Arguments based on religious values—whether akin to the retributive command of an eye for an eye or a virtuous plea for mercy—are increasingly common at the punishment stage of a capital murder trial. Monica Miller asks a single question about this type of argument: Do appeals to religious values influence jurors in deciding a death sentence? To answer that question, Miller devised and administered experiments to assess the effect on mock jurors of appeals to religion. She is prepared to state that “[i]n sum, the results of these two studies indicate that religious appeals do not interfere with jurors’ sentencing decisions.” (168) There is, however, no ground for such a sweeping conclusion.

To conclude prematurely that religious rationales do not influence jurors may interrupt or even end the development of constitutional standards necessary to resolve defendants’ challenges to the use of religious argument. The conclusions that can be drawn from Miller’s study are thus important, and this review pays them particular attention. In advance of that discussion, we provide a brief reminder of the procedures used in capital cases and a review of Miller’s introductory chapters.

In the 1970s, the Supreme Court laid out the constitutional standards that govern capital punishment in a series of landmark cases interpreting the Eighth Amendment’s prohibition against cruel and unusual punishment. To implement the Court’s guidance, capital murder trials are now bifurcated, the jury deciding first whether the defendant is guilty and second whether the offender will be punished by death. In the penalty stage of a capital trial, the jury may hear experts debate the medical and psychological condition of the defendant. The defense may present detailed information about the defendant’s childhood and upbringing, while prosecutors counter with victim impact statements about the effect of the victim’s death. Mitigating evidence provided by the defense lessens the justification of a death sentence and encourages a merciful verdict. In contrast, prosecutors provide aggravating evidence of an especially heinous killing or an unusually dangerous defendant. Before the presiding judge instructs jurors on the state’s specific legal standard, each side presents closing statements that
summarize the arguments for and against the death penalty. In these closing arguments, both prosecutors and defense attorneys sometimes appeal to religious values.

It is now clear that the practice of allowing jurors unbridled discretion to impose the death penalty violates the Constitution. Under the Eighth Amendment, defendants are entitled to an individualized determination of punishment that is based on the facts and circumstances of the conduct at issue and on specific characteristics of the offender. The constitutional requirement of individualized consideration based on law and evidence means that the jury in a capital case must rationally consider and evaluate both mitigating and aggravating evidence in determining whether death is an appropriate sentence. Under the same rationale, religious references may also run afoul of defendants’ Due Process rights to a fair trial. In sum, the Supreme Court’s capital punishment jurisprudence is at odds with a practice that enables jurors to consider their own religious beliefs when determining the sentence of death.

Whether offered by the government or by defense counsel, appeals to the jury based on religious values are inescapably powerful. The familiar narratives about Cain and Abel, taking an eye for an eye, casting the first stone, and turning the other cheek are emotionally compelling even to the nonreligious person. Jurors who accept a prosecutor’s argument that a higher authority requires (or alternatively does not allow) the death penalty would not then rely solely on evidence and law in reaching a decision. Nor would jurors properly evaluate aggravating and mitigating factors or give the defendant the individualized assessment required by the Eighth Amendment. An argument by either side that relieves jurors of their responsibility by making them ministers of a divine command also violates the right to a decision guided by law and evidence.

THE CONTEXT OF THE EXPERIMENTAL STUDIES

In Chapters One and Two, Miller introduces the general use of religion in the criminal justice system, largely by providing examples of high-profile cases such as those of basketball star Kobe Bryant, D.C. Sniper John Allen Mohammad, and child killer Andrea Yates. Chapter Three narrows the focus somewhat to report more specifically, albeit

again very briefly, on the role of religion in the criminal justice system. Miller mentions questions about religion at *voir dire* and the use of evidence of religion in closing arguments, jury deliberations, and judicial opinions. This chapter ends with a short list of examples from other aspects of the legal system, such as restorative justice and prison rehabilitation programs. This *ad hoc* review of religion in the criminal justice system is neither comprehensive nor representative and belies the breadth implied by the book’s title.

Miller broaches the main subject of the book, appeals to religious values in the closing arguments of capital sentencing trials, in parallel discussions in Chapters Four and Five. Chapter Four sets out typical religious appeals made by prosecutors, which begin unsurprisingly with retributive commands from the Bible based on variations of the “eye for an eye” perspective. The summary also highlights prosecutors’ recourse to divine authority, Biblical characters and metaphors, and other religious references that defy categorization. Although cases in which defendants use religious argument are fewer, defense attorneys also use the Bible, this time to plead for mercy and to invoke divine commands against execution and for forgiveness.

In Chapter Six, Miller reviews the judicial decisions that have dealt specifically with religious appeals in closing arguments. In accord with other researchers, she notes that courts employ a wide variety of approaches to the subject. These approaches often conflict, and courts have reached opposing decisions, even when the specific religious references at issue were similar. As a result, “there is much disagreement over the permissibility of religious appeals.” (50)

Rather than pursuing the reasons for disagreement, Miller simply divides the judicial rulings into three categories. The first group of courts prohibits all religious references in closing arguments, while a second group of courts generally permits them. Miller’s third category of cases falls between these extremes, espousing a variety of rationales and limitations. For example, courts in this category have held that the use of religion is not barred if the use is “isolated,” or is not “excessive” or “grossly improper.” (44) Miller also reports that even courts that generally disapprove of any religious argument may nevertheless affirm its use. Conventions, like harmless error, curative instructions, and fair response to a defense argument, effectively allow some use of religious references in closing arguments. Miller concludes this discussion by noting that lower courts will remain sharply divided until the Supreme Court issues a definitive judgment regarding the permissibility of appeals to religious values.
In these introductory chapters, Miller sufficiently piques readers’ interests, provides minimal background for her study, and justifies her experimental treatment. It is, of course, unfair to chide an author for not writing a different book, but the absence of further sorting—for instance by jurisdiction, trial or appellate courts, the specific constitutional challenge, or general type of religious reference—means that legal scholars are not likely to be satisfied by Miller’s summary of the current state of the law. For the further tasks of identifying courts’ reasoning and seeking common patterns among the cases, readers are advised to consult the work of other researchers. For that task, Miller includes a useful reference section with citations to cases and a bibliography of articles by legal scholars.

THE EXPERIMENTS

The heart of Miller’s book examines religious influences on juries through controlled experiments. She begins in Chapter Seven by setting out research questions, including whether religious appeals affect jurors’ decision-making, whether after such appeals jurors are able to weigh dispassionately aggravating or mitigating circumstances, and whether the appeals reduce the responsibility jurors accept for their sentencing decisions.

A very brief Chapter Eight introduces the experiments themselves. The experiments ask each subject to read one of several different versions of a legal case history, similar to an actual North Carolina murder case but where the versions contain carefully chosen religious appeals, attorney directives, and gradations of malevolence. Each version presents a different experimental circumstance. Two main studies were designed to test whether appeals to religious values from prosecutors (Study One reported in Chapter Nine) or from defense attorneys (Study Two reported in Chapter Ten) influence jurors’ decisions. Prosecutors and defense attorneys also directed jurors to use their instinct or their logic in different versions of the case. Aggravating and mitigating characteristics of the defendant’s conduct were represented as well.

Before reading the differing case histories, the subjects first completed a “death qualification” test for openness to the death penalty and those who were inflexible about the death penalty were eliminated, a process that mimics jury selection in capital cases. (81, 123) Remaining for Study One after the “death qualification” test were 257 subjects. Roughly two-thirds of the subjects were undergraduate students from the University of Nebraska-Lincoln who received extra credit in their
psychology courses. One-third of the subjects were local community citizens who received ten dollars for participating. Study Two had 329 subjects after the “death qualification” test, roughly three-fourths of whom were undergraduate students and the remainder of whom were local citizens.

After reading the differing texts, subjects completed a Dependent Measures Survey (Appendix E) that included their recommendation for punishment—either death or life in prison without parole—and their confidence in their verdict, scaled from one to seven. The dependent variable—the verdict—was constructed in numerical form by taking the death penalty as -1, and life in prison as +1, and multiplying it by the confidence measure. The extremes of the variable thus ranged from -7 to +7, a measure that gives substantial weight to the subjects’ level of confidence in their decisions. Observations of this verdict-confidence measure were used to test for effects of the three conditions: religious appeals to retribution or mercy, attorney directives to use logic or instinct, and mitigating or aggravating circumstances.

The primary experiments focused on the jurors’ verdicts, but a survey of subjects produced an impressive array of other variables. These included measures of religious attitude; a rational-experiential inventory; a cognitive experiential self theory measure; and subjects’ ethnic backgrounds, religious backgrounds, age, and gender. Interrelationships among the results of these measures are copiously reported but are too various to summarize in this short review. Anyone venturing further into experimental examination of these issues would be wise to review them.

**PRIMARY EXPERIMENTAL RESULTS**

In both Study One and Study Two, only the mitigator-aggravator treatment had a statistically significant effect on the dependent variable—the verdict of death or life imprisonment. When the defendant’s behavior was more aggravating, subjects more often applied the death penalty or applied it with more confidence. These aggravating and mitigating conditions were included mainly to see whether appeals might have different effects as the crime varied in villainy. Effects of the conditions are not interesting in themselves, for it is not surprising that a more heinous crime more often results in the death penalty. The aim of the experiment was to find whether appeals to religious values or attorney directives to rely on logic or instinct would influence verdicts in either aggravating or mitigating condition, and there was no such finding.
This does not mean we can conclude that religious appeals have no effect. A null hypothesis of no effect is not proven true just because an alternative fails to rebut it. It is presumed to be true merely in order to determine whether an alternative hypothesis can refute it, but it is never directly tested itself. If a null hypothesis is not rebutted by impeccably designed experiments representing all conceivable alternative explanations, it might be given some support. In this instance, however, we do not have an impeccable experiment. As the author concedes in Chapter Eleven, which discusses the results and notes limitations, there can be a significant difference between reading the script of an argument and seeing and hearing actual speakers argue. Subjects in the experiments silently read a pallid eighteen hundred word summary of case facts and closing arguments; there was no video presentation nor any live dramatization, either of which might play more forcibly on religious feelings (think of Gregory Peck in To Kill a Mockingbird). Social psychology literature on persuasion that evaluates a range of circumstances and presentation methods does not imply that dramatization is always more effective for inducing rational decisions, but it shows that the form of presentation matters. Dramatization might make some arguments more accessible, actors’ facial expressions may influence viewers, and effects from a host of other factors force experimenters to acknowledge that the form of presentation can affect outcomes.

Had Miller’s weak written forms of religious appeal produced significant effects, that would have been impressive. But results were not significant; and before concluding that “the concerns raised by various courts that religious appeals interfere with jury decision making seem to be unfounded[.]” (114) we would have to explore more effective ways to present them. It is nevertheless useful to know that religious appeals through written descriptions of cases do not have an effect on a typical juror, so future experiments can use stronger forms of appeal.

Miller also notes in her concluding Chapter Twelve that the experiments focus on individual jurors; therefore, they do not adequately mimic an actual jury determination because jurors interact in their deliberations so that one juror may influence others. This point undercuts the premise of the statistical tests that the decision-maker acts independently, and thus is more important than she acknowledges. In a


4. See e.g. Reid Hastie & Nancy Pennington, Explanation-Based Decision Making, in Judgment and Decision Making 212 (Terry Connolly et al. eds., 2d ed. 2000).
real-world capital murder case, individual jurors work together as a
group to reach a unanimous decision, required because the community
prefers to save a deserving person from death rather than send an
undeserving person to death. Collective action under the high standard
of unanimity means that even if no significant effect was found in
experiments using independent juror decisions—like the ones reported
here but with more effective appeals—we still could not find that
religious appeals have no effect. The average effect that is observed
across a sample of independent jurors in an experiment may not predict
the result if a single juror can persuade others and affect outcomes. For
example, a juror committed to the penalty of death may sway others to
accept that verdict or a single juror who accepts a religious appeal for
mercy may prevent a verdict of death in a capital murder case. Before
conclusions about effects of arguments based on religious values can be
drawn, future work will have to consider this aspect of jury procedure.

*     *     *

Although the experiments yield a substantial harvest of suggestive
findings that further studies may pursue, the findings are not
immediately fruitful on the main question Monica Miller asked. In sum,
neither religious appeals nor attorney directives affect subject jurors’
decisions, or their assessments of responsibility for decisions. Because
experiments were designed only to tell whether a presumed null
hypothesis that religious arguments have no effect could be proven false,
its survival does not mean it is true. It is thus inappropriate to claim, as
the author does: “Although further research will help solidify these
conclusions, these initial studies indicate that religious appeals are not a
threat to proper jury decision making.” (168) Miller’s experiments
simply cannot tell us whether religious appeals interfere with jury
decisions.

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