kills out of hatred, '[t]he avenger of blood may execute the murderer on sight.' " *Estes*, 744 S.W.2d at 426. See *Chambers*, 599 A.2d at 643 ("As the Bible says, 'and *the murderer shall* be put to death.' ") (emphasis added). See also *Jones*, 706 F. Supp. at 1559 (classifying the Bible as a "specific, extra-judicial code of conduct . . . which *mandates* death for numerous offenses . . . and contain[s] enjoiners of mercy and forgiveness") (emphasis added). See generally Part II.C.2.

on the jury[228] and therefore must presume that the argument prejudiced the defendant.[229] Allowing a death sentence to stand despite the prosecutor's interjection of religion into the sentencing consideration does not afford the capital defendant the warranted and required degree of reliability in, and scrutiny of, the sentencing process.[230]

2. Prosecutors Have a Duty to Seek and Protect Justice

Prosecutors may make closing arguments that reach beyond a mere summation of the evidence.[231] In fact, courts recognize a "heat of argument" justification for some improper remarks;[232] however, this justification extends no invitation or approval.[233] Rather, prosecutors must not succumb to temptations or tendencies to make improper arguments,[234] particularly in capital murder cases.[235]

The Supreme Court clearly pronounced that prosecutors, as representatives of the sovereign,[236] must obey a higher standard of professional responsibility.[237] The duty to seek justice binds prosecu-

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228. See note 258. For example, in *Sandoval* the California Supreme Court gave quite opposite definitions of what was a "reasonable" inference of the prejudicial effect. In *Sandoval*, the jurors indicated a six to six split after four days of deliberation. One day later they returned verdicts of life without parole on three of the counts and death on one. The majority found "no reasonable possibility that the jury would have reached more favorable verdicts." *Sandoval*, 841 P.2d at 884. Justice Mosk disagreed, stating that "[a] contrary assumption . . . seems more reasonable on this record: the impropriety's force actually determined the course of the deliberations and thereby prevented four early verdicts of life." Id. at 891 (Mosk, J., dissenting).

229. See Part III.B.3.

230. Id. (describing the eighth amendment requirements).

231. *Hooks*, 416 A.2d at 204. See *Chambers*, 599 A.2d at 643 (discussing the guidelines for reviewing prosecutorial misconduct and stating that prosecuters must have "reasonable latitude" in arguing to the jury). Standard 3-5.8(a) of the ABA Standards for Criminal Justice states: "In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record." ABA Standards for Criminal Justice, Standard 3-5.8(a).

232. *Young*, 470 U.S. at 10 (quoting *Dunlop v. United States*, 165 U.S. 486, 498 (1897)).

233. See id. at 12 (discussing the "invited response" doctrine). For further discussion of the invited response doctrine in relation to religious arguments, see Part IV.B.

234. *Marks*, 493 A.2d at 606. Justice Jackson described the "good prosecuter":

> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Robert H. Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminol. 3, 6 (1940).

235. See *Donnelly*, 416 U.S. at 642 ("[I]n a first degree murder case there must be some duty on a prosecutor to be thoughtful.").

236. Prosecutors are public officials. ABA Standards for Criminal Justice, Standard 3-2.1.

237. *Berger*, 295 U.S. at 88. The Court originally set this standard for United States Attorneys. However, the duty arises from the Federal Constitution and applies to state prosecutors through the Due Process Clause of the Fourteenth Amendment. *Georgia v. McCollum*, 505 U.S. 42, 50 (1992).

tors to strive equally for the commensurate goals of vindicating the people's legal rights, and doing so with a fair trial.[238] The duty is not "to tack as many skins of victims as possible to the wall."[239] Furthermore, the average juror believes that the prosecutor will observe these obligations faithfully. The average juror, therefore, will accord much weight to the prosecutor's arguments, even though they may be improper.[240] Prosecutors must not interject considerations that would divert jurors from their duty of deciding cases based on the law.[241] As the Supreme Court stated in *Berger v. United States*,[242] a prosecutor "may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones."[243]

3. Courts Must Presume Prejudice and Should Reverse

Generally, reversal requires prejudice.[244] Courts must presume prejudice, however, when constitutional error calls into question the objectivity of the adjudicator.[245] Without this protection, no criminal punishment can be "fundamentally fair."[246] In *Estes v. Texas*,[247] the

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238. *Berger*, 295 U.S. at 88.

239. *Donnelly*, 416 U.S. at 648-49 (Douglas, J., dissenting). "The duty of the prosecutor is to seek justice, not merely to convict." ABA Standards for Criminal Justice, Standard 3-1.2(c). However, certain pressures may dictato to the contrary. See Part II.B.2 (stating some of a prosecutor's motivations and pressures).

240. *Berger*, 295 U.S. at 88.

241. See ABA Standards for Criminal Justice, Standard 3-5.8(d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.").

242. 295 U.S. 78 (1935).

243. Id. at 88. The full, oft-cited language reads as follows:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereiguty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculatsd to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id.

244. *Sandoval*, 841 P.2d at 890 (Mosk J., dissenting) (noting the general rule for California law and the United States Constitution, citing *Rose*, 478 U.S. at 576-79).

245. *Vasquez*, 474 U.S. at 263. See, for example, *Tumey*, 273 U.S. at 535 (requiring automatic reversal where judge was an impartial adjudicator). The harmless-error doctrine presupposes an impartial adjudicator. *Rose*, 478 U.S. at 578.

246. *Young*, 478 U.S. at 577-78.

247. 381 U.S. 532 (1965).

Supreme Court noted that it ordinarily requires a showing of prejudice for due process claims.[248] According to the Court, however, some procedures inherently lack due process because of the likelihood of prejudice.[249] A hearing without a fair tribunal constitutes such a procedure:[250] Failure to ensure the impartiality of a jury "violates even the minimum standards of due process."[251]

A prosecutor's religious argument in the sentencing phase of a capital case is an example of constitutional error that jeopardizes the objectivity and impartiality of the jury and thus demands that courts presume prejudice. The religious argument violates the Eighth Amendment to the United States Constitution and the Due Process Clauses of the Fifth and Fourteenth Amendments as well.[252] Prosecutors are officers of the State;[253] therefore, constitutional restrictions apply to their official actions.[254] The eighth amendment prohibition of cruel and unusual punishment requires that the secular law of the jurisdiction guide a capital jury's sentencing determination with specific and detailed directives.[255] Submitting religion for the

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248. Id. at 542-43.

249. Id.

250. Id. at 543.

251. *Irvin*, 366 U.S. at 722.

252. The Eighth Amendment is made applicable to the states through the Fourteenth Amendment. *Robinson*, 370 U.S. at 666. This Note analyzes the errors as violations of the Eighth Amendment and of Due Process. Improper religious arguments may violate the Sixth Amendment right to a trial "by an impartial jury." United States Const., Amend. VI. See *DeMille*, 756 P.2d at 85 (Stewart, J., dissenting) ("Verdicts decided on some other basis [than the law presented to it] make the constitutionally guaranteed right to trial by jury a nullity."); *Jackson*, 920 P.2d at 1300 n.20 (finding claims under the Fifth, Sixth, Eighth, and Fourteenth Amendments without substance for want of objections). *Jones* also lends support. In *Jones* the trial judge approved a juror's request in open court to take a Bible into the jury room for the sentencing deliberations in a capital case. *Jones*, 706 F. Supp. at 1558. On petition for writ of habeas corpus, the District Court reversed the death sentence because allowing the Bible into the jury room, with court-implied approval, violated the Sixth Amendment. Id. at 1560. The right to an impartial jury is guaranteed by both the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, and by principles of due process. *Turner v. Virginia*, 476 U.S. 28, 36 n.9 (1986).

Religious arguments may also violate the Establishment Clause of the First Amendment. *Sandoval*, 841 P.2d at 887-88 (Mosk, J., dissenting).

253. *McCollum*, 505 U.S. at 50; *Donnelly*, 416 U.S. at 649 (Douglas, J., dissenting). For purposes of this Note, the term "prosecutor" includes United States Attorneys who are officers of the federal government and whose actions the United States Constitution similarly restricts. See *Berger*, 295 U.S. at 88.

254. *McCollum*, 505 U.S. at 50. See also note 363 and accompanying text (discussing the inapplicability of the constitutional provisions to the defense attorney).

255. *Godfrey*, 446 U.S. at 427. See Part III.B.1 (discussing the unique requirements for the imposition of death sentences). The Eighth Amendment also requires that statutes provide standards preventing the arbitrary and capricious imposition of the death penalty. *Furman*, 408 U.S. at 238.

jury's consideration frustrates the constitutional requirement of guidance from the secular law.[256]

Furthermore, prosecutorial misconduct that lessens a capital jury's sense of its "awesome responsibility" violates the eighth amendment requirement of reliability in the sentencing determination.[257] Because a court cannot properly say that the State's religious arguments had no effect on the sentencing decision,[258] the proceeding was not fundamentally fair and the sentence must be reversed.[259]

Even if courts do not presume prejudice from the constitutional error, the likelihood of prejudice from a prosecutor's religious argu-

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256. See *Jones*, 706 F. Supp. at 1559; *Sandoval*, 841 P.2d at 888 (Mosk, J., dissenting). Generally, courts reverse when a jury relies on, or there exists a reasonable possibility of reliance on, other sources for purposes relevant to the legal issue. See *Tennessee v. Harrington*, 627 S.W.2d 345, 350 (Tenn. 1981) (finding reversal of death sentence warranted when the foreman read Biblical passages te the jury during deliberations); *Alvarez v. People*, 653 P.2d 1127 (Colo. 1982) (reversing where the jury used a dictionary); *Moore v. State*, 172 Ga. App. 844, 324 S.E.2d 760 (1984) (reversing when the jury consulted a *Readers' Digest* article).

257. *Todd*, 410 S.E.2d at 733-34. See *Caldwell*, 472 U.S. at 330. In holding that the presecutor's improper remarks about review of death sentences mandated reversal, the Court in *Caldwell* stated the following:

> This Court has always premised its capital punishment decisions on the assumption a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

Id. at 341. See Part II.C.2 (discussing how improper religious arguments tend to lessen jurors' sense of responsibility).

258. In *Jones* the court found that it could not ascertain the effect the Bible's presence in the jury room had on the deliberations. *Jones*, 706 F. Supp. at 1559. Though the court could have reasonably assumed that the Bible's presence influenced the jury to approach their task with the appropriate solemn attitude, the court held that it could not determine the effect and, therefore, that the Eighth Amendment required reversal of the sentence. Id. It is not reasonable to assume that a prosecuter's religious arguments have a less prejudicial effect when in *Jones*, the jurors may not have even opened the Bible to access similar passages. See *Vasquez*, 474 U.S. at 263 ("When constitutional error calls into question the objectivity of those charged with bringing a defendant te judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm.").

A court cannot deem the constitutional error harmless when it cannot ascertain the impact on the jury's decision. Id. On appeal, courts must declare "confidently" that an error is harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. Even on the more restrictive habeas review, courts must grant the writ where they cannot ascertain whether the error had a substantial and injurious effect. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995). For examples of errors requiring reversal, see notes 259, 261, 263, 264.

259. See *Caldwell*, 472 U.S. at 341 (holding that the prosecutor's impreper remarks about review of death sentences could not be said to have had no effect, and, therefore, the eighth amendment requirement of reliability mandated reversal of the sentence). In *Harrington*, the Supreme Court of Tennessee found that error required reversal of the death sentence when the foreman read Biblical passages to the jury during deliberations. *Harrington*, 627 S.E.2d at 350.

ments mandates reversal. Because courts cannot ascertain the effect of the arguments, which calls into question the objectivity and impartiality of the jury,[260] the sentencing procedure inherently lacks due process.[261] Despite characterizing forensic misconduct as ordinarily curable "trial errors,"[262] the Supreme Court has required reversal for other types of improper prosecutorial arguments that jeopardized the objectivity of a capital jury.[263] On more than one occasion, the Eleventh Circuit Court of Appeals has reversed a capital sentence on due process grounds when the prosecutor read excerpts from judicial decisions to support a death sentence.[264] The court reasoned that the excerpts discouraged mercy and, whether attributed to the state supreme court or to a legal scholar,[265] tended to lessen the capital jury's sense of responsibility by conveying a message that the jurors had a legal duty to vote for death.[266] The quotations also frustrated the trial judge's provision of the necessary guidance in the instructions on the law.[267] The court based its conclusions on the likelihood that

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260. See Part II.C.2.

261. See *Estes*, 381 U.S. at 542-43; *Harrington*, 627 S.E.2d at 350 (finding reversal of death sentence warranted because the foreman read Biblical passages to the jury during deliberations). See also note 124.

262. *Brecht*, 507 U.S. at 629.

263. See, for example, *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (holding that the prosecutor's references to defendant's previous felony conviction that had been reversed violated the Eighth Amendment and required reversal). See also *Satterwhite v. Texas*, 486 U.S. 249, 260 (1988) (reversing for the prosecutor's use of a psychiatrist's testimony concerning the future dangerousness of defendant). The Court reversed a conviction where the prosecutor deliberately misrepresented evidence in argument to the jury. *Miller v. Pate*, 386 U.S. 1, 6 (1967).

264. *Wilson v. Kemp*, 777 F.2d 62, 627-28 (11th Cir. 1985) (excerpts from *Eberhart v. State*, 47 Ga. 598 (1873), attributed to "a noted legal scholar" and from *Gregg*, 428 U.S. at 153); *Potts*, 734 F.2d at 536 (reversing for excerpts of *Eberhart* before addressing those from *Gregg*); *Drake v. Kemp*, 762 F.2d 1449, 1459 (11th Cir. 1985) (en banc) (reading and attributing *Eberhart* excerpt to the state supreme court). The quoted passage reads:

> We have no sympathy with that sickly sentimentality that springs into action whenever a criminal at length is about to suffer for a crime. This may be the sign of a tender heart, but it is also a sight of one not under proper regulation. Society demands that crime be punished, and that criminals be warned, and the false humanity that shudders when justice is about to strike is a dangerous element for society. We have too much of this mercy. It is not true mercy. It only looks to the criminal. We must insist upon the mercy to society and upon justice for the poor woman whose blood cries out against her murderers. That criminals go unpunished is a disgrace to our civilization. We have reaped the fruits of it in the frequency with which bloody deeds occur. A stern, unbending, unflinching administration of penal laws without regard to position, or sex, as it is the highest mark of civilization, also is the surest mode to prevent the commission of the offense.

Potts, 734 F.2d at 535 n.5.

265. *Wilson*, 777 F.2d at 626.

266. *Potts*, 734 F.2d at 536.

267. See *Wilson*, 777 F.2d at 626 (noting the "tendency to mislead the jury about the proper scope of its deliberations"). See also *Godfrey*, 446 U.S. at 428 (describing the necessary legal guidance of the jury's discretion).

the excerpts would affect the average juror and influence the juror's decision.[268]

The use of religious authority to support the imposition of the death penalty is arguably more prejudicial than a quotation of legal authority. Aside from lessening the jury's sense of responsibility,[269] some religious arguments specifically disparage mercy, and others mandate the imposition of death for many crimes.[270] But more importantly, religion is an "extra-judicial" code to the average juror[271] and is certainly likely to affect a decision filled with moral issues.[272] Furthermore, a moral or religious duty will likely influence jurors more than a legal duty in a life or death decision.[273] Moreover, as the Supreme Court found in *Estes*, the legal system's enduring goal of preventing the probability of unfairness and the maxim that "justice must satisfy the appearance of justice" support reversal.[274] Despite no showing of prejudice, the Court in *Estes* held that the process was "inherently suspect" and mandated reversal.[275]

Threats to the appearance of justice as well as the probability of unfairness emerge in the context of improper arguments at sentencing. First, to satisfy the appearance of justice, courts must vigilantly protect the place of the law in deliberations of the gravest

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268. *Wilson*, 777 F.2d at 626.

269. See Part II.C.2 (discussing the nature of the prejudice).

270. *Jones*, 706 F. Supp. at 1559-60. In *Jones* the court cited Deuteronomy 19:21 for an argument disparaging mercy: "[T]hine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot." Id. at 1560. For examples of crimes for which the Bible mandates death, the court offered filial disobedience and breaking the Sabbath. Id. at 1559 (citing Deuteronomy 21:18-21 and Exodus 31:14-15). The prosecutor in *People v. Bradford*, 929 P.2d 544 (Cal. 1997), pointed out in closing argument that Chapter 22 in the book of Deuteronomy "teaches that the death penalty was required for rape and adultery." Id. at 580.

271. *Jones*, 706 F. Supp. at 1560.

272. See id. (noting the influence of religion); *Furman*, 408 U.S. at 296 (describing the debate over the death penalty as "essentially a moral conflict"). See also notes 177-78 and accompanying text (noting the guidance religions offer).

273. See *Furman*, 408 U.S. at 296 (describing the debate over the death penalty as "essentially a moral conflict").

274. 381 U.S. at 543 (quoting *Ouffutt v. United States*, 348 U.S. 11, 14 (1954)). See also ABA Code of Judicial Conduct, Canon 1 ("A Judge Shall Uphold the Integrity and Independence of the Judiciary . . . [and] participate in establishing, maintaining and enforcing high standards of conduct . . . .").

275. In *Estes*, the defendant claimed, and the Court agreed, that television coverage of his trial and heavy publicity denied him due process. The Court cited reversals in similar cases, *Turner v. Louisiana*, 379 U.S. 466 (1965), and in other contexts, *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *White v. Maryland*, 373 U.S. 59, 62 (1963) (denial of right to counsel). *Estes*, 381 U.S. at 543-44. For examples of other "inherently suspect" procedures that required reversal, see notes 259 and 332.

penalty.[276] Another consideration comes from the tenuous first amendment argument.[277] Separation of church and state demands that State officers follow the secular law and not improperly advance religion.[278] As the Establishment Clause jurisprudence concerns itself with appearances,[279] a prosecutor's improper religious arguments in capital cases present problems given the religious and moral underpinnings of the heated public debate.[280] Furthermore, given the nature of both the prejudice[281] and the capital sentencing determinations,[282] a probability of unfairness exists. When these factors are considered in conjunction with the mandate that capital sentencing procedures receive a higher degree of scrutiny,[283] the death sentences imposed following prosecutors' improper religious arguments are inherently suspect and demand reversal.[284]

4. The Judiciary Will Best Fulfill Its Duty With Automatic Reversal

Incidence of prosecutorial misconduct is great,[285] especially in capital cases.[286] Though courts often condemn improper religious arguments in capital cases, they have done little else to stay the

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276. See Part III.B.1 (discussing the special considerations given for the death penalty).

277. Compare *Sandoval*, 841 P.2d at 887 (Mosk, J., dissenting) (stating in a conclusory manner that the prosecutor's improper religious arguments violated the establishment clauses of the state and federal constitutions) with *Jones*, 706 F. Supp. at 1560 (stating that the court-implied approval of allowing a Bible in the jury room during deliberations presented no Establishment Clause issue).

278. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

279. The Establishment Clause standard found in the *Lemon* test prohibits governmental action that has the primary effect of advancing religion. *Lemon*, 403 U.S. at 612-13. The endorsement test championed by Justice O'Connor analyzes state action from the perspective of a reasonable observer. *Lynch v. Donnelly*, 465 U.S. 663, 687 (1984) (O'Connor, J., concurring).

280. See Part II.C.2 (discussing the powerful prejudicial nature of improper religious arguments).

281. See Part II.C.2.

282. In *Caldwell*, Justice Marshall stated for the majority:

> A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion.

Caldwell, 472 U.S. at 333.

283. *Ramos*, 463 U.S. at 998-99.

284 See *Estes*, 381 U.S. at 543.

285. See Part III.B.2.

286. See *DePew v. Ohio*, 489 U.S. 1042, 1044 (1989) (Marshall and Brennan, JJ., dissenting from denial of cert.) (quoting the Ohio Supreme Court "express[ing] . . . mounting alarm over the increasing incidence of misconduct by both prosecuters and defense counsel in capital cases").

increase in misconduct.[287] The judiciary bears the burden of maintaining decorum in court and among the court's officers,[288] and prosecutorial misconduct directly implicates the dignity of the court.[289] The burden falls largely upon the trial judge to take action to discourage misconduct.[290] Aside from admonitions and instructions,[291] trial judges have broad discretion in determining whether forensic misconduct warrants a new sentencing procedure.[292] Nevertheless, appellate courts share this responsibility and may effectuate it with the exercise of their supervisory powers.[293]

Federal courts have the power to formulate procedural rules that neither the Constitution nor Congress requires.[294] The three purposes for exercise of these powers are (1) vindicating rights, (2) protecting judicial integrity by ensuring that the jury has the appropriate considerations before them, and (3) deterring illegal conduct.[295] Courts should use their supervisory powers to serve the interests of justice by balancing the interests at stake.[296]

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287. See Part II.B.2 (discussing courts' failure to remedy and sanction misconduct). But see *Chambers*, 599 A.2d at 644 (establishing a per se reversible-error rule for impreper religious arguments).

288. *Young*, 470 U.S. at 10-11; *Hooks*, 416 A.2d at 203-04. "A judge shall require order and decorum in proceedings before the judge." ABA Code of Judicial Conduct, Canon 3.B(3).

For example, the Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), was concerned with the potential unfair prejudice stemming from heavy publicity and statod that "[c]ourts must take steps by rules and regulations that will protect their processes from prejudicial outside interferences [and n]either prosecutors, defense counsel, accused, witnesses, court staff nor enforcement officers coming under jurisdiction of court should be permitted to frustrate its function." Id. at 363.

289. Allen, 70 Iowa L. Rev. at 336 (cited in note 20).

290. *Young*, 470 U.S. at 10-11; *Hooks*, 416 A.2d at 203-04. See ABA Code of Judicial Conduct, Canon 3.D(2) (stating that the judge should take "appropriate action" in response to misconduct).

291. *Donnelly*, 416 U.S. at 648 n.23 (suggesting ways that trial judges handle misconduct).

292. See Urban, 78 Geo. L. J. at 1164 (cited in note 54) (noting the broad discretion for declaring a mistrial).

293. *Donnelly*, 416 U.S. at 648 n.23. See also *Hasting*, 461 U.S. at 505 (noting the authority of federal courts and the purposes of the supervisory powers).

The use of the supervisory powers has declined in recent years. Gershman, 53 U. Pitt. L. Rev. at 431 (cited in note 127). For example, in *Bank of Nova Scotia*, the Supreme Court held that federal courts may not circumvent the harmless-error rule, Rule 52(a) of the Federal Rules of Criminal Procedure, with the use of supervisory powers. *Bank of Nova Scotia*, 487 U.S. at 254-55. In other words, federal courts may not invoke supervisory power when no "error, defect, irregularity or variance . . . affect[ed] substantial rights." F.R.Cr.P. 52(a). The Supreme Court, however, has long relied on lower courts' use of the suporvisory powers to curb goverumental action, including prosecutorial misconduct. Gershman, 53 U. Pitt. L. Rev. at 432 (cited in noto 127).

294. *Hasting*, 461 U.S. at 505.

295. Id.

296. Id.

The inefficacy of existing control mechanisms puts the onus directly on the courts to ebb the flow of prosecutorial misconduct.[297] First, little effort is made to discipline misconduct.[298] In one study, researchers found that neither the prosecutors' supervisors nor the local bar association punished prosecutors for any of the hundreds of egregious instances of prosecutorial misconduct that the researchers examined.[299] Furthermore, prosecutors are immune from civil damages for official actions within the scope of their prosecutorial duties.[300]

Courts fail to sanction prosecutors effectively, further exacerbating the problem.[301] The most common sanction is a reprimand from a reviewing court.[302] The comments have little, if any, effect as the courts continue to preserve both the conviction and the sentence.[303] Many prosecutors highly value convictions and harsh sentences for reputational purposes, the only interest a reprimand may bear upon.[304] Courts also have the authority to issue contempt

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297. See ABA Code of Judicial Conduct, Canon 3.D(2) (stating that the judge should take "appropriate action" in response to misconduct).

298. See Wolfram, *Modern Legal Ethics* at 620 (cited in note 106); Gershman, *Prosecutorial Misconduct* § 13.1 at 13-1 (cited in note 4).

299. Gershman, *Prosecutorial Misconduct* § 13.1 at 13-2 (cited in note 4). Prosecuters have a duty to respond te their colleagues' misconduct. ABA Standards for Criminal Justice, Standard 3-1.5.

Professor Gershman offers several reasons for professional associations' failure to discipline prosecutors. Bar associations are reluctant to sanction prosecutors because prosecutors are governmental officials of great power and prostige. Professor Gershman also contends that bar associations are reluctant to appear te be constricting the prosecutors' zeal, given teday's strong anti-crime climate. Moreover, he says, the regulating standards are often too unclear to enforce. Gershman, 53 U. Pitt. L. Rev. at 445 (cited in note 127).

300. *Imbler v. Pachtman*, 424 U.S. 409, 422-24 (1976). The "shield of immunity" for prosecuterial, not investigative, duties extends to cases where the prosecutor's comments violate the defeudant's constitutional rights. In these cases, the defendant's romedy is a new hearing. Meares, 64 Fordham L. Rev. at 891 (cited in note 59).

301. Meares, 64 Fordham L. Rev. at 854 (cited in note 59).

Professor Gershman argues that the extreme positions taken recently by some prosecutors are the direct result of the courts' lax discipline. He cites a former Attorney General of the United States who argued that federal prosecutors should be exempt from ethical restraints imposed by local bar associations. Gershman, 53 U. Pitt. L. Rev. at 446, 448 (cited in note 127). Attorney General William Barr voiced this argument in 1990 when he was Deputy Attorney General. John M. Burkoff, *Symposium: Prosecutorial Ethics: The Duty Not "To Strike Foul Blows"*, 53 U. Pitt. L. Rev. 271, 271 (1992). Professor Gershman also notes that some state prosecutors have indicated that they will argue that the doctrine of separation of powers exempts them from stato bar associations' ethical constraints. Gershman, 53 U. Pitt. L. Rev. at 446, 448 (cited in note 127).

302. Meares, 64 Fordham L. Rev. at 897 (cited in note 59).

303. See Part II.B (analyzing courts' responses and their efficacy).

304. Meares, 64 Fordham L. Rev. at 897 (cited in note 59). See also Part II.B.2 (discussing reasons for misconduct).

sanctions for prosecutorial misconduct but rarely do.[305] Though the sanctions are effective in theory, the proceedings for a contempt sanction are costly.[306] In addition, one theory posits that trial courts may be reluctant to issue contempt orders for fear of reversal.[307]

Vacating the death sentence is the appropriate exercise of a court's power[308] when prosecutors invoke religious arguments in the penalty phase.[309] The present method of addressing the improper arguments, the totality approach, fails to serve the interests of justice; automatic reversal would not so fail.[310] First, courts offer no remedy to defendants whose rights prosecutors violate.[311] Reversal provides this remedy.[312] Second, current methods allow prosecutors to present inappropriate arguments to the juries.[313] Resentencing negates the impact of the improper arguments because the court selects a new jury.[314] Finally, courts fail to deter prosecutors from making improper arguments.[315] Reversing death sentences will ensure adequate deterrence.[316]

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305. Meares, 64 Fordham L. Rev. at 894 (cited in note 59). See 18 U.S.C. § 401 (1994) (granting courts the power to punish misbehavior of its officers "by fine or imprisonment, at its discretion").

306. Meares, 64 Fordham L. Rev. at 893, 894-95 (cited in note 59).

307. Id. at 894 n.154.

308. Again, this applies to trial courts as well as appellate courts. See note 193.

309. *Chambers*, 599 A.2d at 644 (stating that the old practice of discouragement must give way to reversal). See Part III.B.3 (noting defendant's remedy for constitutional violations is reversal) and note 296 and accompanying text (discussing the proper use of supervisory power).

Furthermore, the ABA Code of Judicial Conduct holds that "[a] judge shall require lawyers in proceedings before the judge to refrain from manifesting . . . bias or prejudice based upon . . . religion . . ." and that a judge should take "apprepriate action" in response to misconduct. ABA Code of Judicial Conduct, Canon 3.B(6), 3.D(2).

310. See *Hasting*, 461 U.S. at 505 (listing the applicable interests).

311. See Part II.B.2 (discussing the failure to provide a remedy); Part III.B.3 (discussing the rights at issue).

312. Gershman, *Prosecutorial Misconduct* § 13.2(a)(2) at 13-7 (cited in note 4); Meares, 64 Fordham L. Rev. at 891 (cited in note 59). See *Mead*, 465 U.S. at 1044 (Rehnquist, J., dissenting from denial of cert.) (noting that the appropriate remedy for *Witherspoon* violations is to reverse the death sentence). See also *Vasquez*, 474 U.S. at 262 (holding reversal to be the "only effective remedy" for violation of defendant's constitutional rights).

313. See Part II.B.2 (noting the broad rofusal of courts to take preventive action).

314. See generally *Witherspoon v. Illinois*, 391 U.S. 510, 531 (1968) (remanding with instructions to draw a new sentencing jury to efface any potential prejudice).

315. Allen, 70 Iowa L. Rev. at 334-35 (cited in note 20). See also Part II.B.1 (noting courts' failure to act and ite likely effects). In fact, this failure may encourage impreper arguments. See Part II.B.2.

316. Gershman, *Prosecutorial Misconduct* § 13.2(a)(2) at 13-3, 13-7 (cited in note 4) (stating five reasons why reversals deter prosecutors); Meares, 64 Fordham L. Rev. at 900 (cited in note 59) (arguing against reversal as a sanction but acknowledging that it detors prosecutors). See also *Vasquez*, 474 U.S. at 264 (mandating reversal to deter racial discrimination in grand jury selection). "Significant pregress toward containing tbe problems of presecutorial excess awaits a

The per se reversible-error rule remedies several other problems the current totality approach has in dealing with prosecutorial misconduct. For example, one problem with control mechanisms is the absence of principled criteria.[317] A per se rule defining and prohibiting "religious arguments"[318] in capital penalty phases will guide prosecutors and courts.[319] In fact, prosecutors will likely avoid arguments that a court may consider religious.[320] The per se rule will also cure problems associated with the limited scope of appellate review that engenders affirmation of sentences despite unfairly prejudicial arguments.[321] Furthermore, a standard requiring automatic reversal will constrain judges' discretion and thereby help insulate them from public pressure to impose death in capital cases.[322] The rule will also enable courts to better protect the integrity of the judicial process by preventing the appearance of improper influences in capital sentencing, improper State use of religion, and a lack of control over the courts' officers.[323]

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greater willingness of reviewing courts to reverse criminal convictions." Allen, 70 Iowa L. Rev. at 336 (cited in note 20). However, "deterrence is an inappropriate basis for reversal where 'means more narrowly tailorod to deter objectionable presecuterial conduct are available.'" *Bank of Nova Scotia*, 487 U.S. at 256 (citation omitted). Other methods of deterrence have proven to be ineffective, see Part II.B.2, not to mention that deterrence is not the sole reason for reversal.

317. Gershman, *Prosecutorial Misconduct* § 12.3(d) at 12-13 (cited in note 4).

318. See Part III.A (defining the prohibition).

319. See note 204 (describing how the per se rule is more precise).

320. See note 316 (noting reversal's deterrent effect).

321. See David E. Overby, *Improper Prosecutorial Argument in Capital Cases*, 58 UMKC L. Rev. 651, 663 (1990) (stating the problem).

> The argument for affirmance is strengthened when the trial judge has denied a motion for mistrial and ruled the error unprejudicial, for then the appellate court may rely on the trial judge's discretion and on the assumed superiority of his position to gauge the impact of the errer on the jury's verdict.

Allen, 70 Iowa L. Rev. at 331 (cited in note 20).

322. Professor Charles W. Wolfram stated that streng public responses to a judge's votes and opinions cause some "to be cowardly and to write their opinions for the consumption of the electorate." Loren Singer, *Nebraska, Kentucky, Texas Jurists Lose Their Seats in Nov. 5 Elections*, WLN 12064, 1996 WL 652140, 2 (Nov. 12, 1996) (quoting Professor Wolfram).
The experience of Justice Penny J. White of the Tennessee Supreme Court is instructive. Justico White recently became the first Justice on the court to lose a retention vote. "Victim's rights" organizations, incensed over Justice White's pivotal vote in reversing a death sentence, were instrumental in the denial of retention. John Gibeaut, *Taking Aim*, ABA Journal 50, 53 (Nov. 1996). Also in Tennessee, United States District Court Judge John T. Nixon has come under fire for death sentence reversals. See Corwin A. Thomas, *Jan. 19 Rally to Kick Off Campaign Against Nixon*, The Tennessean 4B (Jan. 8, 1997). The major distinction between these two examples, the life tenure of the federal bench, illustratss why federal courts should take the lead in implementing the per se reversible-errer rule. See U.S. Const., Art. III, § 1 (granting federal judges life tenure).

323. The ABA Code of Judicial Conduct holds that judges should actively respond to prosecutorial misconduct, Canon 3.D(2), prevent improper religious arguments, Canon 3.B(6), and maintain order and decorum in the proceedings, Canon 3.B(3). See also *Hasting*, 461 U.S. at 505 (listing preservation of judicial integrity as a duty of the courts); Gershman, *Prosecutorial*

A rule of automatic reversal tailored to improper religious arguments in capital sentencing phases serves the purposes of the supervisory powers and balances the interests at stake.[324] First, the rule imposes limited costs on society and the judiciary in relation to the defendant.[325] Resentencing does not jeopardize the conviction; it only revisits the penalty phase.[326] Furthermore, if the evidence is usually as strong as courts suggest,[327] prosecutors should have no problem achieving the same outcome, if indeed it was duly achieved the first time.[328] Second, the nature and degree of the harm are relevant to the scope of the remedy.[329] Without reversal, the defendant, sentenced by a jury potentially biased by the State's arguments, faces death.[330] The capital defendant deserves the strictest procedural safeguards for the determination that death is the appropriate punishment.[331] Thus the difficulty of effacing the prejudice of religious arguments from capital sentencing deliberations necessitates reversal.[332]

Misconduct § 10.2(b) at 10-12 (cited in note 4) (noting that courts find some misconduct offensive to the dignity and decorum of the proceedings).

324. See generally *Hasting*, 461 U.S. at 505-07 (discussing the purposes and the propriety of exercising supervisory powers).

325. See *Mitchell*, 443 U.S. at 558 (stating that reversals of convictions impose limited costs on society).

326. See note 192.

327. See Part II.B.1 (describing the weight of the evidence as the primary facter for excusing misconduct). See, for example, note 92.

328. See *Mitchell*, 443 U.S. at 558 (stating that prosecutors have access to the same evidence for retrial). The state secured a death sentence at the new sentencing hearing of the defendant in *Chambers*, 685 A.2d at 100.

329. *Vasquez*, 474 U.S. at 273 (Powell, J., dissenting).

330. See, for example, *Bennett*, 1996 U.S. App. LEXIS 21003 at *2 (affirming the death sentence); *Sandoval*, 841 P.2d at 886 (same).

331. *Ramos*, 463 U.S. at 998-99.

332. The Supreme Court has long recognized the need for "streng measures," such as reversal, to prevent improper influences from weighing against a capital defendant even where thero is no clear showing of prsjudice. *Sheppard*, 384 U.S. at 362 (reversing conviction for prejudicial publicity despite no showing of projudice). The Court noted in *Sheppard* that "reversals are but palliatives" and claimed that the real cure lies in preventing the prejudice at its inception. Id. at 363. An automatic reversal rule would prevent the prejudice at its inception, as prosecuters and judges alike would know which remedial action would apply and the defendant would not be subjected to the risk of a biased jury.

The Court has consistently held that both the potential prejudice from pretrial publicity of a case, *Estes*, 381 U.S. at 543-44 (discussing cases regarding pretrial publicity and reversing for inherent lack of due process), and the potential racial discrimination in the selection of the grand jury require reversal even without a showing of prejudice, *Vasquez*, 474 U.S. at 264 (noting continued adherence to the rule of mandatory reversal for discrimination in the grand jury selection process). The defendant in *Vasquez* had been sentenced to death three times for the murder. Id. at 268 n.1 (O'Connor, J., concurring).

IV. IMPORTANT DISTINCTIONS

Courts may be reluctant to adopt the rule of automatic reversal for theoretical and practical considerations. Theoretically, courts may question the distinction between the guilt phase and the sentencing phase. Why would the prejudice not taint the deliberations on guilt in the same manner? Practically, courts may find a problem reconciling the bar on the prosecutor with the fact that defense attorneys often invoke religion when arguing for a less severe sentence.

A. Why the Rule Applies in the Sentencing Phase and Not in the Guilt Phase

The nature of a jury's decision in the sentencing phase of capital cases is fundamentally different from the decision in the guilt phase.[333] Religious arguments are likely to be more influential in the more abstract determination associated with sentencing.[334] The sentencing jury considers a wider array of factors in making its decision and with much less focus.[335] In fact, despite the requirement of explicit instructions to guide determinations, jurors are often confused about the rules of capital sentencing guidelines and their role in the process.[336] Furthermore, religious arguments are usually irrelevant in determining the guilt of the accused; whereas, they relate directly to the imposition of death for the convicted defendant.[337] For example, invoking the biblical command "and the murderer shall be put to

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Religious arguments have a powerful influence over the average juror. See generally Part II.C.2. They are arguably more prejudicial than pretrial publicity. First, the media carries less weight with jurors, especially given the nature of the decision at issue. Second, the improper influence attaches just before the jury deliberates as opposed te publicity prior to the trial.

Prosecutorial misconduct is also arguably more prejudicial than discrimination in grand jury selection. Presumably, the defendant still received a trial by an impartial jury despito the discrimination. Nevertheless, the Supreme Court ruled that a fair trial cannot cure the taint of discrimination in the grand jury selection. *Vasquez*, 474 U.S. at 264. Furthermore, reversal for prejudice at the indictment stage necessarily imposes far greater costs on the state. See id. at 280-82 (Powell, J., dissenting) (expressing concern about the tremendous costs). The Court in *Vasquez* stated that the discrimination "strikes at the fundamental values of our judicial system and our society as a whole." Id. at 262. Bias in the imposition of our system's unique punishment—death—and the impermissible use of religion by a state official similarly strike at those values. See Part III.B.1 (discussing the special place of the death penalty) and Part III.B.3 (applying the maxim that justice must satisfy the appearance of justice). Moreover, both improper influences are "wholly within the power of the State to prevent." *Vasquez*, 474 U.S. at 262.

333. *Ramos*, 463 U.S. at 1107.

334. See id. at 1107-08 (comparing the different decisions); Part II.C.2 (discussing the effect of religious arguments).

335. *Ramos*, 463 U.S. at 1008. See Part III.B.1.

336. Luginbuhl and Howe, 70 Ind. L. J. at 1161, 1175 (cited in note 117).

337. See generally *Chambers*, 599 A.2d at 644.

death" is basically irrelevant in the guilt stage as the jurors try determine whether the accused is actually a murderer. However, the statement bears directly upon the question of how a juror should vote in the penalty phase.[338]

A per se rule also serves the Eighth Amendment's requirements specific to the sentencing determination.[339] First, the rule prevents prosecutors from interjecting religion and frustrating the requisite guidance of the secular law.[340] Second, avoiding the significant possibility that improper arguments would impair the jury's objectivity helps satisfy the heightened need for reliability and rationality in death sentence determinations.[341] Moreover, confining the prohibition to the sentencing phase satisfies the need for balance in the courts' establishment of procedural rules.[342] Because the rule serves the purposes of the supervisory powers,[343] the balancing of interests leaves courts with little reason not to adopt the per se reversible-error rule.[344]

B. Why Limit the Prosecutor and Not the Defense Attorney

Prosecutors are state officials charged with the duty of seeking justice through the laws of the state.[345] As state officials, their actions must stay within the parameters established by the United States Constitution.[346] Consequently, prosecutors must refrain from improper religious arguments that frustrate the law of the state[347] and violate the constitutional rights of defendants.[348]

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338. See id. (reversing the sentence for this argument).
339. See Part III.B.3 (discussing the constitutional requirements).
340. See id. (discussing the constitutional nature of the misconduct).
341. See Part III.B.1 (discussing the safeguards in capital sentencing).
342. See Part III.B.4 (discussing the authority and requirements of the courts' supervisory powers).
343. See id.
344. See id. (balancing the intsrests at stake) and note 332 (comparing the interests with those where the courts have mandated reversal).
345. See Part III.B.2 (discussing the prosecuter's special duty).
346. Id.
347. A state's death penalty statute must provide specific guidance for the jury's discretion. *Godfrey*, 446 U.S. at 428. See also Part II.C.2 (discussing the tendency of religious arguments to lessen the jury's sense of responsibility).
348. See Part III.B.3 (discussing the constitutional violations of improper religious arguments).

Moreover, prosecutors need not resort to religious arguments to justify the imposition of the death penalty for several reasons.[349] First, jurors already accord significant weight to prosecutors' arguments as representatives of the sovereign, eliminating the need to invoke a "higher law."[350] Furthermore, the jurors have taken oaths to follow the secular law, which obviates any need to justify the legitimacy of the law.[351] Another reason the prosecutor need not "square" the law with jurors is that a majoritarian legislature enacted the death penalty statute, presumably with support of the people. Finally, the prosecutor may exclude potential jurors with religious objections to the death penalty.[352]

In contrast, defense attorneys have different duties, underscoring the fact that the legal system considers their errors in this regard less offensive. Unlike defense attorneys, prosecutors must seek justice, not merely a "successful" outcome in a particular trial or sentencing proceeding.[353] Nor should a prosecutor use severity of sentences as an index of effectiveness.[354] Across the aisle, the function of defense counsel is to serve as the defendant's advocate "with courage and devotion."[355] In sentencing, the defense attorney should present "any

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349. The rule prohibits the type of religious argument that seeks to justify a death sentence, but does not bar all arguments citing religion. See Part III.A (describing what the rule bars, and offering examples of appeals that the rule does not bar).

350. See note 240 and accompanying text.

351. See note 172.

352. The Supreme Court established a standard in *Witherspoon*, 391 U.S. at 510, which allows the state to exclude prospective jurors for cause that are irrevocably committed to vote against death. *McCree*, 476 U.S. at 173 (holding the practice of "death qualification" of juries constitutional). The standard reads strictly, holding that prosecutors can challenge for cause only those veniremen that are "irrevocably committed, before the trial . . . regardless of the facts and circumstances that might emerge." *Witherspoon*, 391 U.S. at 591 n.21. The remedy for a *Witherspoon* violation is automatic reversal of the death sentence. *Davis*, 429 U.S. at 123 (reversing death sentence for *Witherspoon* violation); *Gray v. Mississippi*, 481 U.S. 648, 667 (1987) (reversing for *Witherspoon* violation and holding that it is not subject to harmless-error review). Courts have tended to allow the state greater leeway in excluding prospective jurors, however. The Fifth Circuit Court of Appeals found no error where the state excluded for cause a prospective juror who expressed "very strong feelings" about the death penalty, initially stating that she could not vote for death but then vacillating in expressing her scruples. *Evans v. Thigpen*, 809 F.2d 239, 243 (5th Cir. 1987). Similar equivocal responses in addition to the statement that her parents were Jehovah's Witnesses and were totally against the death penalty sufficed to properly excuse a prospective juror for cause in *Hill*, 839 P.2d at 1010. Furthermore, prosecutors may use peremptory challenges to exclude prespective jurors who give ambiguous responses. *Hooks*, 416 A.2d at 195. Defense attorneys also enjoy the right to challenge for cause prospective jurors who would automatically vote for death if defendant were convicted of a capital offense. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

353. ABA Standards for Criminal Justice, Standard 3-1.2(c). See Part III.B.2 (discussing a prosecutor's duties).

354. ABA Standards for Criminal Justice, Standard 3-6.1.

355. ABA Standards for Criminal Justice, Standard 4-1.2(b).

ground" that will help reach a disposition favorable to the defendant.[356] Also, in capital sentencing, the court should allow consideration of any factors the defense attorney believes may lead to a less severe sentence.[357] Moreover, counsel should acknowledge the gravity of the penalty and make "extraordinary efforts to avoid the death penalty."[358]

A specific justification for allowing certain religious arguments by defendants is that mercy is an important consideration for a capital jury.[359] Defense attorneys often invoke religion in pleas for mercy,[360] and prosecutors should refrain from using religious arguments disparaging it.[361] Though trial judges should carefully govern sentencing proceedings,[362] defense attorneys' religious arguments are less offensive to the court than prosecutors' religious appeals. Defense attorneys are not officers of the state and their religious pleas violate no one's constitutional rights.[363] Appropriately, errors a defense attorney

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356. ABA Standards for Criminal Justice, Standard 4-8.1(b).

357. See note 222 and accompanying text.

358. ABA Standards for Criminal Justice, Standard 4-1.2(c).

359. *Jones*, 706 F. Supp. at 1560.

360. See, for example, *Bennett*, 1996 U.S. App. LEXIS 21003 at *22 n.9 (" 'Father forgive them,' do not punish these people for what they do to me."). The defense attorney in the widely publicized Susan Smith trial also made a particularly powerful religious appeal for mercy. See *State v. Smith*, 94-GS-44-906, 907 at 5079-94 (S.C. 1994).

361. *Jones*, 706 F. Supp. at 1560.

362. See *Young*, 470 U.S. at 10 (stating that the judge is a governor of the trial and has the responsibility of maintaining decorum in keeping with the nature of the proceeding).

Careful governance of the proceedings includes preventing the defense attorney from making irrelevant religious appeals and inflaming the jury with religious arguments. For example, in *Evans v. Thigpen*, the Fifth Circuit Court of Appeals affirmed the exclusion of a reverend's testimony that the defendant proffered in the sentencing phase because it would have been an "abstract review of Biblical teachings." *Evans*, 809 F.2d at 242. Also, in *Thigpen*, 623 F. Supp. 1121 (S.D. Miss 1985), the district court on habeas review affirmed the trial judge's rulings that sustained the State's objections to defense counsel's closing argument. Counsel invoked religion in "an attack on the legislative enactment of the death penalty," and the court found that counsel "clearly exceeded the legitimate field of closing argument." Id. at 1128-29.

363. *Sandoval*, 841 P.2d at 889 n.1 (Mosk, J., dissenting) (stating that the applicable provisions of the Constitution do not constrain defense counsel). One could invoke *Georgia v. McCollum*, 505 U.S. 42 (1992), and argue that a defense attorney's actions in court are subject to the constitutional limitations on state action. In *McCollum*, however, the Court confined its analysis classifying a defense attorney as a state actor te the selection of jurors. Id. at 54. Furthermore, the state may have a standing problem when challenging defense counsel's use of religious arguments because there is no aggrieved party whose rights it could assert. See id. at 55-56.

in this respect engender greater protection for the capital defendant and are therefore more acceptable than a prosecutor's misconduct.[364]

The "invited response" or "rebuttal" doctrine that excuses a prosecutor's improper arguments as long as they were reasonably responsive to the defense attorney's argument is inapplicable. First, the purpose of allowing rebuttal is not to condone the prosecutor's responses but to determine their effect on the proceeding as a whole.[365] Courts will not engage in contextual analyses when applying the per se reversible-error rule. Second, the fact that the defense attorney also interjected religion neither waives the defendant's constitutional protections[366] nor negates the constitutional nature of the prosecutor's errors.[367] In addition, prosecutors have a duty to be more thoughtful and not succumb to improper arguments particularly in capital cases;[368] whereas, defense attorneys have a duty to make extraordinary efforts and introduce any factors that may lead to a sentence less severe than death.[369] Finally, the process of determining what arguments are "fairly responsive" is imprecise and standardless,[370] thereby posing too great a risk that the arguments will be deemed responsive and will unfairly prejudice a capital defendant.[371]

V. CONCLUSION

The current contextual analyses of prosecutorial misconduct and the courts' laissez-faire attitude have created a prosecutorial mentality that "the end justifies the means."[372] The prosecutor's desire to win undermines the duty to seek justice, and, as a result, fairness

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364. See Part III.B.1 (noting the special attention to procedural safeguards for reliability in capital sentencing decisions); note 216 (quoting Supreme Court Justices concerning their tendency to stretch the law to offer protection to the condemned man).

365. *Darden*, 477 U.S. at 182.

366. See generally *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) (articulating the "intelligent and competent" waiver standard and stating that " 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights . . . and . . . 'do not presume acquiescence in the loss of fundamental rights' ").

367. See *Sandoval*, 841 P.2d at 890 (Mosk, J., dissenting) ("[E]ven a 'fair response' of this kind by a prosecutor would be altogether impermissible."). See also Part III.B.3 (discussing the constitutional violations).

368. See Part III.B.2.

369. The trial judge must still maintain control of the proceeding with the relevancy requirement, ensuring that the secular law guides the jury's discretion.

370. For example, while the majority in *Sandoval* believed the "question [was] close," Justice Mosk found that "there was nothing 'fairly responsive' " about [the prosecutor's argument]. *Sandoval*, 841 P.2d at 883, 890 (Mosk, J., dissenting).

371. See Part II.C.2 (noting the powerful prejudicial effect).

372. Gershman, 53 U. Pitt. L. Rev. at 393-94, 458 (cited in note 127).

suffers.[373] This mentality increasingly manifests itself in capital cases.[374] A prosecutor's use of religious arguments is neither inadvertent nor the result of "the heat of argument." Instead, the prosecutor usually makes the argument with full knowledge of not only the constitutional violation but also the courts' reluctance to reverse[375] and the inability to accurately measure the prejudicial effect on the jury.[376] In effect, courts have granted prosecutors a license to "strike foul blows."[377]

Commentators agree that prosecutorial ethics are in "a state of some ferment"[378] and that the lack of imprecise standards governing misconduct and the courts' analysis of the errors contribute significantly to the problem.[379] Instead, only unsatisfactory generalizations exist.[380] If courts acted consistent with the rhetoric offered in these generalizations, however, the need for an automatic reversal rule would be less appreciable. For example, the court in *Bennett* stated that improper religious arguments "have no place in our non-ecclesiastical courts and may not be tolerated there."[381] Nevertheless, the arguments were tolerated as the court found the comments "not sufficiently egregious" to warrant any action on behalf of the court.[382] Similarly, in *Bailey* the court stated that the misconduct exceeded the bounds of "permissible argument" but found the error insufficiently prejudicial.[383]

The imprecision of the standards notwithstanding, contextual factors should not outweigh the prejudicial effect of these religious arguments. Courts and commentators agree that, in theory, the contextual analyses should focus upon the error's effect on the jury.[384] As courts place more weight on the evidence, however, the test becomes a

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373. Id. at 431.
374. Id. at 424.
375. Id. at 429.
376. Id. at 427.
377. Id. at 424.
378. Burkoff, 53 U. Pitt. L. Rev. at 271 (cited in note 301).
379. See generally Gershman, 53 U. Pitt. L. Rev. at 436 (cited in note 127) ("One of the most disturbing developments in criminal justice over the last two decades has been the judiciary's failure to provide clear standards that would place some rational limits on the prosecutor's discretion."); LaFave and Israel, *Criminal Procedure* § 26.6(b) at 997 (cited in note 21) ("Few areas of doctrinal development have been worked by greater twisting and turning than the development of standards for applying the harmless-error rule te evidence related errors.").
380. Gershman, *Prosecutorial Misconduct* § 10.1 at 10-4 (cited in note 4).
381. 1996 U.S. App. LEXIS 21003 at *23.
382. Id. at *24.
383. *Bailey*, 826 F. Supp. at 817.
384. LaFave and Israel, *Criminal Procedure* § 26.6(b) at 997 (cited in note 21).

"correct result test" rather than an "effect on the judgment test."[385] The review standards are unfair and inconsistent with the eighth amendment and due process requirements of reliability in the capital sentencing determination because they force the defendant to make a showing of prejudice to overcome the harmless-error rule. Requiring a contemporaneous objection is also unfairly prejudicial, and the failure to object should be moot because the improper arguments constitute plain error. Furthermore, a prosecutor's improper religious arguments fall within the constitutional-error exceptions to the harmless-error rule.[386] Above all, the concerns of the contextual analyses are less compelling in the sentencing phase of capital cases, as the balance of interests weighs in the defendant's favor.

At the end of the day, the per se reversible-error rule will strengthen death penalty jurisprudence. The absence of meaningful constraints on the prosecutor magnifies the inherent inequality between the State and the defendant.[387] Currently, the state and federal governments face unprecedented challenges arising from concerns about the fairness of the imposition of capital punishment.[388] Despite the judiciary's "herculean efforts" to minimize caprice and bias in capital sentencing, no one can reasonably profess that such improper influences are no longer factors.[389] A rule of automatic reversal for a prosecutor's improper religious arguments will eliminate this particular unfair, powerful prejudice against the defendant. The interests at stake—life for the defendant and the integrity of the judicial system for the State—are simply too grave to allow prosecutors to use

385. Id.; Gershman, 53 U. Pitt. L. Rev. at 425 (cited in note 127). See Part II.C.1.

386. See Part II.B.1.

387. Gershman, 53 U. Pitt. L. Rev. at 448 (cited in note 127).

388. The American Bar Association's Board of Governors advocated a moratorium on the death penalty until adequate procedures are developed to ensure fairness to the defendant. M.A. Stapleton, *ABA to Debate Calling for Halt in Executions*, Chi. Daily L. Bull. 1 (Jan. 31, 1997). The ABA House of Delegates has since approved the measure (280-119), which will lead to increased lobbying efforts. *Bar Association Leaders Urge Moratorium on Death Penalty*, New York Times A9 (Feb. 4, 1997).

389. Allen, 70 Iowa L. Rev. at 320 (cited in note 20).

powerful religious arguments as justification for imposing a sentence of death and to allow courts to excuse these constitutional errors as harmless.

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