

William & Mary Bill of Rights Journal

Volume 9 (2000-2001)
Issue 1

Article 10

December 2000

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Arnold H. Loewy, *Religious Neutrality and the Death Penalty*, 9 Wm. & Mary Bill Rts. J. 191 (2000), <https://scholarship.law.wm.edu/wmborj/vol9/iss1/10>

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RELIGIOUS NEUTRALITY AND THE DEATH PENALTY

Arnold H. Loewy*

Cases involving the Establishment of Religion Clause predominantly emphasize religious neutrality. Believing this to be normatively correct, Professor Loewy argues for religious neutrality in capital punishment cases. In accordance therewith, he would uphold religious peremptory challenges where a juror's religious belief is related to her death penalty perspective. Professor Loewy agrees with the courts' general willingness to disallow religion as an aggravating factor while allowing it as a mitigating factor. This dichotomy comports with the neutrality principle because aggravating factors, in general, are limited whereas mitigating factors are unlimited.

* * *

PROLOGUE

I was not asked to comment on the death penalty as such, but inasmuch as others have expressed an opinion of opposition to capital punishment, I do not wish to have my silence construed as disagreement. As a philosophical matter, I am opposed to capital punishment, especially as it is administered today.¹ As a constitutional matter, a fairly persuasive argument can be made that capital punishment is cruel and unusual.² If I might give a two-word reason for my

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¹ For example, in Illinois, Governor Ryan recently called for a capital punishment moratorium after thirteen death row inmates were found to be factually innocent. See Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1. Unfortunately, this does not appear to be an isolated incident. See JIM DWYER, PETER NEUFELD & BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

² First of all, capital punishment is cruel in the dictionary sense of the term. Marching a prisoner off to be killed by the state is at least as cruel as whipping or stockades. Second, it is unnecessarily cruel in that there is no punitive purpose that cannot be obtained as well, or nearly as well, by less cruel methods.

I reject the argument that death is not cruel and unusual because it has become sufficiently frequent to be usual. Surely, a state could not make boiling a person in oil constitutional by imposing forty such sentences in a week.

Finally, I reject the argument propounded by Justice Scalia, among others, that because capital punishment was recognized when the Constitution was adopted, it cannot be forbidden by implication. See *Callins v. Collins*, 510 U.S. 1141 (1994) (mem.). While concurring in the denial of a writ of certiorari, Scalia wrote:

opposition, it would be "Billy Moore."³

I. RELIGIOUS NEUTRALITY

In assessing the interrelationship between religion and the death penalty, I start with the Establishment of Religion Clause⁴ and the cases construing it. Although the Court occasionally refers to "separation"⁵ or "accommodation"⁶ as guiding principles of Establishment Clause construction, the dominant theme of the Court's Establishment Clause jurisprudence has been neutrality.⁷ By neutrality, the Court means evenhandedness, neither favoring nor disfavoring religion. This concept is embodied in such phrases as "neither advance nor inhibits,"⁸ or more recently, does not "endorse or disapprove."⁹

Neutrality does not, however, mean irrelevancy. A religious perspective can prevail so long as it is not favored over a nonreligious perspective. Thus, religious institutions may be given a tax exemption so long as comparably situated nonreligious entities (e.g., fraternal or benevolent organizations) are similarly treated.¹⁰ Also, Sunday closing laws can be justified if supported by

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life . . . without due process of law." This clearly permits the death penalty to be imposed, and establishes beyond doubt that the death penalty is not one of the "cruel and unusual punishments" prohibited by the Eighth Amendment.

Id.; see also *Stanford v. Kentucky*, 492 U.S. 361, 368-70 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 864 (1987) (Scalia, J., dissenting). In my view, mention of capital punishment in such clauses as the Grand Jury and Due Process Clauses of the Fifth Amendment, merely indicates the process to be followed to the extent that capital punishment is permissible. It does not indicate a considered judgment that capital punishment is necessarily consistent with the Cruel and Unusual Punishment Clause.

³ Billy Moore was the luncheon speaker at this conference. He is currently a minister whose principal mission is ministering to troubled youth. He spent sixteen years on death row and, on more than one occasion, was nearly executed. Had that happened, we would all be poorer for it.

⁴ "Congress shall make no law respecting the establishment of religion . . ." U.S. CONST. amend. I.

⁵ See, e.g., *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 211, 232 (1948).

⁶ See, e.g., *Zorach v. Clauson*, 343 U.S. 306, 314-15 (1952).

⁷ See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 214-15 (1963); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986).

⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

⁹ *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

¹⁰ See *Walz v. Tax Comm'r*, 397 U.S. 664, 673 (1970); cf. *Tex. Monthly v. Bullock*, 489

nonreligious reasons.¹¹

One reason for requiring neutrality (especially in regard to capital punishment) is the inability to contradict religion by ordinary logic. For example, if one believes that God supports an eye for an eye, she will not be persuaded by the power of a contrary philosophical approach. Deific decrees are simply not amenable to philosophical refutation. Consequently, a prosecutorial or defense reference to the Bible should be accompanied by a judicial admonition that the Bible is not the law.

My focus will be on jury selection, religion as an aggravating circumstance, religion as a mitigating circumstance, and gubernatorial pardons.

II. JURY SELECTION

Typically, jury selection questions arise when a juror belongs to a religious group that the prosecutor believes opposes capital punishment. In the easy case, where the juror concedes that her religious beliefs render it impossible for her to impose the death penalty, the juror may be excused for cause. This is a religiously neutral rule because the excusal for cause follows regardless of the source of the opposition. Whether it be religious or secular, one whose scruples preclude the imposition of the death penalty may be excused for cause.¹²

The harder question involves a juror who belongs to a religion that hesitates to judge others, but who states no categorical opposition to the death penalty. Such a juror may not be dismissed for cause.¹³ But may she be peremptorily challenged? Peremptory challenges on the basis of race or gender are, of course, forbidden.¹⁴ Is religion different, or should it be?

The cases are split, and thus far the Supreme Court has refused to consider the question.¹⁵ It typically arises in cases in which a religious reason is proffered to overcome what would otherwise appear to be an unconstitutional racial challenge. In *State v. Davis*,¹⁶ the prosecution sought to explain its peremptory challenge of a

U.S. 1, 14-15 (1989) (holding that the Texas sales tax exemption for religious periodicals was too narrow to be permissible under the First Amendment Establishment Clause. To be constitutional, the Court held, the benefit must be accessible for some non-religious entities).

¹¹ See *McGowan v. Maryland*, 366 U.S. 420, 445 (1961). I sometimes tell my class that the Court's rationale in *McGowan* was that if God came down tomorrow and told us that as far as He was concerned we could all work on Sunday, the labor unions would still insist on Sundays off (or at least time and a half for working Sundays).

¹² See *Lockhart v. McCree*, 476 U.S. 162, 175-76 (1986).

¹³ See *Witherspoon v. Illinois*, 391 U.S. 510, 519-22 (1968).

¹⁴ See *J.E.B. v. Alabama*, 511 U.S. 127, 130-31, 139-40 (1994) (gender); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (race).

¹⁵ See *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), cert. denied 511 U.S. 1115 (1994).

¹⁶ See *id.* Although *Davis* was not a capital case, it raises the same principles.

black juror on the ground that he was a Jehovah's Witness.¹⁷ The prosecutor contended that Jehovah's Witnesses do not like to sit in judgment of their fellow man.¹⁸ Although agreeing that a peremptory challenge based on religion without more would be invalid, the court upheld this peremptory challenge because it found the explanation of Jehovah's Witnesses' beliefs sufficiently related to the case to justify the challenge.¹⁹

State v. Thorson,²⁰ on the other hand, reversed a death sentence because one of the jurors was peremptorily challenged on the basis of her membership in the Holiness Church, a church whose members, according to the prosecutor, could not sit in judgment of others.²¹ Relying on a state constitutional provision precluding religious preference, the Mississippi Supreme Court found exclusive reliance on the juror's religion to be reversible error.²²

Which view is better? Frankly, the question is close. Under the *Davis* view, members of some religious groups could be subject to systematic peremptory challenges. The prospect of some religious sects *never* being represented on a criminal jury is not pretty. Furthermore, as the *Thorson* court emphasized, a juror from one of the nonjudgmental sects *could* be excluded if she were asked if she personally could sit in judgment of her fellow man, notwithstanding the religious admonition to the contrary, and could be excused if her answer were "no."²³ In view of this more precise alternative to the rather blunt instrument of excluding all Jehovah's Witnesses or Holiness Church members, there is much force to *Thorson's* requirement of individual incapacity vis-a-vis presumed group incapacity.

Notwithstanding the power of these arguments, I believe that *Davis* got it right. Religion is inherently tied to belief in a way that race and sex are not. Furthermore, according to *Georgia v. McCollum*,²⁴ peremptory challenges forbidden to the prosecution are also forbidden to the defense.²⁵ Thus, if *Thorson* were to prevail, what would become of a black defendant faced with a potential juror from the Aryan Church who claims that, notwithstanding his church's teachings, he could give a black man a fair trial? Would we want to saddle a

¹⁷ See *id.* at 768, 772.

¹⁸ See *id.* at 768.

¹⁹ See *id.* at 770-72.

²⁰ 721 So. 2d 590 (Miss. 1998).

²¹ See *id.* at 593-95.

²² See *id.* It did, however, uphold the striking of another juror of the same faith on the ground that an additional reason had been given to strike her, thus rendering the religious reason harmless error. See *id.* at 595 n.6.

²³ See *id.* at 595 ("The critical question . . . was whether or not she felt that she could sit in judgment of her fellow man regardless of the position of the Holiness Faith.").

²⁴ 505 U.S. 42 (1992).

²⁵ See *id.* at 48-50.

defendant with such a juror with not even a peremptory challenge to save him? I hope not, but by combining *Thorson* and *McCullum* it would be difficult, if not impossible, to prevent. Thus, I support allowing religious peremptory challenges.

This position accords with my theme of neutrality. Certainly one could base peremptory challenges on club membership. I assume that one could be peremptorily challenged from a capital case because he belongs to "Citizens Against the Death Penalty." Peremptorily challenging one who belongs to a religion believing the same thing is not all that different.

III. RELIGION AS AN AGGRAVATING CIRCUMSTANCE

One cannot read cases pertaining to religion as an aggravating circumstance without getting the impression that prosecutors are equal opportunity religion attackers. The cases in this section involve prosecutorial comment on Satanism, Christianity, Islam, and Judaism. Although not all of the cases were capital cases, the principle of each is applicable to capital cases. In three of these cases, the religious reference was cause for conviction or sentence reversal. In the fourth case, the religious reference was condemned, but the conviction upheld because of curative instructions from the trial court.

In the Satanism case, *Flanagan v. State*,²⁶ Dale Flanagan and his friend, Randolph Moore, murdered Flanagan's grandparents in order to collect insurance proceeds and an inheritance.²⁷ In an effort to obtain the death penalty, the prosecutor offered evidence of the defendants' membership in a satanic cult.²⁸ The Nevada Supreme Court reversed the death sentences on the ground that the free exercise of Satanism could not be penalized in the absence of proof that the religious practice, as opposed to greed, motivated the killings.²⁹

The court's reasoning comported with the neutrality thesis espoused herein. Relying on the Supreme Court case of *Dawson v. Delaware*,³⁰ the Nevada Supreme Court held that the constitutionally-protected activity could be punished only if it directly contributed to the crime.³¹ *Dawson* involved a member of an Aryan supremacy group who escaped from prison.³² After escaping, he stole a car and killed its owner, who happened to be a caucasian woman.³³ Because his Aryan beliefs were unrelated to the killing, the Court held that the First Amendment was

²⁶ 846 P.2d 1053 (Nev. 1993).

²⁷ *See id.* at 1055.

²⁸ *See id.*

²⁹ *See id.* at 1058-59.

³⁰ 503 U.S. 159 (1992).

³¹ *See id.* at 164-68.

³² *See id.* at 160.

³³ *See id.* at 161.

violated by reference to Dawson's beliefs.³⁴ The Court in *Dawson* sharply distinguished *Barclay v. Florida*,³⁵ where the beliefs of a black supremacist were held relevant because he chose his victim on the basis of race.³⁶

Justice Steffan dissented in *Flanagan* on two grounds. First, he argued that because Satanism was a generic commitment to evil, the killings, being evil, were the product of his beliefs.³⁷ He distinguished *Dawson* on the ground that racism was a specific evil vis-a-vis Satanism, which was more general.³⁸ Although not without force, I believe that tarring a group as generically evil, thereby rendering membership in it *always* relevant as an aggravating factor, guts the First Amendment precision that *Dawson* endeavored to draw.

Justice Steffan's second argument was that because of Satanism's devotion to unmitigated evil, it should not be recognized as a religion for purposes of the religion clauses.³⁹ I believe that this reasoning fails for two reasons. First, it is surely anathematic to the First Amendment for courts to accord religious status to only those religions that comport with a judge's sense of propriety. Second, even if Satanism were not a religion, under neutrality principles, it would be entitled to protection as a philosophical belief.⁴⁰ Thus, I conclude that *Flanagan* was rightly decided.⁴¹

Even Christians are sometimes met by prosecutorial wrath. In *State v. Wangberg*,⁴² the prosecution sought to negate the defendant's insanity claim by focusing on his minister father's Christianity.⁴³ The prosecutor argued: "Now, there is another law, a higher law than that of our state law, and that is a law that Pastor Wangberg has taught his son, I am sure only too well; 'Thou shalt not kill.' The fifth commandment."⁴⁴ In reversing Wangberg's conviction, the court

³⁴ See *id.* at 168.

³⁵ 463 U.S. 939 (1983).

³⁶ See *Dawson*, 503 U.S. at 166-67.

³⁷ See *Flanagan v. State*, 846 P.2d 1053, 1060 (Nev. 1993) (Steffan, J., dissenting).

³⁸ See *id.* at 1059-60.

³⁹ See *id.* at 1061.

⁴⁰ See, e.g., *Dawson*, 503 U.S. at 166-67.

⁴¹ The prosecutor argued that it could introduce evidence of Satanism to rebut the defendant's claim that he had converted to Christianity. See *Flanagan*, 846 P.2d at 1057. Unfortunately for the prosecutor's claim, the defendant did not introduce his conversion until *after* the prosecutor presented the Satanism argument. See *id.* Thus, his "[b]ut I was just rebutting the defendant's evidence" argument was rightly rejected. See generally John H. Blume and Sheri Lynn Johnson, *Don't Take His Eye, Don't Take His Tooth, and Don't Cast the First Stone: Limiting Religious Arguments in Capital Cases*, 9 WM. & MARY BILL RTS. J. 61 (2000).

⁴² 136 N.W.2d 853 (Minn. 1965).

⁴³ See *id.* at 854.

⁴⁴ *Id.* at 854-55.

disapproved of this and other biblical references.⁴⁵

Had the court admonished the jury that the law of Minnesota, and not the prosecutor's opinion of the law of God, governed this case, a fairly powerful argument could have been made for affirmance. However, the opinion does not indicate that any such curative instruction was given. Consequently, the court's reversal of the conviction was appropriate. And, although not a capital case, the *Wangberg* logic surely would apply to an attempt to invoke religion in support of the death penalty.

In *Commonwealth v. Mahdi*,⁴⁶ it was Islam's turn to feel the prosecutor's heat in a robbery/murder case. The prosecutor argued as follows:

You know what explains this, don't you, this whole killing and everything else? They talk about the Islamic religion. This is what it is. Who is the colored man? The Caucasian Jacob's made devil, skunk of the [planet] earth. . . . That's what they thought of the Ladners, . . . and they eliminated these two men, and felt that they'd really succeeded in pulling off the robbery of the year . . .⁴⁷

Holding that "[a]ppeals to racial, religious, or ethnic prejudices are especially incompatible with the concept of a fair trial because of the likelihood that such references will 'sweep jurors beyond a fair and calm consideration of the evidence,'"⁴⁸ the court rightly reversed Mahdi's conviction.

Finally, in *United States v. Goldman*,⁴⁹ the prosecutor called attention to the defendant's yarmulke, formally suggesting that the jury *not* be prejudiced against the defendant for wearing it, but suggesting that the "religious symbol that this man wears has been defamed, defiled, and scandalized."⁵⁰ Whether the prosecutor was

⁴⁵ See *id.* at 855. The prosecutor also said:

Does the Bible make any excuse for a man who has blood on his hands? Did God excuse Cain when he killed his brother Abel? It is true that God did not consult perhaps with any psychiatrists. He didn't know Cain was suffering schizophrenia, delusions, hallucinations, paranoia, but I wonder if this makes any difference in the eyes of God. Neither the laws of the State of Minnesota or the law of our God makes any excuse for killing, for a killing such as the defendant, Paul Wangberg, committed on the evening of February 17, 1962. We are all subject to these same laws, be it God's law or the law of the State of Minnesota, and being we farmer, lawyer, doctor or pastor's son.

Id. at 854-55.

⁴⁶ 448 N.E.2d 704 (Mass. 1983).

⁴⁷ *Id.* at 712.

⁴⁸ *Id.* at 713 (quoting *Commonwealth v. Graziano*, 368 Mass. 325, 332 (1975)).

⁴⁹ 563 F.2d 501 (1st Cir. 1977).

⁵⁰ *Id.* at 504.

seeking to inflame anti- or pro-Jewish sentiment (or both), the court rightly found the remarks highly prejudicial. However, because the trial judge explicitly instructed the jury that neither religion nor attire was relevant to its deliberations, the court affirmed the conviction.⁵¹

IV. RELIGION AS A MITIGATING CIRCUMSTANCE

Unlike its use as an aggravator, religion as a mitigator is almost universally accepted.⁵² The federal capital punishment statute has been construed to allow for religious experiences to be considered when offered by the defendant in mitigation.⁵³ Indeed, research has disclosed no case in which a defendant was *not* permitted to use his religious beliefs as a mitigating circumstance. The issue arises, most commonly, when a defendant's religious beliefs are found to be insufficient mitigation by the jury. Typically in such a case, the defendant appeals the death sentence and the appellate court determines that the jury was justified in imposing the death penalty notwithstanding the defendant's religious character.⁵⁴

These decisions follow the principle of religious neutrality. If there is one fixed star in capital punishment jurisprudence, it is that aggravation is limited⁵⁵ and mitigation is unlimited.⁵⁶ Thus, by consistently allowing evidence of religion as a

⁵¹ See *id.* at 505.

⁵² See, e.g., *Franklin v. Lynaugh*, 487 U.S. 164, 186 (1988) (O'Connor, J. and Blackmun, J., concurring in judgment) ("[R]eligious devotion might demonstrate positive character traits that might mitigate against the death penalty."). See generally *United States v. Cooper*, 91 F. Supp. 2d 90 (D.D.C. 2000) (affirming that jurors may consider any mitigating factors when determining whether to apply the death penalty).

⁵³ Federal Death Penalty Act, 18 U.S.C. §§ 3591-3598. See, e.g., *United States v. Webster*, 162 F.3d 308 (5th Cir. 1999); *Cooper*, 91 F. Supp. 2d at 101; *United States v. Cuff*, 38 F. Supp. 2d 282 (S.D.N.Y. 1999); *United States v. Davis*, 904 F. Supp. 554 (E.D. La. 1995).

⁵⁴ See, e.g., *Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999); *Webster*, 162 F.3d at 308; *Daugherty v. Dugger*, 839 F.2d 1426 (11th Cir. 1988).

⁵⁵ See, e.g., *Walton v. Arizona*, 497 U.S. 639, 654-55 (1990) (holding that statutory aggravating circumstances must provide guidance to the sentencer while limiting the number of convicted murderers eligible for the death penalty and must be drawn in an objective manner). *But cf.* *Barclay v. Florida*, 463 U.S. 939, 950-51 (1983) (plurality) (holding that "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." (quoting *California v. Ramos*, 463 U.S. 992, 1008 (1983))). However, this decision also stated that aggravating factors cannot be "so wholly arbitrary as to offend the Constitution." See *id.* at 950-51.

⁵⁶ See, e.g., *Walton*, 497 U.S. at 645-50; *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987) ("In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death

mitigator, but limiting its use as an aggravator, religion is treated precisely as other character evidence.

V. BORN AGAIN PARDONS AND COMMUTATIONS

I close with a section devoid of case law. The problem I examine is the extent to which a governor could adopt a policy of pardoning only those defendants who profess Christianity. Two things seem clear to me: (1) such a policy would be unconstitutional,⁵⁷ and (2) it would not be amenable to judicial review. In regard to enforceability, would we order a state to execute a Christian whose sentence had been commuted? I do not think so. Would we say that the governor could not commute another Christian's sentence until he had commuted two non-Christians? Again, I do not think so.

Yet, the problem could be real. Undoubtedly, some death row inmates have adopted religion while on death row, and have become far better human beings for it.⁵⁸ On the other hand, there are those who have become better people without religion.⁵⁹ Rendering the former eligible and the latter ineligible to live is obviously intolerable. If anyone has a solution to this problem, please let me hear it.

sentence.”); *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978).

⁵⁷ If a person's status as a citizen cannot depend on her relationship with God, a fortiori, her right to life cannot depend on her relationship with God. *See Wallace v. Jaffree*, 472 U.S. 38, 55 (1985).

⁵⁸ E.g., Billy Moore. *See supra* n.3 and accompanying.

⁵⁹ *See Evans v. Muncy*, 498 U.S. 927, 927-31 (1990) (mem.) (Marshall, J., dissenting). In this case, Wilbert Evans, a convicted murderer of a police officer during an attempt to escape, was initially sentenced to death based upon a Virginia jury's finding that Evans posed a serious threat of future danger to society. While he was awaiting execution on death row at Mecklenberg Correctional Facility, six death row inmates used crudely formed knives to take twelve male prison guards and two female nurses hostage in an attempt to escape. *See id.* Evans was credited, by the testimony of the guards and the nurses, with saving the guards' lives and with saving the nurses from rape. *See id.* Notwithstanding, Governor Wilder refused to pardon Evans or commute his sentence to life. There is no evidence that Evan's heroism was religiously motivated.

CONCLUSION

In this brief Essay, I have sought to set out a methodology for resolving questions involving religion and the death penalty. Some of my solutions may be controversial, such as allowing religious peremptory challenges and allowing prosecutorial religious comment where properly cabined by the trial judge. But the methodology of treating religion neutrally is salutary, and should guide the courts.